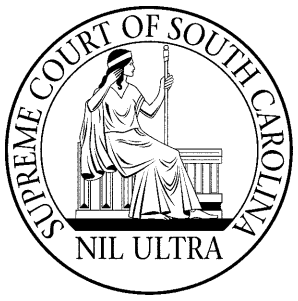

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
September 21, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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HE STATE OF SOUTH CAROLINA
In The Supreme Court

SCANA Corporation and Subsidiaries, Respondent,

v.

South Carolina Department of Revenue, Appellant.

South Carolina Department of Revenue, Appellant,

v.

SCANA Corporation and Subsidiaries, Respondent.

Appeal From Richland County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26511
Heard May 28, 2008 – Re-filed September 21, 2009

AFFIRMED

Harry A. Hancock, Milton G. Kimpson, and Joe S. Dusenbury, Jr., of SC Department of Revenue, of Columbia, for Appellant.

C. Mitchell Brown and A. Mattison Bogan, both of Nelson Mullins Riley & Scarborough, of Columbia; John C. Von Lehe, Jr. and Andrea St. Amand, both of Nelson Mullins Riley & Scarborough, of Charleston, for Respondent(s).

CHIEF JUSTICE TOAL: In this appeal, we review the circuit court's order, which found that an investment tax credit earned by SCANA Corporation and Subsidiaries (SCANA) in 1996, could be carried forward and applied to SCANA's tax liability for the 1997 and 1998 tax years. The South Carolina Department of Revenue (the Department) appealed.

We reversed the decision of the circuit court in *SCANA Corporation and Subsidiaries v. South Carolina Department of Revenue*, Op. No. 26511 (S.C. Sup. Ct. filed June 30, 2008) (Shearouse Adv. Sh. No. 27 at 34). Subsequently, we granted SCANA's petition for rehearing and withdrew our former opinion. We now substitute this opinion affirming the ruling of the circuit court.[1]

FACTS AND PROCEDURAL HISTORY

The facts relevant to this appeal are uncontested by the parties. SCANA earned the investment tax credit at issue pursuant to the Economic Impact Zone Community Development Act of 1995 (The Act). 1995 S.C. Acts 138. The Act is codified as S.C. Code Ann. § 12-14-60. In pertinent part, S.C. Code Ann. § 12-14-60 states:

> (A)(1) There is allowed an economic impact zone investment tax credit against the tax imposed pursuant to Chapter 6 of this title

[1] We note that, due to the retirement of Justice James E. Moore and the untimely passing of Acting Justice James W. Johnson, Jr., the panel on rehearing consists of two members who were not part of the original panel.

> for any taxable year in which the taxpayer places in service economic impact zone qualified manufacturing and productive equipment.

S.C. Code Ann. § 12-14-60(A)(1).

In 1996, SCANA placed in service certain qualifying equipment that earned it an Economic Impact Zone tax credit (EIZ credit) in the amount of $29,575,619. This EIZ credit far exceeded SCANA's tax liability for the 1996 tax year leaving $15,323,257 of the EIZ credit unused.

Originally, there was no provision in the Act which provided that the EIZ credit could be carried forward to subsequent tax years. Nonetheless, in 1997, the General Assembly enacted a carry-forward provision applicable to EIZ credits. 1997 S.C. Acts 151 § 8. This provision, which is codified at S.C. Code Ann. § 12-14-60(D), states that "[u]nused [EIZ] credit…may be carried forward for ten years from the close of the tax year in which the credit was earned." The General Assembly provided that the carry-forward provision "is effective for tax years beginning after 1996." 1997 S.C. Acts 151 § 14.

SCANA applied the unused EIZ credit earned in 1996 to its 1997 and 1998 tax liability pursuant to S.C. Code Ann. § 12-14-60(D). However, the Department denied SCANA's carry-forward application of its EIZ credit because it was not earned in a tax year after 1996.

SCANA appealed to the Administrative Law Court (ALC). The ALC agreed with the Department's interpretation of S.C. Code Ann. § 12-14-60(D) and found that the carry-forward credit was properly denied because the EIZ credit was not earned in a tax year beginning after 1996. SCANA appealed to the circuit court, which reversed and held that the EIZ credit earned but not used by SCANA in 1996 may be applied to its tax liability for 1997 and 1998.

ISSUE

May EIZ credit earned but not applied in 1996 be carried forward to offset tax liability in 1997 and 1998 pursuant to S.C. Code Ann. § 12-14-60(D)?

DISCUSSION

Appellant argues that S.C. Code Ann. § 12-14-60 is ambiguous and the circuit court erred in construing the statute to allow SCANA to carry-forward the EIZ credit it earned, but was unable to use, in 1996. We disagree.

We find that the language of S.C. Code Ann. § 12-14-60(D) and its corresponding effective date are unambiguous. "[W]here a statute's language is plain and unambiguous, and conveys a clear and definite meaning…the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 375, 377 (1994). Thus, the only proposition that is needed to resolve the instant case is this: in the 1997 and 1998 tax years, S.C. Code Ann. § 12-14-60(D) allowed unused EIZ credit to be carried forward beyond the close of the tax year in which the credit was earned.

As enacted in 1997, S.C. Code Ann. § 12-14-60(D) provided:

> Unused credit allowed pursuant to this section may be carried forward for ten years from the close of the tax year in which the credit was earned.

S.C. Code Ann. § 12-14-60(D). This provision was "effective for tax years beginning after 1996." 1997 S.C. Acts 151 § 14.

SCANA earned the EIZ credit at issue in 1996 but was not able to take full advantage of it in the 1996 tax year. When SCANA prepared its tax information for the 1997 and 1998 tax years, the statutory law in effect provided that unused EIZ credit could be carried forward "ten years from the close of the tax year in which the credit was earned." S.C. Code Ann. § 12-

14-60(D). That SCANA was justified in claiming the unused portion of its previously earned credit seems to follow rather directly from a straight-forward application of the statute and its effective date. Thus, we discern no reasonable ambiguity here and hold that the straight-forward application of the statutory law at issue provides that SCANA may carry forward the EIZ credit it earned in 1996 to offset its tax liability for 1997 and 1998.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's decision.

WALLER, PLEICONES and KITTREDGE, JJ., concur. BEATTY, J., dissenting in a separate opinion.

JUSTICE BEATTY: I respectfully dissent. Because there are clearly divergent interpretations of section 12-14-60(D), I find the effective date language of the carry-forward provision is ambiguous and should be construed against SCANA. Accordingly, I would reverse the decision of the circuit court.

In view of the ambiguity, I believe an application of the rules of statutory construction is necessary to analyze the issue presented in this case. See Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) ("Therefore, since the plain language of the statute lends itself to two equally logical interpretations, this Court must apply the rules of statutory interpretation to resolve the ambiguity and to discover the intent of the General Assembly. Where the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself.").

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The Court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006).

Guided by these well-established rules of statutory construction, I would find the Legislature did not intend for unused credit in 1996 to be carried forward to apply to 1997 tax liability.

The quintessential rule of statutory construction is to identify the intent of the Legislature in promulgating a specific statute. In order to do so in the instant case, it is instructive to delve into the evolution of section 12-14-60(D). See Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175

S.E.2d 805, 817 (1970) (noting that in determining the legislative intent, the Court may properly look at the legislative history of the statute).

The EIZ credit was first enacted in 1995. The provision in question was created by Act No. 151 on June 24, 1997. Act No. 151, 1997 S.C. Acts 825. This amendment specifies that the carry-forward provision is "effective for tax years beginning after 1996." S.C. Code Ann. § 12-14-60(D) (Supp. 1997) (emphasis added). In view of this language, I believe the Legislature intended for the amendment to apply to the tax year of 1997 and subsequent tax years.

Before the effective date of Act No. 151 in 1997, a carry-forward provision did not exist. Inferentially, any unused tax credits in 1996 "expired" at the end of the 1996 tax year.[2] Because the carry-forward provision was not enacted until after the expiration of the 1996 tax credit at issue, I would find that it could not logically be carried forward to apply to 1997 tax liability. In other words, prior to 1997 there was no "unused credit." Instead, credit was limited to the extent of the tax liability for the year in which the credit accrued. Thus, once the credit was applied to the year's tax liability, any remaining credit expired or essentially ceased being in existence.

Although the above analysis focuses solely on the provision of Act No. 151 that specifically applies to section 12-14-60(D), a review of the entire Act is essential and lends support to the conclusion that the 1996 unused tax credit could not be applied in 1997. Cf. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008) (stating "[a] statute should not be construed by concentrating on an isolated phrase").

This Act contains thirteen separate legislative provisions. Notably, several of these provisions contain different effective dates which include retroactive dates. For example, Section 1, which applies to county sales and use tax, is effective "for sales or use made on or after December 1, 1992." Act No. 151, 1997 S.C. Acts 819. I believe the retroactivity of Section 1 is of

[2] SCANA conceded this point at oral argument.

significant import given the entire Act No. 151 containing this section was approved on June 24, 1997.

In light of the above-outlined legislative history, I believe the Legislature had it intended would have expressly provided for tax credits earned prior to 1996 to be carried forward. To find otherwise would be contrary to the intent of the Legislature given the other retroactive provisions in Act No. 151. See Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) ("In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary.").

Finally, in cases involving a tax deduction, any ambiguity is resolved against the taxpayer.[3] M. Lowenstein & Sons, Inc. v. S.C. Tax Comm'n, 277 S.C. 561, 290 S.E.2d 812 (1982); Davis Mech. Contractors, Inc. v. Wasson, 268 S.C. 26, 231 S.E.2d 300 (1977); C.W. Matthews Contracting Co. v. S.C. Tax Comm'n, 267 S.C. 548, 230 S.E.2d 223 (1976); S. Soya Corp. v. Wasson, 252 S.C. 484, 167 S.E.2d 311 (1969). Moreover, I would note that the allowance of a tax credit is analogous to a tax deduction since both are a matter of legislative grace.[4]

[3] This is contrary to the general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government. See S.C. Nat'l Bank v. S.C. Tax Comm'n, 297 S.C. 279, 376 S.E.2d 512 (1989) (noting taxpayer should receive the benefit in cases of doubt); Cooper River Bridge, Inc. v. S.C. Tax Comm'n, 182 S.C. 72, 188 S.E. 508 (1936) (same); Columbia Ry., Gas & Elec. Co. v. Carter, 127 S.C. 473, 121 S.E. 377 (1924) (same); State v. Charron, 351 S.C. 319, 569 S.E.2d 388 (Ct. App. 2002) (same (quoting Columbia Ry., Gas & Elec. Co.)).

[4] I note the rule of construction in other jurisdictions is that because a tax credit is a matter of grace, it is strictly construed against the taxpayer. See, e.g., Texasgulf, Inc. v. Comm'r of Internal Revenue, 172 F.3d 209 (2d Cir. 1999); Team Specialty Prods., Inc. v. N.M. Taxation & Revenue Dep't, 107 P.3d 4 (N.M. Ct. App. 2004); MacFarlane v. Utah State Tax Comm'n, 134 P.3d 1116 (Utah 2006); Midland Fin. Corp. v. Wis. Dep't of Revenue, 341 N.W.2d 397 (Wis. 1983).

Based on the foregoing, I would resolve the ambiguity here against the taxpayer and find the Department properly disallowed the carry-forward credit for EIZ credit earned in 1996.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Louis M. Jamison and Evelyn Jamison, Respondents,

v.

John M. Morris and Kevin Morris d/b/a Morris Texaco Mini Mart, Anderson Oil Co. Inc., Texaco, Inc., and Shell Oil Company, Defendants,

of whom John M. Morris and Kevin Morris d/b/a Texaco Mini Mart, Anderson Oil Co. Inc., and Texaco, Inc. are the Appellants.

Appeal from Bamberg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26720
Heard June 23, 2009 – Filed September 21, 2009

REVERSED

C. Mitchell Brown, William C. Wood, Jr., A. Mattison Bogan and Elizabeth H. Campbell, all of Nelson, Mullins, Riley & Scarborough, of Columbia; Rebecca Laffitte, and Robert E. Horner,

both of Sowell, Gray, Stepp & Lafitte, all of Columbia; Robert D. Hays, Matthew S. Harman, and W. Ray Persons, all of King & Spalding, of Atlanta; and Robert H. Hood, Deborah H. Sheffield, and James B. Hood, all of Hood Law Firm, of Charleston, for Appellants.

John H. Tiller and Wendy J. Keefer, of Haynsworth Sinkler Boyd, of Charleston, for Appellants.

Matthew Terry Richardson, of Wyche, Burgess, Freeman & Parham, of Columbia; Nicholas Clekis, of Clekis Law Firm, of Charleston; Richard Ness, of Ness & Jett, of Bamberg; Richard S. Rosen and Alex B. Cash, both of Rosen, Rosen & Hagood, of Charleston; Wallace K. Lightsey and Meliah D. Bowers, both of Wyche, Burgess, Freeman & Parham, of Greenville; and William T. Toal and I.S. Leevy Johnson, both of Johnson, Toal & Battiste, of Columbia, for Respondents.

Alphonse M. Alfano, of Bassman, Mitchell & Alfano, of Washington; Charles E. Carpenter, Jr. and Carmen V. Ganjehsani, both of Carpenter Appeals & Trial Support, of Columbia; Daniel Scott Haltiwanger, of Richardson, Patrick, Westbrook & Brickman, of Barnwell; David J. Kaufmann and Kevin M. Shelley, both of Kaufmann, Feiner, Yamen, Gildin & Robbins, both of New York; Douglas S. Kantor and Michael J. Baratz, both of Steptoe & Johnson, of Washington; J. R. Murphy and Jeffrey C. Kull, both of Murphy & Grantland, of Columbia; John Thomas Lay, of Ellis, Lawhorne & Sims, of Columbia; Victor E. Schwartz and Cary Silverman, both of Shook, Hardy & Bacon, of Washington; William Cleveland, of Buest, Moore, Smythe & McGee, of Charleston; William Sweeny, III, of Sweeny, Wingate & Barrow, of Columbia; William Lloyd Taylor, of Taylor & Powell, of Kiawah Island, and Robert M. Roach, Jr., of Roach & Newton, of Houston, Texas, all for Amici Curiae.

JUSTICE PLEICONES: Appellants appeal from a jury verdict finding appellant Mini Mart liable, and appellants Anderson Oil and Texaco, Inc., vicariously liable, for catastrophic injuries suffered by respondent Louis Jamison (Louis) in a one vehicle automobile accident. We reverse the vicarious liability verdicts against Anderson Oil and Texaco, finding no evidence that Mini Mart was their actual agent for purposes of the sale of alcohol to the driver of the car in which Louis was a passenger. We hold that the erroneous admission of expert testimony predicated on unreliable evidence requires reversal of the verdict against Mini Mart.

FACTS

Louis suffered serious injuries rendering him a quadriplegic when he was involved in a one car accident while he was a passenger in a car driven by his nineteen year old cousin Carlos Davis. Carlos, who died as the result of the accident, was allegedly intoxicated at the time of the accident as the result of drinking beer he was alleged to have illegally purchased from appellant Morris' Texaco Mini Mart (Mini Mart). Mini Mart, a Texaco-branded service station, received its gasoline from appellant Anderson Oil Company (Anderson), which in turn purchased Texaco branded gasoline pursuant to a contract between it and Star Enterprises. Anderson is what is known in the industry as a "jobber." Prior to the alleged alcohol sale to Carlos in 2000, the Anderson/Star contract was assigned to Motiva,[1] an L.L.C. created under the laws of Delaware. Motiva is a joint venture between appellant Texaco (Texaco) and Saudi Aramco.

Louis, who was seventeen at the time of the automobile accident, and his mother (Respondent Evelyn Jamison)[2] sued the appellants. The jury returned a verdict against all three for $30 million actual damages finding Mini Mart negligent and Anderson and Texaco vicariously liable, which

[1] Neither Star Enterprises nor Motiva is a party.

[2] We refer to the respondents collectively as Jamison in the opinion.

verdict was reduced to $27 million as the jury found the appellants 90 % at fault and Louis 10% at fault under comparative negligence principles. Mini Mart, Anderson, and Texaco appeal.

ISSUES

1. Did the trial judge err in denying Anderson's and Texaco's motions for a directed verdict/*judgment non obstante veredicto* because Jamison did not present any evidence of actual agency to support the vicarious liability verdicts?

2. Did the trial judge err in denying Mini Mart's motion for a directed verdict because there was no evidence of a sale of alcohol?

3. Did the trial judge err in failing to dismiss appellant John Morris from the suit?

4. Did the trial judge commit error in ruling that Dr. Crane's expert testimony was admissible thus requiring a new trial for Mini Mart?

ANALYSIS

1. Directed verdict/JNOV

Anderson and Texaco each argue entitlement to a directed verdict or a JNOV contending there was no evidence that either entity had the right to control Mini Mart's alcohol sales, Mini Mart was therefore not their agent, and thus neither could be vicariously liable. The trial judge directed a verdict on Jamison's apparent agency claims, and submitted the case against Texaco and Anderson to the jury solely on the theory of actual agency.

Under South Carolina law:

> The decisive test in determining whether the relation of master and servant exists is whether the purported master has the right or power to direct and control the servant in the performance of his work and in the manner in which the work is to be done. *Keitz v. National Paving Co.*, 214 Md. 479, 134 A.2d 296 (1957); *see Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982) ("The test to determine agency is whether or not the purported principal has the *right to control* the conduct of his alleged agent.") (Emphasis theirs); *Young v. Warr*, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969) ("The general test applied is…whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment."); *DeBerry v. Coker Freight Lines*, 234 S.C. 304, 307-08, 108 S.E.2d 114, 116 (1959) ("The right or power of control retained by the person for whom the work is being done is uniformly regarded as the essential criterion for determining whether the workman is an employee….").
>
> Watkins v. Mobil Oil Corp., 291 S.C. 62, 65-66, 352 S.E.2d 284, 286 (Ct. App. 1986).

In Watkins, a customer sued Mobil after he was assaulted by the gas station's assistant manager when the customer entered the station to purchase cigarettes. The station was operated by a franchisee, which controlled the station's operations, its employees, and its premises. The Court of Appeals held there was no evidence that Mobil, the franchisor, had the right to control the conduct of the business even though the employees wore Mobil uniforms and the station was Mobil-branded.

The key question here is whether Texaco and/or Anderson, as the jobber, has the right or power to direct the manner or means of the purported agent's work, that is, to control Mini Mart "in the performance of [its] work

and the manner in which the work is to be done." Id.; see also Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969).

In an actual agency case, the question is not whether the purported principal could have exercised control over its agent, but whether it did so. Compare Glover v. Boy Scouts of America, 923 P.2d 1383 (Utah 1996) (right to control must rest on facts as they exist, not speculation if different policies had been followed).[3] We begin by looking at the three documents which govern the parties' relationships: the Wholesaler Marketing Agreement between Motiva and Anderson, Texaco's Brand Standards, and a Mystery Shopper Program which checks on Mini Mart's compliance with Texaco's Brand Standards. Nothing in the agreement or the Standards creates, on its face, an agency-principal relationship here.

A franchisor is not the principal of a branded gas station franchisee for purposes of all tort liability. Watkins, *supra*. Moreover, a franchisor is not vicariously liable for a tort committed at an independent gas station unless the plaintiff can show that the franchisor exercised more control over the franchisee than that necessary to ensure uniformity of appearance and quality of services among its franchisees. E.g., Kennedy v. Western Sizzler Corp., 857 So.2d 71 (Ala. 2003); Vandemark v. McDonald's Corp. 904 A.2d 627 (N.H. 2006); Ciup v. Chevron U.S.A., Inc., 928 P.2d 263 (N.M. 1996); Pate v. Alian, 49 P.3d 85 (Ok. Ct. App. 2002).

Texaco and Anderson contend that the Brand Standards are designed only to preserve Texaco's trademark and its goodwill. Jamison argues, however, that Texaco's requirements regarding employee appearance[4] and

[3] We agree with appellants that "The Road Map to the Bottom Line" and "The Successful Alcohol Management Training Guide," both of which were created for use by Texaco-owned stations, are not relevant to the agency issue as neither document was provided to Mini Mart.

[4] E.g., they must be neat, clean, not have visible tattoos or wear excessive jewelry, and wear Texaco shirts and approved pants.

courtesy[5] are indicative of control over employees. Compare, e.g., Sipple v. Starr, 520 S.E.2d 884 (W.Va. 1999) (jobber vicariously liable where he ordered owner to clean the store, redecorate, obtain a liquor license, and to fire an employee for having bad teeth); Wood v. McDonald's, 603 S.E.2d 539 (N.C. Ct. App. 2004) (management company of franchisee liable where it hired, fired, and supervised personnel and controlled operations on a daily basis).

In addition to relying on the Brand Standards requirements for employees as proof of control beyond that ordinarily imposed by a franchisor, Jamison points to the Standards' requirements where a Texaco-branded station opts to sell merchandise. In such cases, the Standards require certain displays and hours of operation,[6] signage,[7] and that cleanliness and hygiene standards be maintained.[8]

We find nothing in these requirements which supports a finding that Texaco or Anderson exercised control over the sale of food, beverages, or general merchandise by Mini Mart. As the parties acknowledge, Texaco did not require Mini Mart to sell alcoholic beverages, compare Sipple, *supra*, nor did Texaco or Anderson exercise any control over Mini Mart's decision to hire or fire employees. Compare Wood, *supra*. Neither Texaco nor Anderson offered Mini Mart any training material with regard to these types of sales. Rather, Mini Mart used training materials and seminars produced by

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[5] E.g., they must not smoke, eat, or listen to the radio in the sales counter area, must greet and thank all customers, must be behind counter and offer receipts.

[6] The retail component is to be open 24 hours a day unless Texaco agrees to shorter hours, and Texaco credit card applications and other point of sale merchandise must be displayed in a specific space.

[7] Legal notices must be displayed in back office, and only preapproved (printed not hand written) signs can be used in the retail area.

[8] E.g., coolers must be clean and kept between 34 and 38 degrees Fahrenheit, shelves must be stocked with in-date merchandise, and area must be kept clean and neat.

the National Association of Convenience Stores in training its employees in the responsible sale of alcoholic beverages.

As noted above, Jamison argues we should find indicia of control over and above the typical franchisor-franchisee relationship in the use of the Mystery Shopper Program, and the fact that Mini Mart, like all Texaco-branded stations, was required to display a Texaco customer service number. Under the Mystery Shopper Program, branded stations were visited twice a year by an anonymous individual who purchased only gasoline and checked the premises for compliance with the Brand Standards in sixty-nine designated areas.[9] In our view, nothing in the Mystery Shopper Program exceeded the scope of the ordinary franchisor-franchisee relationship. See, e.g., Schlotzky's, Inc. v. Hyde, 538 S.E.2d 561 (Ga. Ct. App. 2003) (franchisor's right to inspect or evaluate franchisee's compliance with standards and to debrand for noncompliance is not evidence of day-to-day control). Neither Texaco's requirement that Mini Mart participate in this program, nor Anderson's role as "enforcer," that is, the party responsible for informing Mini Mart of areas where the shopper found problems, is evidence of actual authority over Mini Mart's retail operation, particularly its sale of alcoholic beverages for off-premises consumption. Moreover, the required posting of the Texaco 800 number is in keeping with Texaco's desire to maintain consistency among its franchisees, and not indicative of Texaco's control over Mini Mart's daily operations.

Finally, Jamison contends that because Mini Mart expended approximately $190,000 to bring its station into compliance with Texaco standards in order to retain the right to sell Texaco gasoline, Texaco exercised control sufficient to submit the issue of actual agency to the jury. In our view, this business decision by Mini Mart does not create an actual agency-principal relationship vis-à-vis alcoholic beverage sales.

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[9] Among the items checked by the Mystery Shopper were whether the employees complied with the Brand Standards appearance requirements and courtesy standards, whether merchandise was properly priced and in-date, and whether the premises and exterior were clean and well-kept.

We hold the trial judge erred in submitting the issue of Texaco's and/or Anderson's vicarious liability to the jury. We find no evidence to support a finding that either entity had the right or power to control Mini Mart in the performance of its retail alcoholic beverage sales or in the manner in which that work was done, and therefore reverse the verdicts against Texaco and Anderson, holding each was entitled to a directed verdict. Watkins, *supra*; see also Allen v. Greenville Hotel Partners, Inc., 409 F. Supp. 2d 672 (D.S.C. 2006) (applying South Carolina law, court granted franchisor summary judgment finding through its agreement and brand standards franchisor was merely maintaining uniform standards and goodwill throughout the franchisor's system).

The remaining three issues are raised on appeal by Mini Mart.

2. Directed verdict

Mini Mart contends the trial judge erred in failing to direct a verdict in its favor because there was insufficient evidence that it sold beer to Carlos. The standard on appeal for reviewing the denial of a directed verdict is whether there is any evidence to support the jury's verdict. Watkins, *supra*. Here, there is testimony from Louis that the boys pooled their money, that Carlos Davis and another young man entered the Mini Mart with that money, and that they emerged with beer. There was also testimony from a police officer that one of the passengers in the wrecked automobile told him that the boys had purchased beer from that convenience store. The trial judge properly denied this directed verdict motion because there was evidence that Mini Mart sold beer to the underage boys. Watkins, *supra*.

3. Dismissal of John Morris from the suit

Mini Mart contends the trial court erred in failing to direct a verdict or grant a JNOV motion for John Morris, one of the owners of the Mini Mart. This request is predicated on the testimony of John's son, Kevin, that he bought out his father's interest in the business in 1992, well before the alleged sale in 2000. This issue was not raised as a ground for a directed

verdict during the liability stage of the trial and is not preserved for this Court's review. E.g., In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (only grounds raised in directed verdict can be raised in JNOV motion). Moreover, while Kevin testified that he owned the station, he also testified that the business was owned by his family.

4. New trial

Mini Mart contends the trial court erred in admitting expert testimony from Dr. Crane concerning Carlos Davis's probable level of impairment at the time of the accident because that opinion was predicated on what the trial judge deemed an unreliable blood alcohol level (BAL) test conducted by S.L.E.D. We agree.[10]

The S.L.E.D. analysis used a blood sample drawn at the hospital approximately one hour and fifty minutes after the accident. The sample was drawn to type blood, but the hospital did no testing as Carlos died shortly after the sample was drawn. The sample was released to the Richland County Coroner's office on April 3, two days after the accident. It was delivered to S.L.E.D. for testing on April 4. The S.L.E.D. testing came about at the request of the officer who had investigated the accident, after he learned from a passenger that the beer had allegedly been illegally sold to Carlos by Mini Mart.

At trial, the trial judge held that Jamison had not been able to prove a chain of custody "insofar as was practicable." He subsequently held Dr.

[10] We do not reach two other issues raised by Mini Mart regarding Dr. Crane's testimony. First, we find no objection which properly preserved the question of Dr. Crane's qualification as an expert. E.g., Harris v. Campbell, 293 S.C. 85, 358 S.E.2d 719 (Ct. App. 1987). Second, we disagree that whether Carlos was impaired by alcohol at the time of the accident is an improper subject for expert testimony. E.g., Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002) (decision to admit expert testimony is subject to clear abuse of discretion standard on appeal).

Crane could testify in reliance on the result of the S.L.E.D. test, but not as to the result itself. Before the jury, Dr. Crane opined that Carlos' BAL at the time of the accident was 0.193. Mini Mart contends that once the trial judge found that Jamison was unable to present a "good" chain of custody as to the blood tested by S.L.E.D., he erred in allowing any evidence predicated on the testing of that sample. We agree.

In Ex parte DHEC, 350 S.C. 243, 565 S.E.2d 293 (2002), the Court was asked whether the State could use an individual's HIV record from testing done at DHEC, at the individual's request, in the individual's criminal prosecution for knowingly transmitting HIV to another person. The Court held the DHEC record was admissible as a business record under Rule 803(6), SCRE, even though there was no chain of custody. The Court held that the lack of a chain was not determinative of admissibility because the trustworthiness of medical records is presumed and that test results, including BAL test results, done for purposes of medical treatment are admissible without a chain. The Court emphasized the reliability of a test done for medical purposes, but also held:

> A person charged with DUI based on a blood alcohol test taken at the time of his arrest has no such protection and, therefore, needs the indica of reliability provided by a chain of custody.
>
> Ex parte DHEC, 350 S.C. at 250-251, 565 S.E.2d at 297.

Here, we have a situation where a sample was drawn at a hospital for medical purposes but never tested. Had the hospital performed Carlos' BAL test as part of its medical treatment of him, the results would have been a part of Carlos' medical record. Under Ex parte DHEC, those results would be presumed reliable as a business record regardless of a chain of custody. The fact that the BAL test was performed not for medical purposes necessitates that the proponent be able to demonstrate a chain of custody insofar as practicable in order for the results to be deemed reliable. Id. Without that showing, the test performed by S.L.E.D. on a sample drawn but not tested for

medical purposes, is unreliable. Ex parte DHEC, *supra*; see also S.C. Dep't of Soc. Servs. v. Cochran 356 S.C. 413, 589 S.E.2d 753 (2008) (drug test results inadmissible where no complete chain of custody shown); Gulledge v. McLaughlin, 328 S.C. 504, 492 S.E.2d 816 (Ct. App. 1997) (BAL results admitted where chain of custody had "irregularities" but was complete); Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534 (1957) (BAL done by one hospital for purposes of litigation on blood drawn by another hospital excluded because no complete chain of custody could be shown); Graham v. State, 255 N.E.2d 652 (Ind. 1970) (if chain is incomplete, the evidence cannot be introduced or made the basis for the testimony or report of an expert).

Under Rule 703, SCRE, an expert may rely on inadmissible evidence if the trial judge "examines the reliability of the inadmissible evidence and excludes opinions not deserving of reliance in the specific instance and/or those that rely on grossly unreliable data." Kaye, Bernstein and Mnookin, The New Wigmore: Expert Evidence § 3.6.1a (2004). Under South Carolina law, unless a test is conducted for medical purposes, the result of that test is not reliable unless the proponent can demonstrate a chain of custody. Ex parte DHEC, *supra*.

All expert testimony must meet a reliability threshold under Rule 702, SCRE, which imposes an affirmative and meaningful gatekeeper function on the trial judge. State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Here, the trial judge performed this duty and held that the S.L.E.D. result was not reliable because he found that Jamison did not prove a chain of custody insofar as practicable. Having made that finding, the judge erred in allowing Dr. Crane to give an opinion based on that result. An expert cannot testify to an opinion predicated on an unreliable test.

In camera, Dr. Crane opined that Carlos' BAL had been 0.193 when the crash occurred based upon the S.L.E.D. analysis which tested the sample at 0.168. Dr. Crane also opined as to Carlos' BAL at the time of the accident without reference to the S.L.E.D. test, using Louis' deposition and that of another young man who was a passenger in the car with them that day.

Without the S.L.E.D. test, Dr. Crane opined that Carlos' BAL would have been between 0.046 and 0.114.

Jamison chose to present only the higher S.L.E.D.-based BAL estimate when it examined Dr. Crane before the jury. Jamison argues on appeal that even if Dr. Crane's testimony should not have been allowed to the extent it rested on the S.L.E.D. test, any error was harmless since there was other evidence upon which Dr. Crane could base his opinion that Carlos was intoxicated. While certainly Dr. Crane presented such testimony in his proffer, before the jury Jamison relied solely on the S.L.E.D.-based extrapolation of 0.193. The evidence, other than that of Dr. Crane, that Carlos was intoxicated was not so overwhelming that we are able to conclude that the admission of Dr. Crane's testimony was harmless error here. Mini Mart is therefore entitled to a new trial.[11]

CONCLUSION

We hold that Texaco and Anderson are entitled to a directed verdict, and that Mini Mart is entitled to a new trial. The jury verdict on appeal is

REVERSED.

WALLER, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

[11] We do not foreclose the possibility that, on retrial, Jamison will be able to satisfy the requirement that a chain of custody be shown insofar as practicable. See Hosford v. Wynn, 26 S.C. 130, 1 S.E. 497 (1887) (all questions are reopened upon a new trial).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Financial Federal Credit Inc., Appellant,

v.

Dennis Brown, Gilbert W. Douglas, South Carolina Department of Revenue, and Unisun Insurance Company, Defendants,

Of whom, Dennis Brown is, Respondent.

Appeal From Berkeley County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 26721
Heard February 4, 2009 – Filed September 21, 2009

REVERSED AND REMANDED

Thomas E. Lydon, of McAngus, Goudelock & Courie, of Columbia, for Appellant.

Steven L. Smith, of Smith & Koontz, of Charleston, for Respondent.

JUSTICE BEATTY: This case involves the collection of a promissory note. Financial Federal Credit, Inc. (FFC Inc.), a Texas corporation, brought this action to foreclose a judgment against property owned by Dennis Brown in South Carolina after it obtained a default judgment against Brown in a Texas federal court. Brown filed a motion to dismiss, alleging the Texas default judgment was void due to a lack of personal jurisdiction. The circuit court granted Brown's motion to dismiss, and FFC Inc. appeals. We reverse and remand.

I. FACTUAL/PROCEDURAL BACKGROUND

FFC Inc. provided financing to Gregg Construction Co., a South Carolina corporation, for the purchase of equipment. A Promissory Note dated April 29, 2002 was executed by Gregg Construction Co. in the total amount of $574,992.[1] Repayment of the loan was to be made in forty-eight monthly installments. Gregg Construction Co. did not make the payments as scheduled, however, so the full unpaid balance became due pursuant to an acceleration clause.

Prior to execution of the Promissory Note, Brown had signed a continuing Guaranty whereby Brown guaranteed all obligations of Gregg Construction Co. to FFC Inc. The Guaranty, signed on December 19, 2000, contained provisions regarding choice of venue and service of process.

Under the terms of the Guaranty, venue for any litigation was to be in Harris County, Texas. In addition, Brown agreed that First Federal Commercial, Inc., of Houston, Texas would be his attorney-in-fact and agent to accept or waive service of process, and that written notice of such service or waiver would be sent to Brown by FFC Inc. at the address he designated in the Guaranty within three days after the agent was either served or had executed a waiver. Brown's street address in Moncks Corner, South Carolina was listed on the Guaranty directly below his signature.[2]

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[1] By letter dated April 30, 2002, the Promissory Note was amended to reflect a change in the commencement date of the instrument to April 30, 2002.

[2] The Guaranty specifically provided:

After Brown did not make the payments promised under the Guaranty, FFC Inc. filed a complaint in federal court in Texas pursuant to the parties' contractual agreement as to venue. The complaint was served on Mike Gallagher, Executive Vice President of First Federal Commercial, Inc., as Brown's attorney-in-fact and agent.

FFC Inc. sent notice to Brown at his designated address in South Carolina via certified mail (return receipt requested) and first class mail that it had served First Federal Commercial, Inc., his designated agent, with a complaint, a copy of which was enclosed. The certified mailing was returned unclaimed.

FFC Inc. obtained a default judgment against Brown in the United States District Court for the Southern District of Texas, Houston Division, in the amount of $210,750.02, plus interest. In the order granting default judgment, the court noted that Brown was served with process through his designated agent and was served with FFC Inc.'s motion for default judgment, but he had not responded to the complaint or the motion and was in default. The Texas default judgment was transferred to South Carolina and was recorded in the United States District Court for the District of South Carolina. A Transcript of Judgment was entered for $210,750.02 in the South Carolina federal court.

> As a material part of the consideration for FFCI entering into . . . one or more obligations from Subject or having Subject as an obligor thereon, Guarantor hereby irrevocably designates and appoints First Federal Commercial Inc., Houston, Texas as Attorney-In-Fact and Agent for Guarantor, and in Guarantor's name, place and stead to accept or waive service of any process (and for no other purpose) within the State of Texas, FFCI agreeing to give written notice of such service or waiver to Guarantor within three (3) days after such service was effected or such waiver was executed, by mailing such written notice to Guarantor's address as set forth below by certified mail, return receipt requested; and Guarantor does hereby agree to the jurisdiction and venue of any court located in Harris County, Texas, regarding any matter arising hereunder. Guarantor hereby waives the right to have a jury trial in any action, case or proceeding based on or relating hereto.

The Transcript of Judgment was subsequently recorded in the office of the Berkeley County Clerk of Court and enrolled as a judgment. The Berkeley County Clerk of Court issued a writ of execution to the Berkeley County Sheriff's Department to satisfy the judgment from property owned by Brown in Berkeley County.

FFC Inc. filed the current action for Foreclosure of Judgment against Brown[3] in the Berkeley County Court of Common Pleas. Brown moved to dismiss the action pursuant to Rule 12(b)(6), SCRCP, for failure to state a claim for which relief could be granted. Specifically, Brown alleged the Texas default judgment was void due to a lack of personal jurisdiction and that FFC Inc. could not, therefore, enforce the judgment in South Carolina. Brown argued his due process rights were violated by FFC Inc.'s service of process on an agent who was essentially the same as FFC Inc. and who had an adverse interest. The circuit court granted Brown's motion.

II. ISSUES

On appeal, FFC Inc. contends the circuit court erred in granting Brown's motion to dismiss because the court failed to limit its review to the facts alleged in the complaint, as required by Rule 12(b)(6), SCRCP, and the circuit court did not have the authority to rule on whether the Texas court lacked jurisdiction over Brown. FFC Inc. further contends that, even if the circuit court was within its authority to review whether Brown was properly served in the Texas lawsuit, the circuit court erred in dismissing its action because service upon Brown to obtain the default judgment was proper.

[3] In its complaint, FFC Inc. also named as defendants Gilbert W. Douglas, the South Carolina Department of Revenue, and Unisun Insurance Company, stating they were named because they might claim an interest in or have a lien against the real estate that was the subject of the complaint. However, these defendants are not parties to this appeal.

III. LAW/ANALYSIS

A. Scope of Motion to Dismiss

At the hearing on Brown's motion, FFC Inc. pointed out that Brown's motion to dismiss was technically made under Rule 12(b)(6), SCRCP, failure to state a cause of action, and that Brown did not specifically move pursuant to Rule 12(b)(2), SCRCP to dismiss for lack of jurisdiction over the person. During the ensuing colloquy, Brown reiterated that he was arguing a lack of due process because there was no personal jurisdiction to obtain the Texas default judgment and that the action to foreclose on the judgment should, therefore, be dismissed.

The circuit court inquired whether this was going to be the only argument FFC Inc. intended to make to challenge the motion because, even if FFC Inc. was correct, the issue would still come up at a later time. FFC Inc. stated it was prepared to address the merits of the case. The circuit court stated: "Well, let's address the merits of the case. Whether due process was denied and whether jurisdiction should have been granted in the State of Texas to begin with, though, that's the bottom line issue. And whether it comes up under 12(b) or summary judgment or directed verdict, it's got to be decided at some point in time." FFC Inc. expressly agreed, stating it was "prepared to address that" issue.

In our view, the circuit court did not err in considering the issue of a lack of personal jurisdiction and due process. The 12(b)(6) label notwithstanding, Brown expressly argued a lack of personal jurisdiction and due process in his motion to dismiss, so FFC Inc. was on notice that this was the issue before the court. In addition, FFC Inc. affirmatively consented at the hearing to consideration of the issue. The parties did, in fact, thoroughly argue the merits of the jurisdictional question at the hearing and FFC Inc. presented documents and law in support of its position. Thus, there is no error warranting reversal in this regard.

B. Dismissal of Action

FFC Inc. next argues the circuit court erred in dismissing its action because service upon Brown was proper.

(1) Enforcement of Judgments

As an initial matter, we note actions to enforce foreign judgments are generally brought pursuant to the Uniform Enforcement of Foreign Judgments Act, S.C. Code Ann. §§ 15-35-910 to -960 (2005 & Supp. 2008), which was adopted in South Carolina in 1993. In the current action, however, FFC Inc. did not file a complaint pursuant to the Act; rather, it transferred the Texas federal court judgment to a federal court in South Carolina, then recorded it in state court in Berkeley County, where it sought a judgment lien and foreclosure. Brown and FFC Inc. advised the circuit court at the hearing in this matter that they agreed the Act is not applicable here because the Texas judgment was transferred to a South Carolina federal court.

The circuit court did not apply the terms of the Act in this matter; however, section 15-35-540 of the South Carolina Code provides that a transcript of judgment from a South Carolina federal court may be indexed as a judgment in any county in this state:

> A transcript of a final judgment of any court of record of this State or of any district or circuit court of the United States within this State directing in whole or in part the payment of money, may be docketed with the clerk of the court of common pleas in any county and when so docketed shall be entered upon the book of abstracts and duly indexed and shall have the same force and effect as a judgment of that court. Any such transcript shall set out the names of the parties, plaintiff and defendant, the attorneys of record, the date and amount of the judgment, the time from which interest is to be computed and the amount of costs.

S.C. Code Ann. § 15-35-540 (2005) (emphasis added); see Integrity Ins. Co. v. Taylor, 295 S.C. 143, 367 S.E.2d 441 (Ct. App. 1988) (stating section 15-35-540 allows the entry of transcripts of final judgments of any district court of this state).

(2) Personal Jurisdiction

FFC Inc. contends the circuit court erred in dismissing its action against Brown as the Texas default judgment against Brown was not void due to a lack of personal jurisdiction.

"A judgment is void if a court acts without personal jurisdiction." BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). "A judgment of a court without jurisdiction of the person or of the subject matter is not entitled to recognition or enforcement in another state, or to the full faith and credit provided for in the federal Constitution." 50 C.J.S. Judgments § 986 (1997). "A court generally obtains personal jurisdiction by the service of a summons." BB & T, 369 S.C. at 551, 533 S.E.2d at 503.

"A judgment of a court of record of another state is entitled to the same presumptions of regularity in jurisdiction as a domestic judgment, and such presumption can be overthrown only by clear and convincing evidence of want of jurisdiction." 50 C.J.S. Judgments § 987 (1997) (footnote omitted). "Where a judgment recovered in a court of general jurisdiction in another state is relied on, and the record thereof is duly authenticated or certified, and produced in evidence, it will be presumed that the court had jurisdiction of the subject matter and the parties, in the absence of proof to the contrary or of a showing to the contrary by the record itself . . . ." Id. (footnote omitted).

At the hearing in this matter, Brown argued his due process rights were violated and that there was no personal jurisdiction to obtain the Texas default judgment because when FFC Inc. effected service on his appointed agent at First Federal Commercial, Inc., FFC Inc. merely "served itself" because the two entities were essentially the same. The circuit court agreed and ruled FFC Inc. was not entitled to enforce the Texas default judgment in South Carolina against Brown because the Texas judgment was void due to a lack of personal service and due process.

The circuit court relied upon the case of George v. American Ginning Co., 46 S.C. 1, 24 S.E. 41 (1896). In American Ginning, the plaintiff, from New York, appointed William C. Brown, of South Carolina, the company's treasurer, as her attorney-in-fact to commence an action on a promissory note and attach the property of the defendant, American Ginning, a foreign corporation doing business in South Carolina. Id. at 2, 24 S.E. at 41. Brown procured a summons and complaint in the name of the plaintiff against the corporation, and the sheriff issued a return stating he had served the corporation by delivering a copy to a W. C. Brown, the treasurer. Id.

The corporation moved to vacate a default judgment, arguing service was insufficient because the service was made upon the same William C. Brown who was an officer of the corporation while he was acting as the attorney-in-fact for the plaintiff. Id. at 3, 24 S.E. at 41. The trial court refused to vacate the default judgment. Id. On appeal, this Court reversed, stating:

> The question, then, resolves itself into an inquiry whether a person can legally commence an action against a foreign corporation, of which he happens to be an officer or agent, by serving himself with the process or summons necessary to commence such action. So far as we are informed, there is no authority in this state upon the point; and we do not think any is needed to show that such a proposition, so utterly at variance with any proper conception of the due and orderly administration of justice, cannot for a moment be entertained. To concede such a proposition would open the door to the grossest fraud, which would be a reproach to the administration of justice. Of course, we do not mean to intimate that any fraud was intended in this particular case; but we cannot assent to a proposition which, if established, would afford such an easy mode of perpetrating frauds.

American Ginning Co., 46 S.C. at 4, 24 S.E. at 42 (emphasis added).

American Ginning is not determinative here. American Ginning involved an officer of a corporation bringing an action against that corporation on behalf of a plaintiff, and then purporting to accept service on behalf of the corporation. The officer was essentially serving himself with the action. That inherently involves a conflict of interest that is readily apparent and offensive to any notion of due process. In the current appeal, however, FFC Inc. did essentially serve itself, but with the consent of Brown via the Guaranty agreement. Brown expressly consented to the appointment of the agent as well as to venue and received the benefits of the contract. He did not protest the appointment of the agent until after this action occurred. In American Ginning, there was no agreement as to the manner of service. In the current appeal, Brown specifically and expressly agreed to the manner of service and, further, he even waived personal service altogether.

Although service confers personal jurisdiction, "a defendant may waive personal service by consent or by designating an agent to receive service of process." Myrtle Beach Lumber Co. v. Globe Int'l Corp., 281 S.C. 290, 292, 315 S.E.2d 142, 143 (Ct. App. 1984). Further, where service is accomplished in a manner consented to by the defendant, service of process is valid and a court has jurisdiction over the defendant for purposes of entering judgment. Id.

In Myrtle Beach Lumber Co., the defendants allowed their attorney to accept service of process and then asked him to try to negotiate a settlement. Id. at 291, 315 S.E.2d at 142. When no settlement was reached, the plaintiff obtained a default judgment. Id. The Court of Appeals held where the defendants had actual notice of the complaint and expressly authorized their attorney to be their agent to accept process, but then did not answer the complaint, the defendants' challenge to the imposition of a default judgment was without merit. Id. at 292, 315 S.E.2d at 143.

The Court of Appeals observed service was accomplished in the manner consented to by the defendants, and concluded: "If there has been any denial of due process, which this court doubts, it 'is the result of a self-inflicted wound.'" Id. (quoting Patel v. S. Brokers, 277 S.C. 490, 289 S.E.2d 642 (1982)).

In MinorPlanet Systems USA Limited v. American Aire, Inc., 368 S.C. 146, 628 S.E.2d 43 (2006), we considered a defendant's argument that a Texas default judgment should not be enforced in this state due to an alleged lack of personal jurisdiction. The defendant, however, had signed a contract containing a forum selection clause providing as follows:

> Customer consents to the exclusive personal jurisdiction and venue of the State District Court residing in Dallas County, Dallas, Texas (or if applicable the Federal District Court for the Northern District of Texas, Dallas Division) for all litigation which may be brought with respect to . . . this agreement.

Id. at 148, 628 S.E.2d at 44.

We held the forum selection clause was enforceable under Texas law and the default judgment was enforceable in South Carolina, noting that under Texas law, a defendant waives any objection to the lack of personal jurisdiction by agreeing to a clause naming Texas as the forum. Id. at 150, 628 S.E.2d at 45 (citing In re AIU Ins. Co., 148 S.W.3d 109 (Tx. 2004)). Further, we noted that "[u]nder South Carolina law, a consent to jurisdiction clause is generally presumed valid and enforceable when made at arm's length by sophisticated business entities." Id. at 150 n.1, 628 S.E.2d at 45 n.1.

We stated that under Texas law, "enforcement of forum-selection clauses is mandatory unless the party opposing enforcement clearly shows that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Id. at 150, 628 S.E.2d at 45 (quoting In re Automated Collection Techs., Inc., 156 S.W.3d 557, 559 (Tx. 2004)).

"[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964).

Brown expressly consented to venue in Texas and to the manner of service FFC Inc. provided here, and he further consented to the waiver of personal service altogether. The law clearly provides that a party may not only consent to service via an agent, but may also consent to a waiver of service. Nat'l Equip. Rental, 375 U.S. at 315-16. FFC Inc. provided Brown with notice by sending Brown copies of the pleadings and other documents by certified mail (return receipt requested) and by regular mail to the address he provided for service of process. FFC Inc. followed all of the agreed-upon procedures for service. There is no indication the agent did not promptly send notice to Brown or that another agent would have effected service differently, so Brown has shown no prejudice in this regard. Further, Brown waived any argument about personal jurisdiction when he agreed to the venue and service clauses in the Guaranty. See, e.g., MinorPlanet, 368 S.C. at 152, 628 S.E.2d at 46 (enforcing Texas default judgment where the defendant consented in advance to jurisdiction).

Moreover, "the effect and validity of a foreign judgment must be determined by the laws of the state that supplied the judgment." Carson v. Vance, 326 S.C. 543, 548, 485 S.E.2d 126, 128 (Ct. App. 1997). The judgment to be enforced was from the Texas federal court. Thus, we should look to Texas law regarding the sufficiency of service of process.

In the Texas federal district court, the Federal Rules of Civil Procedure provide that an individual may be served (1) by following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is effected or (2) by delivering a copy of the summons and complaint to an agent authorized to receive service of process. See Rule 4(e)(1), FRCP (providing for service in accordance with state law); id. Rule 4(e)(2), (allowing service upon an authorized agent).[4]

Under the Texas Rules of Civil Procedure, pleadings "may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's

[4] The provision regarding service upon an agent is now found at Rule 4(e)(2)(C), FRCP.

last known address . . . or by such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper . . . in a post office . . . ." Rule 21(a), Tex. R. Civ. P. (emphasis added); cf. id. Rule 106 (stating a citation may be served on a defendant by certified mail, return receipt requested). Thus, under Texas law, FFC Inc. gave proper service, even without the use of the agent, when it sent notice of the pleadings to Brown's last known address, the address he supplied in the Guaranty for service of process, by certified mail.

Accordingly, we hold that the trial court erred in granting Brown's motion to dismiss.

REVERSED AND REMANDED.

WALLER, J., concurs. KITTREDGE, J., concurring in a separate opinion in which TOAL, C.J., and PLEICONES, J., concur.

JUSTICE KITTREDGE: I concur in the result reached by Justice Beatty and agree that the circuit court's order granting Brown's motion to dismiss must be reversed. Service of the pleadings on Brown pursuant to Texas law ends his personal jurisdiction challenge. I write separately because I find it unnecessary to reach Brown's claim that FFC's service of its summons and complaint on itself violates due process.

Brown challenged the validity of the Texas default judgment and argued that it was void due to lack of personal jurisdiction. As Justice Beatty correctly observes, because this judgment originated in Texas, we must look to that state's laws to determine its effect and validity. *Minorplanet Systems USA Ltd. v. American Aire, Inc.*, 368 S.C. 146, 149, 628 S.E.2d 43, 45 (2006) ("The validity and effect of a foreign judgment must be determined by the laws of the state which rendered the judgment.").

A court must make two findings before it may find that it has personal jurisdiction over a particular defendant. The first requirement of personal jurisdiction is that a defendant have minimum contacts with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). In this case, the forum selection clause contained in the Guaranty gave the Texas courts personal jurisdiction over Brown concerning his agreement with FFC. *See In re AIU Ins. Co.*, 148 S.W.3d 109, 112 (Tex. 2004) (recognizing that a defendant waives any objection to lack of personal jurisdiction by agreeing to a clause naming Texas as the forum). Brown has not challenged the validity of this portion of the forum selection clause.

Second, it must be determined whether service was proper under Texas law. *Furst v. Smith*, 176 S.W.3d 864, 868 (Tex. App. 2005) (observing that if a defendant is amenable to the jurisdiction of a court, a plaintiff invokes that jurisdiction by valid service of process).

In my view, Justice Beatty's opinion conflates minimum contacts and service of process. The matter of minimum contacts is satisfied by the unchallenged venue selection provision. The service of process issue is resolved through service of the pleadings on Brown under Texas law. After FFC served itself with the pleadings, the pleadings were promptly served on Brown by certified mail to Brown's last known address, as the parties'

agreement required.[5] Rule 21(a), Tex.R.Civ.P. (providing that pleadings "may be served … by certified or registered mail, to the party's last known address… Service by mail shall be complete upon deposit of the paper … in a post office ….").

Accordingly, the service of the pleadings on Brown was proper. Because FFC established personal jurisdiction by demonstrating minimum contacts and proper service, Brown's personal jurisdiction challenge ends, making a resolution of his due process challenge to the validity of the self-service clause unnecessary.

Not only does the Court need not reach the due process challenge to self-service clauses, the facts of the case do not squarely present this issue. Contrary to Brown's assertion, the agreement between FFC and Brown does not contain a true self-service clause, for FFC (as Brown's agent) was required "to give written notice of such service or waiver to [Brown] within three (3) days after service was effected or such waiver was executed, by mailing such written notice to [Brown's] address … by certified mail, return receipt requested." The contract therefore required notice to Brown of any process notwithstanding the ability of FFC to initially serve itself or waive service. Compliance with the Texas rules concerning service also satisfied this contractual provision. Consequently, the terms of this contract do not present a true self-service clause.

I am concerned that the opinion of Justice Beatty may be construed as giving this Court's imprimatur to self-service clauses in all contracts, regardless of the nature of the contract, the sophistication of the parties and other considerations. Justice Beatty notes that FFC "did essentially serve itself, but with the consent of Brown via the Guaranty agreement." Justice Beatty further states without reservation that "where service is accomplished in a manner consented to by the defendant, service of process is valid and a court has jurisdiction over the defendant for purposes of entering judgment." I do not subscribe to the view that the presence of a self-service provision in a

[5] The Guaranty agreement required FFC, following either service of the pleadings on itself or waiver of service, to give written notice of such action to Brown within three days by certified mail, return receipt requested.

contract comports with due process in all cases. I am concerned the lead opinion may be giving an unintended green light for self-service clauses in the boilerplate of every contract under the sun.

In my judgment, the posture of this case dictates we not reach the due process challenge. This is similar to the approach taken in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). In *National Equipment*, defendants, who were Michigan farmers, leased farm equipment from the plaintiff corporation. The lease purported to authorize service of process on Florence Weinberg of Long Island, New York. Although not disclosed, Florence Weinberg was the wife of one of the plaintiff corporation's officers. Plaintiff commenced an action in New York alleging defendants failed to make payments under the lease. Plaintiff served defendants by having the pleadings delivered to Mrs. Weinberg. Significantly, plaintiff and Mrs. Weinberg also served defendants with the summons and complaint by certified mail in accordance with applicable service of process rules. Defendants defaulted and a judgment was entered for plaintiff. Defendants' effort to quash the service of the pleadings was ultimately decided by the Supreme Court. "Since [defendants] did in fact receive complete and timely notice of the lawsuit pending against them," the Court declined to reach the due process claim. *Id*. at 315. ("We need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice …").

I would reverse the trial court only on the basis that Brown was subject to personal jurisdiction in Texas and was properly served with the pleadings under Texas law.

TOAL, C.J. and PLEICONES, J., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Frances Irene Todd, Petitioner,

v.

Barbara C. Joyner, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Georgetown County
Thomas A. Russo, Circuit Court Judge

Opinion No. 26722
Heard June 9, 2009 – Filed September 21, 2009

AFFIRMED

Gene M. Connell, Jr., of Kelaher, Connell & Connor, of Surfside Beach, for Petitioner.

Linda Weeks Gangi, of Thompson and Henry, of Conway, for Respondent.

JUSTICE PLEICONES: This case stems from an auto accident in which Petitioner Frances Irene Todd was injured. A jury awarded Todd $37,191.11. Petitioner appealed and the Court of Appeals affirmed. Todd v. Joyner, 376 S.C. 114, 654 S.E.2d 862 (Ct. App. 2007). We granted certiorari and, finding no error, now affirm the Court of Appeals.

FACTS

A car driven by Joyner collided with a car in which Todd was a passenger. Todd sustained injuries and sued for damages. State Farm, Joyner's insurer, defended her at trial. Joyner admitted negligence and the trial court directed a verdict on liability. Consequently, the sole issue before the jury was the amount of damages owed Todd. In disputing Todd's claimed damages, Joyner presented Dr. Richard J. Friedman as an expert in orthopedic surgery. Because Dr. Friedman was unavailable during trial, his deposition testimony was read to the jury. At the deposition, Todd questioned Dr. Friedman concerning his relationship with State Farm, but Friedman was unable to provide answers to most questions. Dr. Friedman testified that he did not know the number of times he testified for other lawyers in defense cases or how many depositions he testified in per year. He explained that he does not keep records and routinely throws out invoices relating to past expert testimony once his bill is paid. Moreover, when asked what percentage of his practice was comprised of expert testimony, Dr. Friedman answered "very small" and outlined a typical busy work week which left "not much time . . . for anything else."

Following the deposition, Todd subpoenaed payment records from State Farm for regarding Dr. Friedman's expert consultation in any case for the past three years. The records supplied showed that Friedman was paid between $50,000 and $60,000 for work on eighteen different claim numbers during calendar years 2003-2005. Todd attempted to introduce the payment records at trial as evidence of bias, but the trial judge refused, citing Rule 403 of the South Carolina Rules of Civil Procedure (SCRCP).

In his testimony, Dr. Friedman opined that Todd suffered no permanent impairment from the auto accident and that any treatment she received more than roughly four months after the accident was not reasonable and necessary or proximately caused by the accident. Dr. Friedman was the only expert whose testimony was offered at trial. At the conclusion of the trial, the jury found for Todd in the amount of $37,191.11, the amount of medical bills presented at the trial. Todd moved for *additur* and filed a motion for a new trial, both of which were denied.

Todd contested a number of evidentiary rulings by the trial court as well as the trial court's refusal to grant her motion for *additur*. The Court of Appeals affirmed the trial court's rulings on all points. Todd, 376 S.C. 144, 654 S.E.2d 862. We granted certiorari.

ISSUES

I. Did the Court of Appeals err in affirming the trial court's decision to bar the introduction of evidence of payments made by State Farm to the expert?

II. Did the Court of Appeals err in affirming the trial court's decision allowing Joyner's expert to read from Todd's medical records during his testimony?

DISCUSSION

I. Yoho v. Thompson

On certiorari, Todd argues that the Court of Appeals erred in affirming the trial court's refusal to allow introduction of the payment records because the records were properly admissible to show bias under Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001). We disagree.

Prior to 1995, the long-standing rule in South Carolina was that, in an action for damages, a defendant's insurance coverage should not be revealed to the jury. Yoho, 345 S.C. at 365, 548 S.E.2d at 585. Rule 411 of the South

Carolina Rules of Evidence (SCRE) altered the bar on evidence of insurance and provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 411, SCRE (2008).

In Yoho, we adopted a framework for analysis in considering whether or not to admit evidence of insurance. We held that if Rule 411 does not require the exclusion of evidence of insurance, the court should then proceed to perform Rule 403 analysis and consider whether the probative value of the evidence is substantially outweighed by the prejudicial effect and potential for confusing the jury. Yoho, 345 S.C. at 365, 548 S.E.2d at 586. As liability was admitted in this case, Rule 411 is not implicated and the question whether the records are admissible turns on Rule 403.

In considering whether an expert's connection to a defendant's insurer is sufficiently probative to outweigh the prejudice to the defendant resulting from the jury's knowledge that the defendant carries liability insurance, this Court adopted the "substantial connection" analysis employed in a majority of jurisdictions. Id. at 366, 548 S.E.2d at 586. Applying the "substantial connection" test, the Yoho Court noted (1) that the expert was not merely paid an expert fee in the case but instead maintained an employment relationship with the insurance company and other insurance companies; (2) the expert consulted for the insurance company and gave lectures to its agents and adjusters; (3) 10-20% of the expert's practice consisted of reviewing records for insurance companies; and (4) the expert's yearly salary was based in part on his insurance consulting work. Id. Based on these facts, the Yoho Court found that the expert had a substantial connection to the insurance

company and therefore, the trial court erred in barring admission of evidence of insurance. Id.

Todd showed, through payment records and the testimony of Potts, that Dr. Friedman earned approximately $50,000 from State Farm during calendar years 2003-2005 based on work on eighteen claims, but presented no evidence as to Dr. Friedman's total earnings during that period. Moreover, unlike Yoho, the evidence appears to show that Dr. Friedman was paid an expert fee rather than having an employment relationship with State Farm. In short, the evidence presented by Todd does not show as strong a connection between the expert and the insurance company as in Yoho and we cannot conclude that the Court of Appeals erred in affirming the trial court.

II. Medical Records

Todd contends that the Court of Appeals erred in upholding the trial court's decision allowing Dr. Friedman to read from Todd's medical records at trial. We disagree.

During the deposition, which was read to the jury at trial, Dr. Friedman was asked to comment on the reasonableness of Todd's medical treatment and whether injuries Todd claimed resulted from the car accident actually existed before that time. Dr. Friedman based his opinions, in part, on a review of Todd's medical records and, in explaining his opinions, Dr. Friedman referenced Todd's medical records a number of times and occasionally read from the records. Since Dr. Friedman's testimony centered on the idea that injuries Todd claimed resulted from the wreck actually existed prior to the accident, most of the portions of the records read by Dr. Friedman referred to Todd's statements or complaints to her doctors.[1]

At trial, Todd objected to Dr. Friedman's testimony as to medical records as hearsay. We find no error. We find that the records introduced through Dr. Friedman's testimony referring to complaints or statements Todd

[1] For example, Dr. Friedman testified that Todd "did complain of headaches to her doctor on March 19th, 1998."

made to her physicians are not barred by the hearsay rule. Rule 803, SCRE provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . .
> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

Rule 803(4), SCRE (2008). The medical history referenced by Dr. Friedman falls within the ambit of Rule 803(4) and therefore, does not run afoul of the hearsay rule. The Court of Appeals, therefore, did not err in affirming the trial court's decision to allow the testimony.

CONCLUSION

We find that the Court of Appeals did not err in affirming the trial court's finding that Todd did not show a "substantial connection" between State Farm and Dr. Friedman to require admission of evidence of insurance. We further find no error in the decision to allow Dr. Friedman to refer to Todd's medical records, and therefore affirm on this ground. We affirm all remaining issues under Rule 220(c).

AFFIRMED.

TOAL, C.J., WALLER, J., and Acting Justice E. C. Burnett, III, concur. BEATTY, J., dissenting in a separate opinion.

JUSTICE BEATTY: I respectfully dissent. Dr. Friedman was employed by State Farm on eighteen different occasions over a three year period immediately prior to trial. This employment relationship clearly constitutes a substantial connection between State Farm and Dr. Friedman. Evidence of this substantial connection should have been admitted to show possible bias on Dr. Friedman's part. See Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001) (holding evidence of a defense expert's medical consulting work for an insurance carrier was admissible, even though the evidence contained a reference to insurance, because considerable latitude is allowed during cross-examination to test a witness's bias, prejudice, or credibility).

The probative value of this evidence far outweighed its prejudicial effect. See id. at 366, 548 S.E.2d at 586 (stating that a substantial connection between an expert and a defendant's insurer is sufficiently probative on the issue of bias so as to outweigh the prejudice to the defendant resulting from the fact that the jury knows the defendant carries liability insurance). Considering the fact that liability insurance has been required in South Carolina for decades, see S.C. Code Ann. §§ 56-10-10, -20, -220 (2006), it is highly probable that every juror already knew that insurance was available. The only unknown was the name of the carrier. Therefore, it is probable that there was no prejudicial effect to be concerned with.

Connecting Dr. Friedman to the insurance carrier was highly probative on the issue of his bias in favor of the insurance carrier, State Farm, and Joyner. In my view there was very little, if any, unfair prejudice to Joyner.

I concur in the remaining issues.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jonathan Kyle Binney, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Cherokee County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26723
Heard June 24, 2009 – Filed September 21, 2009

AFFIRMED

Emily C. Paavla, of Center for Capital Litigation, of Columbia, and John H. Blume, of Ithaca, NY, for Petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edward Salter, III, all of

Columbia, and Harold W. Gowdy, III, of Spartanburg; for Respondent.

John Nichols, of Bluestein, Nichols, Thompson & Delgado, of Columbia; Kathy Lynn Osborn and Mary Kristin Glazner, both of Indianapolis, IN, for Amicus Curiae Professors of Legal Ethics.

Joseph L. Savitz, III and Robert M. Dudek, both of Columbia, for Amicus Curiae South Carolina Appellate Defense.

Ernest Charles Grose, Jr., of Greenwood, for Amicus Curiae South Carolina Public Defenders Association.

Frank Eppes, of Greenville, for Amicus Curiae South Carolina Trial Lawyer's Association.

C. Rauch Wise, of Greenwood, for Amicus Curiae South Carolina Association of Criminal Defense Lawyers.

Cecil Kelly Jackson, of Sumter, for Amicus Curiae Solicitor's Association.

CHIEF JUSTICE TOAL: In this case, we granted a writ of certiorari to review an order of the post-conviction relief (PCR) court denying Petitioner's motion for (1) the return of his trial file from the Attorney General's Office (AGO) and (2) the disqualification of the AGO attorneys who viewed the file. Petitioner argues that his attorney-client privilege was violated when, after he filed an application for PCR, trial counsel turned over

his entire trial file to the AGO.[1] We find that Petitioner's attorney-client privilege was not violated by the disclosure of his entire trial file to the AGO and affirm the PCR court's order.

FACTS/PROCEDURAL HISTORY

Petitioner was convicted of murder and first degree burglary, and he was sentenced to death. We affirmed Petitioner's conviction and sentence. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005), *cert denied*, 546 U.S. 852 (2005).

On April 7, 2006, after his execution was stayed, Petitioner filed an application for PCR in which he alleged that trial counsel was ineffective during the guilt and sentencing phases of his trial. Petitioner alleged many grounds of ineffectiveness. In particular, three of the allegations were so broad as to encompass effectively the entire scope of trial counsel's obligations in Petitioner's defense. First, Petitioner alleged that "[trial] counsel failed to investigate the facts and circumstances surrounding the death of the victim." Second, Petitioner alleged that "[trial] counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence." Third, Petitioner alleged that "[trial] counsel failed to

[1] The issue presented by this matter is novel and capable of arising in every PCR proceeding. We granted a writ of certiorari in this case due to these exceptional circumstances. *See In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998); *see also Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009) (finding that, where a matter is not otherwise immediately appealable, this Court may issue a writ of certiorari due to "exceptional circumstances"). In *Bridgestone*, we "granted a petition for a writ of certiorari in our original jurisdiction." *Bridgestone*, 381 S.C. at 464. Writing for the Court in that matter as I do here, my statement of the procedural posture was incorrect. A matter may not be before this Court by a writ of certiorari *and* in our original jurisdiction. The questions presented by *Bridgestone*, just as the issue presented here, were before this Court by way of a writ of certiorari issued due to exceptional circumstances, and not in our original jurisdiction.

investigate and present evidence in support of all potential defenses in the guilt and innocence phase."

On February 27, 2007, trial counsel met with attorneys from the AGO. The purpose of this meeting was to discuss the allegations made by Petitioner in his application for PCR. Due to the breadth of Petitioner's allegations of ineffectiveness, trial counsel determined that it was necessary to make an entire copy of the trial file available for review and copying by the AGO attorneys.

Petitioner later discovered that trial counsel made the entire trial file available to the AGO. Petitioner moved the PCR court to order that his file be returned and that the AGO attorneys who reviewed the file be disqualified from participating in his PCR proceedings, arguing that his attorney-client privilege had not been waived as to the entire file. Following a hearing, the PCR court denied Petitioner's motion finding that the broad allegations of ineffective assistance of counsel contained in Petitioner's PCR application waived the attorney-client privilege with respect to all material contained in the trial file.

Petitioner filed a notice of appeal and a petition for a writ of certiorari to review the order of the PCR court. The PCR court's denial of Petitioner's motion is interlocutory, and thus not immediately appealable. Nonetheless, due to the exceptional circumstances of this matter, we granted Petitioner's writ of certiorari to review the following issue:

> Given the particular allegations made in his April 7, 2006 application for PCR, did Petitioner completely waive his attorney-client privilege with respect to his trial file?

STANDARD OF REVIEW

If the PCR court's findings are supported by any evidence of probative value in the record, they should be upheld. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

LAW/ANALYSIS

Petitioner argues that he did not completely waive his attorney client privilege upon application for PCR and, therefore, this privilege was violated when trial counsel made his entire file available to the AGO. We disagree.

S.C. Code Ann. § 17-27-130 (1996), which describes a PCR applicant's waiver of the attorney-client privilege, states in pertinent part:

> Where a defendant alleges ineffective assistance of prior trial counsel…as a ground for post-conviction relief…the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney client privilege shall be deemed automatic upon the filing of the application alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation.

"In interpreting statutes, th[is] Court looks to the plain meaning of the statute and the intent of the Legislature." *Gay v. Ariail*, 381 S.C. 341, 344, 673 S.E.2d 418, 420 (2009) (citing *State v. Dingle* 376 S.C. 643, 659 S.E.2d 101 (2008)). Furthermore,

> If possible, legislative intent should be found in the plain language of the statute itself. If a 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.

Id. (citing *State v. Gaines*, 380 S.C. 23, 667 S.E.2d 728 (2008)).

We find that the language of S.C. Code Ann. § 17-27-130 (1996) is plain and unambiguous. Section 17-27-130 clearly states that an applicant's "waiver of the attorney client privilege shall be deemed automatic upon the filing of the application alleging ineffective assistance of prior counsel…." In so far as it applies to this case, we find that Petitioner's waiver of the attorney-client privilege was automatic upon the filing of his application for PCR on April 7, 2006. In order to determine the scope of a PCR applicant's waiver pursuant to S.C. Code Ann. § 17-27-130 (1996), the specific allegations made in the initial application are controlling. Due to the automatic nature of this waiver, its scope cannot be whittled down by the subsequent amendment of the application.[2]

Furthermore, § 17-27-130 states that an applicant's waiver is made "to the extent necessary for prior counsel to respond to the allegation." It is clear from the language of this provision that the General Assembly did not intend for the scope of this waiver to be entirely limited or automatically complete. We find that the plain language of § 17-27-130 makes clear that the General Assembly intended for the scope of the automatic waiver to be directly proportional to the breadth of the allegations made in each individual PCR application.

Turning to the facts of this case, upon application, Petitioner waived his attorney-client privilege "to the extent necessary for prior counsel to respond to the allegation[s]" of ineffectiveness. S.C. Code Ann. § 17-27-130 (1996). We find that the particular allegations made in Petitioner's application for PCR were so broad as to effectuate a complete waiver of his attorney-client privilege.

[2] Petitioner amended his application for PCR on May 7, 2007 and May 25, 2007. These amended applications are of no consequence in determining the degree to which Petitioner waived his attorney-client privilege.

Although Petitioner's application alleged many grounds of ineffectiveness, we find that the breadth of three particular allegations constituted a complete waiver of Petitioner's attorney-client privilege. Specifically, Petitioner's application alleges that trial counsel was ineffective because he failed to (1) "investigate the facts and circumstances surrounding the death of the victim," (2) "investigate, develop, and present all available, relevant, and admissible mitigating evidence," and (3) "investigate and present evidence in support of all potential defenses in the guilt and innocence phase." The breadth of these allegations, which encompass in effect the entirety of trial counsel's obligations in presenting a defense, necessitated a review of the entire trial file in order for the AGO, on behalf of trial counsel, to properly "respond to the allegation[s]" in Petitioner's application.

Finally, pursuant to the clear and unambiguous language of § 17-27-130, prior counsel was justified in disclosing the entire trial file for reviewing and copying. Section 17-27-130 states,

> [C]ounsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation.

This provision permits prior counsel, when faced with extremely broad allegations of ineffectiveness, to provide representatives of the State with any information he deems necessary for the defense of his representation. Under the specific facts of this case, prior counsel was justified in making Petitioner's entire trial file available to the AGO.

CONCLUSION

For the foregoing reasons, we rule that Petitioner completely waived his attorney-client privilege pursuant to S.C. Code Ann. § 17-27-130 because

the allegations made in his application for PCR were so broad as to encompass in effect nearly the entire scope of trial counsel's obligations in Petitioner's defense.

WALLER, BEATTY and KITTREDGE, JJ., concur.
PLEICONES, J. dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent, and would require the AGO to return trial counsel's file, and would disqualify the AGO attorneys who viewed that file.

Under our post-conviction relief (PCR) statutes, subject to a limited number of exceptions not applicable here, an applicant must file an application within a one year statute of limitations or be barred from pursuing this form of collateral relief. S.C. Code Ann. §§ 17-27-40 through 50 (2003). The overwhelming majority of these initial applications, including the one at issue here, are filed by the inmate *pro se*. To hold, as does the majority, that the claims made in this uncounseled document determine, forever, the scope of the applicant's waiver of his attorney-client privilege is unsupported by the language of the statute.

The majority's opinion rests on its interpretation of § 17-27-130, entitled "Waiver of attorney-client privilege by allegation of ineffective prior counsel, access to files." In its entirety, this statute provides:

> Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney-client privilege shall be deemed automatic upon the filing of the allegation alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation.

> In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant's prior trial counsel or appellate counsel shall make available to the capital defendant's collateral counsel the complete files of the defendant's trial or appellate counsel. The capital defendant's collateral counsel may inspect and photocopy the files, but the defendant's prior trial or appellate counsel shall maintain custody of their respective files, except as to the material which is admitted into evidence in any trial proceeding.

Reading the first paragraph of the statute, it is my opinion that the automatic waiver of the privilege does not extend to the entire file, but is instead limited to: "oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant,[3] to the extent necessary for prior counsel to respond to the allegation….Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State…to the extent necessary for prior counsel to respond to the allegation." It is noteworthy that while this paragraph makes no mention of counsel's file, but instead explicitly limits the permissible scope of counsel's disclosures to AGO attorneys, it is upon this paragraph of the statute alone that the majority rests its holding.

The second paragraph of the statute does directly reference the attorney's file, and is specifically directed to capital cases such as this. This paragraph requires that the capital defendant's trial and/or appellate attorneys make files available to the defendant's PCR counsel who may inspect and copy the contents but explicitly requires that the original attorneys otherwise retain custody of their files. To hold, as does the majority, that under this statute these attorneys are free to turn over their entire files to the AGO is puzzling in light of the statute's clear directive that the files are to remain in

[3] Note the statutory waiver does not extend to communications between the experts and the defendant's attorney.

the custody of the original attorney, and be made available only to the applicant's attorney. I would not foreclose the possibility that an attorney charged with rendering ineffective assistance may need to rely upon an item in her file as part of her defense, but that is a far cry from copying the entire file and turning it over to the AGO.

When the Court abolished the doctrine of *in favorem vitae*, it did so in large part in reliance upon the legislature's adoption of the Uniform Post Conviction Relief Act. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The decision today to hold that this *pro se* capital defendant has made a wholesale waiver of his attorney-client privilege undermines one of the fundamental tenets upon which the abolition of the ancient doctrine rested, that is, that PCR "safeguards the [capital defendant] and render[s] the protection afforded by *in favorem vitae* surplusage." Id. at 61, 406 S.E.2d 324.

I would reverse the circuit court's order, require that the file be returned to trial counsel, and would disqualify any member of the AGO's staff who has viewed this file or any of its contents. I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

All Saints Parish Waccamaw, a South Carolina Non-profit Corporation; D. Clinch Heyward, Warden for All Saints Parish, Waccamaw; W. Russell Campbell, Warden for All Saints Parish, Waccamaw; Martha M. Lachicotte, Ann Usher Mercer, Vandell Arrington and Rives Kelly, Individually and as Representatives of the Inhabitants of the Waccamaw Neck Region of Georgetown County; and Evelyn Labruce, Individually and as a Descendant of George Pawley; Of Whom W. Russell Campbell in his capacity as Senior Warden of All Saints Church, is also a Defendant by way of Counterclaim, Plaintiffs,

Of Whom All Saints Parish Waccamaw, a South Carolina Non-profit Corporation; D. Clinch Heyward, Warden for All Saints Parish, Waccamaw; W. Russell Campbell, Warden for All Saints Parish, Waccamaw are, Respondents/Appellants,

v.

The Protestant Episcopal Church in the Diocese of South Carolina; The Episcopal Church, a/k/a The Protestant Episcopal Church in the United States of America; Mark Sanford, in his official capacity as the Governor of the State of South Carolina; and John and Jane Doe, as descendants to George Pawley and William Poole, Defendants,

Of Whom The Protestant Episcopal Church in the Diocese of South Carolina; The Episcopal Church, a/k/a The Protestant Episcopal Church in the United States of America are, Appellants/Respondents,

and Mark Sanford, in his official capacity as The Governor of the State of South Carolina; and John and Jane Doe, as descendants to George Pawley and William Poole are, Respondents.

_____

Guerry Green, on behalf of All Saints Parish, Waccamaw, and in his capacity as Senior Warden of the same; Carl Short, on behalf of all of All Saints Parish, Waccamaw, and in his capacity as Junior Warden of the same; and George Townsend, James Chapman, and Edward Mills, on behalf of All Saints Parish, Waccamaw, and in their capacities as Members of the Vestry of the same; The Protestant Episcopal Church in the Diocese of South Carolina and the Right Reverend Edward L. Salmon, Jr., in his capacity as Bishop of the Protestant Episcopal Church in the Diocese of South Carolina, Appellants/Respondents,

v.

W. Russell Campbell, in his capacity as Senior Warden of All Saints Church; D. Clinch Heyward, in his capacity as Junior Warden of All Saints Church; Donald Alford, Butler F. Dargan, Diane Deblock, Robert L. Jones, A.H. (Doc) Lachicotte, David Lane, Lou Paquette, Hugh Patrick and Daniel W. Stacy, in their capacity as Vestry Members of All Saints Church; David E. Grabeman, in his capacity as Treasurer of All Saints Church; All Saints Church, an unincorporated association; All Saints Church, Waccamaw, Inc., a South Carolina Non-profit Corporation; Henry McMaster, in his capacity as Attorney General for the State of South Carolina; Mark Hammond, in his capacity as Secretary of State for the State of South Carolina; and John and Jane Doe, as Unknown Descendants of George Pawley, Defendants,

Of Whom W. Russell Campbell, in his capacity as Senior Warden of All Saints Church; D. Clinch Heyward, in his capacity as Junior Warden of All Saints Church; Donald Alford, Butler F. Dargan, Diane Deblock, Robert L. Jones, A.H. (Doc) Lachicotte, David Lane, Lou Paquette, Hugh Patrick and Daniel W. Stacy, in their capacity as Vestry Members of All Saints Church; David E. Grabeman, in his capacity as Treasurer of All Saints Church; All Saints Church, an unincorporated association; All Saints Church, Waccamaw, Inc., a South Carolina Non-profit Corporation are, Respondents/Appellants,

and Henry McMaster, in his capacity as Attorney General for the State of South Carolina; Mark Hammond, in his capacity as Secretary of State for the State of South Carolina; and John and Jane Doe, as Unknown Descendants of George Pawley are, Respondents.

In Re: All Saints Parish, Waccamaw, a South Carolina Non-profit Religious Corporation.

Appeal from Georgetown County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 26724
Heard March 5, 2009 – Filed September 18, 2009

REVERSED

Benjamin Allston Moore, Jr., Julius H. Hines, David S. Yandle, all of Buist, Moore, Smythe & McGee, and Coming B. Gibbs, Jr., of Gibbs & Holmes, all of Charleston; and David Booth Beers and Heather H. Anderson, both of Goodwin Procter, LLP, of Washington, for Appellant-Respondents.

Attorney General Henry Dargan McMaster, Assistant Attorney General C. Havird Jones, both of Columbia; and Fred B. Newby, of Newby, Sartip, Masel & Casper, of Myrtle Beach, for Respondents.

Henrietta U. Golding and Amanda A. Bailey, both of McNair Law Firm, of Myrtle Beach, for Respondent-Appellants.

C. Mitchell Brown, William C. Wood, Jr., A. Mattison Bogan, all of Nelson, Mullins, Riley & Scarborough, of Columbia, and Lloyd J. Lunceford, of Baton Rouge, for Amicus Curiae.

CHIEF JUSTICE TOAL: This case presents two questions that arise out of a dispute over church property and corporate control: (1) whether the trial court correctly determined that a trust deed, executed in 1745 for the establishment of a Parish in the Waccamaw Neck region

of South Carolina,[1] remains valid; and (2) whether the trial court correctly determined that the vestry representing a minority group of the congregation were the officers of the congregation's corporate entity, All Saints Parish, Waccamaw, Inc.

FACTUAL/PROCEDURAL BACKGROUND

Underlying this appeal are two lawsuits that were consolidated for trial in Georgetown County. The first lawsuit ("the 2000 Action") was a declaratory judgment action filed by All Saints Parish, Waccamaw, Inc. against the Episcopal Church in the United States of America ("ECUSA") and the South Carolina Diocese ("Diocese"). The 2000 Action was precipitated by the Diocese's recording of a notice with the Georgetown County clerk of court by which it purported to put the public on notice that the congregation of All Saints Parish held its property in trust for the Diocese and ECUSA.

After the congregation fractured, the second lawsuit ("the 2005 Action") was filed by a minority faction of the original congregation against its majority which had voted to sever ties with the ECUSA and the Diocese. The minority faction remained loyal to the denominational authorities and was represented by a vestry led by Guerry Green ("the minority vestry"). The majority group was represented by a vestry led by W. Russell Campbell ("the majority vestry"). In the 2005 Action, the minority vestry sought a declaration that they, and not the majority vestry, were the officers of All Saints Parish, Waccamaw, Inc. The 2000 Action and the 2005 Action were consolidated and tried in March 2006. This appeal is from the trial court's order.

The facts relevant to this appeal date to the early eighteenth century. By the Church Act of 1706, the South Carolina Commons

[1] The Waccamaw Neck is a geographical area bounded by the Waccamaw River and Winyah Bay on the west and south, the Atlantic Ocean on the east, and the North Carolina line in the north.

House of Assembly ("Commons House") established the Church of England as the official religion of colonial South Carolina and created the first parishes in the colony. Parishes were regionally defined and served as ecclesiastical and political entities. All Saints Parish, however, was not formed at that time.

In 1734, George Pawley, a member of the Commons House, was appointed by legislative enactment to erect church buildings in the St. John's and the Prince George Parishes. He was "authorized to accept and take any grant or conveyance of any lands within said parishes respectively, to them and their heirs, in trust, for the inhabitants of said parishes." Act No. 567 at § 6, 3 S.C. Stat. 374, 375 (1734). In 1745, Percival and Ann Pawley transferred approximately 60 acres to George Pawley and William Poole. The language of this trust deed ("the 1745 Trust Deed") provided that George Pawley and William Poole were deeded the land "forever in Trust For the Inhabitants On Waccamaw Neck for Use of A Chapel or Church for divine Worship of the Church of England established by Law…". Consideration for this transfer was "the Sum of one hundred pounds current Money of South Carolina."[2] The terms of the 1745 Trust Deed did not bestow any duties upon the trustees, and there is no evidence to suggest that the trustees exercised any duties relative to the 1745 Trust Deed.

On December 10, 1766, the inhabitants of the Waccamaw Neck formally petitioned the Commons House requesting the establishment of their own parish. In 1767, an Act of the Commons House carved out a piece of the Prince George Parish, thus creating a new Parish named All Saints in the Waccamaw Neck region. Subsequently, on January 2,

[2] According to the "Average Earnings Index," one hundred (100) British Pounds in 1745 was worth One Hundred Forty-One Thousand, Eight Hundred Twenty-Five (141,825) British Pounds or Two Hundred Seventy-Seven Thousand, Seven Hundred and Seventy-Eight (277,778) U.S. Dollars in 2007.

1767, the 1745 Trust Deed was recorded in Charleston.[3] By 1774, both George Pawley and William Poole had died. Neither the 1745 Trust Deed nor the trustee's wills named a successor trustee. By all accounts, the property at issue has been actively used as a place of worship since at least 1767, if not before.

The relationship between South Carolina's colonial parishes and the Diocese of London was severed during the Revolutionary War. Nonetheless, the South Carolina General Assembly re-established All Saints Parish in 1778. Even though the Church of England was formally disestablished as the official religion of South Carolina in 1790, the property at issue continued to be used as a place of worship.

In 1820, the South Carolina General Assembly passed an Act which officially incorporated the wardens and the vestry of All Saints Parish. The Act expressly enabled the congregation to "have, hold, take and receive" both real and personal property. The congregation's incorporation was only effective for a period of fourteen years. In 1839, the South Carolina General Assembly renewed the incorporation for an additional fourteen years and, in 1852, the General Assembly did so indefinitely.

An 1880 Act of the South Carolina General Assembly established that title to any property belonging to inactive Episcopal corporations, churches, or dormant parishes was held in trust by the Trustees of the South Carolina Episcopal Diocese. The record makes clear that in 1902, due to the 1880 Act, the All Saints congregation became concerned over the status of their incorporation and the status of title to church property. Evidence in the record also indicates that this concern was exacerbated by the destruction of certain property records in a "great storm."

[3] At the time, Charleston was the only place in South Carolina at which land instruments could be recorded.

In May 1902, as a result of its concern, the congregation asked the Diocese to "cooperate with [them] in having the charter of th[e] Parish renewed." The Diocese's Chancellor responded positively and not only suggested that the congregation formally incorporate with the Secretary of State as a South Carolina eleemosynary corporation, but also indicated that the Diocese would execute a quit-claim deed transferring to the congregation any interest the Diocese may have had in the All Saints property.

Therefore, at the direction of the Diocese, the congregation re-incorporated in 1902 under the name "All Saints Parish, Waccamaw, Inc." Shortly thereafter, in 1903, the Trustees of the Diocese signed a quit-claim deed (hereinafter the "1903 Quit-Claim Deed") transferring any interest the Diocese may have had in the congregation's property to All Saints Parish, Waccamaw, Inc. The Diocese did not retain any interest in the property, reversionary or otherwise. The 1903 Quit-Claim Deed was recorded in the Georgetown County public records on May 30, 1903.

In 1987, the Diocese amended its constitution and canons so as to include the "Dennis Canon." The Dennis Canon purports to declare a trust, in favor of the ECUSA and the Diocese, on all real and personal property held by any congregation.[4] No such property canons existed in 1902 when the Diocese directed the congregation to incorporate, or when it executed the 1903 Quit-Claim Deed in favor of the newly created All Saints Parish, Waccamaw, Inc.

In August 2000, due to concern over the status of title to its property, the All Saints congregation conducted a formal title examination. The examiner concluded that the 1745 Trust Deed and

[4] Presumably, the Dennis Canon was enacted in reaction to the Supreme Court of the United States's opinion in *Jones v. Wolf*, 443 U.S. 595 (1979). In *Jones*, the Supreme Court established that the First Amendment did not require a civil court to defer completely to ecclesiastical authorities when adjudicating church disputes.

the 1903 Quit-Claim Deed were the only recorded deeds pertaining to the congregation's property. Soon thereafter, in September 2000, the Diocese recorded a notice in Georgetown County purporting to declare that the congregation held its property, pursuant to the Dennis Canon, in trust for the benefit of the ECUSA and the Diocese ("the 2000 Notice"). Because of the 2000 Notice and the 1745 Trust Deed, the congregation was unable to acquire title insurance.

In October 2000, the congregation, in the name of its corporate entity, All Saints Parish, Waccamaw, Inc., filed a declaratory judgment action against the ECUSA and the Diocese in which it sought an order declaring that the congregation held title to its property or, in the alternative, held its property in trust for the benefit of the inhabitants of the Waccamaw Neck pursuant to the 1745 Trust Deed. The Diocese and the ECUSA answered and counterclaimed asserting that the property was subject to their canons and the 2000 Notice.

By consent order, a guardian *ad litem* was appointed to represent the interests of John and Jane Doe, the unknown heirs of the original trustees to the 1745 Trust Deed, George Pawley and William Poole. The Does and the congregation filed joint motions for summary judgment. The motions were granted and, pursuant to the 1745 Trust Deed, the trial court found that the Does held legal title to the property at issue and that the inhabitants of the Waccamaw Neck held equitable title as beneficiaries to the 1745 Trust Deed. The matter was remanded to the probate court for further fact finding with respect to the identity of the parties to the 1745 Trust Deed.

The ECUSA and Diocese appealed. The court of appeals found that there were genuine issues of material fact concerning whether the trust created by the 1745 Trust Deed failed when the Church of England ceased to be established as the official religion of South Carolina and whether the Statute of Uses operated to execute the trust. Accordingly, the court of appeals remanded the case to the circuit court. *All Saints Parish, Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 358 S.C. 209, 595 S.E.2d 253 (Ct. App. 2004), cert denied, July 2005.

In August 2003, prompted by events that are not relevant here, the congregation appointed a committee to recommend whether it should leave the Diocese and the ECUSA. On December 9, 2003 the committee recommended that the corporate charter of All Saints Parish, Waccamaw, Inc. be amended so as to delete references to the canons and rules of the Diocese and the ECUSA. Specifically, the committee recommended that "Article Fourth"[5] of the 1902 Certificate of Incorporation be amended to read:

> The purpose of All Saints Parish, Waccamaw, Inc., also known as All Saints Church, is to create an environment in which all people and especially the inhabitants of the Waccamaw Neck come to know Jesus Christ: to Love Him, to Worship Him, to Learn of Him, to Proclaim Him, and to Minister in His Name.

Furthermore, the committee recommended that the congregation additionally amend its charter so as to affirmatively sever its affiliation with the ECUSA and the Diocese.

On December 17, 2003, after learning of the proposed amendments, Edward L. Salmon, Jr., Bishop of the Diocese, sent a letter to the congregation's wardens and each member of the vestry stating that the congregation's status was reduced from that of a parish to a "mission." In his letter, Bishop Salmon also declared that the members of the congregation's vestry had abandoned their offices.[6]

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[5] Prior to the amendment, "Article Fourth" read: "The purpose of the said proposed Corporation is to conduct Religious services, and prosecute religious works under the forms and according to the canons and rules of the protestant Episcopal Church, and as a component part of the Diocese of said Church in South Carolina."

[6] In his letter, Bishop Salmon did not opine as to the status of the congregation's members in so far as it concerned their ability to meet and vote on corporate action.

On December 21, 2003, sixty members of the congregation signed a "Request for Special Congregational Meeting." The purpose of this meeting was to discuss and vote on whether the congregation should take the committee's recommendations and vote to amend its charter so as to change its corporate purpose and sever its affiliation with the ECUSA and the Diocese. Notice of the meeting was sent to the congregation's members on December 23, 2003.

On January 8, 2004, five-hundred and seven of the congregation's members attended the Special Congregational Meeting and more than a two-thirds majority voted to amend the congregation's 1902 Certificate of Incorporation adopting the aforementioned amendment to "Article Fourth." Additionally, more than a two-thirds majority voted to amend the charter so as to withdraw from the Diocese and the ECUSA, but remain part of the Anglican Communion by affiliating themselves with the Episcopal Church of Rwanda and its Anglican Mission in America.[7] Accordingly, the corporate secretary for All Saints Parish, Waccamaw, Inc. prepared and signed the Articles of Amendment to the 1902 Certificate of Incorporation. These Articles of Amendment were filed in the South Carolina Secretary of State's office on January 15, 2004.

On January 9, 2005, a small group of members who remained loyal to the Diocese and the ECUSA met with Bishop Salmon and purported to elect a new vestry for the congregation – the minority vestry. Subsequently, on January 16, 2004, the majority group of members re-elected the vestry removed by the Bishop – the majority vestry.

On January 20, 2005, the minority vestry filed the 2005 Action against the majority vestry alleging that they forfeited office by recommending that the congregation sever its affiliation with the

[7] The Anglican Communion is the worldwide body of Episcopal Dioceses. The Episcopal Church of Rwanda is the Rwandan equivalent of the United States' ECUSA.

ECUSA and the Diocese. The minority vestry sought a declaration that they were All Saints Parish, Waccamaw, Inc.'s true officers. Additionally, they sought the return of the congregation's real and personal property. The Diocese and Bishop Salmon joined in the action. Subsequently, the trial court consolidated the 2000 Action and the 2005 Action.

The consolidated cases were tried and, after each of the parties presented its case, the trial court decided both underlying actions as a matter of law. With respect to the 2000 Action, the trial court held that, pursuant to the terms of the 1745 Trust Deed, legal title to the real property remained in the unknown Heirs of George Pawley and William Poole, while beneficial title was possessed by the "inhabitants of Waccamaw Neck."[8] As to the 2005 Action, the trial court held that members of the minority vestry were the true officers of All Saints Parish, Waccamaw, Inc. In its original bench order, however, the trial court declined to eject the majority group from the real property because the identity of the parties to the trust created by the 1745 Trust Deed was yet to be determined by the probate court. Nonetheless, upon a motion for reconsideration, the trial court ordered the Secretary of State to cancel the Articles of Amendment filed by the majority group, ejected the majority vestry from the property it occupied which was not granted to the congregation by the 1745 Trust Deed, and restrained the majority vestry from acting as the officers of All Saints Parish, Waccamaw, Inc.

QUESTIONS PRESENTED

This Court granted certiorari to review the decision of the trial court and the parties raise the following issues for review:

I. Did the trial court err in holding that the trust created by the 1745 Trust Deed remains valid?

[8] The trial court made its ruling on the 2000 Action pursuant to Rule 39(b), SCRCP.

II. Did the trial court err in holding that members of minority vestry were the corporate officers of All Saints Parish, Waccamaw, Inc.?

STANDARD OF REVIEW

Because the trial court made its ruling on the 2000 Action pursuant to Rule 39(b), SCRCP, the standard of review with respect to the 2000 Action is the same as that for an action at law tried without a jury. In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is no evidence to support the court's finding. *Jowers v. Hornsby*, 292 S.C. 549, 552, 357 S.E.2d 710, 711 (1987).

The standard of review for the grant of a directed verdict applies to the review of the 2005 Action. When reviewing a denial of a motion for directed verdict, this Court applies the same standard as the trial court. *Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc.*, 374 S.C. 171, 175, 648 S.E.2d 585, 588 (2007). In ruling on a motion for a directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. *Hurd v. Williamsburg County*, 363 S.C. 421, 426, 611 S.E.2d 488, 491 (2005).

LAW/ANALYSIS

In this case, we are called upon to adjudicate two disputes. The 2000 Action is a dispute between a congregation and its denomination over title to church property. The 2005 Action is a dispute among the congregation's members over corporate control. Because church disputes are very often prompted by disagreements over religious doctrine and belief, the civil courts in this country have addressed them carefully, keeping the First Amendment in mind. The decisions of the Supreme Court of the United States concerning church dispute litigation make clear that there is no constitutionally prescribed rule for a civil court's disposition of such matters. Nonetheless, there is a general constitutional command, based in the First Amendment,

mandating that civil courts to "decide church…disputes without resolving underlying controversies over religious doctrine." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976).

Within the context of this general constitutional command, the Supreme Court of the United States has expressly approved two methods for a civil court's resolution of church disputes. These approaches have become known as the "deference approach" and the "neutral principles of law approach." We hereby explicitly reaffirm that, when resolving church dispute cases, South Carolina courts are to apply the neutral principles of law approach as approved by the Supreme Court of the United States in *Jones v. Wolf*, 443 U.S. 595 (1979), and expressed by this Court in *Pearson v. Church of God*, 325 S.C. 45, 478 S.E.2d 849 (1996). The following context is necessary for a clear understanding of this rule and its application to the facts presented by this case.

The Supreme Court of the United States first approved the "deference approach" in 1871. *See Watson v. Jones*, 80 U.S. 679 (1871). Under this approach, a court must only determine whether a church is "congregational" or "hierarchical" in nature.[9] If the church is congregational, the court will resolve the dispute by deferring to a majority of the congregation. However, if the congregation at issue is part of a hierarchical organization, the court will defer to the decision of the ecclesiastical authorities.

Because the deference approach was, for a long time, the only approach explicitly approved as constitutional by the Supreme Court of the United States, this Court has issued a handful of opinions that are

[9] "A congregational church is an independent organization, governed solely within itself…, while a hierarchical [or ecclesiastical] church may be defined as one organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." *Seldon v. Singletary*, 284 S.C. 148, 149, 326 S.E.2d 147, 148 (1985).

consistent with the deference approach. *See Bramlett v. Young*, 229 S.C. 519, 93 S.E.2d 873 (1956) (holding that a minority group of a local, hierarchical Presbyterian church's members were entitled to ownership and control of church property because they were recognized as the true congregation by the hierarchical authorities); *Adickes v. Adkins*, 264 S.C. 394, 215 S.E.2d 442 (1975) (holding that where a majority of a local Presbyterian congregation voted to sever its connection with its hierarchical authorities, the minority faction which the hierarchical authorities recognized as the true congregation was entitled to control of the church properties); *Seldon v. Singletary*, 248 S.C. 148, 326 S.E.2d 147 (1985) (holding that a local church was part of a hierarchical denomination, thus, the minority group of members recognized by the hierarchical authorities were entitled to possession and control of church property). In each of these cases we applied the deference approach and analyzed the issues by determining whether the church at issue was congregational or hierarchical in nature and deferred accordingly. This short analysis disposed of those cases and, in so doing, these decisions complied with the First Amendment's command that "civil courts…decide church property disputes without resolving underlying controversies over religious doctrine."[10] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976) quoting *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969).

The deference approach, which the Supreme Court of the United States never explicitly held was the only constitutional method of adjudicating church disputes, is rigid in its application and does not give efficacy to the neutral, civil legal documents and principles with which religious congregations and denominations often organize their affairs. Thus, throughout the country, other approaches to the resolution of church disputes have slowly developed.

[10] This command applies to state courts by way of the Fourteenth Amendment.

In 1979, the Supreme Court of the United States expressly approved the use of a second method of resolving church disputes. In *Jones v. Wolf*, the Supreme Court affirmed a Georgia court's use of the neutral principles of law approach to resolve church disputes. 443 U.S. at 603 (holding that a state is constitutionally entitled to adopt the neutral principles of law approach as a means of adjudicating church disputes). This method "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id*. at 603. Church disputes that are resolved under the neutral principles of law approach do not turn on the single question of whether a church is congregational or hierarchical. Rather, the neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes.

A clear recitation of the neutral principles of law approach as adopted by this Court was enunciated in *Pearson v. Church of God*. In *Pearson*, we articulated the rule that South Carolina civil courts must follow when adjudicating church dispute cases. We reaffirm and more fully explain this rule here. The *Pearson* rule provides:

> (1) Courts may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration; (2) courts cannot avoid adjudicating rights growing out of civil law; (3) in resolving such civil law disputes, courts must accept as final and binding the decision of the highest religious judicatories as to religious law, principle, doctrine, discipline, custom, and administration.

325 S.C. at 53, 478 S.E.2d at 854.

The *Pearson* rule establishes that where a civil court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so. Nonetheless, where a civil court is presented an issue which is a question of religious law or

doctrine masquerading as a dispute over church property or corporate control, it must defer to the decisions of the proper church judicatories in so far as it concerns religious or doctrinal issues. *See Serbian Eastern Orthodox Diocese*, 426 U.S. at 709 (finding that the controversy before the Court "essentially involve[d] not a church property dispute, but a religious dispute the resolution of which…is for ecclesiastical and not civil tribunals.").

It is with the *Pearson* rule in mind that we now turn to the two issues before us in this appeal. We remain mindful of the First Amendment and its protections of religious liberty. Nonetheless, adjudication of this matter does not require us to wade into the waters of religious law, doctrine, or polity. We find that the Diocese and ECUSA organized their affairs with All Saints Parish in a manner that makes the complete resolution of the questions presented achievable through the application of neutral principles of property, trust, and corporate law.

I. Property Ownership

Turning to the 2000 Action, the trial court held that the trust created by the 1745 Trust Deed remained valid and that legal title is held by the unknown heirs of George Pawley and William Poole while the beneficial title is held by the "Inhabitants of Waccamaw Neck." We disagree.

Based upon an application of the relevant neutral principles of law, we hold that the trial court erred in determining that the trust created by the 1745 Trust Deed remains valid. Further, we hold that this trust was executed by the Statute of Uses and that title to the property is held by the congregational corporate entity – All Saints Parish, Waccamaw, Inc.

A. The Statute of Uses

It is well established that "where there is a conveyance to one for the use of another, and the trustee is charged with no duty which

renders it necessary that the legal estate should remain in him to enable him properly to perform such duty, the Statute of Uses executes the use and carries the legal title to the [beneficial] use." *Faber v. Police*, 10 S.C. 376, 389-90 (1877).[11] Further, in a trust where the trustees have no duties, "the legal and equitable titles are merged in the beneficiaries and the beneficial use is converted into legal ownership." *Johnson v. Thornton*, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975). Nonetheless, the Statute of Uses will not operate to execute a trust where there is no beneficiary capable of taking legal title. *See Bowen v. Humphreys*, 24 S.C. 452, 455 (1886) (holding that the Statute of Uses cannot execute a trust where there is no identifiable beneficiary capable of holding title).

Therefore, there are two questions that must be asked in order to determine if the trust created by the 1745 Trust Deed was executed by the Statute of Uses: (1) whether the trustees had any duties relative to their office, and (2) whether there is a beneficiary capable of taking title. We hold that the trustees of this trust did not have any duties relative to their office and that the congregation of All Saints Parish was the intended beneficiary and, upon its formation, was clearly capable of taking title.

1. Trustees' Duties

We hold that the 1745 Trust Deed did not impose any duties upon the trustees, George Pawley and William Poole. Pawley and Poole were colonial appointees given the authority to accept conveyances of land for the purpose of establishing parishes. When named trustees to the 1745 Trust Deed, they were acting as appointees of the colony, not as trustees with traditional duties. This conclusion is supported by the relevant legal realities of that time. The court of appeals in *All Saints* correctly stated that "in colonial times, churches could not be

[11] England enacted the Statute of Uses during the reign of Henry VIII. 27 Henry VIII ch. 10 (1535). It was adopted by the South Carolina Commons House of Assembly in 1712. Act No. 322, 2 S.C. 401 (1712) at 466.

recognized by the government until they owned property, and they could not own property until they had been officially recognized." *All Saints*, 358 S.C. at 225, 595 S.E.2d at 262. "As such, a colonial practice arose in which a settlor placed property in trust for a congregation until such a time as the government recognized the church." *Id*. (citing *Town of Pawlett*, 9 U.S. (Cranch) at 330 (holding "no parish church…could have legal existence until consecration and consecration was expressly inhibited unless a suitable endowment of land.")). Pawley and Poole did not have any duties relative to the trust, but simply acted as custodians of the property at issue until All Saints Parish was officially established. This conclusion is supported by language of the 1745 Trust Deed which did not expressly impose any duties upon them, nor is there any evidence in the record which suggests that either of the trustees performed any acts relative to their office as trustee.

Further, Percival and Ann Pawley were not traditional settlors of a trust. Rather, they sold the property at a price far above nominal value. They were clearly sellers of property to colonially appointed commissioners for the establishment of a parish, purposes specified by the colonial government.

2. Beneficiary Capable of Taking Title

Holding that the trustees to the 1745 Trust Deed had no duties, we now analyze whether there was a beneficiary capable of taking title. According to the terms of the 1745 Trust Deed, the beneficiaries were "the Inhabitants of Waccamaw Neck." This term is ambiguous and parole evidence should be used to ascertain its meaning. *See Shelley v Shelley*, 244 S.C. 598, 606, 137 S.E.2d 851, 855 (1964)(holding that parole evidence is admissible so long as its admission is merely intended to explain and apply what the settlor has written).

Based on the following application of parole evidence, we hold that the term "Inhabitants of Waccamaw Neck" was used by the settlors of the trust as an expression referring to the yet-to-be-created All Saints Parish. Early South Carolina colonial statutes used the term

"inhabitants" when referring to the colony's parishes. For instance, The Church Act of 1706 contains multiple uses of the term "inhabitants" referring to parishes. *See* Act No. 256 at §§ 7, 10, 12, 13, 19, 21, 22, 29, 30, 35, 2 S.C. Stat. 284-89 (1706). Additionally, this understanding of the term is supported by the historical context in which the 1745 Trust Deed was executed. In 1745, the inhabitants of Waccamaw Neck were parishioners of Prince George's Parish. They were clamoring for the establishment of their own Parish congregation and had already been worshipping on the land at issue for approximately eight years. It was within this historical context that the 1745 Trust Deed was executed in expectation that the subject property would be for the benefit of the yet-to-be formed All Saints Parish.

Additionally, according to the express terms of the original Church Act of 1706, a colonial Parish could hold title to land. The Act specifically empowered commissioners "to take up by grant from the Lords Proprietors, or purchase the same for them, or any other person, and have, taken and receive so much land as they think necessary for the several sites of the several churches." Act No. 256 at § 8, 2 S.C. Stat. 284. Thus, when the Church Act of 1767 formed All Saints Parish, the Statute of Uses operated to execute the trust created by the 1745 Trust Deed and title vested in the intended beneficiary, the congregation of All Saints Parish.

B. 1903 Quit-Claim Deed

Moreover, the 1903 Quit-Claim Deed makes clear that All Saints Parish, Waccamaw, Inc. holds title to its property. The All Saints Parish congregation was officially incorporated in 1820. In 1902, due to doubt over the status of the congregation's incorporation, the Diocese directed it to re-incorporate as "All Saints Parish, Waccamaw, Inc." Shortly thereafter, in order to settle any doubt as to the status of title to Parish property, the Diocese voluntarily executed the 1903 Quit-Claim deed. The 1903 Quit-Claim Deed makes clear that title to the property at issue is currently held by the congregation's corporate entity – All Saints Parish, Waccamaw, Inc.

C. 2000 Notice and Dennis Canon

Furthermore, we hold that neither the 2000 Notice nor the Dennis Canon has any legal effect on title to the All Saints congregation's property. A trust "may be created by either declaration of trust or by transfer of property…." *Dreher v. Dreher*, 370 S.C. 75, 80, 634 S.E.2d 646, 648 (2006). It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another. The Diocese did not, at the time it recorded the 2000 Notice, have any interest in the congregation's property. Therefore, the recordation of the 2000 Notice could not have created a trust over the property.

For the aforementioned reasons, we hold that title to the property at issue is held by All Saints Parish, Waccamaw, Inc., the Dennis Canons had no legal effect on the title to the congregation's property, and the 2000 Notice should be removed from the Georgetown County records.

II. Corporate Control

Turning to the 2005 Action, we find that the trial court applied the deference approach, determined that the congregation was part of a hierarchical organization, and deferred to the Diocese's ecclesiastical authority's determination that members of the minority vestry were the true officers of All Saints Parish, Waccamaw, Inc. We disagree.

While it is true that "[c]ourts may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration," *Pearson*, 325 S.C. at 53, 478 S.E.2d at 854, the resolution of the 2005 Action does not require such judicial meddling. The 2005 case turns on a determination of whether the Articles of Amendment approved by the members of All Saints Waccamaw, Inc. on January 8, 2004 were adopted in compliance with the South Carolina Non-Profit Act. *See* S.C. Code Ann. § 33-31-1001, et. seq. We find that the Articles of Amendment were lawfully adopted and

effectively severed the corporation's legal ties to the ECUSA and the Diocese. Therefore, we find that the members of the majority vestry are the true officers of All Saints Parish, Waccamaw, Inc.

Pursuant to the South Carolina Non-Profit Act, a religious corporation may amend its Articles of Incorporation to add or change a provision permitted in the articles or delete a provision not required in the articles. S.C. Code Ann. § 33-31-1001. Amendment to a corporation's articles, to be adopted, must be approved by (1) the board of directors, (2) the members "by two-thirds of the votes cast or a majority of the voting power, whichever is less," and (3) any person whose approval is required by the Articles of Incorporation. S.C. Code Ann. § 33-31-1003(a)(1-3). The passage of the Articles of Amendment approved by the congregation on January 8, 2004 complied with all three of these requirements.

First, the Articles of Amendment were approved by the board of directors. On December 8, 2003, while still in good standing with the Diocese, the majority vestry, acting as the corporation's board of directors, approved the Articles of Amendment at issue here. Thus, the passage of the Articles of Amendment met the requirements of S.C. Code Ann. § 33-31-1003(a)(1).

Second, the Articles of Amendment were approved by the members of All Saints Parish, Waccamaw, Inc. by two-thirds of the votes cast. Five hundred and seven members of All Saints Parish, Waccamaw, Inc. were present at the January 8, 2004 meeting which was called to discuss and vote upon the Articles of Amendment. Of the five hundred and seven members present, four hundred and sixty-four votes were cast in favor of amending the Articles of Incorporation. Therefore, more than nine-tenths of the votes cast were in favor of the amendments, clearly more than the two-thirds statutorily required. There is no evidence in the record to suggest that the members present and voting were not in good standing at the time of the vote. Thus, the passage of the Articles of Amendment clearly met the requirements of S.C. Code Ann. § 33-31-1003(a)(2).

Finally, nothing in the All Saints Parish, Waccamaw, Inc. by-laws or the Constitutions and Canons of the ECUSA or Diocese requires third-party approval for amendments to the congregation's corporate charter, therefore the congregation's adoption of the Articles of Amendment complied with the requirements of S.C. Code Ann. § 33-31-1003(a)(3). The statutory provisions pertaining to a religious corporation's amendment of its corporate charter were amended in 1994 so as to add the option of third-party approval. *See* 1994 S.C. Acts 384. There is no evidence in the record that, since that time, the Diocese has ever attempted to gain approval power over amendments to the All Saints Parish, Waccamaw, Inc. corporate charter.

The facts presented by this case demonstrate that the congregation, in compliance with relevant statutory provisions and applicable bylaws, passed the Articles of Amendment, thus removing any reference to the ECUSA and Diocese and explicitly severing any legal relationship with those organizations. Therefore, through the application of neutral principles of law, it is clear to us that the true officers of All Saints Parish, Waccamaw, Inc. are the members of the majority vestry.

CONCLUSION

For the foregoing reasons, we reverse the trial court's decision with respect to both the 2000 Action and the 2005 Action.

WALLER, BEATTY, JJ., Acting Justice James E. Moore and Acting Justice Perry M. Buckner, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Hollman, Respondent,

v.

Dr. Jonathon Woolfson, individually; TLC Laser Eye Centers (Piedmont/Atlanta) LLC; TLC The Laser Center (Institute), Inc; Dr. Michael A. Campbell, individually; Optical Solutions, Inc.; and Optical Solutions of Bluffton, LLC, Defendants,

of whom Dr. Jonathan Woolfson, TLC The Laser Center (Institute), Inc., TLC Laser Eye Centers (Piedmont/Atlanta) LLC are Petitioners.

And

Danielle Hollman, Respondent,

v.

Dr. Jonathon Woolfson, individually; TLC Laser Eye Centers (Piedmont/Atlanta) LLC; TLC The Laser Center (Institute), Inc; Dr. Michael A. Campbell, individually; Optical Solutions, Inc.; and Optical Solutions of Bluffton, LLC, Defendants,

of whom Dr. Jonathan Woolfson, TLC The Laser Center (Institute), Inc., and TLC Laser Eye Centers (Piedmont/Atlanta) LLC are Petitioners.

And

George E. Carter, Jr., and Jean Carter, Respondents,

v.

TLC Laser Eye Center (Institute), Inc. f/k/a TLC The Laser Center (Piedmont), Inc., Petitioner.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 26725
Submitted September 2, 2009 – Filed September 21, 2009

VACATED

W. Howard Boyd, Jr., Ronald G. Tate, Jr., and J. Matthew Whitehead, of Gallivan, White & Boyd, PA, of Greenville, for Petitioners TLC The Laser Eye Center (Institute), Inc. and TLC Laser Eye Centers (Piedmont/Atlanta) LLC; George C. Beighley

and Mason A. Summers, of Richardson Plowden & Robinson, P.A., for Petitioner Woolfson.

Douglas F. Patrick and Stephen R.H. Lewis, of Covington, Patrick Hagins, Stern & Lewis, P.A., of Greenville; James Walter Fayssoux, Jr., and Paul S. Landis, of Anderson Fayssoux & Chasteen, of Greenville, for Respondents.

PER CURIAM: Petitioners have filed a petition for a writ of certiorari seeking review of an order of the circuit court allowing respondents to contact nonparty patients of petitioners. We grant the petition, dispense with further briefing, and vacate the order of the circuit court.

This matter involves three actions filed against petitioners for medical malpractice, fraud, and breach of contract arising out of LASIK eye surgeries. By order dated November 14, 2008, the circuit court compelled petitioners to respond to respondents' discovery requests, including the production of the medical records of several nonparty patients treated at petitioners' facilities. At the same time, a Protective Order was issued to prohibit the use of confidential information obtained through the medical records and to prohibit any person from contacting the nonparty patients or their medical providers. Petitioners complied with the orders and provided unredacted copies of the medical records of the nonparty patients.

On February 17, 2009, respondents filed a motion to modify the Protective Order to allow them to contact and interview nonparty patients of petitioners whose identity and medical records were disclosed pursuant to the November 14th order. By order dated April 21, 2009, the circuit court found respondents were entitled to interview the nonparty patients subject to the privacy safeguards set forth in the Protective Order.

Petitioners first sought a writ of certiorari to review the April 21st order. This Court granted the petition for a writ of certiorari and remanded

the matter to the circuit court to address whether the interviews with the nonparty patients were necessary to respondents' claims. *Hollman v. Woolfson*, Op. No. 2009-MO-025 (S.C. Sup. Ct. filed May 28, 2009).

On remand, the circuit court found the interviews were necessary for respondents' fraud cause of action, Unfair Trade Practices Act (UTPA) cause of action, and in order for respondents to meaningfully respond to petitioners' defenses of the statute of frauds and the statute of repose. Petitioners now seek another writ of certiorari to review the decision of the circuit court.

A writ of certiorari may be issued to review a discovery order where exceptional circumstances exist. *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009). This matter presents exceptional circumstances which warrant the issuance of a writ of certiorari. Allowing the interviews will moot any claim petitioners could raise on appeal that the discovery was erroneously allowed. In addition, the privacy rights of patients is an issue of significant public interest, and issues involving the release of patient information in discovery is arising more often in the courts. Accordingly, we grant the petition for a writ of certiorari and dispense with further briefing.

On certiorari, this Court will review only errors of law and will not review factual findings unless wholly unsupported by the evidence. *S.C. Bd. of Exam'rs in Optometry v. Cohen*, 256 S.C. 13, 180 S.E.2d 650 (1971). A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989).

Rule 26(b)(1), SCRCP, provides, unless otherwise limited by order of the court, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." If the discovery

process threatens to become abusive or create a particularized harm to a litigant or third party, the trial judge may issue an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense." Rule 26(c), SCRCP; *Hamm v. S.C. Pub. Serv. Comm'n,* 312 S.C. 238, 439 S.E.2d 852 (1994). If a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is "relevant and necessary" to the case. *Laffitte v. Bridgestone Corp.*, *supra; Hamm v. S.C. Pub. Serv. Comm'n*, *supra*. In determining whether a protective order is necessary, the trial judge is required to weigh the factors of whether the information sought is "relevant and necessary" evidence against any particularized harm the opposing party may suffer. *Laffitte v. Bridgestone Corp., supra; Hamm v. S.C. Pub. Serv. Comm'n*, *supra.* In determining whether information is necessary, the party seeking the information must "demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *Laffitte v. Bridgestone Corp.*, 674 S.E.2d at 163. The trial court must determine whether there are reasonable alternatives available to discover the information. *Id.*

As to the requirement of particularized harm, no protective device can limit the invasion of the nonparty patients' privacy once contact with them is permitted. The nonparty patients have a valid and legitimate expectation that their medical information will remain confidential which outweighs respondents' intent to use this personal information to buttress their claims by showing a propensity by petitioners for malpractice. Petitioners have shown particularized harm to the nonparty patients which will arise if the interviews are permitted. Both the State and Federal government have recognized the importance of the privacy rights of patients. Therefore, respondents must show the information sought from the interviews is relevant and necessary to the case.

As to the requirement that the information sought be relevant, this Court has held the information must be specifically relevant to the issues involved in the litigation, not merely relevant to the subject matter of the litigation. *Lafitte v. Bridgestone Corp. supra.*

The circuit court judge found respondents' "methodology by which [they have] restricted its interview requests provides a substantial basis for the relevancy." He found "the ability to interview [the nonparty patients] and discuss their individual experiences at TLC along with those of [respondents] is relevant under Rule SCRCP 26 [sic] and permissible except to the extent that good cause exists to restrict discovery of this information and these witnesses." The judge further found the information sought was directly related to the issues central to respondents' malpractice claims. He stated the discovery of other patients with problems and treatment similar to respondents' problems is clearly relevant since a central issue in the malpractice claims is "the applicable standard of care as it evolved during and after the time of [respondents'] surgeries."

A claim for malpractice requires a showing of the standard of care, a breach of the standard of care, proximate cause, and damages. *Doe v. Am. Red Cross Blood Servs.*, 297 S.C. 430, 377 S.E.2d 323 (1989). The standard of care which must be observed by a physician is that of an average, competent practitioner acting in the same or similar circumstances. *Id.*

The evidence relating to treatment of the nonparty patients is irrelevant to respondents' negligence claims in that it cannot be used to show petitioners breached the standard of care with a particular patient. Accordingly, the circuit court erred in finding the interviews with the nonparty patients were relevant to the causes of action for malpractice. Whether petitioners breached the standard of care with any patients other than respondents is irrelevant to whether petitioners were negligent in their treatment of respondents.

A cause of action for fraud requires: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of the falsity of the representation or reckless disregard of its truth or falsity; (5) the intent that the representation be acted on; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the truth of the representation; (8) the hearer's right to rely on the representation; and (9) the hearer's consequent and proximate injury. *Schnellmann v. Roettger*, 373 S.C. 379, 645 S.E.2d 239 (2007).

There is no evidence that any of the nonparty patients were victims of fraud. The treatment received by the nonparty patients is irrelevant to respondents' causes of action for fraud. Whether other patients were similarly treated does not prove any of the elements required to show fraudulent conduct by petitioners toward respondents.

To establish a cause of action under the UTPA, the plaintiff must prove unfair or deceptive acts or practices in the conduct of any trade or commerce. S.C. Code Ann. § 39-5-20(a) (1985). The unfair or deceptive act or practice must affect the public interest. *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461 (2004). An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Id.* The potential for repetition may be proven by showing: (1) the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) the defendant's procedures created a potential for repetition of the unfair and deceptive acts. *Id.*

Although evidence of petitioners' treatment of nonparty patients could be relevant for the UTPA cause of action, as discussed below, the evidence is not necessary for respondents to establish that cause of action.

In determining whether information is necessary, the party seeking the information must "demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat."

Laffitte v. Bridgestone Corp., 674 S.E.2d at 163. The trial court must determine whether there are reasonable alternatives available to discover the information. *Id.*

The circuit court found that respondents allege petitioners engaged in a corporate-wide scheme to conceal the harm done to respondents and other patients and to delay the disclosure of crucial information beyond the applicable statutes of limitations and/or repose. The judge found the information sought from other patients is necessary because the alleged scheme is based on the institutional quality of petitioners' knowledge of the falsity of their representations and their knowledge that the representations would be relied on by a significant number of patients. However, the circuit court failed to make specific findings as to how the lack of information would impair respondents' case.

Respondents may pursue their claims against petitioners without interviewing petitioners' nonparty patients. Respondents failed to demonstrate with specificity what information they seek or how the lack of interviews with the nonparty patients will impair the presentation of their case to the extent that an unjust result is a real threat. Further, there is no evidence that there are no other reasonable alternatives available to respondents to discover the information they seek from the nonparty patients.

The circuit court committed an abuse of discretion in determining the interviews with the nonparty patients were necessary. Petitioners' treatment of other patients is not necessary to establish any element of respondents' causes of action. In fact, no information obtained in the interviews could establish whether petitioners breached the standard of care when treating respondents or committed fraud on respondents. As to the UTPA cause of action, the circuit court did not make a specific finding as to exactly how the lack of information obtained from the interviews would impair respondents' presentation of the merits of that cause of action or that there were no reasonable alternatives available to discover the information. *Laffitte v. Bridgestone Corp., supra*. Accordingly, the record does not

support the finding that the interviews are necessary for the UTPA cause of action.

Further, it would be inequitable to allow respondents to obtain nonparty patient information from petitioners with the understanding the patients would not be contacted, only to subsequently permit respondents to contact the patients. Had the provision of the Protective Order prohibiting respondents from contacting petitioners' patients not been included, there is a possibility petitioners would not have disclosed the patient records, would have sought to redact the records, and/or would have sought review of the order requiring the disclosure by writ of certiorari or by refusing to comply with the order and appealing a contempt citation. Therefore, the order of the circuit court allowing respondents to interview the nonparty patients is

VACATED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Eddie Wayne Eldridge, Charles Louis Beaudrot, Russie Beaudrot Young, Bernard H. Padgett, Homer Charles Walker, and Ray F. Stewart, individually, and on behalf of a class of plaintiffs similarly situated, and Herbert Malcolm Crum, individually, and on behalf of a class of plaintiffs similarly situated, Petitioners,

v.

South Carolina Department of Transportation, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenwood County
The Hon. Robert M. Erwin, Jr., Circuit Court Judge

Opinion No. 26726
Heard May 28, 2009 – Filed September 21, 2009

REVERSED

J. Kendall Few, of Greer, Thomas E. Hite, Jr., of Hite & Pruitt, of Abbeville, for Petitioner.

G. P. Callison, Jr., of Callison, Dorn, Thomason, Knott & Moore, of Greenwood, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Eldridge v. Dep't of Transp., Op. No. 2007-UP-351 (Ct. App. filed July 11, 2007), in which the Special Referee held Petitioners suffered no damages as the result of the taking of an abandoned right-of-way in downtown Greenwood; the Court of Appeals affirmed. We reverse.

FACTS

This case concerns an abandoned railroad right-of-way in Greenwood, SC. Petitioners are the current property owners along the right-of-way, and/or heirs of the original landowners at the time the right-of-way was acquired by the railroad.

The railroad, located in downtown Greenwood, was originally acquired by Southern Railway's predecessor by virtue of an 1845 Act. Some 150 years later, in the 1980's, the railroad elected to relocate its tracks to the outskirts of Greenwood. Railroad attempted to convey its right-of-way to County by quitclaim deed. Petitioners brought this action challenging the conveyance, claiming ownership to the right-of-way had reverted to them upon Railroad's abandonment.

After a long procedural battle, the Court of Appeals held title to the former right of way vested in the Plaintiffs, Petitioners herein. Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998). Petitioners consist of two classes of individuals: 1) abutting landowners along the right-of-way when the railroad tracks were removed in 1984, and 2) heirs to the original owners at the time the right-of-way was acquired in 1852.

Petitioners were granted class certification, and their takings claim was referred to the Special Referee.

The sole issue before the Referee was the amount of damages suffered by Petitioners as a result of two projects in which Respondent, SCDOT, used the abandoned railroad right of way. The first project was the 1986 Project, consisting of two main areas: 1) the portion of the right-of-way situated between two existing roadways (the Property Between The Roads); and 2) the property directly adjacent to the existing landowners (Adjacent Property). The Adjacent Property consists of 55,605 square feet, while the Property Between the Roads consists of 102,372 square feet. The second project was the Calhoun Road Project (eighteen tracts located within the abandoned right-of-way along Calhoun Road).

The Referee awarded Petitioners damages for the taking of the Adjacent Property and the Calhoun Road Project.[1] As to the Property Between the Roads, however, the Referee held the property had no value for compensation purposes inasmuch as it could not be used for on-premises identification signs. Accordingly, Petitioners were awarded no damages for the taking of the Property Between the Roads. The Court of Appeals affirmed the Special Referee's order.

ISSUE

Did the Court of Appeals err in affirming the Referee's holding that the Property Between the Roads could not be used for on-premises identification signs?

ON-PREMISES SIGNS

The Property Between the Roads is essentially a median which runs through downtown Greenwood. Petitioners contend the Referee and Court of Appeals erred in holding no signs could be placed on the Property Between the Roads. We agree.

[1] No appeal is taken as to these awards.

An "On Premises" sign is defined by Regulation as "any sign which is designed, intended or used to advertise or inform of the principal activity taking place, or the product being sold on the property where the sign is located." 25A S.C. Code Ann. Regs. 63-342 (Q) (Supp. 2006).

A 1986 Greenwood County ordinance states as follows:

> d) Permanent **on premises** identification signs for which a permit is required: One (1) free-standing identification sign per lot for each 100 feet, or fraction thereof of street frontage over 200 feet, provided said signs shall . . . be located no closer than 5 feet from the nearest property line. (Emphasis supplied).

The Referee held an "on premises" sign is required to be located on the actual property where the business is located. The Referee found the Property Between the Roads was not contiguous or adjacent to any land where businesses were located, because it is separated from any businesses by the existing roads. The Court of Appeals affirmed, and went one step further, noting that the 1996 order of Judge Macaulay stated that "[a]s to that portion of the former right-of-way covered by streets, highways, and sidewalks for more than 20 years . . ., the title lies in the City, County, and Highway Department." Based upon the 1996 order, the Court of Appeals found SCDOT owns the portion of the land upon which the roads are situated,[2] such that the Property Between the Roads is physically separated from the business properties and is not contiguous, adjacent to, or adjoining such properties. Eldridge v. Dep't of Transp., Op. No. 2007-UP-351 (Ct. App. filed July 11, 2007). We find the Court of Appeals and Referee placed too strict a construction on the definition of "on premises."

In Keane v. Hodge, 292 S.C. 459, 357 S.E.2d 193 (Ct. App. 1987), the Court of Appeals addressed a situation in which the Petitioners wished to erect a sign on their easement, and the Hilton Head Board of Adjustment revoked their sign permit on the ground that the easement was not

[2] We concur in this holding.

appurtenant to the property it served, such that Petitioners' proposed sign was not "on premises" but off premises. The Court of Appeals reversed, finding the easement was part of Petitioners' property, such that the sign was in fact on premises.[3]

In Keane, the Court of Appeals stated, "[O]rdinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose." 292 S.C. at 464, 357 S.E.2d at 196, citing Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953).

More recently, however, this Court acknowledged that the term "contiguous" has been broadly interpreted. Sonoco v. SC Dep't of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), *citing* Kizer v. Clark, 360 S.C. 86, 90-91, 600 S.E.2d 529, 532 (2004) (recognizing that marshlands and creeks do not defeat town's contiguity for annexation purposes); Mosteller v. County of Lexington, 336 S.C. 360, 364-65, 520 S.E.2d 620, 623 (1999) (explaining the term "contiguous" and stating "'[a]but' means to be contiguous . . . [h]owever, abut does not always mean there must be actual contact").

In Sonoco, we went further and distinguished between "contiguous" in a lay or secondary sense, versus in legal contemplation, stating, "In the legal field, it has been defined as: '[i]n close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded by or traversed by.' Black's Law Dictionary 290 (5th ed.1979)." 378 S.C. at 391, 662 S.E.2d at 602. Significantly, S.C. Code Ann. § 5-3-305 is also cited in Sonoco; it states, in part:

> For purposes of this chapter, "contiguous" means property which is adjacent to a municipality and shares a continuous border.

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[3] SCDOT also cites Young v. SC Dep't of Hwys and Public Transp., 278 S.C. 108, 336 S.E.2d 879 (Ct. App. 1985). Young, however, merely cites Regulation 63-342 for the proposition that "on-premise signs are located contiguous with the land occupied by the commercial or industrial activity."

> Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy contiguity.

In Sonoco, we ultimately held a taxpayer's office buildings were subject to property tax because the public road and railroad tracks did not defeat contiguity of the plant and office buildings. We find the issue presented here is squarely controlled by our opinion in Sonoco; we find the contiguity requirement is met here such that for purposes of the applicable ordinance, the signs may be considered "on premises."

Further support for this result is found in the definition of "adjacent." Black's Law Dictionary, 38 (5th Ed. 1979) defines it adjacent as "lying near or close to; sometimes, contiguous, neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch."

We find the Court of Appeals and Referee unduly restricted the definition of "on premises." Given the liberal construction afforded the definition of "contiguity" in Sonoco, we find the Property Between the Road's separation by the roadway does not defeat contiguity, such that the signs may be considered "on premises" for purposes of the ordinance. Accordingly, the Court of Appeals opinion is reversed, and the case is remanded to the Referee for calculation of damages.

REVERSED AND REMANDED.

TOAL, C.J., BEATTY, J., and Acting Justice Timothy M. Cain, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. Because an intervening landowner separates the Property Between the Roads and the Adjacent Property, I would find that a sign placed on the former would not have constituted an "on-premises identification sign" under the Greenwood County ordinances. Consequently, the Court of Appeals correctly upheld the determination of the special referee that the Property Between the Roads could not be used for identification signs.

In my view, neither Sonoco v. South Carolina Dep't of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), nor case law on municipal annexation are dispositive. The special referee first invoked the word "contiguous" in attempting to determine whether a sign placed on the Property Between the Roads would be considered "on premises" of the Adjacent Property, for purposes of a Greenwood County Regulation. The referee took the term from Young v. South Carolina Dep't of Highways and Pub. Transp., 287 S.C. 108, 336 S.E.2d 879 (Ct. App. 1985), which cited South Carolina Regulation 63-342(Z). The Regulation provided in part:

> On-Premise Sign, shall consist of any outdoor sign, display, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing which is designed, intended or used to advertise or inform of the activity taking place on the property where located, and any additional surrounding land which is under lease or is owned in fee simple and is specifically reserved for use by said activity. Land considered for this purpose shall be contiguous with the land occupied by the commercial or industrial activity and shall not be connected by narrow bands or strips of land. The area between the main building and the advertising device must be improved and landscaped in a suitable manner so as to portray a single unit.

25A S.C. Code Ann. Regs. 63-342(Z) (1985).

In my view, the broad definition of "contiguous" developed in annexation statutes and case law is not relevant to and does not comport with

the term as it was used in defining an "on-premise" sign. Given that SCDOT holds title to the roadway separating the properties rather than a mere easement,[4] I would hold that a sign placed on the Property Between the Roads is not an "on-premises identification sign" of any business located on the Adjacent Property.

The dispute over this land began over two decades ago and I would take this opportunity to bring it to a close. I would affirm the Court of Appeals.[5]

[4] The Court of Appeals found that because Petitioners did not appeal from Judge Macaulay's 1996 order, it became the law of the case. Eldridge v. South Carolina Dep't of Transp., Op. No. 2007-UP-351 (Ct. App. filed July 11, 2007). The Court of Appeals interpreted the order as holding that SCDOT owns the portion of the land upon which the roads are situated. Id. On certiorari, Petitioners do not challenge the Court of Appeals interpretation of the order and it therefore must be accepted as the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unchallenged ruling, right or wrong, is the law of the case).

[5] See Rule 220(c), SCACR (2008) (appellate court may affirm upon any ground appearing in the Record on Appeal).

The Supreme Court of South Carolina

RE: Amendments to Rules Governing Limited Certificates to Practice Law

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O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Appellate Court Rules are amended as follows:

(1) Rule 405(g), SCACR, is amended by adding the following to the end of that provision:

> If an attorney granted a limited certificate engages in the practice of law in excess of that permitted by this rule, the attorney may be subject to discipline under Rule 413, SCACR, suspension or revocation of the limited certificate by the Supreme Court, or being held in contempt of the Supreme Court for engaging in the unauthorized practice of law.

(2) Rule 405(h) and (i), SCACR, are amended to read:

> (h) The limited certificate of admission to practice law shall expire if the attorney ceases to be an employee of the business employer, is otherwise admitted to the Bar of this State, fails to fulfill the obligations required of active members of the South Carolina Bar, is suspended or disbarred from the practice of law in this or any other

jurisdiction, or fails at any time to be a member of the bar in good standing before the highest court of at least one other state or the District of Columbia.

(i) Upon the expiration of the limited certificate of admission to practice law, the attorney shall immediately surrender the certificate to the Clerk of the Supreme Court. The failure to immediately surrender the certificate upon expiration may subject the attorney to discipline under Rule 413, SCACR, or to being held in contempt of the Supreme Court.

(3) Rule 414(e), SCACR, is amended by adding the following to the end of that provision:

If an attorney granted a limited certificate engages in the practice of law in excess of that permitted by this rule, the attorney may be subject to discipline under Rule 413, SCACR, a suspension or revocation of the limited certificate by the Supreme Court, or being held in contempt of the Supreme Court for engaging in the unauthorized practice of law.

(4) Rule 414(f), SCACR, is amended to read:

(f) The limited certificate of admission to practice law shall expire if the attorney ceases to meet the requirements of (b)(1)-(3) above, is otherwise admitted to the Bar of this State, fails to fulfill the obligations required of active members of the South Carolina Bar, is suspended or disbarred from the practice of law in this or any other jurisdiction, or fails at any time to be a member of the bar in good standing before the highest court of at least one other state or the District of Columbia.

(5) Rule 414(g), SCACR, is amended to read:

> (g) Upon the expiration of the limited certificate of admission to practice law, the attorney shall immediately surrender the certificate to the Clerk of the Supreme Court. The failure to immediately surrender the certificate upon expiration may subject the attorney to discipline under Rule 413, SCACR, or to being held in contempt of the Supreme Court.

(6) Rule 415(e)-(g), SCACR, are renumbered as Rule 415(f)-(h).

(7) The following is added as Rule 415(e), SCACR:

> (e) If an attorney granted a limited certificate of practice engages in the practice of law in excess of that permitted by this rule, the attorney may be subject to discipline under Rule 413, SCACR, a suspension or revocation of the limited certificate by the Supreme Court, or being held in contempt of the Supreme Court for engaging in the unauthorized practice of law.

These amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
September 16, 2009

The Supreme Court of South Carolina

In the Matter of Irby E. Walker, Jr., Respondent.

ORDER

Respondent was arrested and charged with solicitation to commit a felony. Consequently, the Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. ODC asserts that respondent's counsel has informed it that respondent consents to the issuance of an order placing him on interim suspension and appointing an attorney to protect his clients' interests.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Martin Linder Stark, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Stark shall take action as required by

Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Stark may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Martin Linder Stark, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Martin Linder Stark, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Stark's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

September 18, 2009

The Supreme Court of South Carolina

In the Matter of Jody Vavra Bentley, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to either place respondent on interim suspension or transfer her to incapacity inactive status pursuant to Rule 17(b) and (c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Kelly Knight, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Ms. Knight shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Knight may make disbursements from respondent's trust account(s), escrow

account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Kelly Knight, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Kelly Knight, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Knight's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

September 18, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Deborah W. Spence,
Individually, and on behalf of the
Estate of Floyd W. Spence, Appellant,

v.

Kenneth B. Wingate, Sweeny
Wingate & Barrow, P.A., Respondents.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4585
Submitted June 1, 2009 – Filed July 9, 2009
Withdrawn, Substituted and Refiled September 18, 2009

REVERSED AND REMANDED

A. Camden Lewis and Brady R. Thomas, both of Columbia, for Appellant.

Pope D. Johnson, III, of Columbia, for Respondents.

HEARN, C.J.: Deborah Spence (Wife) appeals from the circuit court's grant of partial summary judgment in favor of Kenneth Wingate, finding he

did not breach his fiduciary duty to Wife regarding her husband's life insurance policy. We reverse.

FACTS[1]

On August 13, 2001, respondents Kenneth Wingate and Sweeny Wingate & Barrow, P.A. (collectively Wingate) commenced legal representation of Wife. The purpose of the representation was to negotiate an agreement between Wife and the four sons of her husband, Congressman Floyd W. Spence, concerning the division of Spence's probate estate. Wife and Spence's sons entered into an agreement on August 15, 2001. During the course of Wingate's representation of Wife, she consulted with Wingate concerning her husband's Federal Group Life Insurance Policy (the Policy). On August 16, 2001, Spence died. Either in mid-August or early September, Wingate became the attorney for Spence's estate.

Spence had named each of his four sons and Wife as equal beneficiaries under the Policy in 1988. However, prior to his death, Spence attempted to change the named beneficiaries to Wife only. After Spence died, the Members Services Office of the United States House of Representatives determined the benefits of the Policy should be paid equally to Wife and the four sons, and payment was made accordingly.

Wife brought an action against Wingate alleging, among other things, that he breached his fiduciary duty to her by failing to advise her to obtain another attorney, or in the alternative, by failing to file a declaratory judgment action on her behalf concerning the Policy. The circuit court granted Wingate's motion for summary judgment on the issue of whether Wingate owed a fiduciary duty to Wife regarding the Policy. The court based its ruling on the fact that Wingate, as attorney for the estate, did not owe a fiduciary duty to Wife as a beneficiary of the estate. Wife appeals this determination.

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[1] Based on our standard of review, the following facts are recited in a light most favorable to Wife. See Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001) (explaining evidence must be viewed in the light most favorable to the non-moving party when ruling on a motion for summary judgment).

STANDARD OF REVIEW

In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Nexsen v. Haddock, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct. App. 2002). Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c).

LAW/ANALYSIS

Wife argues a genuine issue of material fact exists as to whether Wingate breached a fiduciary duty owed to her based on Wingate's representation of Wife in a prior related matter.[2] We agree.

"A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." Moore v. Moore, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004). "An attorney/client relationship is by nature a fiduciary one." Hotz v. Minyard, 304 S.C. 225, 230, 403 S.E.2d 634, 637 (1991). "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." Smith v. Hastie, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005).

It is undisputed that Wingate represented Wife while negotiating an agreement between her and Spence's sons regarding the probate estate. During that representation, Wife alleges she informed Wingate of her status as sole beneficiary under the Policy. Only days after negotiating on behalf of

[2] This court initially held Wife's contention unpreserved for review, but was reversed upon grant of certiorari by the supreme court. See Spence v. Wingate, 378 S.C. 486, 663 S.E.2d 70 (Ct. App. 2008), reversed, 381 S.C. 487, 674 S.E.2d 169 (2009). Therefore, we will now address the merits of Wife's arguments.

Wife, Wingate assumed the responsibilities of attorney for Spence's estate; however, Wife alleges Wingate never severed their attorney-client relationship. In fact, Wife claims that when Wingate informed her he was going to be the attorney for her husband's estate, he told her that she no longer needed an attorney. Moreover, at a subsequent family meeting, Wife maintains Wingate suggested she give Spence's sons the entire amount due under the Policy, despite his knowledge that Spence had designated her as the sole beneficiary. Upon hearing this suggestion, Wife alleges she asked Wingate "to put his hat back on as [her] attorney and help [her]." According to Wife, Wingate refused to assist her.

Accepting Wife's allegations as true, as we must when reviewing an order granting summary judgment, a factual issue exists regarding what if any fiduciary duties were owed to Wife, and whether these duties were breached. See Hotz, 304 S.C. at 230, 403 S.E.2d at 637. Duties to a former client on a related matter are separate and distinct from any duties arising from Wingate's representation of the estate; therefore, the circuit court erred in finding section 62-1-109 of the South Carolina Code (Supp. 2007) absolved Wingate of any duty he owed to Wife. See Rule 1.9(a), RPC, Rule 407, SCACR ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."). While a jury may ultimately find Wingate committed no wrongdoing, the circuit court erred in making that determination as a matter of law. As a result, we find Wife's allegations sufficient to survive summary judgment.[3] Accordingly, the order of the circuit court is

[3] We note Wife's allegations also support damages caused by Wingate's breach of fiduciary duty. Specifically, Wife claims that as a result of Wingate's breach, the insurance benefits were divided five ways, among Wife and her husband's four sons, instead of being paid solely to her. Wife further claims that had Wingate not breached this fiduciary duty, and either helped her file a declaratory judgment or advised her to hire another attorney, she would not have suffered these damages.

REVERSED and REMANDED.

THOMAS, J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nearin G. Blackwell-Selim, Appellant.

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 4619
Submitted June 1, 2009 – Filed September 15, 2009

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott,

Assistant Attorney General Christina J. Catoe, all of Columbia; John Gregory Hembree, of Conway, for Respondent.

THOMAS, J.: Nearin Blackwell-Selim (Appellant), pled guilty to voluntary manslaughter after stabbing her common-law husband to death in 2005. She appeals her sentence, alleging the trial court erred in making no finding of early parole eligibility under section 16-25-90 of the South Carolina Code (Supp. 2008). We affirm.[1]

FACTS

Appellant and Kenneth Selim (Victim) lived together in Connecticut prior to coming to South Carolina. On June 3, 2005, shortly after arriving in this state, Appellant fatally stabbed Victim once in the chest. According to an affidavit dated June 4, 2005, Appellant, after initially providing deceptive information to the police regarding the incident, admitted she had armed herself with the knife for the purpose of threatening Victim.

Appellant pled guilty to voluntary manslaughter, and the trial court sentenced her to twenty years' imprisonment. Appellant moved the court to find her eligible for early parole based on section 16-25-90 of the South Carolina Code, entitling a defendant to release after serving one quarter of a sentence, if credible evidence is presented to show a history of suffering domestic violence at the hands of the victim. Both Appellant and the State presented evidence of the alleged violent nature of the relationship or lack thereof. At the close of the hearing, the trial court held; "there is no finding of parole eligibility pursuant to 16-25-90." This appeal follows.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

ISSUE

Did the trial court err in declining to find Appellant eligible for early parole under section 16-25-90?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. In reviewing the trial court, this Court is bound by the factual findings of the trial court unless an abuse of discretion is shown. State v. Laney, 367 S.C. 639, 643-44, 627 S.E.2d 726, 729 (2006). This standard is satisfied when there is evidence in the record to support the conclusion of the trial court. Id.

ANALYSIS

Appellant alleges that the trial court erred in not finding her eligible for early parole. We disagree.

Section 16-25-90 of the South Carolina Code (Supp. 2008) provides in pertinent part:

> [N]otwithstanding any other provision of law, an inmate who was convicted of, or pled guilty or nolo contendere to, an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate at the time he pled guilty to, nolo contendere to, or was convicted of an offense against the household member, or in post-conviction proceedings pertaining to the plea or

> conviction, presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member.

Under section 16-25-20, a person commits criminal domestic violence when he "(1) cause[s] physical harm or injury to [his] own household member; or (2) offer[s] or attempt[s] to cause physical harm or injury to [his] own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20 (2003).

Eligibility for early parole under section 16-25-90 requires the accused to demonstrate by preponderance of the evidence that criminal domestic violence was suffered at the hands of the victim. State v. Grooms, 343 S.C. 248, 254, 540 S.E.2d 99, 102 (2000). Thus, a convicted individual must present credible evidence sufficient to meet the preponderance of the evidence standard. In this regard, a sentencing judge is largely unlimited as to either the kind or the source of the information he may consider upon sentencing. Hayden v. State, 283 S.C. 121, 123, 322 S.E.2d 14, 15 (1984); see also State v. Cantrell, 250 S.C. 376, 379, 158 S.E.2d 189, 191 (1967) (stating that the circuit court exercises "a wide discretion in the sources and types of evidence" it considers in sentencing).

The trial court made no explanation as to whether this holding was because Appellant failed to produce credible evidence that she suffered criminal domestic violence at the hands of Victim, or whether she failed to meet the preponderance of the evidence standard. However, " '[t]his Court . . . is authorized to consider any sustaining ground found within the record.' " State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008) (citing Hutto v. State, 376 S.C. 77, 82, n.2, 654 S.E.2d 846, 849 n.2 (Ct. App. 2007)) see Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Accordingly, we may affirm if the record supports either or both:

(1) Appellant failed to produce credible evidence or (2) failed to meet the preponderance of the evidence standard.

Here, we find the trial court's conclusion to be supported by the record as to both the credibility of the evidence as well as the weight. The record reveals that the evidence offered by Appellant may not have been credible as required by section 16-25-90. Much of the testimony received in support of Appellant's motion was hearsay. In addition, a majority of the testimony was offered by parties with potential bias or by Appellant herself. Further, evidence demonstrated Appellant's previous dishonesty with law enforcement. We therefore find sufficient evidence to support a determination that the evidence presented by Appellant was not credible.

Furthermore, with ample amounts of conflicting information, evidence of Appellant's aggressive nature, the fact that Victim had no criminal convictions for domestic violence, and few specific details, we find a determination that Appellant did not satisfy the preponderance of the evidence burden is also supported by the record.[2]

CONCLUSION

We affirm the trial court's ultimate conclusion that Appellant was not entitled to early release under section 16-25-90. The record supports the determination that Appellant failed to produce credible evidence of a history of criminal domestic violence between the parties and she failed to satisfy the

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[2] We recognize that Appellant argues her past violent behavior toward her late husband should not bar her from eligibility for early parole. We do not imply by our holding that Appellant is barred from eligibility because of this behavior. Rather, we simply find that based on our standard of review, the record supports the ultimate conclusion of the trial court under either rational: *i.e.*, either (1) Appellant failed to present credible evidence she suffered criminal domestic violence at Victim's hands or (2) the evidence she presented, whether credible or not, did not satisfy the preponderance of the evidence burden.

preponderance of the evidence standard. Accordingly, the ruling of the trial court is

AFFIRMED.

HEARN, C.J., and KONDUROS J., concur.