The Supreme Court of South Carolina

In the Matter of John Joseph Mulrooney, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 21, 1985, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated January 31, 2011, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of John Joseph Mulrooney shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 17, 2011

The Supreme Court of South Carolina

In the Matter of Isabel W. Smith, Petitioner.

ORDER

By Order dated February 3, 2011, this Court accepted the resignation of Isabel W. Smith as a member of the South Carolina Bar. She has now asked this Court to rescind its Order. The request is granted and Petitioner is hereby reinstated as a member of the South Carolina Bar.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

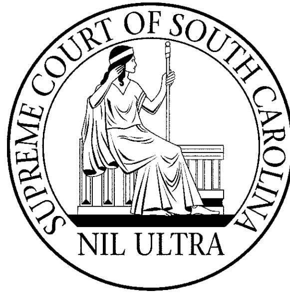
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 17, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6
February 22, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

26928 – Joseph Stinney v. Sumter School District 19

26929 – EllisDon Construction v. Clemson University 24

26930 – Carolina Chloride v. SCDOT 30

26931 – State v. Gregory L. Wright, et al. 37

26932 – Kirby Oblachinski v. Dwight Reynolds 47

26933 – In the Matter of Elizabeth Mason Smith 55

26934 – In the Matter of David Harrison Smith, II 58

26935 – In the Matter of David F. Stoddard 61

26936 – In the Matter of Marva Ann Hardee-Thomas 65

UNPUBLISHED OPINIONS

2011-MO-006 – State v. Alfonzo J. Howard
(Beaufort County, Judge Carmen T. Mullen)

PETITIONS – UNITED STATES SUPREME COURT

26805 – Heather Herron v. Century BMW Pending

26846 – Mary Priester v. Preston Cromer (Ford Motor Co) Pending

26868 – State v. Norman Starnes Pending

2010-OR-00366 – State v. Marie Assaad-Faltas Pending

2010-OR-00322 – State v. Marie Assaad Faltas Pending

2010-OR-00420 – Cynthia Holmes v. East Cooper Hospital Pending

2010-OR-00455 – Joseph H. Gibbs v. State Pending

2010-OR-00694 – Michael Singleton v. State Pending

EXTENSION TO FILE PETITION – UNITED STATES SUPREME COURT

26871 – State v. Steven V. Bixby	Granted
26786 – Sonya Watson v. Ford Motor Co.	Granted

PETITIONS FOR REHEARING

26814 – Sara Robinson v. Estate of Harris	Pending
26859 – Matrix Financial Services v. Louis M. Frazer (Kundinger)	Pending
26909 – Crossman Communities v. Harleysville Mutual	Pending
26911 – SC DOT v. Horry County (Grainger)	Denied 2/16/2011
26912 – Jannette Henry-Davenport v. School Dist. Of Fairfield County	Denied 2/16/2011
26916 – SC DMV v. Larry McCarson	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

4791-Scalise Development, Inc. v. Tidelands Investments, LLC, Gary Owenby, and Nominal Defendant Patrick Stathos, LLC 73

4792-William D. Curtis v. Sandra Morris Blake, as personal representative of the Estate of Brandon T. Blake 86

4793-Richard M. Pendarvis and Thomas A. Pendarvis v. Jewell K. Cook a/k/a Judy Pendarvis 97

UNPUBLISHED OPINIONS

2011-UP-047-Martha F. Edwards v. Michael E. Edwards
(Sumter, Judge George E. McFaddin, Jr.)

2011-UP-048-Sharon Brown v. Cherokee County School District One
(Cherokee, Judge J. Derham Cole)

2011-UP-049-State v. Tony Anthony Stuckey
(Lee, Judge Howard P. King)

2011-UP-050-SCDSS v. Sherry H.
(Union, Judge Robert E. Guess)

2011-UP-051-SCDSS v. Ruth P.
(Berkeley, Judge Jack A. Landis)

2011-UP-052-John Williamson, III and Kathryn Williamson v. The County of Orangeburg
(Orangeburg, Judge Olin D. Burgdorf)

2011-UP-053-SCDSS v. Candida A. and James A.
(Sumter, Judge George M. McFaddin, Jr.)

2011-UP-054-State v. Derick Tyrone Blake
(York, Judge John C. Hayes, III)

2011-UP-055-Amri White v. SCDPPPS
(ALC, Judge Ralph King Anderson, III)

2011-UP-056-Ricky L. Murray v. Dawn Koffskey
(Greenville, Judge Edward W. Miller)

2011-UP-057-Mildred C. Knight and Bobby Knight, III v. Sean K. Trudy et al.
(Charleston, Judge J.C. Buddy Nicholson, Jr.)

2011-UP-058-Charles Jones, in his capacity as personal representative for the Estate of Boyce Jones v. Sumter County Sheriff's Office
(Sumter, Judge R. Ferrell Cothran, Jr.)

2011-UP-059-State v. Russell Campbell, Jr.
(Richland, Judge G. Thomas Cooper, Jr.)

2011-UP-060-State v. Dervick Lamont Parker
(Dorchester, Judge Diane Schafer Goodstein)

2011-UP-061-Mountain View Baptist Church v. Bobby Lee Burdine
(Greenville, Judge John C. Few)

2011-UP-062-Charlotte Roberts, individually and as personal representative of the Estate of Timothy G. Roberts v. Elephant, Inc. d/b/a Platinum Plus
(Greenville, Judge Edward W. Miller)

2011-UP-063-State v. John Harper
(Beaufort, Judge Perry M. Buckner)

2011-UP-064-Lemmie D. Stewart v. State
(Spartanburg, Judge J. Derham Cole)

2011-UP-065-MPI South Carolina-1, LLC v. Levy Center et al.
(Jasper, Judge Marvin H. Dukes, III)

2011-UP-066-Kisha Crawford v. Food Lion, LLC
(Greenville, Judge C. Victor Pyle, Jr.)

2011-UP-067-Mary Lou Moseley v. Jim Oswald
(Lexington, Judge R. Knox McMahon)

2011-UP-068-In the matter of the care and treatment of Don R. Boyd, Sr.
(Aiken, Judge Doyet A. Early, III)

2011-UP-069-Willie Byrd v. SCDC
(ALC, Judge John D. McLeod)

PETITIONS FOR REHEARING

4705-Hudson v. Lancaster Conv.	Denied 02/04/11
4760-State v. S. Geer	Pending
4761-Coake v. Burt	Pending
4763-Jenkins v. Few	Pending
4764-Walterboro Comm. Hospital v. Meacher	Pending
4766-State v. T. Bryant	Pending
4777-Matute v. Palmetto Health	Pending
4779-AJG Holdings v. Dunn	Pending
4781-Banks v. St. Matthews Baptist	Pending
2010-UP-391-State v. J. Frazier	Pending
2010-UP-495-Sowell v. Todd	Pending
2010-UP-503-State v. W. McLaughlin	Pending
2010-UP-507-Cue-McNeil v. Watt	Denied 01/31/11
2010-UP-515-McMillan v. St. Eugene	Pending
2010-UP-523-Amisub v. SCDHEC	Granted 02/07/11
2010-UP-533-Cantrell v. Aiken County	Pending
2010-UP-548-State v. C. Young	Pending
2010-UP-552-State v. E. Williams	Pending

2010-UP-563-SCDHEC v. Windy Hill Orchard	Pending
2010-UP-568-Hinson v. Stafford Park	Pending
2011-UP-005-George v. Wendell	Pending
2011-UP-006-State v. Gallman	Pending
2011-UP-024-Coffey v. Webb	Pending
2011-UP-032-State v. J. Hernandez	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page	Pending
4474-Stringer v. State Farm	Pending
4480-Christal Moore v. The Barony House	Pending
4510-State v. Hoss Hicks	Pending
4526-State v. B. Cope	Pending
4529-State v. J. Tapp	Pending
4548-Jones v. Enterprise	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4597-Lexington County Health v. SCDOR	Pending
4598-State v. Rivera and Medero	Pending
4599-Fredrick v. Wellman	Pending
4605-Auto-Owners v. Rhodes	Pending

4607-Duncan v. Ford Motor	Pending
4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Pending
4611-Fairchild v. SCDOT/Palmer	Pending
4613-Stewart v. Chas. Cnty. Sch.	Pending
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4619-State v. Blackwill-Selim	Pending
4620-State v. K. Odems	Pending
4621-Michael P. v. Greenville Cnty. DSS	Pending
4622-Carolina Renewal v. SCDOT	Pending
4631-Stringer v. State Farm	Pending
4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4639-In the interest of Walter M.	Pending
4640-Normandy Corp. v. SCDOT	Pending
4641-State v. F. Evans	Pending
4653-Ward v. Ward	Pending
4654-Sierra Club v. SCDHEC	Pending
4659-Nationwide Mut. V. Rhoden	Pending

4661-SCDOR v. Blue Moon	Pending
4670-SCDC v. B. Cartrette	Pending
4672-State v. J. Porter	Pending
4673-Bailey, James v. SCDPPPS	Pending
4675-Middleton v. Eubank	Pending
4677-Moseley v. All Things Possible	Pending
4680-State v. L. Garner	Pending
4682-Farmer v. Farmer	Pending
4687-State v. D. Syllester	Pending
4688-State v. Carmack	Pending
4691-State v. C. Brown	Pending
4692-In the matter of Manigo	Pending
4696-State v. Huckabee	Pending
4697-State v. D. Cortez	Pending
4698-State v. M. Baker	Pending
4699-Manios v. Nelson Mullins	Pending
4700-Wallace v. Day	Pending
4702-Peterson v. Porter	Pending
4706-Pitts v. Fink	Pending
4708-State v. Webb	Pending
4711-Jennings v. Jennings	Pending

4714-State v. P. Strickland	Pending
4716-Johnson v. Horry County	Pending
4721-Rutland (Est. of Rutland) v. SCDOT	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4728-State v. Lattimore	Pending
4732-Fletcher v. MUSC	Pending
4737-Hutson v. SC Ports Authority	Pending
4738-SC Farm Bureau v. Kennedy	Pending
4742-State v. Theodore Wills	Pending
4746-Crisp v. SouthCo	Pending
4752-Farmer v. Florence Cty.	Pending
4755-Williams v. Smalls	Pending
4756-Neeltec Enterprises v. Long	Pending
2008-UP-126-Massey v. Werner	Pending
2009-UP-199-State v. Pollard	Pending
2009-UP-266-State v. McKenzie	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending
2009-UP-340-State v. D. Wetherall	Pending
2009-UP-403-SCDOT v. Pratt	Pending
2009-UP-437-State v. R. Thomas	Pending

2009-UP-524-Durden v. Durden	Pending
2009-UP-539-State v. McGee	Pending
2009-UP-540-State v. M. Sipes	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2009-UP-587-Oliver v. Lexington Cnty. Assessor	Pending
2009-UP-594-Hammond v. Gerald	Pending
2009-UP-603-State v. M. Craig	Pending
2010-UP-080-State v. R. Sims	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-131-State v. T. Burkhart	Pending
2010-UP-138-State v. B. Johnson	Pending
2010-UP-140-Chisholm v. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-154-State v. J. Giles	Pending
2010-UP-156-Alexander v. Abbeville Cty. Mem. Hos.	Pending
2010-UP-158-Ambruoso v. Lee	Pending
2010-UP-173-F. Edwards v. State	Pending
2010-UP-181-State v. E. Boggans	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-197-State v. D. Gilliam	Pending

2010-UP-215-Estate v. G. Medlin	Pending
2010-UP-220-State v. G. King	Pending
2010-UP-225-Novak v. Joye, Locklair & Powers	Pending
2010-UP-228-State v. J. Campbell	Pending
2010-UP-232-Alltel Communications v. SCDOR	Pending
2010-UP-234-In Re: Mortgage (DLJ v. Jones, Boyd)	Pending
2010-UP-247-State v. R. Hoyt	Pending
2010-UP-251-SCDC v. I. James	Pending
2010-UP-253-State v. M. Green	Pending
2010-UP-256-State v. G. Senior	Pending
2010-UP-269-Adam C. v. Margaret B.	Pending
2010-UP-273-Epps v. Epps	Pending
2010-UP-281-State v. J. Moore	Pending
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending
2010-UP-289-DiMarco v. DiMarco	Pending
2010-UP-302-McGauvran v. Dorchester County	Pending
2010-UP-303-State v. N. Patrick	Pending
2010-UP-308-State v. W. Jenkins	Pending
2010-UP-317-State v. C. Lawrimore	Pending
2010-UP-330-Blackwell v. Birket	Pending
2010-UP-331-State v. Rocquemore	Pending

2010-UP-339-Goins v. State	Pending
2010-UP-340-Blackwell v. Birket (2)	Pending
2010-UP-352-State v. D. McKown	Pending
2010-UP-355-Nash v. Tara Plantation	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-362-State v. Sanders	Pending
2010-UP-369-Island Preservation v. The State & DNR	Pending
2010-UP-370-State v. J. Black	Pending
2010-UP-372-State v. Z. Fowler	Pending
2010-UP-378-State v. Parker	Pending
2010-UP-396-Floyd v. Spartanburg Dodge	Pending
2010-UP-406-State v. Larry Brent	Pending
2010-UP-419-Lagroon v. SCDLLR	Pending
2010-UP-422-CCDSS v. Crystal B.	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-440-Bon Secours v. Barton Marlow	Pending
2010-UP-448-State v. Pearlie Mae Sherald	Pending
2010-UP-449-Sherald v. City of Myrtle Beach	Pending
2010-UP-450-Riley v. Osmose Holding	Pending
2010-UP-461-In the interest of Kaleem S.	Pending
2010-UP-464-State v. J. Evans	Pending

2010-UP-474-Lindsey v. SCDC (2)	Pending
2010-UP-489-Johnson v. Mozingo	Pending
2010-UP-504-Paul v. SCDOT	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph Stinney and Cynthia Stinney, Individually and as Parents and Natural Guardians of Maurice Stinney, a minor over the age of fourteen years, and Marquis Stinney, Respondents,

v.

Sumter School District 17, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
R. Ferrel Cothran, Jr., Circuit Court Judge

Opinion No. 26928
Heard December 1, 2010 – Filed February 14, 2011

REVERSED

Robert T. King, of Willcox, Buyck & Williams, of Florence, for Petitioner.

Dwight Christopher Moore, of Moore Law Firm, of Sumter, for Respondents.

CHIEF JUSTICE TOAL: Maurice and Marquise Stinney were expelled from Sumter High School for being involved in a fight with other students. After appealing the expulsions up to the Board of Trustees (the Board), Joseph and Cynthia Stinney (the Stinneys), Maurice's and Marquise's parents, filed a suit in circuit court against Sumter School District 17 (the District) for violating Maurice's and Marquise's due process rights, among other claims. The circuit court granted the District's motion for summary judgment on the due process claim, finding the Stinneys failed to exhaust their administrative remedies. The court of appeals reversed, and this Court granted the District's petition for a writ of certiorari.

FACTS/PROCEDURAL BACKGROUND

In September 2003, Maurice and Marquise Stinney were expelled from Sumter High School for their involvement in a fight with two other students. The District superintendent and the Board both upheld the expulsions upon appeal, in October 2003 and November 2003, respectively. Maurice and Marquise had the right to appeal the Board's decision to the circuit court but they did not.

Nearly two years later, the Stinneys brought a suit against the District in circuit court, alleging, among other causes of action, the District's actions or inactions regarding the expulsions violated Maurice's and Marquise's due process rights. The circuit court granted the District's motion for summary judgment as to the due process claim because the Stinneys failed to exhaust their administrative remedies by not appealing to the circuit court. The court of appeals reversed, holding the Stinneys had exhausted their administrative remedies. *Stinney v. Sumter School District 17*, 382 S.C. 352, 359–60, 67 S.E.2d

760, 764 (Ct. App. 2009). This Court granted a writ of certiorari to review that decision.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002).

ANALYSIS

The District argues the court of appeals erred in failing to affirm summary judgment as to the due process claim. We agree.

The circuit court granted summary judgment on the Stinneys' due process claim because they failed to exhaust their administrative remedies as to that claim. This was legal error.[1] Regardless, we find

[1] Both the circuit court and the court of appeals erred in applying the doctrine of exhaustion of administrative remedies in this case. The doctrine of exhaustion of administrative remedies only applies when a litigant invokes the original jurisdiction of the circuit court to adjudicate a claim based upon a statutory violation for which the legislature has provided an administrative remedy. *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002). When an administrative remedy is not available for the injury suffered, the doctrine of exhaustion is not applicable. *Id.* Here, the claim before the Board was an appeal of the expulsions—the Stinneys were seeking to have the expulsions reversed. The Stinneys did not appeal the Board's decision upholding the expulsions to the circuit court. Instead, they initiated a new suit in the circuit court seeking damages and alleging negligence, violations of due process, and failure to follow disciplinary procedures. This new suit was a tort claim, not a statutory

that the Stinneys were afforded all process that was constitutionally due and affirm the grant of summary judgment.

The United States Supreme Court has said the fundamental touchstone of due process is the opportunity to be heard. *Goss v. Lopez*, 419 U.S. 565, 579, 95 S. Ct. 728, 739 (1975). The Supreme Court further stated that the type of hearing required to be provided will depend upon the nature of the case. *Id.* at 579, 95 S. Ct. at 738. For example, in *Goss*, the Supreme Court held a public school student facing a short-term suspension need only be provided with notice of the claims against him and an opportunity to explain his side of the facts, and was not constitutionally guaranteed a full adversarial hearing. *Id.* at 581, 95 S. Ct. at 740.

Expulsion is a more serious disciplinary action than is suspension. Accordingly, the procedures and protections given to the accused student should be greater than the informal, immediate hearing that was authorized in *Goss*.

Without deciding the constitutional minimum that must be given in these circumstances, we find those procedures and protections outlined in section 59-63-240 to be constitutionally sufficient. The statute reads, in pertinent part:

> If procedures for expulsion are initiated, the parents or legal guardian of the pupil shall be notified in writing of the time and the place of a hearing either before the board or a

---

violation for which the legislature has provided an administrative remedy. For that reason, exhaustion simply is inapplicable to the new suit. This conclusion does not indicate that any litigant in an administrative process can bring a tort suit to collaterally attack the findings of the administrative bodies. Res judicata still applies in the administrative setting, and such determinations may bar subsequent litigation. *See Earle v. Aycock*, 276 S.C. 471, 475, 279 S.E.2d 614, 616 (1981) (administrative decision can have preclusive effect in collateral litigation).

> person or committee designated by the board. At the hearing the parents or legal guardian shall have the right to legal counsel and to all other regular legal rights including the right to question all witnesses.

S.C. Code Ann. § 59-63-240 (2004). This statute affords notice, the opportunity to be heard, the right to be represented by counsel, and the right to present evidence and question witnesses. The record shows the Stinneys were provided with the process established in the statute. The Stinneys chose not to be represented by counsel during the initial hearing, and the fact that they did not present evidence or exercise their statutory right to question witnesses does not create a procedural due process violation.

CONCLUSION

This Court can affirm for any reason appearing in the record. Rule 220(c), SCACR; *I'on L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000). Accordingly, we hold the Stinneys were provided with due process, and we reverse the court of appeals and affirm the circuit court's grant of summary judgment as to the Stinneys' due process claim.

PLEICONES, BEATTY, KITTREDGE, JJ., and Acting Justice Dorothy Mobley Jones, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

EllisDon Construction, Inc., Appellant,

v.

Clemson University, South Carolina Procurement Review Panel and Chief Procurement Officer, Respondents.

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 26929
Heard September 23, 2010 – Filed February 14, 2011

AFFIRMED

N. Ward Lambert and R. Patrick Smith, both of Harper, Lambert & Brown, of Greenville, for Appellant.

Christian M. Emanuel, of Columbia; James W. Logan, Jr. and Stacey Todd Coffee, both of Logan, Jolly & Smith, of Anderson; Keith C. McCook, Frank S. Potts, and Edwin E. Evans, all of Columbia, for Respondents.

CHIEF JUSTICE TOAL: In this case, EllisDon Construction (Appellant) appeals the decision of the circuit court that held Appellant was not entitled to interest under section 34-31-20 of the South Carolina Code (1987 & Supp. 2008). We affirm.

FACTS/PROCEDURAL BACKGROUND

Appellant, a general contractor, had contracted with Clemson University (Clemson) to construct a new science complex on Clemson's campus. The contract stated that Clemson would pay interest to Appellant in accordance with the Prompt Payment Act found at section 29-6-50 of the South Carolina Code (2007). This section reads, in pertinent part:

> If a periodic or final payment to a contractor is delayed by more than twenty-one days . . . the owner, contractor, or subcontractor shall pay his contractor or subcontractor interest, beginning on the due date, at the rate of one percent a month or a pro rata fraction thereof on the unpaid balance as may be due. However, no interest is due unless the person being charged interest has been notified of the provisions of this section at the time request for payment is made.

Clemson withheld a portion of the payment for the project, claiming Appellant had materially failed to perform its contractual obligations. After failed mediation attempts, the Chief Procurement Officer found that Appellant failed to meet the requirement for receiving an award of interest under section 29-6-50 because it failed to provide Clemson notice of the statute when it requested payment. The Procurement Review Panel (Panel) reasoned that although Appellant failed to meet the notice requirement of section 29-6-50, it would be inequitable to hold that EllisDon could not collect prejudgment interest. Thus, the Panel held Appellant was entitled to interest under the general interest statute found at section 34-31-20(A) of the

South Carolina Code.[1] The circuit court reversed the Panel, finding that Appellant had not met the requirements of section 29-6-50, and that section 34-31-20(A) only applies in the absence of a contractually agreed upon interest provision. Appellant appealed to the court of appeals, and this Court certified the case pursuant to Rule 204(b), SCACR.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs the judicial review of a decision of an administrative agency. S.C. Code Ann. § 1-23-380 (Supp. 2008). An appellate court may reverse the decision of an administrative agency if it is affected by an error of law. *Id.* § 1-23-380(5).

ANALYSIS

Appellant argues that the circuit court erred in holding South Carolina's general interest statute was not applicable to the contract in question. We disagree.

The circuit court found section 29-6-50, incorporated into the contract in this case, is properly applicable to the contract. The circuit court also found that Appellant failed to satisfy the notice requirements under that statute, and therefore is not entitled to interest under section 29-6-50. Appellant does not challenge that finding on appeal; therefore, the only question is whether section 34-31-20(A), the general interest statute, also applies in this case. Appellant argues the general interest statute applies to all cases where any sum of money is due and owing, and that this statute is not superseded by section 29-6-50. The circuit court, however, relying on *Sears v. Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987), found the general interest statute only applies when an interest rate has not been agreed to in the contract. In *Sears v. Fowler*, this Court stated that the general interest statute

[1] "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."

does not apply when the parties have contracted for a different interest rate. 293 S.C. at 45, 358 S.E.2d at 575 (citing *Turner Coleman, Inc. v. Ohio Const. & Eng'g, Inc.*, 272 S.C. 289, 251 S.E.2d 738 (1979)). Appellant, however, argues that reliance upon *Turner Coleman* is misplaced because in that case the contract noted a particular interest rate, and in this case the contract incorporated a statute that determines the interest rate. That is a distinction without a difference, and *Sears v. Fowler* and *Turner Coleman* are controlling in the instant case. Therefore, Appellant is not entitled to interest under section 34-31-20(A) because it contracted for a different rate of interest.

Further, the circuit court correctly found that the Panel improperly awarded Appellant interest under the general interest statute because the Panel felt it would be inequitable to do otherwise. As the circuit court explains, equity is only available when a party is without an adequate remedy at law. *See Key Corp. Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) ("While equitable relief is generally available where there is no adequate remedy at law, an adequate legal remedy may be provided by statute."). In this case, Appellant had a legal remedy for collecting interest— it needed only to meet the requirements of section 29-6-50 to be entitled to interest. A party failing to fulfill the requirements of its legal remedy cannot later come to the courts complaining of hardship, seeking an equitable remedy.

CONCLUSION

Because the contract specified an interest amount, section 34-31-20(A) does not apply. Therefore, the circuit court did not err in reversing the judgment of the Panel, and the judgment of the circuit court is affirmed.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the majority's decision to affirm the circuit court's order, but write separately as I reach this result by a different route.

While it is certainly accurate to say that parties may contract for a different interest rate than that provided by the prejudgment interest statute,[2] S.C. Code Ann. § 34-31-20 (Supp. 2009), I do not find that rule applicable here. The parties' contract provides, in subparagraph 9.7.2, that Clemson "shall pay interest on delayed certified payments to [appellant] in accordance with Section 29-6-50 of the SC Code of Laws." While this provision expressly incorporates the Prompt Payment Act into the contract, it does not alter a statutorily-set interest rate. Moreover, neither the Act nor subparagraph 9.7.2 are applicable to this contract dispute, which does not involve certified periodic or final payments, but rather arises from appellant's successful claim that Clemson wrongfully withheld monies due under the contract.

I find, however, that appellant is barred from recovering prejudgment interest by the doctrine of sovereign immunity. It is well-settled that the doctrine bars recovery of interest against the State "unless [the State has been] bound by an act of the Legislature or by a lawful contract of its executive officers . . . ." Monarch Mills v. S.C. Tax C'n, 149 S.C. 219, 146 S.E. 870 (1929); see also e.g. Div. of Gen. Serv. v. Ulmer, 256 S.C. 523, 183 S.E.2d 315 (1971).

In 1985, this Court prospectively abrogated the doctrine of sovereign immunity insofar as that doctrine had insulated state and local governments from tort liability. McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985). McCall included Appendix A, a list of 122 cases, and provided that these cases were "overruled to the extent that they hold that an action may not be maintained against the State without its consent." Although Monarch Mills and Ulmer are on that list, their holdings that the State is not liable for prejudgment interest except when bound by statute or by contract remain

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[2] Turner Coleman, Inc. v. Ohio Const. & Eng'g Inc., 272 S.C. 289, 251 S.E.2d 738 (1979).

unaffected as the right to this interest is not a matter of tort liability.[3] Since § 34-31-20 does not allow for recovery of interest against the State, and because the parties' contract is silent as to this type of interest, I find that appellant's request for prejudgment interest is barred by the doctrine of sovereign immunity. Ulmer, *supra*; Monarch Mills, *supra*. For this reason, I concur in the result reached by the majority.

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[3] This is an appeal from an administrative proceeding involving a contract dispute. Whether a party to a tort action against the State could recover prejudgment interest under § 34-31-20 is a question best left for another day. Compare Varn v. S.C. Dep't of Highways and Pub. Transp., 311 S.C. 349, 428 S.E.2d 895 (Ct. App. 1993) (costs available against State in tort action even though Tort Claims Act does not specifically provide for award since Act provides State agencies are liable in tort in same manner and to same extent as private individual).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolina Chloride, Inc., Respondent,

v.

South Carolina Department of Transportation, Appellant.

Appeal From Richland County
Joseph M. Strickland, Master in Equity

Opinion No. 26930
Heard November 3, 2010 – Filed February 22, 2011

REVERSED AND REMANDED

Beacham O. Brooker, Jr. and Natalie J. Moore, both of Columbia, for Appellant.

Edward D. Sullivan, Christian Stegmaier, and Amy L. Neuschafer, all of Collins & Lacy, of Columbia, for Respondent.

JUSTICE PLEICONES: Respondent brought this inverse condemnation action against South Carolina Department of Transportation (SCDOT). The master in equity granted summary judgment in favor of respondent. SCDOT appeals. We reverse and remand.

FACTS

Respondent owned a tract of land located at the southeast corner of the intersection of Killian Road (running east to west) and Farrow Road (running north to south). A railroad track owned by Norfolk Southern Corporation (Norfolk Southern) runs parallel to Farrow Road, adjacent to respondent's property. Respondent never had direct access to Farrow Road from its property. Respondent directly accessed Killian Road using a driveway to the right of the railroad track.

In 2006, Norfolk Southern entered an agreement with SCDOT whereby SCDOT closed the portion of Killian Road that contained a railroad grade crossing near the intersection of Farrow Road.[1] After the road closing, respondent could no longer access Farrow Road by turning left onto Killian road and crossing the Norfolk Southern tracks. Instead, respondent had to turn right onto Killian Road, then right onto Longtown Road, and travel around the back of the property to the point where Longtown Road intersects Farrow Road.

Respondent subsequently brought this inverse condemnation action seeking damages for the lost value of its land that purportedly resulted from the taking of its access rights to Farrow Road. The master in equity granted summary judgment in favor of respondent.

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[1] This agreement was made pursuant to S.C. Code Ann. § 58-15-1625 (Supp. 2009). The agreement also provided for the construction of a highway overpass over the tracks at the next intersection to the north.

ISSUES

I. Did the master err in finding Hardin v. S.C. Dep't of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007) does not apply to this case?

II. Did the master err in granting summary judgment in favor of respondent?

DISCUSSION

I. Applicable Law

SCDOT argues the master erred in finding Hardin should only apply prospectively. We agree.

Prior to the Court's decision in Hardin, a landowner's ability to recover damages as a result of a re-configuration of road access depended on the location of his land with reference to the road vacated and the effect of the vacation on his rights as an abutting landowner. See City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946). The Cothran Court held a landowner is not entitled to recover damages unless he has sustained a "special injury," which is an injury different in kind and not merely in degree from that suffered by the public at large. Id at 368-69, 40 S.E.2d at 243-44.

In Hardin, the Court abandoned the "special injury" analysis which previously existed in this state's jurisprudence, and specified that the focus in these cases should be how any road re-configuration affects a property owner's easements. Hardin, 371 S.C. at 609, 641 S.E.2d at 443.

"The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." Toth v. Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989). "Prospective application is required when liability is

created where formerly none existed." Id.; See also Marcum v. Bowden, 372 S.C. 452, 643 S.E.2d 85 (2007) (the holding that an adult social host who knowingly and intentionally serves an alcoholic beverage to a person between the ages of 18 and 20 created tort liability where formerly there was none, and thus, the Court's decision should be applied prospectively); Ludwick v. This Minute of Carolina, 287 S.C. 219, 337 S.E.2d 213 (1985) (employment law case first recognizing the tort of retaliatory discharge, thereby creating a new cause of action and a new substantive right); McCaskey v. Shaw, 295 S.C. 372, 368 S.E.2d 672 (Ct. App. 1988) (the Court's recognition of a tort for the negligent infliction of emotional distress created a new cause of action and should be applied prospectively).

We find the master erred in concluding Hardin should only be applied prospectively. At the outset, we note counsel for respondent candidly agreed at oral argument that Hardin should apply here. We find Hardin created no new right or cause of action, but, rather restated the focus in determining whether a road re-configuration amounts to a taking. Thus, Hardin applies retrospectively.

II. Summary Judgment

SCDOT argues the master in equity erred in granting summary judgment in favor of respondent. We agree.

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). In determining whether any triable issues of fact exist, the court must view the evidence and all

reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860.

Private property shall not be taken for public use without the payment of "just compensation." S.C. Const. art. I, § 13. The elements of an action for an inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use. Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005). A plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking. Hardin, 371 S.C. at 604, 641 S.E.2d at 441.

A property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless whether he has additional access to and from another public road. Hardin, 371 S.C. at 606, 641 S.E.2d at 442. A property owner also has an easement for access to and from the public road system. Id. In cases addressing road re-configuration, the focus must be on a landowner's actual property interests; that is, his easements. Hardin, 371 S.C. at 609, 641 S.E.2d at 443.

As explained above, the master in equity erred in finding Hardin does not apply to this case. The master, however, went on to state respondent would prevail even under Hardin. Specifically, the master found the railroad track did not destroy the contiguity of respondent's property for purposes of determining whether the property abuts Farrow Rd. Thus, the master concluded SCDOT's closing of the grade crossing effected a taking of respondent's easement of access to Farrow Road.

We find the master erred in granting summary judgment in favor of respondent. There is no question respondent satisfied the first element of inverse condemnation, as SCDOT's closing of Killian Road was affirmative conduct of a government entity. Viewing the evidence in the light most favorable to SCDOT, however, we find that while the closure was effected for a public purpose, there remains a genuine issue of material fact whether

SCDOT's actions constituted a taking. Specifically, there is a question whether respondent had an easement of access as an abutting landowner to Farrow Road. Respondent's property is separated from Farrow Road by the strip of land surrounding the railroad track, and there has been no evidence presented of the quantum of the estate of that portion of land. Because further inquiry into the facts of this case is desirable to clarify the application of the law, we find summary judgment was not appropriate.

CONCLUSION

Based on our finding the factual record is insufficient for summary judgment, the decision of the master is

REVERSED AND REMANDED.

TOAL, C.J., BEATTY and HEARN, JJ., concur. KITTREDGE, J., concurring in a separate opinion.

JUSTICE KITTREDGE: I concur in result and agree that the presence of a genuine issue of material fact renders summary judgment inappropriate. I write separately because my view of the law is reflected in Justice Waller's dissent in *Hardin v. S.C. Dep't. of Transportation*, 371 S.C. 598, 641 S.E.2d 437 (2007).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Gregory Leon Wright, Ernest Anderson, Elijah Carroll, Orlando Coulette, Reco Ham, Jennifer Lyles, and Booker T. Washington, Respondents.

Appeal from Clarendon County
Ralph F. Cothran, Circuit Court Judge

Opinion No. 26931
Heard November 17, 2010 – Filed February 22, 2011

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General Deborah R.J. Shupe, all of Columbia, for Appellant.

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, of Columbia; Deborah J Butcher, of Camden; Harry Leslie Devoe, Jr, of New Zion; and

Steven Smith McKenzie, of Coffey, Chandler & Kent, of Manning, for Respondents.

CHIEF JUSTICE TOAL: In June 2007, a Clarendon County Grand Jury indicted Respondents on several counts related to dogfighting. This matter was called for trial on July 14, 2008. The circuit court granted Respondents' motion to suppress certain evidence, and the State timely appealed the circuit court's ruling. This Court certified this case for review pursuant to Rule 204(b), SCACR.

FACTS/PROCEDURAL BACKGROUND

On November 26, 2006, the Clarendon County Sheriff's Office received an anonymous tip about dogfighting at a mobile home off Jackson Road in Clarendon County. Respondents Orlando Coulette (Coulette) and Jennifer Lyles (Lyles) lived in the mobile home. This tip was received around 7:00 p.m. when the officers were just about to change shifts. Because the tip came in around shift change, the deputies were instructed to stay over and wait at a church approximately two miles from the mobile home in case they were needed. Two deputies then drove past the Jackson Road address on a public road and observed a large number of vehicles parked at the mobile home and spotlights shining in an area next to the mobile home.

Approximately forty-five minutes to an hour after receiving the anonymous tip, law enforcement gathered at the church, paired up in several cars, and drove to the address to investigate further. The mobile home was located down a dirt road shared by at least one other mobile home.[1] The deputies initially had their car headlights off as they drove down the shared road. When the deputies turned their headlights on, they saw people and dogs running away from the mobile home. Sergeant Clay Conyers testified that as he got out of his car to chase the people and the dogs, he could hear dogs fighting in the woods behind the mobile home. Two deputies testified

[1] It appears from the Record that the dirt road is a private road.

that while they were driving down the dirt road they saw a portable dogfighting pit in the area with the spotlights. Corporal Bernie Thorton testified that as the deputies arrived, people were trying to dismantle the dogfighting pit.

The deputies apprehended and detained the people who ran away, and captured as many loose dogs as possible. Sergeant Dan Cutler (Sergeant Cutler) was the investigations supervisor called to the Jackson Road location after the deputies found evidence of dogfighting there. After Sergeant Cutler observed the dogfighting pit with fresh blood and hair on the panels, and a dog with fresh lacerations, he advised the deputies to place the Respondents under arrest for dogfighting. While securing the scene, deputies saw in plain view dogfighting paraphernalia, including a dogfighting pit, dog muzzles, drugs, syringes, several injured dogs, and a dog suspension collar. Deputies obtained a search warrant the next day and seized additional evidence from the yard and from inside the mobile home. The probable cause for the search warrant was premised on the evidence seized the previous night.

Prior to trial, Coulette and Lyles moved to suppress all evidence seized on the property on the ground that law enforcement did not have a warrant and there was not an emergency such that the deputies could come onto the property. The other Respondents joined the motion to suppress, contending their seizures and subsequent arrests were premised on their presence at the scene and the illegally seized evidence. The State argued Respondents had no expectation of privacy in the driveway and the visible front of the residence. Moreover, the fleeing people and dogs created exigent circumstances that justified the warrantless entry onto the property. The State further asserted the evidence seized without a warrant was in plain view, and the arrests were based on that evidence.

After hearing testimony, the circuit court granted Respondents' motion to suppress, finding the exigent circumstances exception did not apply, and the plain view exception was precluded because discovery of the evidence was not inadvertent. Because the search warrant for the mobile home was obtained based on the evidence seized without a warrant, the court

suppressed all of the State's evidence, precluding further prosecution of the State's case.

ISSUE

> Did the circuit court err in granting Respondents' motion to suppress because the evidence at issue was properly seized under the plain view and exigent circumstances exceptions to the warrant requirement, and inadvertent discovery is not required for purposes of the plain view exception to the warrant requirement?

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citations omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citation omitted). When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. *State v. Missouri*, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004) (citation omitted). "The appellate court will reverse only when there is clear error." *Id.* (citation omitted).

ANALYSIS

The State contends the circuit court erred as a matter of law in granting Respondents' motion to suppress because the evidence at issue was properly seized under the plain view and exigent circumstances exceptions to the warrant requirement. The State further contends that inadvertent discovery is not required for purposes of the plain view exception to the Fourth Amendment warrant requirement. We agree.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *Horton v. California*, 496 U.S. 128, 133, 110 S. Ct. 2301, 2306 (1990) (citation omitted). Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S. Ct. 2408, 2412 (1978) (citations omitted). Recognized exceptions to the warrant requirement include plain view and exigent circumstances. *See State v. Beckham*, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) (recognizing the plain view doctrine as an exception to the warrant requirement); *State v. Brown*, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (recognizing the exigent circumstances doctrine as an exception to the warrant requirement).

I. Plain View

"Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." *Beckham*, 334 S.C. at 317, 513 S.E.2d at 613. Consistent with federal law prior to 1990, South Carolina case law regarding the plain view exception requires: (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities. *Beckham*, 334 S.C. at 317, 513 S.E.2d at 613 (citation omitted). However, in *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301 (1990), the United States Supreme Court (USSC) discarded the inadvertent discovery requirement for the plain view exception. In doing so, the USSC noted, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton*, 496 U.S. at 138, 110 S. Ct. at 2308–09. Moreover, "[t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement."

Id. at 138, 110 S. Ct. at 2309. We take this opportunity to join with the majority of states and adopt *Horton*, thereby discarding the inadvertence requirement of the plain view doctrine. Hence, the two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities.

A. Initial Intrusion Was Lawful

The State argues that the deputies' observations from the public highway and the dirt road, the anonymous tip, and the exigent circumstances that developed after the deputies entered the shared dirt road justified the initial intrusion onto the property surrounding Coulette's residence to capture fleeing suspects and dogs, ensure public safety, and prevent further destruction of evidence. We agree.[2]

1. Investigative Authority and Exigent Circumstances

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. U.S.*, 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967) (citations omitted). "A policeman may lawfully go to a person's home to interview him. . . . In doing so, he obviously can go up to the door . . . ." *U.S. v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990) (citations omitted). "A police officer without a warrant is privileged to enter private property to investigate a complaint or a report of an ongoing crime." 24 C.J.S. *Criminal Law* § 2404 (2006); *see also Clark v. City of Montgomery*, 497 So. 2d 1140, 1142 (Ala. Crim. App. 1986).

[2] At trial, the State conceded that the anonymous tip alone would not have created probable cause to search. The State contends that the circuit court erroneously interpreted this concession to mean there was no probable cause at the time the deputies entered Coulette's property. We agree. The State argued throughout the motion hearing that the search and seizure was supported by the exigent circumstances and plain view doctrines.

"A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling." *State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 495 (2009) (*citing Minnesota v. Olson*, 495 U.S. 91, 100, 110 S. Ct. 1684, 1690 (1990)). "In such circumstances, a protective sweep of the premises may be permitted." *Id.* (citing *Maryland v. Buie*, 494 U.S. 325, 337, 110 S. Ct. 1093, 1099–1100 (1990); *State v. Abdullah*, 357 S.C. 344, 351 592 S.E.2d 344, 348 (Ct. App. 2004)). "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Whren v. U.S.*, 517 U.S. 806, 814, 116 S. Ct. 1769, 1775 (1996) (citations omitted) (emphasis in original). In the Fourth Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action. *See id.* at 815, 116 S. Ct. at 1775.

In this case, the deputies responded to an anonymous tip by first driving by the residence on a public road. From this road, deputies observed a large number of vehicles at the mobile home and saw spotlights shining next to the mobile home. These observations were not subject to any Fourth Amendment protection because they were knowingly exposed to the public. Moreover, these observations would give a reasonable police officer in the deputies' position cause to go forward. However, even absent these observations, the police had the investigative authority to approach the front door of the mobile home in order to investigate the anonymous tip. Respondent Coulette's defense counsel admitted that the police may lawfully knock on the door after receiving a complaint. If the deputies could properly drive up the dirt driveway to get to the front door, then their observations of the dogfighting pit and fleeing people and dogs did not exceed their investigative authority.

The deputies' observations as they drove down the dirt road corroborated the anonymous tip and gave them ample reason to believe dogfighting was in progress. Exigent circumstances developed when the suspects started fleeing. Moreover, the presence of dogs created a potential

danger to the deputies. Hence, the deputies had the authority to perform a protective sweep of the premises.

The initial intrusion by the deputies onto Coulette's property was lawful, both because the deputies had the investigative authority to enter the property, pursuant to the anonymous tip and observation from a public road, and because exigent circumstances developed after entering the private driveway. Therefore, we find that the State has satisfied the first element of the plain view exception to the warrant requirement.

B. Incriminating Nature of Evidence Was Immediately Apparent

The State argues that the incriminating nature of the evidence they saw in plain view was immediately apparent. We agree.

While securing the scene, deputies saw in plain view dogfighting paraphernalia, including the dogfighting pit, dog muzzles, drugs, syringes, several injured dogs, and a dog suspension collar. The incriminating nature of this evidence was immediately apparent considering the deputies were there to investigate a tip concerning dogfighting.

CONCLUSION

As noted above, the better approach to the plain view doctrine is to discard the inadvertent discovery requirement as the United States Supreme Court did in *Horton*. Thus, the two elements necessary for the plain view doctrine are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. In this case, the initial intrusion by the deputies was lawful and the incriminating nature of the evidence was immediately apparent, hence, the suppression of the evidence by the circuit court is reversed.

KITTREDGE and HEARN, JJ., concur. Acting Justice Howard P. King concurring in part and dissenting in part in a separate opinion in which PLEICONES, J., concurs.

ACTING JUSTICE KING: Respectfully, I concur in part and dissent in part. I agree with the majority that the inadvertent discovery requirement is no longer realistic, and that we should join the majority of states in discarding this requirement. However, I disagree that this Court may then decide the remaining two requirements of the plain view doctrine according to its own view of the facts. For that reason, I would remand the case for the trial court to make those determinations.

In criminal cases, the appellate court sits to review errors of law only. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citations omitted). The admission of evidence is within the discretion of the trial court and will not be reversed unless it is based upon an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Here, the trial court granted the defendants' motion to suppress based upon an error of law—its conclusion that the State must prove the discovery was inadvertent.[3] The trial court did not make specific findings regarding the remaining requirements of the plain view doctrine: (1) whether the initial intrusion which afforded the authorities the plain view was lawful, and (2) whether the incriminating nature of the evidence was immediately apparent to the seizing authorities. *See State v. Beckham*, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) (outlining the requirements of the plain view doctrine). Therefore, in my view, the proper result would be to adopt the appropriate standard as established in *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990), and remand the case to allow the trial court to make the factual determinations regarding the remaining two elements.

PLEICONES, J., concurs.

[3] Certainly, the trial judge could not foresee a change in the law, and he correctly relied upon the existing law when he made his ruling.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kirby A. Oblachinski, Appellant,

v.

Dwight Raymond Reynolds, Individually and Lexington Pediatric Practice, Respondents.

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 26932
Heard November 4, 2010 – Filed February 22, 2011

AFFIRMED

Heath Preston Taylor, of Taylor Law Firm, LLC, of West Columbia, and Katherine Carruth Goode, of Winnsboro, for Appellant.

Mark Steven Barrow, of Sweeny Wingate & Barrow, PA, of Columbia, for Respondents.

JUSTICE HEARN: In this case, we are asked to decide whether South Carolina should recognize a third party cause of action for negligent diagnosis of sexual abuse. We hold no such cause of action exists and affirm the circuit court's grant of summary judgment.

FACTUAL/PROCEDURAL BACKGROUND

Dwight Raymond Reynolds ("Reynolds"), as the Medical Director of the Lexington County Children's Center, Inc., examined a four-year old girl ("Victim") for sexual abuse. Reynolds examined Victim for thirty seconds to one minute, took photographs and videotape for later reference, diagnosed Victim with a torn hymen, and concluded she had been sexually abused. Kirby Oblachinski ("Oblachinski") subsequently was indicted for criminal sexual conduct with a minor, but the charges were dropped after a second doctor concluded Reynolds misdiagnosed the child and opined Reynolds' examination fell below the standard of care.

Oblachinski brought a civil suit against his accusers, and Reynolds testified during that action on Oblachinski's behalf. Reynolds admitted there was no evidence of blunt force trauma to the hymen, Victim had a "perfectly normal hymen," and he had made a mistake in his earlier diagnosis. Following this civil suit, Oblachinski brought a separate suit against Reynolds and Lexington Pediatric Practice, (collectively, "Respondents") alleging negligence in examining and diagnosing Victim.

The circuit court granted Respondents' motion for summary judgment, finding that Respondents owed no duty of care to Appellant. This appeal followed.

ISSUE

Oblachinski raises one issue on appeal: Did the circuit court err in granting summary judgment to Respondents based on a determination that they owed no duty of care to Oblachinski?

STANDARD OF REVIEW

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine. *See Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007) (recognizing that whether a duty exists is a question of law for the courts).

LAW/ANALYSIS

Oblachinski contends the circuit court erred by finding Reynolds owed no duty of care to him. Oblachinski therefore urges this Court to find an exception to the general rule that no duty of care exists between a physician and a third party. Respondents argue South Carolina case law limits situations where a third party can bring a suit against a physician, and that these facts do not fall within the recognized exception to the general rule. We agree with Respondents and affirm the circuit court's grant of summary judgment.

An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence. *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 82 (1998) (citing *Rogers v. S.C. Dep't of Parole & Community Corrections*, 320 S.C. 253, 464 S.E.2d 330 (1995)). As a general rule, only a patient can maintain an action against a doctor for medical negligence. *See id.* at 91, 502 S.E.2d at 84. However, a doctor-patient relationship is not required in every legal action against a medical provider. *Hardee v. Bio-Medical Applications of S.C., Inc.*, 370 S.C. 511, 515, 636 S.E.2d 629, 631 (2006) (citing *Bishop*, 331 S.C. at 92, 502 S.E.2d at 84.). Limited circumstances exist where a reasonably foreseeable third party can maintain a suit against a physician for malpractice. *Bishop*, 331 S.C. at 92, 502 S.E.2d at 84.

In *Bishop*, following the grandmother's involuntary commitment of the mother, the South Carolina Department of Mental Health ("Department") determined the victim's mother was not mentally ill and released her. The next day, the mother arrived at the grandmother's home and after being permitted to remove her minor daughter from the grandmother's care, the mother physically abused the child. The grandmother brought a negligence action against the Department, contending the child was a foreseeable plaintiff, and that the Department owed a duty to the child to properly diagnose and treat the mother. *See Bishop*, 331 S.C. at 84, 502 S.E.2d at 80. While recognizing the possibility that a reasonably foreseeable third party could bring a claim against a physician under certain circumstances, the Court held Department's duty to properly diagnose and treat was owed only to the mother, and not to the child. *See id.* at 92, 502 S.E.2d at 84.

Several years later, in *Hardee*, the Court found the facts gave rise to the duty recognized in *Bishop*. There, the Hardees were injured when a patient of a dialysis center lost control of his automobile and struck their vehicle after leaving one of his treatments. *See Hardee*, 370 S.C. at 513, 636 S.E.2d at 630. The Hardees sued the dialysis center for negligence, asserting it should have warned the patient of the risks of operating a motor vehicle after a dialysis treatment. The trial court granted summary judgment in favor of the

dialysis center and this Court reversed, finding the center had a duty to warn a dialysis patient of the risks associated with operating a motor vehicle, and by failing to do so, it breached the duty owed to the Hardees as reasonably foreseeable third parties injured by the patient's actions. *Id.* at 516, 636 S.E.2d at 631-32.

Oblachinski argues *Hardee* and *Bishop* permit reasonably foreseeable third parties to pursue negligence claims against medical providers. Initially, we note that although the *Bishop* Court stated that such a duty may exist under limited circumstances, no duty was recognized on the facts of that case. Moreover, "[f]oreseeability of injury, in and of itself, does **not** give rise to a duty." *Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Ins. Co.*, 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003) (citing *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986)). Importantly, the duty recognized in *Hardee* mirrored the duty owed to the patient. As noted in *Hardee*, "this duty owed to third parties is identical to the duty owed to the patient, i.e., a medical provider must warn a patient of the attendant risks and effects of any treatment." *Hardee*, 370 S.C. at 516, 636 S.E.2d at 632. In both *Bishop* and *Hardee*, the actions hinged on conduct by the patient which injured the third-party plaintiff. Here, Oblachinski asks us to extend the limited duty recognized in *Hardee* to a non-patient injured by the negligence of the doctor in diagnosing a patient. Even though the harm which befell Oblachinski as a result of the misdiagnosis may have been reasonably foreseeable, we believe important policy concerns weigh against extending a duty to him in this case.

The devastating nature of child sexual abuse charges requires that they be lodged only after a careful and thorough investigation. Juxtaposed against this important principle is the equally compelling goal of protecting children from sexual abuse. Medical diagnoses of sexual abuse as well as a child's ability to accurately relate the history of such incidents are not as absolute and infallible as they ought to be, given the serious consequences that may result. In our view, the good faith willingness of medical providers to identify the existence of sexual abuse should not be chilled or otherwise compromised by subjecting them to malpractice actions. While in no way

minimizing the traumatic effect to an individual wrongfully accused of child sexual abuse, an analysis of the competing policy ramifications of our decision persuades us to refuse to recognize a cause of action in this situation.

We note that no other state has recognized a cause of action under similar facts. Instead, other jurisdictions have specifically declined to extend a duty of care from physicians to third parties in such instances. *See, e.g., Althaus ex rel. Althaus v. Cohen*, 562 Pa. 547, 553-54, 756 A.2d 1166, 1169 (2000) (consequences of burdening medical professionals outweighed imposing duty of care); *Vineyard v. Kraft*, 828 S.W.2d 248, 252-53 (Tex. App. 1992) (physician owed no duty to father of child in connection with alleged negligent misdiagnosis of sexual abuse). A Texas case, *Dominguez v. Kelly*, 786 S.W.2d 749 (Tex. App. 1990), is instructive. There, criminal proceedings were instituted against Dominguez, in part because of Dr. Kelly's examination and report that the female victim, who had been brought to Kelly by a member of the Texas Department of Human Services, had been sexually assaulted along with a discovery of syphilis. *Id.* at 750. Subsequent testing negated Kelly's conclusion of syphilis. Dominguez sued Kelly for negligence in the diagnosing and reporting of his conclusions, and summary judgment was granted in favor of Kelly based on the lack of a duty owed by Kelly to Dominguez. *Dominguez*, 786 S.W.2d at 750-51. The Texas Court of Appeals held that the "doctor's only duty is to conduct the examination in a manner not to cause harm to the person being examined." *Id.* (citing *Johnston v. Sibley*, 558 S.W.2d 135 (Tex. App. 1977)). Similarly here, we believe Respondents' duty extended only to the patient.

The dissent contends we should recognize a duty of care between professionals and third parties as it relates to reckless examination and diagnosis. The arguments before the circuit court on the motion for summary judgment were based solely on whether a duty existed on these facts. While the dissent correctly notes that Oblachinski pled recklessness in his complaint, at no time during the arguments on the motion before the circuit court, at the post-trial motion stage, or in briefs or oral argument before us was the issue of recklessness raised. Therefore, whether a duty might exist between a physician and a third party based on reckless misdiagnosis of

sexual abuse is not an issue before this Court and we decline to address it. *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (1984), *rev'd*, 286 S.C. 85, 332 S.E.2d 100 (1985) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

We decline to be the first state appellate court to recognize the existence of a duty flowing between a physician and a third party under these circumstances. Therefore, we affirm the circuit court's grant of summary judgment.[1]

AFFIRMED.

BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur. ACTING CHIEF JUSTICE PLEICONES concurring in part and dissenting in part in a separate opinion.

[1] Because we find no duty of care exists, we decline to address Respondents' other arguments. *See State v. Allen*, 370 S.C. 88, 102, 634 S.E.2d 653, 660 (2006) (declining to address remaining issues addressed by appellant when prior issue was dispositive).

ACTING CHIEF JUSTICE PLEICONES: I dissent in part and concur in part. I agree that the question of the existence of a duty is one for the Court, and that policy concerns must govern our decision to extend the duty of a diagnosing physician to a third party. I also agree that we must tread warily where the diagnosis sought to be challenged is that of sexual abuse of a child. Moreover, these concerns lead me to agree that negligence alone is not the appropriate standard for the duty. I would hold, however, that a professional owes a duty to third persons to refrain from examining and diagnosing a child as a victim of sexual abuse in a reckless manner.[2] In finding such a duty, I have considered not only the stigma that attaches to a person accused of such abuse, but also of the suffering of a child falsely labeled a sexual abuse victim.

I would reverse the order of the circuit court as I find that appellant pled that respondent recklessly misdiagnosed sexual abuse, and thus alleged a breach of the duty that I would recognize today.

[2] That is, by consciously failing to exercise due care. E.g., McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Elizabeth Mason Smith, Respondent.

Opinion No. 26933
Submitted January 24, 2011 – Filed February 22, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Charles B. Macloskie, of Macloskie Law Firm, of Beaufort, for respondent.

PER CURIAM: In this attorney disciplinary matter the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an indefinite suspension or disbarment pursuant to Rule 7(b), RLDE, Rule 413, SCACR.[1] Respondent requests that, if the Court accepts the agreement, that the sanction be imposed retroactively to July 31, 2009, the date of her

[1] Since formal charges were not filed prior to January 1, 2010, an indefinite suspension remains a possible sanction under prior Rule 7(b)(2), RLDE. See Amendments to the South Carolina Rules of Lawyer Disciplinary Enforcement Order dated October 16, 2009.

interim suspension. In the Matter of Smith, 2009 WL 7310699 (2009). We accept the agreement and disbar respondent from the practice of law in this state, retroactive to the date of her interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

On July 30, 2009, while respondent was the Beaufort County Clerk of Court, she was indicted and charged with writing checks on two Clerk's Office accounts between August 2006 and April 2009 for uses unrelated to her role as a lawyer or duty as the Clerk of Court. The checks totaled $23,500. On September 21, 2009, following a trial, respondent was convicted of three counts of embezzlement of public funds less than $5,000, one count of embezzlement of public funds more than $5,000, and one count of misconduct in office.

Respondent was sentenced to five years on each of the three counts of embezzlement of public funds less than $5,000, six years on the count of embezzlement of public funds more than $5,000, and one year on the count of misconduct in office, all of which were suspended upon service of five years of probation. The sentences were ordered to run concurrently. All of the funds have been repaid.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Further, respondent admits her misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of a serious crime), and 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law retroactively to the date of her interim suspension. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David Harrison Smith, II, Respondent.

Opinion No. 26934
Submitted January 24, 2011 – Filed February 22, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

David Harrison Smith, II, of Rincon, Georgia, pro se.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29, RLDE, Rule 413, SCACR.

Respondent was admitted to the South Carolina Bar on November 17, 2003,[1] and to the Georgia Bar on November 22, 2005.

[1] On April 4, 2010, the South Carolina Supreme Court suspended respondent from the practice of law for failure to pay his 2010 license fees. On June 11, 2010, the Court suspended respondent from the practice of law for failure to comply with continuing legal education requirements.

On November 1, 2010, the Supreme Court of the State of Georgia disbarred respondent. In Re Smith, 288 Ga. 155, 702 S.E.2d 136 (2010).

The facts cited in the Supreme Court of Georgia's disbarment order provide that respondent failed to respond to the Notice of Investigation served on him by the Georgia State Bar. Thereafter, respondent failed to file a Notice of Rejection to the Notice of Investigation which, pursuant to Georgia Bar Rule 4-208.1(b), resulted in his deemed admission of the allegations, waiver of his rights to an evidentiary hearing, and the imposition of discipline as determined by the Supreme Court of Georgia.

According to the order, the Notice of Investigation alleged a client retained respondent in early 2009 to represent her in an uncontested divorce which respondent led the client to believe would be concluded shortly after the 30-day waiting period. On or about March 19, 2009, respondent cashed the client's $580.00 retainer check. When the client did not hear from respondent concerning the status of her case, she repeatedly attempted to contact him by telephone but was unsuccessful. In August 2009, the client contacted the clerk of court and learned no divorce action had been filed on her behalf. Around August 17, 2009, the client sent a letter to respondent by certified mail requesting an explanation, return of her file, and a refund of her fee. The letter went unclaimed and the client had no further communication from respondent.[2]

Further, as specified in the order, the Supreme Court of Georgia found that, in aggravation of discipline, respondent acted willfully and dishonestly, failed to respond in any manner to the

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[2] On September 1, 2009, respondent was suspended from the Georgia State Bar for failure to pay dues.

disciplinary proceedings, and did not provide a current address to the State Bar.

Pursuant to Rule 29(a), RLDE, the Office of Disciplinary Counsel (ODC) submitted a certified copy of the Supreme Court of Georgia's Order of Disbarment to the Clerk. In accordance with Rule 29(b), RLDE, the Clerk provided the parties thirty (30) days in which to inform the Court of any reason why the imposition of identical discipline in this state was not warranted. Respondent did not file a response.[3]

After thorough review of the record, we hereby disbar respondent from the practice of law in this state. See Rule 29(d), RLDE. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

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[3] Further, respondent has failed to keep the Bar apprised of his current mailing address as required by Rule 410(e), SCACR.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David F. Stoddard, Respondent.

Opinion No. 26935
Heard February 2, 2011 – Filed February 22, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard and Harvey MacLure Watson, III, both of Ballard, Watson and Weissenstein, of West Columbia, for Respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of a public reprimand with two conditions: 1) completion of the Legal Ethics and Practice Program Trust Account School within six months of the date of the Court's order and 2) submission of his monthly trust account reconciliations to the Commission on Lawyer Conduct for a period of one year. We accept the agreement and issue a public reprimand with the stated conditions. The facts, as set forth in the agreement, are as follows.

FACTS

Until 2006, respondent's secretary conducted monthly reconciliations of his trust account. In 2006, the secretary left the law firm and, at that time, reported to respondent that she had been unable to balance his books for some period of time. Respondent stopped his monthly reconciliations at that time.

Between December 2008 and August 2009, respondent's paralegal, Ann Pressley, issued twenty-nine checks payable to herself for a total of $117,000.00 on respondent's trust account. Ms. Pressley issued the checks by either forging respondent's signature on the checks or signing her name to others. Ms. Pressley was not entitled to these funds and respondent did not authorize issuance of these checks. Respondent had not given Ms. Pressley signatory authority on the account; however, he did delegate the preparation of trust account checks to her and allowed her to sign his name on those checks.

Respondent did not discover Ms. Pressley's misappropriation because he did not review his monthly bank statements or conduct monthly reconciliations of his trust account. On three occasions between April and July 2009, respondent did ask Ms. Pressley for his bank statements, but she did not comply with his request.

In August 2009, respondent discovered the defalcation when he obtained copies of his bank statements and checks. Ms. Pressley had been able to remove funds from the trust account without detection because she did not issue checks to clients and third parties who were entitled to funds from the account. If respondent had conducted monthly reconciliations, he would have discovered a significant number of outstanding checks, some more than four years old.

In August 2009, a warrant was issued for Ms. Pressley's arrest in connection with the checks drawn on respondent's trust

account. Respondent fully cooperated with law enforcement in the investigation and prosecution of Ms. Pressley. Respondent also retained an outside accountant to reconcile his account and to determine the extent of the misappropriation. Further, he replaced his clients' funds with personal funds, and he opened a new trust account and made arrangements with his bank to insure that outstanding checks were paid from the new account. Respondent reissued checks to replace outstanding checks that had not been delivered. He self-reported this matter to ODC in January 2010.

Respondent admits he violated other provisions of the Court's rules. In particular, he admits he failed to adequately account for law firm funds maintained on deposit in his trust account to cover bank charges and fees, resulting in overdrafts to that subaccount. Further, he did not prepare settlement statements on all of his contingency cases in violation of Rule 1.5, Rule 407, SCACR. Moreover, respondent's firm had a practice of disbursing checks to clients and to his firm prior to actually depositing and collecting the funds to cover the disbursements.

In addition, respondent issued at least two checks to cash. Although he has been able to document the purposes of those checks and demonstrate the funds were properly paid, respondent acknowledges he violated the provision of Rule 417, SCACR, that requires trust account checks be made payable to a named payee and not to cash. Finally, on two occasions following the opening of his new trust account, respondent inadvertently wrote checks from the wrong account, resulting in insufficient funds. The errors were corrected upon discovery and no client funds were lost.

LAW

Respondent admits that, by his misconduct, he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.5 (contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined), Rule 1.15 (lawyer shall safe keep client funds; lawyer shall not disburse

funds from an account containing funds of more than one client or third person unless funds to be disbursed have been deposited in the account and are collected funds), and Rule 5.3 (lawyer having direct supervisory authority over non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct). Respondent also admits he violated the recordkeeping provisions of Rule 417, SCACR.

CONCLUSION

We find that respondent's misconduct warrants a public reprimand with conditions. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Further, within six months of the date of this order, respondent shall complete the Legal Ethics and Practice Program Trust Account School and, for a period of one year from the date of this opinion, respondent shall submit his monthly trust account reconciliations to the Commission on Lawyer Conduct.

PUBLIC REPRIMAND.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Marva Ann Hardee-Thomas, Respondent.

Opinion No. 26936
Heard January 6, 2011 – Filed February 22, 2011

TWO YEAR DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

James K. Holmes, of Charleston, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) filed formal charges on allegations of misconduct against Marva Ann Hardee-Thomas (Respondent) involving her mishandling of clients' trust account funds. Following a hearing, the Hearing Panel of the Commission on Lawyer Conduct (the Panel) recommended Respondent be indefinitely suspended from the practice of law, along with certain other requirements. Neither the ODC nor Respondent took exception to the Panel Report.[1] However, because the sanction of indefinite suspension

[1] Neither party filed briefs with this Court. Therefore, the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and

is no longer an available sanction under the revised South Carolina Rules for Lawyer Disciplinary Enforcement (RLDE),[2] this Court determines Respondent's sanction without recommendation from the Panel and orders Respondent's suspension from the practice of law for a period of two (2) years from the date of this opinion. Further, we adopt all of the additional recommendations made by the Panel and order Respondent to complete these recommendations within the time period recommended by the Panel.

FACTS

I. Matter A

In Matter A, a client complained that Respondent failed to pay medical providers out of the settlement proceeds of a personal injury case, resulting in a tax lien being placed on the client and negatively impacting the client's credit rating. In Respondent's Answer, she contended that she delayed in paying the surgeon and chiropractor because of uncertainty as to whether Medicaid had paid the doctors and placed a statutory lien on the settlement proceeds, or whether Respondent was to pay the doctors directly. Respondent maintained that as soon as she resolved the Medicaid lien question she paid the medical providers. Respondent paid the medical providers more than a year after she received the settlement proceeds on behalf of the client in Matter A. Respondent did not deposit the amounts necessary to pay medical providers into the trust account, and finally paid the providers out of her office account.

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recommendations. *See* Rule 27(a), RLDE, Rule 413, SCACR ("The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

[2] *See* Amendments to the South Carolina Rules for Lawyer Disciplinary Enforcement, Order dated October 16, 2009 (the amended rules apply to cases where formal charges are pending on the effective date of January 1, 2010). In this case, the formal charges were filed on November 20, 2008 and May 19, 2009, but these charges were pending on January 1, 2010. Therefore, the new rules should have been applied in this case.

II. Matter B

In Matter B, a client complained that he was not paid the amount owed to him after Respondent settled his accident case with an insurance company. Respondent answered that she received the settlement check for that case on the day she had met with the ODC and was placed on interim suspension. She deposited the full check for $4,500 into her trust account, which brought the balance to $2,715.81. Respondent admitted that $3,000 was owed to her client and that she does not know why there were not enough funds in her trust account to cover the balance. Respondent paid neither the medical providers listed on the settlement statement nor the client. The client was forced to file a claim with the South Carolina Bar Lawyers' Fund for Client Protection (Lawyers' Fund) to recover for his loss.

III. Matter C

In Matter C, the client complained that Respondent failed to pay medical providers out of the proceeds of the client's settlement. Respondent admits that she failed to pay $3,589.70 to certain medical providers as represented in the settlement statement to the client. The client in Matter C was unable to recover from the Lawyers' Fund because she must first satisfy medical bills before she seeks recovery from the Lawyers' fund, and she lacks the funds to do so.

IV. Matter D

In Matter D, Respondent failed to pay third party medical providers in the amount of $1,826.50, as represented in the settlement statement given to the client. The client was also unable to recover from the Lawyers' fund because she must first satisfy medical bills before she seeks recovery from the Lawyers' fund, and she lacks the funds to do so.

V. Various Trust Account Matters

In addition to the failure to pay settlement sums to certain clients and medical providers, Respondent failed to properly maintain trust account records, reconcile her trust account, or maintain client ledgers pursuant to the requirements of Rule 1.15 of Rule 407, SCACR, and Rule 417, SCACR. Respondent carried a negative balance of $96.11 in her trust account from July 19, 2007 to August 14, 2007. Additionally, Respondent paid several bills from her trust account that were unrelated to client matters. Respondent maintained her office, trust, and personal accounts at the same bank and mistakenly authorized a payment from her trust account of $595.79 to pay her husband's BellSouth phone bill, never reimbursing the trust account. Respondent mistakenly caused drafts payable to Bank of America to be drawn from her trust account in the amounts of $500 and $160 that were negotiated to a credit card company for expenses unrelated to client matters, then failed to reimburse the trust fund for these mistaken drafts. On several occasions, Respondent wrote checks on her trust account made payable to herself with the memo field reflecting "Law Office Costs" without any accounting as to which client's case these costs were charged. Generally, Respondent's trust account was so poorly maintained that an accurate accounting was not possible with the records provided and, therefore, it is unknown which clients are owed funds and what funds are missing from the trust account.

Ultimately, the Panel found that Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR:

- Rule 1.1 (Competence)
- Rule 1.3 (Diligence)
- Rule 1.15 (Safekeeping Property)
- Rule 8.4 (a) (Misconduct)
- Rule 8.4(d) (Conduct involving dishonesty)
- Rule 8.4(e) (Conduct prejudicial to the administration of justice)

Additionally, the Panel found that Respondent violated Rules 7(a)(1) & 7(a)(6), RLDE, Rule 413, SCACR.

The Panel determined that Respondent should be indefinitely suspended from the practice of law. Additionally, the Panel recommended that Respondent undergo a full forensic accounting of her trust account, reimburse the Lawyers' Fund for all payments made on her behalf, and receive continuing legal education in trust accounting prior to petitioning this Court for reinstatement into the practice of law. Finally, the Panel recommended that Respondent immediately pay restitution to the parties who were unable to collect from the Lawyers' Fund, and pay for the cost of the proceedings. Respondent testified that she would agree to all of these recommendations.

STANDARD OF REVIEW

The sole authority to discipline attorneys and decide appropriate sanctions after a thorough review of the record rests with this Court. *In re Thompson*, 343 S.C. 1, 10–11, 539 S.E.2d 396, 401 (2000). In such matters, this Court may draw its own conclusions and make its own findings of fact. *Id.* Nonetheless, the findings and conclusions of the Panel are entitled much respect and consideration. *Id.*

ANALYSIS

The sanction of indefinite suspension recommended by the Panel was no longer an available sanction under the amended RLDE contained in Rule 413, SCACR. Therefore, this Court will determine a sanction without a recommendation from the Panel. The record of this case includes five attorney discipline opinions, all decided prior to the rule changes, and apparently relied upon by the Panel when deciding what sanctions to impose on Respondent. In four of the five cases, the attorneys were disbarred as a result of the misappropriation of rather large sums of clients' trust account monies. It appears that the Panel found the present case to be more in line with *In re Johnson*, 380 S.C. 76, 668 S.E.2d 416 (2008), an attorney

discipline matter resulting in indefinite suspension. In that case, Respondent was charged with three instances of misconduct, all involving the misappropriation of clients' settlement funds. *Id.* at 80–81, 668 S.E.2d at 418. The quantity of money misappropriated in that case was substantially higher than in the present case and appeared to be a product of deception, rather than a product of careless record-keeping. *See id.* (Over a five year period, and after repeated inquiry from the client, Respondent wired only $5,525 of the $75,822 in settlement proceeds to a client, misappropriating the rest). Regardless of the factual differences between the two cases, it is apparent that the Panel believed a lesser sanction than disbarment was in order for Respondent's actions.

We agree with the Panel's finding that a lesser sanction than disbarment is merited in this case. With the exception of the client in Matter B, whose settlement check arrived on the day that Respondent was placed on interim suspension, Respondent disbursed settlement sums to her clients, but in many cases failed to make full payments to third party medical providers. Respondent's handling of her trust account was, at best, haphazard and slovenly; at worst, deceptive. However, considering the comparative cases and the mitigating factors noted by the Panel, we believe that a term of definite suspension from the practice of law will allow Respondent to adequately reflect on her actions and to learn proper methods of recording and administering client funds.

From a review of attorney discipline cases under the revised RLDE where trust account mismanagement was involved and where a lesser sanction than disbarment was imposed, *In the Matter of Witcraft* bears the strongest resemblance to this case. 387 S.C. 301, 692 S.E.2d 534 (2010). In that case, the attorney received a settlement check in the amount of $21,000, of which $19,000 was owed his client. *Id.* at 303, 692 S.E.2d at 535. The attorney did not immediately disburse the proceeds, but instead misappropriated the money and was waiting to obtain funds from other sources to replace the funds owed to his client. *Id.* The attorney finally admitted to the client that he could not pay the client what was owed to him, but would pay him $5,000 from his personal account and issue a promissory

note for the remainder. *Id.* An accounting of the attorney's trust fund showed that he used the money to pay debts owed on his student loan, various credit card companies, and retail stores. *Id.* This Court imposed a two year definite suspension. *Id.*

"This Court has made it abundantly clear than an attorney is charged with a special responsibility in maintaining and preserving the integrity of trust funds." *In the Matter of Houston*, 382 S.C. 164, 167, 675 S.E.2d 721, 723 (2009) (citation omitted). Here, Respondent admits that she failed to properly maintain adequate financial records, and as a result, clients' money was used to pay her personal expenses and other clients' expenses.

Because of Respondent's inept handling of trust account funds, medical providers did not receive payment for their services, a client was unable to apply for credit due to a tax lien placed by a medical provider, and another client did not receive the money owed to him under a settlement agreement. The failure to keep proper financial records in accordance with the Rules is a serious offense and merits a serious sanction. This Court considers as an aggravating circumstance the duration of Respondent's reckless record-keeping habits. Additionally, Respondent had prior disciplinary history that included a Letter of Caution without a finding of misconduct, and an Admonition citing Rules 1.1 (Competence), 1.3 (Diligence), and 1.4 (Communication). However, Respondent's full acceptance of responsibility for her actions and her willingness to accept all of the recommendations of the Panel, bear in favor of a two year definite suspension, rather than disbarment.

CONCLUSION

For the foregoing reasons, we order Respondent's suspension from the practice of law for a period of two years from the date of this opinion. Additionally, we follow the Panel's recommendations and order that prior to Respondent's petition for reinstatement into the practice of law, Respondent must undergo a forensic audit of her trust accounts for the years 2001 through 2007, complete the South Carolina Bar's Legal Ethics and Practice Program

and Trust Accounting School, and reimburse the Lawyers' Fund for all payments made on her behalf. Respondent must also reimburse the ODC for the costs of these proceedings within sixty days of this opinion. Finally, if Respondent has not done so already, she shall immediately pay restitution to the clients of Matters C and D, who were unable to recover from the Lawyers' Fund, in the amounts specified by the Panel.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Scalise Development, Inc.,	Respondent,
v.	
Tidelands Investments, LLC, Gary Ownbey, and Nominal Defendant Patrick Stathos, LLC,	Defendants,
Of whom Tidelands Investments, LLC and Gary Ownbey are	Appellants.

Appeal From Georgetown County
L. Henry McKellar, Special Referee

Opinion No. 4791
Heard December 9, 2010 – Filed February 16, 2011

AFFIRMED

Randall K. Mullins and Jarrod E. Ownbey, both of North Myrtle Beach, for Appellants.

David B. Miller and George W. Redman, III, both of Myrtle Beach, for Respondent.

LOCKEMY, J.: In this breach of contract action, Gary Ownbey and Tidelands Investments, LLC (Tidelands) argue the special referee erred in granting Scalise Development, Inc.'s motion for partial summary judgment. We affirm.

FACTS

On March 28, 2005, Scalise entered into a contract with Ownbey and Tidelands (the Appellants) to purchase "9.5+ acres" (the Property) in Murrells Inlet, South Carolina for $9,400,000. Pursuant to the contract, the Property included the former Voyager's View Marina as well as acreage on Business 17 and the former Plantation Kitchen restaurant. The contract provided the Property was to consist of at least 9.5 acres and the Appellants were to convey marketable title and deliver a proper general warranty deed to Scalise before the July 28, 2005 closing date. The contract also provided Scalise was to pay a $50,000 earnest money deposit. Scalise held the option to extend the closing date for two additional thirty-day periods upon the payment of an additional $50,000 earnest money deposit for each extension.

Scalise's development plans for the Property included a mix of high-end residential and light retail/commercial uses. Pursuant to the Georgetown County Planned District Development (PDD) Ordinance, property must consist of a minimum of ten acres to qualify for a commercial planned unit development. Scalise intended to combine the Property with an adjoining one acre tract in order to have the requisite acreage to apply for a PDD zoning designation.[1] At the time the contract was signed, Tidelands owned a portion of the Property and Ownbey had a contract to purchase the Voyager's View Marina and Plantation Kitchen properties from Isadore Limited

[1] Georgetown County ultimately determined Scalise did not have the requisite ten acres in order to qualify for a PDD plan.

Liability, LLC (Isadore).[2] Ownbey did not acquire these portions of the Property until December 15, 2005, after the closing date.

In a June 9, 2005 letter to the Appellants, counsel for Scalise expressed numerous title concerns regarding the Property. On July 28, 2005, Scalise elected to extend the closing date an additional thirty days. Thereafter, on August 29, 2005, Scalise again elected to extend the closing date an additional thirty days. On September 23, 2005, the Appellants declined to grant any further extensions and made a claim to Scalise's earnest money deposits in the event Scalise failed to perform under the contract by the closing date. On October 21, 2005, Scalise demanded the return of all of its earnest money deposits pursuant to the terms of the contract. The parties continued to negotiate after the expiration of the contract; however, their negotiations ended without resolution.

In June 2006, Scalise filed suit against the Appellants alleging causes of action for breach of contract and declaratory judgment.[3] Scalise maintained the Appellants failed to convey marketable title to the Property by general warranty deed, and that it was entitled to reimbursement of the $150,000 in earnest money it paid as well as attorney's fees and damages.[4]

In December 2007, Scalise filed a motion for summary judgment as to its breach of contract claim. In February 2009, the special referee issued an order granting Scalise's motion for partial summary judgment, finding the Appellants did not convey marketable title to at least 9.5 acres by general warranty deed on September 28, 2005. The special referee determined the Property had several defects that made it unmarketable, including: (1) Ruth Street was subject to <u>Blue Ridge</u>[5] easement rights; (2) a substantial portion of

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[2] Ownbey and his brother own Tidelands Investments, Inc.

[3] While this action was pending, the Appellants conveyed the Property to various third-party purchasers. The Voyager's View Marina parcel was purchased by Inlet Marina and Boathouse, LLC (Inlet). Inlet later commenced an action to quiet title to the parcel.

[4] According to the Appellants' brief, their answer denied Scalise's claims and asserted a counterclaim for the return of the earnest money in their favor.

[5] <u>Blue Ridge Realty Co. v. Williamson</u>, 247 S.C. 112, 145 S.E.2d 922 (1965).

the Property was below the mean high water mark; (3) only 8.05 acres could be conveyed; (4) Judge Maring's order created a break in the chain of title; (5) the Property was subject to two commercial casino boat leases; and (6) the Property was previously conveyed to a non-existent entity. The special referee found Scalise was entitled to reimbursement of its earnest money deposits, including all accrued interest, and an evidentiary damages hearing. The Appellants appealed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

LAW/ANALYSIS

The Appellants argue the special referee erred in granting Scalise's motion for partial summary judgment. Specifically, they maintain the special referee erred in finding (1) Ruth Street was subject to Blue Ridge easement rights and the claims of Ruth Macklen or her heirs; (2) a portion of the Property was below the mean high water mark; (3) only 8.05 acres were conveyed; (4) Judge Maring's order created a break in the chain of title; and (5) the Property was subject to commercial casino boat leases. We address these arguments in turn.

I. Ruth Street/Ruth Macklen

A. Ruth Street

Ruth and R.W. Macklen were predecessors in title to portions of the Property. In February 1980, the Macklens recorded a plat (Ruth Street Plat)

in Georgetown County. The Ruth Street Plat depicts six square blocks of subdivided lots bisected by Ruth Street. After the Ruth Street Plat was recorded, numerous conveyances of the lots were made with reference to the Ruth Street Plat.

The special referee determined the Appellants were unable to convey marketable title to Ruth Street by proper general warranty deed. The special referee found Ruth Street was "a classic example of a Blue Ridge easement." In Blue Ridge, our supreme court held that "when the owner of land has it subdivided and platted into lots and streets and sells and conveys the lots with reference to the plat, he thereby dedicates said streets to the use of such lot owners, their successors in title, and the public." 247 S.C. at 118, 145 S.E.2d at 925. Pursuant to Blue Ridge, "persons who own lots fronting on or adjacent to property dedicated as public streets or highways have such special property interests as entitle them to maintain a suit for the enforcement and preservation of the use of the property as such." Id. at 121-22, 145 S.E.2d at 926.

The special referee, quoting Sanders v. Coastal Capital Ventures, Inc., 296 S.C. 132, 134, 370 S.E.2d 903, 905 (Ct. App. 1988), also noted that "a purchaser of realty cannot be required to take doubtful title" and "[i]f there is a reasonable probability of litigation with respect to the title, it is unmarketable." "To be marketable, a title need not be flawless." Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). "Rather, a marketable title is one free from encumbrances and any reasonable doubt to its validity." Id. "It is a title which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept." Id.

The Appellants argue there was no reasonable probability of litigation with respect to Ruth Street. They assert no one has made a claim to use the Ruth Street right of way. Additionally, the Appellants contend the parties' contract requires conveyances be made "subject to all easements as well as covenants of record (provided they do not make the title unmarketable) and

to all government statutes, ordinances, rules and regulations."[6] Scalise argues there were no marketability requirement exceptions made for Ruth Street and the Appellants were required to convey Ruth Street by the delivery of a general warranty deed. Scalise maintains third party claims could prevent it from using Ruth Street for any purpose other than a road, and therefore, the Appellants could not convey marketable title by general warranty deed.

We agree with Scalise. In his June 9, 2005 letter to the Appellants, counsel for Scalise notified the Appellants of the Ruth Street title defect. In his deposition, Steven Querin, counsel for the Appellants, confirmed he discussed the necessity of a Statutory Road Closing Action in order to achieve marketable title, however no action was ever commenced. While Querin maintained in his deposition that title to Ruth Street was marketable, he also admitted Ruth Street could not be conveyed free and clear of the rights of others. Querin also stated he recommended conveying Ruth Street by quitclaim deed "because of the issues we've been discussing . . . [r]egarding the rights of others to Ruth Street."[7] Based on the foregoing, we find the Appellants were unable to convey marketable title to Ruth Street by proper general warranty deed.

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[6] The Appellants also argue one of the deeds conveying an interest in Ruth Street referred to the Ruth Street Plat as a "proposed plan for subdivision imposed hereon in pencil, subject to change." The Appellants maintain that whether the Ruth Street Plat was a proposed plan subject to change or a recorded final plat raises a genuine issue of material fact with respect to the alleged Blue Ridge easement rights. This argument is not preserved for our review, as it was never raised to and ruled upon by the special referee. See S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (holding that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge).

[7] The Appellants ultimately sold Ruth Street and an adjoining portion of the Property after this litigation began. The adjoining portion of the Property was conveyed by general warranty deed; however, Ruth Street was conveyed by a quitclaim deed.

B. Claims of Ruth Macklen

In April 1998, Ruth Macklen attempted to convey Ruth Street and several lots. The deeds purporting to divest her interest conveyed the property to RCP, LLC; however, the Secretary of State's records indicate RCP, LLC was not formed until 2003. In his June 9, 2005 letter to the Appellants, counsel for Scalise asserted this title defect could result in some interest remaining vested in Ruth Macklen, her heirs, or other predecessors in interest. The special referee noted the Appellants did not dispute that this defect was not addressed prior to closing, and therefore, found the Appellants were unable to convey marketable title by general warranty deed to that portion of the Property.

The Appellants argue the correct name of the intended grantee was RCP Construction, LLC and admit there "may need to be a corrective deed." However, they contend the "intended conveyance renders the likelihood of litigation concerning the Ruth Street easement . . . to be a virtual non-issue." Scalise argues the Appellants' admission that the deed is not correct is evidence of a break in the chain of title, and thus, the Appellants were unable to convey marketable title to the Property.

We agree with Scalise. The Appellants were aware of this title defect and did not obtain a corrective deed identifying the proper grantee prior to the closing date. Therefore, the Appellants were unable to convey marketable title by general warranty deed.

II. High Water Mark

The State of South Carolina holds presumptive title to all tidelands below the mean high water mark, which are held in trust for the benefit of the public. Lowcountry Open Land Trust v. State, 347 S.C. 96, 102, 552 S.E.2d 778, 781-82 (Ct. App. 2001). "A grant from the State purporting to vest title to tidelands in a private party is construed strictly in favor of the government and against the grantee." Id. at 103, 522 S.E.2d at 782. "Consequently, the party asserting a transfer of title bears the burden of proving its own good title." Id. Here, the special referee determined 1.16 acres of the Property was below the mean high water mark and in the tidal waters of Murrells Inlet, and

therefore, the Appellants could not convey marketable title to the Property by general warranty deed on September 28, 2005.

The Appellants argue Scalise failed to object to the Property's title based on the portion of the Property below the mean high water mark before the closing date, and failed to give the Appellants an opportunity to cure the defect. They also argue the Property was operated as a marina during their ownership and that Scalise intended to use the Property for the same purpose; therefore, Scalise could not object to the Property's public use, because it intended to use the Property for a marina. The Appellants also maintain the contract provides that all conveyances are made "subject to all easements, as well as covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations."[8] The Appellants assert this case is similar to McMaster v. Strickland, 305 S.C. 527, 530, 409 S.E.2d 440, 442 (Ct. App. 1991), in which this court held the trial court erred in finding property designated as "wetlands" was unmarketable, opining that nothing in the record indicated the sellers did not own the disputed property or that it was unlawful to sell the property. The Appellants contend there was ample evidence they owned the disputed portion of the Property.

Scalise argues the record contains no evidence the Appellants owned the portions of the Property below the mean high water mark. Scalise maintains that while the Appellants claim Scalise waived its right to object to this title defect, the affidavit of Scalise's attorney, Claude Epps, indicates this issue was the subject of public hearings held by Georgetown County, and the position taken by Georgetown County was reported in the local media. Scalise also contends the June 9, 2005 letter sent to the Appellants' counsel noted Scalise was not required to make title objections at any time prior to closing.

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[8] The Appellants arguments that (1) the prior owners possessed a permit to dredge the marina basin and (2) the marina basin was not "coastal water" are not preserved for our review. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. at 301, 641 S.E.2d at 907 (holding that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge).

We agree with Scalise. Here, unlike in McMaster, there was evidence the Appellants did not own the portions of the Property below the mean high water mark. Scalise introduced Epps's affidavit, which stated that Georgetown County required Scalise to prove it owned fee simple title to the tidelands and real property underlying the marina. According to Epps, Georgetown County asked Scalise to produce a King's Grant of the property to predecessors in interest. Counsel for Scalise was unable to find a King's Grant to the disputed portions of the Property and, according to Epps, the Appellants were also unable to obtain fee simple title. Additionally, we find Scalise did not waive its right to object to this title defect. The contract does not provide that Scalise was required to notify the Appellants of all title objections prior to closing, or provide the Appellants the opportunity to cure any defects. In a letter to the Appellants' counsel, counsel for Scalise stated that "the contract between our respective clients does not require us to make objections to title at any time prior to closing. Accordingly, we reserve all rights regarding making title objections up to and including the day of closing." Pursuant to the contract, the Appellants were required to convey marketable title to at least 9.5 acres to Scalise. Because the Appellants did not hold title to the 1.16 acres of the Property below the mean high water mark, they were unable to convey marketable title to at least 9.5 acres.

III. Only 8.05 acres conveyed

Pursuant to the contract, the Property was to consist of "at least 9.5 acres." This acreage was necessary for Scalise to qualify for the PDD zoning designation. Addendum 2 of the contract provides:

> [I]f Buyer is unable to obtain all approvals necessary for the Buyer to develop this property in accordance with the Buyer's intended use by the scheduled closing date as provided hereinabove, the Buyer shall have the option to either terminate this agreement and receive a refund of its earnest money deposit, or at Buyer's option, the Buyer may pay an additional $50,000 earnest money to extend the closing date for an additional thirty (30) days . . . . If Buyer needs to

> extend for an additional thirty (30) days . . . then Buyer agrees to pay an additional $50,000 earnest money . . . . If the Buyer does so agree to pay the additional $50,000/$50,000 earnest money and extend this Agreement, then the entire earnest money . . . shall be non-refundable, provided the Seller is willing and able to perform under the provisions of this Agreement.

The special referee determined the Appellants were unable to convey marketable title to "at least 9.5 acres" as required by the parties' contract. The special referee noted the Appellants were unable to convey marketable title to Ruth Street and the tidelands around the Voyager's View Marina.

The Appellants maintain the special referee improperly inferred that the Property was unmarketable because of the Zoning Department's refusal to include the disputed portions of the Property in the required acreage. The Appellants argue Georgetown County's approval of Scalise's request for a PDD zoning designation was not a contingency of the contract. They contend that while the Zoning Department ordinances require at least ten acres to qualify for a PDD designation, this did not prevent Scalise from developing the Property or preclude it from seeking approval for a different zoning district designation. The Appellants argue the contract provides that Scalise's earnest money deposits were non-refundable, regardless of whether it received a PDD designation from the Georgetown County Zoning Department. Scalise does not argue it is excused from performance because Georgetown County would not allow the Property to be developed as intended. Rather, Scalise contends the Appellants could not convey at least 9.5 acres as required by the express terms of the contract.

We agree with Scalise. Addendum 2 of the contract provides Scalise's earnest money deposits were "non-refundable, provided the [Appellants were] **willing and able** to perform" under the contract. As discussed above, the Appellants did not own the portions of the Property below the high water mark and could not convey marketable title to Ruth Street. Therefore, the Appellants were unable to convey marketable title to at least 9.5 acres by proper general warranty deed as required by the express terms of the contract.

IV. Judge Maring's Order

In the mid-1990s, members of the Player family, predecessors in interest to portions of the Property, incurred a sizable judgment lien following a bungee jumping accident. The Steinke family, the plaintiffs in the action against the Players, undertook to set aside conveyances made by the Players in anticipation of the judgment. Portions of the Property the Players conveyed to Isadore (which Isadore ultimately conveyed to Ownbey), including the Voyager's View Marina, were at issue. In March 1997, circuit court Judge David Maring issued an order holding "[the Players'] interest in any and all property transferred . . . remained the same after the transfers as it existed immediately prior to the transfers."

The special referee determined Judge Maring's order setting aside the Players' conveyances created a break in the chain of title, thus rendering title to the Property unmarketable. On appeal, the Appellants admit they should have obtained a quitclaim deed from Mr. Player, however they argue any effort to secure a quitclaim deed would have been futile. The Appellants maintain Scalise abandoned the parties' contract by failing to respond to its September 23, 2005 letter sent in response to Scalise's request for an extension on the contract. The Appellants also contend they abandoned their efforts to obtain a quitclaim deed after Scalise's failure to respond. Scalise argues the Appellants' admission they should have obtained a quitclaim deed, as well as Inlet's action to quiet title, are proof the Property was not marketable.

We agree with Scalise. The Appellants' admission they should have obtained a quitclaim deed from Mr. Player is evidence of the Appellants' inability to convey marketable title by general warranty deed to Scalise. Furthermore, Inlet's action to quiet title is further evidence of the Appellants' inability to convey marketable title. Accordingly, we find the special referee did not err in finding title to the Property was unmarketable because Judge Maring's order created a break in the chain of title. See Sanders, 296 S.C. at 134, 370 S.E.2d at 905 (holding "[i]f there is a reasonable probability of litigation with respect to [a] title, it is unmarketable").

V. Casino Boats Leases

In October 2001, Isadore entered into a two-year lease agreement with Dinner Cruises, LLC. The lease agreement provided Dinner Cruises was entitled to lease two hundred feet of dockage at the Voyager's View Marina for commercial use, as well as the right to park vehicles for employees and customers in the Voyager's View Marina parking area. Dinner Cruises also had the option of extending the original lease term an additional eight years. In 2003, Isadore entered into an unrecorded ten-year lease agreement with Palmetto Princess, LLC. The lease agreement provided Palmetto Princess would pay rent according to revenue derived from video gaming machines.

Pursuant to the parties' contract, "closing . . . is contingent on [Scalise] receiving verification adequate to [its] counsel that the [P]roperty is not subject to any existing contractual obligation, including, without limitation, any obligation in respect to any 'casino boat' operation." In an April 28, 2005 letter to the Appellants, counsel for Scalise stated "the issue of the nebulous casino boat lease must be concluded prior to closing." Counsel further stated that "either sufficient evidence terminating this lease must be presented or, in the alternative, a court order reflecting the same may be necessary. Regardless, the obligation of clearing the casino boat lease issue is strictly that of your client." An October 11, 2005 email sent from the Appellants' counsel to Scalise's counsel indicates the casino boat lease issue was not resolved prior to the closing date.

The special referee determined the two outstanding casino boat leases prevented the Appellants from conveying marketable title to the Property by general warranty deed. The Appellants argue the Dinner Cruises lease fails due to lack of consideration and because the intended purpose of the lease was illegal at the time the lease was signed. Scalise argues the casino boat lease issue was not resolved prior to the closing date. Scalise also maintains the Appellants' lack of consideration and illegal purpose arguments could constitute affirmative defenses in the event of litigation, but they could not be used to prevent any claim from being pursued in litigation.

We agree with the special referee that the casino boat leases prevented the Appellants from conveying marketable title to the Property by delivery of

a proper general warranty deed. The Appellants do not argue, and the record does not reflect, that the casino boat lease issue was resolved prior to the closing date as required by the contract.

CONCLUSION

The special referee did not err in finding the Appellants were unable to convey marketable title to the Property by proper general warranty deed. Accordingly, the decision of the special referee is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William D. Curtis, Respondent,

v.

Sandra Morris Blake, as Personal Representative of the Estate of Brandon T. Blake, Appellant.

Appeal From Orangeburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 4792
Heard September 15, 2010 – Filed February 16, 2011

AFFIRMED

Thomas J. Keaveny, II, and Amy Rothschild, both of Charleston, for Appellant.

C. Bradley Hutto, of Orangeburg; Mark A. Tinsley, of Allendale; and Robert Norris Hill, of Newberry, for Respondent.

THOMAS, J.: In this personal injury action, Sandra Morris Blake, as personal representative of the estate of Brandon T. Blake, appeals the amount of damages awarded to William D. Curtis.[1] We affirm.

[1] Blake died on August 21, 2006, while this appeal was pending. On August 27, 2009, this court issued an order authorizing the substitution of the

FACTS AND PROCEDURAL HISTORY

On March 25, 2003, a pickup truck driven by Brandon Blake struck an empty log trailer that was being pulled by a tractor-trailer operated by Curtis. Blake had disregarded a stop sign and entered the intersection where the collision occurred. After the impact, Curtis maneuvered his vehicle to the side of the road.

Curtis did not request medical attention either at the accident scene or any time later that day, stating he only felt nervous and anxious. Although his neck and back were hurting and he felt stiff the morning after the accident, he still declined to seek treatment. He took Tylenol for his pain and continued to work as a truck driver. It was not until one month after the accident, and only at his wife's insistence, that Curtis went to a hospital emergency room for treatment.

The emergency room physician gave Curtis prescriptions for Ibuprofen and a muscle relaxer and then discharged him. Curtis did not take the prescribed medications because he was advised they could make him sleepy, which would interfere with his employment as a truck driver. Instead, he continued to take Tylenol for his pain.

A few weeks after visiting the emergency room, Curtis consulted Dr. Campbell, a chiropractor. Dr. Campbell diagnosed Curtis with a lumbosacral sprain and cervical sprain with disk involvement. He treated Curtis with physical therapy involving electrical stimulation, heat, and chiropractic manipulation adjustments. On May 14, 2003, after four treatments, Dr. Campbell released Curtis.

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personal representative of his estate as the appellant in this matter. For ease of reference, the name "Blake" will refer interchangeably to either Blake, the personal representative, or to both parties collectively.

On November 19, 2003, about six months after his discharge from Dr. Campbell, Curtis saw Dr. Nivens, a physician specializing in spinal medicine, seeking treatment for neck and low back pain. Dr. Nivens' evaluation showed Curtis had pain in his neck, tenderness in the musculature of his neck and shoulder girdle, and tenderness or pain in his lumbar spine. A subsequent MRI showed Curtis exhibited three levels of disk protrusion in the cervical spine (i.e. the neck). Dr. Nivens prescribed Naprosyn, an anti-inflammatory medicine, and a steroid treatment, which Curtis admitted helped with the pain he was experiencing.

Dr. Nivens released Curtis in January 2004, after Curtis indicated the pain had essentially gone away. Curtis was to consult Dr. Nivens only on an "as needed basis." In April 2005, after Curtis had filed this action, Dr. Nivens saw him again. During that visit, Curtis indicated he was still having pain, for which Dr. Nivens suggested a nonprescription pain reliever. Dr. Nivens then gave Curtis a "spur-of-the-moment" impairment rating of "somewhere around 10 percent for the neck and low back, the whole body essentially."

On February 17, 2004, Curtis sued Blake seeking actual and punitive damages for Blake's alleged negligence in causing the collision. Initially, Blake denied the allegations of negligence and asserted several affirmative defenses, including failure to mitigate damages and sudden emergency.

The parties pursued discovery, and the matter came for a jury trial on October 31, 2005. After the jury was seated but before the testimony began, the trial judge announced Blake admitted he was negligent and his negligence caused the accident. The jury therefore had to determine only whether Curtis sustained injuries or losses that were proximately caused by the accident and his monetary damages.

Presentation of the evidence began at 1:50 p.m. Curtis presented (1) the deposition testimony of Dr. Campbell, which was read by counsel; (2) the video deposition of Dr. Nivens; (3) live testimony from Michele Curtis,

Curtis's wife; and (4) Curtis's own testimony. Blake did not introduce any evidence.

The jury began deliberating at 5:15 p.m. Around 5:40 p.m., the jury returned to the courtroom with a verdict. After the trial judge allowed publication of the verdict, the clerk announced that the jury awarded Curtis actual damages of $450,000.00. At the request of Blake's attorney, the clerk polled the jurors, all of whom confirmed the verdict. Blake unsuccessfully moved for a new trial absolute, a new trial based on the thirteenth juror doctrine, or in the alternative, a new trial nisi remittitur and then filed this appeal.[2]

ISSUES

I. Was Blake entitled to a new trial absolute or a new trial nisi remittitur because (1) the verdict amount was roughly one hundred times Curtis's proven actual damages or (2) the verdict resulted from passion, prejudice, bias, or other consideration not based on the evidence?

II. Did the trial judge improperly permit Curtis's wife to testify when she was disclosed as a witness only one week before trial?

III. Was Blake entitled to a new trial because of the brevity of the jury's deliberation?

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[2] This court initially dismissed Blake's appeal, ruling that his new trial motion was untimely and therefore did not stay his time for appeal; however, the Supreme Court, in a published opinion, reversed the dismissal and held Blake's motion was timely because it was " 'made' when it was placed in the mail for service on opposing counsel.' " Curtis v. Blake, 381 S.C. 189, 191, 672 S.E.2d 576, 577 (2009). Based on this holding, the Court reinstated Blake's appeal and remanded the matter to this court for a decision on the merits. Id. at 192, 672 S.E.2d 578.

IV. Should the trial judge have granted a new trial pursuant to the thirteenth juror doctrine?

STANDARD OF REVIEW

"A motion for a new trial nisi remittitur asks the trial court to reduce the verdict because the verdict is merely excessive." James v. Horace Mann Ins. Co., 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." Id. "If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court must grant a new trial absolute." Id. See also Sanders v. Prince, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991) ("When a verdict is 'grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict.' ") (quoting Small v. Springs Indus., 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987)).

" '[T]he exclusion of a witness whose name is not given in answer to an interrogatory calling for it is but one of the discretionary powers committed to a trial judge for the proper conduct of litigation.' " Laney v. Hefley, 262 S.C. 54, 59, 202 S.E.2d 12, 14 (1974) (quoting Wright v. Royse, 193 N.E.2d 340, 350 (Ill. Ct. App. 1963)).

"A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion was controlled by an error of law." Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990). "[T]o reverse the denial of a new trial motion under [the thirteenth juror doctrine,] we must, in essence, conclude that the moving party was entitled to a directed verdict at trial." Parker v. Evening Post Publ'g Co., 317 S.C. 236, 247, 452 S.E.2d 640, 646 (Ct. App. 2001).

LAW/ANALYSIS

I. New trial absolute and new trial nisi remittitur

Blake advances numerous reasons to support his argument that he was entitled to a new trial absolute or a new trial nisi remittitur because the evidence presented at trial did not support the amount of damages the jury awarded Curtis. These reasons include (1) Curtis's total medical expenses were only $4,530.98, of which $2,830.00 involved the MRI and its interpretation; (2) Curtis lost only $2,615.76 in wages as a result of the accident; (3) Curtis did not receive medical treatment at the scene of the accident and delayed treatment until more than one month after the accident; (4) Curtis was still able to work after the accident; (5) Curtis did not take his prescribed medications; and (6) Curtis's treating doctors believed he had recovered from his pain. Blake also points out the award of $450,000.00 is almost one hundred times the cost of Curtis's medical treatment and his lost wages.

In view of all the evidence presented, however, we hold the circumstances cited by Blake do not constitute "compelling reasons" that would warrant the grant of a new trial nisi remittitur. See Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006) (stating "compelling reasons must be given to justify invading the jury's province by granting a new trial nisi remittitur" and noting "[t]he consideration for a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented").

Blake's arguments appear to disregard Curtis's explanation for his behavior after the accident and his evidence of nonmonetary damages in addition to lost wages and medical bills. Dr. Campbell diagnosed Curtis with a lumbosacral sprain and cervical sprain with disc involvement. The MRI showed three separate disc protrusions in Curtis's cervical spine and a fourth disc protrusion in his lower back. According to Dr. Nivens, the disc protrusions were permanent injuries directly related to the accident. Dr.

Nivens also stated Curtis showed signs of degenerative disk disease that were most likely associated with the disk protrusions rather than age, given that Curtis was only thirty-one years old at the time of the accident.

Curtis told Dr. Campbell he was no longer in pain, but explained at trial that the chiropractic treatments were not helping him and he was concerned about the expense. Similarly, Curtis ended his treatment with Dr. Nivens even though he continued to have problems because he believed Dr. Nivens was unable to do anything for his pain. Both Curtis and his wife testified that he continued to work as a truck driver because his family needed the income and he had no experience in any other line of work. Furthermore, until the accident, Curtis never had neck or back problems.

Curtis also testified at length about the pain and suffering that he experienced since the accident. In addition to pain in his neck and back, which he experienced on a daily basis, he had difficulty sleeping, was unable to enjoy interacting with his family as he did previously, and would become irritable with his young children. He also suffered from paranoia while driving whenever he encountered a vehicle approaching a traffic light or stop sign. His pain prevented him from lifting things, working on cars, and riding a bicycle as he could before the accident. Curtis's "loss of enjoyment of life" was a "compensable element, separate and apart from pain and suffering, of a damages award." Boan v. Blackwell, 343 S.C. 498, 501, 541 S.E.2d 242, 244 (2001). See id. at 502, 541 S.E.2d 244 ("[D]amages for 'loss of enjoyment of life,' compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations.").

We therefore hold that in view of all the evidence presented at trial, Blake failed to show compelling reasons that would justify the reduction of the damages award by the trial judge. Likewise, we hold the trial judge's denial of a new trial absolute was supported by the evidence and not controlled by an error of law. See Manios v. Nelson, Mullins, Riley & Scarborough, 389 S.C. 126, 141-42, 697 S.E.2d 611, 652 (Ct. App. 2010)

("The grant or denial of new trial motions rests within the discretion of the trial court and its decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.").

II. Testimony of Curtis's wife

Blake next argues the trial judge should have prevented Curtis's wife from testifying at trial because she was not disclosed as a witness until one week before the hearing. He further contends the manner in which she presented her testimony was unduly prejudicial and merely cumulative to Curtis's own testimony. We reject these arguments.

" '[T]he sanction of exclusion of a witness should never be lightly invoked. . . . The precise nature of the interrogatories and discovery posture of the case, willfulness and the degree of prejudice are some of the important factors.' " Laney, 262 S.C. at 60, 202 S.E.2d at 14-15 (quoting Carver v. Salt River Valley Water Users' Ass'n, 446 P.2d 492, 496 (Ariz. Ct. App. 1968)).[3] Here, Blake's appellant's brief acknowledges an expectation that Curtis would call his wife to testify on his behalf. Furthermore, Blake could have but did not move for a continuance to depose Mrs. Curtis before she testified. See Jackson v. H&S Oil Co., 263 S.C. 407, 411-12, 211 S.E.2d 223, 225 (1975) (noting that the appellant, who objected to a witness who was not disclosed until the morning of trial could have, among other things, requested a delay or continuance to examine the witness).

We decline to address Blake's arguments that Mrs. Curtis's testimony was inflammatory and cumulative. Blake made no objections while Mrs. Curtis was on the stand; therefore, his arguments on appeal about the inflammatory and cumulative nature of her testimony are not preserved for appellate review. See Cogdill v. Watson, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986) ("The failure to make an objection at the time evidence

[3] Carver was later vacated by the Arizona Supreme Court on other grounds. 456 P.2d 371 (Ariz. 1969).

is offered constitutes a waiver of the right to object.") (quoted in Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 39, 691 S.E.2d 135, 144 (2010)).

III. Length of jury deliberations

Blake next argues the amount of time the jury took to return a verdict warrants the grant of a new trial. He alleges that the jurors either had already made up their minds before entering the jury room or were more concerned with reaching a decision as soon as possible because they were deliberating on Halloween night and many of them had children who would be awaiting their return. We disagree.

Regarding the question of whether a short jury deliberation calls for the grant of a new trial, this court has stated

> A spate of juridical writings confirms the strict parameters placed upon courts attempting to police jury deliberations based upon a timekeeper mentality. Despite the discretion given a judge by the thirteenth juror doctrine, it does not allow the court to overstep these boundaries in toto. Additionally, granting a new trial due to suspicions of deliberation quality is a flagrant deviation from premising a new trial upon the facts.

Youmans v. S.C. Dep't of Transp., 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008), cert. dismissed as improvidently granted, 386 S.C. 640, 690 S.E.2d 582 (2010). This court further stated: "The thirteenth juror doctrine entitles a trial court to act as a thirteenth juror when it finds the evidence does not justify the verdict and it may then grant a new trial based solely on the facts." Id. at 287, 670 S.E.2d at 13 (emphasis added).

In Youmans, this court held that brief jury deliberations alone would not be a sufficient basis for the grant of a new trial. Although recognizing the discretion accorded to a trial court by the thirteenth juror doctrine, the court

referenced a "general rule" that "the shortness of time taken by a jury in reaching its verdict has no effect upon the validity of the verdict." Id. at 282, 670 S.E.2d at 11 (quoting 89 C.J.S. Trial § 792 (2001)). This court also quoted from Thomas v. Atlantic Coast Line Railroad Co., 221 S.C. 462, 471-72, 71 S.E.2d 403, 407 (1952), in which the Supreme Court stated that "[w]hile it was unusual for the jury to arrive at its verdict in so short a time, we would not be justified in concluding therefrom that the jury acted capriciously or that it was [actuated] by passion or prejudice." Youmans, 380 S.C. at 283, 670 S.E.2d at 11.

We have determined that the evidence supports the damages award. Based on this determination, we further hold the brevity of the jury deliberations alone does not suffice as a reason to set aside the verdict and remand for a new trial.

As to the concern that some of the jurors may have been eager to conclude deliberations because of Halloween plans, we note the trial judge gave the jury the option of returning the following day to deliberate, which the jurors collectively declined. Furthermore, with the consent of both parties, the trial judge informed the jurors that they would not have to return the following day if they reached a verdict that evening. Finally, we note that Blake presented no evidence that any of the jurors were motivated by improper considerations to reach a hasty decision in the matter. See Bratton v. Lowry, 39 S.C. 383, 387-88, 17 S.E.2d 832, 834 (1893) (holding the allegation that the verdict was "hastened by an alarm of fire in the town" did not warrant the grant of a new trial absent an objection from any member of the jury panel before the verdict was published); Parker, 317 S.C. at 247 n.7, 452 S.E.2d at 647 n.7 (Ct. App. 1994) (holding the appellant's argument "that the jury did not give due and serious consideration to the case" because it ended deliberations one-half hour before the NCAA basketball tournament was to begin on television was "rank speculation without any evidentiary support" and "manifestly without merit").

IV. New trial based on the thirteenth juror doctrine

Finally, Blake contends the trial judge should have granted a new trial pursuant to the thirteenth juror doctrine based on Curtis's failure to present substantial evidence of disfigurement, death, permanent injuries, debilitating injuries, inability to work, loss of wages and future income, or significant medical expenses. We find no abuse of discretion in the trial judge's decision to deny a new trial.

"The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict." Folkens, 300 S.C. at 254, 387 S.E.2d at 267. "As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." Lane v. Gilbert Constr. Co., 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009). Review by an appellate court of the grant or denial of a new trial is "limited to consideration of whether evidence exists to support the trial court's order." Id.

Based on this narrow scope of review and our determination that evidence supports the jury's decision, we hold the trial judge acted within his discretion in refusing to grant a new trial under the thirteenth juror doctrine.

CONCLUSION

We agree with the trial judge that the verdict in this case was supported by the evidence presented at trial. We further hold the trial judge committed no reversible error in allowing Curtis's wife to testify. Based on our determination that the evidence supported the amount of damages awarded, we hold the trial judge properly determined the brevity of the jury deliberations did not warrant a new trial and acted within his discretion in denying a new trial under the thirteenth juror doctrine.

AFFIRMED.

FEW, C.J., and LOCKEMY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard M. Pendarvis and Thomas A. Pendarvis, Respondents,

v.

Jewell K. Cook a/k/a Judy Pendarvis, Appellant.

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 4793
Heard December 8, 2010 – Filed February 17, 2011

AFFIRMED

David Jay Parrish, of Charleston, for Appellant.

A. Parker Barnes, Jr., and Thomas A. Pendarvis, both of Beaufort, for Respondents.

FEW, C.J.: Jewell Cook appeals the master's order granting Respondents Thomas and Richard Pendarvis an easement over a portion of a

private road that was recently discovered to cross onto her land. The master granted an easement under the theories of prescriptive easement and easement implied by prior use. We affirm the trial court's order granting an easement implied by prior use.

I. Facts and Procedural History

Respondents are brothers whose stepgrandfather, Irvin Tavel, owned property on Peters Point Road on Edisto Island. Respondents grew up camping, hunting, and fishing on the property with Tavel. By June 1972, Tavel built a road across the property to provide access from Peters Point Road to the other side of the property bordering Sandy Creek.[1] Respondents helped Tavel build, repair, and maintain the road. In 1974, Tavel divided the property into two tracts. He retained the eastern tract A for himself and conveyed tract B to his wife to hold in trust for Respondents, who were eleven and twelve years old. Ann Pendarvis, Respondents' mother, testified that Tavel "wanted [Respondents] to have that property and to build and keep it up[,] . . . to do a lot of the work. Every time [they] went to visit, they would haul sea shells, or stone and dirt, whatever, across the road in a wagon or a go-cart to fill in the muddy spaces, the marsh." In addition to holding the land in trust for Respondents, their grandmother opened a trust account named "Sandy Creek – T&R Pendarvis" for the benefit of maintaining the land. Money from the account was used for various maintenance of the road in the mid- to late-1970s. In 1977, Tavel deeded tract A to Respondents' father, J.M. "Butch" Pendarvis.

The portion of the road at issue in this case is a causeway located over wetlands. Thomas Pendarvis testified that Tavel's choice of location for the causeway was affected by the water levels in the marsh at high tide in the early 1970s, and, specifically, that the causeway was redirected to its present location and "placed at the closest point between the high land areas." When

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[1] A prior road was built in the 1960s which ended near Sandy Creek on tract A; however, since Tavel moved the road in the early 1970s to its present location it has remained the sole access from Peters Point Road to Sandy Creek.

asked if the causeway could have been placed in another location, Thomas Pendarvis answered that putting the causeway at the most narrow part of the wetlands was the practical, reasonable, and economically efficient choice made by Tavel at the time.

This dispute arose in 2002 when Cook, Respondents' stepmother, received title to tract A from Butch in a divorce settlement. A drawing completed as part of an appraisal Cook ordered showed that the causeway portion of the road encroached onto tract A. Respondents were unaware of the encroachment until Butch told them that he saw survey flags on the property in early 2003. Before these events, Respondents and Cook believed the road was located entirely on tract B. Respondents now claim an easement over the portion of the road crossing onto tract A.

Respondents filed this action seeking a declaratory judgment for either an easement by necessity or prescription, but later filed an amended complaint substituting an easement by prior use cause of action for easement by necessity. Cook appeals the master's order declaring "that Plaintiffs are entitled to an Easement under either or both theories" of prescriptive easement or easement by prior use. She also appeals the master's acceptance of a plat submitted by Respondents after trial and his use of the plat to define the scope of the easement.

II. Easement Implied by Prior Use

In Boyd v. BellSouth Telephone Telegraph Co., 369 S.C. 410, 633 S.E.2d 136 (2006), our supreme court set out seven elements a plaintiff must prove in order to establish an easement implied by prior use.

> The party asserting the right to an easement implied by prior use must establish the following: (1) unity of title; (2) severance of title; (3) the prior use was in existence at the time of unity of title; (4) the prior use was not merely temporary or casual; (5) the prior use was apparent or known to the parties; (6) the prior use was necessary in that there could be no other

> reasonable mode of enjoying the dominant tenement without the prior use; and (7) the common grantor indicated an intent to continue the prior use after severance of title.

369 S.C. at 417, 633 S.E.2d at 139.

Cook disputes the master's finding of an easement implied by prior use by arguing that elements five, six, and seven are not met. As to element six, she contends it was not necessary for the causeway to be in its present location. She combines elements five and seven to argue that Tavel could not have intended to continue the prior use of part of tract A when the encroachment onto it was not apparent or known to him. "The determination of the existence of an easement is a question of fact in a law action, . . . and this Court reviews factual issues relating to the existence of an easement under a highly deferential standard." Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism, 377 S.C. 86, 91, 659 S.E.2d 151, 153 (2008) (internal citation omitted) (citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 776 (1976) (providing that questions of fact in a law action are generally reviewed under the "any evidence" standard)). We find evidence in the record to support the master's conclusion that these elements are satisfied.

A. Necessity

The element of necessity was a primary issue in Boyd. The plaintiff sought an easement over a driveway across BellSouth's property that provided the only access to the rear entrance of her antique store. 369 S.C. at 414, 633 S.E.2d at 138. The special referee granted BellSouth's motion for summary judgment on the claim for easement implied by prior use, finding specifically that the plaintiff did not meet the element of necessity. 369 S.C. at 416, 633 S.E.2d at 139. This court reversed the special referee, finding "evidence exists within the record indicating use of the driveway to access the rear doors was necessary for the enjoyment of Boyd[']s property." Boyd v. BellSouth Tel. Tel. Co., 359 S.C. 209, 215, 597 S.E.2d 161, 164 (Ct. App. 2004). In its decision affirming this court as to that issue, the supreme court

considered what "necessity" requires in the context of an easement implied by prior use. 369 S.C. at 420-22, 633 S.E.2d at 141-42. The supreme court explained that the party seeking the easement need not prove that the prior use was absolutely necessary. 369 S.C. at 421, 633 S.E.2d at 141 (citing 28A C.J.S. Easements § 72). Rather, "necessity means 'there could be no other reasonable mode of enjoying the dominant tenement without this easement.'" Id. (quoting Crosland v. Rogers, 32 S.C. 130, 133, 10 S.E. 874, 875 (1890)). Applying that definition to the facts of Boyd, the court acknowledged it was possible for the plaintiff to put in another driveway; however, it found "the evidence also indicat[ed] an alternative driveway to the building would be infeasible, impractical, and very costly." 369 S.C. at 422, 633 S.E.2d at 142.

This court addressed an easement implied by prior use in Hynes Family Trust v. Spitz, 384 S.C. 625, 682 S.E.2d 831 (Ct. App. 2009). In that case, the plaintiff positioned his storm drainage system to discharge water onto the neighboring defendant's backyard, and then sought an easement implied by prior use. 384 S.C. at 627, 682 S.E.2d at 832. This court upheld the trial court's finding that the necessity element was not met, and explained: "Evidence in the record indicates Hynes could have discharged his gutter water onto his own property without unreasonable burden or expense." 384 S.C. at 633, 682 S.E.2d at 835. Applying the definition of necessity from Boyd, this court found the plaintiff failed to satisfy the necessity element because an alternative could be employed "without unreasonable burden or expense." Id.

The Boyd and Spitz courts' application of the definition of necessity to the facts of those cases provides us context in which to determine the sufficiency of the evidence in this case. The master found:

> It would necessarily have cost more money, taken greater effort, and therefore would have been impractical in 1974 to construct, move, or relocate the causeway portion and immediately preceding portion of the Access Road further over to the west on Tract B because the causeway would have needed

> to be much longer and therefore would have cost more money and taken greater effort to build.

There is evidence in the record to support this finding of necessity. The road was the only one in existence in 1974 and remains the only route a vehicle may take from Peters Point Road to Sandy Creek over thirty years later. Thomas Pendarvis testified the causeway's location was dictated by the high land areas in the marsh and that Tavel's choice of location was economically efficient. Cook's argument that the causeway was not the only "reasonable mode of gaining access to and enjoying the property," but rather "the causeway was located where it was out of convenience and not out of necessity," incorrectly focuses on whether there were other suitable locations available for the causeway before 1972 when Tavel built it. As the supreme court stated in Boyd, "[t]he necessity element of easement implied by prior use must be determined at the time of the severance." 369 S.C. at 421, 633 S.E.2d at 141. The master properly focused on the fact that the road already existed in 1974 when Tavel divided the property. The master then properly considered whether the alternative of building a new road entirely on tract B was feasible, practical, and cost efficient. See Boyd, 369 S.C. at 422, 633 S.E.2d at 142. In other words, the master's inquiry was not to find the most convenient location to build a road in 1974, but rather to determine whether keeping the existing road, as opposed to building a new one entirely on tract B, was "necessary." Because there is evidence in the record to support the master's finding that continuing to use the road met the definition of necessity under Boyd, we affirm.

B. Apparent or Known Use and Intent

The fifth element requires that the plaintiff prove the prior use was apparent or known to Tavel, and the seventh element requires proof he intended the use to continue after he conveyed tract B to Respondents in trust. The master found:

> Mr. Tavel's construction and prior use of the Access Road, including the portion on Tract A . . . , was obviously known by him and therefore clearly

> intentional . . . . Substantial improvements to the Access Road were paid for by funds belonging to a Trust created for the exclusive benefit of Thomas and Richard Pendarvis. . . . Tavel intended for Plaintiffs to continue the prior use of the portion of the Access Road on Tract A . . . .

There is ample evidence in the record to support this finding. As to the fifth element, the use of the causeway before severance was apparent and known to Tavel because he used, maintained, and improved the road. Respondents testified to working on the road with Tavel digging ditches and filling in portions of the road after it was built in 1972. Because they worked on and traversed the road for two years prior to severance, the prior use of the causeway was apparent or known to the parties.[2]

As to the seventh element, there is evidence that Tavel intended for Respondents to continue the prior use after severance. First, access to Sandy Creek over this road is an integral part of what Tavel wanted Respondents to enjoy from their use and ownership of tract B. Ann Pendarvis testified that Tavel wanted Respondents to maintain the road and "had planned to convey the property directly across the road which bordered Sandy Creek to Thomas and Richard, in the hopes that some day when they got grown, that they would build a cabin or some kind of little place." Additionally, Tavel's conveyance of the property and help in improving the road and building the dock which the road led to demonstrates an intent that Respondents continue to use the road to access the dock. Accordingly, we find sufficient evidence in the record to support the master's finding that the fifth and seventh elements are met.

Cook argues the easement nevertheless fails because she claims Tavel did not realize the road encroached onto tract A. She contends Tavel "could not have indicated an intent to continue a prior use after severance of title that he did not know existed." We disagree. Contrary to Cook's argument,

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[2] The word "parties" in the fifth element of Boyd refers to the parties to the transaction dividing the property, not necessarily the parties to the lawsuit.

elements five and seven do not contemplate that Tavel knew the extent, or even the existence, of the encroachment onto tract A. Rather, the focus of those two elements is on use. "The purpose of an implied easement is to give effect to the intentions of the parties to a transaction . . . ." Inlet Harbour, 377 S.C. at 91, 659 S.E.2d at 154. The master found Tavel knew Respondents used the road, and intended that they do so in the future. Tavel's supposed lack of knowledge of the causeway's encroachment onto tract A does not defeat his intent that the prior use of the road continue.

Cook's argument essentially asks us to impose a new element on easement implied by prior use: that the party seeking the easement must prove the parties to the transaction dividing the property knew of the existence and extent of encroachment. A simple illustration demonstrates the proposed new element is unworkable. In many cases, the dispute that leads to litigation arises years after the transaction dividing the united parcel of land. In Boyd, for example, the portion ultimately owned by the plaintiff had been sold by BellSouth to the City of Denmark in 1988. 369 S.C. at 414, 633 S.E.2d at 138. It is highly likely that by 2001,[3] when the dispute arose in Boyd, there were no employees of BellSouth or Denmark still available who knew, or if they once knew who remembered, where the property line was in relation to the driveway. Under Cook's theory of this appeal, BellSouth could have defended the plaintiff's claim by requiring proof that BellSouth and Denmark knew not only of the use, but also of the encroachment, at the time the lot was sold. Such a requirement is unwarranted, and would render many valid claims not provable simply because no witnesses are available to testify to what these parties knew.

Even so, we will not presume Tavel was unaware of the encroachment. Rather, because Tavel divided the property and executed the deed for tract B, the law presumes he was aware of the location of the property lines the deed created. See Binkley v. Rabon Creek Watershed Conservation Dist. of

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[3] The dispute arose in Boyd in late 2001 when BellSouth decided in response to the September 11 terrorist attacks to erect a fence around its building on the adjoining lot, thereby blocking the driveway used by Boyd to access the rear of her building. 369 S.C. at 414, 633 S.E.2d at 138.

Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) ("Notice of a deed is notice of its whole contents . . . and it is also notice of whatever matters one would have learned by any inquiry which the recitals of the instrument made it one's duty to pursue." (quoting 66 C.J.S. Notice § 19 (1998))); see also S.C. Dep't of Transp. v. Horry County, Op. No. 26911 (S.C. Sup. Ct. filed January 18, 2011) (Shearouse Adv. Sh. No. 2 at 18-19) (citing Binkley for the proposition that constructive notice of recorded instruments forecloses a claim of lack of knowledge). Nothing was presented by either side to overcome this presumption.[4]

Because we find the master properly analyzed evidence of use instead of the parties' knowledge of encroachment in regard to the fifth and seventh elements, and because there is evidence in the record to support his finding that those two elements were met, we affirm.

III. Adoption of Post-Trial Plat

Over a year after trial, Respondents filed a motion to introduce a plat into evidence whose purpose was "to show access through Tract A for the benefit of Tract B" and "[i]n order for the property records for the separate properties presently owned by [Respondents] and [Cook], respectively, to accurately reflect the location of the easement." The master incorporated the plat by reference into the order granting the easement to Respondents. The order further stated:

> In the event [Cook] objects to the location of this easement as shown by this plat, she may submit her own plat establishing the precise location of where the actual easement exists within thirty (30) days of this order, along with any further relief she may seek under Rule 59(e), SCRCP.

Cook filed a motion to reconsider, alter, or amend the order under Rules 52(b) and 59(e), SCRCP, which included an objection to Respondents' plat

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[4] Tavel died in 1983 and thus did not testify.

and a request to replace it with an attached plat. Cook argued that Respondents' plat "does not reflect the applicable setbacks that define the developable footprint" on the waterfront of her property and "does not accurately reflect the location and encroachment of the access road in relation to the buildable footprint." She now appeals the master's denial of her motion.

The scope of an easement is a question in equity as to which "an appellate court may find facts in accordance with its own view of the preponderance of the evidence." Inlet Harbour, 377 S.C. at 91, 659 S.E.2d at 154. We have considered all the evidence in the record concerning the location of the easement, and agree with the master's decision to adopt Respondents' plat.

IV. Conclusion

We affirm the easement implied by prior use, and adopt Respondents' plat submitted after trial. Because we affirm the finding of an easement implied by prior use, we do not reach the existence of a prescriptive easement. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address remaining issues when resolution of one issue is dispositive).

AFFIRMED.

SHORT, J., and CURETON, A.J., concur.