The Supreme Court of South Carolina

In the Matter of Greenville County Magistrate James E. Hudson, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

IT IS ORDERED that the petition is granted and respondent is placed on interim suspension. Greenville County is under no obligation to pay respondent his salary during the suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991). Respondent is directed to immediately deliver all books, records, bank account records, funds, property, and documents relating to his judicial office to the Chief Magistrate of Greenville County. He is enjoined from access to any monies, bank accounts, and records related to his judicial office.

IT IS FURTHER ORDERED that respondent is prohibited from entering the premises of the magistrate court unless escorted by a law enforcement officer after authorization from the Chief Magistrate of Greenville County. Finally, respondent is prohibited from having access to, destroying, or canceling any public records and he is prohibited from access to any judicial databases or case management systems. This order authorizes the appropriate government or law enforcement official to implement any of the prohibitions as stated in this order.

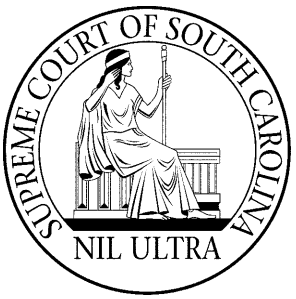
This Order, when served on any bank or other financial institution maintaining any judicial accounts of respondent, shall serve as notice to the institution that respondent is enjoined from having access to or making withdrawals from the accounts.

II IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

September 11, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40
September 14, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Super Duper Inc., dba Super Duper Publications, Plaintiff,

v.

Pennsylvania National Mutual Casualty Insurance Company, The Travelers Indemnity Company of America, and Travelers Property Casualty Company of America, Defendants.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR SOUTH CAROLINA
Henry F. Floyd, United States District Judge

Opinion No. 26717
Heard May 12, 2009 – Filed September 14, 2009

CERTIFIED QUESTIONS ANSWERED

Esten B Leinster, III, of Greenville, and Eugene Clark Covington, Jr., of Covington, Patrick, Hagins, Stern & Lewis, of Greenville, for Plaintiff.

Heather M. Hughes, Laura A. Brady, and William T. Corbert Jr., of Drinker Biddle & Reath, of Florham Park, New Jersey; M. Dawes Cooke, Jr. and John W. Fletcher, of Barnwell, Whaley, Patterson & Helms, of Charleston; Timothy A. Domin and Christina R. Fargnoli, both of Clawon & Staubes, of Charleston, for Defendant.

JUSTICE KITTREDGE: The United States District Court for the District of South Carolina presents certified questions concerning commercial general liability (CGL) insurance policies. We are asked, as an issue of first impression in South Carolina, whether the respective policies' inclusion of an advertising injury may encompass trademark infringement. Generally, based on the policy terms before us, we answer in the affirmative. We are not asked nor do we attempt to offer an opinion on the ultimate issues of coverage in this case. The ultimate questions of coverage remain with the federal district court.

I.

Super Duper, Inc., a South Carolina corporation, manufactures education and therapy materials for children. Mattel, Inc., an international toy manufacturer, challenged Super Duper's registration of four trademarks and filed formal notices of opposition and petitions for cancellation with the United States Patent and Trademark Office. Super Duper brought a declaratory judgment action in the federal district court to determine if its trademark infringed on Mattel's trademarks. Mattel counterclaimed asserting trademark infringement along with other claims.

Super Duper was insured by Travelers Indemnity Company of America and Travelers Property Casualty Company of America (collectively "Travelers") and Pennsylvania National Mutual Casualty Insurance Company ("Penn National") under commercial general liability insurance policies for "advertising injury." Super Duper notified Travelers and Penn National

about the trademark infringement counterclaims and requested coverage. Travelers and Penn National denied coverage and refused to provide Super Duper a defense. Thus, Super Duper defended itself. Subsequently, Mattel prevailed on its trademark infringement claims.

Super Duper brought this action in the federal district court seeking a declaratory judgment and damages for failure to defend or indemnify, breach of contract, and bad faith.

A.

This case involves three CGL policies provided by Travelers: 1999 policy (effective from August 26, 1999 through August 26, 2000), 2000 policy (effective from August 26, 2000 through August 26, 2001), and 2005 policy (effective from August 26, 2005 through August 26, 2006). The 1999 and 2000 CGL policies include the following definition:

> "Advertising injury" means injury arising out of one or more of the following offenses:
>
> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. *Misappropriation of advertising ideas or style of doing business*; or
>
> d. *Infringement of copyright, title or slogan.*

(emphasis added).[1] The 2005 policy redefined "advertising injury" as arising out of one or more of the following offenses:

> a. Oral, written or electronic publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services, provided that claim is made or "suit" is brought by a person or organization that claims to have been slandered or libeled, or whose goods, products or services have allegedly been disparaged;
>
> b. Oral, written or electronic publication of material that appropriates a person's likeness, unreasonably places a person in a false light or gives unreasonable publicity to a person's private life; or
>
> c. *Infringement of copyright, title or slogan*, provided that claim is made or "suit" is brought by a person or organization claiming ownership of such copyright, title or slogan.

(emphasis added).[2]

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[1] This policy definition is the verbatim language provided by the Insurance Services Office (ISO) for commercial general liability (CGL) policies in 1986. 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION §33:5 (4th ed. 2009).

[2] Travelers apparently did not insure Super Duper in the interim between the 2000 and 2005 policies. Travelers used a CGL policy during this non-coverage time which included an exclusion stating:

> "Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.
>
> However this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

Effective from August 26, 2005 to August 26, 2006, Travelers provided a Commercial Excess Liability Umbrella (CUP) insurance policy for Super Duper. This policy also included "[i]nfringement of copyright, title or slogan" in its definition of "advertising injury."

We turn next to the Penn National CGL policies, which were in effect August 26, 2001 through August 26, 2002 (referred to as "2001 policy") and August 26, 2002 through August 26, 2003 (referred to as "2002 policy"). The 2002 policy was renewed for consecutive one-year terms, ending on August 26, 2006. Unlike the Traveler policies, the relevant Penn National Policies (2001 policy and 2002 policy) defined "advertisement." The 2001 Penn National policy stated, "'[a]dvertisement' means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters."[3] The 2002 Penn National policy mirrored the precedent policy only adding references about the Internet and websites.

The 2001 and 2002 Penn National policies also included definitions for "personal and advertising injury":

> "Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:
>
> . . .
>
> f. The use of another's advertising idea in your "advertisement"; or

---

As Travelers conceded at oral argument, this exclusion has no application in the case at hand as the 2005 CGL policy deleted this exclusion in its entirety.

[3] The "advertisement" definition follows the 1998 standard language by ISO for CGL policies. 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §33:5 (4th ed. 2009).

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".[4]

The 2002 Penn National CGL policy also included the following exclusion:

> "Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.
>
> However, this exclusion does not apply to infringement, in your "advertisement," of copyright, trade dress or slogan.

B.

Quoting portions of the above Penn National and Travelers policies, the federal court certified the following questions in the indemnification action, which this Court accepted:

1. Whether an underlying suit premised upon trademark infringement by the insured qualifies as injury arising out of the offense of "misappropriation of advertising ideas or style of doing business?"

2. Whether an underlying suit premised upon alleged trademark infringement by the insured qualifies as injury arising out of the offense of "infringement of copyright, title or slogan?"

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[4] Other items in the definition differed slightly among the two policies, but subsections f and g are identical. These subsections are also identical to language provided by the ISO for CGL policies in 1998. 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §33:5 (4th ed. 2009).

3. Whether an underlying suit premised upon trademark infringement by the insured qualifies as injury arising out of the offense of "use of another's advertising idea in your 'advertisement?'"

4. Whether an underlying suit premised upon trademark infringement by the insured qualifies as injury arising out of the offense of "infringing [upon] another's copyright, trade dress or slogan in your 'advertisement?'"[5]

II.

Although the federal district court quoted language from the Travelers and Penn National policies in the certified questions posed to this Court, the federal court did not seek our determination on the ultimate coverage questions, and we offer no such opinion today. Moreover, we neither reach the insurers' challenge to the pleadings in the federal district court, nor do we reach the express exclusion in Penn National's 2002 policy.

We now turn to the first two certified questions as they implicate Super Duper's policies with Travelers.

A.

Question 1: Whether an underlying suit premised upon trademark infringement by the insured qualifies as injury arising out of the offense of "misappropriation of advertising ideas or style of doing business?"

In *State Auto Property & Casualty Insurance Co. v. Travelers Indemnity Co. of America*, 343 F.3d 249, 255-58 (4th Cir. 2003), the federal court of appeals interpreted the same contract language applying North Carolina law. We find the *State Auto* opinion well-reasoned and sound,

[5] We note the second certified question uses the term "alleged trademark infringement." The remaining three questions make no such qualification.

drawing on basic contract interpretation law to which South Carolina also adheres.[6] Today, we adopt its analysis regarding whether trademark infringement constitutes an advertising injury.

State Auto began by recognizing the phrase "misappropriation of advertising ideas or style of doing business" presents two distinct questions: "(1) whether 'misappropriation' under the Travelers Policy is limited to common law misappropriation, or whether it encompasses any claim related to the wrongful use of a trademark; and (2) whether a trademark can constitute an advertising idea or a style of doing business." *State Auto*, 343 F.3d at 255.

The court in *State Auto* rejected Travelers' contention the undefined term misappropriation refers to the common law tort of misappropriation[7] for

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[6] *Compare Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) ("An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law."), *and Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) ("[T]o ascertain the intention of an instrument resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument."), *and Forner v. Butler*, 319 S.C. 275, 277, 460 S.E.2d 425, 427 (Ct. App. 1995) ("Where the words of an insurance policy are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured. Furthermore, exclusions in an insurance policy are to be construed most strongly against the insurer.") (citation omitted), *with State Auto*, 343 F.3d at 254 ("An insurance policy is a contract, and its provisions govern the rights and duties of the parties thereto. . . . Further, provisions in a policy 'which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction.'") (citations omitted).

[7] The common law tort of misappropriation is defined as, "[a] judge-made common law form of unfair competition where the defendant has copied or appropriated some item or creation of the plaintiff which is not protected by either patent law, copyright law, trademark law, or any other

a multitude of reasons: (1) North Carolina's refusal to limit a similar phrase, "unfair competition," to its common law meaning when interpreting the phrase in an insurance policy; (2) the majority of courts interpreting "misappropriation" apply a general meaning, not the common law meaning; and (3) an ambiguity must be resolved in the policyholder's favor. 343 F.3d at 255-57.

We too reject Travelers' contention the undefined term misappropriation refers to the common law tort of misappropriation as the insurance policy makes no such limitation and instead uses the general term misappropriation, to which we apply its common meaning. *See Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) ("When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense."). Generally, misappropriate is "to appropriate dishonestly for one's own use . . . [or] to appropriate wrongly or misapply in use." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1442 (2002). Trademark infringement is squarely within this definition.

Even if we were to find uncertainty with the common understanding of the term misappropriation, we would be left with an ambiguity and thus the same result. Ambiguous terms must be construed in favor of the insured. *Greenville County v. Ins. Reserve Fund*, 313 S.C. 546, 547-48, 443 S.E.2d 552, 553 (1994). If Travelers intended to restrict its exposure solely to the common law tort of misappropriation, then Travelers had both the means and the responsibility to use restrictive language in the contract instead of the general term "misappropriation."

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traditional theory of exclusive rights." J. THOMAS MCCARTHY, MCCARTHY'S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY 273 (2d ed. 1995). Trademark infringement would fall outside the common law tort of misappropriation definition; however, Travelers' reliance on the common law tort is improperly restrictive.

Next, we turn to part two of question one: whether a trademark can qualify as an advertising idea or a style of doing business. *State Auto* began its analysis by listing four functions a trademark serves:

> (1) it identifies and distinguishes a seller's goods; (2) it indicates that all goods bearing the mark derive from the same source; (3) it signifies that all goods bearing the mark are of the same quality; and (4) it serves as a prime instrument in the advertisement and sale of the seller's goods.

State Auto, 343 F.3d at 257-58 (citing 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §3:2 (4th ed. 2003)). As a trademark is the prime advertising instrument, we adopt *State Auto*'s holding, "at the very least, a trademark has the potential to be an advertising idea." *State Auto*, 343 F.3d at 258. As we do not reach the ultimate coverage issue, we end our analysis here with our recognition a trademark has the potential to constitute an advertising idea or a style of doing business.

Therefore, we join the majority of courts finding misappropriation may include trademark infringement. *See Cat Internet Servs., Inc. v. Providence Washington Ins. Co.*, 333 F.3d 138, 142 (3rd Cir. 2003) ("We now hold that when a complaint alleges that an insured misappropriates and uses trademarks or ideas in connection with marketing and sales and for the purpose of gaining customers, the conduct constitutes 'misappropriation of an advertising idea or style of doing business' under Pennsylvania law."), *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 749 (3rd Cir. 1999) ("A trademark depends for its effectiveness on communicating a message to consumers about the marked good, which is the essence of advertising, and therefore allegations of trademark infringement arguably allege misappropriation of an advertising idea."), *Adolfo House Distrib. Corp. v. Travelers Prop. & Cas. Ins. Co.*, 165 F.Supp.2d 1332, 1339 (S.D. Fla. 2001) ("This court therefore concludes that allegations of trademark or trade dress infringement meet the CGL 'advertising injury' definition of 'advertising injury' under the definition sub-part for 'misappropriation of advertising ideas or style of doing business.'"). *But see Advance Watch Co., Ltd. v. Kemper Nat. Ins. Co.*, 99 F.3d 795, 802 (6th Cir. 1996) ("[T]his court

concludes, contrary to the district court's conclusion, that 'misappropriation of advertising ideas or style of doing business' does not refer to a category or grouping of actionable conduct which includes trademark or trade dress infringement.").

In sum, we hold misappropriation may encompass a claim related to the wrongful use of a trademark, and a trademark may constitute an advertising idea or a style of doing business. Accordingly, to the first certified question, we answer yes.

B.

> Question 2: Whether an underlying suit premised upon alleged trademark infringement by the insured qualifies as injury arising out of the offense of "infringement of copyright, title or slogan?"

The 1999 and 2000 Travelers policies defined an advertising injury as "[i]nfringement of copyright, title or slogan." The 2005 Travelers policy redefined "advertising injury" as "[i]nfringement of copyright, title or slogan, provided that claim is made or 'suit' is brought by a person or organization claiming ownership of such copyright, title or slogan."

Again, the policy failed to define these terms, and we therefore must look to their common meanings. Super Duper conceded at oral argument it made no allegations pertaining to copyright; thus, we shall examine the terms title and slogan. A title is "a descriptive name." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2400 (2002). A slogan is "a brief striking phrase used in advertising or promotion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2145 (2002). Therefore, trademarks, titles, and slogans are heavily related and can be synonymous. Thus, coverage for "infringement of copyright, title or slogan" may envelop trademark infringement. *See Union Ins. Co. v. Knife Co., Inc.*, 897 F. Supp. 1213, 1217 (W.D. Ark. 1995) (holding trademark infringement can be described as infringement of a title or slogan as "both titles and slogans . . . can undoubtedly be protected as trademarks"). Accordingly, we answer the second certified question yes.

III.

Now, we reach Penn National's policies, as certified questions three and four solely implicate this insurer. The quoted language in certified questions three and four appears in Penn National's 2001 and 2002 CGL policies, which state:

> "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> . . .
>
> f. The use of another's advertising idea in your "advertisement"; or
>
> g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

The Penn National policies defined "advertisement" as, "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." The Travelers policies include no such definition of "advertisement."

A.

> Question 3: Whether an underlying suit premised upon trademark infringement by the insured qualifies as injury arising out of the offense of "use of another's advertising idea in your 'advertisement?'"

The third certified question asks whether trademark infringement may occur when another's advertising idea is used. "An 'advertising idea' is an

'idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage.'" *Ohio Cas. Ins. Co. v. Cloud Nine, LLC*, 464 F.Supp.2d 1161, 1166 (D. Utah 2006) (quoting *Atlantic Mut. Ins. Co. v. Badger Med. Supply Co.*, 528 N.W.2d 486, 490 (Wis. Ct. App. 1995)). As discussed *supra*, there is a close link between advertising and trademarks. This connection exists under Penn National's definition of an advertisement as "notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." A trademark is "any 'word, name, symbol, or device' used by a manufacturer or merchant 'to identify his goods and distinguish them from those manufactured by others.'" 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §3:4 (4th ed. 2009) (quoting Lanham Act §45, 15 U.S.C.A. §1127 (Supp. 2009)).

Thus, the use of another's advertising idea may include trademark infringement because to infringe upon someone's trademark, which is an advertising device, one improperly uses another's advertising idea to draw the consumer's attention to a product. Accordingly, we answer the third certified question, yes.

B.

> Question 4: Whether an underlying suit premised upon trademark infringement by the insured qualifies as injury arising out of the offense of "infringing [upon] another's copyright, trade dress or slogan in your 'advertisement?'"

In the fourth certified question, this Court must determine whether trademark infringement occurs when a party improperly uses another's copyright, trade dress or slogan in their advertisement. Again, the definition of copyright is not pertinent to this case, so we turn to trade dress and slogan. As discussed *supra*, a slogan is "a brief striking phrase used in advertising or promotion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2145

(2002). Accordingly, we hold a trademark may be a product's slogan. Therefore, trademark infringement potentially relates to the improper use of another's slogan.

Trade dress is a more amorphous concept. Historically trade dress included a product's labels and containers; now trade dress refers to the product's packaging, the product's shape and design, and the totality of elements creating the product's overall image. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §8.4 (4th ed. 2009). Further, McCarthy stated, "the history of American law throughout much of the Twentieth Century is the gradual disappearance of distinctions between the law of 'trade dress' and that of 'trademarks.'" 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §8.1 (4th ed. 2009). Therefore, a trademark may serve as an element to the overall trade dress of a product.

Accordingly, we answer the fourth certified question yes, as trademark infringement may occur when a party infringes upon another's trade dress or slogan in its advertisement.

IV.

In answering these certified questions, we make no judgments regarding the overall coverage issues in this case. We answer the certified questions narrowly and conclude, based on the policies presented, trademark infringement has the potential to constitute an advertising injury. This potential is all we find today. We recognize this case requires more analysis, procedurally and substantively, to resolve the parties' disputes.

CERTIFIED QUESTIONS ANSWERED.

TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jerome Mitchell, Jr., Respondent,

v.

Fortis Insurance Company, Appellant.

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 26718
Heard January 22, 2009 – Filed September 14, 2009

AFFIRMED IN PART; REVERSED IN PART

C. Mitchell Brown, of Nelson, Mullins, Riley & Scarborough, of Columbia; J. Boone Aiken, III, and James M. Saleeby, Jr., of Aiken, Bridges, Nunn, Elliott & Tyler, both of Florence; Stephan I. Voudris, of Jorden Burt, of Miami, FL; and Franklin G. Burt, of Jorden Burt, of Washington, DC, for Appellant.

Edward L. Graham, Brian D. Phelan, and Sallie P. Phelan, all of Graham Phelan Law Offices, of Florence, for Respondent.

Elizabeth Van Doren Gray and Tina Cundari, both of Sowell, Gray, Stepp & Laffitte, of Columbia; Gray T. Culbreath, of Collins & Lacy, of Columbia; David T.

McDowell and Alana K. Pulaski, both of Bracewell & Guiliani, of Houston, TX; for Amicus Curiae.

CHIEF JUSTICE TOAL: In this case, a policyholder brought causes of action for breach of contract and bad faith rescission against his insurance company, and sought actual and punitive damages for the company's termination of his health care insurance from original issuance on the grounds of a purported misrepresentation. The jury awarded the policyholder $36,000 in actual damages on the breach of contract claim, $150,000 in actual damages on the bad faith rescission claim, and $15 million in punitive damages deriving from the bad faith cause of action. This appeal followed.

FACTUAL BACKGROUND

On May 15, 2001, Respondent Jerome Mitchell, Jr. ("Mitchell"), of Florence, submitted an application for health insurance to Appellant Fortis Insurance Company ("Fortis"). Mitchell, who was seventeen years old at the time, was preparing to attend college and was no longer covered under his mother's health insurance policy. The application required him to answer a medical questionnaire, which included the question: "Been diagnosed as having or been treated for any immune deficiency disorder by a member of the medical profession?" Mitchell answered "no" to this question. Fortis issued Mitchell a health insurance policy.

In April 2002, Mitchell attempted to donate blood to the Red Cross. On May 13, 2002, the Red Cross contacted Mitchell to inform him that his blood had screened positive for HIV. The Red Cross suggested Mitchell get a confirmation test from his personal physician, and Mitchell immediately contacted Dr. Michael Chandler. On May 14, 2002, Dr. Chandler's tests confirmed that Mitchell was HIV positive. That day, one of Dr. Chandler's assistants noted on Mitchell's intake chart: "Gave blood in March – got letter yesterday stating blood tested [positive for] HIV." The handwritten chart note identified

Mitchell correctly as eighteen years old, but was erroneously dated May 14, 2001.

Dr. Chandler referred Mitchell to Dr. Kevin Shea, an infectious disease specialist with Carolina Health Care ("Carolina"). On May 23, 2002, Dr. Shea met with Mitchell and recorded Mitchell's medical history as follows:

> Mr. Mitchell is an 18 year old African-American male with no past medical history who apparently tried to donate blood in April of this year. He was noted to be HIV positive. Subsequent confirmation through Dr. Chandler's office included a positive ELISA and Western Blot. He is referred at this time for further evaluation.

Fortis soon received claims for Mitchell's treatment and for the blood testing that indicated Mitchell was HIV positive. Pursuant to company policy in cases involving long-term disease, Fortis launched an investigation to determine whether Mitchell had failed to disclose a pre-existing condition on his policy application.

In June 2002, a Fortis investigator contacted Mitchell to request that he identify his healthcare providers and authorize a medical records release. Mitchell did so, and Fortis contacted Carolina and Dr. Shea to obtain Mitchell's medical records and billing information. Carolina sent Fortis copies of Dr. Chandler's records, Dr. Shea's records, and Mitchell's blood test results.

A Fortis investigator reviewed the records and discovered the erroneously-dated intake note in Dr. Chandler's files. That information was then forwarded to Fortis Senior Underwriter Kate Stephens ("Stephens") for review. Stephens completed a "referral summary" for the rescission committee and recommended that Mitchell's policy be rescinded on the grounds that he had misrepresented his HIV positive status. Stephens's summary referenced the handwritten notation on the intake form as the sole foundation for her recommendation. Some time

shortly thereafter, a Fortis employee – in all likelihood Stephens[1] – drafted an addendum to the referral summary, which read:

> The only question misrepresented on the Enrollment form is #20 – "Within the last 10 years has any proposed insured been diagnosed as having or been treated for any immune deficiency disorder." Can't use the question re: AIDS as he does not have AIDS, he has tested positive for the HIV virus. This is the only question I've found that we can use – any other suggestions?
>
> Technically, we do not have the results of the HIV test. This is the only entry in the medical records regarding HIV status. Is this sufficient?

The referral summary and addendum were sent to Fortis's rescission committee ("the committee"). On September 4, 2002, the committee conducted an approximately two-hour meeting, in which they considered forty-six cases, including Mitchell's. When it came time to consider Mitchell's case, the committee considered Stephens' referral summary and the addendum. The committee voted to rescind Mitchell's policy.

On September 5, 2002, Fortis sent Mitchell a letter informing him that his health insurance policy was rescinded due to a material misrepresentation on his application form. The letter stated that Fortis would "welcome any additional information you may have which would effect [sic] our decision to rescind your policy." Upon receiving the letter, Mitchell attempted to contact Stephens in order to inform her that he had not misrepresented his health status. Mitchell was directed to a customer service representative, who informed him that there was "nothing [the representative] could do" about the rescission.

[1] The addendum was not signed. However, the record strongly supports the conclusion that Stephens was the author, a fact that Fortis neither admitted nor denied.

Mitchell then sought the help of a case manager at the Hope Health free medical clinic. The manager called Stephens to inform her that she had medical records confirming that Mitchell first tested for HIV positive after he had purchased the Fortis policy. The manager offered to send these records to Stephens by fax or mail. Stephens spurned this offer and informed the manager "that there was nothing she could do at this time."[2] Stephens did not provide any information regarding Mitchell's right to an appeal.

On June 4, 2003, Mitchell's attorney sent Fortis a copy of Dr. Chandler's initial test results along with a letter informing Fortis that Mitchell was first diagnosed with HIV in May 2002. One week later, Fortis advised Mitchell's attorney that it would review his appeal. The rescission committee met to consider Mitchell's appeal. The information before the committee consisted of a single notation that read: "letter from attorney stating that the insured did not misrep[resent] coverage since the first diagnosis of AIDS was 5/14/2002."[3] The committee denied Mitchell's appeal and upheld the rescission.[4]

[2] Stephens had a similar conversation with Mitchell's insurance agent, who called to inquire about the rescission at the request of Mitchell's mother. Stephens explained that Mitchell had misrepresented a pre-existing condition on his application form, and provided no information regarding Mitchell's right to an appeal.

[3] This notation was in error, as Mitchell was HIV positive, and did not have AIDS.

[4] Fortis eventually reinstated Mitchell's policy on May 27, 2004, well after the litigation had begun.

PROCEDURAL BACKGROUND

On July 21, 2003, Mitchell filed this action for breach of contract and bad faith rescission of his health insurance, seeking actual and punitive damages.

At trial, Mitchell's insurance expert testified that it was Fortis's practice to shut down an investigation once a single piece of evidence was discovered that would support rescission. Further, Mitchell introduced testimony from Fortis's manager of underwriting and correspondence – Stephens's direct supervisor – who testified that she was "not able to answer" whether she or any of her employees "had a responsibility to find out the truth" about a policyholder's medical conditions. On cross-examination, Fortis's insurance expert conceded that an insurance company has a duty to investigate and find information that may lead to payment of a claim.

In light of this testimony, Mitchell argued that Fortis acted in bad faith in rescinding his policy solely on the basis of the handwritten note from Dr. Chandler's files. Mitchell argued that there was ample countervailing evidence in his medical records to put any reviewer on notice that the handwritten note was erroneously dated.[5] Mitchell

[5] Deborah Poston, an employee of Carolina, testified that when Mitchell's counsel notified her on March 8, 2004 that there might be an error on one of the records, she reviewed the medical chart and determined that there was a discrepancy in the date. Poston testified that it took her "five minutes" to verify the correct date. She further indicated that all records are kept chronologically, and that the misdated note was included with 2002 medical records. Other contextual clues included Mitchell's age on the note, which indicated he was eighteen (he would have been seventeen in 2001), the corresponding day and month with the other records from Dr. Chandler's office, and Dr. Shea's referral summary, which Fortis claimed it did not have but Mitchell alleged was in the file.

contended that the rescission committee, presented with the "addendum," which openly acknowledged that the investigation had uncovered no clear evidence that Mitchell was HIV positive prior to the inception of his contract with Fortis, rescinded Mitchell's policy in the course of what was likely no more than a three-minute review.[6]

Mitchell also argued that Fortis had tried to conceal evidence of its bad faith and that Fortis had twice sent them an illegible copy of the addendum to the referral form, and that Stephens's call log included no entry for her phone call with the Hope Health case manager. Mitchell questioned Fortis's practice of not maintaining records of its referral forms in the same manner as other company documents.

As to Mitchell's actual and potential harm and the determination of damages, Mitchell presented testimony from a medical expert who testified that without medical treatment, he would contract AIDS in two years and likely die two years after that. Mitchell introduced testimony from a health care expert who testified to the minimum expected costs that it would take to care for Mitchell throughout his life, not including complications from HIV and AIDS. Mitchell also introduced an economist who relied on the health care expert's figures to project a total present value of $1,081,189.40 for Mitchell's treatment and costs.

The jury awarded Mitchell $186,000 in compensatory damages, including $36,000 on the breach of contract claim and $150,000 on the bad faith rescission claim. The jury also awarded $15 million in punitive damages for the bad faith rescission claim.

Fortis filed post-trial motions to (1) elect remedies; (2) vacate, or in the alternative, remit the punitive damages award; and (3) for judgment notwithstanding the verdict or, in the alternative, a new trial absolute, or in the alternative, a new trial *nisi remittitur*. The circuit

[6] Mitchell introduced evidence that forty-five other cases were considered with Mitchell's in a single two-hour meeting. Mitchell thus argued that it was unlikely that the committee spent more than three minutes on any one case, including Mitchell's.

court granted the motion to elect, and Mitchell elected actual and punitive damages on the bad faith cause of action. Following a hearing, the circuit court denied Fortis's remaining motions.

Fortis appealed and we certified the case pursuant to Rule 204(b), SCRAP. Fortis now submits the following questions for our review:

I. Did the $15 million punitive damages verdict violate Fortis's constitutional right to due process?

II. Did the circuit court admit improper evidence at trial?

III. Did the circuit court err in denying Fortis's motion for judgment notwithstanding the verdict?

IV. Was the jury's verdict a result of passion, caprice, or prejudice?

STANDARD OF REVIEW

As a preliminary matter, we restate the standard of review appellate courts should apply to a trial court's post judgment due process review of a punitive damages award. We have typically applied an abuse of discretion standard in reviewing a trial court's post judgment review of a punitive damages award. *See Gamble v. Stevenson*, 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991) ("[O]nly when the trial court's discretion is abused, amounting to an error of law, does it become the duty of this Court to set aside the award."); *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 314, 529 S.E.2d 45, 61 (Ct. App. 2000) (evaluating the trial court's post-judgment review and finding "no abuse of discretion in the trial court's conclusions following its review of the jury verdict."). However, changes in the federal case law have persuaded us to adopt a de novo standard for the review of trial court determinations of the constitutionality of punitive damages awards.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424 (2001), the United States Supreme Court held that courts of appeal should apply a de novo standard of review to district court determinations of the constitutionality of punitive damages awards. The Supreme Court identified three bases for its promulgation of a de novo review standard. First, the concepts involved in the due process analysis of punitive damages awards are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Cooper Industries*, 532 U.S. at 436 (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). Second, the due process criteria acquire content only through application, and "independent review is therefore necessary if appellate courts are to maintain control of, and clarify, the legal principles." *Id.* (quoting *Ornelas*, 517 U.S. at 697). Third, "de novo review tends to 'unify precedent' and 'stabilize the law.'" *Id*. (quoting *Ornelas*, 517 U.S. at 697-98). We agree with this analysis.

For the reasons articulated in *Cooper Industries*, we find that determinations of the constitutionality of punitive damages awards are best conducted pursuant to a de novo review. Accordingly, we hold that our appellate courts must conduct a de novo review when evaluating the constitutionality of a punitive damages award. *Cooper Industries*, 532 at 431.

LAW/ANALYSIS

I. Due Process and Punitive Damages

Fortis argues that the $15 million punitive damages award is so excessive as to violate its constitutional right to due process under the standards set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) (hereinafter "*Gamble*"), and *BMW of North America v. Gore*, 517 U.S. 559 (1996) (hereinafter "*Gore*"). We agree with this conclusion, although our analysis differs substantially from that urged by Fortis.

A. The History of Due Process Limitations on Punitive Damages Awards

The practice of awarding punitive damages originated in principles of common law "to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964). "Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568. The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (quoting *Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P.*, 347 F.3d 672, 676 (7th Cir. 2003)).

Nevertheless, "while states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm v. Campbell*, 538 U.S. 408, 416 (2003). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id*. at 417.

Prior to *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the United States Supreme Court had never directly considered the matter of whether a punitive damage award could be so excessive as to violate due process. In *Haslip*, the Court held that a punitive damages award more than four times the amount of compensatory damages did not violate the defendant's due process rights. However, the Court acknowledged that unlimited discretion in the fixing of punitive damages may invite extreme results that violate due process. The Court noted that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." *Id*. at 18. Since *Haslip*, the Court has built a healthy body of jurisprudence that adds substance and context to this area of law. *See TXO Production Corp. v. Alliance Resources*, 509

U.S. 443 (1993) (holding that the harm likely to occur from a defendant's conduct was relevant to the due process inquiry); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) (holding that due process requires post-judgment review of a punitive damages award); *Gore*, 517 U.S. 559 (identifying three "guideposts" that assist a due process analysis); *Cooper Industries v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001) (adopting a de novo standard of review for determining the constitutionality of punitive damages awards); *Campbell*, 538 U.S. 408 (identifying evidence that, if used to support a punitive damages award, will violate due process); *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) (holding that a punitive damages award that is based on harm to others violates due process).

The Supreme Court expounded upon *Haslip*'s due process standard in *Gore*, where it held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose." *Gore*, 517 U.S. at 575. In *Gore*, the Court first adopted a specific test by which to conduct a due process analysis. The Court established three guideposts that indicate whether the due process requirement of fair notice has been met. In determining the constitutionality of a punitive damages award, *Gore* directed that courts consider: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 575.

Since *Gore*, much of the Supreme Court's punitive damages jurisprudence has focused on the type of evidence that may be used to support a punitive damages award. In *Campbell*, the Supreme Court held that punitive damages awards may not be based on out-of-state conduct and must be related to the plaintiff's injury or damage. "A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant

for unlawful acts committed outside of the State's jurisdiction." *Campbell*, 538 U.S. at 421-22. Furthermore, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423.

Similarly, in *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007), the Court held that a punitive damages award that is based on evidence of harm to persons other than the plaintiff or plaintiffs will violate due process. The Court noted that harm to others may be considered to help show that the conduct that caused the plaintiff's harm also posed a risk to the public, but the jury may not go further and base a punitive damages award on that evidence.

In these cases, the Supreme Court has continued to uphold *Haslip* and further delineate the contours of punitive damages awards that "run wild." *Haslip*, 499 U.S. at 19. Nevertheless, the Court has consistently declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 18.

B. *Gamble* and Punitive Damages Review Under South Carolina Law

Our own jurisprudence has largely tracked the Supreme Court's constitutional pronouncements, beginning with our *Gamble* opinion, which was written in response to *Haslip*. In *Gamble*, we identified eight considerations that trial courts should apply in conducting a post-judgment due process review of any punitive damages award. These considerations are: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. *Gamble*, 302 S.C. at 111-12, 406 S.E.2d at 354.

We have said in the past that trial courts must consider both the *Gamble* and the *Gore* factors. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 195, 638 S.E.2d 667, 671 (2006) ("Although we find the punitive damages award was reasonable under the *Gamble* factors, we must also review the trial court's ruling on punitive damages under *Gore*."). However, considerations of judicial economy weigh in favor of a less burdensome and duplicative analysis. We now hold that *Gamble* remains relevant to the post-judgment due process analysis, but only insofar as it adds substance to the *Gore* guideposts. With these considerations in mind, we articulate the following test for our courts in conducting a post-judgment review of punitive damages awards.

1. Reprehensibility

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 565. "This principle reflects the view that some wrongs are more blameworthy than others." *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.[7] *Campbell*, 538 U.S. at 419.

[7] We observe that this analysis adequately encompasses – and obviates the need for – the first four factors of the *Gamble* review, which include the defendant's degree of culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct.

2. Ratio

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." *Gore*, 517 U.S. at 580. Although the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." *Id*. at 425-26. With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay.[8] Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

[8] We caution that trial courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. *Campbell*, 538 U.S. at 427. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth.

3. Comparative Penalty Awards

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

Post-Judgment Due Process Review In the Instant Case

1. Reprehensibility

Turning to the facts of the instant case, we find ample support in the record to establish that Fortis's conduct was reprehensible.

First, Mitchell's harm was economic, rather than physical. This would typically weigh against the reprehensibility of Fortis's conduct. However, this case is unique in that Mitchell's economic harm – the termination of his health insurance policy – exposed him to great risk of physical danger.

Second, this truth is also relevant to the consideration of whether Fortis demonstrated an indifference to Mitchell's life and a reckless disregard to his health and safety. We conclude that Fortis did. The record is clear that a person with HIV, without proper medication, will develop AIDS and die within a relatively short time. But for the free medical services provided by Hope Health, Fortis's conduct would have deprived Mitchell of health insurance for at least three years, during which time his health would have surely deteriorated. The jury could have reasonably inferred from the evidence that Fortis deliberately ignored contextual and other evidence in order to rescind Mitchell's policy on the pretext of a misrepresentation. It was reasonable to conclude, from the evidence presented, that Fortis was

motivated to avoid the losses it would undoubtedly incur in supporting Mitchell's costly medical condition. Based upon this evidence, we find that Fortis was deliberately indifferent to its contractual obligations and to Mitchell's health and wellbeing.

Third, Mitchell was financially vulnerable. Again, without the assistance of free medical services, Fortis's actions would have rendered him unable to obtain additional insurance.

Fourth, Fortis's conduct involved repeated acts of deliberate indifference for more than two years. Fortis reinstated Mitchell's policy nearly twenty months after it had been put on notice that the evidence upon which it relied was erroneous. The rescission committee decided to reject Mitchell's appeal even after his attorney contacted Fortis to emphasize the significance of the medical records which demonstrated that Mitchell had not misrepresented his condition at the time he applied for the policy.

Finally, there is ample evidence in the record to support a finding that the harm Mitchell suffered was a result of intentional deceit. Stephens' addendum acknowledged that the investigation yielded no clear evidence to establish that Mitchell's HIV positive status predated his policy with Fortis. The rescission committee, when presented with this information, elected to rescind Mitchell's policy. After the initial rescission, Stephens was contacted by Mitchell, Mitchell's Hope Health case worker, Mitchell's mother's insurance agent, and Mitchell's attorney to inform her that her information was inaccurate. Stephens did not appear at trial, and the jury was justified in drawing a negative inference from her unavailability.

Fortis's refusal to conduct a further investigation suggests that it was aware of its own wrongdoing. Furthermore, the lack of written rescission policies, the lack of information available regarding appeal rights or procedures, the separate retention policies for rescission documents, the omission of the case manager's call from Stephens' phone log, and the inference evident from the record that Fortis was in possession of Dr. Shea's records as early as the summer of 2002, were

all evidence that Fortis tried to conceal the actions it took in rescinding Mitchell's policy.

Based on these findings, we conclude that Fortis's conduct was highly reprehensible and that the imposition of punitive damages was appropriate.

2. Ratio

In reviewing the ratio guidepost, a court need not always compare the punitive damages award to the actual damages awarded, but in certain cases may compare it to the *potential* harm suffered by the plaintiff. The Supreme Court squarely addressed this issue in *TXO*, where the petitioner had brought a frivolous claim against the respondent's oil and gas rights in an effort to renegotiate its royalty arrangement with the respondent. 509 U.S. 443. The jury in that case awarded $19,000 in actual damages and $10 million in punitive damages. The petitioner argued on appeal that the 526 to 1 ratio was grossly excessive, but the Supreme Court found that there was ample evidence in the record to support an inference that petitioner was seeking a multimillion dollar reduction in its potential royalty obligation. The Supreme Court held that "it is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460. Although the Court did not designate a monetary value to the potential harm suffered by the respondent, it found that even the most conservative approximations – each falling within a single-digit ratio to the $10 million punitive damages award – did not "jar one's constitutional sensibilities." *Id*. at 462.

Turning once again to the present case, there is ample evidence that Fortis's conduct would have potentially resulted in a great deal of harm to Mitchell if not for the free medical services of Hope Health. In reviewing the ratio guidepost, the circuit court found that because Mitchell's lifetime maximum payout on the rescinded health insurance

policy was $6 million, "the potential economic loss to [Mitchell] from the wrongful rescission was thus" at least that amount. However, in this de novo review, we need not – and in this case should not – accept the circuit court's assertion that Mitchell suffered $6 million in potential harm. This figure is unsupported by the evidence and too speculative. Rather, the more appropriate measure of potential harm, supported by the evidence, is the present value of cost for the minimal evaluation and treatment of HIV over Mitchell's lifetime – $1,081,189.40. This figure bears a closer relation to Mitchell's potential risk than the $6 million maximum lifetime payout. It also bears a closer relation to the reprehensibility of Fortis's conduct because this figure represents the minimal pecuniary gain to Fortis in rescinding the policy. For these reasons, $1,081,189.40 is the accurate measure of the potential harm to which Fortis exposed Mitchell and is appropriately considered in evaluating the ratio to the punitive damages award.

The next question we must ask is whether a ratio of 13.9 to 1, based upon the $15 million punitive damages award and $1,081,189.40 in potential harm, is grossly excessive. We conclude that it is.

In *Campbell*, the Supreme Court observed that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outer limits of the due process guarantee." 538 U.S. at 425. Although the determination of whether a compensatory damage award is "substantial" is necessarily an imprecise and relative inquiry, it is safe to say that Mitchell's $150,000 in actual damages – excluding, for the moment, the $1,081,189.40 in potential harm suffered – is a fairly substantial compensatory damage award in South Carolina.

With that in mind, we find that a 13.9 to 1 ratio, in this particular case, exceeds due process limits. There is ample evidence in the record to support the imposition of punitive damages, and there is no need for further findings of fact. However, in order to determine the proper amount to remit, we must turn to the third *Gore* guidepost, which

instructs us to compare the present award to civil penalties imposed in similar cases.

3. Comparative Penalty Awards

Although a thorough review of case law has uncovered no cases on all fours factually with the present case, South Carolina has a substantial, if somewhat dated, history of upholding punitive damages awards against insurance companies that fraudulently rescind their customers' health insurance policies. *See Kinard v. United Ins. Co.*, 237 S.C. 266, 116 S.E.2d 906 (1960) (where the jury awarded $200 in actual damages and $1,300 punitive damages against an insurer who stopped collecting the premiums from the insured, with knowledge from the claims filed and from the agent's observation that the insured was near death, so that the policy would lapse); *Yarborough v. Bankers Life & Casualty Co.*, 225 S.C. 236, 81 S.E.2d 359 (1954) (where the jury awarded $7.50 in actual damages and $1,000 in punitive damages against an insurer who repudiated a health insurance policy by failing to send a notice of premiums due after the insured filed a claim for gall-bladder trouble, and attempted to have the insured agree to a retroactive rider excluding illnesses resulting from gall-bladder trouble); *Riley v. Life & Casualty Ins. Co.*, 184 S.C. 383, 192 S.E. 394 (1937) (where the jury awarded $36 in actual damages and $1,000 in punitive damages against an insurer who stopped collecting premiums from the insured after it was clear that his health was failing and with the obvious intention to cancel the life insurance policy);[9] *Jamison v. American Workmen Ins. Co.*, 169 SC 400, 169 S.E. 83 (1933) (where the jury awarded $20 in actual damages and $480 in punitive damages against an insurer who stopped notifying the insured when premiums were due

[9] These humble verdicts appear quaint in light of today's multimillion dollar awards. Nevertheless, it helps to keep in mind that this $1,000 punitive damages award was imposed for breach of a contract involving only $155 in life insurance, paid at a weekly premium of 25 cents.

after the insured became very ill in hopes that the insured would miss a payment and thereby justify rescission).

In reviewing more recent punitive damages awards, South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct.[10] *See James*, 371 S.C. at 196-97, 638 S.E.2d at 671-72 (upholding a 6.82 to 1 ratio); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) (upholding a 3.75 to 1 ratio); *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004) (upholding a 2.54 to 1 ratio); *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (upholding a 9.96 to 1 ratio); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding a 28 to 1 ratio). *Cf. Atkinson*, 361 S.C. at 170, 604 S.E.2d at 392-93 (overruling a 127 to 1 ratio).

In our view, the conduct in this case was reprehensible enough to merit an award towards the outer limits of the single-digit ratio. *See Campbell*, 538 U.S. at 425 (observing that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process). Fortis willfully disregarded Mitchell's health and safety, and the jury so found in assessing this punitive damages award. In assessing this remittitur, we place great emphasis upon that consideration.

We therefore remit the punitive damages award to $10 million, resulting in a ratio of 9.2 to 1. We believe a $10 million award in this case satisfies due process and comports with South Carolina law. We are also certain that a $10 million award will adequately vindicate the

[10] Fortis is correct to observe that most of South Carolina's punitive damages awards have been on the low end of the single-digit-ratio spectrum. That does not mean the constitution requires this to be so.

twin purposes of punishment and deterrence that support the imposition of punitive damages.

II. Evidence at Trial

Fortis argues that the judgment should be vacated, or judgment rendered in its favor, because the circuit court erred in admitting certain evidence. We disagree.

A. Other Rescissions

Fortis argues that the circuit court allowed the jury to consider evidence that the rescission committee harmed nonparties to the suit, in violation of its constitutional rights. *See Campbell*, 538 U.S. at 420. Fortis asserts that the jury should not have considered evidence indicating that forty-five other rescission cases were considered with Mitchell's in the course of a two-hour committee meeting. This argument is without merit. It is evident from the record that Mitchell introduced this evidence in order to establish the inference that Fortis could not have spent more than three minutes in deliberating the rescission of Mitchell's policy. Fortis could have defended itself from such evidence had the rescission committee kept minutes in its meetings. The circuit court did not err in allowing this evidence.

B. Post-claim Underwriting

Fortis argues that the circuit court erred in allowing testimony regarding Fortis's retrospective investigation practices, also known as "post-claim underwriting." Fortis asserts that expert testimony indicating that this practice is unlawful in "at least half a dozen states" constituted evidence of out-of-state conduct that violated Fortis's constitutional right to due process. *See Campbell*, 538 U.S. 408. We disagree.

Fortis argues that, as a general matter, post-claim underwriting is "perfectly lawful" in South Carolina. However, in the context of this case, Fortis's post-claim underwriting practices played a pivotal role in

the harm inflicted upon Mitchell in South Carolina. This evidence was probative of Fortis's bad faith conduct, and was properly submitted to the jury.

C. Improper Litigation Conduct

Fortis argues that the trial court erred in allowing the jury to consider evidence that Fortis engaged in "improper conduct" following the September 4, 2002 rescission committee meeting on the grounds that "dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Campbell*, 538 U.S. at 422. We disagree for three reasons.

First, the rescission was not final until June 2003 review of Mitchell's "appeal." At a bare minimum, all evidence of concealment until that point is allowable. Second, this evidence is probative of Fortis's bad faith liability, not punitive damages. Lastly, Fortis waived any objection to the admission of evidence of bad acts that occurred after the second rescission committee meeting by: (1) repeatedly emphasizing their own "good act" of reinstatement following the "temporary" rescission, and (2) repeatedly arguing that Mitchell himself acted negligently in failing to submit additional information prior to March 8, 2004.

D. Value of Mitchell's Free Medical Treatment

Fortis argues that the circuit court erred in allowing the jury to consider the value of the free medical care Mitchell received from Hope Health. We disagree.

The value of Mitchell's free medical care is relevant to the determination of damages because the collateral source rule provides that an award for damages should not be decreased if the plaintiff receives compensation for all or part of the damage from a collateral source. *See Haselden v. Davis*, 353 S.C. 481, 579 S.E.2d 293 (2003) (holding that the proper measure of damages is the "reasonable value" of the medical services, even if the plaintiff receives the treatment free

or at a discount). In this case, the value of Mitchell's free medical treatment is necessary to the determination of the amount of damage Fortis inflicted upon Mitchell in rescinding his policy.

E. Mitchell's Future Medical Expenses

Fortis argues that the circuit court erred in allowing the jury to consider the value of the Mitchell's future medical expenses. This objection, however, is meritless. This evidence is probative of Fortis's financial motive to rescind Mitchell's policy, and we find it is relevant to Mitchell's allegations of bad faith.

F. Mitchell's Risk of Death Without Appropriate Medication

Fortis argues that the circuit court erred in allowing the jury to consider the risk of death Mitchell faced without treatment, because it was "irrelevant, highly prejudicial, and . . . inflamed the jury." We find this assertion to be entirely without merit. Evidence of the risk Mitchell faced without health insurance coverage is properly admissible to establish Fortis's reprehensibility and support an award for punitive damages.

III. Fortis's Motion for JNOV

We find it patently clear from the record that there is no support for Fortis's claim that "the evidence as a whole is susceptible to only one reasonable inference" that Fortis was not liable for bad faith rescission of Mitchell's health insurance policy.

IV. Passion, Caprice, and Prejudice

Similarly, we find no credible evidence anywhere in the record to support Fortis's contention that "the jury's $15 million punitive damages award and/or its $150,000 compensatory damages award were the result of passion, caprice, or prejudice, and therefore must be reversed and a new trial ordered."

CONCLUSION

For the forgoing reasons, we affirm the jury's finding of liability on the bad faith cause of action, affirm the $150,000 compensatory damages award, and remit the $15 million punitive damages award to $10 million.

WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Pete S. Bryant, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26719
Submitted December 4, 2008 – Filed September 14, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Molly Crum, all of Columbia, for Petitioner.

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the grant of post-conviction relief (PCR) to Pete S. Bryant. On December 11, 1997, Bryant was convicted of armed robbery. Because Bryant had "prior conviction[s]" for armed robbery, he was sentenced to life without parole under section 17-25-45 of the South Carolina Code. The PCR court ruled that Bryant was not subject to a life without parole sentence and vacated the sentence. We reverse.

I.

On December 27, 1996, at approximately 1:30 p.m., while armed with a pistol, Bryant and accomplices robbed the E-Z Shop BP Station in Orangeburg County, South Carolina. The next day, December 28, around 2:00 a.m., Bryant and accomplices committed a second armed robbery of a convenience store, this time in Colleton County. On December 29, shortly before midnight, Bryant and accomplices committed a third and final armed robbery in Jasper County. In early January 1997, Bryant was arrested and charged with three armed robberies.

Bryant pled guilty on July 8, 1997, to the armed robberies in Colleton and Jasper Counties and was sentenced to ten years in prison. On December 11, 1997, Bryant was convicted of the Orangeburg County armed robbery. The trial court sentenced Bryant to life without parole in light of its reading of sections 17-25-45 and 17-25-50 of the South Carolina Code. Trial counsel failed to challenge the court's construction of these statutes. Bryant's direct appeal was affirmed by the court of appeals. *State v. Bryant*, Op. No. 99-UP-654 (S.C. Ct. App. filed Dec. 21, 1999).

II.

Bryant's initial application for PCR in 2000 was denied. In 2003, this Court held in *State v Gordon*, 356 S.C. 143, 154, 588 S.E.2d 105,

111 (2003) that sections 17-25-45 and 17-25-50 "must be construed together in determining whether crimes committed at points close in time qualify for a recidivist sentence." The *Gordon* Court applied its decision retroactively. *Id*. at 155 n.12, 588 S.E.2d 111 n.12.

Based on *Gordon*, Bryant filed the current PCR application in 2004 alleging ineffective assistance of counsel for failing to challenge the trial court's interpretation of sections 17-25-45(F) and 17-25-50. Bryant asserted at the PCR hearing that he was not a "career criminal," the armed robberies were not "isolated," and the robberies constituted "one string of events." The PCR court agreed and granted relief. The PCR court referenced *Gordon* and found that "all the Applicant's armed robbery offenses stemmed from a single criminal incident and were committed so closely in point of time as to be treated as one offense under S.C. Code Ann. Section 17-25-50 (Supp. 2004)."

The State petitioned for a writ of certiorari, which we granted.

III.

An appellate court "will reverse the PCR judge's decision when it is controlled by an error of law." *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). As this case involves statutory interpretation, we are presented with a question of law. *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("The issue of interpretation of a statute is a question of law for the court.").

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). A statute should be read as a whole. *Id*. Further, "[s]tatutes which are part of the same legislative scheme should be read together." *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000). "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." *Mid-State Auto*, 324 S.C. at 69, 476 S.E.2d at 692.

IV.

The resolution of this case requires the Court to examine the legislative history of section 17-25-45, scrutinize the interplay between subsection (F) of section 17-25-45 and 17-25-50, and revisit *Gordon*, in light of the 2006 amendment to section 17-25-45(F).

For the reasons discussed below, we adhere to that part of *Gordon* holding sections 17-25-45(F) and 17-25-50 must be construed together, as section 17-25-50 operates in some situations to preclude the imposition of a life without parole sentence. 356 S.C. at 154, 588 S.E.2d 111. We overrule *Gordon* insofar as its assessment of legislative intent concerning sections 17-25-45(F) and 17-25-50. 356 S.C. at 153-54, 588 S.E.2d at 110-11.

Specifically, referring to sections 17-25-45 and 17-25-50, a majority of this Court in *Gordon* stated "the recidivist statute is aimed at career criminals, those who have been previously sentenced and then commit another crime." 356 S.C. at 154, 588 S.E.2d at 111. *Gordon* further concluded that "[t]he purpose of requiring separate offenses is to ensure that those offenders being sentenced under the harsh provisions of a recidivist sentencing statute have not been classified as habitual offenders because of multiple convictions arising from a single criminal enterprise." *Id*. at 154, 588 S.E.2d at 110-11 (quoting *State v. Benjamin*, 353 S.C. 441, 446, 579 S.E.2d 289, 291 (2003) (Waller, J., dissenting)).

A.

Section 17-25-45(F)

In the abstract, the policy rationale of the majority in *Gordon* is entirely defensible. But the desired policy of the *Gordon* majority is at odds with the unambiguous language in section 17-25-45(F). We do not make this finding lightly, for we recognize that a rigid application of section 17-25-45(F), standing alone, would lead to harsh results. Our

perception of the potential for harsh results, however, serves as no license to construe the statute in a manner inconsistent with its clear language. Moreover, as addressed below, section 17-25-50 serves in most situations as a meaningful safeguard to the perceived unfair imposition of a life without parole sentence.

The view of the *Gordon* majority is, we believe, best understood by looking to the predecessor to section 17-25-45(F). In 1982, the Legislature repealed former section 17-25-40 of the South Carolina Code (1976) and replaced it with section 17-25-45. The statute listed certain offenses and provided that "any person who has three convictions" shall be sentenced to life in prison. S.C. Code Ann. § 17-25-45(1)(A) (1985). Of particular significance is the following provision:

> [A] conviction shall be considered a second conviction only if the date of the commission of the second crime occurred subsequent to the imposition of the sentence for the first offense. A conviction shall be considered a third conviction only if the date of the commission of the third crime occurred subsequent to the imposition of the sentence for the second offense.

S.C. Code Ann. § 17-25-45(1)(C) (1985). The language of the 1982 statute fits well with policy notions set forth in *Gordon* of "habitual offenders," "multiple criminal trials," "multiple convictions," and "opportunities to understand the gravity of [one's] behavior." *Gordon*, 356 S.C. at 154, 588 S.E.2d at 111.

The 1995 amendments to section 17-25-45 abandoned the necessity that a subsequent offense for enhancement purposes occur after imposition of the sentence for the prior offense. The same is true with amendments subsequent to 1995. Thus, while the *Gordon* rationale fits well with the 1982 legislation, those policy considerations are nowhere to be found in the prevailing statutory language, effective with the 1995 amendments.

In 1996, when Bryant committed the armed robberies, subsection (F) provided:

> For the purpose of determining a prior conviction under this section only, a prior conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication.

S.C. Code Ann. § 17-25-45(F) (Supp. 1995).

As noted, this Court decided *Gordon* in 2003, making a determination of legislative intent as to subsection (F). In 2006, the Legislature amended section 17-25-45(F), and we believe the amendment was in response to *Gordon* on two fronts. First, the Legislature confirmed the correctness of *Gordon*'s holding that sections 17-25-45(F) and 17-25-50 must be construed together. Second, the Legislature repudiated *Gordon*'s reading of "a prior or previous conviction."

> For the purpose of determining a prior or previous conviction under this section *and Section 17-25-50*, a prior or previous conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication. *There is no requirement that the sentence for the prior or previous conviction must have been served or completed before a sentence of life without parole can be imposed under this section.*

S.C. Code Ann. § 17-25-45(F) (Supp. 2008) (emphasis added).

Even in the absence of the second sentence added to subsection (F) in 2006, the statute provides that "a prior conviction shall mean the defendant has been convicted of a most serious or serious offense . . . on a separate occasion, prior to the instant adjudication." S.C. Code Ann. § 17-25-45(F) (Supp. 1995). Bryant's situation falls squarely

within the triggering language of section 17-25-45(F), as it existed in 1996. The last sentence in subsection (F), added in 2006, confirms the timing feature contained in the first sentence and repudiates *Gordon*'s contrary interpretation.

B.

Section 17-25-50

Section 17-25-50 states:

> In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

While section 17-25-45(F) lends Bryant no support, the outcome of this case turns on the meaning of section 17-25-50's phrase "so closely connected in point of time that they may be considered as one offense." We acknowledge the "so closely connected in point of time" language in section 17-25-50 may become ambiguous as applied to certain situations. When construing statutes forming part of the same legislative scheme, we must examine the statutes together as a whole. Accordingly, when we read the unambiguous timing feature of "a prior conviction" under section 17-25-45(F) alongside section 17-25-50, we construe the language of section 17-25-50 to preclude a life without parole sentence when the multiple offenses are inextricably connected and share an immediate temporal proximity.

State v. Woody, 359 S.C. 1, 596 S.E.2d 907 (2004) illustrates a proper application of section 17-25-50 to preclude a life without parole sentence. Woody was convicted of second-degree burglary and had two prior convictions for armed robbery. *Id*. at 2, 596 S.E.2d at 907. The State sought to use both armed robbery convictions for

enhancement purposes and a life without parole sentence. *Id*. The State's position was rejected because the armed robberies constituted, as a matter of law, one offense for purposes of section 17-25-50. *Id*. at 4, 596 S.E.2d at 908. The two armed robberies arose from a single incident at the same time and at the same location—a robbery of the store's clerk and the store itself. *Id.* at 2, 596 S.E.2d at 907.

In *Koon v. State*, 372 S.C. 531, 534, 643 S.E.2d 680, 682 (2007), this Court held a burglary committed on March 28th of a different building and a different location clearly constituted a separate offense from burglaries occurring two weeks prior on March 13th and March 14th. Due to this determination, it was not necessary for this Court to determine if the March 13th and March 14th burglaries were so closely connected to constitute one offense. Today we address the question left unanswered in *Koon*.

Our assessment of legislative intent—multiple offenses inextricably connected and sharing an immediate temporal proximity—will not provide a sure answer in every circumstance. Because the "so closely connected in point of time" language in section 17-25-50 may become ambiguous in some situations, it necessarily follows that section 17-25-50 does not lend itself to a bright-line rule. This Court so held in *Koon*. When a *genuine* ambiguity exists as a result of the proposed application of section 17-25-50 to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor. *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (recognizing the settled rule that penal statutes must be strictly construed in the defendant's favor); *see also United States v. Shabani*, 513 U.S. 10, 17 (1994) (observing that the rule of lenity "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute"). *Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.'").

We find no ambiguity concerning the application of section 17-25-50 to Bryant's multiple armed robberies over several days. Bryant committed the three separate armed robberies on different days, at

different locations, and the robberies involved different victims. These separate and distinct crimes over a several day period were not inextricably connected and did not share an immediate temporal proximity. Thus, Bryant's multiple armed robberies may not, as a matter of law, be considered "one offense" under section 17-25-50.

We emphasize that the determination of the number of prior convictions under section 17-25-45(F) must be made in conjunction with the section 17-25-50 "one offense" safeguard. Cases involving the life without parole statutory scheme tend to raise the specter of two concerns. First, without the link between sections 17-25-45(F) and 17-25-50, troubling issues would arise from the *timing* of the adjudications when a defendant is arrested and charged with multiple serious offenses. Assuming a defendant is adjudicated guilty, disposing of all charges at the same time will avoid the application of section 17-25-45(F) as it relates to those charges and preclude a life without parole sentence. This is so even if the offenses, if adjudicated separately, would otherwise require a life without parole sentence. Conversely, disposing of the charges at different times would result in a life without parole sentence, unless the "one offense" provision of section 17-25-50 operates to foreclose a life sentence. It would be an unsettling policy that allows the state to manipulate the timing of the adjudications of guilt to pursue a life without parole sentence. Hence the importance of section 17-25-50's "one offense" safeguard.

This leads to the second concern. The language of section 17-25-50 is ambiguous when applied to certain situations. The imprecise language, "so closely connected in point of time that they may be considered as one offense," does not remove in every situation the potential for manipulating the timing of the adjudications. As with Bryant's multiple and separate armed robberies, the applicability or nonapplicability of section 17-25-50 may be readily apparent in most circumstances. Nevertheless, section 17-25-50's imprecise language will continue to generate uncertainty in some situations. Pending clarification from the Legislature, we earnestly attempt today to discern legislative intent.

V.

In sum, we hold: (1) section 17-25-45 operates to trigger a life without parole sentence under the respective "two-strikes" and "three-strikes" provisions; (2) subsection (F) of section 17-25-45 sets forth a straightforward timing feature for identifying "a prior conviction;" and (3) section 17-25-50 is intended to serve as a legislatively sanctioned safeguard to ensure that a life without parole sentence is not imposed in cases where the multiple section 17-25-45 offenses are "so closely connected in point of time that they may be considered as one offense," which we construe to mean the offenses are inextricably connected and share an immediate temporal proximity. In essence, what may be charged as two, three or more strikes under section 17-25-45 must be deemed "one-strike" for sentencing purposes under section 17-25-50 and, as a result, preclude a life without parole sentence. We believe this approach most closely hews to legislative intent based on what is admittedly imprecise statutory language.

We reverse the grant of PCR to Bryant.

REVERSED.

TOAL, C.J., concurs. PLEICONES, J., concurring in a separate opinion. BEATTY dissenting in a separate opinion in which WALLER, J., concurs.

JUSTICE PLEICONES: I concur in Justice Kittredge's decision to reverse the grant of post-conviction relief to respondent as I continue to believe that State v. Benjamin, 353 S.C. 441, 579 S.E.2d 289 (2003) was correctly decided and should apply to persons such as respondent who received an LWOP sentence pursuant to S.C. Code Ann. § 17-25-45 prior to the amendment of § 17-25-45 (F), effective July 1, 2006. Further, I concur in his analysis of the impact of the 2006 amendment on the interplay between § 17-25-45 and S.C. Code Ann. § 17-25-50 on cases arising after the effective date of that amendment.

JUSTICE BEATTY: I disagree with the majority's analysis of the import of the Legislature's 2006 amendment to section 17-25-45(F). In my view, this amendment does not call into question the Gordon decision or its expression of legislative intent.

Section 17-25-45(F) recognizes Gordon's requirement that it should be read together with section 17-25-50. To do so does not mean section 17-25-45(F) should be read to the exclusion of section 17-25-50; nor does it mean that section 17-25-50 acquired a new meaning or should be interpreted differently. These sections should be interpreted in a manner that gives effect to both. This may be accomplished by recognizing that section 17-25-45 focuses on how to determine a prior conviction and section 17-25-50 focuses on how a conviction should be treated for sentencing purposes under certain circumstances.

The issue in this case is the same as in Gordon; that is the correct interpretation of section 17-25-50. Section 17-25-50 is unquestionably ambiguous in its use of the language ". . . committed at times so closely connected in point of time that they may be considered as one offense . . . ." There is no requirement under section 17-25-50 that multiple offenses occur at the same time or in the same transaction. Yet, the majority injects a contemporaneous transactional requirement though none is found in either section 17-25-45(e) or section 17-25-50 and is unnecessary to effectuate the intent of either section.

The Legislature has had ample opportunity since Gordon to further clarify section 17-25-50 but has not done so. Thus, it would appear that Gordon's interpretation of legislative intent is correct. The Legislature's focus is recidivism, and flexibility in interpreting "close in time" is necessary to give effect to legislative intent. In Gordon, the multiple offenses took place over a period of seven days. Here, the offenses took place during a period of fifty-four hours. Assuming an LWOP sentence is inappropriate under the facts of the instant case, Bryant would still be exposed to multiple, maximum consecutive sentences.

I would affirm.

WALLER, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frederick T. McKnight, as
Personal Representative of the
Estate of Brooks Leon Thomas, Appellant,

v.

South Carolina Department of
Corrections and Just Care, Inc., Defendants,

of whom Just Care, Inc. is the Respondent.

Appeal From Dorchester County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4615
Heard April 23, 2009 – Filed September 9, 2009

AFFIRMED

J. Edward Bell, III, and C. Carter Elliott, Jr., both of Georgetown, for Appellant.

Mason A. Summers and William C. McDow, both of Columbia, for Respondent.

KONDUROS, J.: As personal representative of Brooks Leon Thomas's estate, Frederick T. McKnight filed a survival and wrongful death action against the South Carolina Department of Corrections (the Department) and Just Care, Inc.[1] after inmate Thomas committed suicide. The trial court granted Just Care's motion for summary judgment finding any deficiency in treatment was too attenuated from Thomas's death to have proximately caused it because he committed suicide over a year after his discharge. The trial court also determined Just Care did not owe Thomas a duty because he was not in Just Care's custody at the time of the suicide. McKnight appealed and we affirm.

FACTS

The plea court sentenced Thomas to ten years' imprisonment after he pled guilty to armed robbery. Thomas entered the Department's custody on April 8, 2003. On September 14, 2003, Thomas reported he had swallowed ten razor blades and the following day the Department sent him to the Carolina Care Center (the Center).[2] A psychiatrist examined Thomas at the Center on September 17, 2003. During the examination, Thomas denied wanting to commit suicide but admitted he was "a little depressed." He also indicated he had "a history of life-long depression." Thomas was prescribed medications including Zoloft and was transferred back to the Department's custody on September 22, 2003.

On October 5, 2004, Thomas died after he hung himself while in the Department's custody. McKnight brought suit against the Department and Just Care for medical malpractice, negligence, wrongful death, and survival. McKnight alleged Thomas and his family members informed prison officials on numerous occasions that he was contemplating suicide. The complaint also contended prison employees beat and physically abused Thomas without justification. Just Care made a motion for summary judgment. McKnight

[1] Just Care has a contract to provide the Department with medical and health services.

[2] Just Care operates a prison hospital at the Center.

opposed the motion arguing the affidavit of his expert witness, Dr. James Merikangas, provided evidence of proximate cause. That affidavit stated:

> These violations of the standard of care have proximately caused injuries and damages to the Plaintiff/Decedent in this case which may be summarized as follows:
>
> (A) Mr. Brooks Thomas was a patient at the Just Care/Columbia Care Center inpatient medical facility . . . . Had a proper examination been performed by the team members of Just Care/Columbia Care Center (including a proper history), Mr. Thomas would have been committed and administered the appropriate treatment including anti-psychotic medications over an appropriate time period. Because this was not properly carried out, Mr. Thomas suffered both mentally and physically after his discharge and before his death.
> (B) As Mr. Thomas was not sent back to the [Department] with the proper discharge instructions or treatment plan, it is likely that Mr. Thomas suffered both mentally and physically before his death. Additionally, it is likely that Mr. Thomas was not sent back to Just Care/Columbia Care Center after September 22, 2003 as there was no proper follow up or discharge instructions sent to [the Department].
> (C) The above mentioned breaches in the appropriate standard of medical care le[]d to a further decline in Mr. Thomas' overall mental health condition and likely contributed to his eventual death by suicide October 5, 2004.

The trial court granted Just Care's motion for summary judgment, finding McKnight presented no evidence Just Care owed Thomas a duty or any alleged negligence by Just Care proximately caused his death. McKnight filed a Rule 59(e), SCRCP, motion for reconsideration arguing in part the trial court failed to address the survival claim in its order. The trial court denied the motion and this appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if evidentiary facts are not disputed, if only the conclusions to be drawn from them are, the trial court should deny the motion for summary judgment. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is not appropriate when further inquiry into the facts is desirable to clarify the application of law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

LAW/ANALYSIS

I. Proximate Cause

McKnight contends the trial court erred in granting Just Care summary judgment because the mere passage of thirteen months' time between the

alleged negligence and death does not preclude a finding of proximate causation. We disagree.

The plaintiff in a medical malpractice action must establish both proximate cause and negligence. Hanselmann v. McCardle, 275 S.C. 46, 48, 267 S.E.2d 531, 533 (1980). "To prevail in a negligence action, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." Platt v. CSX Transp., Inc., 379 S.C. 249, 258, 665 S.E.2d 631, 635 (Ct. App. 2008), cert. pending. "Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." Hanselmann, 275 S.C. at 48-49, 267 S.E.2d at 533 (quoting Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977)).

Proximate cause is the efficient or direct cause; the thing that brings about the complained of injuries. Platt, 379 S.C. at 266, 665 S.E.2d at 640. "Proximate cause requires proof of (1) causation in fact and (2) legal cause." Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation in fact is demonstrated by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence, while legal cause is proved by establishing foreseeability. Platt, 379 S.C. at 266, 665 S.E.2d at 640. The court looks to the natural and probable consequences of the complained of act to determine foreseeability. Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996). A plaintiff proves legal cause by establishing the injury occurred as a natural and probable consequence of the defendant's negligence. Id. "When the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability." Eadie v. Krause, 381 S.C. 55, 64, 671 S.E.2d 389, 393 (Ct. App. 2008), cert. pending. When the cause of a plaintiff's injury may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing the defendant's conduct proximately caused his injuries. Mellen v. Lane, 377 S.C. 261, 280, 659 S.E.2d 236, 246 (Ct. App. 2008). "For an

intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable." Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 180, 463 S.E.2d 636, 640 (Ct. App. 1995). Ordinarily, proximate cause is a question for the jury, but when the evidence is susceptible to only one inference, it becomes a matter of law for the court. Platt, 379 S.C. at 266, 665 S.E.2d at 640.

Although we did not find and the parties did not provide any South Carolina cases directly on point, other jurisdictions have contemplated situations similar to the one at hand. See, e.g., Tolton v. Am. Biodyne, Inc., 48 F.3d 937, 944 (6th Cir. 1995) (holding when the decedent committed suicide more than one month after his last visit to the hospital and received treatment from two other hospitals during that one-month period, the plaintiffs could not prove damages because of the time lapse and intervening medical treatment); Darren v. Safier, 615 N.Y.S.2d 926, 928 (N.Y. App. Div. 1994) (finding the plaintiff had not established a hospital's alleged failure to follow its guidelines for suicidal patients was the proximate cause of a patient's suicide that occurred one month after his discharge from the hospital); Paradies v. Benedictine Hosp., 77 A.D.2d 757, 759 (N.Y. App. Div. 1980) (citations omitted) ("[A]s a matter of law the decedent's suicide was not a proximate cause of any alleged negligence on the part of defendants. Plaintiff has failed to present any evidence establishing a causal connection between the alleged acts of negligence and the subsequent suicide which occurred some three weeks after the decedent's release.").

However, McKnight points to two cases that discourage using the passage of time to show lack of proximate cause, although both cases involve situations in which the patient later harmed another person and not himself. The first case upon which McKnight relies held:

> Remoteness in time or space may give rise to the likelihood that other intervening causes have taken over the responsibility. But when causation is found, and other factors are eliminated, it is not easy to discover any merit whatever in the contention that

> such physical remoteness should of itself bar recovery. The defendant who sets a bomb which explodes ten years later, or mails a box of poisoned chocolates from California to Delaware, has caused the result, and should obviously bear the consequences.

Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1332 (Ohio 1997) (quoting Prosser & Keeton on Torts 283, § 43 (5th ed. 1984)), superseded by statute on other grounds. The court concluded:

> Thus, no fixed rule can be established as to how quickly the harm must occur in order to hold the defendant liable. Some courts have found periods ranging between three and a half months to two years and five months to be too remote, while other courts have found periods ranging from five and one-half months to three years not to be too remote. Physical or temporal remoteness, therefore, may be an important consideration in whether negligent conduct is a substantial factor in producing harm; but the mere lapse of time, in the absence of intervening causes, is not of itself sufficient to prevent the defendant's negligence from being the legal cause, regardless of how much time has passed.

Id. (citations omitted).

The other case upon which McKnight relies is very fact specific. In it, the Minnesota Supreme Court found:

> It is also a close question whether the shooting was foreseeable. The question is whether it was reasonably foreseeable in July 1970 that (a) the patient would, a year and a half later, refuse his

> medication and have a reoccurrence of his illness and that (b) in the course of that reoccurrence, he would use his gun to shoot someone. The question before us is one of policy: Is the doctor's conduct so closely connected with the tragedy of the shooting that the law may allow a cause of action?

Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984).

Because our search of South Carolina case law revealed no analogous situations, we find other states' jurisprudence instructive. As previously referenced, other states have found no proximate cause when a suicide occurred within weeks of the release. Although the courts in the cases McKnight cites found the remoteness of time was not sufficient to establish proximate cause, these cases involved the shooting of others. Therefore, we do not find them as relevant as cases in which the patient committed suicide.

Additionally, McKnight argues the cases on which the trial court relied all contained intervening acts in addition to the passage of time. Although some of the cases we rely upon contain intervening acts in addition to the passage of time, others do not. Further, in McKnight's complaint, he alleges employees, agents, and/or servants of the Department beat and/or physically abused Thomas without justification or provocation. The Department's summary of Thomas's medical records include several references to prison guards' using gas on him. Thomas's return to prison for thirteen months with no further treatment, especially considering his allegations of abuse and additional suicide attempts, constituted an intervening act sufficient to break the causal chain.

McKnight also relies upon the affidavit of his expert witness, Dr. Merikangas, to establish evidence of proximate cause. South Carolina courts have consistently held evidence must amount to more than speculation and conjecture to submit a case to the jury. See Ellis v. Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996) ("When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged

negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence."); Daves v. Cleary, 355 S.C. 216, 229-30, 584 S.E.2d 423, 430 (Ct. App. 2003) (alterations by court) (quoting James v. Lister, 331 S.C. 277, 286, 500 S.E.2d 198, 203 (Ct. App. 1998)) ("In medical malpractice cases, the plaintiff must show through expert testimony that, 'in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence . . . [and] when it is the only evidence of proximate cause relied upon, it must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection.'"); see also Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) (quoting Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)) (applying the directed verdict standard to a summary judgment motion and holding "[a] jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. . . . 'However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation.'"). Dr. Merikangas's affidavit is at best nothing more than conjecture and speculation and thus, does not create any genuine issue of material fact. Therefore, the trial court properly granted summary judgment on the basis of lack of proximate cause.

II. Duty

McKnight asserts the trial court erred in adopting the contention that a "duty of care to prevent suicide exists only on the part of a defendant who has custody of a suicidal person." We disagree.

"In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages." Sabb v. S.C. State Univ., 350 S.C. 416, 429, 567 S.E.2d 231, 237 (2002). "An

essential element in a negligence cause of action is the existence of a legal duty of care owed by the defendant to the plaintiff." Platt, 379 S.C. at 258, 665 S.E.2d at 635. Without such a duty, a plaintiff cannot establish negligence. Id. "In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002).

South Carolina "has recognized a cause of action in negligence for breach of a duty to prevent a known suicidal patient from committing suicide" but in those cases the patient had not been discharged from the hospital at the time of the suicide. See Bramlette, 302 S.C. at 74, 393 S.E.2d at 917 (affirming the trial court's denial of defendant's directed verdict motion on basis of proximate cause when patient committed suicide while on a recreational outing with other patients and occupational therapist employed by hospital); see also Hoeffner v. Citadel, 311 S.C. 361, 368, 429 S.E.2d 190, 194 (1993) ("Bramlette does not impose strict liability on those with a duty to prevent suicide" "because health care professionals are subject to liability for failure to prevent suicide only when departure from the standards of their profession proximately causes their patient's suicide"); Sloan v. Edgewood Sanatorium, Inc., 225 S.C. 1, 13, 80 S.E.2d 348, 353 (1954) (holding the issue of negligence was properly submitted to the jury and its finding of negligence was a reasonable inference because decedent had known suicidal tendencies and committed suicide while a patient at a psychiatric hospital). Other states have recognized that same duty and have noted "there is no justification for extending that duty beyond the patient's unconditional release." Katona v. County of Los Angeles, 172 Cal. App. 3d 53, 59 (Cal. Dist. Ct. App. 1985), superseded by statute on other grounds. The California District Court of Appeal found:

> In the instant case, decedent's suicide occurred more than six weeks after she had been discharged from either the county's mental health facility or Somos Amigos. Moreover, there is no indication whatsoever that either hospital had any contact with decedent or

> her parents after her unconditional release. Under the circumstances, there would be no basis for imposing a duty on defendants to control decedent's actions in an attempt to prevent her suicide.

Id.

The Florida District Court of Appeal has also found a hospital has no duty once a patient is released:

> [A] hospital or sanatorium owes its patients or inmates a specific duty of care. If that duty is breached and as a result of such breach, the patient commits suicide or inflicts injury upon himself, the institution is liable. The duty is based solely on the fact of the patient's confinement in the hospital, and the hospital's ability to supervise, monitor and restrain the patient. Upon release of the patient, this duty ceases.

Paddock v. Chacko, 522 So. 2d 410, 416 (Fla. Dist. Ct. App. 1988) (citations omitted). The Oklahoma Supreme Court has found although a duty exists when the decedent is a patient being treated for mental illness at a hospital, there is no duty when the decedent is an outpatient. Runyon v. Reid, 510 P.2d 943, 950 (Okla. 1973). The court noted "defendants could not exercise the degree of control over decedent which a hospital could exercise over a patient." Id.

The New York Supreme Court, Appellate Division, has provided a compelling argument against expanding a hospital's duty in this area:

> The prediction of the future course of a mental illness is a professional judgment of high responsibility and in some instances it involves a measure of calculated risk. If a liability were imposed on the physician or

> the State each time the prediction of future course of mental disease was wrong, few releases would ever be made and the hope of recovery and rehabilitation of a vast number of patients would be impeded and frustrated. This is one of the medical and public risks which must be taken on balance, even though it may sometimes result in injury to the patient or others.

Taig v. State, 19 A.D.2d 182, 183 (N.Y. App. Div. 1963).

Although South Carolina has found a hospital owes a duty to a patient while that patient is still in the custody of the hospital, it has not determined whether the duty continues once the patient is released. McKnight argues Bramlette extended that duty. However, Bramlette is distinguishable from the present case because in Bramlette the patient had not been released and was on a hospital sanctioned trip at the time of the suicide. 302 S.C. at 69-70, 393 S.E.2d at 915. Here, Thomas had been discharged from the hospital. States that have considered whether the duty continues once the patient is released have found the duty ceases once the patient is released. McKnight has not provided case law from any state that has expanded the duty. Accordingly, the trial court properly granted summary judgment on the basis the Hospital had no duty.

III. Survival Causes of Action

McKnight alleges the trial court erred in failing to address the survival action in its order. We disagree.

The trial court's findings on proximate cause and duty apply to the survival action as well. While Just Care had a duty to Thomas while he was at its hospital, he did not harm himself while in Just Care's custody. The complaint's survival action seems to allege Thomas tried to commit suicide unsuccessfully after Just Care discharged him. As with the wrongful death claim, Thomas's return to prison is an intervening cause that breaks the causal

connection. Accordingly, the trial court properly granted summary judgment on the survival cause of action.

CONCLUSION

The trial court properly granted Just Care's summary judgment motion based on lack of proximate cause and duty as to both the wrongful death and survival causes of action. Accordingly, the grant of summary judgment is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Too Tacky Partnership, Appellant,

v.

South Carolina Department of Health and Environmental Control and Mayo Read, Jr., Respondents.

Appeal From Charleston County
Roger Young, Circuit Court Judge

Opinion No. 4616
Heard June 10, 2009 – Filed September 9, 2009

AFFIRMED

John P. Seibels, Jr. and Jason Scott Luck, both of Charleston, for Appellant.

Carlisle Roberts, Jr., of Columbia; Davis A. Whitfield-Cargile, of North Charleston; and Elizabeth Applegate Dieck, of Charleston, for Respondent South Carolina Department of Health and Environmental Control; Richard L. Tapp, Jr. and

Stephen P. Groves, Sr., both of Charleston, for Respondent Mayo Read, Jr.

KONDUROS, J.: Too Tacky Partnership (Too Tacky) appeals the South Carolina Department of Health and Environmental Control's (DHEC) issuance of a permit allowing Mayo Read, Jr. to construct a dock. We affirm.

PROCEDURAL BACKGROUND/FACTS

In 1992, Too Tacky purchased a parcel of land (Lot 4) bordering the Leadenwah River. Lots 1, 2, 3, and 4 are side-by-side with Lot 3 positioned along the western border of Lot 4. The lots all belonged to a common owner at one time and were subdivided and sold to Too Tacky, Mayo Read, Sr. (Lot 1), Ellen Read (Lot 2), and Mayo Read, Jr. (Lot 3).[1] In the early 1990s, Too Tacky built a dock off Lot 4 extending into the Leadenwah River. In 2004, Mayo Read, Jr. sought a critical area permit from DHEC's Office of Ocean and Coastal Resource Management (OCRM) to construct a dock along the Leadenwah River on an easement running east toward the river on the northern borders of Lots 1, 2, 3, and 4.

In applying for the permit, Read submitted a permit application form listing Too Tacky as an adjoining landowner. The application described the location of the project to be on Tacky Point Road at the "end of easement." The application also included an affidavit of ownership or control with preprinted boxes for the applicant to check. Read indicated he was the "record owner" of the property described in the application, which was the "end of right of way" on "Tacky Point Road." Read further affirmed the preprinted language, stating he would get prior approval of all other persons with legal interests in the property and if he was not the record owner, would submit written permission of the owner. Read submitted a drawing of the project and indicated again the dock would be located at the end of a fifty-foot easement for the benefit of Lots 1, 2, and 3. Read further provided an uncertified plat signed by the original owner of the parcel and the purchasers

[1] Mayo Read, Jr. has since sold Lot 3 to his father, Mayo Read, Sr.

of the subdivided Lots recognizing the fifty-foot easement for drainage and creek access by Lots 1, 2, and 3. From the record, it does not appear the plat was submitted with the application but was submitted prior to the application's approval.

Too Tacky was notified of Read's application and objected via letter from its attorney. In that letter, Too Tacky set forth several bases for its objection. First, Too Tacky contended Read's proposed dock would violate Regulation 30-12(A)(2)(a) of the South Carolina Code (current version at Regulation 30-12(A)(1)(a) (Supp. 2008)), which prohibits the building of two docks on the same parcel of land absent special circumstances and requires docks not impede navigation of the waters upon which constructed. Too Tacky further argued Read's application was improper because he was not the record owner of Lot 4, and he did not present sufficient proof of a property interest on Lot 4 that would allow construction of a dock. Finally, Too Tacky cited the negative use-and-enjoyment and financial impacts the construction of Read's dock would have on Too Tacky's property, specifically because the dock would be in close proximity to the residence on Lot 4.

OCRM granted Read's permit application over Too Tacky's objections. Too Tacky appealed the grant of the permit, which the Administrative Law Court (ALC) and the Coastal Zone Management Appellate Panel (Appellate Panel) both affirmed. The circuit court affirmed the issuance of the permit, and this appeal followed.

STANDARD OF REVIEW

An appellate court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2008). However, the court may reverse or modify a final agency decision if the agency decision was affected by an error of law, was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or was arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. Id. The DHEC Board's findings are presumptively correct, and therefore, the challenging party bears the burden of proving its decision was erroneous in

view of the substantial evidence in the record. Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (Ct. App. 2000).

LAW/ANALYSIS

I. Read's Application and Affidavit

Too Tacky contends OCRM erred in granting Read's permit because Read's application was incomplete, and his affidavit contained false information. We disagree.

Pursuant to statute, applications for permits from OCRM shall include the following:

> (1) Name and address of the applicant.
> (2) A plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished.
> (3) A plat of the area in which the proposed work will take place.
> (4) A copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal.
> (5) A list of all adjoining landowners and their addresses or a sworn affidavit that with due diligence such information is not ascertainable.

S.C. Code Ann. § 48-39-140(B) (2008). The companion DHEC regulation, Regulation 30-2(B)(4) of the South Carolina Code (Supp. 2008), states that a certified copy of the deed, lease, or other instrument under which the applicant claims title, possession, or permission shall ordinarily be required to complete the application.

The Appellate Panel concluded Read's affidavit and the copy of the plat submitted by Read constituted an "other instrument" as contemplated by the statute and regulation. The interpretation by an agency of its own regulation is given great deference. Earl v. HTH Assocs., Inc./Ace Usa Ins. Co. of N. Am., 368 S.C. 76, 81, 627 S.E.2d 760, 762 (Ct. App. 2006). In this case, the plat was a document signed by the landowner and purchasers at the time of subdivision. The plat was stamped as approved by Charleston County Council and recorded in the register mesne conveyances' office (RMC). Consequently, the plat appears to have the requisite formality associated with the term instrument. As defined in Black's Law Dictionary, an instrument is a "written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate." Black's Law Dictionary 869 (9th ed. 2009). In this case, the plat defines the right conveyed by the common grantor to the original grantees of a fifty-foot easement for drainage and creek access to benefit Lots 1, 2, and 3. Furthermore, two other South Carolina cases have found plats to be instruments. See Sutcliffe v. Laney Bros., 247 S.C. 417, 422, 147 S.E.2d 689, 691 (1966) (stating subject property had not been divided by plat or other instrument of record); see also Hamilton v. CCM, Inc., 274 S.C. 152, 154, 263 S.E.2d 378, 379 (1980) ("[T]he outcome of this litigation is largely controlled by the construction given an instrument referred to as the Harbour Town Townhouse Plat.").

Additionally, Too Tacky contends the application was incomplete because the other instrument was not certified. However, the statute does not require the instrument to be certified and the regulation allows for some flexibility in this requirement by employment of the term ordinarily. Furthermore, as DHEC points out, Too Tacky does not dispute the plat submitted to OCRM was not identical to the one on file with RMC. Consequently, Too Tacky was not prejudiced based on the lack of certification of the plat.

Finally, Too Tacky argues Read's affidavit was false because he claimed to be the record owner of the property at issue. However, as discussed in the facts, Read made numerous references to the fact that his proposed dock would be at the end of an easement. He never suggested,

other than by checking the pre-printed "record owner" box, that he owned Lot 4. Therefore, any perceived falsity in his affidavit could not have misled OCRM about the nature of Read's property interest.[2]

II. Ownership of Easement

Too Tacky next contends Read failed to sufficiently prove the existence and scope of the easement on Lot 4. We disagree.

OCRM is neither authorized nor required to make legal findings regarding the existence or precise nature of property rights in the permitting process. If an adjoining landowner objects to the assertion of the applicant's property interest, then the regulations provide the permitting process will be held in abeyance if litigation to quite title in the property is commenced.

> If the alleged adjoining landowner of critical area files a written objection to the permit application within the period prescribed in Section 48-39-140 (15 days for minor and 30 days for major permits) based upon a claim of ownership and indicates an intention to file a court action pursuant to Section 48-39-220, the application will be deemed incomplete and further processing of the permit will not take place until a final judicial decision is rendered by a court of competent jurisdiction. However, written proof of filing a court action pursuant to Section 48-39-220 must be received by the Department within 30 days

[2] At oral argument, Too Tacky contended the plat at issue could not satisfy the requirements of subsections (3) and (4) of section 48-39-140(B). However, Too Tacky did not raise this issue until oral argument. Therefore, we will not consider it. See In the Interest of Bruce O., 311 S.C. 514, 515 n.1, 429 S.E.2d 858, 858 n.1 (Ct. App. 1993) ("This court will not grant relief on an alleged error asserted for the first time on appeal. Further, an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief.").

> of the date of the expiration of the comment period. If no such written proof is timely received, the permit will be processed pursuant to law.

S.C. Code Ann. Regs. 30-2(I)(3) (Supp. 2008).

Based on this regulation, neither OCRM nor DHEC has the authority to make determinations regarding parties' legal interests in property. The regulation and permitting process allows adjoining landowners to assert their interest and protect their rights through actions filed with a "court of competent jurisdiction." In the absence of such assertion, OCRM will proceed with its review of the application.

With that in mind, OCRM cannot ignore the objections or concerns of adjoining landowners. A permit applicant must present a cognizable "claim [to] title, possession or permission from the owner of the property to carry out the proposal." § 48-39-140(B)(4) (emphasis added). The ALC concluded this means the applicant must make a prima facie showing of ownership or permission. We agree with that standard and with the conclusion that Read met his burden in this case.

III. One Dock Rule

Too Tacky next argues OCRM violated Regulation 30-12(A)(2)(a) of the South Carolina Code (Supp. 2004) when a dock on Lot 4 already existed.[3] The regulation stated "[d]ocks and piers shall normally be limited to one structure per parcel." It appears this issue is not preserved for our review. While Too Tacky raised the issue to the ALC, the ALC did not rule on the matter and Too Tacky did not file a Rule 59(e), SCRCP, motion. See Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 562-63, 667 S.E.2d 582, 586 (2009) (holding Rule 59(e) motions are proper in appeals from administrative decisions); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (stating issues not raised to and ruled upon by the ALC are unpreserved for appellate review).

[3] This is currently Regulation 30-12(A)(1)(a) of the South Carolina Code (Supp. 2008), and the "normally" language is no longer included.

IV. Impact on Adjoining Landowners

Finally, Too Tacky contends OCRM failed to consider how the construction of Read's dock would impact the value and enjoyment of its property, a question that should be considered pursuant to Regulation 30-11(B) of the South Carolina Code (Supp. 2008).[4] We disagree.

Too Tacky maintains testimony by OCRM's project manager for the application, Frederick Mallet, is somewhat conflicting. Mallet testified he believed consideration was given to the ten factors during the permitting process; however, he did not think the diminishment in value of Lot 4 had come up. Mallet also testified the original dimensions of the dock were altered to ensure it did not extend beyond the property lines of the easement and the roof was deleted to lessen visual impact. Consequently, the record indicates the impact to the adjoining landowner was considered. Furthermore, Too Tacky did not present any evidence to show how the dock would financially impact the value of its property. In sum, it cannot be said OCRM erred in granting Read's permit on the basis of this argument.

CONCLUSION

We find there was evidence upon which OCRM could have reasonably relied in awarding the dock permit to Read. We give great deference to an agency's interpretations of its own regulations, and we cannot conclude the circuit court clearly erred in affirming the issuance of the permit because of any alleged irregularities with the application and affidavit themselves. Furthermore, we agree with the circuit court that OCRM is not vested with the authority to make binding legal findings regarding the validity of parties' interest in property. So long as the petitioner presents a prima facie case of ownership of or sufficient interest in the land, OCRM has not clearly erred in granting the permit. Finally, evidence in the record supports the circuit

[4] Reg. 30-11(B) sets forth ten factors OCRM should consider in issuing a permit including "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners."

court's finding OCRM considered the impact of issuing the permit on adjoining landowners. Accordingly, the decision of the circuit court is

AFFIRMED.

HEARN, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch, Appellant,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc., Defendants,

of whom Bayshore Concrete Products/South Carolina, Inc., and Bayshore Concrete Products Corporation are the Respondents.

Kevin Key and Sandra Key, Appellants,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc., Defendants,

of whom Bayshore Concrete Products/South Carolina, Inc., and Bayshore Concrete Products Corporation are the Respondents.

Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch and Julius Poch, Appellant,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc., Defendants,

of whom Bayshore Concrete Products/South Carolina, Inc., and Bayshore Concrete Products Corporation are the Respondents.

Appeal From Horry County
Paul M. Burch, Circuit Court Judge

Opinion No. 4617
Heard April 22, 2009 – Filed September 9, 2009

AFFIRMED

Christine Companion Varnado, John Kuhn, and Frank X. Duff, all of Charleston, and Gerald E. Loftstead, III, of Wheeling, West Virginia, for Appellants.

Samuel R. Clawson, Timothy A. Domin, and Barrett R. Brewer, all of Charleston, for Respondents.

LOCKEMY, J.: Thelma Poch, as the Personal Representative for the Estate of Kenneth O. Poch and Kevin and Sandra Key appeal the circuit court's order of dismissal of their causes of actions against Bayshore Concrete Products South Carolina, Inc. (Bayshore SC), and Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc. (Bayshore Corp) following a finding all claims were barred by the exclusivity provision of the Workers' Compensation Act. We affirm.

FACTS

Bayshore Corp is a Virginia corporation which is in the business of manufacturing pre-cast concrete products for use in construction projects. Bayshore SC is a South Carolina corporation which is a wholly owned subsidiary of Bayshore Corp and is also in the business of manufacturing pre-cast concrete products for use in construction projects. After securing a bid to supply pre-cast concrete forms for use in the Carolina Bays Parkway project in Horry County, Bayshore Corp formed Bayshore SC, to effectively act as a remote casting yard to fulfill the bid for the Carolina Bays project locally in South Carolina. Bayshore Corp executed a lease for a South Carolina factory site and purchased equipment on behalf of Bayshore SC so that Bayshore SC could produce the concrete forms necessary to fulfill the bid. Bayshore SC paid the rent for the leased property, and Bayshore SC used the equipment to produce the concrete forms for the Carolina Bays Project. Under the terms of the lease, Bayshore SC was required to return the work site to its original condition.

While Bayshore SC was in the final stages of finishing its Carolina Bays project, it contracted with Job Place to hire workers for the site cleanup and equipment dismantling. Job Place had previously leased several employees of Personnel Resources of Georgia (Personnel Resources), and Job Place signed a contract with Personnel Resources on June 13, 2002. Job Place provided Bayshore SC with approximately ten workers to help with the project, including Kevin Key and Kenneth Poch. During the completion of the casting removal job, Poch and Key were involved in a work related accident when the trench where they were working caved in. Poch died as a result of the accident, and Key was severely injured. When the accident occurred on June 6, 2002, Key and Poch worked directly with Larry Lenart, a Bayshore SC supervisor. After the accident, Poch's Estate and Key received workers' compensation benefits through Job Place.

After receiving workers' compensation benefits, Poch's Estate and Key sued Bayshore Corp and Bayshore SC. Specifically, Thelma Poch, Kenneth's mother, filed a wrongful death and survival action, alleging negligence, gross negligence, professional negligence, breach of a professional duty, and premises liability. Kevin and Sandra Key filed a personal injury and loss of consortium action and also alleged negligence, gross negligence, professional negligence, breach of a professional duty, and premise liability. In their answer, Bayshore Corp and Bayshore SC claimed Kenneth Poch and Kevin Key were statutory employees of both the parent and the subsidiary. In an amended complaint, Thelma Poch and the Keys added a cause of action for breach of contract accompanied by fraud and negligent and/or intentional misrepresentation and/or deceit.

Bayshore Corp and Bayshore SC then moved for summary judgment and alternatively moved to dismiss for lack of subject matter jurisdiction. Specifically, Bayshore Corp and Bayshore SC requested a hearing to determine workers' compensation exclusivity jurisdiction. On April 19, 2007, the Honorable Steven H. John issued an order confirming the agreement of the parties to schedule a hearing date for the motions hearing. In his order, Judge John noted the parties agreed to a half day hearing, that

the presentation of evidence would be by way of affidavits, deposition testimony, and applicable records. Further, the order allowed both parties to submit memoranda of law prior to the May 31, 2007 hearing.

Prior to the May 31 hearing, Appellants filed motions to exclude affidavits of Keith Colonna, Larry Lenart, and Vernon Dunbar. After a hearing on June 1, 2007, the circuit court addressed Bayshore's motions and included several factual findings. The circuit court determined Bayshore Corp and Bayshore SC were immune from civil suit under the workers' compensation exclusivity provisions. Specifically, the circuit court found: (1) Poch and Key were leased employees, solely performing the work of Bayshore Corp and Bayshore SC at the time of this accident; (2) Bayshore SC was a wholly owned subsidiary of Bayshore Corp formed for the purpose of filling a bid secured by Bayshore Corp to supply concrete forms to the Carolina Bays project. Bayshore SC was the special employer of Appellants and, because Bayshore SC was performing the work of Bayshore Corp both parent and subsidiary were entitled to immunity pursuant to worker's compensation exclusivity; (3) under the subcontractor analysis, both Bayshore SC and Bayshore Corp were entitled to workers' compensation exclusivity; and (4) Bayshore SC and Bayshore Corp were statutory employers of Poch and Key because Appellants were performing the work of Bayshore SC and Bayshore Corp In three separate orders the circuit court denied Appellants' motion to exclude the affidavits.

The circuit court found Appellants' reliance on section 42-5-40 of the South Carolina Code (Supp. 2007) for the proposition that Bayshore SC and Bayshore Corp did not secure worker's compensation coverage and were not entitled to immunity was misplaced. Specifically, the circuit court noted section 42-5-40 only concerns the ability of an upstream employer to shift the burden of worker's compensation coverage onto the state uninsured fund and explicitly cannot be applied to prevent an employer from benefitting from worker's compensation exclusivity. Accordingly, the circuit court dismissed Bayshore SC and Bayshore Corp from this case with prejudice after finding it lacked subject matter jurisdiction to hear the action.

Thereafter, Appellants filed a Rule 59(e) motion. In their motion, Appellants asked the circuit court to reconsider several factual findings and argued the circuit court erred in finding Poch and Key were employees of both Bayshore SC and Bayshore Corp and that both parent and subsidiary had workers' compensation insurance. Poch and Key argued the circuit court erred in finding Bayshore SC and Bayshore Corp were entitled to workers' compensation exclusivity because Poch and Key were (1) special or borrowed employees; or (2) statutory employees because neither Job Place nor Bayshore SC ever transferred certain documentation per statute. Additionally, Appellants argued Bayshore SC fraudulently misrepresented the work that it required the temporary employees to perform, the elements of fraud were met, and no meeting of the minds was reached between the parties. Appellants maintained Bayshore SC and Bayshore Corp are separate entities and should be treated separately for purposes of workers' compensation coverage. Appellants argued Bayshore Corp did not own the work site where the injury occurred and thus the circuit court erred in concluding both Bayshore SC and Bayshore Corp were entitled to exclusivity under the subcontractor analysis. Appellants argued the circuit court erred in finding Bayshore Corp was Poch and Key's statutory employer. The circuit court did not specifically rule on Appellants' Rule 59(e) arguments but generally denied their motion for reconsideration. This appeal follows.

STANDARD OF REVIEW

The existence of the employer-employee relationship is a jurisdictional question and one of law. Porter v. Labor Depot, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007). When deciding questions of law, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009); Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999). It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. Hill v. Eagle Motor Lines, 373 S.C. 422, 429, 645 S.E.2d 424, 427 (2007); see also Wilkinson, 382 S.C. at 300, 538 S.E.2d at 702 (indicating the court's

sensitivity "to the general principle sanctioned by the Legislature that workers' compensation laws are to be construed liberally in favor of coverage").

LAW/ANALYSIS

The essential issue in this appeal is whether the circuit court can exercise subject matter jurisdiction over Bayshore Corp and Bayshore SC. The Estate and Key present several theories under which the circuit court could exercise jurisdiction. For the reasons set forth below, we believe Appellants' only remedy was workers' compensation benefits.

WORKERS' COMPENSATION EXCLUSIVITY

"Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Sabb v. S.C. State Univ., 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002). While the circuit court has subject matter jurisdiction over tort claims, certain cases may be taken from the circuit court's original jurisdiction by the General Assembly. Id. at 423, 567 S.E.2d at 234. The General Assembly has vested the South Carolina Workers' Compensation Commission with exclusive original jurisdiction over an employee's work-related injuries. Id. The South Carolina Workers' Compensation Act contains an "exclusivity provision." Edens v. Bellini, 359 S.C. 433, 441, 597 S.E.2d 863, 867 (Ct. App. 2004). Pursuant to this provision, the Act is the exclusive remedy for an employee's work-related accident or injury, and the exclusivity provision precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. Id. at 441-42, 597 S.E.2d at 867-68. "The exclusive remedy doctrine was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee." Id. at 442, 597 S.E.2d at 868 (citing Strickland v. Galloway, 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct. App. 2002)).

Specifically, the exclusivity provision states:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.
>
> Provided, however, this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer.

S.C. Code Ann. § 42-1-540 (1985).

In Cason v. Duke Energy Corp., the South Carolina Supreme Court expressed only four exceptions to the exclusivity provision:

> (1) where the injury results from the act of a subcontractor who is not the injured person's direct employer; (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego; (3) where the tort is slander and the injury is to reputation; or (4) where the Act specifically excludes certain occupations.

348 S.C. 544, 548 n.2, 560 S.E.2d 891, 893 n.2 (2002) (internal citations omitted).

I. Bayshore SC's Immunity[1]

Appellants maintain the circuit court erred in finding Bayshore SC was entitled to immunity under the Act and present several theories for this assertion.

A. Statutory Employer Status

In support of this assertion, Appellants argue Bayshore SC should not take advantage of the statutory employer status because it failed to collect insurance documentation when Appellants were engaged to performed work as required under section 42-1-415 of the South Carolina Code (Supp. 2008).

Respondents assert Bayshore SC is the statutory employer of Appellants and entitled to immunity. Respondents maintain Bayshore SC was the owner of the business enterprise and was statutorily required to provide workers' compensation to the employees of its subcontractors. In support of their assertion, Respondents point to three tests articulated in Bailey v. Owens, 298 S.C. 36, 39, 378 S.E.2d 63, 64 (Ct. App. 1989), rev'd on other grounds, Bailey v. Owen, 301 S.C. 399, 392 S.E.2d 1 (1990).

Here, the circuit court found Appellants' documentation argument was misplaced because the referenced code section 42-5-40 only concerns the ability of an upstream employer to shift the burden of workers' compensation coverage onto the state uninsured fund and explicitly cannot be applied to prevent an employer from benefitting from workers' compensation exclusivity. However, in Appellants' brief they reference section 42-1-415 of the South Carolina Code to support their assertion that Bayshore SC should not be allowed to take advantage of the statutory employer status.

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[1] We first address whether Bayshore SC has tort immunity under the Act. Next, we discuss whether Bayshore Corp could piggyback on Bayshore's immunity as the parent company. Finally, we address Appellants' evidentiary issues.

Pursuant to section 42-1-415 (B):

> To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee.

(emphasis added). As the circuit court found, we find Appellants' argument has no merit because this section concerns only whether a higher tier subcontractor, contractor, or project owner can qualify for reimbursement from the Uninsured Employer's Fund. Therefore, we find this section has no bearing on whether Bayshore SC or Bayshore Corp can take advantage of the statutory employer status.

Furthermore, we find the circuit court properly concluded Bayshore SC was Appellants' statutory employer. "The concept of statutory employment is designed to protect the employee by assuring workmen's compensation coverage by either the subcontractor, the general contractor, or the owner if the work is a part of the owner's business." Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 72, 267 S.E.2d 524, 528 (1980). Pursuant to section 42-1-410 of the South Carolina Code (1985):

> When any person, in this section and §§ 42-1-420 to 42-1-450 referred to as "contractor," contracts to perform or execute any work for another person which is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the

> execution or performance by or under the subcontractor of the whole or any of the work undertaken by such contractor, the contractor shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

In determining whether a worker is a statutory employee, our courts consider the following three factors: "(1) whether the activity is an important part of the trade or business, (2) whether the activity is a necessary, essential and integral part of the business, and (3) whether the identical activity in question has been performed by employees of the principal employer." Bailey, 298 S.C. at 39, 378 S.E.2d at 64 (Ct. App. 1989). As in Bailey, we find Bayshore SC satisfies all three tests.[2] Id.

Here, it is undisputed that Bayshore SC was not Appellants' direct employer. However, at the time of Poch's death and Key's injuries, Bayshore SC had contracted with Job Place to provide additional workers for its excavation site. Bayshore's own employees, including Lenart, assisted in the same type of removal work as Poch and Key. The work Key and Poch performed for Bayshore SC was not only part of Bayshore SC's trade or business but essential to it because its lease agreement required the company leave the leased land in the same or better condition. Therefore, we find all three Bailey tests are met in the present situation. Accordingly, we affirm the circuit court's legal determination that Bayshore SC is entitled to tort immunity as Poch and Key's statutory employer.

[2] Though we find all three factors are met here, in doing so we note the supreme court stated in Olmstead v. Shakespeare, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003): "If the activity at issue meets even one of these three criteria, the injured employee qualifies as the statutory employee of 'the owner.'"

B. Borrowed Employee

Appellants maintain the circuit court should have found Bayshore SC failed to meet the first prong of the borrowed employee test because there was no express or implied contract for hire. Further, Appellants argue Bayshore SC's contract with Job Place was "fatally flawed" because neither Bayshore nor Job Place transferred workers' compensation documentation as required by sections 40-68-70 - 110 of the South Carolina Code. As such, Appellants contend Bayshore SC should not be deemed their employer. Bayshore maintains Poch and Key were borrowed employees performing the work of and under the direct control of Bayshore SC.

Because we found Bayshore SC was Poch and Key's statutory employer and entitled to workers' compensation immunity under that theory, we need not address the borrowed employee argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

C. Fraud and Meeting of the Minds

Appellants maintain Bayshore SC fraudulently misrepresented the work it required the temporary employees to perform for the purpose of inducing Job Place to enter into the contract. Additionally, Appellants maintain the practice of fraud will vitiate all contracts, and here, the nine elements of fraud are met. Accordingly, Appellants assert Bayshore SC cannot rely upon workers' compensation coverage to exempt itself from its tortuous conduct since an employment contract is an essential element of the defense.

Appellants also argue no contract of employment exists because the parties to the contract never reached a meeting of the minds, and therefore, acceptance of the contract terms did not occur. Thus, Bayshore SC was not entitled to hide behind the shield of workers' compensation immunity.

We find these arguments have no merit because Bayshore SC qualifies as a statutory employer and neither fraud nor a lack of the meeting of the minds were articulated in Cason v. Duke Energy Corp., as exceptions to the exclusivity provision. 348 S.C. 544, 548 n.2, 560 S.E.2d 891, 893 n.2 (2002) (finding only the following are exceptions to workers' compensation exclusivity: (1) where the injury results from the act of a subcontractor who is not the injured person's direct employer; (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego; (3) where the tort is slander and the injury is to reputation; or (4) where the Act specifically excludes certain occupations).

II. Bayshore Corp's Immunity under Workers' Compensation Act

Appellants maintain Bayshore Corp cannot rely upon workers' compensation immunity because it was not Appellants' "employer." Instead, Appellants argue Bayshore Corp was a "co-subcontractor" to Bayshore SC and Job Place, and because co-subcontractors are excluded from workers' compensation coverage, Appellants can pursue a tort or contract remedy against Bayshore. Therefore, the circuit court erred in dismissing Appellants' claims against Bayshore. We disagree.

a. Bayshore Corp v. Bayshore SC Relationship

To support the assertion above, Appellants maintain the circuit court erred in failing to distinguish between Bayshore Corp and Bayshore SC in making its findings concerning whether an employment relationship existed. Essentially, Appellants argue the circuit court erroneously found Bayshore Corp stood in the same position as its subsidiary Bayshore SC in relation to the employment of Appellants. Specifically, Appellants contend the circuit court misinterpreted Nix v. Columbia Staffing Inc., 322 S.C. 277, 471 S.E.2d 718 (Ct. App. 1996). Instead, Appellants argue Monroe v. Monsanto Co., 531 F.Supp. 426 (D.C.S.C. 1982) is the appropriate case to consider when determining whether Bayshore Corp and Bayshore SC are separate and distinct entities for purposes of workers' compensation. Further, under the factors set forth in Monroe, Appellants argue the circuit court erred in finding

Bayshore Corp was exempt from suit in tort because it stood in the same position as its subsidiary.[3]

Bayshore maintains it is immune as an upstream employer because Appellants were performing the work of Bayshore SC and Bayshore Corp. Bayshore argues it receives immunity under the exclusivity provision because Appellants were actually doing the work of Bayshore Corp not because of a parent/subsidiary relationship. However, even if Monroe is applicable, Bayshore contends it would still be entitled to immunity.

b. Upstream Statutory Employer

Bayshore relies on Voss v. Ramco, Inc., to support its assertion that it is immune as an upsteam employer where this court found Voss was a statutory employee of Ramco even though NATCO was Voss's direct employer rather than Ramco. 325 S.C. 560, 569, 482 S.E.2d 582, 587 (Ct. App. 1997). NATCO, a company owned by Jones that sold equipment manufactured by Ramco, hired Voss as a sales representative. 325 S.C. at 563, 482 S.E.2d at 583-84. The Voss court found selling the equipment was an essential part of Ramco's business; thus, Jones's employees were statutory employees of Ramco. Id. at 568, 482 S.E.2d at 586. In its holding, the court referenced section 42-1-400 of the South Carolina Code (1985) which provides:

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-

[3] Though we believe Monroe is persuasive, we do not believe it is controlling, and we rely upon other case law from South Carolina. We also note with interest that no South Carolina court has used the test articulated in Monroe to date. Therefore, in analyzing whether or not Bayshore Corp is also entitled to workers' compensation immunity, we rely on our state court cases which were decided after Monroe.

> 450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

325 S.C. at 566, 482 S.E.2d at 585. Thereafter, the court stated: "[D]epending on the nature of the work performed by the subcontractor, an employee of a subcontractor may be considered a statutory employee of the owner or upstream employer." Id.

Additionally, Bayshore relies on Ost v. Integrated Products, Inc., 296 S.C. 241, 371 S.E.2d 796 (1988), where the supreme court discussed several cases to determine whether employees of a secondary employer constitute statutory employees of the principal employer. There, the Ost court held employees of National Sales Company, a sister company of Integrated, were statutory employees of Integrated. Id. at 247, 371 S.E.2d at 799. In making its determination, the court considered the following factors: 1) Integrated's control over National Sales and the importance of National Sales selling Integrated's product; 2) the companies' intertwined operations; and 3) the similarity of the companies' business activities and shared employees. Id. at 245-47, 371 S.E.2d at 798-800.

We recognize the above cases and referenced statutes involve a contractor/subcontractor relationship rather than a parent/subsidiary relationship. However, we find the statutes, cases, and factors considered therein equally appropriate to consider in the current situation. We find Poch and Key statutory employees of Bayshore Corp under Voss because Poch and Key's work was an essential part of Bayshore Corp's business. Furthermore, because Bayshore Corp wholly owned Bayshore SC, it was financially beneficial to the parent for Bayshore SC to be a profitable subsidiary.

We believe Poch and Key are statutory employees under the Ost test. First, Bayshore Corp's salaried employees, including but not limited to Lenart, exercised control over the hourly employees of Bayshore SC. As an additional factor supporting the first prong, and as mentioned above, it was important to Bayshore Corp as the parent company for Bayshore SC to be successful and profitable in this business venture. Second, the companies maintained intertwined operations whether through the hiring process, payroll and accounting, or generally shared procedures. Third, we believe the parent and subsidiary business activities were similar, while they maintained many of the same salaried employees. Accordingly, under the Ost test, we find Bayshore Corp is Poch and Key's statutory employer and therefore entitled to workers' compensation immunity.

III. Affidavits as Evidence

Appellants argue this court should not consider evidence presented in the affidavits of Dunbar, Lenart, and in the second affidavit of Colonna. The wording of this argument is problematic for several reasons, most notably the fact that Appellants put together the record on appeal. We believe Appellants are trying to argue the circuit court erred in considering these affidavits in making its ruling; therefore, this is the argument we address. In regard to evidentiary rulings, it is within the circuit court's discretion to decide what is admissible and on appeal we should reverse the circuit court's ruling only when based on a legal error. Wright v. Craft, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct. App. 2006) ("The admissibility of evidence is within the sound discretion of the [circuit] trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing the defendant.").

A. Legal Expert Vernon Dunbar's Affidavit

Appellants maintain the circuit court should disregard Vernon Dunbar's affidavit because his expert testimony was on legal issues and invaded the court's province. Appellants argue Dunbar's testimony went to the heart of the issues to be decided by the court. To support their assertion Appellants

cite Dawkins v. Fields, 354 S.C. 58, 66-67, 580 S.E.2d 433, 437 (2003), where our supreme court held a circuit court properly refused to consider the affidavit where an expert's affidavit primarily contained legal arguments and conclusions. The Dawkins court stated: "In general, expert testimony on issues of law is inadmissible." Id. at 66, 580 S.E.2d at 437.

Though we agree with Appellants that Dunbar's affidavit addressed the ultimate issue of the case, we do not believe any consideration of the affidavit was outcome determinative due to the clear exclusivity immunity. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). Therefore, whether the circuit court used Vernon's affidavit in making its determination makes no difference on appeal. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

B. Company President Keith Colonna's Second Affidavit

Appellants argue the circuit court erred in considering the evidence offered in the second affidavit of Colonna where he contradicted his own prior testimony. Appellants maintain Bayshore Corp and Bayshore SC should be judicially estopped from changing their position on the facts to blur the distinction between Bayshore Corp and Bayshore SC to their advantage. Specifically, Appellants maintain the circuit court can use the "competing" or "sham" affidavit exception to the judicial estoppel test set forth by the supreme court to disregard a contradictory subsequent affidavit.

The "competing" or "sham" affidavit exception argument is not preserved for our review. In Appellants' motion to exclude Colonna's affidavit, they rely only on the doctrine of judicial estoppel which the circuit court ultimately denied. Though they raise the "competing" or "sham" affidavit exception in their Rule 59(e) motion, this is not enough to preserve the argument for review. A party cannot use a motion to reconsider, alter or

amend a judgment to present an issue that could have been raised prior to the judgment but was not. Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59, SCRCP, motion is not preserved for review); Kiawah Prop. Owners Grp. v. Public Serv. Comm'n., 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for first time in petition for rehearing not preserved).

Though Appellants maintain Bayshore Corp and Bayshore SC should be judicially estopped from changing their position on the facts to blur the distinction between Bayshore Corp and Bayshore SC to their advantage, we do not believe Appellants developed this argument enough for review. Glasscock, Inc. v. U.S. Fidelity & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). ("[Short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.")

C. Larry Lenart's Testimony

Appellants argue the circuit court should disregard the affidavit of Larry Lenart because they were denied an opportunity to cross examine him. Because we do not believe Lenart's testimony was outcome determinative, we find no reversible error. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. at 26, 609 S.E.2d at 509 ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). Furthermore, we do not believe Appellants carried their burden of proving prejudice. See id. Therefore, whether the circuit court used Lenart's affidavit in making its determination makes no difference on appeal. See McCall v. Finley, 294 S.C. at 4, 362 S.E.2d at 28 ("[W]hatever doesn't make any difference, doesn't matter.").

CONCLUSION

Bayshore SC is entitled to tort immunity under workers' compensation exclusivity. Additionally, we find Bayshore Corp should be entitled to share in Bayshore SC's statutory employer status under the Voss and Ost tests. Lastly, we affirm all of Appellants' evidentiary arguments. Accordingly, the decision of the circuit court is

AFFIRMED.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and
Treatment of James Carl Miller,

Appellant.

Appeal From Lexington County
James R. Barber, Circuit Court Judge
Larry R. Patterson, Circuit Court Judge

Opinion No. 4618
Heard April 23, 2009 – Filed September 9, 2009

AFFIRMED

Appellate Defender Lanelle C. Durant, of Columbia, for Appellant.

Attorney Genernal Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney Genernal Deborah R. J. Shupe, Assistant Attorney General Brandy A. Duncan, Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

LOCKEMY, J.: James Carl Miller appeals the trial court's denial of his motion to dismiss, arguing the State's failure to hold a hearing within sixty days after the court found probable cause to believe Miller was a sexually violent predator requires the action be dismissed pursuant to the Sexually Violent Predator Act (the Act). We affirm.

FACTS/PROCEDURAL BACKGROUND

In 1998, the mother of a one-year-old baby walked into a room and found Miller leaning over her child with his pants down, while the baby's diaper was off. While exiting the room, Miller punched the mother. Miller pled guilty to committing a lewd act on a child under the age of sixteen years and criminal domestic violence of a high and aggravated nature (CDVHAN). The trial court sentenced Miller to fifteen years' imprisonment for the lewd act offense suspended upon the service of ten years and five years' probation, and ten years imprisonment for the CVDHAN, to be served concurrently.[1]

Prior to his release, Miller's case was referred to the multi-disciplinary committee for assessment pursuant to section 44-48-40 of the South Carolina Code (Supp. 2008). After review in May of 2005, the multi-disciplinary team found Miller satisfied the statutory definition of "Sexually Violent Predator" (SVP) pursuant to section 44-48-30 of the South Carolina Code (Supp. 2008). Thereafter, the multi-disciplinary team referred the case to the Prosecutor's Review Committee (the Committee).

The Committee determined probable cause existed to conclude Miller was an SVP. After this finding, pursuant to section 44-48-70 of the South Carolina Code (Supp. 2008), the State filed a petition requesting a trial court

[1] Prior to Miller's 1998 plea, Miller pled guilty to taking indecent liberties with children in a North Carolina court. The date of the offense was on or about June 5, 1995. North Carolina sentenced Miller to probation for the offense on the condition that he participate in sex offender treatment. Subsequently, he violated probation and was imprisoned for approximately two-and-a-half months in 1996. In 1998, Miller fled North Carolina while still on probation and was considered a fugitive.

make a judicial determination as to whether Miller was an SVP and petitioned the trial court for a probable cause hearing. In August, the court appointed Janice Baker as Miller's counsel. A probable cause hearing pursuant to section 44-48-80 of the South Carolina Code (Supp. 2008) was set for August 29, 2005, before the Honorable William P. Keesley.

When notified of the hearing, Baker informed the Attorney General's office that she would be relieved of counsel in the case and that the new attorney would be David B. Betts. Therefore, she would not participate in the hearing, and it needed to be postponed until Betts received the case file from her. The original hearing date was continued, and Betts was appointed by order. Efforts to get a new hearing were hindered by the untimely death of Judge Marc Westbrook shortly thereafter. On November 3, 2005, the court held Miller's probable cause hearing.

After the court found probable cause existed to believe Miller was an SVP, pursuant to section 44-48-90 of the South Carolina Code (Supp. 2008), the State had sixty days to conduct Miller's civil SVP trial. Although Miller was scheduled to be released from prison on December 1, 2005, the Act allowed the State to continue to confine Miller for the sixty days leading up to his SVP civil trial. See § 44-48-90. The sixty-day window would have expired on January 2, 2006. Prior to the expiration of the sixty day time period, the State realized that it would not have a mental health evaluation from the Department of Mental Health by the deadline set by the statute. The State, therefore, moved for a continuance pursuant to section 44-48-90 on December 29, 2005. In its motion, the State pointed out January 2, 2006, was a holiday, and the last day for a trial of Miller's case would be December 30, 2005. Furthermore, the State indicated the court-ordered evaluation of Miller would not be complete until January 31, 2006, and pointed to problems in obtaining information related to Miller's prior North Carolina convictions.[2]

[2] Though the State indicated Miller's evaluation would not be completed until January 31, 2006, from the record it appears the evaluation was completed on January 13, 2006, as the State was ready to proceed with Miller's civil commitment trial the day of the continuance hearing. Further,

On January 13, 2006, the trial court held a hearing regarding the State's motion for a continuance. At the hearing, Miller's counsel argued Miller was being held "without bond and is now incarcerated because they said there was probable cause to have him evaluated." Further, Miller's counsel argued "the statute says--the [S]tate can ask for a continuance . . . only if the respondent will not be substantially prejudiced, and it says it may be continued up[on] request of either party on a showing of good cause." Up until this time, Miller had made no motion to dismiss or raised an objection even though he was being held beyond his release date. The State responded that it was ready to try the case on January 13 or as soon as the court could get a jury together. The trial court commented on the State's delay in bringing the action by stating: "The Attorney General has got to comply with the statute, and the [courts] have got to give you an opportunity to be heard." Furthermore, the trial court noted: "The State has a habit of waiting until the man's about to be released in all cases and then filing these actions. . . . The legislature drew hard and fast lines and if [Miller] is going to suffer substantial prejudice and a deprivation of liberty is substantial prejudice." The court made the assertion about alleged habits of the State without any supporting documentation or evidence for its assertion. Even so, the trial court found it was not unreasonable to set the trial for the following week, beginning January 17, 2006. Thus, in effect the trial court granted the State's motion for a continuance.

Miller voiced no objection to the continuance, but in response to the trial court's ruling, Miller's counsel made a motion to dismiss for the first time based on Miller's substantial prejudice and cited to In re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001). The trial court did not rule on Miller's motion to dismiss, but stated: "I think you have to file your motion if you want it dismissed, and then if you have a motion to dismiss and set forth the reasons then I could address that today." Miller's counsel agreed to file the motion to dismiss that afternoon and requested scheduling a hearing on that motion. The trial court again did not rule on Miller's motion to dismiss but

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the record indicates Miller's counsel received the evaluation report prior to the January 17, 2006 hearing.

instructed trial counsel to "file whatever you think you need to" and indicated "[w]hat I've stated in the record is the order of the [c]ourt."

On January 17, 2006, the trial court held a hearing on Miller's motion to dismiss. There, counsel stated: "[Miller] paid his debt under the criminal statutes of this State. He was free to go on December the 1st." The State responded by pointing out that Dr. Pamela Crawford conducts all the SVP evaluations in South Carolina, which is a fairly significant load. Further, the State reasoned "that [it] is very important, not only for the public and the State . . . for her to do a thorough job." As support for its "good cause" assertion, the State mentioned several things out of its control occurred before and after Miller's probable cause hearing, including the untimely death of Judge Westbrook, change of Miller's counsel, and changes in the Attorney General's office. The State repeated that it was ready for trial, but the defense inferred that if the motion to dismiss was not granted it needed the case continued to have its own evaluation completed to combat the State's expert. Accordingly, the trial court continued the case. Further, it did not rule on Miller's motion that day but apparently took the matter under advisement. The trial court denied Miller's motion in a written order filed July 24, 2006, after weighing the State's interest in proceeding with the SVP trial against Miller's prejudice. Specifically, the trial court's order stated:

> [T]he State routinely waits until the inmates falling under the [Act] are nearing their max-out date before beginning the process set out under the statute. However, the [c]ourt finds that the State's interest in examining potential [SVP]s outweighs the prejudice to [Miller]. Absent a showing of substantial prejudice, the [c]ourt DENIES the motion to dismiss but reminds the State that it is in the interest of justice to begin the statutory evaluation prior to the imminent max out date of inmates falling under the statute.

Thereafter, the State moved to alter or amend the trial court's order denying Miller's motion to dismiss. Specifically, the State requested the trial court remove the following sentence: "[T]he State routinely waits until the inmates falling under the [Act] are nearing their max-out date before beginning the process set out under the statute" from its order. The State pointed out that regardless of what may have occurred in other cases, the state began this process more than 180 days prior to Miller's scheduled release date. Furthermore, the State asserted but for Miller's decision to change counsel which delayed the process for more than sixty days, the probable cause hearing would have taken place more than ninety days before his release date. The trial court denied the State's motion to alter or amend on September 6, 2006, once again without providing any evidence to support its assertion.

Miller's civil SVP trial began on November 27, 2006, in Lexington County.[3] The jury found Miller was an SVP, and the trial court issued an order of commitment. This appeal followed.

LAW/ANALYSIS

Miller argues the trial court erred in denying his motion to dismiss when his civil SVP trial was not held within sixty days after the probable cause hearing because he was incarcerated past his release date. Specifically, Miller argues section 44-48-90 allows for a continuance only upon 1) request of either party; 2) good cause shown; and 3) "only if the respondent will not be substantially prejudiced." Miller argues he was substantially prejudiced because he was faced with two choices: 1) he could have gone forward with trial on January 13, 2006, without having an independent psychiatric evaluation, depriving him an opportunity to prepare a defense or 2) he could have asked for a continuance in order to obtain the independent psychiatric evaluation which would have resulted in his continued incarceration past his release date. Miller argues either choice was substantially prejudicial.

[3] The record on appeal does not indicate that Miller made any other requests to the court after the January 17, 2006 hearing to seek an earlier trial date or make any other complaints about the process before his trial on November 27, 2006.

In reply, the State argues the trial court did not err in denying Miller's motion because the case was properly continued under section 44-48-90. Specifically, the State addressed the three statutory requirements Miller cited and argued it demonstrated good cause for a continuance and Miller was not substantially prejudiced. In its prejudice argument, the State mentions most of Miller's extended confinement was due to circumstances beyond its control, including the untimely death of Judge Westbrook. Additionally, Miller's change in counsel required a postponement of the initial probable cause hearing from August 29, 2005 to November 3, 2005. Finally, the State contends obtaining records for a complete evaluation is in the best interest of the State as well as Miller and explained Dr. Pamela Crawford could not perform a complete evaluation of Miller within the statutory time parameters. The State further argues that "as a matter of public policy, it is important that the court appointed evaluator be afforded the time and opportunity to conduct a complete evaluation." Such a thorough evaluation, explains the State, would be in the best interest of the public at large as well as Miller. Further, the State notes all the burdens it must comply with under the Act and argues "any prejudice to [Miller] in this case was overwhelmingly outweighed by the interest of the State."

The Act requires the State to follow certain procedures and timelines before committing an individual as an SVP. When a person has been imprisoned for one or more of the sexually violent offenses identified in section 44-48-30 of the South Carolina Code (Supp. 2008), the Act requires the agency with jurisdiction over that person to notify the Attorney General and a multidisciplinary team designed to evaluate the particular offender prior to his release. See S.C. Code Ann. § 44-48-40(A) (Supp. 2008). The multidisciplinary team reviews relevant records and assesses whether the person the team is reviewing satisfies the definition of an SVP under the Act. S.C. Code Ann. § 44-48-50 (Supp. 2008). If the multidisciplinary team determines the person satisfies the statutory definition, the team forwards its assessment and all relevant records to the Committee. Id.

Section 44-48-80(A) of the South Carolina Code (Supp. 2008) states "the court must determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator." Once probable cause is established in a hearing, a trial is conducted. Section 44-48-90 of the South Carolina Code (Supp. 2008) states: "Within sixty days after the completion of a hearing held pursuant to Section 44-48-80, the court must conduct a trial to determine whether the person is a sexually violent predator." A provision in section 44-48-90 allows for an extension of the sixty-day time frame and states: "The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and only if the respondent will not be substantially prejudiced."

In In re Matthews, the South Carolina Supreme Court addressed whether a trial court had subject matter jurisdiction when the State failed to comply with the sixty-day time period without asking for a continuance. 345 S.C. 638, 550 S.E.2d 311 (2001). The Matthews court found "the legislature's use of the word 'shall' in section 44-48-90 indicates the holding of a trial within sixty days of the probable cause hearing is mandatory." 345 S.C. at 644, 550 S.E.2d at 313. Additionally, the court noted section 44-48-90 created a statutory burden on the State or the trial court to "require the issuance of a continuance, or even a notation in the record, indicating (1) the trial cannot be held within sixty days; (2) good cause for the delay; and (3) the respondent will not suffer prejudice." Id. at 644, 550 S.E.2d at 314. Ultimately, the supreme court found the State's failure to comply with the statutory time period did not deprive the trial court of jurisdiction. Id. at 645, 550 S.E.2d at 314. Thus, the appellant in Matthews should have filed a motion to dismiss when the State failed to bring the case within sixty days without asking for a continuance. Id. Here, the State sought a continuance before the expiration period as required by Matthews and noted why the case could not be tried within sixty days.

We find the trial court did not err in denying Miller's motion to dismiss. As the trial court mentioned, the legislature set definite timelines for SVP actions, and this court must give plain meaning to clearly written statutes.

See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. . . . Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."). Under the legislation at issue, the General Assembly used strong language like "shall" and intended to make exceptions to the sixty-day requirement only in limited circumstances. See Matthews, 345 S.C. 638, 644, 550 S.E.2d 311, 314 ("The language of the Act does allow a trial to be held outside the sixty day period, but only under certain conditions."). We find the State followed Matthews and the statutory requirements for the trial court to conduct Miller's civil commitment trial more than sixty days after the probable cause hearing.

Here, the State complied with these conditions and followed the guidelines set by Matthews by seeking a continuance prior to the expiration of the sixty day time period.[4] It is clear that the Matthews court decided that although the legislature has set mandatory standards to be followed in SVP cases, these standards are not jurisdictional. 345 S.C. at 645, 550 S.E.2d at 314. Further, Matthews notes that the statute provides a means for cases to be continued. Id. at 644, 550 S.E.2d at 314. In the instant case the trial court found good cause existed to grant the State's motion for a continuance and that granting the motion would not result in substantial prejudice to Miller. In making this ruling, the trial court considered several factors, including: 1) Miller's change in counsel that delayed the case over thirty days, 2) the interest of Miller in having a thorough report by DMH that could have been in his favor; and 3) granting the State's motion for continuance on January 13, 2006, was only ten days after the expiration of the sixty day window set on November 3, 2005. Therefore, we find the State satisfied the first two prongs

[4] We note with interest that Miller does not appeal the trial court's decision to grant the continuance based upon consideration of section 44-48-90, rather he appeals the trial court's decision not to grant his motion to dismiss. It should also be noted that the State was ready to proceed on and after January 13, 2006, and the record does not indicate any delay thereafter was attributable to the State.

of Matthews by demonstrating the trial could not be held within sixty days and good cause for the delay.

Our analysis now turns to whether Miller was substantially prejudiced by the trial court's granting of the State's motion for a continuance. The Act does not define "prejudice." Here, both Miller and the State were granted great latitude in order to sufficiently prepare for the SVP trial. Though the State was ready to proceed to trial on January 13, due to the trial court's grant of the motion for a continuance, Miller, pursuant to his request, was able to prepare a defense and complete an independent psychiatric examination. Therefore, the trial court's grant of the motion for a continuance enabled Miller to adequately prepare for his trial and develop a trial strategy, and we find the trial court properly denied Miller's motion to dismiss thereafter.

We recognize Miller was incarcerated past his release date; however, we are hesitant to set a bright line rule which would require reversal of an SVP's commitment when a sentence is prolonged. In this respect, the State was ready to proceed with trial on January 13, 2006 and prior to that date Miller had not filed a motion to dismiss. Accordingly, the trial court found it was not unreasonable to set Miller's civil commitment trial the week beginning January 17, 2006. Accordingly, we do not believe Miller suffered substantial prejudice by his two week prolonged incarceration. For the reasons set forth above, we believe the State met the three part test articulated in Matthews.

We also note with concern that Miller's civil commitment trial did not occur until well over a year after the probable cause hearing was held, some ten months longer than the limit prescribed in section 44-48-90. It is further noted that, with the exception of the trial court's order denying the motion to dismiss, the record before us contains no indication whether either party moved to proceed with the commitment trial prior to the date it actually took place. Although not reversible error under these circumstances, as explained above, it is worth emphasizing that SVP trials should take priority when scheduling a court's docket, precisely because of the potential for the prolonged incarceration evidenced in this case. See § 44-48-90 ("If such a

request is made, the court must schedule a trial before a jury at the next available date in the court of common pleas in the county where the offense was committed. "). For the reasons set forth above, the decision of the circuit court is therefore

AFFIRMED.

HEARN, C.J., and PIEPER, J., concur.