The Supreme Court of South Carolina

RE: Extension of Time Regarding the Administration of the Amended Judge's Oath

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ORDER

By Order dated October 22, 2003, this Court revised the oath given to judges in this State and directed that all current judges take this new oath. A series of Continuing Legal Education (CLE) seminars were established so that every judge in this State could have training relating to the new oath and also take the new oath during 2004.[1] The new oath is now contained in Rule 502.1 of the South Carolina Appellate Court Rules.

It now appears that there will be a number of members of the judiciary of this State who will not have completed the required CLE seminar by the end of this calendar year. Additional CLE seminars will be scheduled during January and February 2005.

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[1] If the judge is a lawyer in South Carolina, the judge must also take the revised oath that is now required for all lawyers. The judge may take both oaths at the CLE seminar for the new judicial oath. By order issued today, this Court has extended the time for lawyers to take the required oath until February 28, 2005.

All judges of this State who have not completed the required CLE seminar and taken the new oath must do so by February 28, 2005. The Office of Court Administration will provide this Court with a list of names of those judges who have not completed the required CLE seminar and received the new oath by April 1, 2005. This Court will issue an order suspending these judges from their office, and they may petition this Court for reinstatement once they provide proof that they have completed the required CLE seminar and taken the new oath.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

December 13, 2004

The Supreme Court of South Carolina

RE: Extension of Time Regarding the Administration of the Amended Lawyer's Oath

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ORDER

In October 2003, this Court revised the lawyer's oath contained in Rule 402(k), SCACR. By order dated January 9, 2004, this Court required all members of the South Carolina Bar to certify that they had taken the revised lawyer's oath contained in Rule 402(k), SCACR, in their 2005 License Fee Statement from the South Carolina Bar.

Except for certain out-of-state members, all members of the South Carolina Bar are required to take the oath in conjunction with a Continuing Legal Education (CLE) seminar developed for the administration of the new oath. As to out-of-state members, a member who does not live in South Carolina and does not engage in the practice of law in South Carolina

is not required to take the CLE seminar,[1] but is required to execute the new oath using a form provided by the South Carolina Bar.

It now appears that a number of the members of the Bar will not have taken the new oath and the accompanying CLE seminar in time to certify that they have taken the new oath before January 1, 2005, the due date of the 2005 Bar License Fee. Accordingly, we hereby extend the period to take the new oath until February 28, 2005.

Members of the Bar who do not certify that they have completed the new oath in their 2005 License Fee Statement[2] must certify in writing

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[1] This Court's order of January 9, 2004, exempted members who do not live in South Carolina and do not "undertake representation of any cases in South Carolina" from having to complete the CLE seminar for the new oath. The South Carolina Bar, in providing advice to members about the meaning of this language, has interpreted the word "cases" in a broad manner to mean any matters, not just court cases. We agree with this interpretation, and further clarify our intent by indicating in this order that this exemption is only applicable to out-of-state members who do not engage in the practice of law in South Carolina.

[2] In the License Fee Statement, the South Carolina Bar is not requiring the member to sign a certification regarding the taking of the oath. Instead, if the records of the South Carolina Bar already indicate that the member has completed the required oath, the Fee Statement states that the Bar's records show that the oath has been completed and asks the member to correct this information if inaccurate. Returning this form without a correction is equivalent to a certification by the member that he or she has taken the oath and any required CLE seminar.

that they have taken the new oath, to include the CLE seminar, if applicable, on or before February 28, 2005. This certification shall be done on the attached form and sent to the South Carolina Bar on or before March 1, 2005.

On March 1, 2005, any member who has not taken the new oath and any required CLE seminar shall be automatically suspended from the practice of law in this State by the South Carolina Bar. The Bar shall notify these members of their suspension, and the Bar may reinstate a member upon a showing that the member has taken the new oath and any required CLE seminar, and paid a $25 fee made payable to the Commission on Continuing Legal Education and Specialization. If not reinstated by the South Carolina Bar before April 1, 2005, their names will be published in the Shearouse Advance Sheets.

The South Carolina Bar shall forward to this Court a list of the names of those members who remain suspended on May 1, 2005. These

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If the records of the Bar fail to disclose that the member has taken the oath, the License Fee Statement advises the member of this fact and asks the member to correct this information if it is inaccurate. If the member provides a correction indicating that the member has taken the oath, this is equivalent to a certification by the member that he or she has taken the oath and any required CLE Seminar.

members shall be suspended by order of this Court and shall thereafter forward their certificate of admission to practice law in this State to the Clerk of this Court. Any petition for reinstatement shall be submitted as provided by Rule 419(f), SCACR, and, if not reinstated within three years of the date of being suspended by this Court, the member's membership in the South Carolina Bar will be terminated as provided by Rule 419(g), SCACR.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
December 13, 2004

TIME TO TAKE THE REVISED LAWYER'S OATH IS EXTENDED

The South Carolina Supreme Court has extended the time for members of the South Carolina Bar to take the revised lawyer's oath and the associated Continuing Legal Education seminar until February 28, 2005. The order provides for the suspension of those members who fail to comply by that date, and includes a form for certifying completion of the requirement if a member's 2005 Bar License Fee Statement did not show completion of the oath and any required seminar.

TIME TO TAKE THE REVISED JUDGE'S OATH IS EXTENDED

The Supreme Court has extended the time for judges to complete the revised judge's oath and the associated Continuing Legal Education Seminar until February 28, 2005. The order provides for the suspension of those judges who fail to comply by that date.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF DAVID E. BELDING, PETITIONER

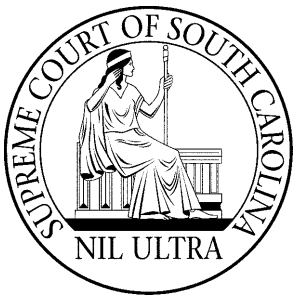
David E. Belding, who was suspended from the practice of law for a period of one year, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, January 14, 2005, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
December 13, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48

December 13, 2004

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Raymond Magazine, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Sumter County
Thomas W. Cooper, Jr., Circuit Court Judge
Howard P. King, Post-Conviction Relief Judge

Opinion No. 25908
Submitted September 23, 2004 – Filed December 6, 2004

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Elizabeth R. McMahon, all of Columbia, for Petitioner.

Assistant Appellate Defender Robert M. Pachak, of S.C. Office of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Respondent Raymond Magazine was arrested for criminal sexual conduct in the first degree (CSC). He was indicted on charges of kidnapping, attempted murder, assault and battery with intent to kill, CSC, and possession of a weapon. The post-conviction relief (PCR) judge granted a new trial after finding that Respondent was not personally served with a copy of the indictment and that counsel was ineffective for (1) failing to intelligently evaluate each juror during jury selection and (2) failing to request a charge on assault and battery of a high and aggravated nature (ABHAN) as a lesser-included offense of CSC. After granting State's petition for certiorari, we reverse.

FACTUAL/PROCEDURAL BACKGROUND

Late one night, the victim was walking along Highway 15 in Sumter after a fight with her boyfriend. She and her boyfriend were on their way to Lee County; he pulled the car over; she got out; and after she refused to get back into the car, he drove away. The victim testified that Respondent appeared shortly thereafter, pulled her into a ditch, beat her up, put a knife to her throat, and raped her. The victim also testified that Respondent forced her to walk with him into the woods and later to an area behind a motel. Along the way and behind the motel, he raped her at least two more times and forced her to perform oral sex. The victim was eventually released and called 911 from the motel.

At a bond hearing before trial, Respondent said that he did not know the victim and that he was out of town on the day of the alleged crime. At trial, Respondent did not testify but maintained that he was innocent.

The first trial resulted in a hung jury. In the second trial, Respondent was found guilty of kidnapping, CSC, and ABHAN. He was sentenced to thirty years for CSC and ten years for ABHAN, to be served consecutively. He was also sentenced to thirty years for kidnapping, to be served concurrently. The same defense counsel represented Respondent in both trials.

Respondent appealed and his appeal was dismissed. Respondent then applied for PCR on eleven grounds. After a hearing, the PCR judge found that three of the grounds had merit and granted a new trial. This Court granted certiorari to review the PCR judge's decision.

The State raises the following issues for review:

I. Did the PCR court err in ruling that Respondent did not receive proper notice of the charges against him?[1]

II. Did the PCR court err in ruling counsel was ineffective for failing to use eight peremptory jury strikes?

III. Did the PCR court err in ruling that trial counsel was ineffective for failing to request a jury charge for ABHAN, a lesser-included offense of CSC?

LAW/ANALYSIS

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's errors, there is a reasonable

[1] In its brief, the State frames this issue as one concerning arraignment. But the PCR judge explicitly acknowledged that arraignment was not a statutory right. Instead, the judge granted relief on the basis that Respondent was not notified of the charges against him; therefore, we have framed the issue accordingly.

probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 688 (1984); *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694.

I. INDICTMENT

The State argues that the PCR court erred in ruling that Respondent did not receive proper notice of the charges against him. We agree.

In a criminal case, the defendant has the right "to be fully informed of the nature and cause of the accusation" against him. S.C. Const. art. I, § 14. The right to be fully informed is a personal right, and therefore the defendant himself, not just his attorney, must be fully informed of the charges against him. *State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977) (citation omitted). In *Green*, the defendant was not served with an arrest warrant or indictment, was not arraigned, and was never informed of the charges against him. *Id.* If he received any notice at all, it was from his attorney. *Id.* The Court held that notice from the attorney was inadequate, and therefore the defendant's constitutional rights were violated. *Id.*

In the present case, Respondent was initially arrested for CSC. He was subsequently indicted on four additional charges. Respondent did not receive a copy of the indictment listing all of the charges until after the first trial.

At the PCR hearing, Respondent testified that before the first trial began, he knew only of the CSC charge and not the other four. He admitted that later, once the trial began, the trial judge read aloud all five charges. He also admitted that he knew he was facing serious charges and substantial jail time. Moreover, counsel told Respondent about the charges and about the possibility that Respondent may be imprisoned for life. At trial, counsel did not challenge the indictment issue.

The PCR judge found that Respondent received notice of the CSC charge but not the other four charges. The judge explained that Respondent should have been "personally served with the warrants or indictment."

Accordingly, the PCR judge reversed all convictions except the conviction for CSC.

Unlike the defendant in *Green*, Respondent was personally informed of the charges against him. At the beginning of the first trial, the judge read aloud all five charges in the indictment. The trial ended in a mistrial. At the beginning of the second trial, the charges were read aloud once again. Consequently, Respondent was notified, on at least two occasions, of the charges against him.

Therefore, the PCR court erred in ruling that Respondent was not notified of the charges against him.

II. JURY SELECTION

The State argues that the PCR court erred in ruling that trial counsel's failure to use all available peremptory strikes during jury selection prejudiced Respondent's case. We agree.

When the PCR court is reviewing a counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Consequently, courts apply a "highly deferential" standard of review. *Strickland*, 466 U.S. at 689. Counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Counsel's strategy will be reviewed under "an objective standard of reasonableness." *Id.*

South Carolina courts have not directly addressed the issue of whether a failure to use all available peremptory strikes gives rise to a finding that counsel was ineffective. Our courts have found, however, that the process of jury selection inherently falls within the expertise and experience of trial counsel. *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). In *Palacio*, this Court reviewed a finding that counsel was ineffective for failing to use a peremptory strike as her client instructed. *Id.* at 516, 511 S.E.2d at 67-68. In holding that counsel was ineffective, the PCR court found that jury

selection was a *defendant's* right and not trial strategy. This Court reversed the PCR court, finding that jury selection is within the ambit of trial strategy. *Id.* at 517, 511 S.E.2d at 68; *see also Wilcher v. State*, 863 So.2d 719, 754-55 (Miss. 2003) (holding that counsel was not ineffective for failing to use all of the available peremptory challenges). In addition, the Court noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Id.* at 516, 511 S.E.2d at 68. Finding no evidence that defendant's right to a trial by a competent and impartial jury was violated, the Court reversed. *Id.*

In the present case, counsel initially used seven of his ten available peremptory strikes. The State made a *Batson*[2] motion, and the trial judge ruled that counsel did not have racially neutral reasons for striking certain jurors. The jury was re-drawn, and during the second round of jury selection, counsel used only two peremptory strikes.

At the PCR hearing, counsel testified that he did not use all available strikes because he had "just gotten shot down on the first jury selection" and he felt "like [he] was boxed in." He also testified that after the *Batson* motion was granted, he abandoned his initial trial strategy to select "black female[s]."[3] Counsel admitted that his focus was on the racial composition of the jury. The jury ultimately consisted of nine white and three black jurors.

The PCR judge found that counsel "did not intelligently evaluate each juror and did not have a plan or theory in striking the jury." Moreover, the judge found that counsel's use of only two of his ten available strikes supported the conclusion that counsel was ineffective. The judge did not, however, explain how the outcome in Respondent's trial would have been different if Respondent had used all available strikes. Instead, the judge merely said that he was concerned that the racial composition of the jury was significantly different than that of the first jury. The judge pointed out that jury selection was "very important," especially given the fact that the first trial ended in a mistrial.

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[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[3] Respondent is black and the victim is white.

The PCR judge correctly found that counsel failed to properly evaluate and select jury members. Counsel admitted that he gave up his initial strategy and ended up selecting jurors that he had struck the first time—jurors whose names he had written "No" next to. In other words, counsel did not even show that he had a trial strategy for jury selection. Nevertheless, Respondent did not present any evidence to support a finding that counsel's error resulted in a violation of Respondent's right to a trial by a competent and impartial jury.

Therefore, the PCR court erred in finding counsel ineffective for failing to use all available peremptory strikes.

III. JURY CHARGE

The State argues that the PCR judge erred in finding counsel ineffective for failing to request an ABHAN charge as a lesser-included offense of CSC. We agree.

ABHAN is a lesser-included offense of CSC. *State v. Primus*, 349 S.C. 576, 582, 564 S.E.2d 103, 106 (2002). A trial judge must charge the jury on a lesser-included offense if there is any evidence from which it could be inferred that the defendant committed the lesser rather than the greater offense. *Brightman v. State*, 336 S.C. 348, 350-51, 520 S.E.2d 614, 615 (1999). Evidence that a physical fight—instead of rape—occurred warrants a charge of ABHAN as a lesser-included offense of CSC. *State v. Pressley*, 292 S.C. 9, 10, 354 S.E.2d 777, 777-78 (1987). In *Pressley*, the victim, who was the defendant's fourteen-year-old daughter, testified that the defendant jumped on her, put his hands around her throat, straddled her, slapped her, and then raped her. *Id.* at 9-10, 354 S.E.2d at 777. The defendant, on the other hand, testified that he and his daughter argued, he slapped her, shook her, and when she tried to get away, he grabbed for her, tearing off her clothes. *Id.* The Court held that because the defendant's testimony, if believed, would establish that he was guilty of only the lesser-included offense, the trial judge should have charged the jury on ABHAN. *Id.* at 10, 354 S.E.2d at 778.

In the present case, the trial judge charged the jury with ABHAN as a lesser-included offense of assault and battery with intent to kill. The judge did not, however, charge the jury with ABHAN as a lesser-included offense of CSC in the first degree. Moreover, counsel did not request that the judge charge the jury with ABHAN as a lesser-included offense of CSC.

At the PCR hearing, counsel testified that he was not aware that, under certain circumstances, ABHAN was a lesser-included offense of CSC. He also testified that he could not remember whether he had researched, at that time, the elements of the various offenses with which his client was charged.

The PCR judge ruled that according to the facts and evidence, Respondent was entitled to the ABHAN charge. Moreover, the judge ruled that Respondent's case was prejudiced by counsel's failure to request the charge. Therefore, the PCR judge found that the conviction for CSC in the first degree should be reversed.

At the bond hearing, Respondent denied the charges and said he was out of town on the day of the alleged crime. At trial, Respondent did not testify or present any witnesses to refute the victim's testimony or to suggest that something other than rape occurred. Moreover, Respondent's counsel did not present any evidence from which it could be inferred that Respondent committed ABHAN rather than CSC. Later, at the PCR hearing, Respondent testified that he was not with the victim on the night in question and that he did not rape the victim. In sum, the record did not contain any evidence warranting the lesser charge.

Therefore, the PCR court erred in finding counsel ineffective for failing to request an ABHAN charge as a lesser-included offense of CSC.

CONCLUSION

Because there is no evidence of probative value sufficient to support the PCR court's ruling, we REVERSE.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Larry Dean McCluney, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Cherokee County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 25909
Heard November 17, 2004 – Filed December 6, 2004

REVERSED AND REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David Spencer, all of Columbia, and Harold W. Gowdy, III, of Spartanburg, for Petitioner.

Jack B. Swerling, of Columbia, for Respondent.

ACTING JUSTICE MYERS: This is a cocaine-trafficking case. Larry Dean McCluney (Respondent) was convicted of trafficking in more than 400 grams of cocaine in violation of South Carolina Code section 44-53-370(e)(2)(e).[1] The circuit court sentenced Respondent to twenty-five years of imprisonment and a fine of $200,000. The Court of Appeals reversed, holding the circuit court should have granted Respondent's motion for a directed verdict. State v. McCluney, 357 S.C. 560, 593 S.E.2d 509 (Ct. App. 2004). We granted a writ of certiorari to review the Court of Appeals' decision. We reverse and remand.

FACTS

Respondent was charged under section 44-53-370(e)(2)(e) with trafficking in more than 400 grams of cocaine.

At trial the State presented evidence that Respondent agreed with two other persons to purchase over 400 grams of cocaine from a fourth person, who happened to be a police informant. The State also presented evidence that in a reverse-buy operation conducted by police with the help of the informant, Respondent and the other two persons purchased over 400 grams of imitation cocaine, thinking it was real.

ISSUE

Whether Respondent was entitled to a directed verdict.

ANALYSIS

A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001).

[1] S.C. Code Ann. § 44-53-370(e)(2)(e) (2002).

The Court of Appeals held that Respondent was entitled to a directed verdict because a transaction involving imitation cocaine "does not fall under the purview of the trafficking statute." State v. McCluney, 357 S.C. 560, 565, 593 S.E.2d 509, 511 (Ct. App. 2004). According to the court, "the only indictable offense applicable to imitation cocaine would be under S.C. Code Ann. § 44-53-390(a)(6) (2002)."[2] McCluney, 357 S.C. at 564, 593 S.E.2d at 511. We disagree.

Trafficking is not limited to the substantive offenses of purchasing, possessing, and selling large amounts of controlled substances. Conspiring and attempting to do those acts also constitute trafficking. The part of the trafficking statute pertinent to this case is as follows: "Any person who knowingly … attempts[] or conspires to … purchase … ten grams or more of cocaine … is guilty of a felony which is known as 'trafficking in cocaine.'" S.C. Code Ann. § 44-53-370(e)(2) (2002).

The Court of Appeals errantly focused on the facts that only imitation cocaine was present at the transaction and that purchasing imitation cocaine does not constitute trafficking. In doing so, the court relied heavily on Murdock v. State of South Carolina, 311 S.C. 16, 426 S.E.2d 740 (1992), which is irrelevant to Respondent's case.

The court should have focused on the State's evidence that Respondent conspired and attempted to purchase real cocaine. Section 44-53-370(e)(2) plainly states that conspiring and attempting to purchase ten grams or more of real cocaine constitute trafficking. The presence of only imitation cocaine at the transaction is irrelevant to Respondent's intent and thus irrelevant to the State's conspiracy and attempt arguments. Respondent was not entitled to a directed verdict.

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[2] "It is unlawful for a person knowingly or intentionally to … distribute or deliver a noncontrolled substance or an imitation controlled substance" that is represented as or appears to be a controlled substance. S.C. Code Ann. § 44-53-390(a)(6) (2002).

CONCLUSION

The State introduced evidence that Respondent knowingly agreed with at least one other person to purchase real cocaine and took a substantial step toward fulfilling his intention. Because conspiring and attempting to purchase ten grams or more of real cocaine constitute trafficking, the Court of Appeals erred by holding that Respondent was entitled to a directed verdict. Due to this error, the Court of Appeals declined to address the other two issues before it. Accordingly, the decision of the Court of Appeals and the case are respectively

REVERSED AND REMANDED.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Johnny Wayne Sutton, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From Lancaster County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 25910
Submitted October 20, 2004 – Filed December 13, 2004

AFFIRMED

Phillip J. Mace, of Columbia, for Petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Elizabeth R. McMahon, all of Columbia, for Respondent.

JUSTICE BURNETT: The circuit court dismissed Johnny W. Sutton's (Petitioner) post-conviction relief (PCR) application as barred by the statute of limitations. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was convicted in 1991 of murder and was sentenced to life in prison. We affirmed. State v. Sutton, Op. No. 93-MO-197 (S.C. Sup. Ct. filed July 19, 1993) (unpublished decision).

Petitioner filed his first PCR application on May 8, 2001, and later amended it. He alleged the one-year statute of limitations should not bar his application because his trial and appellate attorneys failed to inform him of his right to seek collateral review of his conviction on grounds not available in a direct appeal.

The PCR judge dismissed Petitioner's application as untimely without an evidentiary hearing because it was filed nearly five years after July 1, 1996 – the deadline to file an application for all persons convicted before the effective date of the statute of limitations contained in S.C. Code Ann. § 17-27-45(A) (2003). See Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

We granted Petitioner's writ of certiorari to address a novel issue:

> Did the circuit court err in summarily dismissing Petitioner's PCR application as untimely, where Petitioner alleged he did not file a timely application because neither his trial nor his appellate attorneys informed him of the statutory right to file an application?

STANDARD OF REVIEW

Dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the

applicant is not entitled to relief. S.C. Code Ann. § 17-27-70(b) and (c) (2003). When considering the State's motion for dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Similarly, when reviewing the propriety of a dismissal, we must view the facts in the same fashion. See S.C. Code Ann. § 17-27-80 (2003) (PCR actions are governed by usual rules of civil procedure); Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002); Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000).

In a case raising a novel issue of law, the appellate court is free to decide the question of law with no particular deference to the trial court. Osprey, Inc. v. Cabana Ltd. Partn., 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718 (2000). We will reverse the PCR judge's decision when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004); Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

LAW AND ANALYSIS

Petitioner argues the PCR judge erred in dismissing his application as untimely because neither trial nor appellate counsel informed him of the availability of PCR following his conviction and unsuccessful appeal. We disagree.

A person convicted or sentenced for a crime has a statutory right to file a PCR application. S.C. Code Ann. §§ 17-27-10 to -160 (2003). In a PCR proceeding, "the focus usually is upon alleged errors made by trial or plea counsel. . . . The applicant attempts to show that his or her attorney erred in a manner that a reasonably proficient attorney would not, and that the error prejudiced his case." Al-Shabazz v. State, 338 S.C. 354, 363-364, 572 S.E.2d 742, 747 (2000) (explaining the history and basic principles of the PCR process, and holding that PCR generally is limited to collateral attacks on the validity of a conviction or sentence).

A PCR action is a civil action generally subject to rules and statutes that apply in civil proceedings. Wade v. State, 348 S.C. 255, 263, 559 S.E.2d 843, 846-847 (2002); S.C. Code Ann. § 17-27-80 (2003). A PCR application ordinarily "must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45(A) (2003). After the Legislature enacted the statute of limitations in 1995, we held that all persons convicted before the statute's effective date had one additional year to file an application. Consequently, the application of persons such as Petitioner had to be filed by July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

Absent extraordinary circumstances, such as when a defendant inquires about an appeal, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). On the other hand, when a defendant is convicted and sentenced after a trial, "trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal, and if the client is indigent, assist the client in filing an appeal." Wilson v. State, 348 S.C. 215, 218 n.3, 559 S.E.2d 581, 583 n.3 (2002) (citing In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991) and Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)); see also Rule 602(e), SCACR ("Trial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal" unless relieved by court order or case is properly transferred to the state Office of Appellate Defense).

We accept as true, as we must at this stage of the proceeding, Petitioner's allegation that his trial and appellate attorneys never informed him of the right to file a PCR application. However, we decline to impose a duty on trial or appellate counsel to inform a convicted defendant of the availability of PCR or the one-year deadline to file an application.

We have described a PCR action as a hybrid form of action because it is rooted in a criminal case, which means important constitutional protections and criminal law concepts are regularly implicated. Wade, 348 S.C. at 263, 559 S.E.2d at 847 (PCR cases are treated differently from traditional civil cases, requiring, for example, that appellate counsel brief all arguable issues despite counsel's belief the appeal is frivolous and requiring, by statute, court-appointed counsel for an indigent applicant who is granted a hearing). Nevertheless, we reject Petitioner's argument because, while a PCR action is hybrid in nature, it generally remains subject to rules and statutes that apply in civil proceedings. Accordingly, we affirm the PCR judge's decision to dismiss Petitioner's application because it is apparent on the face of the application there is no need for a hearing to develop any facts and Petitioner is not entitled to relief.

CONCLUSION

We affirm the circuit court's dismissal of Petitioner's PCR application on the ground it was barred by the statute of limitations. We conclude neither trial nor appellate counsel has a duty to inform a convicted defendant of the availability of PCR or the one-year deadline to file an application.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Transportation, Appellant,

v.

Hinson Family Holdings, LLC (formerly Hinson Family Limited Partnership, a South Carolina limited partnership) and Hinson Properties, LLC, a South Carolina limited liability company, Respondents.

Appeal From Horry County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 25911
Heard October 5, 2004 – Filed December 13, 2004

AFFIRMED

Clifford O. Koon, Paul D. de Holczer, and Mary Frances Gibson, all of Moses Koon & Brackett, of Columbia, for Appellant.

Howell V. Bellamy, Jr., and Robert S. Shelton, both of Bellamy, Rutenberg, Copeland, Epps, Graveley & Bowers, P.A., of Myrtle Beach, for Respondents.

JUSTICE BURNETT: This is an appeal in a condemnation case which has yet to be tried. The South Carolina Department of Transportation (DOT) appeals a circuit court order granting partial summary judgment to Respondents (Hinson). This appeal was transferred from the Court of Appeals pursuant to Rule 204, SCACR. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In February 1994, DOT exercised its right of eminent domain and filed a notice of condemnation and lis pendens to purchase 102 acres in Horry County from International Paper Realty Corp. (International Paper) for construction of new S.C. Highway 22, the Conway Bypass. The project included the new highway and relocation of a portion of the public Watertower Road, a logging road that had been maintained by the county and used by the public for years.

In March 1994, International Paper sold 160 acres to Apache Group II, an entity owned by Hinson. Apache Group II had notice of the anticipated condemnation proceeding involving Highway 22 and relocation of Watertower Road from the condemnation and lis pendens notices filed with the clerk of court and a pre-sale survey of the property. Apache Group II subsequently conveyed the property to Hinson in 1999.[1]

In June 1994, DOT and International Paper settled the condemnation action. The settlement was based on a 1993 appraisal and included payment for a 25 percent diminution in the value of adjoining property owned by International Paper. The appraiser reduced the value of

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[1] The parties apparently agree this transfer has no impact on the analysis of this case because Apache Group II, Hinson Family Holdings, the former Hinson Family Limited Partnership, and Hinson Properties, LLC, are all owned and controlled by Keith Hinson. We will refer only to Hinson in this opinion for purposes of clarity.

the adjoining property because Highway 22 (running north-south) would divide it, and access to the new highway and the relocated Watertower Road would be reduced.

A second appraiser hired by DOT in 1993 valued the acreage taken and the impact on remaining parcels, but did not specify any diminution in value due to a loss in right of access to public roads from the property at issue in the present case. In fact, the second appraiser stated no "uneconomic remnant" would exist after construction of Highway 22 and, although various parcels would be divided, "the remaining portions can be accessed from relocated [Watertower Road]." The acreage purchased by Hinson included the adjoining property for which DOT had compensated International Paper for diminished value because of reduced access to public roads.

In September 2000, DOT began condemnation proceedings to purchase approximately 88 acres of Hinson's property for construction of new S.C. Highway 31 (running east-west), the Carolina Bays Parkway, and an interchange with Highway 22. DOT informed appraiser John Wilkins that it had fully compensated the previous property owner (International Paper) in 1994 for loss of the right of access to public roads as a result of the condemnation action related to the construction of Highway 22. DOT took the position that Hinson had purchased the acreage from International Paper knowing it was without access to public roads.

Hinson's property lies on both sides of Highway 22: an eastern portion of 132 acres and a western portion of 28 acres. The highest and best use of the non-wetland acreage was as residential resort property, which appraiser Wilkins valued at $13,000 per acre. Hinson's property is located near Barefoot Resort, a mixed-use residential community north of the Intracoastal Waterway and east of Highway 22. The appraiser, accepting DOT's assertions, concluded the eastern portion of the property was landlocked before the taking and valued non-wetland portions of it at $1,300 per acre – a ninety percent reduction from the market value for non-landlocked property.

Hinson moved for partial summary judgment on the issue of whether the eastern portion of the property was landlocked. Hinson argued (1) DOT neither paid it nor International Paper for loss of all right of access to public roads, indicating DOT did not believe or try to assert the property was landlocked until realizing that position might allow it to pay less for Hinson's property in the 2000 condemnation action; and (2) the eastern portion was not landlocked when Hinson purchased it in 1994 or as of September 2000 because it bordered old Watertower Road which, while no longer maintained by the county, had not been formally abandoned and was still publicly accessible. Hinson relied in its arguments on the 1993 appraisals and affidavits and correspondence from county, International Paper, and DOT officials involved in the previous condemnation action.

In response, DOT presented similar affidavits from five DOT officials or subcontractors who set forth the history of events related to the 1994 transactions and construction of Highway 22. The affiants stated Hinson had knowingly purchased a parcel of property landlocked by Highway 22 and the relocation of Watertower Road. The affiants and DOT further asserted that, as of September 2000, Hinson's acreage was landlocked because the parcel did not include a strip of land 100 feet wide that lies between the north end of the eastern portion of Hinson's land and the relocated Watertower Road. International Paper retained that strip of land in the 1994 transaction, but subsequently sold it to another entity. The appraiser also relied on the fact Hinson did not own the 100-foot strip in concluding the eastern portion was landlocked.

DOT contended that even if Hinson had access to old Watertower Road in 1994, Hinson did not have access when DOT filed notice of the condemnation action in September 2000 because the old road was closed and abandoned in late 1999 when the relocated road was opened. DOT argued there was a factual dispute on whether the eastern portion was landlocked, making summary judgment inappropriate.

The circuit court granted Hinson's motion for partial summary judgment, concluding Hinson's property was not made completely inaccessible by the 1993 condemnation action. Although DOT compensated

International Paper for a 25 percent diminution in value due to reduced access, old Watertower Road never had been abandoned under the statutory process and so remained publicly accessible. "[I]t is clear to the Court the subject parcel enjoyed some access [to public roads] on the date the Highway 31 Condemnation Notice was filed" in September 2000, the circuit court stated.

STANDARD OF REVIEW

A trial court may properly grant a motion for summary judgment 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), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

ISSUE

Did the circuit court err in granting Hinson's motion for partial summary judgment because a genuine factual dispute exists on whether old Watertower Road has been formally abandoned?

LAW AND ANALYSIS

DOT contends the circuit court erred because this case presents a genuine issue of material fact: whether Horry County abandoned the portion

of old Watertower Road which abutted Hinson's property when the road was relocated in late 1999 during construction of Highway 22. We disagree.[2]

S.C. Code Ann. § 57-9-10 provides, "any interested person, the State or any of its political subdivisions or agencies may petition a court of competent jurisdiction to abandon or close any street, road or highway whether opened or not." Notice must be given to the public by newspaper advertisements and to abutting landowners by mail. Section 57-9-10. The court must determine if it is in the best interest of all concerned to abandon or close the street, and determine in whom the title to property comprising the former street shall be vested. S.C. Code Ann. § 57-9-20 (1991).

"By creating a formal judicial procedure for terminating a public right of way over land, [Section 57-9-10] removes the uncertainty attending the common law of dedication and abandonment. It also ameliorates the rigor of the common law rule requiring strict proof of intent to abandon a public right of way before that right can be extinguished." Hoogenboom v. City of Beaufort, 315 S.C. 306, 319, 433 S.E.2d 875, 884 (Ct. App. 1992). DOT and the local municipality are indispensable parties that must be joined in an action to abandon a public road. Without their inclusion, they would not be bound by the decision or discharged from their maintenance duties or other obligations and liabilities. BancOhio Natl. Bank v. Neville, 310 S.C. 323, 426 S.E.2d 773 (1993).

Watertower Road is an admittedly public road, although the record does not reveal whether it became public by dedication or through prescriptive or long-established use. It is undisputed that no interested person

[2] DOT in its brief argues the circuit court should have applied S.C. Code Ann. § 57-5-80 (Supp. 2003), which addresses the removal of highways from the state highway secondary system of roads. This argument was withdrawn at oral argument because counsel for DOT acknowledged having mistakenly believed Watertower Road was part of the state's secondary system.

has instituted an action under the statutory process to effect an abandonment of old Watertower Road. Moreover, an affidavit and letter from an Horry County official show the county had ceased maintaining, but had not abandoned, the portion of old Watertower Road abutting Hinson's property. In light of these facts, conclusory assertions by DOT's affiants regarding the allegedly landlocked nature of Hinson's property are insufficient to create a genuine issue of material fact. The circuit court correctly concluded old Watertower Road remains publicly accessible because no formal action has been instituted to abandon it pursuant to Sections 57-9-10 and -20.

CONCLUSION

We affirm the circuit court's ruling old Watertower Road remains publicly accessible. Accordingly, as a matter of law, Hinson's property was not landlocked as a result of the 1994 condemnation action or the relocation of Watertower Road in 1999. We remand this case for further proceedings consistent with this opinion.

We decline to address the additional sustaining ground raised by Respondents regarding the propriety of an implied, appurtenant easement by necessity. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Harry Montgomery, Appellant,

v.

CSX Transportation, Inc., Respondent.

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

Opinion No. 3903
Heard October 13, 2004 – Filed December 6, 2004

REVERSED and REMANDED

Mark A. Stephens and Robert A. McKenzie, both of Columbia, for Appellant.

Mark C. Wilby, of Augusta, Georgia, for Respondent.

ANDERSON, J.: Harry Montgomery, a railroad employee with CSX Transportation, Inc. (CSX), was injured as he attempted to tighten a bolt on a railroad track. Montgomery filed this action against CSX Transportation, Inc. under the Federal Employers' Liability Act. The circuit court granted summary judgment. We reverse and remand for trial.

FACTUAL/PROCEDURAL BACKGROUND

CSX Transportation, Inc. (CSX) owns and operates two mainline tracks north of Charleston, South Carolina: the "A-line" and the "S-line." The A-line runs from Charleston to Dillon, South Carolina to Rocky Mount, North Carolina to Richmond, Virginia and beyond. The S-line runs from Charleston to Andrews, South Carolina then cuts inland to Hamlet, North Carolina, then to Raleigh, North Carolina and then cuts eastward and reconnects with the A-line north of Rocky Mount.

Other than the physical places that the rails run, there are several significant differences between the A-line and S-line. First, the A-line is made of "welded rail," which is continuous quarter-mile rail sections welded together. Thus, there are no track bolts or nuts on the A-line needed to hold the rail together. Contrastively, the S-line is made up of "jointed rail." "Jointed rail" is made from thirty-nine foot rail sections held together by "rail joints," which are iron plates placed on either side of the ends of the rail where they abut. The plates are attached to the rails by six large track bolts and nuts which hold the rail sections together.

Second, the A-line is much more active than the S-line in terms of the amount of traffic run by CSX on the rail. The A-line is a "Class 4 Track" – a high speed passenger track through which most of the freight is run. On the other hand, the S-line is a "Class 3 Track" that is mostly used for local freight. Between sixteen and seventeen trains run daily on the A-line. Approximately three trains run daily on the S-line.

Third, at the time of the events which form the basis of this suit, the A-line was in much better condition than the S-line. Harry Montgomery, the plaintiff in this action and a CSX employee since 1977, described the difference between the two tracks:

> [The S-line] was tore up and run down for many years and you had to be there to see it. It was—it was a bad railroad track. It was a bad piece of track. It was rough, it was rugged, there was a lot of work. I mean a whole lot more work to have been done on that piece of railroad track than it was on the A Line.

Because of the S-line's poor condition, CSX placed a lot of "slow orders" on the S-line, which meant that the freight that needed to be run was often "backed-up." In fact, CSX's employees were told that the Federal Railroad Administration (FRA) was going to shut down the S-line because the track was in such bad shape. Fourth, the employees working on the A-line were given more equipment and much superior equipment than that given to Montgomery, the only track maintenance employee on the S-line.

Montgomery began working for CSX in 1977. In 1994, he was promoted to foreman. At the time of Montgomery's injury in 1999, James F. Reed was Montgomery's Roadmaster in charge of both the A-line and the S-line. Darrell Crook was CSX's Assistant Division Engineer. There were two track inspectors working for Reed: Montgomery and Ussery. A track inspector's job is to inspect the railroad tracks, look for anything that is unsafe, and try to make it safe or take it out of service. Montgomery summarized a track inspector's duties:

> [T]ighten[ed] track bolts, replaced broken joints, replaced broken joint bars, replaced anything that's—that might be broken or defective in a switch or on—on, not necessarily in a switch, but preferably in a—well, more important in a switch or on just railroad tracks to assure proper rock, railroad we call a balance, but it's railroad rocks, so that you would understand, make sure that on a given day if there is a lot of rocks, ample rocks, enough rocks on a given—anything to make sure that signs, railroad signs, that they're supposed to be in place are in place, report anything that we see that's out of the ordinary that would—that would allow a piece of track to be unsafe.

Although Montgomery had twenty years of experience and Ussery had only worked for CSX for two years, Reed and Crook took Montgomery off the A-line and gave supervision of that line to Ussery. Montgomery was made the inspector of the S-line. Ussery was then labeled the "Senior" Track Inspector. These changes occurred approximately one to two months before Montgomery's accident. Because Montgomery felt his job would be in danger if he complained, he did not refuse to work on the S-line.

Montgomery was responsible for the "Andrews Subdivision" of the S-line, a stretch of track forty-five to fifty miles long. Crook professed that at the time he assigned Montgomery to the Andrews Subdivision of the S-line, he knew that it "had a lot of bolts out, [it] had broken bars over there, [it] had a good many weak ties and had some surface conditions." In actuality, the condition of the track was much worse. Few of the bolts that held the jointed rails together were secure. Some were loose, while others were missing. In fact, some joint bars needed to be totally replaced and/or lifted up.

Although Montgomery was technically a "foreman" at the time of his injury, he had no employees working under his supervision on the S-line. Not only was Montgomery the only person assigned to inspect the S-line, but he was also the only person to make the repairs and maintenance on the S-line. Montgomery was required to inspect and repair and/or replace every bolt on every joint bar on the S-line. There are approximately 130 joints per mile per rail on the S-line, meaning that there were 3,120 bolts and nuts that needed to be checked per mile. Montgomery was required to be certain that more than 70,000 bolts were tightened and/or replaced in addition to all the other problems with the S-line.

Before Montgomery began work on this project, Crook advised Montgomery that he knew the S-line "was in bad shape." Because the S-line was in a state of disrepair, Crook promised Montgomery that CSX would provide him with a "bolt-tightening machine" to do the assignment. A "bolt-tightening machine" is a hydraulic, eight horsepower machine that mechanically tightens and loosens track nuts. Crook gave Montgomery a bolt-tightening machine, albeit a very old one. However, Montgomery was provided no other power equipment or welding equipment to repair the S-line. On the other hand, even though the A-line has no bolts to tighten (because it was welded rail) and was not in disrepair, Ussery was given a new truck with which to maintain the A-line. The truck was equipped with a newer bolt-tightening machine, a MAT-weld unit—a detachable hydraulic and gas-powered unit that allowed the user to operate power tools while working on the line, including, but not limited to, power wrenches, power saws, power drills, welding equipment, and a welding torch.

On Montgomery's first day of work on the S-line, the old bolt machine given to him by Crook failed and became inoperable. It was neither repaired nor replaced by CSX. The other bolt-tightening machine issued to Ussery, the only remaining machine that CSX allocated to Crook's department, which covered 1400 miles of track, was not made available to Montgomery even though Ussery had no real need for it. Because CSX would not give Montgomery another machine or even Ussery's machine, Montgomery's only alternative was to replace and tighten the bolts by hand with a three to four foot long manual "track wrench."

To use the track wrench, Montgomery had to stand on the ground facing the rail with the head of the wrench pointing down and fastened on the nut. The nut is on the opposite side of the rail from the bolt head. The head of the bolt is oblong and fits into an oblong hole on the inside of the joint bar so it will not move if the nut is tightened or loosened on the other side. Montgomery would then push the handle of the wrench from right to left to remove the nut or left to right to tighten the nut.

Every day for the entire day, Montgomery tightened and replaced bolts by hand with the manual track wrench. Montgomery stated that he "was supposed to go on as far as, you know, my work time would allow me to [every day]." Although Montgomery had been working over a month on the S-line's Andrews Subdivision at the time he was injured, he had only been able to repair a few of the forty-five miles of his assignment before he was hurt.

Montgomery was injured on July 13, 1999, between 11:30 a.m. and 12:00 p.m., approximately three-and-a-half hours after he began working that day. He was trying to tighten a loose nut with the track wrench when the nut stiffened up or froze on the bolt. When Montgomery applied more pressure, the frozen nut suddenly gave way, the end of the wrench came off the nut, he was thrown between the rails by his momentum, and he landed hard on the track on his right knee, side, and elbow. Montgomery explained:

> Okay. When I—when I started to tighten this—this bolt, after I seen that that bolt—that particular bolt was loose, I got my wrench and I—I—I positioned myself and I, you know, went

about trying to tighten it. So I give it a few turns and at one point the—the wrench, the bolt actually froze, so I went about giving it some—and I—as I looked, the bolt was not—it was not tightening. So when I get to—when I went and put my wrench back on there and I tried to tighten it some more, the bolt had froze, which allowed me to apply just a little more pressure than normal, and then all of a sudden the whole thing gave which sent me—threw me across the rail, sent me across the rail.

Montgomery had neck surgery and knee surgery as a result of the accident.

At the time Montgomery was injured, which was the mid-point in his shift, he had already tightened or replaced over 200 bolts that day. He was not charged with violation of any rule by CSX. Yet, the attorney for CSX criticized Montgomery for trying to free up and tighten the tough bolt. Montgomery realistically had no option but to try to do so:

Q: Do you have any procedures or instructions for what to do in the event that a bolt sticks like that one did, any rules or regulations?
A: Well, you've got—you've got—you have several options, because if you—if—if given I had that—that—that torch that I was telling you about, you can cut it off and don't even have to use a wrench or if a welder was in the area, you can—you can ask him to cut it off, which is the same as cutting it off.
Q: And then just put a new one on there?
A: That's right.
Q: Okay. And why did you not just stop and get somebody to come and do that for y[ou]?
A: Oh, well, no, it's not like that, Miss. It's not that every time you run into a joint bar you call a welder to tighten it. That's—that's—that's part of your job. I mean, that's—and you don't cry—you don't cry or scream help every time you run into a minor problem.

According to Montgomery, even if he had called, no one would have come to cut one single bolt:

> Q: She asked could you have called for help. Could you have gotten any help?
> A: It is very doubtful that I would have gotten any. I could have called.
>
> Ms. McLeod: Why is it doubtful?
> The Witness: Because of the amount of people that works—that was working at the time in Bennett Yard, a shortage.

Montgomery filed a personal injury action against CSX under the Federal Employers' Liability Act (FELA), asserting his injuries were caused "in whole or in part" by the negligence of CSX. Montgomery alleged that he was assigned an unreasonable task, maintenance of the entire S-line, and the recurring tightening of bolts required by this assignment caused his injury. Alternatively, or in combination with the unreasonable task theory, Montgomery averred he was provided insufficient equipment for the task assigned. In his complaint, Montgomery specifically claimed that CSX was negligent "in its engines, cars, appliances, machinery, roadbed, track, work assignments and methods, works or other equipment" and in its failure "to exercise reasonable care to furnish and maintain reasonably safe and suitable equipment and work methods and [to provide] a reasonably safe place in which to perform his work."

CSX maintained that it follows job analysis and physical qualifications in assigning certain jobs. Indeed, Reed stated that a track worker like Montgomery would only normally be required to tighten two dozen bolts in a normal day of work and that if a worker has to tighten as many as 100 bolts in a day that he should be given a bolt tightening machine to properly perform his assignment:

> Q: If he had—if—if you knew that a man would have to tighten as many as a hundred bolts in a day, would you give him a machine to do it?
> A: Yes, if we had somebody doing that.

Reed inconsistently claimed that it is appropriate to require an employee to tighten 100 to 150 bolts a day with a track wrench. He did not express any opinion about whether 200 bolts was appropriate. Yet, Montgomery had already done 200 in less than half of the day's work.

In support of the theories asserted by Montgomery, he presented affidavits from two experts that show the assignment given to Montgomery and the tools provided to Montgomery were not reasonably safe. First, Montgomery produced an affidavit from Don H. Bowden, Sr., a railroad safety consultant. Bowden has testified concerning common and reasonable work assignments and safety practices in the railroad industry. He explicated that repairing the Andrews Subdivision should not have been done by one worker alone:

> Under common industry practice, this job should not be done by one man alone. Mr. Montgomery was assigned to the monumental task of repairing the track by himself. While it is not uncommon for one man to be assigned a task in inspecting a track, it is unreasonably hazardous to require one man to not only inspect the track, but also perform the actual track maintenance himself. A prudent and reasonable railroad would assign a gang of men to do this type of job. To do otherwise, in my opinion, subjects the employee to an unsafe workplace in the railroad industry because an accident is bound to happen.

Bowden declared the track wrench was an unsafe and unsuitable tool for this assignment:

> The unreasonable hazards to which Mr. Montgomery was exposed by working this track by himself were greatly exacerbated and increased by CSX requiring him to replace and/or tighten the track bolts with a manual track wrench. While it is not uncommon for workers to use manual track wrenches to tighten sporadic loose bolts on a stretch of track, this particular track was in such a state of disrepair that the use of a track wrench was not only impracticable, it unreasonably increased the

likelihood of injury to Mr. Montgomery. To use an analogy, a swing-blade works fine to knock-down sporadic weeds on a private lawn; however, one would not require a man to use a swing-blade to clear several years of growth on a 100 acre plat of land. In addition to the sheer volume of bolts that Mr. Montgomery needed to replace and/or tighten, the condition of the bolts and the track also made the manual track wrench an unsuitable tool for this job. This track had been neglected by CSX for a long period of time. As such, CSX should have known that the bolts were very likely to be "rusted-on," making them very difficult to remove and/or tighten. Requiring Mr. Montgomery to work with a manual wrench in these conditions unreasonably multiplied his risk of injury. Mr. Montgomery's description of the accident shows these hazards were present because he was required to use a tremendous amount of leverage on the wrench to break through the rust. For all of these reasons, a prudent and reasonable railroad would not have supplied just a track wrench to Mr. Montgomery to do this job. A prudent and reasonable railroad would have provided him with another bolt tightening machine when the first one became inoperable or would have fixed the one assigned to him.

Second, Montgomery submitted the affidavit of Dr. Tyler A. Kress, Ph.D., a biomechanical engineer. In his affidavit, Dr. Kress discussed a 1986 study undertaken by the Association of American Railroads, which indicated that 11.1% of all tool-related injuries resulted from the use of track wrenches. Dr. Kress opined the type of work that Montgomery was performing daily and the tools he was given to perform that work created unreasonably dangerous biomechanical risks to his body:

> It is my opinion that (1) the type of work that Mr. Montgomery was performing daily and (2) the tools he was given to perform that work created unreasonably dangerous biomechanical risk factors to his body. It is my further opinion that these risk factors are consistent with his fall and the injuries he sustained as a result of his fall.

> Apparently, Mr. Montgomery was ordered to perform the repetitive motion of tightening and untightening bolts with a manual track wrench. Proper use of the track wrench requires the employee to keep the head of the wrench fixed on the nut that is being tightened or untightened. Keeping the head of the wrench on the nut is even more important when the bolts and nuts are rusted and susceptible to being "stuck." Sporadic use of the track wrench to tighten and untighten nuts and bolts would not normally cause risk to the human body. However, performing repetitive tasks daily—and specifically ones that require push/pull forces of the upper extremity and upper body like the track wrench—are widely associated with increased risk of injury because of the cumulative effects of the repetition and fatigue. In Mr. Montgomery's work environment, his use of the track wrench was not spora[d]ic because of the sheer number of bolts that were evidentially in disrepair on this stretch of track. His fatigue from this manual, repetitive motion was increased by the increased forces needed to free the nuts and bolts from their rusted condition. With each repetitive use of the wrench, it became more physically difficult for Mr. Montgomery to control the wrench and its pivot point where the head is fastened to the nut. The probabilities of both (1) the wrench slipping off of the nut and (2) an abrupt motion occurring because of a nut breaking free are increased significantly due to the repetitive and tiring nature of the assigned job. It is understandable that Mr. Montgomery may fall if and when one of these events occur. Therefore, it is my opinion that his fall is a natural result of the work environment imposed on him by C.S.X.

CSX moved for summary judgment, which the circuit court granted.

ISSUES

I. Under FELA and South Carolina summary judgment procedure, did the trial court err in granting the railroad employer summary judgment on a railroad employee's claim for negligent failure to provide a safe workplace?

II. Under FELA and South Carolina summary judgment procedure, did the trial court err in granting a railroad employer summary judgment on a railroad employee's claim for negligent failure to provide safe and suitable equipment?

III. Under FELA and South Carolina summary judgment procedure, did the trial court err in granting a railroad employer summary judgment on a railroad employee's FELA combined negligence claims?

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Schmidt, 357 S.C. at 319, 592 S.E.2d at 331. Summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003).

LAW/ANALYSIS

I. Expert Witnesses/Affidavits

Rule 56(e), SCRCP, requires a party opposing summary judgment to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial. Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001). Where a motion for summary judgment is made and supported by proper affidavits, a plaintiff cannot rest on allegations in his pleadings that are controverted by affidavits and/or depositions submitted by defendants. See Rule 56(e), SCRCP; Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987).

Use and admissibility of affidavit and deposition testimony to rebut a motion for summary judgment is governed by Rule 56(e) and reads in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

Rule 56(e), SCRCP. Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence. Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002). "[O]n a defendant's motion for summary judgment, there will usually be no genuine issue of material fact unless the plaintiff presents expert testimony on the standard of care and its breach by the defendant." Jernigan v. King, 312 S.C. 331, 334, 440 S.E.2d 379, 381 (Ct. App. 1993) (citing Botehlo v. Bycura, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984)).

II. FELA

Section 1 of FELA renders common carrier railroads "liable in damages to any person suffering injury while . . . employed by [the] carrier" if the "injury or death result[ed] in whole or in part from the negligence of any of the officers, agents, or employees of [the railroad]." 45 U.S.C. § 51 (1986). When Congress enacted FELA in 1908, its focus was on reducing injuries and death to employees resulting from accidents on interstate railroads. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994). Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy that "shifted part of the human overhead of doing business from employees to their employers." Id. at 542 (internal quotations omitted).

FELA is a broad remedial statute which the United States Supreme Court construes liberally in order to effectuate its purposes. See Id. at 543. The Supreme Court has interpreted FELA's language liberally in light of its humanitarian purposes. Metro-North Commuter R.R. v. Buckley, 521 U.S. 424 (1997).

State courts have concurrent jurisdiction to hear FELA claims. 45 U.S.C. § 56 (1986). A FELA action brought in state court is controlled by federal substantive law and state procedural law. Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 567 S.E.2d 851 (2002). However, a form of practice may not defeat a federal right. Brown v. Western Ry., 338 U.S. 294 (1949); Norton, 350 S.C. at 476, 567 S.E.2d at 853. A FELA action is controlled by state procedural law as long as the state procedural law does not conflict with

federal substantive right guaranteed by FELA. Norton, 350 S.C. at 476, 567 S.E.2d at 853. It is firmly established that questions of sufficiency of evidence for the jury in cases arising under FELA in state courts are to be determined by federal rules. Brady v. Southern Ry. Co., 320 U.S. 476 (1943); Norton, 350 S.C. at 476, 567 S.E.2d at 853. The sufficiency of evidence needed to withstand a motion for summary judgment in a FELA case is controlled by federal, not state law. Norton, 350 S.C. at 476, 567 S.E.2d at 853.

The United States Supreme Court noted that liability under FELA rests upon "negligence" and that FELA does not make the railroad the insurer for all employee injuries. See Metro-North Commuter R.R., 521 U.S. at 429; Gottshall, 512 U.S. at 543. Although railroad workers are required to prove negligence under the federal FELA standard, the Supreme Court has held that employees need only show that their employer's negligence "played any part, **even the slightest**, in producing the injury." Gottshall, 512 U.S. at 543 (emphasis added & internal quotations omitted). A plaintiff's burden in a FELA action is significantly lighter than it would be in an ordinary South Carolina common law negligence case:

> [FELA's] [history] has been said to reduce the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the "vanishing point." While it is still undoubtedly true that there must be some shreds of proof both of negligence and of causation, and that "speculation, conjecture and possibilities" will not be enough, there appears to be little doubt that under [FELA] jury verdicts for the plaintiff can be sustained upon evidence which would not be sufficient in the ordinary negligence action.

Norton v. Norfolk S. Ry. Co., 341 S.C. 165, 533 S.E.2d 608 (Ct. App. 2000), rev'd on other grounds, 350 S.C. 473, 567 S.E.2d 851 (2002) (citing W. Page Keeton et al., Prosser & Keeton on Torts § 80, at 578 (5th ed. 1984)) (internal quotations omitted).

In Blair v. Baltimore & Ohio R.R., 323 U.S. 600 (1945), the United States Supreme Court articulated:

> We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer "becomes 'more imperative' as the risk increases." Bailey v. Central Vermont Ry., 319 U.S. 350, 352, 353, 63 S.Ct. 1062, 1063, 1064, 87 L.Ed. 1444 [(1943)]. See also Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 63 S.Ct. 444, 451, 87 L.Ed. 610 [(1943)]. The negligence of the employer may be determined by viewing its conduct **as a whole**. Union Pacific Railroad Co. v. Hadley, 246 U.S. 330, 332, 333, 38 S.Ct. 318, 319, 62 L.Ed. 751 [(1918)]. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so **closely interwoven** as to form a **single pattern**, and where each imparts character to the others.

Id. at 604 (emphasis added).

Thereafter, in Lavender v. Kurn, 327 U.S. 645 (1946), the Supreme Court explained:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Id. at 653.

Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957), is particularly instructive:

> Under th[e FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that e[m]ployer negligence played any part, **even the slightest**, in producing the injury or death for which damages are sought. **It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes**. . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that **negligence of the employer played any part at all in the injury or death**. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence. (Emphasis added.)
>
> The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes **the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit**. **The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference**.

> The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme. We reach the same conclusion in this case. **The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury**. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination.

Id. at 506-11 (footnotes omitted) (emphasis added).

A. Unreasonable Task of Repairing the S-Line Track

As a corollary to the railroad employer's duty to maintain safe working conditions, it is required to provide its employee with sufficient help in the performance of the work assigned to him. Blair v. Baltimore & Ohio R.R., 323 U.S. 600 (1945). Where the failure to provide sufficient help causes, in whole or in part, injury to the employee, the railroad employer is liable for negligence under FELA. Yawn v. Southern Ry. Co., 591 F.2d 312 (5th Cir. 1979); Southern Ry. Co. v. Welch, 247 F.2d 340 (6th Cir. 1957); Deere v. Southern Pac. Co., 123 F.2d 438 (9th Cir. 1941); Cheffey v. Pennsylvania R.R., 79 F. Supp. 252 (E.D. Pa. 1948); Louisville & Nashvile R.R. v. Crim, 136 So. 2d 190 (1961); see also Deere, 123 F.2d at 441 ("when failure to provide sufficient help results in injury to an employee, there exists a ground of negligence which is recognized under [FELA]"); Beeber v. Norfolk S. Corp., 754 F. Supp. 1364 (N.D. Ind. 1990) (noting that, under FELA, railroad employer has duty to provide sufficient number of employees to perform assigned work and failure to provide adequate assistance can be breach of

duty); Leonidas v. Great N. Ry. Co., 72 P.2d 1007, 1013 (Mont. 1937), aff'd in part and cert. dismissed in part, 305 U.S. 1 (1938) ("It is fundamental that if the employer fails to use reasonable care to provide a sufficient number of workmen to conduct the work at hand with reasonable safety, he is guilty of negligence."); Lis v. Pennsylvania R.R., 173 N.Y.S.2d 132, 134 (City Ct. 1958) ("That failure or refusal upon the part of a defendant to provide a sufficient number of workmen to assist one of its employees, if such additional help is necessarily required by the kind of work to be done, constitutes negligence under FELA is now so well settled as not to require extended discussion.").

Here, Montgomery has presented sufficient evidence that a genuine issue of material fact exists as to whether the failure of CSX to provide him with sufficient help to repair the S-line caused, at least in part, his injuries.

B. Duty to Provide Proper Equipment

As a FELA employer, CSX is "under a duty to exercise ordinary care to supply [tools,] machinery and appliances [that are] reasonably safe and suitable for the use of the employee." Chicago & Northwestern Ry. Co. v. Bower, 241 U.S. 470, 473 (1916); see also Chicago, Rock Island & Pac. R.R. v. Lint, 217 F.2d 279 (8th Cir. 1954); Coal & Coke Ry. Co. v. Deal, 231 F. 604 (4th Cir. 1916); Pitt v. Pennsylvania R.R., 66 F. Supp. 443 (E.D. Pa. 1946), aff'd, 161 F.2d 733 (3rd Cir. 1947). Although a railroad "is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements," it must still provide tools that are reasonably safe and suitable for the specific job. Bower, 241 U.S. at 474.

Because there is sufficient evidence that CSX knew or should have known that the manual track wrench was an unsafe and unsuitable tool for Montgomery to use to repair forty-five miles of the S-Line track by himself and Montgomery's experts attested factually that the manual track wrench was an unsafe and unsuitable tool for the circumstances of Montgomery's assignment, summary judgment should have been denied. Factually and legally, the jury could reasonably determine that CSX breached this duty to Montgomery.

C. Totality of Negligence

The United States Supreme Court, in Blair v. Baltimore & Ohio R.R., 323 U.S. 600 (1945), clarified that, while several factors operating alone might not constitute negligence, where an insufficient amount of workers **and** insufficient tools **combine together** to create an unreasonably unsafe place to work, a breach of duty is established:

> We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer "becomes 'more imperative' as the risk increases." The negligence of the employer may be determined by viewing its conduct **as a whole**. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so **closely interwoven** as to form a **single pattern**, and where each imparts character to the others.

Id. at 604 (emphasis added and citations omitted). The Blair Court held that the fact that the plaintiff was commanded to undertake the movement of a greased, 1000 pound steel tube, thirty feet in length, with only a five foot truck and with only a few men "raised questions appropriate for a jury to appraise in considering whether or not the injury was the result of negligence as alleged in the complaint." Id. at 604-05 (citations omitted). The Court ruled: "We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here" and that "**the jury**, and not the court, should finally determine these issues." Id. (emphasis added).

The Blair case is controlling here. To make Montgomery not only work on the entire Andrews Subdivision of the S-line by himself all day, every day, until completed, but also limiting his ability to make the numerous repairs by only providing him with a manual track wrench is prima facie evidence of negligence, if not negligence as a matter of law. Because there is sufficient evidence for a reasonable jury to conclude that CSX failed to provide Montgomery with a safe workplace, the trial court improperly invaded the province of the jury to determine whether or not CSX was negligent.

CONCLUSION

The trial judge concluded that the expert affidavits did not create a genuine issue of material fact. In contrariety to the circuit judge's finding, we come to the ineluctable conclusion that the expert witness affidavits were not only admissible but created genuine issues of material fact as to **NEGLIGENCE** under FELA. The circuit judge mistakenly and improvidently rejected the experts' opinions in the case sub judice.

Because a jury may reasonably draw inferences under the evidence that CSX was negligent, the trial court's grant of summary judgment was erroneous. It was improper for the trial court to weigh the quality or quantity of the evidence or to determine as a matter of law the inferences that may be drawn. "To deprive [railroad] workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." Bailey v. Central Vermont Ry., Inc., 319 U.S. 350, 354 (1943).

Accordingly, we **REVERSE** the circuit court's order granting summary judgment and **REMAND** this case for a jury trial.

REVERSED and REMANDED.

WILLIAMS, J., concurs.

GOOLSBY, J., dissents in a separate opinion.

GOOLSBY, J. (dissenting): I respectfully dissent. I would affirm the trial court's determination that Montgomery failed to present sufficient evidence to survive summary judgment on any of his three theories of CSX's alleged negligence under FELA.

A FELA action in state court is controlled by federal substantive law.[1] I agree that, under the federal FELA standard, a plaintiff in a FELA case need

[1] Norton v. Norfolk S. Ry., 350 S.C. 473, 476, 567 S.E.2d 851, 853 (2002).

only show that the "employer's negligence played any part, even the slightest, in producing the injury."[2] Nevertheless, although the quantum of evidence sufficient to present a jury question of causation in a FELA case is less than that required in a common law tort case, the plaintiff must still demonstrate some causal connection between the defendant's negligence and the alleged injury.[3] As the South Carolina Supreme Court has recognized, "'the FELA . . . is not to be interpreted as a workers' compensation statute.'"[4]

In support of his argument that sufficient evidence was presented of CSX's failure to provide sufficient help with the repair of the S-line, Montgomery points to the affidavit of Don A. Bowden, a railroad safety consultant, who stated as follows:

> 5. Under common industry practice, this job should not be done by one man alone. Mr. Montgomery was assigned to the monumental task of repairing the track by himself. While it is not uncommon for one man to be assigned a task in inspecting a track, it is unreasonably hazardous to require one man to not only inspect the track, but also perform the actual track maintenance himself. A prudent and reasonable railroad would assign a gang of men to do this type of job. To do otherwise, in my opinion, subjects the employee to an unsafe workplace in the railroad industry because an accident is bound to happen.

I agree with the trial court that, because the dispute here did not involve a task that required more than one worker, such as dragging a heavy object, assigning additional employees would mean only that the job would be

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[2] Rogers v. Mo. Pac. R.R., 352 U.S. 500, 506 (1957).

[3] Claar v. Burlington N. R.R. Co., 29 F.3d 499, 503 (9th Cir. 1994).

[4] Norton, 350 S.C. at 480 n.5, 567 S.E.2d at 855 n.5 (quoting Hernandez v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432, 436-37 (4th Cir. 1999)).

finished more quickly.[5] Indeed, it was acknowledged by Montgomery himself that CSX imposed no time limits or quotas for the work Montgomery was performing at the time of his injury.[6] Moreover, Bowden did not explain why the task assigned to Montgomery was unreasonably dangerous without additional help or how Montgomery's accident was "bound to happen" as a result of this circumstance.[7]

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[5] See Frazier v. Norfolk & W. Ry. Co., 996 F.2d 922, 923 (7th Cir. 1993) (concerning a plaintiff who was injured while unloading 11,600-pound double-axle wheel assemblies from a trailer); S. Ry. Co. v. Welch, 247 F.2d 340, 341 (6th Cir. 1957) (noting "circumstances of particular difficulty" warranting assigning additional personnel to assist in a particular task); McKennon v. CSX Transp., 897 F. Supp. 1024, 1027 (M.D. Tenn. 1995) (holding in a summary judgment case that "the fact that Plaintiff's job would have been easier if there had been more workers does not constitute negligence on the part of Defendant, nor does it create an unreasonably unsafe work environment").

[6] Montgomery testified in his deposition as follows: "I was supposed to go on as far as, you know, my work time would allow me to and you know, get off."

[7] See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990) ("The object of [Rule 56] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Lavender v. Kurn, 327 U.S. 645 (1956) (stating speculation and conjecture are not a substitute for probative facts); Zarecki v. Nat'l R.R. Passenger Corp., 914 F. Supp. 1566, 1574 (N.D. Ill. 1996) ("An affidavit that does not set forth the facts and reasoning used in making a conclusion amounts to nothing more than a denial of the adverse party's pleading."); E.T. Barwick Indus. v. Walter Heller & Co., 692 F. Supp. 1331, 1347 (N.D. Ga. 1987) ("Theoretical speculations, unsupported assumptions, and conclusory allegations advanced by an expert . . . are [not] entitled to any weight when raised in opposition to a motion for summary judgment.") (citations omitted), aff'd, 891 F.2d 906 (11th Cir. 1989).

In addition, Montgomery cites Forcino v. National Railroad Passenger Corp.[8] in support of his argument that an unreasonable work assignment from CSX proximately caused his injuries. I agree with CSX that this reliance is misplaced.

In Forcino, the plaintiff, while repairing a track that had been damaged by a derailment, allegedly injured himself as a result of the strain and fatigue of the heavy work. Unlike Montgomery, however, Forcino was performing a task outside his regularly assigned duties when he was injured, had been told to rush to finish the job to which he had been reassigned, and had worked without taking his normal afternoon break. In contrast, at the time of his injury, Montgomery was doing the same tasks that he had been performing for at least the previous month, had never claimed to be affected by fatigue, and by his own admission was instructed to go only as far as he was able to work at his own speed.

Montgomery further challenges the trial court's determination that "[t]he lack of any time requirement precludes a claim that defendant exposed plaintiff in a 'fatigued and exhausted condition to unreasonable peril' so that defendant could be found negligent in doing so." Assuming without deciding that Montgomery is correct that the trial court should not have made this finding, this error is of no consequence. Montgomery never specifically argued on appeal that he was suffering from fatigue or exhaustion on the day he was injured.

Montgomery further contends that the practical considerations of the burdens imposed by CSX could yield the inference that he felt pressure to maintain more bolts than could be reasonably expected of an employee in his situation. This argument lacks merit.

Montgomery first points out that, had he tightened only as many bolts as his supervisor agreed was reasonable during a normal workday, he would

[8] 671 So. 2d 888 (Fla. Dist. Ct. App. 1996).

have taken almost eight years to complete his assignment.[9] He further argues that testimony from his supervisor that CSX would lose profits when a rail is in disrepair gives rise to an inference that CSX would look unfavorably on his performance unless he worked at a faster than normal pace. There was no evidence, however, that Montgomery himself was aware of any financial concerns of CSX.

Similarly, Montgomery cites the threat of a shutdown of the S-line by the Federal Railroad Administration as additional evidence of an internal time pressure imposed by CSX. He testified in his deposition that there had been "some talks . . . that . . . [the] 'S' line was in bad shape, that something had to be done or they were talking about shutting the railroads down." I agree with CSX, however, that this evidence was hearsay and therefore properly rejected by the trial court.[10]

Similarly, I find no merit to Montgomery's argument that he had presented sufficient evidence to support a finding that CSX was negligent in providing him with only a manual track tool.

Under FELA, employers are under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of their employees; however, employers are not required to furnish the latest, best, and safest appliances, or discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and

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[9] Montgomery notes in his brief that one of the supervisors testified that a track worker with only manual equipment would be expected to tighten only 24 bolts during a normal workday.

[10] See Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (holding hearsay evidence presented in response to summary judgment motion did not create a genuine issue of material fact because "[o]ur appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be admissible in evidence").

suitable.[11] It is undisputed that the track wrench Montgomery was using when he fell was not defective and was similar to other track wrenches he had used for the past twenty years.

The focus of this controversy comes down to whether CSX should have provided a bolt-tightening machine in view of expert testimony suggesting that a manual track wrench, although not defective, was unreasonably dangerous for Montgomery's assignment.[12]

Bowden provided a statement acknowledging that, although a manual track tool was safe and suitable for sporadic tightening and untightening of bolts, the Andrews subdivision "was in such a state of disrepair that the use of a track wrench was not only impracticable, it unreasonably increased the likelihood of injury to Mr. Montgomery." Bowden further noted that, as the S-line "had been neglected by CSX for a long period of time," "CSX should have known that the bolts were very likely to be 'rusted on,' making them very difficult to remove and/or tighten." Similarly, Tyler A. Kress, an industrial engineer, stated in an affidavit that "when an employee is forced to use a manual track wrench all day long on rusted and poorly tended nuts and bolts, the risk of injury increases with each repetitive use."

I would hold the trial court correctly concluded that the expert opinions offered in response to CSX's summary judgment motion do not give rise to an inference that a manual track wrench was not reasonably safe for the work that was assigned to Montgomery. There was no admissible evidence supporting a finding that Montgomery was subject to any pressure with respect to the amount of work he had to complete in any given time period.

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[11] Chicago & N.W. Ry. v. Bower, 241 U.S. 470, 473-74 (1916).

[12] See McKennon, 897 F. Supp. at 1027 ("Under FELA, the proper inquiry is whether the method prescribed by the employer was reasonably safe, not whether the employer could have employed a safer alternative method for performing the task.").

Furthermore, the record is devoid of any suggestion that Montgomery was suffering from fatigue or other ill effects of repetitive motion.[13]

Finally, citing Blair v. Baltimore & Ohio Railroad Co.,[14] Montgomery argues he presented sufficient evidence of negligence on the part of CSX through the combined effect of its failure to provide him with the necessary help and its refusal to give him proper equipment. I disagree.

In Blair, the Supreme Court, in reinstating an award under FELA, held there was sufficient evidence of the railroad defendant's negligence to have the issue determined by a jury. In so holding, the Supreme Court stated as follows:

> The negligence of the employer may be determined by viewing its conduct as a whole. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.[15]

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[13] See Mayhew v. Bell S.S. Co., 917 F.2d 961, 963 (6th Cir. 1990) (stating that although "relaxed standards applied in FELA and Jones Act suits" do not require a medical expert "to articulate to a 'reasonable degree of medical certainty,' . . . a medical expert must be able to articulate that it is likely that the defendant's negligence, or more than possible that the defendant's negligence, had a causal relationship with the injury and disability for which the plaintiff seeks damages"); Moody v. Me. Cent. R.R. Co., 823 F.2d 693, 695 (1st Cir. 1987) ("[A]lthough a plaintiff need not make a showing that the employer's negligence was the sole cause, there must be a sufficient showing (i.e., more than a possibility) that a causal relation existed."); Collier v. Varco-Pruden Bldgs., 911 F. Supp. 189, 192 (D.S.C. 1995) (finding an expert's affidavit "amount[ed] to nothing more than his speculation as to what 'most likely' happened, and has no support in the record").

[14] 323 U.S. 600 (1945).

[15] Id. at 604 (citations omitted).

Further reading of the opinion, however, indicates that the cumulative impact of the "several elements from which negligence might be inferred" was not the deciding factor in the decision. Rather, it is evident from the text immediately following what is quoted above that the Supreme Court had already accepted the premise that the railroad employer was negligent in several respects, any one of which would have been actionable in its own right, and the relationship between all of these undisputed manifestations of negligence only enhanced an already meritorious action:

> The nature of the duty which the petitioner was commanded to undertake, the dangers of moving a greased, 1000 pound steel tube, 30 feet in length, on a 5 foot truck, the area over which that truck was compelled to be moved, the suitableness of the tools used in an extraordinary manner to accomplish a novel purpose, the number of men assigned to assist him, their experience in such work and their ability to perform the duties and the manner in which they performed those duties—all of these raised questions appropriate for a jury to appraise in considering whether or not the injury was the result of negligence as alleged in the complaint. We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury "in whole or in part." Consequently, we think the jury, and not the court should finally determine these issues.[16]

In contrast, none of the specifications of negligence alleged in the present case had sufficient evidentiary support to withstand CSX's summary judgment motion. Blair therefore is easily distinguishable from the present case.

I would affirm the grant of summary judgment to CSX.

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[16] Id. at 604-05 (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Harley L. Landis, **Appellant.**

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3904
Heard November 9, 2004 – Filed December 6, 2004

AFFIRMED

Jeffrey Falkner Wilkes, of Greenville, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah R. J. Shupe, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

ANDERSON, J.: In this criminal action, Harley L. Landis (Landis) appeals his conviction for driving under the influence (DUI). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On November 27, 2000, South Carolina Highway Patrol Trooper David Davis (Trooper Davis) observed a vehicle driven by Landis headed northbound on Interstate 85. Landis was weaving and straddling the center lane. A State Transport Police Officer had taken a position immediately behind Landis' vehicle. The State Transport Police Officer initiated blue lights and pulled Landis over to the side of the interstate. Trooper Davis then pulled behind the Transport Police Officer. After the Transport Officer removed Landis from his car, Trooper Davis performed the field sobriety test, determined Landis was impaired, and placed him under arrest for DUI. There was no videotape of the incident site because Trooper Davis' videotape machine was inoperable at the time of Landis' arrest.

Landis was convicted by a magistrate's court jury and fined $637. On appeal, the circuit court affirmed the conviction and sentence of Landis.

STANDARD OF REVIEW

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception." State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001); accord Rogers v. State, 358 S.C. 266, 594 S.E.2d 278 (2004) (quoting City of Landrum v. Sarratt, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct. App. 2002)). In criminal cases, the court of appeals sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973); State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004).

LAW/ANALYSIS

Landis contends the circuit court erred in affirming his conviction because the State failed to comply with the mandatory provisions of section 56-5-2953 of the South Carolina Code (Supp. 2001) requiring videotaping at the incident site. Landis presents two arguments supporting his position. First, he argues the circuit court erred in finding that Trooper Davis constituted the arresting officer as contemplated by section 56-5-2953. Second, Landis alleges the circuit court erred in finding that the affidavit requirement of section 56-5-2953(B) was satisfied by the State. We disagree and affirm.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) (citing State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999) cert. denied as improvidently granted, State v. Hudson, 346 S.C. 139, 551 S.E.2d 253 (2001). The determination of legislative intent is a matter of law. Hudson, 336 S.C. 237, 519 S.E.2d 577.

The legislature's intent should be ascertained primarily from the plain language of the statute. Morgan at 366, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. Id. When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Id. This Court must apply clear and unambiguous terms of a statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). We should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997). The

terms must be construed in context and their meaning determined by looking at the other terms used in the statue. Hudson, 336 S.C. 237, 519 S.E.2d 577.

When a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Id. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. Id.; City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998).

I. Arresting Officer

Landis asserts the State Transport Police Officer—not Trooper Davis—was the arresting officer at the incident site. Consequently, Landis contends that any effort by the State to comply with the statutory requirements of section 56-5-2953 must be met by the State Transport Officer as the arresting officer. The circuit court found Trooper Davis, not the State Transport Officer, was the arresting officer pursuant to section 56-5-2953. We agree.

Section 56-7-2953 provides, in pertinent part:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped.
>
> (1) The videotaping at the incident site must:
>
> > (a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945 . . . .

. . . .

> (B) . . . . **Failure by the arresting officer to produce the videotapes** required by this section **is not alone a ground for dismissal** of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 **if the arresting officer submits a sworn affidavit** . . . .

S.C. Code Ann. (Supp. 2001) (emphasis added).

The statute does not define "arresting officer." Consequently, we must interpret this phrase in accord with its usual and customary meaning. See City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997) (stating when legislature elects not to define a term in a statute, courts will interpret term in accord with its usual and customary meaning).

Pellucidly, the record supports the finding that Trooper Davis was the "arresting officer" as that phrase is ordinarily understood. Trooper Davis personally observed Landis' driving prior to the traffic stop. He arrived at the scene simultaneously with the State Transport Officer. Trooper Davis pulled in directly behind the Transport Officer and approached just after Landis had been removed from his vehicle. Moreover, Trooper Davis conducted the field sobriety test, determined Landis was impaired, and **placed him under arrest** for DUI.

In State v. Garvin, 341 S.C. 122, 533 S.E.2d 591 (Ct. App. 2000), we noted:

> The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by, the process.

Id. at 126-27, 533 S.E.2d at 593 (quoting State v. Leak, 11 N.C.App. 344, 181 S.E.2d 224 (1971)). Trooper Davis "restrained [Landis] of his liberty" and brought him "within the custody and control of the law." Therefore, we hold that the State Transport Officer merely assisted in facilitating the traffic stop. Trooper Davis was the arresting officer responsible for meeting the statutory videotaping requirements of section 56-5-2953(A).

II. Videotaping Requirements

Landis argues the State failed to comply with the videotape requirements of the incident scene contained in section 56-5-2953(A) of the South Carolina Code (Supp. 2001). Specifically, Landis contends the circuit court erred in affirming his conviction because the affidavit prepared by Trooper Davis was not entered into evidence at trial. We disagree.

Section 56-5-2953(A) provides that a person charged with driving under the influence shall have "his conduct at the incident site and the breath test site videotaped." Videotaping at the incident site must begin not later than the activation of the officer's blue lights and conclude after the arrest of the person. S.C. Code Ann. section 56-5-2953(A)(1)(a) (Supp. 2001). While Trooper Davis was unable to videotape the arrest due to the inoperable condition of his videotape equipment, section 56-5-2953(B) clearly envisions instances where videotape might not be available at the incident site and provides:

> Nothing in this section may be construed as prohibiting the introduction of other evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. **Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to**

> **maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county** or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed. Further, in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the videotape.

S.C. Code Ann. section 56-5-2953(B) (Supp. 2001) (emphasis added).

In accordance with section 56-5-2953(B), Trooper Davis prepared a sworn affidavit certifying that his videotape equipment was inoperable at the time of the arrest despite reasonable efforts to repair the equipment. Trooper Davis testified at trial to the existence of the affidavit:

> **Q**: Was your car equipped with video at this time?
> **A**: It was, but it was inoperable at the time.
>
> . . . .
>
> **Q**: And pursuant to section [56-5-2953] did you sign an affidavit for failure to produce videotape indicating that your videotaping machine was inoperable?
> **A**: Yes, I did.

Moreover, Landis' counsel was provided a copy of Trooper Davis' affidavit.

> **Counsel for Landis**: I haven't seen any Affidavit. I'm assuming you will be admitting it.
> **State**: I thought you were given a copy.
> **Counsel**: I don't think so.
> **State**: That was done today.
> **Counsel**: Oh, Okay.
> . . . .
> **Counsel**: That's fine. I just needed to see it.

Indeed, Landis used the affidavit during cross-examination of Trooper Davis. And during the motion hearing, Landis' counsel requested to enter the affidavit into evidence but decided to wait until trial to admit the document.

> **Counsel for Landis**: Can we put the Affidavit in as an exhibit?
> **The Court**: Sure.
> **State**: If counsel wants to put the Affidavit into evidence in his trial, then (inaudible)
> **Counsel**: I think we're entitled to introduce that at this time for the record on our motion. It is not something that—
> **State**: You want to introduce it for purposes in the motion?
> **Counsel**: Well, we need it for purposes of the motion, but I guess we can—we'll do it at trial. We'll hang on to it and just go ahead and admit it during the trial itself.

In further refutation of Landis' argument, the record discloses that not only was Landis' counsel in possession of Trooper Davis' affidavit, but the court accepted counsel's request to place the affidavit into evidence. Landis' counsel then decided not to enter the affidavit after the court had given him permission to do so. Although the statute does not specify to whom the arresting officer should submit the affidavit, we hold that whether the affidavit has been submitted is not an issue when it has undisputedly been prepared and is in defense counsel's possession at trial.

Based on the cited testimony and Trooper Davis' affidavit, we hold the statutory requirements of section 56-5-2953(B) were satisfied.

CONCLUSION

Therefore, the order of the circuit court is hereby

AFFIRMED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Paul Davis Systems, Inc., Appellant,

v.

Deepwater of Hilton Head, LLC, Columbia Construction Services Company, Inc., and Andrew Batten, Respondents.

Appeal From Beaufort County
Thomas Kemmerlin, Master-In-Equity

Opinion No. 3905
Heard September 16, 2004 – Filed December 6, 2004

REVERSED

Sean Michael Bolchoz and James O. Hale, both of Hilton Head Island, for Appellant.

Edward E. Bullard and John R.C. Bowen, both of Hilton Head Island; and Robert C. Calamari and

William Jerad Rissler, both of Myrtle Beach, for Respondents.

HEARN, C.J.: Paul Davis Systems, Inc. ("Davis") sought to foreclose on a mechanic's lien against Deepwater of Hilton Head ("Deepwater"). The trial judge directed Deepwater's property be sold to satisfy the mechanic's lien, but subsequently granted Deepwater's motion for relief from judgment and dismissed Deepwater as a party. Davis asserts the trial court erred in (1) granting Deepwater's motion for relief from judgment and (2) ruling upon defenses offered through a post-trial motion. We reverse.

FACTS

Pursuant to a work authorization order entered into on April 6, 1999, Davis agreed to perform certain subcontracting services for Columbia Construction Services ("Columbia"), a general contractor, to make improvements to real property owned by Deepwater. Though Deepwater owned the property being renovated, Columbia had been retained as the project's general contractor by C.A. Muer Corporation ("Muer"). Muer was leasing the property from Deepwater for use as a seafood restaurant.

At some point during the project, a dispute arose between Davis and Columbia regarding payment for labor. Davis served a notice and certificate of mechanic's lien on Deepwater on September 28, 1999, followed by service of a summons and complaint on October 4, 1999. Davis's complaint asserted a cause of action against Columbia for breach of contract in which Davis sought damages of $37,721.00, and a separate claim for foreclosure of a mechanic's lien against Deepwater's real property. Neither the mechanic's lien nor the complaint was served on Muer or named Muer as a party. However, Deepwater provided a copy of the complaint to Muer and directed Muer to release Deepwater's property from the lien.

In order to release the property from the lien, Columbia, at Muer's request, posted a mechanic's lien bond dated October 28, 1999 in the

amount of one and one-third times the amount claimed by Davis. Deepwater received a copy of a letter from Columbia's attorney, Ann Marscher, to Davis's attorney referencing attached unsigned copies of a discharge of mechanic's lien, cancellation of lis pendens, and a stipulation of dismissal[1] between Columbia and Davis and a copy of the bond to discharge the construction lien filed with the Beaufort County Register of Deeds.

Although Columbia answered Davis's complaint by filing a general denial, Deepwater failed to respond to the complaint. As a consequence, Davis moved for an order of default against Deepwater and for release of the bond. Deepwater responded through attorney Marscher by filing an answer and opposing Davis's default motion. Although default had not been entered against Deepwater at this point, Deepwater styled this motion as a motion to set aside default based on Rule 55 and 60(b), arguing mistake, inadvertence, or excusable neglect on the part of attorney Marscher. Marscher stated in her affidavit that Deepwater failed to file an answer based on the mistaken belief that Deepwater had been discharged upon the filing of the bond and based on the mistaken impression that Davis's counsel would consent to the dismissal of Deepwater. By order entered April 3, 2000, the trial court denied Davis's motion for default and allowed Deepwater to answer as previously filed. A subsequent answer to Davis's second amended complaint filed on behalf of all defendants, including Deepwater, added as a defense that Deepwater's property had been discharged from the suit by the posting of the surety bond.

The matter proceeded to a bench trial, and the judge entered an order awarding Davis a total of $54,168.89 on the breach of contract claim. Because the court's order made no mention of the mechanic's lien, Davis filed a motion to amend, asking the court to authorize foreclosure on the lien against Deepwater's property. The trial judge granted the motion through an order invalidating the surety bond, finding that Deepwater failed to comply with the conditions of South Carolina Code section 29-5-110 (Supp. 2003) for the discharge of a lien from real property by the posting of a bond because

[1] Copies of the discharge of mechanic's lien, cancellation of lis pendens, and stipulation of dismissal do not appear in the record on appeal.

the surety that executed the bond was not licensed to do business in South Carolina. The order also directed Deepwater's property be sold to satisfy Davis's mechanic's lien.

On May 30, 2002, with the scheduled foreclosure sale of its property mere days away, Deepwater filed an emergency motion asking for relief from the judgment pursuant to Rule 60, SCRCP.[2] Deepwater argued that it should be relieved from the order entitling Davis to foreclose on the lien against its property based on mistake, inadvertence, surprise, or excusable neglect pursuant to Rule 60(b)(1). Deepwater asserted that it neither received nor was served with any papers to put it on notice that an action was pending against it and never engaged counsel because it reasonably relied on the copy of the letter from Marscher to Davis's attorney referencing the discharge of mechanic's lien, cancellation of lis pendens, stipulation of dismissal, and surety bond. Deepwater further argued it was denied an opportunity to represent its interests during the bench trial because it reasonably believed it had been dismissed from the suit by the surety bond filed by Columbia. Deepwater also introduced its lease with Muer and argued that because it was Muer rather than Deepwater that entered into the construction contract with Columbia, Davis's lien should encumber Muer's leasehold interest rather than the real property owned by Deepwater.

By order entered February 5, 2003, the trial judge concluded the lack of a contractual relationship between Deepwater and Davis precluded Davis from encumbering Deepwater's real property with a valid mechanic's lien. Having so concluded, the court dismissed Deepwater from the suit and released its property from Davis's lien. The court set aside the previous award of attorney's fees in Davis's favor based on the assertion of the lien and permitted Deepwater to apply for costs and attorney's fees incurred in defending against Davis's lien. Davis appeals.

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[2] Deepwater's motion was captioned "Notice of Emergency Motion and Emergency Motion for Stay and for Alternate Forms of Relief Pursuant to SCRCP Rules 17, 19, 21, 59, 60, 62, 67 and Memorandum in Support of Motion." The motion ruled upon by the trial judge and relevant to this appeal is Deepwater's Rule 60(b) motion for relief from final judgment.

LAW/ANALYSIS

Davis contends the trial judge erred in granting Deepwater relief based on excusable neglect and in considering and ruling upon defenses available to Deepwater prior to trial but asserted only by post-trial motion. Deepwater alleges it was entitled to relief from the judgment under Rule 60(b)(1) because although its interests were represented by attorney Marscher, it was not aware that it was represented, never engaged counsel, and reasonably believed it had been discharged from the lien. We disagree with Deepwater and reverse the decision of the trial judge.

Rule 60(b)(1), SCRCP, allows a party to seek relief from a final judgment or order on the grounds of "mistake, inadvertence, surprise, or excusable neglect." Relief under this section lies within the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. See Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-03 (1989). "Such an abuse arises when the judge issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." Id. at 119, 382 S.E.2d at 903. It is incumbent upon the party seeking relief pursuant to Rule 60(b)(1) to show the applicability of one of the qualifying grounds. See Williams v. Ray, 232 S.C. 373, 381, 102 S.E.2d 368, 371 (1958) (referencing the statutory relief from judgment for mistake, inadvertence, surprise or excusable neglect available prior to the adoption of the South Carolina Rules of Civil Procedure).

As an initial matter, we find Deepwater's belief that it had been discharged from the lien based on Marscher's letter to Davis's attorney was unreasonable and does not amount to "mistake, inadvertence, surprise, or excusable neglect," warranting relief under Rule 60(b), SCRCP. As we have long held, "a party has a duty to monitor the progress of his case." Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (quoting Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988)). We note that Deepwater was not the intended recipient of

the letter, and the copies of the discharge of mechanics lien, cancellation of lis pendens, and stipulation of dismissal to which the letter referred had not been executed and were unsigned. In addition, the bond to discharge the construction lien referenced in the letter was later determined to be invalid because it did not comply with the statutory prerequisites. See S.C. Code Ann. § 29-5-110 (Supp. 2003).

Moreover, we agree with Davis that the trial judge erred in ruling on Deepwater's defenses asserted in the Rule 60(b) motion, which were available to Deepwater prior to trial. See Greenville Income Partners v. Holman, 308 S.C. 105, 107, 417 S.E.2d 107, 108 (Ct. App. 1992) (stating that the failure of an attorney to interpose available defenses does not amount to the kind of mistake, surprise, inadvertence, and excusable neglect contemplated by Rule 60(b)); see also Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163-64, 375 S.E.2d 321, 323 (Ct. App. 1988) ("[T]he neglect of the attorney is the neglect of the client, and . . . no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground for relief unless it would have been excusable if attributable to the client."). But see Graham v. Town of Loris, 272 S.C. 442, 452, 248 S.E.2d 594, 599 (1978) (stating that this general rule is not applied where there has been a willful and unilateral abandonment of the client by counsel).

Deepwater attempts to circumvent the tenet that Rule 60(b) relief is not available based on the failure of an attorney to assert available defenses by explaining that it was unaware that Marscher filed a motion and answer on its behalf. However, whether Deepwater knew that its interests were represented by Marscher is of little import considering Deepwater's unreasonable belief that it had been discharged from the case and its failure to monitor the progress of the case. See Goodson, 295 S.C. at 403, 368 S.E.2d at 689. This is not a case of willful and unilateral abandonment of the client by counsel in which we could refuse to apply the general rule that the neglect of an attorney is the neglect of a client. Cf. Graham, 272 S.C. at 452, 248 S.E.2d at 599 (finding the attorney's withdrawal from the case at a crucial stage without reasonable notice to the client to be an action of willful abandonment and thus not attributable to the client). Rather, there is ample evidence that Marscher represented Deepwater's interests throughout the

litigation, including filing a motion opposing default and an answer on behalf of Deepwater.

We find Marscher's failure to interpose Deepwater's contract defense at the time she answered on behalf of Deepwater does not amount to "mistake, inadvertence, surprise, or excusable neglect" warranting relief under Rule 60(b). Further, we find Marscher's failure attributable to Deepwater. Accordingly, we hold the trial judge erred in granting Deepwater relief from judgment under Rule 60(b) and ruling on defenses readily available to Deepwater prior to trial.

REVERSED.

HUFF and KITTREDGE, JJ., concur.