OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5

January 31, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Nelson, Jr., as guardian ad litem for Ty'Quain S. Nelson, a minor child, Respondent/Petitioner,

v.

QHG of South Carolina, Inc., d/b/a Carolina Hospital System, Quorum Health Group, Inc., Drs. Coker, Phillips, and Haswell, P. A., and Thomas W. Phillips, M.D., Defendants,

of whom Drs. Coker, Phillips, and Haswell, P.A. and Thomas W. Phillips, M.D. are Petitioners/Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Williamsburg County
L. Henry McKellar, Circuit Court Judge

Opinion No. 25931
Heard November 30, 2004 – Filed January 24, 2005

AFFIRMED IN PART, REVERSED IN PART

Edward L. Graham, of Graham Law Firm, P.A., of Florence, for respondent/petitioner.

Robert H. Hood, D. Nathan Hughey, Deborah Harrison Sheffield, and Molly Craig, of Hood Law Firm, LLC, of Charleston, for petitioners/respondents.

JUSTICE MOORE: Respondent/petitioner (Grandfather) appealed the circuit court's decision granting petitioners/respondents' (the Doctors') motion to dismiss on the bases *res judicata* and collateral estoppel barred Grandfather from asserting the same arguments advanced in a previous suit against Dr. Thomas W. Phillips. The Court of Appeals reversed. Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003). We affirm in part and reverse in part.

FACTS

In 1996, Latonia Nelson (Mother), as guardian *ad litem* for Ty'Guain S. Nelson, brought a medical malpractice action against Carolina Women's Center and Thomas W. Phillips, M.D. for injuries allegedly caused during the delivery of Ty'Guain. When Mother failed to identify any experts who would testify to a breach of the standard of care, the circuit court granted Dr. Phillips' motion for summary judgment. However, the circuit court granted Mother thirty days to file a motion to reconsider along with an affidavit from an expert establishing a breach of the standard of care. No motion to reconsider was filed.

James Nelson, Jr. (Grandfather) brought this medical malpractice action in 2001 against Dr. Phillips, his medical group (the Doctors), Carolina Hospital System, and Quorum Health Group, Inc.[1] alleging negligence on the part of Dr. Phillips and the Doctors in the delivery of Ty'Guain. Grandfather

[1]The claims against QHG of South Carolina, Inc., d/b/a Carolina Hospital System, and Quorum Health Group, Inc. are not at issue in this appeal.

consented to the dismissal of Dr. Phillips after being advised of the prior lawsuit. The Doctors then filed a motion to dismiss, which was granted by the circuit court.

ISSUES

I. Did the Court of Appeals err by finding the medical malpractice claim is barred and by finding the negligent record-keeping claim is not barred by the doctrines of collateral estoppel and *res judicata*?

II. Did the Court of Appeals err by failing to hold the collateral estoppel doctrine inapplicable because the first court order was a consent order, prior counsel was inadequate, the Doctors could have joined in the prior case, and due to policy considerations?

DISCUSSION

I

The Court of Appeals held Grandfather's action was properly dismissed against Dr. Phillips based on *res judicata* and collateral estoppel. However, the court held that Grandfather could maintain his claim against the Doctors for negligent medical record-keeping since that was an independent basis of liability separate from Dr. Phillips' liability. The Doctors contend this was error.

We find Grandfather is barred from bringing a negligent record-keeping claim against the Doctors because Dr. Phillips' negligence has previously been litigated and determined in the first action of Mother versus Dr. Phillips. *See* Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164 (1986) (under doctrine of collateral estoppel, once final judgment on the merits has been reached in prior claim, relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded in any subsequent action based upon a different claim).

Grandfather's claims against the Doctors are collaterally estopped

because there was a fair and full opportunity to litigate those claims in the earlier suit. Previously, the 1996 circuit court found that Mother had not produced an expert witness stating the standard of care and stating that Dr. Phillips had breached the standard of care and, therefore, Mother's action did not present a genuine issue of material fact as to whether medical malpractice had occurred. *See* Pederson v. Gould, 288 S.C. 141, 341 S.E.2d 633 (1986) (in medical malpractice actions, plaintiff must use expert testimony to establish both required standard of care and doctor's failure to conform to that standard). As a result, the 1996 circuit court granted summary judgment to Dr. Phillips and dismissed the action with prejudice. Accordingly, the ability to subsequently raise any claim regarding Dr. Phillips' negligence was extinguished when summary judgment was granted to Dr. Phillips. *See* Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (summary judgment is adjudication on the merits). Grandfather does not allege that any employee of the Doctors, other than Dr. Phillips, was negligent for failing to maintain medical records. Grandfather is attempting to try the previously decided medical malpractice claim through a claim of negligent record-keeping. However, negligent record-keeping is not a separate claim under these facts.

Accordingly, the Court of Appeals erred by finding Grandfather could proceed against the Doctors via a negligent record-keeping claim.

II

Grandfather argues the Court of Appeals erred by: (1) failing to hold the order in the prior case was a consent order which bars the application of collateral estoppel; (2) failing to hold collateral estoppel should not bar the action because prior counsel was inadequate; (3) failing to hold collateral estoppel should not be applied because the Doctors could have joined in the prior case; and (4) failing to hold policy considerations should bar the application of collateral estoppel.

Consent Order

Grandfather argues that when counsel in the 1996 action consented to

the summary judgment order, the consent barred the use of collateral estoppel. The Court of Appeals found the consent order exception contained in Restatement (Second) of Judgments § 51 (1982) did not apply.

Restatement (Second) of Judgments § 51 (1982) provides, in pertinent part:

> If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.
>
> . . .
>
> (4) A judgment by consent for or against the injured person does not extinguish his claim against the person not sued in the first action . . .

In the 1996 summary judgment order, the trial court noted that, "At the conclusion of the hearing, [Mother's counsel] agreed the relief granted herein was appropriate and he consented thereto." This language does not convert the summary judgment order into a consent order.

Accordingly, the Court of Appeals did not err by failing to adopt the restatement as requested by Grandfather and by failing to find the consent order exception to be applicable.

Inadequate Representation

Grandfather argues counsel's representation in the 1996 suit was so inadequate that collateral estoppel should not be applied. We find the Court of Appeals properly concluded the argument was without merit. *See* Dennis v. First State Bank of Texas, 989 S.W.2d 22 (Tex. App. 1998) (to allow appellants another chance to relitigate issues that should have been brought in

previous suit would allow losing party to relitigate cause of action based solely on an assertion of inadequate representation). The remedy for inadequate representation is a malpractice action against the child's former counsel, not a second action attempting to bring the same suit.

Joinder

Grandfather argues the Court of Appeals erred by failing to hold there should be an exception to collateral estoppel in this case because the Doctors could have easily joined in the first case. However, Grandfather's argument is not preserved for review because the argument was not raised as a separate issue until Grandfather filed a petition for rehearing with the Court of Appeals. *See* Rule 226(d)(2), SCACR (issue must have been raised in initial arguments to Court of Appeals).

Policy Considerations

Grandfather argues the Court of Appeals erred by failing to find that policy considerations should bar the application of collateral estoppel.

Grandfather asserts that if collateral estoppel is applied in this case to preclude an innocent minor's action against the Doctors, this would violate the principles of fundamental fairness, the judicial preference for disputes to be resolved after full litigation and determination of the substantive issues, and the overriding need for the interests of minors to be protected by the law.

Under the circumstances of this case, Grandfather's policy considerations do not override the interest of bringing an end to litigation and the interest of ensuring a defendant is not being forced to defend the same action repeatedly. *See* First Nat'l Bank v. U.S. Fidelity and Guar. Co., 207 S.C. 15, 35 S.E.2d 47 (1945) (public interest requires end to litigation and no one should be twice sued for same cause of action). As noted above, the remedy is a malpractice action against the former counsel, not a second attempt to bring the same suit. Accordingly, the Court of Appeals did not err by failing to find policy considerations bar the application of collateral estoppel.

AFFIRMED IN PART, REVERSED IN PART.

TOAL, C.J., WALLER and BURNETT, JJ., concur.
PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gloria Cole and George DeWalt, Jr., in their capacities as Personal Representatives of the Estate of George Ernest Cole, deceased, Petitioners/Respondents,

v.

South Carolina Electric & Gas, Inc., Respondent/Petitioner.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 25932
Heard December 1, 2004 – Filed January 31, 2005

AFFIRMED AS MODIFIED

F. Xavier Starkes and William T. Toal, of Johnson, Toal & Battiste, P.A., of Columbia, for petitioners/respondents.

Robert A. McKenzie and Gary H. Johnson, II, of McDonald, McKenzie, Rubin, Miller & Lybrand, L.L.P., of Columbia, for respondent/petitioner.

ACTING CHIEF JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision involving application of the Recreational Use Statute, S.C. Code Ann. § 27-3-10 et seq. (1991), and assumption of the risk.[1] We affirm as modified.

FACTS

Petitioners/respondents (hereinafter collectively referred to as "Cole") brought this wrongful death action for the death of their son George Cole. George drowned on August 6, 1997, at the age of fourteen while swimming at a Lake Murray recreation site owned by respondent/petitioner South Carolina Electric & Gas (SCE&G). Cole alleged SCE&G was negligent and grossly negligent for failing to provide lifeguards, life-saving equipment, and the proper warnings at the site. On SCE&G's motion for summary judgment, the trial court found SCE&G was entitled to immunity from liability for simple negligence under the Recreational Use Statute and the trial proceeded only on the issue of SCE&G's gross negligence.

At trial, Cole produced evidence that George was at Lake Murray Site #1 with his friend Vincent, Vincent's mother, and her boyfriend. By all accounts, George was a good swimmer. The boys were told not to go into the water without telling the adults but they did not follow this directive. Vincent testified that he and George swam out to the safety line, or buoy line. They did not know the water at the buoy line was over their heads. The two boys were racing back to shore when Vincent turned around and saw George floundering. Vincent ran for a security guard who called 911.

Another witness saw George crying for help and bobbing up and down. Several bystanders attempted a rescue but could not find George under the water. After about fifteen to twenty minutes, his body was

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[1] Cole v. South Carolina Elec. & Gas, Inc., 355 S.C. 183, 584 S.E.2d 405 (Ct. App. 2003).

found in seven or eight feet of water at the bottom of the lake. He could not be revived.

At trial, Cole's aquatic safety expert, Stanly Shulman, testified that George would have lived had there been a lifeguard on duty because lifeguards are trained to search under water. Further, bystanders could have saved him had there been safety equipment available. Shulman also testified that the buoy line should have been placed at a depth of three-and-a-half to five feet, rather than seven to eight feet, and that depth markers should have been placed. The signs warning simply "no lifeguard on duty" were inadequate in his opinion to warn of the dangers inherent in swimming in a lake. Shulman also testified that SCE&G failed to develop an effective risk management plan even after two previous drownings at the site.

The jury returned a verdict for SCE&G and Cole appealed. On appeal, the Court of Appeals affirmed summary judgment on the issue of immunity under the Recreational Use Statute but reversed and remanded for a new trial on the gross negligence cause of action because the trial judge failed to charge SCE&G's burden to prove its affirmative defense of assumption of the risk. Both parties petitioned this Court for a writ of certiorari.

DISCUSSION

Cole's Appeal

Application of the Recreational Use Statute

In 1968, our legislature enacted a Recreational Use Statute (RUS), codified at §§ 27-3-10 through -70, which limits the liability of a landowner under certain conditions. In pertinent part, these sections provide as follows.

> **§ 27-3-10. Declaration of purpose.**
> The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for

recreational purposes by limiting their liability toward persons entering thereon for such purposes.

§ 27-3-20. Definitions.

(c) "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, summer and winter sports and viewing or enjoying historical, archaeological, scenic, or scientific sites.

(d) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

§ 27-3-40. Effect of permission to use property for recreational purposes.

Except as specifically recognized by or provided in § 27-3-60, an owner of land who permits without charge any person having sought such permission to use such property for recreational purposes does not thereby:

(a) Extend any assurance that the premises are safe for any purpose.

(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.

§ 27-3-60. Certain liability not limited.

Nothing in this chapter limits in any way any liability which otherwise exists:

> (a) For grossly negligent, willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.
>
> (b) For injury suffered in any case where the owner of land charges persons who enter or go on the land for the recreational use thereof. . . .

(emphasis added).

It is undisputed that on the day George drowned, the driver of the car in which George was a passenger paid a three-dollar parking fee at SCE&G's recreational site on Lake Murray. The fee is a per-vehicle charge and is not related to the number of visitors in the vehicle. People who enter on foot or by bicycle are charged no fee. The trial court ruled that the parking fee was not a "charge" within the meaning of the RUS and therefore SCE&G was entitled to the protection of the RUS.

Cole contends the parking fee is a "charge" that fits within the exception to landowner immunity stated in § 27-3-60(b). However, subsection (d) specifically defines "charge" as "the admission price or fee asked in return for invitation or permission to enter or go upon the land." (emphasis added.) This definition limits a "charge" to a general charge for admission to the property. Courts interpreting this phrase have consistently held that a parking fee does not qualify as a "charge" because not everyone must pay it for admission to the property. *See* Stone Mountain Mem. Assoc. v. Herrington, 171 S.E.2d 521 (Ga. 1969); City of Louisville v. Silcox, 977 S.W.2d 254 (Ky. App. 1998); Hanley v. State, 837 A.2d 707 (R.I. 2003); *see generally* Moss v. Dep't of Nat. Resources, 404 N.E.2d 742 (Ohio 1980) (admission fee is a charge necessary to utilize the overall benefits of a recreational area). We concur in this view and conclude a parking fee does not fit within the statutory definition of "charge." The trial court therefore properly held SCE&G is entitled to immunity for simple negligence under the RUS.

SCE&G's Appeal

1. Burden of proof on assumption of risk[2]

The trial judge declined to charge that SCE&G had the burden of proving its affirmative defense of assumption of the risk and instead charged generally that SCE&G had the burden of proving the plaintiff's "fault" for purposes of comparative negligence and that the jury should "consider the defenses" set forth by SCE&G. The only charge specifically regarding assumption of the risk was to define it as a defense and then instruct: "If you find that . . .the plaintiff assumed the risk associated with this activity, then you would find for the defendant." The Court of Appeals found this charge was inadequate to properly instruct the jury regarding SCE&G's burden of proof and reversed on this issue. SCE&G contends this was error on the following grounds.

a. The charge as a whole was sufficient.

It is well-settled that assumption of the risk is an affirmative defense which the defendant bears the burden of proving. Baldwin v. Piedmont Mfg. Co., 102 S.C. 402, 86 S.E. 379 (1915); *see also* Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 433 S.E.2d 871 (1993) (defendant has burden of proving affirmative defenses listed in Rule 8(c), SCRCP); Rule 8(c), SCRCP (assumption of risk is affirmative defense).

The question here is whether the charge as a whole conveyed this burden to the jury. We agree with the Court of Appeals that it did not, especially in light of the instructions defining the plaintiff's burden of proof:

[2]Assumption of the risk is abolished for causes of action accruing after November 9, 1998. Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998). This cause of action arose before that date.

> As the trial begins, the scales are even, but throughout the course of the trial as the testimony and the evidence comes in, the scales may tip back and forth. If after all of the evidence has been presented, the scales remain even or they tip ever so slightly in favor of the defendant, then the plaintiffs would not have satisfied their burden of proof in this particular matter.

By contrast, the charge regarding SCE&G's affirmative defense indicated only that the jury should "consider" SCE&G's defenses and if the jury found the plaintiff assumed the risk, it should find for SCE&G. This charge gave the jury no standard by which to determine if SCE&G had established its defense. The Court of Appeals properly found the charge inadequate.

b. Primary implied assumption of the risk.

SCE&G contends there was no need to charge assumption of the risk under the doctrine of "primary implied assumption of the risk." We disagree.

Primary implied assumption of the risk arises when the plaintiff impliedly assumes risks inherent in a particular activity. Davenport, 333 S.C. at 81, 508 S.E.2d at 570. It is not a true affirmative defense but is another way of stating there is no duty to the plaintiff. *Id.* We disagree SCE&G owed no duty here. A landowner has a duty to warn a licensee of concealed dangerous conditions or activities known to the landowner. Vogt v. Murraywood Swim & Racquet Club, 357 S.C. 506, 593 S.E.2d 617 (Ct. App. 2004). Despite immunity under the RUS, SCE&G may still be liable for gross negligence which is the failure to exercise even slight care. Clyburn v. Sumter County Sch. Dist. No. 17, 317 S.C. 50, 451 S.E.2d 885 (1994). Whether SCE&G met this standard of care in warning only that there was no lifeguard is a question of fact for the jury.

c. Harmless error

SCE&G contends any error in the failure to charge the burden of proof is harmless because the jury must have concluded Cole failed to prove gross negligence. SCE&G bases this assertion on the fact that the only question put to the trial court by the jurors was regarding the distinction between negligence and gross negligence. This question, however, does not indicate the jury failed to consider assumption of the risk, especially since SCE&G's case basically turned on proving that George assumed the risk of swimming in Lake Murray.

d. Assumption of risk as a matter of law

SCE&G contends George assumed the risk inherent in swimming in a natural body of water and since his fault was greater than 50%, the case should not be remanded for a new trial.

There are four requirements to establishing the defense of assumption of risk: (1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger. Davenport, 333 S.C. 79, 508 S.E.2d 569. According to Cole's expert witness, the warning simply stating there was no lifeguard was insufficient notice of the danger involved. There remains a factual issue whether George was sufficiently warned of the danger to have legally assumed the risk of swimming in Lake Murray. SCE&G has not established assumption of the risk as a matter of law.

2. Effect of Regulation 61-50

At trial, Cole introduced evidence that at the time of George's drowning, DHEC Regulation 61-50 required the use of lifeguards and lifesaving equipment.[3] SCE&G responded with evidence of a 1978

[3]This regulation was subsequently amended in 1999 as discussed at footnote 4, *infra*.

administrative ruling exempting it from this requirement. In 1980, the regulation was amended. The issue at trial was whether SCE&G's exemption remained valid under the amended regulation.

Rather than decide this issue, the trial judge ruled it would be submitted to the jury as a factual issue. In charging the jury, however, the trial judge charged only that evidence of a violation of a regulation is evidence of negligence. Cole appealed, contending the trial judge should have decided whether the regulation applies as a matter of law. SCE&G argued in response that the regulation conflicts with the RUS and therefore as a matter of law it does not apply regardless of whether the 1978 exemption remained valid. Rather than resolve this issue, the Court of Appeals concluded any error was harmless because the trial judge's charge instructed the jury to determine whether the regulation was violated, an instruction that was favorable to Cole who therefore could not show prejudice on appeal.

SCE&G contends the Court of Appeals should have addressed whether the regulation applies as a matter of law to resolve whether on remand a violation should be charged as evidence of negligence. We agree and find as a matter of law the regulation does not apply.

The purpose of the RUS as stated in the statute is "to encourage owners of land to make land and water areas available to the public for recreational purposes." § 27-3-10. Under the RUS a landowner's liability is limited to gross negligence, which is defined as the failure to exercise slight care. Clyburn, *supra*. By contrast, Regulation 61-50, as it read at the time this cause of action arose,[4] imposed "owner responsibility" for lifeguards and lifesaving equipment and subjected the violator to fines and imprisonment. This regulation, as applied, conflicts with the RUS since a qualifying landowner under the RUS has

[4] Regulation 61-50 was amended in 1999 and now applies only to a natural swimming area if there is "a fee or membership required to gain access to a natural freshwater location." Further, the regulation no longer requires safety measures such as lifeguards and life-saving equipment but applies solely to monitoring water quality.

a duty to exercise only slight care. A duty to provide recreational safety features such as lifeguards and lifesaving equipment exceeds this "slight care" standard. Since a regulation cannot alter or add to a statute, Regulation 61-50 does not apply. *See* McNickel's, Inc. v. S.C. Dep't of Rev., 331 S.C. 629, 503 S.E.2d 723 (1998).

In sum, on remand a violation of Regulation 61-50's safety provisions should not be charged as evidence of negligence since SCE&G has no duty under the RUS to exercise more than slight care.

AFFIRMED AS MODIFIED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice James W. Johnson, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward D. Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of South Carolina, and on behalf of all others similarly situated, Petitioners,

v.

David H. Wilkins, in his officially capacity as Speaker of the S.C. House of Representatives, R. Andre Bauer in his official capacity as Lt. Governor and President of the S. C. Senate, and the State of South Carolina, Respondents.

Glenn F. McConnell, in his capacity as President Pro Tempore of the South Carolina Senate, Intervenor.

IN THE ORIGINAL JURISDICTION

Opinion No. 25933
Heard December 2, 2004 – Filed January 28, 2005

James G. Carpenter and Jennifer J. Miller, both of The Carpenter Law Firm, PC, of Greenville, for Petitioners.

Attorney General Henry D. McMaster, Assistant Deputy Attorney General Robert D. Cook, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for Respondent State of South Carolina

Michael R. Hitchcock, S. Phillip Lenski, Jennifer L. Parrish, all of Columbia, for Respondent State of South Carolina Senate and Intervenor.

Charles F. Reid, Robert R. Smith, II, Benjamin P. Muskin and Patrick G. Dennis, all of Columbia, for Respondent South Carolina House of Representatives.

Dwight F. Drake, William C. Hubbard, C. Mitchell Brown, all of Nelson, Mullins, Riley & Scarborough, of Columbia,; and Keith D. Munson and Heather Ruth, both of Womble, Carlyle, Sandridge & Rice, PLLC, of Greenville, for Amicus Curiae.

JUSTICE WALLER: This matter is before us in our original jurisdiction to determine whether Act No. 187, 2004 Acts (the Act), violates the one subject requirement of Article III, section 17, of the South Carolina Constitution.[1]

FACTS

On March 17, 2004, the General Assembly enacted Act No. 187, 2004 Acts (commonly referred to as the Life Sciences Act). The Act is comprised of twenty-one separate sections, and includes a Life Sciences Act, the Venture Capital Investment Act, the South Carolina Research University Infrastructure Act, an act relating to Public Institutions of Higher Learning, and numerous other subjects as will be discussed below. In passing Act No.

[1] "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. CONST. Art. III, § 17.

187, the Legislature overrode the Governor's veto.[2] Sloan filed a petition in this Court's original jurisdiction seeking a declaration that Act 187 violates Article III, § 17 (the one subject provision) of the South Carolina Constitution. We granted the petition.[3]

ISSUES

1. Does Sloan have standing to challenge Act No. 187?

2. Does Act No. 187 violate Article III, § 17 and, if so, are the offending provisions severable?

1. STANDING

Respondents assert Sloan is without standing to proceed with this action.[4] We disagree.

As a general principle, a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained. Joytime Distribs. & Amusement Co., Inc. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649-650 (1999). However, "the rule [of standing] is not an inflexible one." Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). Standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance." Baird v. Charleston County, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Recently, both this Court and the

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[2] The veto was based upon the Governor's "fundamental objection to receiving legislation that has numerous tack-ons, each containing their own complex policy considerations, many of which did not receive appropriate public debate."

[3] We also granted intervenor status to Senator Glenn McConnell as President *Pro-Tempore* of the Senate, and granted requests to file amicus briefs to ChangeSCNow and to the University of South Carolina Development Foundation, Medical University of South Carolina Foundation for Research Development, and Clemson University Foundation, Inc.

[4] By "Respondents," we are speaking of the General Assembly. Although the Attorney General is also technically a respondent, his brief is more in line with that of Petitioners.

Court of Appeals have granted standing in cases of important public interest. See Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004) (standing to challenge governor's commission as an officer in the Air Force reserve); Sloan v. Greenville County, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App. 2003) (standing to bring declaratory judgment action alleging county failed to comply with ordinances governing procurement of construction services on design-build public works projects).

In light of the great public importance of this matter, we find Sloan has standing to maintain this action.

2. ONE SUBJECT/ SEVERABILITY

Sloan asserts Act 187 violates the one subject requirement of Article III, section 17. We agree.

Act No. 187 contains the following provisions:

1. The Life Sciences Act (§§ 1-4) (§ 1 setting forth definitions, etc.; § 2 regarding Depreciation Allowances; § 3 providing for Economic Development Projects and Bonds;[5] and § 4 reporting requirements)
2. The Venture Capital Investment Act (§§ 5-7)
3. Public Institutions of Higher Learning relating to bonuses for employees, fee waivers for students, grant positions and health insurance and, in particular, vesting public institutions of higher learning with the power of eminent domain (§ 8)
4. The South Carolina Research University Infrastructure Act (§ 9)
5. An Act defining Permanent Improvement Project (§ 10)
6. Use of funds by research universities (§ 11)
7. Creation of a Four-Year Culinary Curriculum Program at Trident Technical College (§ 12)

[5] Section 3(C) of the Act also includes the provisions for issuance of bonds for a tourism training infrastructure project or a national and international convention and trade show center.

8. Authorization of a Four-year degree program at University of South Carolina-Sumter (§ 13)
9. A requirement of prior authorization for campus closing for USC (§ 14)
10. A requirement of annual reports of the number of out-of-state undergraduate students at any public institution of higher learning (§ 15)
11. Eligibility requirements for Life Scholarship recipients (§ 16) (and §§ 17-18 defining eligible institutions and grade point averages)
12. A Law School Feasibility Study for South Carolina State University (§ 19)
13. Section 20 (provisions not to be construed as an appropriation of funds)
14. Severability Clause (§ 21)

S.C. Constitution, Art. III, § 17 provides that "every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." The purpose of Article III, § 17 is to apprise the members of the General Assembly of the contents of an act by reading the title, (2) prevent legislative log-rolling and (3) inform the people of the state of the matters with which the General Assembly concerns itself. South Carolina Public Svc. Comm'n v. Citizens and Southern Nat'l Bank, 300 S.C. 142, 386 S.E.2d 775 (1989). See also Keyserling v. Beasley, 322 S.C 83, 470 S.E.2d 100 (1996). Article III, § 17 is to be liberally construed so as to uphold an Act if practicable. McCollum v. Snipes, 213 S.C. 254, 49 S.E.2d 12 (1948). Doubtful or close cases are to be resolved in favor of upholding an Act's validity. Alley v. Daniel, 153 S.C. 217, 150 S.E. 691 (1929). Article III, § 17 does not preclude the legislature from dealing with several branches of one general subject in a single act. It is complied with if the title of an act expresses a general subject and the body provides the means to facilitate accomplishment of the general purpose. Keyserling, supra. However, Article III, section 17 requires "the topics in the body of the act [be] kindred in nature and hav[e] a legitimate and natural association with the subject of the title," and that the title conveys "reasonable notice of the

subject matter to the legislature and the public." Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 141, 262 S.E.2d 45, 47 (1980).

It is patent that the myriad provisions comprising Act 187 simply do not comprise one subject.[6] On the contrary, the Act is teeming with subjects, from life sciences provisions to the establishment of a culinary arts institute. In our view, Act 187 is obviously violative of Article III, § 17. However, notwithstanding this violation, we must address whether portions of the Act may be read to express one subject and, if so, whether the offending provisions may be severed. We find that they may.

As noted previously, Section 21 of Act 187 contains a very detailed severability clause, as follows:

> If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

We recently addressed severability in Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 649, 528 S.E.2d 647, 654 (1999), stating:

> The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that

[6] We simply cannot accept the dissent's assertion that the General Assembly may enact myriad measures, ranging from establishment of life sciences facilities to creation of a culinary arts institute, under the general guise of "economic development," and thereby comport with the one subject requirement of Article III, § 17. For this Court to accept such a premise would give tacit approval to legislative logrolling.

> which is rejected, and is of such a character that it may fairly be presumed that the legislature would have passed it independent of that which conflicts with the constitution. "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision."

We find the offending portions of Act 187 are severable. From a reading of the entire Act, it is evident that its underlying purpose was to foster economic growth in this state through development of the life sciences industry. Accordingly, we find the "one subject" of the Act is that of life sciences. Further, we find several provisions of the Act are so intertwined with the provision and growth of the life sciences field that they can reasonably be deemed to fall within that subject.

The Life Sciences Act, section 1 of the Act, has the purpose of fostering economic development and encouraging the creation of high-paying jobs in the life sciences industry.[7] Section 2 captioned "Depreciation Allowances," sets forth a 20% depreciation allowance for machinery and equipment used directly in the manufacturing processes of a life science facility. Section 3 of Act 187 provides for Economic Development Projects and Bonds, and increases the limits on general obligation debt in order to "foster economic development and to encourage the creation of high-paying jobs in the life sciences industry." Section 4 provides for annual reports of the cost and benefit of the act. We find each of these sections is intrinsically related to the underlying purpose of the Life Sciences Act so as to fall within its one subject.[8]

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[7] A "life sciences facility" is defined as a "business engaged in pharmaceutical, medicine, and related laboratory instrument manufacturing, processing, or research and development. . ." Section 1(B).

[8] However, section 3(C) of the Act includes the provisions for issuance of bonds for a tourism training infrastructure project or a national and international convention and trade show center. We simply do not see that these provisions are kindred in nature to the underlying spirit of the Life Sciences bill; accordingly, this provision is stricken as violative of the Article III, § 17.

Sections 5 through 7 of the Act, the "Venture Capital Investment Act," were enacted to increase the availability of equity, near-equity, or seed capital in amounts of one hundred million dollars or more for emerging, expanding, relocating, and restructuring enterprises in the State, so as to help strengthen the state's economic base, and to support the economic development goals of this State. We find these provisions sufficiently related to the General Assembly's goal of fostering economic development in the life sciences industry to withstand a challenge under Article III, § 17.

Section 8 of the Act is entitled "Public Institutions of Higher Learning." It provides for bonuses for employees, fee waivers for students, establishes grant positions, and providing graduate students with health insurance. This section of the Act also vests the board of trustees of such institutions with the power of eminent domain. We simply cannot find that these provisions inhere with the underlying purposes of the Life Sciences Act. Accordingly, they are stricken as violative of Article III, § 17.

Section 9 of the Act, the South Carolina Research University Infrastructure Act,[9] increases the limitation on general obligation bond debt to six percent. This section is similar in nature to Section 3 of the Act (Economic Development Projects and Bonds), and aids with funding for research universities. Given the direct correlation between research universities and the life sciences field, we find this section sufficiently related to the purposes of the Life Sciences Act to comply with Article III, § 17.

Section 10 of the Act requires the State Budget and Control Board to formally establish each permanent improvement project before any actions may be taken to implement such a project. This section of the Act, although conceivably related to the Life Sciences Act, is simply too remote to be deemed part of the one subject expressed in that Act. Accordingly, it is stricken.

[9] The purpose of this increase is "to advance economic development and create a knowledge based economy, thereby increasing job opportunities, and to facilitate and increase research within the State at the research universities."

Section 11 of the Act, entitled "Use of Funds," governs funding sources which may be utilized by senior research universities to provide for endowed professorships. Notably, this section states that matching funds from private or federal sources may only be used for "Engineering, Nanotechnology, Biomedical Sciences, Energy Sciences, Environmental Sciences, Information and Management Sciences, and for other sciences and research that create well-paying jobs and enhanced economic opportunities for the people of South Carolina." Clearly, these provisions directly relate to the underlying purposes of the Life Sciences Act.

We have reviewed the remaining sections of Act 187, and we simply cannot find them to be within the purview of the Life Sciences Act. Accordingly, they are, with the exception of the severability clause set forth in section 21, stricken as violative of Article III, § 17. The stricken sections are as follows:

> Section 12 - authorizing Trident Technical College to establish a four-year culinary curriculum program.
>
> Section 13- authorizing the University of South Carolina Sumter campus to offer four-year degree programs.
>
> Section 14- requiring prior authorization for any campus of the University of South Carolina to close any of its campuses.
>
> Section 15- requiring public institutions of higher learning to annually report the number of out-of-state undergraduate students in attendance at the university for each semester.
>
> Section 16- setting forth certain eligibility requirements for LIFE scholarship recipients. Sections 17 and 18 defining institutions at which students are eligible to receive a LIFE Scholarship and establishing the requisite grade point averages for recipients.

> Section 19- establishing a committee to study the feasibility and need for a School of Law at South Carolina State University in Orangeburg.
>
> Section 20 sets forth the General Assembly's intent that the provisions set forth in the Act not be construed to appropriate funds.

We simply do not see any manner in which the above provisions relate to the one subject of the Life Sciences Act. Any relation which they may have is clearly too tangential to fit within the purpose and meaning of Article III, § 17. Accordingly, the above provisions are stricken.

CONCLUSION

We find Act No. 187 violates the one subject requirement of Article III, § 17 of the constitution. However, we find those provisions which are germane to the Life Sciences Act, as set forth above, are within the one subject requirements of Article III and are, accordingly, upheld. The offending provisions of Act 187 are stricken.

TOAL, C.J., MOORE and BURNETT, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully concur in part and dissent in part. In my opinion, Act 187 is constitutional in its entirety.

"The three objectives of the constitutional provision requiring that each act relate to one subject are to (1) apprise the members of the General Assembly of the contents of an act by reading the title, (2) prevent legislative log-rolling and (3) inform the people of the State of the matters with which the General Assembly concerns itself." S.C. Pub. Serv. Auth. v. Citizens and S. Nat'l Bank of S.C., 300 S.C. 142, 162, 386 S.E.2d 775, 786-87 (1989) (citations omitted); Carll v. S.C. Jobs-Economic Dev. Auth., 284 S.C. 438, 442, 327 S.E.2d 331, 334 (1985) (citations omitted).

The title of an act "need not be an index to every provision of the act" in order to "apprise members of the General Assembly" and "inform the people of the State." Carll, 284 S.C. at 442, 327 S.E.2d at 334 (citing Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980)). In this case, the title *is* an index to every provision of Act 187, so neither the legislators nor the people lacked notice of the act's contents. Accordingly, Act 187 does not violate the first or third objectives of Article III, section 17.

That leaves log rolling as the only possible basis for invalidating the act. "Log rolling" is a "legislative practice of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measures into a majority that will adopt them all." Black's Law Dictionary 849 (5th ed.1979). In the language of the constitution, "every Act or resolution having the force of law shall relate to but one subject …." S.C. Const. art. III, § 17.

The issue is, therefore, whether the provisions of Act 187 are germane to one subject. The majority finds that "the Act is teeming with subjects, ranging from life sciences to the establishment of a culinary arts institute." I disagree. The majority's view of what constitutes a subject is too narrow. Article III, section 17 is to "be liberally construed, and construed so as to uphold [an act] if practicable." Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 102 (1996); McCollum v. Snipes, 213 S.C. 254, 261, 49 S.E.2d

12, 14 (1948). Here, all of Act 187's provisions reasonably relate to the subject of economic development.

That "economic development" is a general subject does not render it an invalid subject. Article III, section 17 "does not preclude the legislature from dealing with several branches of one general subject in a single act." Keyserling, 322 S.C. at 86, 470 S.E.2d at 102 (citing De Loach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938)). Further, the Court should read the provisions of Act 187 together, not in isolation. Keyserling, 322 S.C. at 88, 470 S.E.2d at 103. Act 187 addresses various aspects of economic development, including a knowledge-based workforce, the life-sciences industry, research, education, venture capital, permanent improvements, and tourism.[10] I would uphold Act 187 in its entirety.

I do not agree with the majority that Act 187 is "teeming with subjects." As I have stated, I believe the act relates to several branches of one subject. If Act 187 were indeed an indulgence in log rolling, then it should be declared unconstitutional in its entirety. Log rolling undermines the legislative process and the democratic principle of majority rule. Severing certain provisions of an act neither prevents nor corrects log rolling, but rather "creates uncertainty and promotes arbitrary and uneven enforcement" of the one-subject rule. State ex rel. Ohio AFL-CIO v. Voinovich, 69 Ohio St. 3d 225, 249-50, 631 N.E.2d 582, 599-600 (Ohio 1994) (William Sweeney, J., concurring in part and dissenting in part); see also State ex rel. Hinkle v. Franklin County Bd. of Elections, 62 Ohio St. 3d

[10] Some examples of topics beyond the scope of economic development are elections, judicial procedure, criminal law, and domestic-relations law. The only provision invalidated by the majority that is arguably not germane to economic development is section 20, which "sets forth the General Assembly's intent that the provisions set forth in the Act not be construed to appropriate funds." The majority strikes section 20 because it is unrelated to life sciences. It is unrelated, however, because it is an interpretation section. Under the majority's rationale, the section containing the severability clause should also be stricken, for it does not relate to life sciences, either.

145, 153, 580 N.E.2d 767, 773 (Ohio 1991) (Douglas, J., dissenting) (asking, "[H]ow does the majority know which part of the Act is defective? The Act is a promulgation of the General Assembly in package form. Can we break into the package and excise what we perceive (or want to be) the offending part?"); Heggs v. State, 759 So.2d 620, 630 (Fla. 2000) (stating it is "manifestly unsound to employ severability"). Employing the severability clause in Act 187 turns the Court into a super-legislature.

Because I find all of Act 187's provisions germane to the one subject of economic development, I would hold the act constitutional in its entirety.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Linda Angus, individually, and as class representative for all those similarly situated, Appellant/Respondent,

v.

The City of Myrtle Beach, Respondent/Appellant.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 25934
Heard June 10, 2004 – Filed January 31, 2004

AFFIRMED IN PART; REVERSED IN PART; REMANDED

L. Sidney Connor, IV, of Kelaher, Connell & Connor, P.C., and Natale Fata, both of Surfside Beach, for appellant/respondent.

James B. Van Osdell and Charles B. Jordan, Jr., both of Van Osdell, Lester, Howe & Jordan, of Myrtle Beach, for respondent/appellant.

JUSTICE MOORE: This action was brought by appellant/respondent Angus, a municipal taxpayer, challenging the property tax rollback millage rate adopted by respondent/appellant City of Myrtle Beach (Myrtle Beach) for the 1999-2000 fiscal year. Angus appeals a final order holding that Myrtle Beach did not violate S.C. Code Ann. § 6-1-320 (2004) or § 12-37-251(E) (2000). Myrtle Beach cross-appeals an order certifying a class of municipal taxpayers, and an order refusing to join the South Carolina Department of Revenue as a party. We affirm the rulings appealed by Myrtle Beach. We agree with Angus that the millage rate was improperly calculated, reverse on this issue, and remand for the trial court to determine the appropriate relief.

FACTS

As provided by § 6-1-320(A),[1] in most years, a municipality may raise its general operating (GO) millage rate above that of the year before only by the amount the consumer price index rose the preceding year. In a year when a reassessment program[2] is implemented, however, the "rollback millage," rather than the previous year's millage, is the base GO millage rate. Rollback

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[1]Section 6-1-320(A) provides:

> Notwithstanding Section 12-37-251(E), a local governing body may increase the millage rate imposed for general operating purposes above the rate imposed for such purposes for the preceding tax year only to the extent of the increase in the consumer price index for the preceding calendar year. However, in the year in which a reassessment program is implemented, the rollback millage, as calculated pursuant to Section 12-37-251(E), must be used in lieu of the previous year's millage rate.

[2]Countywide reassessments and equalizations of real property are conducted every fifth year. S.C. Code Ann. §12-43-217 (2000). Municipalities and other taxing entities within a county use the county's property valuations.

millage is calculated under § 12-37-251(E).[3]

Following a countywide reassessment in 1998, Myrtle Beach was required to use rollback millage calculated under § 12-37-251(E) in setting its 1999-2000 GO millage rate. Section 12-37-351(E) requires that the total assessed value of property, which is the divisor used in calculating the rollback millage, be adjusted by deducting the amount of the increase attributable to (1) new construction, (2) renovations to existing structures, and (3) property and improvements not previously taxed. In calculating its rollback millage for 1999-2000, Myrtle Beach applied an additional variable to further reduce property values; it denominated this variable the "appeals allowance." This variable took into account the fact that some owners would successfully appeal the new valuations placed on their properties. Myrtle Beach used an appeals allowance of 7.5%.

In addition, Myrtle Beach adjusted the dividend used in calculating the rollback millage. This dividend is the prior year's property tax revenues. Although § 12-37-251(E) does not provide for any adjustment of this figure, Myrtle Beach applied an estimated collection rate of 86% to account for the fact that not all taxes billed would be collected. It is undisputed that in making these adjustments to the rollback millage calculation specified by

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[3]Section 12-37-251(E) provides:

> Rollback millage is calculated by dividing the prior year property tax revenues by the adjusted total assessed value applicable in the year the values derived from a countywide equalization and reassessment program are implemented. This amount of assessed value must be adjusted by deducting assessments added for property or improvements not previously taxed, for new construction, and for renovation of existing structures.

§ 12-37-251(E), Myrtle Beach did not utilize the provisions of § 6-1-320(C)[4] which allows the millage rate limitation to be overridden and the millage rate increased by a positive majority vote of the governing body at a special public meeting.

ISSUE

Did the trial court err in determining that Myrtle Beach's method of calculating rollback millage was proper?

DISCUSSION

Angus contends that the circuit court erred in holding Myrtle Beach did not violate § 12-37-251(E) by adding two variables to the statutory formula for calculating rollback millage without holding a public hearing as required by § 6-1-320(C). We agree that § 12-37-251(E) and § 6-1-320(A) do not permit Myrtle Beach to make these adjustments unless it utilizes the provisions of § 6-1-320(C).

As noted above, § 12-37-251(E) permits the use of three adjustments in calculating the rollback millage. Angus argues, and we agree, that

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[4]Section 6-1-320(C) provides:

> The millage rate limitation provided for in subsection (A) of this section may be overridden and the millage rate may be further increased by a positive majority vote of the appropriate governing body. The vote must be taken at a specially-called meeting held solely for the purpose of taking a vote to increase the millage rate. The governing body must provide public notice of the meeting notifying the public that the governing body is meeting to vote to override the limitation and increase the millage rate. Public comment must be received by the governing body prior to the override vote.

application of the statutory maxim *inclusio unius est exclusio alterius* mandates that these variables and no others be used in calculating the rollback millage. The circuit court found this maxim inapplicable, reasoning that the variables used by Myrtle Beach "appear to be sensible and necessary devices" and that denying their use "would lead to a result that is unworkable, inefficient, inaccurate, and problematic." The variables permitted by the statute are clear and unambiguous; regardless of the merit of Myrtle Beach's formula, it is not what the statute allows. See Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (where statutory language is clear and unambiguous, enumeration of certain exceptions excludes others).

The fixing of a tax rate is a legislative function that must be given the greatest respect by the courts unless that function is exercised in an illegal manner. Simkins v. City of Spartanburg, 269 S.C. 243, 237 S.E.2d 69 (1977).[5] It is basic hornbook law that when a government entity levies a tax, "the method outlined in the applicable law must be followed, at least in substance and especially concerning all mandatory provisions." 16 McQuillin Mun. Corp. § 44.97 (3d ed. 1998). We conclude Myrtle Beach's

[5] Despite our recognition of this basis principle in Simkins, we excused an illegal tax rate in County of Lee v. Stevens, 277 S.C. 421, 289 S.E.2d 155 (1982). In that case, a county auditor challenged the county's authority to set the tax rate before current property values were known. We held the modest deficit caused by the county's error could be excused, but we prospectively ordered the tax rate to be based upon current property valuations. We found a prospective ruling necessary as a matter of "practicability and reasonableness" because of the various methods in use at the time by local governments statewide.

We view County of Lee v. Stevens as a narrow exception and decline to follow it here. The critical factor in that case was that there was no standard procedure in place to accomplish the statutory requirement at the local level; to strictly enforce that requirement would have caused havoc for local governments statewide. Here, there is no such special circumstance. We cannot condone a taxing entity's illegal acts in fixing the tax rate simply because the resulting impact may be characterized as modest.

use of non-statutory variables violates § 12-37-251(E). Further, Myrtle Beach failed to hold a public meeting as provided under § 6-1-320(C) which would have allowed it to legally override the mandatory requirements of subsection (A).

CONCLUSION

We hold the trial court erred in upholding Myrtle Beach's use of non-statutory variables to calculate rollback millage without the override vote required under § 6-1-320(C) and we remand for the trial court to determine the appropriate relief. We affirm Myrtle Beach's appeal pursuant to Rule 220(b), SCACR. *See* Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990) (decision to certify a class rests in trial judge's discretion); Charleston County Parents for Public Schools, Inc. v. Moseley, 343 S.C. 509, 541 S.E.2d 543 (2001) (party that is not indispensable need not be joined under Rule 19, SCRCP).

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

TOAL, C.J., and Acting Justice Deadra L. Jefferson, concur. PLEICONES, J., dissenting in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: I respectfully dissent. I agree that Myrtle Beach erred in relying upon non-statutory factors in computing the GO rollback millage. I would find, however, that Angus has shown no prejudice and would therefore affirm the circuit court's order denying her relief.

At the time Myrtle Beach was calculating its 1999-2000 GO millage rate in June 1999, it was required to estimate the prior year's property tax revenues since final figures are not provided to it by the county auditor until August. The city estimated its prior year's revenue by applying an 86% "collection rate" to the overall amount billed. Further, while Myrtle Beach had available the new assessment values, the appeals process whereby property owners may seek a reduction in valuation was not yet complete.

The use of non-statutory variables violated S.C. Code Ann. § 12-31-251(E) (2000). The reality of municipal budgeting is that it is an inexact science, relying as it must upon estimates and "best guesses." As this Court recognized in Simkins v. City of Spartanburg, 269 S.C. 243, 237 S.E.2d 69 (1977), municipalities must rely upon imperfect and incomplete calendar year figures to meet their obligation to enact a fiscal year budget. Simkins held that a city "can proceed on the basis of past experience and the best available estimate of revenue…." Id. at 249, 237 S.E.2d at 72; see also County of Lee v. Stevens, 277 S.C. 421, 289 S.E.2d 155 (1982) ("It is a fact of life not all property taxes are ever collected").

Although Myrtle Beach erred in relying on the nonstatutory variables, Angus has not shown prejudice. First, she does not challenge the circuit court's finding that Myrtle Beach could lawfully have levied a total of 65 mills in 1999-2000, but levied only 61. Further, Angus does not challenge the circuit court's calculation showing that Myrtle Beach's GO millage for 1999-2000 exceeded that permitted by § 12-37-251(E) by approximately 4.44 mills. When the city learned it had overcollected taxes for 1999-2000, it reduced the following year's millage by 2.3 mills. As the Court said in Lee County, "If in the last analysis during some particular year there is a modest surplus or a modest deficit, no serious harm will come. Adjustments can be made the ensuing year." Id. at 427, 289 S.E.2d at 158. Myrtle Beach made such an adjustment.

I would hold that while Myrtle Beach erred in calculating the GO rollback millage, this error was within the latitude afforded taxing entities that must rely on incomplete figures when calculating millage rates.[6] Simkins, *supra*; Lee County, *supra*. Further, I recognize that in calculating this rollback millage, Myrtle Beach relied upon the advice provided by the Department of Revenue to all municipalities located in counties that had undergone a reassessment.[7] The effect of the majority's decision today is to subject these municipalities to refund litigation over relatively nominal sums. Such a result is not required by our precedents, and imposes an unnecessary fiscal burden on our cities and their current taxpayers. I would affirm the order of the circuit court.

BURNETT, J., concurs.

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[6] A taxpayer, whose property tax bill was too high because a city or county made a minor error in calculating the millage rate in reliance upon advice from the Department of Revenue, is in a different position from a taxpayer who has been required to pay a disproportionate share of property taxes as the result of the taxing entity's adoption of a patently unlawful ordinance. Thus, Angus and others affected by Myrtle Beach's good faith efforts to set the appropriate millage are not in the same position as Charleston County taxpayers who were unlawfully taxed pursuant to an ordinance capping valuation increases for owner-occupied residences at 15% while placing no cap on non-owner occupied property. These taxpayers were entitled to a refund. See Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002). The difference between the taxing decision made by Myrtle Beach and that made by Charleston County is more than a matter of degree: Charleston created two classes of taxpayers, in order to lighten the tax burden on one group by shifting it to the other. Further, the impact of the Charleston Ordinance on owners of non-capped property could not be characterized as "modest."

[7] Countywide reassessments and equalizations of real property are conducted every fifth year. S.C. Code Ann. §12-43-217 (2000). Municipalities and other taxing entities within a county use the county's property valuations.

The Supreme Court of South Carolina

In the Matter of H. Brent Fortson, Respondent.

ORDER

Respondent was suspended on November 22, 2004, for a period of sixty (60) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY Daniel E. Shearsouse
Clerk

Columbia, South Carolina

January 31, 2005

The South Carolina Court of Appeals

The State, Respondent,

v.

Timothy Scott Frey, Appellant.

The Honorable Reginald I. Lloyd
Spartanburg County
Trial Court Case No. 2002-GS-42-02919

ORDER

PER CURIAM: The State has petitioned for a rehearing and argues our prior opinion was incorrect in several particulars. While we deny the petition for rehearing, we briefly address the State's contentions.

The State argues initially that the record establishes its compliance with the statutory mandate requiring that "[b]lood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility." S.C. Code Ann. § 56-5-2950 (a) (Supp. 2003). We disagree, for we remain firmly convinced that this record fails to establish that Scott Darragh is either a licensed physician, registered nurse or is otherwise properly qualified under the statute.

The State further argues that it would have been unduly burdensome to "utilize the out-of-state subpoena process, and expend Spartanburg County's limited financial resources, to secure the testimony of" Darragh. Assuming

Darragh has moved to another state as alleged, the suggestion that Darragh's qualifications could be established only by his presence and testimony at trial is specious.

We also view as meritless the State's newly asserted efforts to recast the issue as one of "chain of custody."

The State finally contends that a remand to the trial court is the appropriate remedy. While we agree that a remand is appropriate under the circumstances, we do not adopt the State's expansive proposal for the taking of new evidence. We have reviewed the cases cited by the State for the proposition that it is entitled to a second bite of the apple to establish Darragh's qualifications: State v. Primus, 312 S.C. 256, 440 S.E.2d 128 (1994) (case remanded to lower court to conduct an initial Jackson v. Denno hearing to determine whether the defendant was "in custody" for Miranda purposes when he made statements to a police officer); State v. Williams, 258 S.C. 482, 189 S.E.2d 299 (1972) (case remanded to trial court to consider defendant's motion to strike the in-court identification testimony where the trial court "overruled the motion without going fully into whether or not there had, in fact, been improper prior confrontations, and whether, in fact, either or both of the in-court identifications were perchance the tainted product of any such unlawful confrontation"); State v. Sampson, 317 S.C. 423, 454 S.E.2d 721 (Ct. App. 1995) (court declined on appeal to rule on motion to suppress, instead remanding to the trial court to conduct an initial hearing on the sufficiency of a search warrant affidavit). These cases represent remands to trial courts to address issues that were not fully addressed and developed during the original trial. Remand in such circumstances is far removed from the request here—allowing the State a second evidentiary hearing. We conclude the remand should be limited to the existing record for the trial court to determine whether the State's failure to establish the qualifications of Darragh per section 56-5-2950(a) "materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure." S.C. Code Ann. § 56-5-2950 (e) (Supp. 2003).

The original opinion, therefore, is withdrawn and the attached opinion is substituted therefore.

Kaye G. Hearn, C. J.

Thomas E. Huff, J.

John W. Kittredge, J.

Columbia, South Carolina
January 31, 2005

cc: Ricky Keith Harris, Esquire
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General Deborah R.J. Shupe
Harold W. Gowdy, III, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Timothy Scott Frey, Appellant.

Appeal From Spartanburg County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 3878
Submitted September 15, 2004 – Filed October 25, 2004
Withdrawn, Substituted and Refiled January 25, 2005

REVERSED IN PART AND REMANDED

Ricky Keith Harris, of Spartanburg, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, all of Columbia;

and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

KITTREDGE, J.: Timothy Scott Frey appeals his conviction for driving under the influence. Frey seeks a new trial, contending the circuit court improperly admitted evidence of the results of a blood-alcohol test. We reverse in part and remand.

FACTS AND PROCEDURAL HISTORY

On December 21, 2001, Frey, while driving a pick-up truck in Spartanburg County, collided with two Spartanburg County Sheriff's Office vehicles. Frey was injured in the accident and transported to the Spartanburg Regional Medical Center. The police officer investigating the accident, Trooper L.D. Smith of the South Carolina Highway Patrol, met Frey at the hospital emergency room. After Trooper Smith advised Frey of his rights under the Implied Consent Laws, Frey consented to a blood sample being taken for blood-alcohol level analysis.

Trooper Smith prepared a standard-form SLED Blood Collection Report in connection with obtaining the blood sample from Frey. According to the report, the blood was drawn from Frey by an individual named "Scott Darragh." Darragh signed the form in the space labeled "licensed or trained collector," and the form was admitted in evidence over Frey's hearsay objection. The report, however, does not indicate what position Darragh held at the hospital nor did the State offer any evidence to show what, if any, medical training or licensure Darragh had that would qualify him to obtain the blood sample.

At trial, Frey sought to suppress the admission of the blood-alcohol test results on the grounds the State did not present any evidence that the blood sample was drawn by a qualified individual as required under the implied consent statute. The circuit court denied Frey's request and admitted the test results. Frey was convicted and sentenced. This appeal followed.

STANDARD OF REVIEW

A trial judge's decision to admit or exclude evidence is within his discretion and will not be disturbed on appeal absent an abuse of discretion. Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002).

LAW/ANALYSIS

Frey argues the circuit court erred in the admission of the blood-alcohol analysis test results.

Under the Implied Consent Statute, an arresting officer may direct that a blood sample be collected from a person arrested for DUI if that person is unable to submit to a breathalyzer test for medical reasons. S.C. Code Ann. § 56-5-2950 (Supp. 2003). The statute requires, however, that blood samples be collected by qualified medical personnel: "Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility." S.C. Code Ann. § 56-5-2950(a). The circuit court found there was enough "circumstantial evidence" to establish statutory compliance based upon the fact that, following the trooper's request, Darragh appeared in the emergency room wearing "hospital like scrubs."

We disagree with the reasoning of the circuit court. With any question regarding statutory construction and application, the court must always look first to the legislative intent as determined from the plain language of the statute. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002). The plain language of section 56-5-2950 requires that, when an officer directs a blood sample be collected from a person arrested for DUI, the sample "must" be obtained by trained, qualified medical personnel. Our courts have consistently held that use of words such as "shall" or "must" indicates the Legislature's

intent to enact a mandatory requirement. See, e.g., South Carolina Police Officers Ret. Sys. v. City of Spartanburg, 301 S.C. 188, 191, 391 S.E.2d 239, 241 (1990) (noting that statutory prescriptions couched in language such as "shall" and "must" are mandatory in application and effect); Starnes v. South Carolina Dep't of Pub. Safety, 342 S.C. 216, 221, 535 S.E.2d 665, 667 (Ct. App. 2000) (same). The plain language of section 56-5-2950 demands that the State offer some evidence to establish compliance with this statutory requirement.

The plain language of section 56-5-2950 further requires that we reject the State's suggestion that the mere appearance of Scott Darragh in the emergency room is sufficient, for the statute mandates that the blood sample "must" be obtained by a trained medical professional. One's mere appearance in a hospital wearing generic hospital attire is not evidence of one's medical training. We likewise reject the State's assertion that Darragh's signature on the SLED form in the space labeled "licensed or trained collector" is sufficient to establish compliance with the statute. Simply signing a preprinted form does not provide any indicia that the signatory's qualifications meet the specific licensing or training requirements of section 56-5-2950.[1] To hold otherwise would render

[1] We reject the State's argument to the extent it relies on the signature of Darragh as substantive evidence of his qualifications to collect the blood sample. We find guidance on this point in the manner our Rules of Criminal Procedure address the admission of a report of chemical analysis to establish the physical evidence of a controlled substance. Under narrowly limited circumstances, such a report signed by the chemist or analyst who performed the test may be admitted for chain of custody and substantive purposes. Rule 6(a), SCRCrimP. However, if the defendant timely objects to the admission of the report, the signed report alone is insufficient to establish that the tests were performed by a SLED-certified chemist and were conducted pursuant to SLED-approved procedures. The rule instead requires that, in the face of a proper objection to the report, "the trial judge shall require the chemist or analyst to be present at trial for the purpose of personally testifying." In the present case, the admission of the blood collection report to establish the qualifications of Darragh was hotly contested—subject to repeated defense objections. While the SLED form here may maintain its efficacy for chain of custody purposes, we decline to find that

the minimal foundational requirement of section 56-5-2950 without any meaningful force or effect. In light of the State's failure to satisfy this basic requirement, we are constrained to find the circuit court erred in finding the foundational requirements of section 56-5-2950 had been satisfied.[2]

The State alternatively asserts that, assuming Darragh was not qualified under the statute to collect the blood sample, suppression would not be warranted. Specifically, the State contends Frey was not prejudiced by the failure to comply with the statute. The State bases its argument on the principle that where a statute is silent about the admissibility of evidence, the "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures." State v. Sheldon, 344 S.C. 340, 343, 543 S.E.2d 585, 586 (Ct. App. 2001) (quoting State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976)).

Recent revisions to section 56-5-2950 are in accord with the State's position. The statute was amended in 2003 to include the addition of subsection (e),[3] which provides, in pertinent part:

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the medical training and qualification requirements mandated under section 56-5-2950 may be proven by the mere signature on the form.

[2] We are mindful of the legitimate concern of the trial court that law enforcement officers who request blood samples should not be required to demand detailed background information about the hospital employee who shows up to take the sample. This concern, however, is misplaced. There is no basis to find fault with the actions of Trooper Smith. Law enforcement officers may generally rely on the implicit and explicit assurances of medical providers regarding the qualifications of personnel who are assigned to assist them in their investigation. The failure of proof in this case is directly attributable to the State's failure to establish the qualifications of Scott Darragh.

[3] The 2003 revisions to § 56-5-2950 became effective shortly after the trial of this case. Because subsection (e) addresses procedural rather than substantive rights, it is remedial in nature, and therefore retroactive in its application. See South Carolina Dep't of Revenue v. Rosemary Coin Machs., Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000) (noting that "statutes that are remedial or

> The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence any tests results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure.

S.C. Code Ann. § 56-5-2950 (e) (Act No. 61, 2003 S.C. Acts 689) (emphasis added).

Since the statutory mandate in question is inextricably connected to the accuracy and reliability of the blood test results, we remand to the trial court. We are persuaded that in the first instance the issue of prejudice should be addressed by the trial court. We find instructive the case of State v. Sheldon, 344 S.C. 340, 543 S.E.2d 585 (Ct. App. 2001). Sheldon, a then on-duty state trooper, was charged with reckless homicide. The Highway Patrol participated in the accident investigation, in violation of a statute. As a result of the statutory violation, the trial court granted Sheldon's motion to suppress evidence gathered or prepared by the Highway Patrol's Multi-disciplinary Accident Investigation Team (MAIT). The State appealed, and this court noted that evidence obtained in violation of a statute "is not necessarily inadmissible absent a demonstration of prejudice resulting from the violation." Id. at 344, 543 S.E.2d at 586. We remanded to the trial court since "[i]t did not make any findings on whether Sheldon would be prejudiced by MAIT's investigation of the collision." Id. Here, the trial court on remand shall, on the existing record, determine whether the State's failure to comply with section 56-5-2950 (a) "materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure." Cf. State v. Huntley, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002) (noting that, in a DUI prosecution, breathalyzer operator error did not impact the accuracy of the breath test results, concluding "[t]here is no question the breathalyzer machine was operating properly and its results were reliable"); State v. Chandler, 267 S.C. 138, 142, 226 S.E.2d 553, 555 (1976) (holding that evidence seized at nighttime was properly admitted pursuant to warrant

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procedural in nature are generally held to operate retrospectively").

authorizing a search "in the daytime only" since the court determined the violation had no impact on the reliability or probative value of the evidence).

CONCLUSION

Because the State failed to establish Frey's blood sample was obtained by a licensed physician, registered nurse, or "other medical personnel trained to obtain the samples in a licensed medical facility" as mandated by section 56-5-2950, we remand to the trial court to determine whether "such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure." An answer in the affirmative shall entitle Frey to a new trial, but otherwise, the admission of the blood test results and resulting conviction shall stand affirmed.

REVERSED IN PART AND REMANDED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cowden Enterprises, Inc.,	Respondent,
v.	
East Coast Millwork Distributors, f/k/a Arndt and Herman Lumber Co., Builders Firstsource-Southeast Group, Inc., f/k/a Pelican Companies, Inc., Agee-McCoy, Inc., Senergy, Inc., Floyd B. Conner, Jr., d/b/a FBC Construction Co., and J.F. Bihlear Construction, Inc.,	Defendants,
Of Whom Senergy, Inc. is the	Appellant.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3928
Heard December 14, 2004 – Filed January 24, 2005

REVERSED

D. Andrew Williams and Curtis L. Ott, both of Columbia, for Appellant.

Albert A. Lachour, III, of Charleston, for Respondent.

WILLIAMS, J.: In this civil action, Senergy, Inc., appeals a circuit court order holding it liable to Cowden Enterprises, Inc., on a claim for contribution. We reverse.

FACTS

Cowden Enterprises acted as general contractor on a home constructed for John and Dawn Thomas in 1994. In February 2000, the Thomases brought suit against Cowden, alleging the home developed moisture intrusion problems as a result of several flaws in the home's exterior, including defective exterior cladding. The faulty cladding used on the home was manufactured by Senergy, Inc., and marketed as "EIFS" (Exterior Insulation and Finish System). Cowden promptly settled the Thomases' entire claim relating to the residence for $81,328 and brought subsequent contribution claims against all other manufacturers, suppliers and subcontractors involved in the construction of the home's exterior, including Senergy. Cowden resolved its claims against all joint tortfeasors except Senergy, which asserted as its defense a class action settlement that allegedly resolved all claims relating to EIFS defects.

In 1998, Senergy entered into a national class action settlement entitled Ruff, et al. v. Parex, et al., 96 CVS 0059 (N.C. Supp. Ct. Div. 1998). The Ruff Settlement Agreement, approved for fairness by the North Carolina Superior Court after prolonged litigation and negotiation, set forth the following definition of the settlement class:

> Settlement Class means a class composed of all Persons who, as of the Notice Date, have owned or own Property in the United States clad, in whole or in part with the Settling Defendants' EIFS.

The North Carolina Special Superior Court Judge for Complex Business Cases noted, in approving the national settlement class and notice plan, that he was "particularly attuned to the fact that this was a nationwide settlement and made a special effort to see that the Notice Plan targeted homeowners in those parts of the country in which [Synergy] sold [its] products." Written notice was mailed to all ascertainable settlement class members, and all were given the option to "opt out" of the class by August 1998.

It is undisputed that the Thomases were the owners of the residence on the settlement's notice date, but they neither made a claim for compensation prior to the agreement's four-year cut off date, nor opted out of the settlement class. Accordingly, Senergy made no payments under the Ruff agreement for damage to the Thomas residence. Senergy nevertheless asserted at trial that the settlement agreement, and its accompanying release by the entire settlement class, barred Cowden's contribution claim. The parties stipulated that if Senergy is not protected by the Ruff settlement agreement, the sum due to Cowden as Senergy's pro-rata share of the damages is $17,500.

The circuit court held Senergy was not protected by the Ruff settlement agreement and awarded Cowden $17,500 under its claim for contribution. This appeal followed.

STANDARD OF REVIEW

When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. WDW Prop. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. Scott v. Brunson, 351 S.C. 313, 316, 569 S.E.2d 385, 387 (Ct. App. 2002).

LAW/ANALYSIS

Senergy argues the circuit court erred in finding it was not protected from contribution claims arising from alleged EIFS defects by the Ruff settlement agreement. We agree.

Since no right to contribution among joint tortfeasors existed in South Carolina common law, Cowden's claim arises solely under the South Carolina Contribution Among Tortfeasors Act ("the Act"), S.C. Code Ann. §§ 15-38-10 to -70 (Supp. 2003). See M&T Chemicals, Inc. v. Barker Indus., Inc., 296 S.C. 103, 106, 370 S.E.2d 886, 888 (Ct. App. 1988) (reluctantly finding no common law right to contribution in South Carolina prior to the Act's 1988 enactment). "Because the Act is in derogation of the common law, it must be strictly construed." G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S.C. 82, 87, 591 S.E.2d 42, 44 (Ct. App. 2003). Cowden's only claim against Senergy is for contribution and, accordingly, may only succeed if it meets the strictly construed requirements set forth in the Act.

According to the Act, where two or more persons become jointly or severally liable in tort for the same injury to property, a right of contribution arises among them, even if judgment has not been recovered against all or any of them. S.C. Code Ann. § 15-38-20(A) (Supp. 2003); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999). In these situations, the right of contribution exists only in favor of a tortfeasor who, like Cowden, has paid more than his pro rata share of the common liability. S.C. Code Ann. § 15-38-20(B) (Supp. 2003); Vermeer, 336 S.C. at 68, 518 S.E.2d at 309. This right to contribution, however, is subject to certain limitations set forth in the Act. S.C. Code Ann. § 15-38-20(A) (Supp. 2003).

One such limitation is laid out in section 15-38-50, which reads, "[w]hen a release . . . is given in good faith to one of two or more persons liable in tort for the same injury . . . (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." S.C. Code Ann. § 15-38-50 (Supp. 2003). The plain language of this limitation on contribution yields only one interpretation, namely that once a joint tortfeasor obtains a release from a plaintiff, he is no longer liable for contribution

claims arising from injuries subject to that release.[1] See South Carolina Nat'l Bank v. Stone, 749 F. Supp. 1419, 1430 (D.S.C. 1990) ("[A] Settling Defendant is insulated from later contribution claims by co-tortfeasors if he obtains a good faith release . . . from the Plaintiff."); see also Restatement Third, Torts: Apportionment of Liability, § 23(a) (2000) ("[When one joint tortfeasor discharges the liability of another], the person discharging the liability is entitled to recover contribution from the other, unless the other previously had a valid settlement and release from the plaintiff." (emphasis added)).

As previously noted, the Thomases were the owners of record on the notice date for the national class action settlement and did not opt out of the settlement class. In its order approving the Ruff agreement, the North Carolina Court stated the following:

> "All persons falling within the definition of the Settlement Class who did not timely and validly request exclusion . . . are Settlement Class Members and are bound by Settlement Agreement, the settlement and releases contained therein, and the Final Order and Judgment, and do not have any further opportunity to opt out of the settlement class."

[1] Cowden asserts on appeal that subsection (1) of section 15-38-50 requires an actual monetary payment to the plaintiff by the party asserting a release in order for that release to insulate them from contribution claims. As subsection (1) refers only to liability of other joint tortfeasors following a valid release by one jointly liable party, we do not adopt Cowden's interpretation. Although subsection (1) does outline a setoff Cowden was possibly entitled to assert against the Thomases, it does not speak to the contribution liability of Senergy, the party asserting the defense of a good faith release. See S.C. Code Ann. § 15-38-50(1) (Supp. 2003) ("[When a release is given to a joint tortfeasor,] it does not discharge any of the other tortfeasors from liability for the injury . . . but it reduces the claim against the others to the extent of any amount stipulated by the release . . . or in the amount of the consideration paid for it, whichever is the greater.").

Ruff, et al. v. Parex, et al., 96 CVS 0059 (N.C. Supp. Ct. Div. 1998). The Ruff agreement states, under the heading Releases and Assignments, "each settlement class member . . . does hereby release and forever discharge [Senergy] . . . from any and all Settled Claims . . . [e]ach Releasing Party, upon entry of the Final Order and Judgment . . . shall be deemed to and hereby does release and discharge [Senergy] of and from any and all Settled Claims." Furthermore, the court specifically found "the parties have reached accord with respect to a Settlement that provides substantial benefits to Settlement Class Members, in return for a release and dismissal of the claims . . . ." Id. (emphasis added). Under the Full Faith and Credit Clause of the United States Constitution, we may not disregard the judicial proceedings of the North Carolina Court, even as they relate to a national class action lawsuit. U.S. Const. Art. IV, § 1; See Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 374 (1996) ("[A] judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit."); Hospitality Management Assoc., Inc. v. Shell Oil Co., 356 S.C. 644, 591 S.E.2d 611 (2004) (granting full faith and credit to two nationwide class action settlements from other state courts as they apply to local members of the national settling classes). We therefore conclude the Thomases, as settlement class members, were bound by the terms of the national class action settlement granting Senergy a release from liability.

Cowden puts much stake in the fact that builders and contractors were expressly excluded as members of the settlement class by the terms of the Ruff settlement agreement. We are not swayed by its arguments based on this exclusion. The fact that Cowden and other contractors were excluded from filing claims under the settlement in no way alters the unambiguous release granted to Senergy by the terms of the Ruff settlement. Cowden's claim arises under a statutory contribution scheme which this court is bound to strictly follow. While we recognize the unfortunate outcome the Act demands in this case, we nevertheless conclude Senergy received a good faith release from the Thomases under the Ruff settlement prior to Cowden's payment of the entire claim. Senergy, therefore, is insulated from Cowden's contribution claim under Section 15-38-50(2) of the South Carolina Code (Supp. 2003).

For the foregoing reasons, the circuit court's decision is

REVERSED.

HEARN, C.J., and GOOLSBY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Samuel Coakley, individually and as Trustee of a Special Needs Trust for Christian Coakley, Respondent,

v.

Horace Mann Insurance Co., Scott Andrew Mitchell, Christopher N. Mitchell and Claudia Dee Dee Mitchell, Appellants.

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 3929
Heard November 17, 2004 – Filed January 24, 2005

AFFIRMED

Phillip E. Reeves, and Jennifer D. Eubanks, both of Greenville, for Appellants.

Benjamin C. Harrison, and David H. Tyner, both of Spartanburg, for Respondent.

WILLIAMS, J.: Respondent filed this declaratory judgment action to determine the applicability of certain automobile liability policies issued by

Horace Mann Insurance Company (Horace Mann). The circuit court found coverage under all three policies. We affirm.

FACTS

On August 19, 1994, sixteen-year-old Christian Coakley was a passenger in a car being driven by seventeen-year-old Scott Andrew Mitchell. As they were traveling towards a friend's house, Scott lost control and the car slammed into a tree. The force of the impact shattered a vertebra in Christian's neck, partially severing his spinal cord. As a result of these injuries, Christian is a permanent quadriplegic.

The automobile, a 1984 Mazda RX-7, belonged to Scott's older brother Christopher Mitchell and was titled in Christopher's name. Christopher, a student at Clemson University, resided in an apartment in Clemson, normally kept the car with him, and was its primary user. [1] Prior to the accident, Christopher went on a trip to California and left the car at his mother's house. Christopher was on the way back from California when the accident occurred. Scott was a high school student and lived with his mother in Spartanburg, South Carolina.[2] Claudia "Dee Dee" Mitchell, Scott and Christopher's mother, testified in her deposition that Scott had permission to use the car.

The car was insured through Horace Mann, with Dee Dee being the named insured. The policy provided liability limits of $50,000.00 for personal injury. Dee Dee also maintained policies on three other vehicles. Two of these policies carry liability limits of $50,000.00, and the third has a liability limit of $250,000.00. None of these other policies provided primary coverage for the vehicle involved in the accident.

[1] Horace Mann contested ownership of the RX-7, but the Answer filed on behalf of Scott, Christopher, and Dee Dee in the underlying litigation admits that Christopher owned the car.

[2] Scott and Christopher's parents divorced in the 1980's.

The special needs trust (the Trust) created on behalf of Christian commenced this action seeking compensation for Christian's injuries.[3] The Trust sought recovery under the policy covering the RX-7, as well as excess coverage under the policies on the other three cars. Horace Mann initially denied liability, but following discovery, the parties entered into a covenant not to execute. Pursuant to the covenant, Horace Mann paid out the liability limits on the policy covering the RX-7. The covenant also allowed the Trust to bring a declaratory judgment action to determine the applicability of the three additional policies. In exchange for permission to bring the action, the Trust agreed that recovery, if any, would be limited to $350,000.00—the combined total of the three policies.

The Trust then filed this declaratory judgment action alleging that although the other policies do not provide primary coverage on the RX-7, they provide excess coverage for "non-owned" vehicles. The Trust argued the RX-7 was a non-owned vehicle because Christopher owned the car and was not a relative within the meaning of the policies.

The parties agreed to transfer the litigation to a non-jury docket and the case was submitted upon memoranda of authority, copies of the policies in dispute, and the deposition testimony of the Mitchell defendants. On March 5, 2003, the trial court issued its order, in which it found excess liability coverage was available to Christian under all three policies. Accordingly, judgment was entered in the amount of $350,000.00. Horace Mann, Scott, Christopher, and Dee Dee (collectively "Appellants") have appealed from that Order.

STANDARD OF REVIEW

A declaratory judgment action to determine coverage under an automobile liability policy is an action at law. Travelers Indem. Co. v. Auto World of Orangeburg, Inc., 334 S.C. 137, 140, 511 S.E.2d 692, 694 (Ct. App. 1999). In an action at law tried by a judge without a jury, the judge's

[3] By Order dated July 28, 1998, the court established a Supplemental Needs Trust for Christian to receive funds to assist him with his extraordinary care needs.

findings will not be disturbed on appeal unless no reasonable evidence supports the judge's conclusions. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Since Appellants have admitted that no facts are in dispute in this case, this court can review conclusions of law based on those facts. Midland Guardian Co. v. Thacker, 280 S.C. 563, 568, 314 S.E.2d 26, 29 (Ct. App. 1984).

LAW/ANALYSIS

I. The Insurance Policy

"Insurance policies are subject to general rules of contract construction." State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct. App. 2000) (citations omitted). Accordingly, courts "should give policy language its plain, ordinary and popular meaning." Id. Furthermore, courts should not rewrite policy language or torture its meaning to extend coverage never intended by the parties. Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975). When an insurance contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). However, "[a]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." Stewart v. State Farm Mut. Auto Ins. Co., 341 S.C. 143, 151, 533 S.E.2d 597, 601 (Ct. App. 2000).

In the instant case, all four Horace Mann policies issued to Dee Dee Mitchell contain identical policy language. The policies extend liability coverage to payment of damages which an insured becomes legally liable to pay because of bodily injury to others caused by or resulting from the ownership, maintenance or use of the covered vehicle. Scott is an "insured" under the policy because he is a relative of Dee Dee.

The policies also extend liability coverage to the use of other cars by an insured. The pertinent language provides as follows: "Bodily Injury and Property Damage Liability coverages extend to the use, by an insured, of . . . a non-owned car while being used with the permission of the owner."

(emphasis omitted). The policies further provide that if there is other coverage, the applicable policy will be excess: "If an insured is using a . . . non-owned car, our liability insurance will be excess over other collectible insurance." (emphasis omitted).

The definition of "non-owned car" has been replaced by an amendatory endorsement. As amended, the definition provides as follows:

> Non-owned car means a private passenger car . . . not:
> 1. owned by;
> 2. registered in the name of; or
> 3. furnished or available for the regular use of you or your relatives. The use must be within the scope of consent of the owner or person in lawful possession of it.

The policies define "relative" as follows: "Relative means a person related to you by blood, marriage or adoption who lives with you. It includes your unmarried and dependent child who is away at school." (emphasis omitted).

Horace Mann has conceded liability on the liability policy covering the RX-7 and tendered the limits on that policy. The other three policies do not cover the RX-7, but they do cover non-owned vehicles. These policies specifically provide that if there is other coverage on a non-owned vehicle, they provide excess coverage. The heart of the issue is whether the RX-7 was a non-owned vehicle, and that question turns on whether Christopher owned the car or was a relative within the meaning of the policy.

II. Ownership of the Car

Appellants first argue the RX-7 could not have been a non-owned car because Dee Dee Mitchell, not Christopher, was the owner of the vehicle. The trial court found Christopher owned the car and this finding will not be disturbed on appeal unless no reasonable evidence supports the court's conclusions. Townes, 266 S.C. at 86, 221 S.E.2d at 775. We note that Scott, Dee Dee, and Christopher admitted in their Answer that Christopher owned the RX-7. The Covenant Not to Execute also states that Christopher is the

owner. Appellants assert in their brief that the facts in this case are not in dispute and Dee Dee testified that the car is titled in Christopher's name. Therefore, we find sufficient evidence in the record to sustain the trial court's finding that Christopher owned the car, not Dee Dee Mitchell.

III. Status of Christopher in Relation to Dee Dee Mitchell

Since the RX-7 was not "owned by" or "registered in the name of" Dee Dee Mitchell, the named insured, the car could only be a non-owned vehicle if it was not "furnished or available for the regular use of" Dee Dee Mitchell or her "relatives." It is undisputed that the RX-7 was not available for the regular use of Scott at the time of the accident. Additionally, the trial court found, and Appellants have not disputed, that the car was not available for the regular use of Dee Dee at the time of the accident. Therefore, the car qualifies as a non-owned vehicle unless Christopher was a relative of Dee Dee under the policies.

The determination of resident relative status is a question of fact. Auto Owners Ins. Co. v. Langford, 330 S.C. 578, 581, 500 S.E.2d 496, 497 (Ct. App. 1998). The trial court found that Christopher did not reside with Dee Dee, nor was he dependent on her at the time of the accident. This finding must be affirmed unless no evidence reasonably supports it. Townes, 266 S.C. at 86, 221 S.E.2d at 775.

Christopher qualifies as a relative under the policy if he is (1) "related to" her and (2) "lives with" her. The first prong of the test is easily satisfied. Christopher is Dee Dee's son. Therefore, he is related to her by blood. The second prong, whether Christopher "lives with" Dee Dee, contains an additional qualification. He is deemed to live with her if he is her "unmarried and dependent child who is away at school." Christopher was not married and was "away at school." At issue, then, is whether Christopher was a "dependent child" of Dee Dee at the time the accident occurred.

Although there is evidence in the record which would support an inference that Christopher was dependent on his mother, there is also evidence to support the trial court's finding that "if [Christopher] were dependent on either of his parents, it was the father to whom he was

dependent."[4] For instance, although Dee Dee testified in her deposition that she provided some financial support to Christopher, such as money for groceries, gas, and insurance, she also admitted that Christopher's father paid the majority of his tuition. Christopher explained that his father provided him with a lump sum payment of $3500.00 every semester for tuition and living expenses.

Some of the testimony in this regard was conflicting. Dee Dee testified that she and Christopher's father paid for Christopher's rent while he was living in an apartment in Clemson. Christopher, however, testified he did not receive income, help with tuition, or rent money from Dee Dee. Christopher stated that his father paid for these expenses. Similarly, although Dee Dee testified she paid for gasoline and repairs on Christopher's car, Christopher testified that he paid these expenses. When conflicting testimony is presented, the trial court is in a better position to determine credibility. See Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885-886 (1994). Therefore, we find there is evidence which supports the trial court's ruling that Christopher was not a dependent of Dee Dee.[5]

The trial court's ruling that Christopher did not "live with" Dee Dee is supported by our case law. The residency test in South Carolina is found in

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[4] The dissent bases its opinion largely on its interpretation of the trial court's order and this statement in particular. The dissent believes the trial court "interpreted the policy provision to mean that Christopher could only be dependent on one of his parents" and, therefore, erred as a matter of law. We do not believe the trial court made such a finding. When considering the trial court's treatment of this issue as a whole, we believe it found Christopher was not dependent on either of his parents. The trial court's statement simply asserts that if he were dependent on either of the parents, it would be the father.

[5] Appellants also make much of the fact that Dee Dee listed Christopher as a dependent on her income tax return the year of the accident. However, as the trial court noted, she has claimed both children as dependents on her income taxes since she and their father divorced in the 1980s, as she was permitted to do by court order. Such an order issued in relation to a divorce proceeding does not amount to a determination of dependency.

Buddin v. Nationwide Mutual Ins. Co., 250 S.C. 332, 157 S.E.2d 633 (1967). In Buddin, the supreme court noted that a "resident of the same household is one, other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently." Id. at 339, 157 S.E.2d at 636 (citations omitted). Because Christopher did not live in the same household as Dee Dee, he would not qualify as a resident relative under this test. Several cases have elaborated on the Buddin test, but none of them would have found Christopher to reside with Dee Dee.[6] Accordingly, we affirm the trial court's finding that he was not her dependent, and he did not live with her for purposes of the policies.

Because there is evidence in the record to support its conclusion, we agree with the trial court that the RX-7 was a "non-owned car" within the meaning of the policies. It is undisputed that upon such a finding, the other three policies become applicable as excess coverage. Thus, the only remaining issue is the amount of coverage.

IV. Amount of Coverage

The trial court found that all three policies applied and could be stacked. The general rule is that stacking of liability coverage is permitted unless limited by statute or by a valid policy provision. State Farm Mut.

[6] See Auto Owners Ins. Co. v. Langford, 330 S.C. 578, 500 S.E.2d 496 (Ct. App. 1998) (holding that a granddaughter was not a resident relative with her grandmother where she usually lived with her mother, and only stayed with her grandmother when she and her mother fought); Richardson v. S.C. Farm Bureau Mut. Ins. Co., 336 S.C. 233, 519 S.E.2d 120 (Ct. App. 1999) (holding that a daughter was not a resident relative of her parents' household where she had moved away as a graduate student several years before, maintained her own residence in another town and only kept a few items at her parents' home); Auto-Owners Ins. Co. v. Horne, 356 S.C. 52, 586 S.E.2d 865 (Ct. App. 2003) (holding that a daughter was not a resident-relative of her father, the non-custodial parent, for purposes of stacking UIM coverage where she lived with her mother in Conway and only occasionally visited her father in Saluda).

Auto. Ins. Co. v. Moorer, 330 S.C. 46, 60, 496 S.E.2d 875, 883 (Ct. App. 1998). A policy provision that purports to limit stacking of statutorily required coverage is invalid. Id. Although liability coverage is required, non-owned vehicle coverage is not and, therefore, may be limited by contract. Id. Therefore, the question is whether the policy language effectively prohibited stacking.

The trial court based its ruling on a plain reading of the policy provisions located in the amendatory endorsements under the heading "If There is Other Coverage" reproduced below:

> 1. Policies Issued by ***Us*** to ***You***
>
> If two or more vehicle liability policies issued by ***us*** to ***you*** apply to the same accident, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.
>
> 2. Other Liability Coverage Available From Other Sources
>
> Subject to item 1, if other vehicle liability coverage applies, ***we*** are liable only for ***our*** share of the damages. ***Our*** share is the percent that the limit of liability of this policy bears to the total of all vehicle liability coverage applicable to the accident.
>
> ***3. Temporary Substitute Car, Non-Owned Car, Trailer***
>
> If a ***temporary substitute car***, a ***non-owned car*** or a ***trailer*** designed for use with a ***private passenger car*** or ***utility vehicle*** has other vehicle liability coverage on it, then this coverage is excess.

(emphasis in original).

Specifically, the trial court found these provisions clearly and unambiguously provided excess coverage for non-owned vehicles. In so ruling, the trial court read paragraph three as being independent of the

limitation contained in paragraph one. The court reasoned that if the drafters of the policy intended the limitations of paragraph one to apply to paragraph three, they would have expressly included the limitation, or some reference to it, in paragraph three. Alternatively, the trial court held that if it was possible to read paragraph one as qualifying paragraph three, then it was just as reasonable to read paragraph three as qualifying paragraph one. Thus, the court reasoned that when an insurance policy is ambiguous it must be construed in a light most favorable to the insured. Accordingly, the trial court held that the policies provided liability coverage for Scott in the amount of $350,000.

Appellants, on the other hand, argue that the limitation of paragraph one qualifies the non-owned coverage provided by paragraph three. According to the Appellants, even if the trial court found the policies provided excess coverage, because Horace Mann issued all three policies to Dee Dee, coverage should have been limited to the policy with the highest limit or $250,000. We disagree.

Initially, we note this court considered similar policy language in Moorer and found in that case it effectively prohibited stacking of non-owned coverage. However, while the policy language in Moorer is identical to that in the current policies, there are a number of significant differences in the two cases. Id. at 59, 496 S.E.2d at 882. For instance, in Moorer, only the first and third paragraphs are excerpted. In addition, the heading of the third paragraph, while couched in the same language as the current policies, is neither bolded nor italicized as it is in the policies under consideration. Id.

We find these differences make the cases distinguishable. As the trial court noted, the second paragraph concerning "Other Liability Coverage" specifically references the limitation of paragraph one. Thus reading the provisions together one could easily come to the conclusion that because paragraph two references the limitation and paragraph three does not, paragraph three is not subject to the limitation. In addition, because the heading of paragraph three in the current case is in bold print and italicized, it supports the trial court's interpretation that it is intentionally set off from the other provisions and meant to be read as existing independently. Accordingly, we agree with the trial court's interpretation of the policies.

CONCLUSION

Based on the foregoing, we find sufficient evidence in the record to support the trial court's ruling that the additional policies provided excess coverage for Christian's injuries. Therefore, the trial court's ruling is

AFFIRMED.

GOOLSBY, J., concurs.

HEARN, C.J., dissents in a separate opinion.

HEARN, C.J., dissenting: I respectfully dissent and would hold that Christopher was a resident relative of his mother at the time of the accident.

The majority's decision to affirm is largely driven by our standard of review in a law case, i.e. whether there is any evidence to support the trial judge's decision. While I agree there is evidence supporting the trial judge's decision that Christopher was dependant on his father, I would hold the trial judge erred in not finding him dependant on his mother as well.

The uncontroverted evidence reflects that at the time of the accident in 1994, Christopher was a student at Clemson who relied on both his mother and father for financial support. Specifically, the record demonstrates that his mother contributed to his rent and was a guarantor on his lease. Although Christopher testified his father gave him a lump sum of money each semester for his tuition, the record also clearly shows that his mother contributed toward his tuition, groceries, and automobile expenses. In fact, Christopher testified that he had no idea about the insurance on his vehicle because he simply didn't "handle that." His mother testified without contradiction that she paid the premium on Christopher's car insurance. She also paid the property taxes on the vehicle, claimed Christopher as a dependent on her tax returns, and maintained a room for him in her home. Christopher received his mail at her address and came home approximately

every two weeks while he was at Clemson to do his laundry. Christopher testified that he had not stayed in his father's home overnight since 1992.

Although I believe the record actually shows that Christopher was more dependent on his mother than on his father, I recognized there is some evidence, albeit slight, to support the trial judge's decision that Christopher may have been more financially dependent on his father than on his mother. Nevertheless, it is simply irrelevant that Christopher may have been more dependent on one parent than the other. In either case, he still qualifies as a resident relative under the plain and ordinary language of the policy. The policy at issue defines relative thusly: "Relative means a person related to you by blood, marriage or adoption who lives with you. It includes your unmarried and dependent child who is away at school." In my view, Christopher falls squarely within this definition of resident relative.

To the extent the trial judge interpreted the policy provision to mean that Christopher could only be dependent upon one of his parents and found he was not dependent upon his mother, he erred as a matter of law. Thus, I would reverse the trial judge's decision that Christopher was not his mother's resident relative.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William A. Lenz, Respondent,

v.

James L. Walsh, individually and as Trustee of the James L. Walsh Revocable Trust, and Marsha L. Walsh, individually and as Trustee of the Marsha L. Walsh Revocable Trust, Appellants.

Appeal From Clarendon County
Ralph F. Cothran, Master-in-Equity

Opinion No. 3930
Heard December 14, 2004 – Filed January 24, 2005

AFFIRMED

Charles Craig Young, of Florence, and J. Calhoun Land, IV, of Manning, for Appellants.

Marvin E. McMillan, Jr., of Sumter, for Respondent.

GOOLSBY, J.: James L. Walsh and Marsha L. Walsh appeal from the master's ruling denying them recovery on their counterclaims against William A. Lenz, an unlicensed residential builder who was hired to construct their home. The Walshes contend the master erred in finding they could not recover on their counterclaims because they failed to prove damages in excess of the amount of the final unpaid draw due Lenz under the contract. They argue the master's finding effectively violates the South Carolina statute that prohibits an unlicensed residential builder from enforcing a construction contract. We affirm.

FACTS

On March 30, 1996, the Walshes entered into a contract with Lenz to construct their home in the Wyboo Plantation subdivision of Manning, South Carolina. Lenz signed the document listing himself as the "contractor." The contract price was $120,960.00, with payments to be made in regular installments or "draws." The house was to be constructed according to plans and specifications attached to the contract. Lenz granted the Walshes allowances for the purchase of certain items used in construction of the home, such as cabinets, flooring, countertops, and appliances. The Walshes were responsible for paying any amount over the stated allowance. All other materials were included in the contract price.

Lenz obtained a building permit on April 10, 1996 and began construction on the home. During construction, the Walshes made changes in some of the materials for the home and often purchased items themselves without going through Lenz. Some of the materials the Walshes purchased, such as plumbing fixtures, light fixtures, and cabinets, were provided for either as part of the contract price or as a stated allowance. Lenz and the Walshes had some disagreements, and Lenz eventually halted construction after the Walshes failed to pay the amount he requested in a June 1997 letter for overages incurred for additional work and materials. The Walshes never paid the fifth and final draw of $18,000.00 due on the contract. The Walshes prohibited Lenz from coming on the property when the house was

approximately ninety-five percent complete. The Walshes thereafter spent $2,792.65 on labor and $1,267.91 on materials to complete the house.

In August 1997, Lenz filed a notice for a mechanic's lien and a complaint for foreclosure of the lien and breach of contract. Lenz sought $14,377.58 for unpaid amounts due for construction of the home.

The Walshes answered, denying any amount was due, and counterclaimed for damages for breach of contract, fraud, and intentional infliction of emotional distress. They sought to recover amounts they personally expended for the construction of the house and also sought damages for alleged delays in construction.

The Walshes subsequently moved for summary judgment as to Lenz's complaint on the ground he was not a licensed residential builder as required by the South Carolina Code and was, therefore, statutorily prohibited from enforcing the contract. By order filed March 22, 1999, circuit court Judge Howard P. King granted the Walshes' motion and held Lenz was prohibited by then-section 40-59-130 of the South Carolina Code[1] from pursuing any claim against the Walshes on the contract because he was not a licensed residential builder when he entered the contract.

The case was thereafter referred to a master-in-equity, Ralph F. Cothran, who held a hearing and thereafter concluded in an order dated January 22, 2002 that the Walshes were not entitled to recover on any of their counterclaims.

The master found Lenz had provided labor and materials in the amount of $13,695.58 that remained unpaid. He also noted there was no dispute concerning the Walshes' failure to pay the $18,000.00 final draw due on the

[1] All references in this opinion are to former section 40-59-130, which at the time of the court's order was codified at S.C. Code Ann. § 40-59-130 (Supp. 1999). Section 40-59-130 has since been amended and recodified by 2002 Act No. 359, § 1 and is now found at S.C. Code Ann. § 40-59-30 (Supp. 2004).

contract. Because the Walshes refused to allow Lenz to complete the house, the master prohibited the Walshes from recovering the amounts they paid for labor and materials to complete construction. The master further found many of the items the Walshes purchased were provided for as allowances in the contract or were items outside the contract that they voluntarily purchased. The master concluded "[t]hat the damages alleged and proven by the [Walshes] do not exceed the unpaid amount of the final draw in the amount of $18,000.00 and the [Walshes] therefore are not entitled to any recovery on their counterclaim." The Walshes filed a motion to alter or amend the judgment, which was denied.

LAW/ANALYSIS

On appeal, the Walshes contend the master erred in finding they are not entitled to recover on their counterclaims because any damages they sustained did not exceed the final payment of $18,000.00. They argue this finding effectively allows Lenz to recover under the contract in violation of South Carolina statutory law that prohibits an unlicensed residential builder from enforcing a construction contract. We disagree.

Former section 40-59-130 proscribed an unlicensed residential builder from enforcing a construction contract. The statute provided in relevant part as follows:

> Any residential builder or residential specialty contractor who undertakes or attempts to undertake the business of residential building or residential specialty contracting without first having procured a valid license or registered with the commission as required . . . is guilty of a misdemeanor . . . .
>
> A residential builder who does not have a license or residential specialty contractor who is not registered as required may not bring any action either at law or in equity to enforce the provisions of any contract for residential building or residential

> specialty contracting which he entered into in violation of this chapter.[2]

South Carolina courts have held that, pursuant to the statute, a builder who is not licensed at the time he enters into a contract for residential construction may not bring an action to enforce the provisions of the contract.[3] The purpose of the statute is to protect homeowners.[4] Our supreme court has stated that, because the statute is plain and unambiguous, it should be applied literally; thus, where a builder has no license, he may not enforce the contract.[5]

Although our courts have decided the aforementioned cases involving attempts by unlicensed contractors to enforce residential construction contracts, this state has never addressed whether a homeowner may recover payments made to an unlicensed builder under a residential construction contract. North Carolina has considered the question, however, and held in Hawkins v. Holland[6] that such payments are not recoverable.

In a case of first impression involving the consolidation of several suits presenting the same issue, the Court of Appeals of North Carolina observed in Hawkins that the grounds for the holdings in other jurisdictions are (1) the statutes requiring licenses do not specifically authorize the recovery of money paid; (2) such laws are penal in nature and must be strictly construed; (3) the specification of particular penalties precludes the addition of other penalties by judicial interpretation; (4) allowing the recovery of such

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[2] S.C. Code Ann. § 40-59-130 (Supp. 1999) (emphasis added).

[3] See, e.g., Columbia Pools, Inc. v. Moon, 284 S.C. 145, 325 S.E.2d 540 (1985); Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978); Wagner v. Graham, 296 S.C. 1, 370 S.E.2d 95 (Ct. App. 1988).

[4] See Burry & Son Homebuilders, Inc. v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992).

[5] Duckworth, 270 S.C. at 649, 244 S.E.2d at 218.

[6] 388 S.E.2d 221 (N.C. Ct. App. 1990).

payments is not necessary to effectuate the policy of licensing statutes; and (5) equity and the principles of restitution do not require that unlicensed contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost.[7]

South Carolina case law provides support for the same reasoning.[8] We, therefore, find Hawkins persuasive and agree with its determination that, generally, a homeowner may not recover payments already made to an unlicensed contractor merely because the contractor did not hold a license when the contract was executed.

In the current appeal, it is undisputed that Lenz may not bring an action to enforce the contract pursuant to former section 40-59-130 since he was not licensed at the time the contract was entered into. At issue now is the Walshes' counterclaims. The Walshes argue the master's ruling that they could not recover on their counterclaims because they failed to prove damages in excess of the final unpaid draw effectively allows Lenz to bring an action to enforce the contract in contravention of the statute.

We hold this situation is analogous to Hawkins, wherein the homeowners were seeking reimbursement for payments previously made. The Walshes voluntarily paid for many items that were either outside the contract or were to be purchased by the builder under the contract. Regardless of whether they paid for these items out of pocket or paid the builder a draw under the contract, the sums spent by the Walshes went towards materials provided for in the contract and those used in construction of the house. Allowing the Walshes to recover these sums would be indistinguishable from allowing them to recover money paid directly to the

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[7] Id. at 222-23.

[8] See, e.g., Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting Black's Law Dictionary 602 (7th ed. 1999))); Rorrer v. P.J. Club, Inc., 347 S.C. 560, 556 S.E.2d 726 (Ct. App. 2001) (stating it is well established that penal statutes must be strictly construed).

builder to purchase construction materials. Consequently, the decision of the master is

AFFIRMED.

HEARN, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Samuel Hackett, Appellant.

Appeal From Greenwood County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 3931
Submitted December 1, 2004 – Filed January 24, 2005

AFFIRMED

Acting Chief Attorney Joseph L. Savitz, III, of Columbia, for Appellant.

Deputy Director for Legal Services Teresa A. Knox, Legal Counsel Tommy Evans, Jr., and Legal Counsel J. Benjamin Aplin, South Carolina Department of Probation, Parole, and Pardon Services, all of Columbia, for Respondent.

HUFF, J.: This appeal presents the novel question of whether a probationer's probationary period may be tolled when he absconds from supervision. Appellant, Samuel Hackett, was sentenced to fifteen years suspended with five years of probation for second-degree burglary, and ten years suspended with five years probation for larceny. Hackett was twice brought before the court for probation violations, at which times he was found to be in violation of his probation conditions, and in both instances his probation was ordered tolled from the issuance of the warrant. On the third time Hackett was brought before the court for violating his probation, the trial court revoked Hackett's probation in full. Hackett appeals. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On November 9, 1993, Hackett pled guilty to burglary and grand larceny and received concurrent sentences of fifteen and ten years respectively, suspended with five years probation. The probation order transferred Hackett's probation to Oregon and required Hackett to pay restitution.

On January 5, 1995, an arrest warrant was issued that charged Hackett with violating his probation by, among other things, failing to report to Oregon authorities, and absconding from supervision. Because Hackett could not be located, he was not served with this warrant until October 1, 1998. Thereafter, a probation citation was issued on October 16, 1998 charging Hackett with violation of his probation subsequent to the issuance of his January 5, 1995 warrant, for being sentenced to prison on January 13, 1995 for robbery in Oregon. Hackett appeared before the court for a hearing on February 5, 1999, at which time the trial court continued his probation and ordered the probationary period be tolled from the issuance of the warrant on January 5, 1995 until the hearing date, February 5, 1999.

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

On May 4, 1999, another arrest warrant was issued that charged Hackett with violating the terms of his probation by, among other things, failing to report, failing to pay restitution, and failing to notify his agent of his arrest for DUI, DUS, open container violation, violation of the seatbelt law, and child endangerment. On October 8, 2001, the trial court again continued Hackett's probation, but ordered Hackett to attend the restitution center and again ordered the probationary period be tolled from the issuance of the warrant on May 4, 1999 until the date of the order, October 8, 2001.

Hackett was admitted to the Spartanburg Restitution Center on November 6, 2001. On January 11, 2002, Hackett absconded from the center following an incident at the center after he was fired from his job that day. A warrant was issued on January 16, 2002 charging Hackett with violating his probation by, among other things, failing to complete the restitution center by absconding, failing to work diligently at a lawful occupation, and disrupting the facility and threatening conduct. Hackett was arrested in Georgia on July 8, 2002 and transported back to South Carolina on July 18, 2002, at which time he was served with the January 16, 2002 warrant. Thereafter, a probation citation was issued and served on September 19, 2002, charging Hackett with a probation violation for leaving the state without permission.

Hackett appeared at a probation revocation hearing on December 12, 2002 concerning the January 16, 2002 warrant and September 19, 2002 citation. At that hearing, Hackett argued the maximum period of probation is five years and his probationary term expired on November 8, 1998. He asserted the five-year period could not be interrupted unless his probation had been revoked and he was sent back to prison. Accordingly, he asked that his warrant and citation be dismissed for lack of subject matter jurisdiction. The trial court found Hackett's period of probation was properly tolled in both instances and the court therefore had subject matter jurisdiction. Following the taking of testimony on the merits, the trial court found Hackett to be in violation of his probation and revoked Hackett's probation in full. This appeal follows.

LAW/ANALYSIS

Hackett argues the trial court erred in revoking his November 1993 probation in December 2002 because the probationary period could not exceed five years. He asserts S.C. Code Ann. § 24-21-440 does not allow a period of probation to exceed five years, and probation may not be extended absent a partial revocation. Accordingly, Hackett maintains his probation could not be extended beyond November 8, 1998, and the February 5, 1999 order tolling his probation was therefore invalid.[2] We disagree.

South Carolina Code Ann. § 24-21-440 (Supp. 2003) provides as follows: "The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit." A trial court's order extending probation beyond the five-year period authorized by statute is an illegal sentence requiring reversal. State v. Sumpter, 334 S.C. 369, 371, 513 S.E.2d 373, 374 (Ct. App. 1999).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Elmore v. Ramos, 327 S.C. 507, 510, 489 S.E.2d 663, 665 (Ct. App. 1997). "In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Adkins v. Comcar Indus., Inc., 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." State v. Smith, 330 S.C. 237, 240, 498 S.E.2d 648, 650 (Ct. App. 1998). "Where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself." Id. On the other hand,

[2] The only issue on appeal is the propriety of the tolling of Hackett's probation from January 5, 1995 to February 5, 1999 as per the court's order dated February 5, 1999. A finding that this tolling was proper would necessarily mean Hackett was still on probation on September 19, 2002, when the probation citation was issued.

"[c]ourts will reject the plain and ordinary meaning of statutory language when to accept it would lead to a result so absurd that it could not possibly have been intended by Legislature, or would defeat plain legislative intention; if possible we will construe a statute so as to escape an absurd result and carry the legislative intention into effect." State v. Gordon, 356 S.C. 143, 152-53, 588 S.E.2d 105, 110 (2003).

Construing the plain and ordinary meaning of the words of §24-21-440, we find no prohibition for the tolling of a probationary sentence under these circumstances. In the instant case, the trial court did not attempt to continue or extend probation beyond the five-year limit imposed by §24-21-440. Rather, the court tolled the probationary period from running during the time Hackett absconded from supervision. Thus, § 24-21-440 does not explicitly prohibit the tolling of time during which a probationary term runs.

Further, even if the "plain and ordinary meaning of the statute" does not specifically authorize tolling of probation, we find tolling is proper to reflect the legislative intent. "The primary concern in interpreting a statute is to determine the intent of the legislature if it reasonably can be discovered in the language when construed in the light of its intended purpose." Clemson Univ. v. Speth, 344 S.C. 310, 312-13, 543 S.E.2d 572, 573 (Ct. App. 2001). The courts will reject a meaning when to accept such would lead to a result so plainly absurd that the Legislature could not possibly have intended it. Id. at 313, 543 S.E.2d at 573-74. In interpreting statutes, the court's "sole function is to determine and, within constitutional limits, give effect to the intention of the legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute." State v. Cobb, 355 S.C. 98, 101 n.4, 584 S.E.2d 371, 373 n.4 (2003); State v. Ramsey, 311 S.C. 555, 561, 430 S.E.2d 511, 515 (1993).

The trial court logically determined Hackett should not receive credit against the five-year probationary period when he was not under the supervision of a probation officer. Hackett habitually violated the terms of his probation, and while he may have been spared the court's harsh decision to revoke probation on two occasions, the court properly determined probation should be tolled during the time between the issuance of the

probation arrest warrant on January 5, 1995 and the time Hackett actually appeared before the court on that warrant on February 5, 1999. Clearly, Hackett was not reporting and was not under probationary supervision during this time period, and the time during which he absconded from supervision should not be included within the five-year probationary period to which he was sentenced. To allow a probationer who is initially spared from revocation of probation to then abscond from supervision and to escape any further punishment, free and clear of all consequences, as long as he manages to elude apprehension for a set amount of time would lead to an absurd result.

We find further support for our position in the federal case law arena. In United States v. Green, 429 F. Supp. 1036 (W.D. Tex. 1977), Green asserted that a probationary period running past five years from the start of her probation was in violation of the federal statute that provided, "The period of probation, together with any extension thereof, shall not exceed five years." Id. at 1038. The district court held her contention must fall because the period of time during which Green was in violation of her probation tolled the running of the probationary term. Id. There, the court found, "It would be unreasonable to conclude that a probationer could violate conditions of probation and keep the clock running at the same time, thereby annulling both the principle and purpose of probation." Id. Additionally, in the fourth circuit's opinion in United States v. Workman, 617 F.2d 48 (4th Cir. 1980) the court, in discussing prior decisions regarding the computation of the federal five-year limitation period of probation, noted as follows: "The unifying principle implicit in the resulting decisions is that a probationer can not obtain credit against the five-year period for any period of time during which he was not, in fact, under probationary supervision by virtue of his own wrongful act." Id. at 51. It observed the focus was not on a simple mathematical computation of a five-year period from the beginning date of probation, but was on whether the probationer's wrongful acts resulted in termination of probationary supervision. Id.

Finally, we note that in the Florida case of Ware v. State, 474 So.2d 332 (Fla. Dist. Ct. App. 1985), the Florida District Court of Appeal was also faced with the novel issue of whether probation may be tolled during the period of time a probationer absconds from supervision. There, the

appellant's three year probationary period began on May 7, 1979. On July 23, 1980, an affidavit of violation of probation was filed alleging appellant had absconded from jurisdiction. On April 6, 1984, appellant pled guilty to second-degree murder. Thereafter, an amended affidavit of violation of probation and an amended warrant were filed on May 31, 1984. Following a hearing on July 13, 1984, the trial court revoked appellant's probation. Id. at 333. On appeal, appellant asserted the court lacked jurisdiction to entertain the amended affidavit filed in 1984 which included a violation that occurred after his probation had expired. Id. Noting it found no Florida case law directly on point, the court, citing several cases including Workman and Green, held "case law of other jurisdictions, as well as simple logic, indicates that where a probationer 'absconds from supervision,' the probationary period is tolled until he is once more placed under probationary supervision." Id. at 333-34.

For the foregoing reasons, we find the trial court properly tolled Hackett's period of probation from January 5, 1995 to February 5, 1999, and thereafter had jurisdiction to revoke Hackett's probation during the five-year period of Hackett's active supervision. Accordingly, the order of the trial court is

AFFIRMED.

KITTREDGE and BEATTY, JJ., concur.