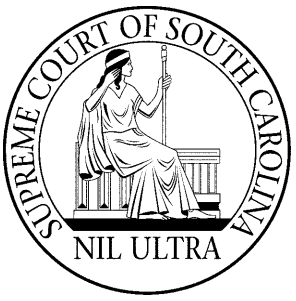


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 7**
**February 9, 2009**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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# The Supreme Court of South Carolina

James S. Richardson and Karolina M. Richardson, Petitioners,

v.

Donald Hawkins Construction, Inc., Donald Hawkins, Sharon Preu, as Personal Representative for the Estate of Joseph Taylor and James Hodge, Defendants,

Of Whom Donald Hawkins Construction, Inc. and Donald Hawkins are Respondents.

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ORDER

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Respondents have filed a petition for rehearing. The petition for rehearing is denied. The original opinion, however, is hereby withdrawn and the attached opinion is substituted in its place.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ John W. Kittredge J.

s/ Larry B. Hyman, Jr. A.J.

Columbia, South Carolina
February 9, 2009

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

---

James S. Richardson and Karolina M. Richardson, Petitioners,

v.

Donald Hawkins Construction, Inc., Donald Hawkins, Sharon Preu, as Personal Representative for the Estate of Joseph Taylor and James Hodge, Defendants,

Of Whom Donald Hawkins Construction, Inc. and Donald Hawkins are Respondents.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Clarendon County
Howard P. King, Circuit Court Judge

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Opinion No. 26575
Heard October 22, 2008 – Re-filed February 9, 2009

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**REVERSED**

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Steven Smith McKenzie, of Manning, for Petitioners.

Kenneth R. Young, Jr., of Sumter, for Respondents.

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**JUSTICE WALLER:** We granted petitioners' request for a writ of certiorari to review the Court of Appeals' opinion in Richardson v. Donald Hawkins Constr., Inc., 370 S.C. 125, 634 S.E.2d 9 (Ct. App. 2006). We reverse.

## FACTS

Petitioners James and Karolina Richardson purchased a house from respondents Donald Hawkins Construction and Donald Hawkins in 1999. After moving in, petitioners noticed several cosmetic and structural problems with the house. Initially, respondents sent a representative to repair the problems, but as the problems persisted, respondents stopped responding to petitioners' service requests. In February 2001, petitioners retained legal counsel who contacted respondents by letter about completing the home repairs. Counsel's letter demanded a response by March 7, 2001; respondents never answered the letter.

On March 12, 2001, petitioners' residence was severely damaged by a fire that investigators concluded was intentionally set.

On May 21, 2002, the police questioned Joseph Taylor about the arson. Taylor, an employee of respondent Hawkins, gave the police a written statement in which he claimed to have overheard Hawkins ask another coworker, James Hodge, to burn down petitioners' house because petitioners were threatening to sue him due to the problems with the house ("Statement One"). According to Statement One, Hodge later told him Hawkins offered him $2,000 to burn the house down; a few days later, Taylor learned that Hodge had set the fire but had not succeeded in burning the entire house down.

Due to investigators' suspicions that Taylor was more involved in the arson than he revealed in Statement One, he was interviewed again later that afternoon. Following this interview, Taylor submitted another written statement to the police ("Statement Two"). In Statement Two, Taylor admitted that Hawkins approached **both** him and Hodge and offered them $2,000 to burn down petitioners' house. While Taylor acted as lookout, Hodge crawled under the house and ignited a jug filled with flammable liquid. The following day, Hodge told Taylor that, because the house was not completely destroyed, Hawkins gave him only $1,000. Taylor claimed he did not get any money for his role as lookout.

Two days after giving the police the written statements, Taylor wrote and signed the following statement ("Statement Three") before two witnesses and a notary:

> I Joseph Taylor has [sic] never been paid by Donnie Hawkins for doing anything illeagle [sic]. Donnie paided [sic] me for subcontracting carpentry work only. I have never heard or seen him pay anyone to do anything illeagle [sic]!

According to Taylor's mother, Sharon Preu, Taylor visited her shortly after being questioned by the police and told her that the statements he had made to police were "all a lie." During trial, Preu's testimony was proffered. Preu stated that Taylor told her the police "had him in Sumter all day long and ... cussed at him." According to Preu, Taylor said he was promised no jail time if he confessed, so he told police that he "and Mr. Hodge had done it and that it was all a lie, that they had offered him two years probation if he was to go along with it." ("Statement Four").

Petitioners consented to having all criminal charges regarding the arson dropped in order to pursue a civil case. Thereafter, a civil suit was filed against Taylor, Hodge, Hawkins, and Donald Hawkins Construction, Inc. Taylor was served a summons and complaint, but he failed to file an answer. In May 2003, petitioners filed an affidavit of default as to defendant Taylor.

In January 2004, before the case went to trial, Taylor died in an unrelated automobile accident.

In September 2004, the trial court ruled on several pre-trial matters, including the admissibility of Statements One, Two, and Three. First, the trial court ruled on the status of petitioners' case against Taylor's estate, represented after his death by Preu. The trial court found that Taylor's default prior to his death put the estate in the procedural posture of having admitted all of the allegations contained in the complaint. As to Statements One and Two, the court found them admissible against the remaining defendants under the statements against interest exception to hearsay described in Rule 804(b)(3), SCRE.[1] As to Statement Three, however, the circuit court excluded Taylor's own written statement under Rule 403, SCRE. The circuit court concluded that the probative value of the written statement was substantially outweighed by the danger of unfair prejudice because, due to his default, Taylor was deemed to have admitted all allegations in the complaint.[2]

At trial, the defense proffered the testimony of Preu concerning Taylor's statements to her after he had been questioned by police (i.e., Statement Four). Petitioners objected on hearsay grounds, and the trial court found the statement did not fall within a hearsay exception. The trial court further stated that Taylor's statements to Preu simply were denials of his involvement in the arson and thus, ruled them inadmissible.

At the conclusion of trial, the jury found the defendants liable and awarded petitioners $84,758 in actual damages and $150,000 in punitive damages against Hawkins Construction; $5,500 in actual damages and $5,000

[1] At trial, the circuit revised its basis for the admission of Statement One. The circuit court found Statement One admissible as a statement by a co-conspirator of a party during the course and furtherance of a conspiracy pursuant to Rule 801(d)(2)(E), SCRE. The circuit court upheld its ruling *in limine* on Statement Two, admitting the statement under the statement against interest exception to hearsay.

[2] For example, the Complaint specifically alleged that Hawkins agreed to pay Hodge and Taylor $2,000 to burn down petitioners' house.

in punitive damages against Hodge; and $5,500 in actual damages and $250,000 in punitive damages against Hawkins.[3] The jury did not award petitioners any damages against Taylor's estate.

Only Respondents Donald Hawkins Construction, Inc. and Hawkins appealed from the jury's verdict. The Court of Appeals reversed and remanded for a new trial.

The Court of Appeals based its reversal on Rule 806, SCRE.[4] Because Taylor's first two statements were admitted under hearsay rules 801 and 804, the Court of Appeals concluded that "[p]ursuant to Rule 806 and basic concepts of fairness," the defense should have been allowed to impeach Taylor with evidence that was inconsistent with Statements One and Two. Richardson, 370 S.C. at 130, 634 S.E.2d at 12.

## ISSUE

Did the Court of Appeals err in reversing the trial court's decision to exclude Taylor's Statements Three and Four?

[3] By post-trial order, the punitive damages award against Hawkins was reduced from $250,000 to $49,500.

[4] Rule 806 provides:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

## DISCUSSION

Petitioners argue the trial court did not abuse its discretion by finding Statements Three and Four inadmissible, and therefore the Court of Appeals erred by reversing the trial court's decision to exclude the evidence. We agree.

Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE.

It is well settled that the admission and rejection of testimony is largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion. E.g., Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000)

In our opinion, it was within the trial court's discretion to exclude Taylor's Statements Three and Four pursuant to Rule 403, SCRE. In its pretrial Rule 403 ruling, the trial court noted the unusual procedural posture of the case because of defendant Taylor's default. The trial court found that because Taylor was considered to have admitted the allegations of the complaint, his statements denying the same allegations would be unduly prejudicial. Likewise, the trial court excluded Statement Four in part because it amounted to a denial of the allegations that were already deemed admitted by Taylor. The trial court clearly believed that by admitting these statements, the jury would have been misled and/or confused on the issues presented, and therefore, the court properly excluded them. See Rule 403, SCRE; see also Rule 220, SCACR (this Court may affirm any ruling based upon any ground appearing in the record). Given the factual and procedural circumstances of the instant case, we hold the trial court did not err in this determination.

## CONCLUSION

We find the trial court did not abuse its discretion in excluding Taylor's Statements Three and Four. Accordingly, we reverse the Court of Appeals' decision, and reinstate the jury's verdict, as modified by post-trial order.[5]

**REVERSED.**

**TOAL, C.J., PLEICONES, KITTREDGE, JJ., and Acting Justice Larry B. Hyman, Jr., concur.**

[5] See footnote 3, supra.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Larry Tucker Gay, Jr., Appellant,

v.

Robert M. Ariail, in his official capacity as Solicitor, Thirteenth Judicial Circuit, and the South Carolina Law Enforcement Division, Respondents.

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Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

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Opinion No. 26592
Heard December 2, 2008 – Filed February 9, 2009

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**REVERSED**

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Jon Rene Josey, of Turner, Padget, Graham & Laney, of Florence, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh and Assistant Attorney General David Spencer, of Columbia, for Respondent.

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**JUSTICE WALLER:** Appellant, Larry Tucker Gay appeals an order of the circuit court finding him ineligible to apply for expungement of his criminal record. We reverse.

## FACTS

In 1990, when he was twenty-two years old, Gay pled guilty to assault and battery of a high and aggravated nature (ABHAN). He received a ten-year sentence, suspended on five years probation. Sixteen years later, in June 2006, Gay sought to have the record of that conviction expunged. The circuit court held that because Gay was sentenced as an adult, he was ineligible for expungement under S.C. Code Ann. § 22-5-920(2007).

## ISSUE

Did the court err in ruling Gay was ineligible for expungement?

## DISCUSSION

S.C. Code Ann. § 22-5-920(B) permits a defendant who was convicted as a youthful offender to apply for an expungement, stating, in part:

> Following **a first offense conviction as a youthful offender**, the defendant after fifteen years from the date of the conviction may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction. However, this section does not apply to an offense involving. . . to an offense classified as a violent crime in Section 16-1-60,[1]. . . . If the defendant has had no other conviction during the fifteen year period following the first offense conviction as a youthful offender, the circuit court may issue an order expunging the records. . . .

(Emphasis supplied). S.C. Code Ann. § 24-19-10 defines "youthful offender" as follows:

[1] ABHAN is not listed as a violent crime in § 16-1-60. See State v. Rogers, 338 S.C. 435, 527 S.E.2 101 (2000). ABHAN is a common law misdemeanor punishable by up to ten years in prison. State v. Morris, 371 S.C. 278, 639 S.E.2d 53 (2006).

> d) "Youthful offender" means an offender who is:
> (ii) **seventeen but less than twenty five years of age at the time of conviction for an offense that is not a violent crime**, as defined in Section 16-1-60, and that is a misdemeanor. . . .
> (f) "Conviction" means a judgment in a verdict or finding of guilty, **plea of guilty**, or plea of *nolo contendere* to a criminal charge where the imprisonment is at least one year, but excluding all offenses in which the maximum punishment provided by law is death or life imprisonment. (Emphasis supplied).

Gay contends he was a "youthful offender" at the time of his plea in 1990, such that SLED and the circuit court erred in ruling he was ineligible to be considered for expungement. The state contends that because Gay was sentenced as an adult, he is ineligible for expungement under S.C. Code Ann. § 22-5-920(B). We disagree. Under the clear and unambiguous terms of the statute, Gay was convicted as a "youthful offender" and was therefore entitled to have his application for expungement considered.[2]

In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature. State v. Dingle, 376 S.C. 643, 659 S.E.2d 101(2008). All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), *cert. denied* 128 S.Ct. 1872 (2008). A statute's language must be construed in light of the intended purpose of the statute. If possible, legislative intent should be found in the plain language of the statute itself. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008).

Here, the statutes permit a "youthful offender," i.e., one who is seventeen but less than twenty five years of age at the time of conviction,

[2] The mere fact that Gay is entitled to have his application considered does not mean expungement necessarily follows; Gay concedes expungement is a privilege and not a right.

who has "pled guilty" to an offense which is not a violent crime, and which was both a first offense and a misdemeanor, to apply for an order expunging the records of the arrest and conviction. S.C. Code Ann. § 24-19-10 and § 22-5-920(B). Gay meets these requirements.

S.C. Code Ann. § 24-19-50 is entitled "Powers of courts upon conviction of youthful offenders." It provides as follows:

> In the event of a **conviction** of a youthful offender the court may:
> (1) suspend the sentence and place the youthful offender on probation;
> (2) release the youthful offender to the custody of the division before sentencing for an observation and evaluation period of not more than sixty days. The observation and evaluation must be conducted by the Reception and Evaluation Center operating under joint agreement between the Department of Vocational Rehabilitation and the Department of Corrections and the findings and recommendations for sentencing must be returned with the youthful offender to the court for sentencing;
> (3) if the offender is under the age of twenty one, without his consent, sentence the youthful offender indefinitely to the custody of the department for treatment and supervision pursuant to this chapter until discharged by the division, the period of custody not to exceed six years. If the offender is twenty one years of age but less than twenty five years of age, he may be sentenced in accordance with this item if he consents in writing;
> (4) if the court finds that the **youthful offender** will not derive benefit from treatment, may sentence the youthful offender under any other applicable penalty provision. The youthful offender must be placed in the custody of the department;
> (5) not sentence a youthful offender more than once under this chapter.

(emphasis supplied). The clear import of the above statute is that a person who meets the definition of "youthful offender" is "convicted" regardless of

the manner of sentencing, and is eligible to apply for expungement if the requirements of § 22-5-920(b) are met.

The state contends Gay is ineligible for expungement because he was not **sentenced** as a youthful offender but as an adult. Contrary to the state's contention, S.C. Code Ann. § 22-5-920(B) requires only that one be **convicted** as a youthful offender. Under the literal terms of the statute, Gay was **convicted** as a "youthful offender."

In Creel v. State, 262 S.C. 558, 564, 206 S.E.2d 825, 828 (1974), we held "a person between the ages of seventeen and twenty-five is, by definition, a youthful offender and must be sentenced pursuant to that Act. The trial judge must sentence the youthful offender under one of the subsections of Section 55-395 (the predecessor to S.C. Code Ann. 24-19-50)." Although a trial judge has discretion to impose sanctions which are "outside" the YOA, see § 24-19-50(4), the sentencing nonetheless takes place pursuant to the provisions of § 24-19-50 of the YOA.

The state relies on Brown v. State, 265 S.C. 516, 220 S.E.2d 125 (1975), *cert. denied* 426 U.S. 939 (1976), in which the Court found it implicit the trial judge had found the defendant would receive no benefit from a YOA sentence. Brown is immaterial to the issue of whether or not an individual who meets the statutory definition of "youthful offender" is eligible for expungement under § 22-5-920(B).

We find the Legislature, in enacting § 22-5-920(B), reasonably concluded that persons who had been convicted of non-violent, misdemeanor offenses at a young age (between 17-25), and who had committed no subsequent offenses over the course of the next fifteen years, were entitled to be considered for an expungement.

## CONCLUSION

The trial court erred in ruling Gay was ineligible to have his application for expungement considered. Accordingly, the circuit court's order is reversed.

**REVERSED.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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William F. Dykeman and
Leslie L. Dykeman, on behalf
of themselves and all others
similarly situated, Appellants,

v.

Wells Fargo Home Mortgage,
Inc., Respondent.

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

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Opinion No. 26593
Heard October 22, 2008 – Filed February 9, 2009

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**AFFIRMED**

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J. Olin McDougall, II, of Newman & McDougall, of Beaufort, Timothy E. Eble, of Mt. Pleasant, and Tom Young, Jr., Charles W. Whetstone, Jr., Cheryl F. Perkins, all of Whetstone, Myers, Perkins & Young, of Columbia, for Appellants.

Walter Keith Martens and Herbert W. Hamilton, both of Hamilton, Martens, Ballou & Sipe, of Rock Hill, for Respondent.

John T. Moore, C. Mitchell Brown, and B. Rush Smith, III, both of Nelson, Mullins, Riley & Scarborough, of Columbia, for Amicus Curiae South Carolina Bankers Association, and Robert R. Thuss and Susan B. Berkowitz, also of Columbia, for Amicus Curiae SC Appleseed Legal Justice Center.

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**JUSTICE KITTREDGE:** This case involves the interpretation of penal statutes imposing a duty on the record holder of a mortgage on real estate to enter a satisfaction of the mortgage in the proper office, upon the occurrence of certain conditions. The sole condition before us relates to the requirement in sections 29-3-310 and 320 of the South Carolina Code (2007), that the mortgagor make a request to the mortgagee to enter the satisfaction. In this case, we must answer whether the mortgagor's compliance with the "borrower's responsibilities" set by the mortgagee constituted an affirmative request from the mortgagor. The circuit court answered in the negative and granted the mortgagee summary judgment. We affirm.

## I.

In June of 2000, William and Leslie Dykeman purchased property in Beaufort County, South Carolina by executing a purchase-money mortgage in favor of Wells Fargo. In February of 2002, the Dykemans refinanced the loan with Wells Fargo. Wells Fargo provided to the Dykemans' closing attorney certain documents which set forth the "borrower's responsibilities." These documents included a transmittal form, a payment coupon, and a complete payoff amount. Part of the payoff amount (five dollars) was a payment for "recording fees."

The Dykemans complied with the "borrower's responsibilities" by completing the forms and paying the amount submitted by Wells Fargo, including the five dollar recording fee. A check (for the payoff) was mailed to Wells Fargo on or about February 28, 2002. The record does not contain a cover letter from the Dykemans' counsel to Wells Fargo, as typically occurs

as part of the real estate closing process.[1] In any event, Wells Fargo acknowledged receipt of the payment and documentation pursuant to the "borrower's responsibilities."

Wells Fargo did not record the mortgage satisfaction until July 16, 2002, by filing a lost mortgage satisfaction with the Beaufort County Register of Deeds. The record discloses that the Dykemans' closing attorney wrote Wells Fargo about a month earlier on June 27, 2002, specifically citing to sections 29-3-310 and 320 and noting that Wells Fargo "may already be liable for the statutory penalty." Because the mortgage satisfaction was not entered within three months after Wells Fargo's receipt of the mortgage payment and payoff fee, the Dykemans brought this statutory claim against Wells Fargo.[2] Pursuant to cross-motions for summary judgment, the trial court granted judgment for Wells Fargo. The Dykemans appealed, which is before us pursuant to Rule 204 (b), SCACR, certification.

## II.

We set forth the relevant statutory sections requiring the recording of a satisfaction. Section 29-3-310 provides:

> *Any holder of record of a mortgage who has received full payment or satisfaction* or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate *shall, at the request by certified mail or other form of*

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[1] Following a real estate refinancing, the standard cover letter from a closing attorney to the holder of the mortgage usually includes the payment due on the debt and any fee necessary to enter a satisfaction of the mortgage in the proper office. Such standard cover letters may include an affirmative request that the mortgagee cause a satisfaction to be entered of record. We recognize, however, that in some circumstances, the mortgagee may enlist the closing attorney to accomplish the task of ensuring that the mortgage satisfaction is properly entered. *See Kinard v. Fleet Real Estate Funding Corp.*, 319 S.C. 408, 410, 461 S.E.2d 833, 834 (Ct. App. 1995).

[2] This action was brought by the Dykemans "on behalf of themselves and those similarly situated."

> *delivery with a proof of delivery of the mortgagor or of his legal representative* or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage and on tender of the fees of office for entering satisfaction, *within three months after the* certified mail, or other form of delivery, with a proof of delivery, *request is made, enter satisfaction in the proper office* on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

(emphasis added).

Section 29-3-320 provides:

> *Any holder of record of a mortgage having received such payment, satisfaction, or tender* as aforesaid *who shall not,* by himself or his attorney, *within three months after such* certified mail, or other form of delivery, with a proof of delivery, *request* and tender of fees of office, *repair to the proper office and enter satisfaction* as aforesaid *shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court,* to be recovered by action in any court of competent jurisdiction within the State.

(emphasis added).

Sections 29-3-310 and 320 are penal statutes. Penal statutes must be strictly construed. *Bostic v. Am. Home Mortg. Servicing, Inc.*, 375 S.C. 143, 149, 650 S.E.2d 479, 482 (Ct. App. 2007) ("South Carolina has long recognized the principle that penal statutes are to be strictly construed."). The Court of Appeals in *Rorrer v. P.J. Club, Inc.*, 347 S.C. 560, 567, 556 S.E.2d 726, 730 (Ct. App. 2001) expounded:

> The rule that penal statutes, as contradistinguished from remedial statutes, must be construed strictly, is but a means of arriving at

> the intention. When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and when it is entirely within the discretion of the lawgiver, it will not be presumed that he intended it should be extended further than is expressed; and humanity would require that it should be so limited in the construction as to be certain not to exceed the intention.

Further, the statute as a whole must be examined to determine and fulfill the Legislature's intent. *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.").

In *Bostic*, the Court of Appeals interpreted sections 29-3-310 and 320 to determine what constitutes a "request," sufficient to render the mortgagee statutorily liable. 375 S.C. at 154, 650 S.E.2d at 485. The facts in *Bostic* are similar to those before us. Bostic "obtained a statement [from the mortgagee] for the payoff amount on the loan, which . . . included a 'release fee' and a 'recording fee.'" *Id*. at 145, 650 S.E.2d at 480. Bostic sent the funds to the mortgagee which acknowledged receipt, but the mortgage was not satisfied of record within the statutory three-month period. *Id*. Bostic, through counsel, then sent a certified letter to the mortgagee to two separate addresses. *Id*. The certified letter referenced the statute and demanded the statutory penalty. *Id*. at 145-46, 650 S.E.2d at 480.

Bostic filed suit against the mortgagee seeking the statutory penalty and related relief. *Id*. at 146, 650 S.E.2d at 480. The trial court granted Bostic summary judgment, but the Court of Appeals reversed. *Id*. at 144-45, 650 S.E.2d at 480. The Court of Appeals determined that under the applicable statutory scheme, as a matter of law, Bostic failed to make an affirmative request to have his mortgage recorded as satisfied. *Id.* at 156, 650 S.E.2d at 486. The *Bostic* court interpreted the element of a request as a condition precedent to statutory relief. *Id*. at 150, 650 S.E.2d at 483. In this regard, sending the payoff check to the mortgagee did not constitute a "request" within the meaning of the statute. *Id*. at 155, 650 S.E.2d at 485.

We agree with the *Bostic* court's determination that our Legislature intended a request, under the penal statutory framework, "operate to inform the mortgagee of the mortgagor's desire for the satisfied mortgage to be recorded." *Id*. at 154, 650 S.E.2d at 485. For liability to attach under the applicable statutes, payment of the mortgage is "only the first step in the mortgage satisfaction process. In order for Bostic to recover the statutory penalty under section 29-3-320, he had to satisfy the condition precedent of making a 'request' for [the mortgagee] to record his mortgage as satisfied." *Id*. A request, to trigger the statutory penalty, may not be implied or inferred. *Id*. at 155, 650 S.E.2d at 486. The request must affirmatively convey to the mortgagee that a recording of the satisfaction is sought.[3] *Id*.

The Dykemans' claim under the applicable penal statutory framework similarly fails for lack of an affirmative request to have the mortgage recorded as satisfied. The Dykemans may have entertained a reasonable expectation that Wells Fargo would satisfy the mortgage of record following the payoff. That expectation, however, was unstated. Because of the windfall nature of the statutory penalty, we are persuaded the Legislature did not intend to invoke the statutory penalty in the absence of a clear, affirmative request. The Court of Appeals spoke directly to this in *Kinard v. Fleet Real Estate Funding Corp.*, 319 S.C. 408, 412, 461 S.E.2d 833, 835 (Ct. App. 1995). The court in *Kinard* described two statutory interpretation

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[3] *Bostic* additionally involved an allegation of telephone conversations between the parties shortly after the payoff check was mailed. *Id*. at 155, 650 S.E.2d at 485. It appears the record was scant in this regard, and the court declined to conclude for summary judgment purposes that these purported phone conversations be construed as a "request." *Id*. at 155-56, 650 S.E.2d at 485-86. In the case before us, the Dykemans rely exclusively on their compliance with the "borrower's responsibilities" document furnished by Wells Fargo. (As alleged in the Dykemans' second amended complaint, "[t]he payment and delivery of the $5.00 fee by [the Dykemans] . . . pursuant to [Wells Fargo's] demand therefore as a condition to filing a satisfaction of mortgage constituted a request.") We therefore do not reach the question whether a verbal request could be sufficient.

principles, in the context of the applicable statutory scheme, when it stated, "the proposition that penal statutes must be strictly construed, especially when the penalty may result in a windfall to a plaintiff" and "the proposition that the requirements of a penal statute must be applied in a manner which results in fairness and justice to the parties." *Id*. A fair and balanced consideration of this penal statutory scheme leads us to conclude that an implied request does not satisfy sections 29-3-310 and 320.[4]

We hold that section 29-3-310 requires the following elements be established by the mortgagor to trigger the substantial penalty and related relief in section 29-3-320: (1) that he has made full payment of his "debts," including any applicable "damages, costs, and charges"; (2) that he has made a "request by certified mail or other form of delivery"[5] that the mortgage be satisfied of record; (3) that he has made a "tender of fees of office for entering satisfaction"; and (4) that the mortgagee has failed to "enter satisfaction in the proper office on the mortgage" within three months of the request.[6]

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[4] We do not suggest that a mortgagee's conduct is irrelevant in analyzing a mortgagor's compliance with the section 29-3-310 elements. *Kinard* illustrates this point. 319 S.C. at 412-13, 461 S.E.2d at 835 (holding the mortgagor's remittal of fees to the mortgagor's attorney constituted a tender of fees under the statute because the mortgagee agreed to have the attorney record the satisfaction). Thus, there may be situations when a mortgagor may properly rely on the conduct of a mortgage company to support the finding of a request under section 29-3-310. We hold the record before us does not present such a situation.

[5] Section 29-3-310 was amended in 1999 to include the requirement that the request be accomplished "by certified mail or other form of delivery with a proof of delivery . . . ."

[6] This case, of course, has drawn our attention to the request element. As discussed, the mortgagor must make the request, and under the facts presented, we do not imply a request by the mortgagor from the mortgagee's representations in the "borrower's responsibilities" document. Our holding today should not be construed as foreclosing all relief to a mortgagor in this circumstance. When a mortgagee, for valuable consideration, represents that

## III.

Because the Dykemans have failed to establish the element of a request under sections 29-3-310 and 320, the trial court properly entered summary judgment for Wells Fargo.

**AFFIRMED.**

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

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it will perform in a particular manner, and then fails to perform as promised, a traditional action may be available. In such circumstance, a mortgagor may pursue an action by alleging and proving the existence of a duty; breach of that duty; and damages proximately caused by the breach. A claim under sections 29-3-310 and 320 is clearly more appealing to mortgagors with its windfall penalty and accompanying absence of the usual burden of having to prove proximate cause and damages.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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David H. Barton, Employee, Claimant,

v.

William Ian Higgs d/b/a Iyanel Enterprises and Total Home Exteriors, Inc., Employers, and Key Risk Insurance and SC Uninsured Employers Fund, Carrier, Defendants,

Of Whom Total Home Exteriors, Inc., Employers, and Key Risk Insurance are the Respondents,

and SC Uninsured Employers Fund is the Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

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Opinion No. 26594
Heard November 18, 2008 – Filed February 9, 2009

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**REVERSED**

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Amy V. Cofield, of Lexington, and Latonya Dilligard Edwards, of Columbia, for Petitioner.

David A. Wilson and Michael A. Farry, both of Horton, Drawdy, Ward & Jenkins, of Greenville, for Respondents.

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**CHIEF JUSTICE TOAL:** In this workers' compensation case, the court of appeals held that Petitioner South Carolina Uninsured Employers' Fund (the Fund) was responsible for paying benefits to an injured employee. *Barton v. Higgs*, 372 S.C. 109, 641 S.E.2d 39 (Ct. App. 2007). We granted a writ of certiorari to review that decision and now reverse.

## FACTUAL/PROCEDURAL BACKGROUND

David Barton (Claimant) was employed by William Higgs d/b/a Iyanel Enterprises (Iyanel), which served as the roofing subcontractor for Respondent Total Home Exteriors (Total Home). On November 22, 2003, Claimant sustained a compensable injury when he fell from a roof. At the time of the accident, Iyanel did not have workers' compensation insurance, and thus, as the higher-tier contractor, Total Home remained liable to pay Claimant benefits. Total Home sought to transfer liability to the Fund pursuant to S.C. Code Ann. § 42-1-415 (Supp. 2007).

At the hearing before the single commissioner, the president of Total Home testified that he received a Certificate of Insurance from Higgs showing that Iyanel had a workers compensation policy in effect from September 13, 2003 through September 13, 2004. The Certificate listed Total Home as the certificate holder and Jackie Perry Insurance Agency (Insurance Company) as the producer, but the Certificate was not signed in the blank listed for "Authorized Representative." Higgs testified that he paid for the workers' compensation insurance and that an employee of the Insurance Company issued the Certificate of Insurance. Nonetheless,

coverage was never bound, resulting in Iyanel not being insured on the date of the accident.

The single commissioner found that Iyanel had attempted in good faith to obtain workers' compensation insurance and presented the Certificate of Insurance to Total Home, upon which Total Home relied in good faith. Accordingly, the single commissioner ruled that liability should be transferred to the Fund. The full commission, the circuit court, and the court of appeals affirmed the single commissioner's decision to transfer liability.

We granted a writ of certiorari and the Fund presents the following issue for review:

> Did the court of appeals err in affirming the decision to transfer liability to the Fund pursuant to § 42-1-415?

## STANDARD OF REVIEW

When reviewing an appeal from the workers' compensation commission, the appellate court may not weigh the evidence or substitute its judgment for that of the full commission as to the weight of evidence on questions of fact. *Therrell v. Jerry's Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-95 (2006). However, the appellate court may reverse the full commission's decision if it is based on an error of law. *Id.* The issue of interpretation of a statute is a question of law for the Court. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

## LAW/ANALYSIS

The Fund argues that the court of appeals erred in affirming the decision to transfer liability because the Certificate of Insurance was unsigned. We agree.

Under the Workers' Compensation Act, a general contractor is considered the "statutory employer" of a subcontractor's employees and is

liable to pay workers' compensation benefits to the subcontractor's employee injured on the job. *See* S.C. Code Ann. § 42-1-410 (2006). Thus, "[t]he employee of the sub-contractor may look to the prime contractor for workers' compensation benefits without regard to whether the sub-contractor is covered by a workers' compensation insurance policy." *Freeman Mechanical, Inc. v. J.W. Bateson Co., Inc.*, 316 S.C. 95, 97, 447 S.E.2d 197, 198 (1994). The purpose of this statute is to protect the employee and assure coverage in the event of an injury.

In 1996, however, the Legislature created a narrow exception to this rule which provides that the general contractor may transfer the responsibility to pay benefits:

> [U]pon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section.

Section 42-1-415(A). However, to transfer liability to the Fund, the higher-tier contractor "must collect documentation of insurance . . . on a standard form acceptable to the commission." The workers' compensation commission has promulgated a regulation providing that a Certificate of Insurance "shall serve as documentation of insurance" and that the Certificate "must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured." S.C. Code Reg. 67-415 (Supp. 2007). In other words, liability may be transferred from the higher tier contractor to the Fund only after the higher tier contractor has properly documented the subcontractor's claim that it retains workers' compensation insurance. This statutory scheme provides an ultimate safety net for general contractors against a subcontractor's act of fraud.

In the instant case, by failing to collect a signed Certificate of Insurance form, Total Home failed to meet the requirement as set forth in the regulation. Even assuming Iyanel was not acting fraudulently in submitting the unsigned form, Total Home could have easily investigated the absence of the signature and determined that Iyanel did not have a valid policy. In our view, public funds should not be expended where Respondent could have discovered the mistake by acting in accordance with the regulations.

We recognize that the full commission found that the form was a valid documentation and, as the agency charged with administering the Workers' Compensation Act, this decision should be given great deference. *See Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (recognizing that the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration). However, we hold that the full commission's decision should not be upheld because the interpretation is clearly contrary to its own regulation. *See Brown v. South Carolina Dep't of Health and Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002) (holding that while the Court typically defers to an agency's construction of its own regulation, where the plain language of the regulation is contrary to the agency's interpretation, the Court will reject the interpretation).

## CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and hold that Total Home may not transfer liability to the Fund.

**KITTREDGE, J., and Acting Justices James E. Moore and Donna S. Strom, concur. WALLER, J., dissenting in a separate opinion.**

**JUSTICE WALLER:** I respectfully dissent. In my opinion, the Court of Appeals correctly held that respondent Total Home "met all of the statutory requirements to transfer liability." Barton v. Higgs, 372 S.C. 109, 117, 641 S.E.2d 39, 43 (Ct. App. 2007). Accordingly, I would affirm in result.

S.C. Code Ann. § 42-1-415 provides that when a subcontractor "has represented himself" to a general contractor as having workers' compensation insurance at the time the subcontractor "was engaged to perform work," the general contractor "must be relieved of any and all liability." The statute further states that the general contractor "must collect documentation of insurance … on a standard form acceptable to the commission." S.C. Code Ann. § 42-1-415 (Supp. 2008).

A review of some additional facts is in order. The president for Total Home testified that he would not have given Iyanel Enterprises a contract without obtaining a certificate of workers' compensation insurance. Likewise, the testimony of William Higgs confirmed that before Iyanel could work as a subcontractor on jobs for Total Home, Total Home required him to get a certificate of insurance. According to Higgs, he went to the Jackie Perry Insurance Agency, paid his money for the policy, and obtained the certificate. Despite the issuance of the certificate by the Perry Agency, the coverage was never bound, resulting in Iyanel not being insured on the date of Claimant's accident.

The record reflects that the Perry Agency had employed someone who issued certificates of insurance without the coverage being bound. Therefore, the only fraud that seems to have occurred in this case is by an employee of the insurance agency, not by the subcontractor. Although the majority concedes that section 42-1-415 is designed to protect a general contractor from fraud, the end result of the majority's reasoning is that Total Home becomes a victim of fraud simply because it was not committed by the subcontractor.

More importantly, however, the majority seems to gloss over the fact that the express requirements of the statute clearly were met in the instant

case. Instead, the majority opinion focuses its attention on the regulation's requirements.[1] This runs contrary to settled precedent.

Although regulations authorized by the Legislature generally have the force of law, a regulation may not alter or add to a statute. Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995); Banks v. Batesburg Hauling Co., 24 S.E.2d 496, 499 (1943); see also Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute.").

The Goodman case is instructive. Goodman involved S.C. Code § 42-17-50, the workers' compensation statute which allows "an application for review" of the single commissioner's order by the Full Commission. The Commission promulgated Regulation 67-701 which requires that a specific form be filed (Form 30). The petitioner in Goodman did not file a Form 30, but instead wrote the Commission a letter "expressing his desire to appeal." Goodman, 318 S.C. at 490, 458 S.E.2d at 532. On direct appeal, the Court of Appeals found the petitioner's letter did not substantially comply with section 42-17-50.

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[1] The Fund's sole argument, with which the majority agrees, is that because the form was **unsigned**, it did not meet the requirements of the applicable regulation. Regulation 67-415 provides the following information about the term "documentation of insurance" used in the statute:

> For purposes of Section 42-1-415, the ACORD Form 25-S, Certificate of Insurance, as published by the ACORD Corporation and as issued by the insurance carrier for the insured, shall serve as documentation of insurance. The Certificate of Insurance must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured.

S.C. Code Reg. 67-415(A) (Supp. 2008). The ACORD Form 25-S is a standard insurance industry form.

On certiorari, this Court reversed. The Goodman court stated that Regulation 67-701 "adds the requirement of applying for review with a particular form, thereby adding to the statute. **Insofar as Reg. 67-701 increases the threshold requirements of section 42-17-50, the specifications set forth in the statute must prevail.**" Id. at 490-491, 458 S.E.2d at 532 (emphasis added). The Court in Goodman therefore held that that petitioner's letter constituted substantial compliance with section 42-17-50. Id. at 491, 458 S.E.2d at 532.

The instant case is analogous to Goodman in that there was substantial compliance with the applicable statute. Total Home requested and received documentation of Iyanel's insurance on a form authorized by the Commission. All the substantive parts of the form were filled in – it listed Higgs as being insured with a workers' compensation policy (including a policy number and coverage dates), and also listed Total Home as the certificate holder.

The only thing missing was a signature. In my opinion, requiring such strict compliance with the regulation would only serve to frustrate legislative intent.[2] The obvious purpose of section 42-1-415 is to encourage a higher tier contractor to require proof that its subcontractors carry workers' compensation insurance. Therefore, if the higher tier contractor substantially complies with the document collection requirement, it should not be ultimately liable when the subcontractor turns out to not actually be insured. See §42-1-415; Goodman, supra.

In addition, nowhere in the statute is there a requirement that the higher tier contractor **verify** the authenticity of the documentation of insurance. Nevertheless, the majority suggests that Total Home "could have easily investigated the absence of the signature and determined that Iyanel did not have a valid policy." First, I disagree that section 42-1-415 imposes this burden on the general contractor. Moreover, I also disagree that under the

[2] See, e.g., South Carolina Second Injury Fund v. American Yard Prods., 330 S.C. 20, 22, 496 S.E.2d 862, 863 (1998) (this Court's primary function when interpreting a statute is to ascertain and give effect to the intent of the legislature).

facts of this case, any such investigation would have uncovered the fraud apparently committed by a rogue employee of the insurance agency.[3]

Put simply, the majority's focus on the absence of a signature literally "elevat[es] form over substance." South Carolina Second Injury Fund v. American Yard Prods., 330 S.C. 20, 24, 496 S.E.2d 862, 864 (1998). At the very least, the majority has elevated regulation over statute, and in my opinion, this runs contrary to well-settled law. See, e.g., Goodman, supra; Society of Prof'l Journalists v. Sexton, supra.

In sum, because I believe the majority opinion overlooks precedent which stands for the principle that a regulation should not trump the language and intent of the statute, I respectfully dissent.

[3] For example, if Total Home had called the Perry Agency to verify the unsigned documentation, it is quite possible that the employee who was not binding the coverage could have simply lied to cover up his/her own fraudulent activity.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Appellant,

v.

Jimmy Ramsey, Respondent.

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Appeal from York County
John C. Hayes III, Circuit Court Judge

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Opinion No. 26595
Heard October 8, 2008 – Filed February 9, 2009

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**REVERSED AND REMANDED**

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, for Appellant.

Christopher A. Wellborn, of Rock Hill, for Respondent.

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**CHIEF JUSTICE TOAL:** In this case, the magistrate held a probable cause hearing on Respondent Jimmy Ramsey's criminal domestic violence (CDV)

charge and dismissed it for lack of probable cause. The circuit court affirmed the magistrate's finding. On appeal, the State claims the magistrate erred in holding a probable cause hearing and dismissing Respondent's CDV charge.

## FACTUAL/PROCEDURAL BACKGROUND

On February 18, 2006, Respondent was arrested on a warrant for burglary first degree and was issued a uniform traffic ticket for CDV first offense. On May 16, 2006, the circuit court held a preliminary hearing on the burglary charge. The circuit court dismissed the burglary charge for lack of probable cause and remanded the CDV charge to the magistrate. Respondent filed with the magistrate a motion to dismiss the CDV charge for lack of probable cause. On August 14, 2006, the magistrate held a hearing to determine probable cause and granted Respondent's motion to dismiss. The State appealed to the circuit court. The circuit court affirmed the magistrate's order of dismissal and the State appealed. We certified this case pursuant to Rule 204(b), SCACR.

## ISSUE

Did the magistrate have jurisdiction to hold a probable cause hearing on Respondent's charge for criminal domestic violence?

## LAW/ANALYSIS

In general, magistrates have criminal jurisdiction "of all offenses which may be subject to the penalties of either fine or forfeiture not exceeding five hundred dollars or imprisonment in the jail or workhouse not exceeding thirty days." S.C. Code Ann. § 22-3-550 (2007). For crimes outside magistrates' jurisdiction, magistrates are authorized to conduct a preliminary examination. *See* Rule 2, SCRCrimP ("Any defendant charged with a crime not triable by a magistrate shall be brought before a magistrate and shall be given notice of his right to a preliminary hearing."). The purpose of a preliminary examination is to determine whether probable cause exists to believe that the defendant committed the crime and to warrant the defendant's subsequent trial. 12 S.C. JURISPRUDENCE *Magistrates and Municipal Judges* § 31.

Nevertheless, for those matters within magistrates' jurisdiction, preliminary determinations of probable cause are not authorized by statute. Indeed, South Carolina law requires that all magistrate proceedings "shall be summary or with only such delay as a fair and just examination of the case requires." S.C. Code Ann. § 22-3-730 (2007).

In the present case, Respondent was charged with criminal domestic violence, first offense, pursuant to Section 16-25-20 of the South Carolina Code, which provides that the offense "must be tried in summary court." S.C. Code Ann. § 16-25-20 (2007). Prior to ruling on the merits, the magistrate found that Section 22-5-710 of the South Carolina Code gave him the authority to hold preliminary examinations in criminal cases. *See* S.C. Code Ann. § 22-5-710 (2008). We disagree, and hold that the magistrate did not have the authority to hold a preliminary hearing in this matter.

Section 22-5-710, relied upon by the magistrate, grants "magistrates in counties where a county court has been established" the authority to conduct a preliminary hearing "as is provided by law in criminal cases beyond the jurisdiction of magistrates." *Id.* This section is inapplicable because South Carolina no longer uses a county court system. However, even if we were to assume that the magistrate intended to rely upon the authority granted him by Section 22-5-320, which empowers magistrates to conduct preliminary hearings upon the motion of the defendant on matters beyond their jurisdiction, we must find that the magistrate exceeded his authority. *See* S.C. Code Ann. § 22-5-320 (2008). The CDV charge was within the magistrate's jurisdiction, and we find there is no authority for the proposition that magistrates are authorized to conduct preliminary hearings on matters within their own trial jurisdiction. To hold otherwise would undermine the summary nature of magistrate proceedings and unduly expand magistrate dockets.

Accordingly, we hold that the magistrate judge should have declined Respondent's request for a probable cause hearing and instead brought the charge to trial for summary disposition. The trial court therefore erred in considering the merits of the probable cause inquiry and affirming the magistrate.

## CONCLUSION

For the foregoing reasons, we hereby reverse and remand this case to the magistrate for summary disposition.

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Jennifer Marie Harris, Appellant,

v.

Anderson County Sheriff's Office, Respondent.

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Appeal From Anderson County
James C. Williams, Circuit Court Judge

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Opinion No. 26596
Heard November 5, 2008 – Filed February 9, 2009

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**REVERSED AND REMANDED**

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R. Lawton McIntosh, of McIntosh, Sherard & Sullivan, of Anderson, for Appellant.

Wm. Douglas Gray, of McNair Law Firm, of Anderson, for Respondent.

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**JUSTICE KITTREDGE:** This appeal requires the Court to construe section 47-3-110 of the South Carolina Code (1987), the so-called dog bite statute. The narrow question before us is the meaning of the term "or" in section 47-3-110. The broader question requires us

to discern the degree, if any, to which the Legislature retained the application of common law principles in section 47-3-110.

In construing the term "or" consistent with its common understanding as a disjunctive, we hold section 47-3-110 allows a plaintiff to pursue a statutory claim against the owner of the dog "or other person having the dog in his care or keeping." Because of the plain language in this statute, we conclude that the Legislature intended to allow a claim against the owner of the dog when another person has the dog in his care or keeping. Moreover, in light of the trial court's determination that statutory liability against a dog owner fundamentally rests on negligence concepts, we address the common law remnant retained in section 47-3-110. For the reasons set forth below, we reverse the grant of summary judgment to the Anderson County Sheriff's Office and remand for trial.

## I.

Deputy Todd Caron of the Anderson County Sheriff's Office kenneled his police dog (Sleuber) at the Happistance Veterinary Clinic (clinic) in Townville, South Carolina, while he was on vacation. Sleuber had a recent history of multiple unprovoked attacks, a history well known to Deputy Caron and the sheriff's office. Jennifer Harris worked at the clinic as a veterinary assistant. While kenneled at the clinic, Sleuber attacked Harris, severely injuring her. It is undisputed that Harris did not provoke the attack.

Harris pursued workers' compensation benefits from her employer, the clinic. Harris subsequently filed this lawsuit against the sheriff's office, asserting claims under section 47-3-110 and negligence. Cross-motions for summary judgment were filed. The circuit court focused on the statutory claim and, with respect to a dog owner's liability, read negligence principles into the statute. The circuit court reasoned that the sheriff's office was no longer in control of its police dog (and should not be held responsible) once care of the dog was relinquished to the clinic. In granting the sheriff's office

summary judgment, the circuit court held that when a dog owner leaves his dog in the care of another, section 47-3-110 only permits a claim against the "other person having the dog in his care or keeping." Harris appealed, and we granted Rule 204(b), SCACR, certification.

## II.

Summary judgment is governed by Rule 56, SCRCP. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Our review is plenary, however, for we are presented with a question of statutory interpretation. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

## III.

### A.

We begin our analysis with this Court's decision in *Hossenlopp v. Cannon*, 285 S.C. 367, 329 S.E.2d 438 (1985). In *Hossenlopp*, the Court was presented with a common law negligence claim arising from injuries caused by a dog. At the time, South Carolina adhered to what was commonly referred to as the "one free bite" rule. The "one free bite" rule imposed common law liability against a dog owner only when the owner knew or should have known of the dog's vicious propensities, that is, there was no liability for the first bite. In *Hossenlopp*, under our policy making role in the common law, we rejected the "one free bite" rule and imposed quasi-strict liability on dog owners by adopting the "California Rule" for dog bite liability. This shift in the common law is reflected in the *Hossenlopp* Court's adoption of the following jury instruction:

> The law of California provides that the owner of any dog which bites a person while such person is on or in a public place or is lawfully on or in a private place, including the property of the owner of such dog, is liable for such damages as may be suffered by the person bitten regardless

> of whether or not the dog previously had been vicious, regardless of the owner's knowledge or lack of knowledge of any such viciousness, and regardless of whether or not the owner has been negligent in respect to the dog, provided, however, that if a person knowingly and voluntarily invites attack upon himself [herself], or if, when on the property of the dog owner, a person voluntarily, knowingly, and without reasonable necessity, exposes himself [herself] to the danger, the owner of the dog is not liable for the consequences.

*Id.* at 372, 329 S.E.2d at 441.

*Hossenlopp* represents the last time the Court addressed a dog bite case in a purely common law setting. The following year, 1986, the Legislature enacted section 47-3-110:

> Whenever any person is bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, including the property of the owner of the dog or other person having the dog in his care or keeping, the owner of the dog or other person having the dog in his care or keeping is liable for the damages suffered . . . . If a person provokes a dog into attacking him then the owner of the dog is not liable.

Section 47-3-110 was enacted in response to *Hossenlopp*. This transition from the common law to the statutory setting, of course, restricts our policy making role and concomitantly requires this Court to discern legislative intent. The juxtaposition of *Hossenlopp* to section 47-3-110 does, however, provide a strong frame of reference for ascertaining legislative intent. Section 47-3-110 retained *Hossenlopp*'s strict liability against dog owners and additionally imposed liability on any other persons having the dog in their "care or keeping."

**B.**

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [L]egislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008). The Legislature unmistakably adopted a strict liability approach for injuries caused by dogs, save the situation when the injured party provoked the attack. Traditional principles of statutory construction bolster this interpretation.

In light of the remedial nature of the statute, and its plain language, we find the Legislature intended the word "or" in accordance with its common, disjunctive usage. *Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) (noting that the use of the word "or" in a statute "is a disjunctive particle that marks an alternative"); *see also Rollison*, 378 S.C. at 609, 663 S.E.2d at 488 (observing that "'[a] statute remedial in nature should be liberally construed in order to accomplish the object[ive] sought'" (quoting *Inabinet v. Royal Exch. Assurance of London*, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932))).

To construe the term "or" in an atypical manner, limiting the statutory claim of Harris to the clinic, would be inconsistent with the remedial and strict liability underpinnings of the statute. With the singular exception for the circumstance where the injured person provokes the attack, the Legislature has chosen to impose strict liability against dog owners and others having "the dog in [their] care or keeping." § 47-3-110 ("[T]he owner of the dog or other person having the dog in his care or keeping is liable for the damages suffered . . . .").

Strict liability is a policy decision to impose liability regardless of fault. Relieving the dog owner of liability where the dog was in the care or keeping of another would be contrary to the statutory language and run counter to the manifest legislative intent of strict liability.

Given the unambiguous language, allowing a plaintiff to sue either the owner of the dog or the party who assumes the care or keeping of the dog is entirely consistent with a logical construction of section 47-3-110. *Investor Premium Corp. v. S.C. Tax Comm'n*, 260 S.C. 13, 20, 193 S.E.2d 642, 645 (1973) (setting forth the Court's function in discerning legislative intent to interpret words in a statute in a way that both gives meaning to the use of the word and is logical).

The use of the term "or" in section 47-3-110 does not mandate a forced selection for an injured party. With the one exception noted in the statute, the owner of the dog is subject to liability for injuries caused by his dog. Where the person is injured while the dog is in the care or keeping of someone who is not the dog's owner, the injured party may pursue a statutory claim against the owner of the dog or the other person having the dog in his care or keeping.

**C.**

The dog owner posits two basic arguments to sustain the grant of summary judgment in its favor. First, we are asked to adopt the reasoning of the circuit court which overlaid negligence principles on section 47-3-110's imposition of liability on a dog owner. The circuit court essentially found that the dog owner was no longer in control (and hence not at-fault) once the dog was left at the veterinary clinic. While the statute does implicate considerations of control with respect to the "other person having the dog in his care or keeping," there is no such limitation with respect to the dog owner. Imposing a control requirement or other negligence principles by judicial fiat on the dog owner would impose requirements nowhere found in the statute.[1]

[1] One rule of statutory construction allows the Court to deviate from a statute's plain language when the result would be so patently absurd that it is clear that the Legislature could not have intended such a result. *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning, when to accept it would lead to a result so plainly absurd that it could

Second, the dog owner invites the Court, on policy grounds, to create a "kennel worker exception," and preclude that class of people from asserting statutory strict liability claims against a dog owner. *See Priebe v. Nelson*, 140 P.3d 848, 861 (Cal. 2006) (recognizing a "kennel exception" and precluding a kennel worker from maintaining a claim against the owner of a dog when injured by the dog while in the performance of his duties as a kennel worker). Because we are confronted with a matter of statutory interpretation, such policy decisions rest exclusively in the Legislature. We are constrained therefore to decline the invitation to create a policy exception to section 47-3-110. Similarly, we acknowledge that application of section 47-3-110's strict liability against dog owners may appear harsh and have unintended consequences. But again, such concerns now lie in the Legislature.

**D.**

Because of the dog owner's reliance on, and the trial court's acceptance of, negligence principles to determine statutory liability against a dog owner, we address the limited interplay between section 47-3-110 and the common law. We broach this subject for the benefit of the bench and bar, as some adhere to the belief that section 47-3-110 liability against a dog owner incorporates negligence principles. This belief, while erroneous, is understandable in light of the statutorily

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not possibly have been intended by the Legislature, or would defeat the plain legislative intention; and if possible will construe the statute so as to escape the absurdity and carry the intention into effect." (quoting *Stackhouse v. Rowland*, 86 S.C. 419, 422, 68 S.E. 561, 562 (1910))). While we may be concerned with the unintended consequences of applying the clear meaning of section 47-3-110 in every conceivable circumstance, such concerns in this case fall far short of an absurdity that would warrant applying this rule of statutory construction. We decline to construe the statute in a manner to shield this dog owner from liability, for the imposition of strict liability under section 47-3-110 reflects a permissible policy determination of the Legislature.

imposed liability against those who undertake to provide the care or keeping of a dog.

The Legislature's use of the phrase "care or keeping" clearly requires that the "other person" act in a manner which manifests an acceptance of responsibility for the care or keeping of the dog. To this degree, the Legislature retained the common law principle of duty in determining the liability of the "other person." An example of this relationship between section 47-3-110 and the common law is illustrated in the case of *Nesbitt v. Lewis*, 335 S.C. 441, 517 S.E.2d 11 (Ct. App. 1999).

*Nesbitt* involved an unprovoked attack by dogs on a child who was lawfully on private property. The property was owned by three persons, a mother and her two adult children, a son and a daughter. The mother owned the dogs, and she lived on the property with her son. The mother was liable under the statute simply as a result of owning the dogs. The added feature of owning the property and exercising control over the premises, in tandem with providing the care and keeping of the dogs, was a further basis on which to impose liability against the mother.

The son was liable under the statute as a property owner who exercised control over the premises. As concerns the statutory element of "care or keeping," the son "lived with [his mother] at the time of the attack and . . . tended [to] the dogs, taking them to the veterinarian, feeding them, and playing with them on occasion." *Id.* at 446, 517 S.E.2d at 14.

The daughter was the third property owner. She "had lived elsewhere for over five years." The daughter "did not take care of the dogs . . . [and she did] not exercise control over the premises . . . ." *Id.* The *Nesbitt* court reversed a jury verdict against the daughter, noting that the "evidence precludes a finding that [she] owned the dogs or had them in her care or keeping." *Id.* at 447, 517 S.E.2d at 14. The daughter was not liable under the statute for the dog attack, for "she lacked possession and control over [her mother's] house and the dogs."

*Id.* at 446, 517 S.E.2d at 14. In short, the daughter owed no duty of care to the injured party. The *Nesbitt* court correctly invoked common law concepts in analyzing and determining the liability of a property owner who does not own the dog which caused the injury.

*Nesbitt*, thus, presents three scenarios under section 47-3-110 when the attack is unprovoked and the injured party is lawfully on the premises. First, the dog owner is strictly liable and common law principles are not implicated. Second, a property owner is liable when he exercises control over, and assumes responsibility for, the care and keeping of the dog. Third, a property owner is not liable under the statute when he has no control of the premises and provides no care or keeping of the dog. It is the presence or absence of a duty that determines liability in the latter two situations that involve a statutory claim against the "other person having the dog in his care or keeping." To this degree, section 47-3-110 implicates the common law.[2] Our Legislature has spoken clearly in section 47-3-110 that, as concerns a dog owner's liability, negligence principles in general and fault in particular have no place.

**E.**

We recognize there remain unanswered questions concerning section 47-3-110. Merely by way of example, we can envision questions arising with regard to principles of indemnification and third party practice under Rule 14, SCRCP. We leave these questions for another day.

**IV.**

Construing the language of section 47-3-110, and discerning legislative intent, we hold that a person injured by a dog may pursue a

[2] We do not suggest that the "other person" for section 47-3-110 purposes must always be a property owner. There may well be circumstances where a person (who is not the dog owner) has the care or keeping of a dog and property ownership is not relevant.

claim against the owner of the dog when the injury occurs while the dog is in the care or keeping of another. The Legislature has made a policy decision to hold dog owners strictly liable when the dog bites or otherwise attacks a person who is lawfully on the premises, except when the injured person provoked the attack. The Legislature has further statutorily imposed liability on those who assume the care or keeping of a dog. The grant of summary judgment in favor of the Anderson County Sheriff's Office is reversed and the matter is remanded to the circuit court for trial.

**REVERSED AND REMANDED.**

**TOAL, C.J., WALLER and BEATTY, JJ., concur. PLEICONES, J., concurs in the holding.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of Former
Calhoun Falls Municipal Court
Judge Clinton J. Hall, II, Respondent.

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Opinion No. 26597
Heard January 21, 2009 – Filed February 9, 2009

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**PUBLIC REPRIMAND**

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Senior Assistant Attorney General James G. Bogle, Jr., of Columbia, for Commission on Judicial Conduct.

Clinton H. Hall, II, of Due West, pro se Respondent.

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**PER CURIAM:** In this judicial disciplinary matter, the Commission on Judicial Conduct (the Commission) instituted this proceeding against then Calhoun Falls municipal court judge Clinton J. Hall, II (Respondent). We find the imposition of a public reprimand is warranted.

## FACTS

The Commission notified Respondent on April 4, 2008 that formal charges had been filed against him pursuant to the Rules for Judicial Disciplinary Enforcement (RJDE) found in Rule 502 of the South Carolina

Appellate Court Rules (SCACR). The charges stemmed from the alleged failure of Respondent to meet his continuing legal education (CLE) obligations under Rule 510, SCACR, to timely file the required annual CLE reports, and to petition this Court for reinstatement (following his suspension) before resuming his judicial duties. Respondent filed a response to the charges.

A hearing was held before a panel of the Commission on July 14, 2008, and a Panel Report was issued on August 28, 2008. The panel recommended that Respondent receive a public reprimand and that he be required to pay the costs of these proceedings.[1] In addition, the panel recommended that Respondent be barred from future judicial service until he receives explicit written permission from this Court to serve.

By letter dated September 11, 2008, the Commission forwarded the Panel Report and the record to this Court. Neither Disciplinary Counsel nor Respondent has filed any exceptions to the Panel Report and the matter is before the Court based on the record of the proceedings in this case.

## LAW

After a review of the record of the proceedings in this matter, we find that by his conduct, Respondent has violated the following provisions of the Code of Judicial Conduct contained in Rule 501, SCACR: Canon 1 (upholding the integrity and independence of the Judiciary); Canon 1A (stating a judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards); Canon 2 (avoiding impropriety and the appearance of impropriety); Canon 2A (respecting and complying with the law); Canon 3B(2) (exhibiting faithfulness to the law); Canon 3B(8) (disposing of all judicial matters promptly, efficiently, and fairly); and Canon 3C(1) (diligently discharging

[1] When a judge no longer holds judicial office, a public reprimand is the most severe sanction this Court may impose. In re Koulpasis, 376 S.C. 496, 657 S.E.2d 759 (2008).

judge's administrative responsibilities and cooperating with other judges and court officials).

In addition, we find Respondent has violated the following provisions of the RJDE contained in Rule 502, SCACR: Rule 7(a)(1) (violating or attempting to violate the Code of Judicial Conduct or the Rules of Professional Conduct or any other applicable ethics codes); Rule 7(a)(2) (willfully violating a valid order of the Supreme Court, the Commission, or the panels of the Commission or willfully failing to respond or appear as required); Rule 7(a)(4) (persistently failing to perform judicial duties or persistently performing judicial duties in an incompetent or neglectful manner); Rule 7(a)(7) (willfully violating a valid court order); and Rule 7(a)(9) (violating the Judge's Oath of Office).

## CONCLUSION

Respondent shall not apply for, seek, or accept any judicial position whatsoever in this State without the prior written authorization of this Court after due service on the Office of Disciplinary Counsel of any petition seeking the Court's authorization. Respondent is hereby reprimanded for his misconduct and is ordered to pay the costs of these proceedings.

**PUBLIC REPRIMAND.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of John L. Drennan, Respondent.

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Opinion No. 26598
Submitted December 29, 2008 – Filed February 9, 2009

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**DEFINITE SUSPENSION**

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

Grover C. Seaton, III, of Moncks Corner, for respondent.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) 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 any sanction up to a definite suspension from the practice of law between nine (9) months to one (1) year. See Rule 7, RLDE, Rule 413, SCACR. We accept the Agreement and suspend respondent from the practice of law for nine (9) months with conditions for the misconduct reported in the Agreement. The facts, as set forth in the Agreement, are as follows.

## FACTS

On or about December 8, 2007, the Mount Pleasant Police Department arrested respondent for possession of a cocaine substance.[1] Respondent admits that he in fact had possession of the cocaine in his vehicle at the time of his arrest. Respondent admits he has a substance abuse problem and, further, that substance abuse is a serious problem which impacts all aspects of his life, including his fitness to practice law.

Respondent represents he has undergone and completed in-patient counseling for substance abuse and has signed a contract with Lawyers Helping Lawyers for continuing assistance in dealing with his substance abuse. Respondent represents he completed Pretrial Intervention and the charges arising out of his December 8, 2007 arrest have been dismissed.

## LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct), Rule 8.4(b) (lawyer shall not commit criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness to practice law in other respects), Rule 8.4(c) (lawyer shall not commit criminal act involving moral turpitude), and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice).

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[1] On December 19, 2007, the Court placed respondent on interim suspension. In the Matter of Drennan, (S.C. Sup. Ct. dated December 19, 2007) (Shearouse Adv. Sh. No. 43 at 55).

## CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine (9) months for his possession and use of cocaine. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct for the investigation and prosecution of this matter. Further, as set forth in the Agreement, should respondent be reinstated to the practice of law, he shall maintain his contract with Lawyers Helping Lawyers and agree to drug monitoring, both for a period of not less than two (2) years. Within fifteen 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, RLDE, Rule 413, SCACR.

**DEFINITE SUSPENSION.**

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

**IN THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of Charles N. Pearman, Respondent.

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Opinion No. 26599
Submitted December 29, 2008 – Filed February 9, 2009

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**DEFINITE SUSPENSION**

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Attorney General Henry D. McMaster and James G. Bogle, Jr., Senior Assistant Attorney General, both of Columbia, for Special Prosecutor.

Michael J. Virzi, of Columbia, for respondent.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Special Prosecutor have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed two (2) years. See Rule 7(b), RLDE, Rule 413, SCACR. Respondent requests the suspension be made retroactive to the date of his interim

suspension.[1] We accept the Agreement and impose a definite suspension of two (2) years. Because of the serious nature of respondent's misconduct, we deny respondent's request to make the suspension retroactive to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

## FACTS

On or about November 2, 2006, respondent was arrested in Richland County for the crime of soliciting prostitution in violation of S.C. Code Ann. § 16-15-90 and § 16-15-100 (2003). The warrant alleged respondent met with an undercover South Carolina Law Enforcement Division (SLED) agent posing as a prostitute and solicited the undercover agent for sex.

As a result of the same occurrences, respondent was also arrested on November 2, 2006 in Richland County for impersonating a law enforcement agent in violation of S.C. Code Ann. § 16-17-720 (2003). The warrant alleged that, during the encounter with the undercover SLED agent who was posing as a prostitute, respondent verbally identified himself as a SLED agent by presenting a badge and stating he was a SLED agent. At the time of the arrests, respondent was employed on a full-time basis as an attorney with the Office of Disciplinary Counsel and the badge he presented to the undercover SLED agent was his Disciplinary Counsel badge.

Respondent admits that, during his conversation with the undercover SLED agent, he made statements that she reasonably understood to be soliciting prostitution, even though he did not offer money but, instead, used words that reasonably represented an arrangement had been made by respondent's friend in the escort service business which would allow for sexual activity without payment. Respondent also acknowledges that, during the encounter with the

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[1] On November 3, 2006, respondent was placed on interim suspension. In the Matter of Pearman, 371 S.C. 19, 637 S.E.2d 309 (2006).

undercover SLED agent, he stated he had overheard information regarding investigations into prostitution activity while he was at SLED and stated that he might be able to provide information regarding future prostitution investigations. Respondent admits that the statements concerning his ability to inform about future prostitution investigations were false; the Special Prosecutor has no evidence to establish otherwise. Respondent further admits that, during the exchange with the undercover SLED agent, he identified himself as a "SLED agent" and, upon her inquiry as to what "SLED" meant, he responded "State Law Enforcement Division" or words to that effect.

The responsibility for prosecuting respondent for these crimes was transferred to the Solicitor's Office of the Sixth Judicial Circuit. Respondent was allowed to enter the Pre-Trial Intervention Program and he completed that program on or about September 8, 2008.

## LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(5) (lawyer shall not 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); and Rule 7(a)(6) (lawyer shall not violate the oath of office taken upon admission to practice law in this State). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for 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(c) (it is professional misconduct for lawyer to commit a criminal act involving moral turpitude); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); Rule 8.4(e) (it

is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice); and Rule 8.4(f) (it is professional misconduct for lawyer to state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law).

## CONCLUSION

We accept the Agreement for Discipline by Consent and impose a definite suspension of two (2) years. Within fifteen 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, RLDE, Rule 413, SCACR.

**DEFINITE SUSPENSION.**

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

**IN THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of Arthur C. McFarland, Respondent.

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Opinion No. 26600
Submitted December 29, 2008 – Filed February 9, 2009

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# PUBLIC REPRIMAND

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

Arthur C. McFarland, of Charleston, pro se.

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**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 either an admonition or public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

## FACTS

### Matter I

In November 2000, respondent was retained by Complainant A to clear title to property on Complainant A's behalf.

Complainant A paid respondent $1,000.00 to begin the process; however, respondent maintains the retainer fee was actually $1,500.00.

Respondent represents he met with Complainant A to outline the steps necessary to clear title to the property. He further represents that he prepared a complaint. In April 2003, Complainant A terminated respondent's service. As of that date, respondent had not filed the complaint.

At times during the course of respondent's representation, respondent failed to return Complainant A's telephone calls. Respondent further failed to promptly return Complainant A's file as requested after the representation had been terminated.

Matter II

In February 2005, Complainant B consulted with respondent regarding the filing of a civil case on his behalf. Respondent agreed to review materials in Complainant B's case to determine whether he would accept representation in the matter. During the course of respondent's consultation with Complainant B, respondent received $1,000.00 from Complainant B to conduct some legal research. Respondent decided not to proceed with the legal research, but failed to promptly return Complainant's $1,000.00 fee.

In June 2005, Complainant B retained respondent to handle a motor vehicle accident claim on his behalf. In July 2005, respondent notified the insurance company he represented Complainant B.

Other than a review of Complainant B's medical records, respondent conducted no other meaningful work in the case. In February 2007, Complainant B terminated respondent's representation in the motor vehicle accident matter and requested respondent forward the client file to his new lawyer. Respondent failed to promptly forward Complainant B's file as requested. Once he did forward the file, only ten (10) days remained before expiration of the statute of limitations. Respondent maintains it was his intention to file a suit

prior to the expiration of the statute of limitations. Respondent agrees he failed to keep Complainant B reasonably informed about the status of the motor vehicle accident case.

Matter III

In January 2007, respondent was retained to partition property on behalf of Complainant C and two other clients. On March 21, 2007, respondent filed suit in the action. Service of the pleadings was not completed until August 21, 2007. Respondent represents that a miscommunication between respondent and his legal assistant led to the delay in service of the pleadings.

For a period of over four months, respondent failed to return Complainant C's telephone calls or keep Complainant C and the other two clients reasonably informed regarding the status of their case. Both respondent and Complainant C represent that communications between them have improved.

## LAW

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 admits that by his misconduct he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall abide by client's decision concerning objectives of representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall promptly respond to reasonable requests for information); Rule 1.15 (lawyer shall safe keep client property); and Rule 8.4(e) (lawyer shall not engage in conduct prejudicial to the administration of justice).

## CONCLUSION

We find that respondent's misconduct warrants a public reprimand.[1] Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

**PUBLIC REPRIMAND.**

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

[1] Respondent previously received a public reprimand. In the Matter of McFarland, 360 S.C. 101, 600 S.E.2d 537 (2004). In addition, he received an admonition in 2001 and a private reprimand in 1996. As permitted by Rule 7(b)(5), RLDE, we have considered the admonition and private reprimand solely upon the issue of determining the proper sanction in the current matter.

# The Supreme Court of South Carolina

| | |
|---|---|
| Thomas R. Wieters, M.D., | Petitioner, |
| v. | |
| Bon-Secours-St. Francis Xavier Hospital, Inc., Allen P. Carroll, William B. Ellison, Jr., Jeffrey M. Deal, M.D., Sharron C. Kelley, and Esther Lerman Freeman, Psy. D., | Defendants, |
| of whom Bon-Secours-St. Francis Xavier Hospital, Allen P. Carroll, William B. Ellison, Jr., Jeffrey M. Deal, M.D., and Sharron C. Kelley are | Respondents. |

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ORDER

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This matter is before the Court by way of a petition for a writ of certiorari to review the Court of Appeals' decision in Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 378 S.C. 160, 662 S.E.2d 430 (Ct. App. 2008). The petition for a writ of certiorari is denied because the order on appeal is not immediately appealable. See Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 582 S.E.2d 405 (2003) (holding an order compelling discovery is not immediately appealable even if it is challenged as violating

the attorney-client privilege); Waddell v. Kahdy, 309 S.C. 1, 419 S.E.2d 783 (1992) (explaining an order requiring a party to submit to a deposition is not immediately appealable); Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) (applying the same rule to a non-party); see also McGee v. Bruce Hosp. Sys., 312 S.C. 58, 439 S.E.2d 257 (1993) (reviewing a pre-trial discovery order pursuant to a petition for a common law writ of certiorari). We therefore vacate the Court of Appeals' opinion.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

February 4, 2009

# The Supreme Court of South Carolina

In re: Amendments to the South Carolina Rules of Civil Procedure

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O R D E R

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By Order dated May 1, 2008, the Court amended Rule 33(b), SCRCP, pursuant to a request from the South Carolina Bar. The amendment added an eighth standard interrogatory, and renumbered subsection (b)(8) as subsection (b)(9). However, the first sentence of Rule 33(a) incorrectly refers to former subsection (b)(8), rather than subsection (b)(9).

Therefore, pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 33(a), SCRCP, as set forth in the attachment to this Order. This order is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
February 5, 2009

## RULE 33
## INTERROGATORIES TO PARTIES

**(a) Availability; Procedures for Use.** Except as limited by paragraph (b)(9), any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

. . . .

# The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

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O R D E R

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Pursuant to Act No. 361, 2008 S.C. Acts 3623, the Legislature transferred the South Carolina Children's Code from S.C. Code Ann. § 20-7-10 et seq. to a new title in the Code, Title 63. There are several references to the former sections within the South Carolina Appellate Court Rules which, based on the amendments, are now incorrect. Furthermore, Rule 608 incorrectly refers to the South Carolina Administrative Law Court as the South Carolina Administrative Law Division. S.C. Code Ann. § 1-23-500 (Supp. 2008) ("There is created the South Carolina Administrative Law Court, which is an agency and a court of record within the executive branch of the government of this State.").

Therefore, pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rules 225, 608, and Canon 3, Rule 501, SCACR, as set forth in the attachment to this Order, to cite to the correct code sections and to refer to the proper nomenclature for the South Carolina Administrative Law Court. This order is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

February 5, 2009

## RULE 225
## STAY AND SUPERSEDEAS IN CIVIL ACTIONS

. . .

**(b) Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:

. . .

**(6)** Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. § 63-3-630.

. . .

**(9)** Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. § 63-3-530(A)(2).

. . . .

## Rule 608
## Appointment of Lawyers for Indigents

. . .

**(d) Active Members Who Are Exempt From Appointment.**

. . .

**(1)** The following active members shall be exempt from appointment:

. . .

**(E)** Members who are employed by the South Carolina Administrative Law Court or by any Federal Administrative Law Judge if those members do not engage in the private practice of law.

. . .

**(g) Minimizing Appointments.**

. . .

**(3)** When available, the circuit and family courts should consider using non-lawyers as GALs. The family court in each county is expected to encourage and support the South Carolina Guardian Ad Litem Program, S.C. Code Ann. §§ 63-11-500 to -570. Effective use of this program will further reduce the burden placed on lawyers while insuring that competent GALs are provided for children in abuse and neglect cases.

. . . .

**Rule 501, SCACR**

## CANON 3

## A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

. . .

Commentary:

. . .

Examples when an *ex parte* communication may be expressly authorized by law include the issuance of a temporary restraining order under certain limited circumstances [Rule 65(b), SCRCP], the issuance of a writ of supersedeas under exigent circumstances [Rule 225(d)(6), SCACR], the determination of fees and expenses for indigent capital defendants [S.C. Code Ann. § 16-3-26 (Supp. 1995)], the issuance of temporary orders related to child custody and support where conditions warrant [S.C. Code Ann. § 63-17-390 (Supp. 2008)], and the issuance of a seizure order regarding delinquent insurers [S.C. Code Ann. § 38-27-220 (Supp. 1995)].

. . . .

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Ricky C. Pelzer, Respondent,

v.

State of South Carolina, Petitioner.

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Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

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Opinion No. 4457
Heard October 22, 2008 – Filed November 18, 2008
Withdrawn, Substituted, and Refiled February 3, 2009

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**REVERSED**

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Assistant Attorney General Brian T. Petrano, of Columbia, for Petitioner.

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Respondent.

**CURETON, A.J.:** Following a grant of post-conviction relief (PCR), the State petitioned for and received a writ of certiorari. The State now argues the PCR court erred in finding Ricky C. Pelzer's plea counsel was ineffective and in granting Pelzer relief from one part of a negotiated guilty plea but leaving the rest of the plea intact. We reverse.

## FACTS

In March 2001, after six years of cohabitation resulting in the birth of two children, Diana Gibbs required Ricky Pelzer leave their home. On April 20, 2001, Gibbs obtained a restraining order against Pelzer. In the early hours of May 6, 2001, Pelzer, carrying a can of gasoline, went to the home where Gibbs and two of her children were sleeping. When Gibbs refused to let him in, Pelzer forced the door open. Gibbs and the children ran out the back door. Pelzer followed them into the front yard, where he attacked Gibbs. After Gibbs's son pulled Pelzer off Gibbs, Pelzer returned to the house. Threatening to burn the house, Pelzer doused the inside of the home with gasoline and began ingesting gasoline himself. Gibbs called the police from a neighbor's house. The police eventually took Pelzer into custody and drove him to a hospital, where he was successfully treated for gasoline ingestion.

Pelzer was charged with first-degree burglary, attempted second-degree arson, criminal domestic violence of a high and aggravated nature (CDVHAN), and violation of a family court restraining order. An attorney was appointed to represent him. After extensive negotiations between Attorney and the State, Pelzer pled guilty to the lesser included offense of second-degree burglary and the original charges of attempted second-degree arson and violation of a family court restraining order. The State nolle-

prossed the CDVHAN charge. In accordance with the negotiated deal, the circuit court sentenced Pelzer to a total of fifteen years' imprisonment.[1]

Pelzer later learned of attempt to burn, a statutory offense similar to the charged offense of attempted arson. Attempt to burn carried a shorter sentence than attempted arson. Pelzer then filed an application for PCR, arguing in his petition that his plea counsel was ineffective because she failed to apprise him of attempt to burn, which carried only a five-year sentence. The attorney testified at the PCR hearing that she did not recall discussing that statute with Pelzer. The PCR court granted Pelzer's application. The State petitioned for a writ of certiorari, which was granted.

## STANDARD OF REVIEW

In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). Thus, an appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

## LAW/ANALYSIS

The State argues the PCR court erred in finding Pelzer's plea counsel was ineffective for failing to advise him of the attempt-to-burn statute. We agree.

A two-prong test exists to evaluate claims of ineffective assistance of counsel. First, a defendant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Bennett v. State, 371 S.C. 198, 203, 638 S.E.2d 673, 675 (2006) (citing Strickland v. Washington, 466 U.S. 668 (1984)). Secondly, a defendant must establish "a reasonable probability that, but for counsel's unprofessional

[1] This sentence included fifteen years each for the burglary and arson charges and thirty days for violating the family court's restraining order, all to be served concurrently.

errors, the result of the proceeding would have been different." Bennett, 371 S.C. at 203, 638 S.E.2d at 675. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700.

Trial counsel must provide "reasonably effective assistance" under "prevailing professional norms." Id. at 687-88. Reviewing courts presume counsel was effective. Id. at 690. Therefore, to receive relief, the applicant must show (1) counsel departed from professional norms resulting in (2) prejudice. Id. at 690, 693. Trial counsel's failure to apprise the accused of a lesser included offense constitutes deficient performance when, under the facts of the case, he could be convicted of the lesser offense. Kerrigan v. State, 304 S.C. 561, 563, 406 S.E.2d 160, 162 (1991). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

"Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial." Bennett, 371 S.C. at 203-04, 638 S.E.2d at 675. In resolving PCR issues relating to guilty pleas, it is proper to consider the guilty plea transcript as well as the evidence at the PCR hearing. Id. at 204, 638 S.E.2d at 675.

First-degree burglary is punishable by imprisonment from fifteen years to life. S.C. Code Ann. § 16-11-311 (2003). Second-degree arson is punishable by imprisonment from five to twenty-five years.[2] S.C. Code Ann. § 16-11-110(B) (Supp. 2008). To prove second-degree arson, the State must show the accused willfully and maliciously caused an explosion, set fire to, burned, or caused to be burned, or aided, counseled, or procured the burning that resulted in damage to any structure designed for human occupancy. Id. An attempt to burn is punishable by imprisonment up to five years or a fine of not more than $10,000. S.C. Code Ann. § 16-11-190 (2003). To prove

[2] "A person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense." S.C. Code Ann. § 16-1-80 (2003).

attempt to burn, the State must show the accused willfully and maliciously attempted "to set fire to, burn, or aid, counsel, or procure the burning of any of the buildings or property mentioned in Sections 16-11-110 to 16-11-140," or that the accused committed an act in furtherance of burning these buildings. Id.

First-degree burglary is classified as a most serious offense in South Carolina, while second-degree arson and second-degree burglary are classified as serious offenses. S.C. Code Ann. § 17-25-45 (Supp. 2008). If a person has been convicted of two serious or most serious offenses, he must be sentenced to life imprisonment without parole upon conviction of a third such offense. Id.

"The trial court lacks subject matter jurisdiction to convict the defendant of a crime that is not a lesser included of the offense charged in the indictment." State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000), overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005). For an offense to be a lesser included offense of another, the greater offense must include all the elements of the lesser offense. Id.; accord Blockburger v. U.S., 284 U.S. 299, 304 (1932). "If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997).

The evidence before us supports the PCR court's conclusion Attorney's performance failed the Strickland test for effective assistance of counsel. Attorney's assistance fell below prevailing professional norms for criminal defense counsel when she failed to advise Pelzer that had he gone to trial, he could have been convicted of attempt to burn, a less serious offense than second-degree arson. Although the PCR court did not determine whether attempt to burn was a lesser included offense of attempted second-degree arson, we hold it is. Upon review of the elements of each offense, we find attempted second-degree arson contains all the elements of attempt to burn.[3]

[3] In addition to the elements found in the attempt-to-burn statute, the second-degree arson statute requires property damage and allows culpability for

Therefore, attempt to burn is a lesser included offense of attempted second-degree arson. Given the facts of this case, Attorney's failure to advise Pelzer of this offense fell below prevailing professional norms and was deficient under Strickland.

Having concluded Attorney departed from prevailing professional standards, we now turn to a discussion of whether Pelzer suffered prejudice as a result of Attorney's deficient advice. At the PCR stage, to show prejudice, Pelzer bore the burden of establishing that but for the misadvice of Attorney, he would not have pled guilty, but instead would have elected to go to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

Although the PCR judge found in her order that Pelzer "testified at the hearing that he would not have plead [sic] guilty to the charges had he known that the attempt to burn statute was the applicable statute," we are unable to locate that testimony anywhere in the record. Moreover, the thrust of Pelzer's plea counsel's testimony was that from the outset, the solicitor insisted on trying Pelzer on the original charge of first-degree burglary, which in Pelzer's case carried a mandatory sentence of life without the possibility of parole since Pelzer had a prior conviction of assault and battery with intent to kill. She stated, "[W]e were, from the early outset, working toward a plea," and Pelzer's principal reason for entering into the negotiated plea was to avoid facing trial on the original burglary charge. She stated further that she believed there was "a significant risk that [Pelzer] would be found guilty if he went to trial" on the first-degree burglary charge. Because Pelzer did not want to face the first-degree burglary charge, he requested his plea counsel negotiate the first-degree burglary charge down to second-degree burglary to avoid the possibility of a sentence of life without the possibility of parole.

During the guilty plea colloquy, the plea judge thoroughly discussed with Pelzer his decision to plead guilty and the terms of the negotiated plea. Additionally, as noted previously, at the PCR hearing, Pelzer never testified that he would not have pled guilty except for his plea counsel's error. In fact,

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causing an explosion, apparently as an alternative to burning. § 16-11-110(B).

he specifically testified he did not wish to set aside his guilty plea to the burglary charge. The following colloquy between Pelzer and his PCR attorney is instructive:

> Q. You don't want to try to go back to the beginning and start completely over.
>
> A. No.
>
> Q. Okay.
>
> A. I just want to argue 190.
>
> Q. All you want to argue is that your lawyer was ineffective in allowing you to be sentenced under 110(B) as opposed to arguing that on the facts of this case that you were properly – should have properly been sentenced under 190.
>
> A. That's correct.

In view of this testimony, we conclude the evidence does not demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Consequently, the PCR court erred in finding Pelzer suffered prejudice as a result of his plea counsel's misadvice.

The State also argues the PCR court erred in granting Pelzer relief as to the arson charge, only, without vacating the entire plea. Inasmuch as we have reversed the PCR court on the issue of ineffective assistance of counsel, we do not reach this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

## CONCLUSION

We find the PCR court did not err in finding Pelzer's plea counsel performed deficiently by failing to advise him of the attempt-to-burn statute because attempt-to-burn is a lesser included offense of arson. Nevertheless, we hold Pelzer suffered no prejudice because of this misadvice, because he has not demonstrated that he would not have pled guilty but for the misadvice. Therefore, we reverse the order of the PCR court and reinstate Pelzer's conviction.

We do not reach the issue of whether the PCR court erred in granting Pelzer relief as to the arson charge, only, without vacating the entire guilty plea. Accordingly, the order of the PCR court is

**REVERSED.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

| | |
|---|---|
| Pee Dee Stores, Inc., | Plaintiff, |
| v. | |
| Carolyn H. Doyle, d/b/a Pee Dee Farms Company, and Billy W. Huggins, individually and d/b/a Huggins Farm Service, Inc., | Defendants, |
| of Whom Carolyn H. Doyle, d/b/a Pee Dee Farms Company, and Billy W. Huggins, individually and d/b/a Huggins Farm Service, Inc. are the, | Third-Party Plaintiffs, |
| v. | |
| Helena Chemical Company, | Third-Party Defendant. |
| Pee Dee Stores, Inc., | Plaintiff, |
| v. | |
| Carolyn H. Doyle, d/b/a Pee Dee Farms Company, Defendant, of Whom Carolyn H. Doyle, d/b/a Pee Dee Farms Company is the, | Third-Party Plaintiff, |
| v. | |
| Helena Chemical Company, | Third-Party Defendant, |

of Whom Carolyn H. Doyle, d/b/a Pee Dee Farms Company, and Billy W. Huggins, individually and d/b/a Huggins Farm Service, Inc. are the Appellants

and

Pee Dee Stores, Inc., and Helena Chemical Company are the Respondents.

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

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Opinion No. 4467
Submitted October 8, 2008 – Filed December 12, 2008
Withdrawn, Substituted, and Refiled January 29, 2009

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**REVERSED AND REMANDED**

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Amanda A. Bailey, Esquire, and Henrietta U. Golding, Esquire, of Myrtle Beach; for Appellant.

Douglas M. Zayicek, Esquire, of Myrtle Beach, for Respondent.

**GEATHERS, J.:** Appellant Billy W. Huggins, d/b/a Huggins Farm Service (Huggins), seeks review of an order granting Pee Dee Stores, Inc.'s (Pee Dee Stores) summary judgment motion and motion to compel settlement based on a Settlement Agreement. Huggins asserts that the Settlement Agreement was intended to resolve only the landlord/tenant claims and that his civil conspiracy and unfair trade practices claims against both Pee Dee Stores and Third-Party Defendant Helena Chemical Company (Helena) survived the Settlement Agreement. As such, Huggins alleges that summary judgment was improper because a genuine issue of material fact exists as to whether the parties to the Settlement Agreement intended to extinguish Huggins' claims against Pee Dee Stores and Helena. We reverse.

## FACTUAL/PROCEDURAL BACKGROUND

Pee Dee Stores and Paul E. Doyle, deceased husband of Defendant Carolyn Doyle,[1] d/b/a Pee Dee Farms Company (Doyle), entered into a five-year commercial lease agreement that commenced on March 1, 2000 and was to terminate on February 28, 2005. Doyle used the leased premises to operate a convenience store, gas station, and farm supply retail store. The lease agreement afforded Doyle an option to renew the lease by providing written notice to Pee Dee Stores by December 1, 2004. During the lease term, and pursuant to an agreement with Doyle in late 2003, Huggins began selling farm supplies out of the leased premises in his capacity as a commissioned agent for Helena.[2]

Prior to the termination of the lease, Pee Dee Stores represented to Doyle that the lease term would be extended to allow Doyle until December 1, 2005 to consider the option to renew. In addition, Helena represented to Huggins that it intended to purchase Huggins' farm supply business with all

[1] Carolyn Doyle succeeded to Paul E. Doyle's rights under the lease after his death.

[2] Huggins was not a party to the lease agreement.

of the attached goodwill. At that time, Huggins, Doyle, and Helena began negotiations. Subsequently, and prior to the December 1, 2005 deadline, Doyle notified Pee Dee Stores in writing of her intention to exercise the option to renew the lease. Pee Dee Stores informed Doyle that she could not exercise the option to renew and asked her to vacate the store.

Pee Dee Stores filed an ejectment action against Doyle in magistrate court, asserting a violation of the lease as well as its expiration as grounds for ejectment.[3] Doyle answered the complaint by denying the material allegations and sought a declaratory judgment that she was the legal tenant under the lease and had properly exercised the option to renew. In addition, Pee Dee Stores later filed a separate action for breach of contract against Doyle and Huggins. The complaint also alleged interference with contractual relations and fraud, among other claims.

In response to both the ejectment and breach of contract actions, Doyle and Huggins counterclaimed against Pee Dee Stores seeking monetary damages for issues related to the landlord/tenant relationship. Further, the parties asserted in a Third-Party Complaint against Helena causes of action for negligent misrepresentation, unfair trade practices, civil conspiracy, promissory estoppel, interference with a contract, and interference with a prospective contract. These causes of action were based upon an alleged conspiracy between Helena and Pee Dee Stores to oust Doyle and Huggins from the property in order to enable Helena to rent the leased premises and take over both parties' business goodwill without compensation.

Subsequently, Doyle and Huggins brought a motion to consolidate the ejectment and breach of contract actions. The trial court denied the motion to consolidate, ordering the parties to resolve the issues related to the ejectment action first, after which discovery and trial of the remaining issues would occur.

While both actions were pending, Pee Dee Stores, Doyle, and Huggins entered into a Settlement Agreement, which was subtitled as "Relating Only to All Landlord/Tenant Issues." The record does not indicate which party

[3] This action was subsequently transferred to trial court.

drafted the Settlement Agreement. All three parties signed the Settlement Agreement. The pertinent provisions of the Settlement Agreement are as follows:

> 7. The parties shall forever release each other from all claims and/or issues, whenever arising, with each agreeing they will never sue or involve each other in any litigation involving the premises, the store, any business on the premises, and/or the relationship between the Parties, as follows: **(1) the Parties agree this is a full and complete release of all claims known and unknown, between Pee Dee Stores, Inc. and Carolyn Doyle, d/b/a Pee Dee Farms Company; and (2) the Parties agree this is a full and complete release of all landlord/tenant claims and issues, known or unknown, between the Parties.**
>
> 8. **Nothing in this agreement shall be construed as in any way effecting [sic] the rights of Billy W. Huggins and/or Huggins Farm Service, Inc. to assert claims against Helena Chemical Company. Nothing in this agreement shall be construed as in any way effecting [sic] the rights of Billy W. Huggins and/or Huggins Farm Service, Inc. to assert claims against Pee Dee Stores, Inc. for claims other than the landlord/tenant claims. Nothing herein shall be construed as a relinquishment**, waiver, discharge or release of any claims by Billy W. Huggins and/or Huggins Farm Services, Inc. against Pee Dee Stores, Inc., **for any claims other than the landlord/tenant claims**.
>
> . . .

> 10. Pee Dee Stores, Inc. and Carolyn Doyle d/b/a Pee Dee Farms Company agree to dismiss all claims against each other, with prejudice, and Pee Dee Stores, Inc. and Billy W. Huggins, individually and Huggins Farm Service, Inc., agree to dismiss **only the** landlord/tenant claims with prejudice.

(emphasis added).

Pee Dee Stores later moved to enforce the Settlement Agreement. Subsequently, Doyle and Huggins moved to amend their pleadings to remove all of the landlord/tenant claims against Pee Dee Stores that were resolved by the Settlement Agreement, including the declaratory judgment, breach of lease, and negligent misrepresentation claims. Huggins proposed to leave intact the civil conspiracy and unfair trade practices claims against Pee Dee Stores and Helena. Pee Dee Stores also moved to amend its pleadings to reflect the Settlement Agreement and moved for summary judgment.

At the hearing on the various motions, counsel for Pee Dee Stores, Doyle, and Huggins acknowledged that settlement was reached regarding the ejectment action and that the terms were set forth in the Settlement Agreement. The trial court granted Pee Dee Stores' motion to compel settlement and summary judgment motion, finding the pleadings indicated that all allegations involved landlord/tenant claims and issues "involving the premises, the store, any business on the premises, and/or the relationship between the Parties[,]" and as such were resolved by the Settlement Agreement. Huggins now appeals.

## STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this Court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (when

reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court). Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). However, summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the non-moving party. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 227, 612 S.E.2d 719, 722 (Ct. App. 2005). Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004). If evidentiary facts are not disputed, but the conclusions or inferences to be drawn from them are, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Further, "[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (internal citations omitted).

Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument. Gilliland v. Elmwood Prop., 301 S.C. 295, 299, 391 S.E.2d 577, 579 (1990) (internal citations omitted); HK New Plan Exch. Prop. Owner I, LLC v. Coker, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007); Bishop v. Benson, 297 S.C. 14, 17, 374 S.E.2d 517, 518-19 (Ct. App. 1988). The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed. Blakely v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976). Construction of an ambiguous contract is a question of fact to be decided by the trier of fact. Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997); Lacke v. Lacke, 362 S.C. 302, 309, 608 S.E.2d 147, 150 (Ct. App. 2005).

## LAW/ANALYSIS

Huggins asserts the trial court erred in granting Pee Dee Stores' summary judgment motion and motion to compel settlement because a genuine issue of material fact exists as to whether the parties to the Settlement Agreement intended to dismiss Huggins' unfair trade practices and civil conspiracy claims against Helena and Pee Dee Stores. We agree.

### A. Settlement Agreement Viewed as a Contract

In South Carolina jurisprudence, settlement agreements are viewed as contracts. Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001); see also Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (enforcement of the terms of a settlement agreement is a matter of contract law); Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (a release agreement is a contract and contract principles of law should be used to determine what the parties intended); Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986) (applying the general rules of contract construction to a settlement agreement).

General contract principles are applied in the construction of a settlement agreement because, as stated above, a settlement agreement is a contract. Summary judgment is not appropriate if a contract is ambiguous. Thus, the initial determination for a court seeking to ascertain whether a grant of summary judgment based on a settlement agreement's interpretation is proper is whether the agreement is ambiguous. See Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. at 234, 482 S.E.2d at 555.

### B. Ambiguity in a Contract

Whether the language of a contract is ambiguous is a question of law for the court. Auten v. Snipes, 370 S.C. 664, 669, 636 S.E.2d 644, 646 (Ct. App. 2006). A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation. South Carolina Dept.

of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001); Davis v. Davis, 372 S.C. 64, 76, 641 S.E.2d 446, 452 (Ct. App. 2006). The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe. Hann v. Carolina Cas. Inc. Co., 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969). Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement. Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975).

In the matter presently before the Court, an ambiguity exists in the Settlement Agreement regarding the definition and scope of "landlord/tenant claims." The term "landlord/tenant claims" is reasonably susceptible to more than one interpretation, and therefore, summary judgment was inappropriate.

The trial court based its summary judgment ruling on the conclusion that all allegations in both the ejectment and breach of contract actions involved landlord/tenant claims, and issues "involving the premises, the store, any business on the premises, and/or the relationship between the Parties[,]" and as such were resolved by the Settlement Agreement. This constituted error because there was a genuine issue of material fact as to the meaning and scope of "landlord/tenant claims," and the parties' intentions as to which claims survived the Settlement Agreement differed, thus precluding summary judgment in favor of Pee Dee Stores.

The language of the Settlement Agreement is clear that all landlord/tenant claims were to be resolved by the Settlement Agreement. In fact, the title of the Agreement itself evinces the intent to resolve only all landlord/tenant issues. It reads in relevant part: "Relating Only to All Landlord/Tenant Issues." Paragraphs 7 and 10 of the Settlement Agreement state that the parties agree to dismiss with prejudice all litigation involving the premises, store, any business on the premises, and/or the relationship between the parties, including all claims between Pee Dee Stores and Doyle, and all landlord/tenant issues between all parties. These provisions clearly resolved the claims between Doyle and Huggins and Pee Dee Stores in the ejectment action, as well as all of the claims against Doyle and counterclaims by Doyle in the breach of contract case. This was the basis for Doyle and Huggins' motion to amend their pleadings.

However, the language of the Settlement Agreement does not provide a definition of "landlord/tenant claims." This phrase is not a legal term of art; rather, it is shorthand for the parties' conceptualization of the claims that should be labeled as "landlord-tenant." Therefore, the Settlement Agreement is ambiguous as to the scope and application of "landlord/tenant claims." It is unclear whether the parties intended that the Settlement Agreement resolve Huggins' civil conspiracy and unfair trade practices claims against Pee Dee Stores and Helena because it is uncertain whether "landlord/tenant claims" includes civil conspiracy and unfair trade practices claims. Reasonable minds can certainly differ as to the meaning of "landlord/tenant claims."

The language of the Settlement Agreement does not support the trial court's conclusion that **all** of Huggins' claims were extinguished. That construction is implausible, particularly because it would nullify Paragraph 8 of the Settlement Agreement, which clearly sought to exclude some of Huggins' claims from the ambit of the Settlement Agreement. The language of Paragraph 8 unequivocally states that the parties agreed that Huggins never intended to relinquish all of his claims against Pee Dee Stores and Helena and, in fact, clearly excludes Huggins' **non**-landlord/tenant claims from resolution by the Settlement Agreement. It is highly unlikely that the language of Paragraph 8 was included in the Agreement but yet meant to have no effect. The parties must have intended that non-landlord/tenant claims survive the Settlement Agreement. Had it been the parties' intention to extinguish all claims by Huggins, the Settlement Agreement could have simply done so, instead of expressly carving out specific exceptions in Paragraphs 7, 8, and 10 to exclude Huggins' **non**-landlord/tenant claims. The language of the Settlement Agreement does not indicate that it was the parties' intention to resolve all claims.

Further, Pee Dee Stores' various statements concerning its own interpretation of the Settlement Agreement are inconsistent and improbable, again demonstrating that there was a genuine issue of material fact that rendered summary judgment improper. Pee Dee Stores contends that the "and/or [] relationship between the parties" language of Paragraph 7 was intended to be broadly interpreted to waive all claims relating to the

relationship between the parties, including the civil conspiracy and unfair trade practices claims. Yet, elsewhere in its brief Pee Dee Stores states:

> [Huggins and Doyle] also allege the Settlement Agreement is ambiguous because Huggins only agreed to dismiss with prejudice the landlord/tenant claims and issues, and thus reserved the right to sue [Pee Dee Stores] for other things. That is partially correct — the Settlement Agreement certainly does not apply, for example, to any open accounts [Pee Dee Stores] may have with Appellant Huggins, etc. However, Huggins clearly and unambiguously resolved with prejudice all landlord/tenant claims and issues, defined in the Settlement Agreement as "any litigation involving the premises, the store, any business on the premises, and/or the relationship between the Parties.

Contrary to its assertion above, Pee Dee Stores' broad interpretation of the Settlement Agreement would also preclude Huggins from litigating any open accounts with Pee Dee Stores, as these open accounts would certainly pertain to the relationship between the parties. Moreover, Pee Dee Stores moved to amend its pleadings to reflect the Settlement Agreement, which is inconsistent with its contention that the Settlement Agreement dismissed all claims.

In view of the fact that an ambiguity exists in the Settlement Agreement regarding the scope and definition of "landlord/tenant claims," this Court would have to strain to determine the parties' intention, and it is not at liberty to do so. See Blakely 266 S.C. at 73, 221 S.E.2d at 769. Thus, the parties' intention is a question of fact to be ascertained by the trier of fact. To ascertain the parties' intent, the trier of fact must look at the language of the Settlement Agreement, the circumstances known to the parties at the time, and all other pertinent extrinsic evidence.

The trial court committed reversible error in granting Pee Dee Stores' summary judgment motion and motion to compel settlement. The definition

of "landlord/tenant claims" is susceptible to more than one interpretation, and therefore, the contract is ambiguous. Because of the ambiguous nature of the contract, a genuine issue of material fact exists as to whether it was the intent of the parties to extinguish Huggins' claims for civil conspiracy and unfair trade practices.[4]

## CONCLUSION

Accordingly, the trial court's order is

**REVERSED AND REMANDED.**

**HUFF, J., and GOOLSBY, A.J., concur.**

[4] We decline to address Pee Dee Stores' purported sustaining grounds on appeal as our determination that the language of the Settlement Agreement is ambiguous is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (the appellate court need not address remaining issues when the disposition of other issues is dispositive).