Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E
February 17, 2006

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his/her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

The Commission will not accept applications after **12:00 noon on Monday, March 20, 2006.**

A vacancy exists in the office formerly held by the Judge of the Circuit Court, At-Large, Seat 9. The successor will fill the unexpired term of the Honorable Reginald I. Lloyd, which will expire on June 30, 2009.

A vacancy exists in the office formerly held by the Judge of the Administrative Law Court, Seat 5. The successor will fill the unexpired term of the Honorable Ray N. Stevens, which will expire on June 30, 2008.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8

February 21, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Eric Dale Morgan, Appellant.

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

Opinion No. 26116
Heard January 17, 2006 – Filed February 21, 2006

VACATED AND REMANDED

Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Harold W. Gowdy, III, of Spartanburg, for respondent.

ACTING CHIEF JUSTICE MOORE: Pursuant to Roper v. Simmons, 543 U.S. 551 (2005), we vacate appellant's sentence of death and remand to the trial court for re-sentencing.

FACTS

Appellant was charged with murder, armed robbery, and possession of an explosive device. The charges resulted from the murder and armed robbery of a convenience store employee on May 3, 2000. Appellant admitted shooting the victim once in the head as the victim was closing the store and then stealing a bag the victim was carrying that contained more than $7000. Appellant and his accomplice, who had been hired at the store a week before the incident, had originally planned to blow a hole in the back wall of the store with a pipe-bomb after it closed. Following a trial, appellant was found guilty as charged.

The State sought the death penalty, relying on two aggravating statutory circumstances: (1) the murder occurred during the commission of an armed robbery, and (2) the murder occurred during the commission of larceny while armed with a deadly weapon. *See* S.C. Code Ann. §§ 16-3-20(C)(a)(1)(d) and (e) (2003). At sentencing, the defense relied on three mitigating circumstances: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the age or mentality of the defendant at the time of the crime; and (3) the defendant was below the age of eighteen at the time of the crime. *See* §§ 16-3-20(C)(b)(1), (7), and (9) (2003).

The jury found both statutory aggravators and appellant was sentenced to death on the murder charge. On the charge of armed robbery, appellant was sentenced to an imprisonment term of thirty years. On the charge of possession of an explosive device, he was sentenced to an imprisonment term of fifteen years to be served consecutively to the armed robbery sentence.[1]

[1]Appellant's sentences on the charges of armed robbery and possession of an explosive device are unaffected by this decision.

Subsequently, the United States Supreme Court decided Roper v. Simmons, 543 U.S. 551 (2005). The Roper court held that the execution of individuals who were under eighteen years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments of the United States Constitution.[2] Accordingly, appellant's sentence of death is vacated.

ISSUE

Should appellant be allowed to present evidence on a remand for re-sentencing that he is entitled to a sentence less than life imprisonment?

DISCUSSION

The parties disagree on the appropriate procedure on a remand for re-sentencing. The State argues the matter should be remanded to the trial court for the sole purpose of sentencing appellant to life imprisonment without the possibility of parole. The State contends life without parole is the only alternate sentence because the jury found two aggravating circumstances. The State bases its argument on the portion of S.C. Code Ann. § 16-3-20(A) (Supp. 2005) which states, "If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt . . ., and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment." The State argues that where it has sought the death penalty and the jury has found aggravating circumstances, the only available sentence other than death is life imprisonment.

Appellant, however, contends that, on remand, he should be allowed to argue that he should be sentenced to something less than life imprisonment without parole. Appellant is correct. Pursuant to Roper v. Simmons, *supra*, appellant's death sentence is prohibited. The portion of § 16-3-20(A) cited by the State does not apply to appellant. Further, on remand, whether the

[2] Both the State and appellant agree that appellant was seventeen years old at the time of the murder. The record indicates appellant's birthday is May 19, 1982.

jury found certain aggravating circumstances at his sentencing proceeding is irrelevant because the discussion of aggravators arises only when the State seeks the death penalty, which the State cannot do in this case.

We therefore look to § 16-3-20(A) for guidance on how a person convicted of murder and who is not subject to the death penalty should be sentenced. Section 16-3-20(A) provides that "[a] person who is convicted of . . . murder must be punished by . . . imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years." Therefore, on remand, the trial court may receive additional evidence on the question of whether appellant is entitled to receive a sentence less than life imprisonment and decide on a sentence that ranges from a mandatory minimum imprisonment term of thirty years to life imprisonment.

VACATED AND REMANDED.

BURNETT, PLEICONES, JJ., Acting Justice Clyde N. Davis, Jr., and Acting Justice Edward B. Cottingham, concur.

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

Rule 410(e), SCACR, currently requires that any member wishing to practice in the Unified Court System provide a current e-mail address to the Bar, and promptly notify the Bar of any change of e-mail address. The purpose of the requirement is to allow the Bar and the respective clerks of court to quickly and efficiently communicate with members. Moreover, as the practice of law becomes increasingly driven by technology, it is paramount that all members have a current and valid e-mail address not only to facilitate prompt communication, but so that the judiciary can begin implementing e-filing procedures.

However, it has recently come to the Court's attention that an unacceptable number of members have failed to provide the Bar with their current e-mail addresses. Further, it is essential that all members, not just those practicing in the Unified Court System, provide the Bar with current e-mail address information.

Therefore, pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 410(e), South Carolina Appellate Court Rules, as set forth in the attachment, to require that all members, other than retired members, provide the Bar with a current e-mail address. Further, members are now required to update change of address information within ten days of any such change. Members who have not yet provided their current e-mail address shall submit that information to the Bar by April 3, 2006.

The amendment is effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Waller, J., not participating.

Columbia, South Carolina
February 21, 2006

(e) Enrollment of Members. Every person admitted to the practice of law in South Carolina shall, within sixty (60) days after admission, register with the Secretary of the South Carolina Bar. Registration shall be made on a form provided by the South Carolina Bar.

For purposes of this section, member address information shall include the current e-mail address for all members, other than retired members.

It shall be the responsibility of all members of the Bar to notify the Secretary of the South Carolina Bar, at the South Carolina Bar, of any change of physical or e-mail address within ten days of any such change. The member's address which is on file with the South Carolina Bar shall be the address which is used for all purposes of notifying and serving the member.

Amended by Order dated February 21, 2006. This amendment specifies time limits for providing change of address information to the Bar and specifically requires all members, with the exception of retired members, to provide a current email address to the Bar.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Bernard Elmore, Appellant.

Appeal From Saluda County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 4082
Submitted January 1, 2006 – Filed February 21, 2006

AFFIRMED

C. Rauch Wise and Robert J. Tinsley, both of Greenwood, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Special Assistant Attorney General Amie L. Clifford, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

KITTREDGE, J.: David Bernard Elmore appeals his conviction and sentence for possession with intent to distribute marijuana. Elmore argues the trial court erred in failing to grant his motion for a directed verdict and erred in ruling the State could use two prior drug convictions for impeachment if he testified. We affirm.

FACTS

On December 16, 2001, Deputies Mike Rushton and Chuck Padgett of the Saluda County Sheriff's Office were on patrol on Highway 178 in Saluda County. The deputies observed a white Cadillac cross the center line. The deputies suspected the driver of the Cadillac was driving under the influence and pulled the car over.

After the car was pulled over, the deputies noticed several bags fly out of the vehicle's passenger side window. Deputy Rushton approached the car and asked the driver (and sole occupant), David Bernard Elmore, for his driver's license. Elmore did not have a license and was arrested for driving without a license.

The deputies searched Elmore, the car, and the ground around the car. Eight small plastic sandwich bags, each containing a green leafy substance, were found on the side of the road; one larger bag, containing a similar substance, was found in the Cadillac's center console. Elmore was carrying $653 in cash in his pockets. The deputies found no marijuana residue, no evidence of marijuana being smoked in the car, and no drug paraphernalia—"no cigarette lighters, no matches, no marijuana smoking pipes or anything of that nature . . . , no rolling papers, [and] no blunts."

Testing confirmed the leafy substance was marijuana, and Deputy Rushton testified that the street value of each bag ranged from ten to thirty dollars. The total weight of the marijuana was 27.55 grams. Investigator Joe Collier testified that four of the bags were virtually identical in weight. Elmore was charged with possession with intent to distribute marijuana.

At the close of the State's case, Elmore argued the State failed to prove the element of intent and moved for a directed verdict. The trial court found the State "submitted evidence that could be viewed by the jury as intent to distribute" and denied the motion.

The trial court then informed Elmore of his right to testify and explained that his prior convictions may be "brought up" if he testified. The Solicitor informed the trial court of the State's desire to question Elmore about two prior drug convictions: a 1995 conviction for possession of crack cocaine; and a 2001 conviction for possession with intent to distribute marijuana. Elmore contended the convictions were prejudicial and objected to their admission. Specifically, Elmore argued the marijuana conviction should not be allowed because it is "unduly similar" and cited Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), and State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). The trial court summarily noted the objection and found the State could ask about both convictions if Elmore testified. Elmore elected not to testify.

Elmore was found guilty of possession with intent to distribute marijuana and sentenced. This appeal followed.

LAW/ANALYSIS

I. Denial of Motion for a Directed Verdict

Elmore argues the trial court erred in not granting a directed verdict because there was insufficient evidence to establish an intent to distribute marijuana. We disagree.

"On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). The trial court, in a directed verdict motion, is concerned with the existence or nonexistence of evidence, not with its weight. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). This standard remains constant even when the State relies exclusively on circumstantial evidence. Id. "A defendant is entitled to a

directed verdict when the State fails to produce evidence of the offense charged." McHoney, 344 S.C. at 97, 544 S.E.2d at 36. A trial court should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). However, "[i]f there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury." McHoney, 344 S.C. at 97, 544 S.E.2d at 36.

Section 44-53-370(d)(3) of the South Carolina Code (Supp. 2004) creates a "permissive inference to be considered by the jury" that possession of more than twenty-eight grams or one ounce of marijuana constitutes possession with intent to distribute.[1] State v. Andrews, 324 S.C. 516, 522, 479 S.E.2d 808, 812 (Ct. App. 1996). However, "conviction of possession with intent to distribute does not hinge upon the amount involved." State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (1987). "Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute." State v. James, 362 S.C. 557, 561-62, 608 S.E.2d 455, 457 (Ct. App. 2004).

Although we find no South Carolina precedent directly on point, we do find instructive two cases with overlapping features. In State v. Robinson, 344 S.C. 220, 224, 543 S.E.2d 249, 250 (Ct. App. 2001), and State v. Cherry, 361 S.C. 588, 594-95, 606 S.E.2d 475, 478 (2004), sufficient evidence of the intent to distribute was found to withstand motions for directed verdicts. In Robinson, the court found a sufficient indicia of intent to distribute when the State presented testimony from police officers that a user of cocaine would not typically possess seven rocks of cocaine, that a dealer is not typically found with scales or individual baggies in his possession, and that a dealer typically wraps crack cocaine as Robinson did. Robinson, 344 S.C. at 224, 543 S.E.2d at 250.

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[1] This section has subsequently been amended and the pertinent language is currently in section 44-53-370(d)(4). See 2005 Act No. 127, § 4 (eff. June 7, 2005).

In State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001) (en banc), aff'd in result, 361 S.C. 588, 606 S.E.2d 475 (2004), this court found sufficient evidence of the intent to distribute to withstand a motion for a directed verdict where: (1) the arrest occurred in a high crime area; (2) defendant possessed eight rocks of crack cocaine; (3) defendant possessed no drug paraphernalia; (4) defendant possessed $322 in cash, predominantly in twenty dollar bills; and (5) testimony provided that a single rock of crack cocaine is typically sold for twenty dollars. Cherry, 348 S.C. at 285, 559 S.E.2d at 299. Our supreme court granted a writ of certiorari to review this court's opinion in Cherry, and the majority opinion affirmed this issue,[2] holding the above combination of factors was sufficient to submit the charge of possession with intent to distribute to the jury. Cherry, 361 S.C. at 594-95, 606 S.E.2d at 478. The majority further held that, when reviewing a directed verdict motion, the trial court is not required to find the evidence infers guilt to the exclusion of any other reasonable hypothesis. Id. at 594, 606 S.E.2d at 478.

Elmore argues the facts of this case more closely mirror those in State v. James, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004), where this court found evidence was insufficient to submit to the jury a possession with intent to distribute charge. We disagree.

We believe the facts of the case before us more closely line up with those in Robinson and Cherry. The overlapping features include the number of "baggies" containing drugs, the method of individual packaging, the amount of cash found on Elmore, and the complete absence of drug paraphernalia. Conversely, James is readily distinguishable. In James, two of the reasons this court found insufficient evidence of intent were: (1) James did not have a large amount of cash on his person, he only possessed thirty-

[2] The dissent in Cherry took no exception to the majority's analysis on the directed verdict issue. 361 S.C. at 602-06, 606 S.E.2d 482-04. The dissent advocated reversal based on a challenge to the jury charge on circumstantial evidence. Id. We are not presented with any challenge to the jury charge in the present case.

seven dollars; and (2) the amount of crack cocaine possessed by James was speculative, because the bag containing the crack cocaine was never recovered for evidentiary testing and was only seen briefly by the arresting police officer. James, 362 S.C. at 565, 608 S.E.2d at 459.

Viewing the evidence in the light most favorable to the State, as we must, we find the trial court properly denied the directed verdict motion, for a jury question was presented on the element of intent. We construe Elmore's final brief as tacitly acknowledging the presence of a jury question. As Elmore puts it: "The fact that marijuana is commonly sold in small packages also means that marijuana is commonly purchased in small packages. With only nine small bags, the evidence is *just as susceptible* as establishing . . . Elmore had purchased the marijuana in small bags." (emphasis added). We agree that the evidence is reasonably susceptible of two inferences—one of which is consistent with the State's theory of possession of marijuana with intent to distribute, especially in view of the commonality of factors shared with Robinson and Cherry.[3]

II. Admissibility of Prior Convictions

Elmore asserts the trial court committed reversible error in ruling the State could impeach him through the use of two prior drug convictions if he testified. We disagree based on supreme court precedent.

"[W]hen the trial judge chooses to make a preliminary ruling on the admissibility of prior convictions to impeach a defendant and the defendant does not testify at trial, the claim of improper impeachment is not preserved for review." State v. Glenn, 285 S.C. 384, 385, 330 S.E.2d 285, 286 (1985).

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[3] In Cherry, the court "rejected the contention that in ruling on a directed verdict motion, the trial judge must grant a directed verdict unless the circumstantial evidence pointed conclusively to the defendant's guilt, to the exclusion of every other reasonable hypothesis." Cherry, 361 S.C. at 594, 606 S.E.2d at 478, (citing State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889, cert. denied, 493 U.S. 895, 110 S. Ct. 246, 107 L. Ed. 2d 196 (1989)).

In Glenn, the court adopted the United States Supreme Court's reasoning in Luce v. United States, 469 U.S. 38 (1984), that "when the defendant does not testify, appellate review is too speculative for several reasons," including:

> the freedom of the trial judge to later alter his ruling; the possibility the prosecution may not have sought to impeach the defendant with the prior convictions; the likelihood that an adverse ruling might not have been the real motivation for the defendant's decision not to testify; and the inability of the appellate court to review any error for harmlessness.

Glenn, 285 S.C. at 385, 330 S.E.2d at 285-86. We adhere to the Luce preservation rule adopted in Glenn. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Thus, because Elmore did not testify, we find he failed to preserve the question of improper impeachment for review.

Elmore urges a departure from a strict application of Glenn, desiring instead a less rigid preservation rule. Some jurisdictions have declined to follow the Luce preservation rule. See generally State v. Galmore, 994 S.W.2d 120, 123-25 (Tenn. 1999) (discussing, for states that have not adopted the Luce preservation rule, the two primary alternative approaches to preserving a challenge to a trial court's pre-testimony decision on admissibility of prior convictions for impeachment purposes). As an error correction court, we leave it to our supreme court to determine if a retreat from Glenn is warranted.

We take this opportunity to remind and caution the bench and bar of the inherent prejudice that flows from the use of similar prior convictions for impeachment purposes under Rule 609(a)(1), SCRE. The trial court, in weighing the probative value of prior convictions pursuant to Rule 609(a)(1), SCRE,[4] should consider all relevant factors including but not limited to: "1)

[4] We recognize that under a precedent of this court, the use of a prior conviction under Rule 609(a)(2), SCRE, does not require a probative value

the impeachment value of the prior crime; 2) the point in time of the conviction and the witness's subsequent history; 3) *the similarity between the past crime and the charged crime*; 4) the importance of the defendant's testimony; and 5) the centrality of the credibility issue." State v. Bryant, 356 S.C. 485, 490, 589 S.E.2d 775, 777-78 (Ct. App. 2003) (citations omitted) (emphasis added). The current state of the law does not mandate the trial court make an on-the-record specific finding "as long as the record reveals that the trial judge did engage in a meaningful balancing of the probative value and the prejudicial effect before admitting a non-609(a)(2) prior conviction under 609(a)(1)." State v. Scriven, 339 S.C. 333, 341, 529 S.E.2d 71, 75 (Ct. App. 2000). However, as we have urged trial courts, when balancing the probative value of a prior conviction under Rule 609(a)(1) against the prejudicial effect, meaningful appellate review is best achieved when the trial court "articulate[s] its ruling and the basis for it." Id. at 342, 529 S.E.2d at 75.

An on-the-record analysis is especially needed when undertaking a balancing that involves a prior similar offense under Rule 609(a)(1). This is because the "the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission." State v. Dunlap, 353 S.C. 539, 542, 579 S.E.2d 318, 320 (2003); see also, Green v. State, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000) (finding trial counsel's failure to argue that the prejudicial effect of the convictions outweighed their probative value constituted ineffective assistance of counsel and prejudiced the defendant). Indeed, the similarity of a prior crime to the crime charged heightens the prejudicial value of the crime. State v. Colf, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000). Moreover, for prior similar convictions involving violations of narcotics laws, the prejudicial value is further increased as such violations "are generally not probative of truthfulness," and "this relative lack of probative value should figure prominently in the weighing of prejudice." Dunlap, 353 S.C. at 542, 579 S.E.2d at 320. Thus, we strongly encourage trial courts to engage in an on-the-record analysis

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versus prejudice analysis. State v. Al-Amin, 353 S.C. 405, 425-27, 578 S.E.2d 32, 43-44 (Ct. App. 2003).

when admitting such convictions because of the presumption against their admission.[5]

CONCLUSION

We find the trial court properly denied Elmore's motion for a directed verdict. We adhere to the State v. Glenn precedent in holding that Elmore's challenge to the trial court's presumptive ruling concerning the admissibility of his prior drug convictions for impeachment under Rule 609(a)(1) is not preserved for review.

AFFIRMED.

STILWELL and WILLIAMS, JJ., concur.

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[5] One permissible approach, advocated by the United States Fourth Circuit Court of Appeals, is to allow the prosecutor to ask the witness about the existence of a prior similar conviction under Rule 609(a)(1) without disclosing to the jury the nature of the prior offense. See United States v. Boyce, 611 F.2d 530, 531 n.1 (4th Cir. 1979). The Boyce approach was approvingly referenced by our supreme court in Green v. State, 338 S.C. 428, 433 n.5, 527 S.E.2d 98, 101 n.5 (2000). The Boyce approach still requires a meaningful balancing of the probative value and prejudicial effect before admission of the prior conviction, although the prejudice occasioned by the similarity of the prior crime to the crime charged is removed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kathleen L. Gadson,
Employee, **Respondent,**

v.

Mikasa Corporation,
Employer, The Yasuda Fire &
Marine Insurance Co.,
Carrier, **Appellants.**

Appeal From Charleston County
Mikell R. Scarborough, Circuit Court Judge

Opinion No. 4083
Heard February 6, 2006 – Filed February 21, 2006

AFFIRMED

Duke K. McCall, Jr., of Greenville, for Appellants.

Thomas M. White, of Goose Creek, for Respondent.

ANDERSON, J.: In this Workers' Compensation case, the employer, Mikasa Corporation, and its insurance carrier, The Yasuda Fire & Marine Insurance Company (collectively referred to as Mikasa) appeal the

circuit court's affirmance of the appellate panel's ruling that Kathleen L. Gadson had reached maximum medical improvement and was entitled to permanent disability benefits. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In September of 1997, Kathleen Gadson began working for Mikasa in Charleston, South Carolina. On January 8, 1998, Gadson sustained an injury by accident arising out of and in the course of her employment. She was injured while unloading some boxes. Since January of 1998, Dr. Jeffrey K. Wingate, a spine surgeon with the Carolina Spine Institute, has been her primary treating physician. The single commissioner found Gadson had injuries to her abdomen and lower back. She was awarded temporary total disability and permanent partial disability of ten percent for loss of use and disability to her back.

Subsequently, Gadson filed a Form 50 alleging a material change in her condition and requesting additional benefits. The single commissioner found that Gadson had experienced a material change in her condition entitling her to additional benefits under S.C. Code Ann. § 42-17-90. Mikasa was required to be responsible for Dr. Wingate's medical bills and to provide medical care through Dr. Wingate. The appellate panel affirmed the single commissioner.

Following two surgical procedures by Dr. Wingate and the assignment of a permanent impairment rating, Gadson filed a Form 50 alleging that she had reached maximum medical improvement (MMI), was permanently and totally disabled, and was entitled to lifetime medical care. The single commissioner ruled that Gadson was at maximum medical improvement as of May 22, 2002. The commissioner further found that Gadson was permanently and totally disabled under S.C. Code Ann. § 42-9-30. Mikasa appealed asserting that Gadson had not reached MMI and that further medical care and treatment would tend to lessen her period of disability. The appellate panel unanimously affirmed the single commissioner's order in its

entirety. The circuit judge affirmed the appellate panel, concluding there was substantial evidence in the record to support the panel's findings.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Under the scope of review established in the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); S.C. Code Ann. § 1-23-380(A)(6)(d) (2005).

The substantial evidence rule of the APA governs the standard of review in a Workers' Compensation decision. Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); see also Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001) ("Any review of the commission's factual findings is governed by the substantial evidence standard."). Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law. See Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005); Gibson v. Spartanburg Sch. Dist. # 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); S.C. Code Ann. § 1-23-380(A)(6) (2005); see also Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) ("A reviewing court will not overturn a decision by the Workers' Compensation Commission unless the

determination is unsupported by substantial evidence or is affected by an error of law."). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003).

The appellate panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Frame, 357 S.C. at 528, 593 S.E.2d at 495. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004). Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999). It is not within our province to reverse findings of the appellate panel which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).

LAW/ANALYSIS

I. Maximum Medical Improvement

Mikasa argues the circuit court erred in affirming the appellate panel's finding that "Gadson had reached MMI and that she was totally and permanently disabled." Mikasa claims this ruling is not supported by substantial evidence. We disagree.

Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment. Bass v. Kenco Group, 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005); Lee v. Harborside Café, 350 S.C. 74, 564 S.E.2d 354 (Ct. App. 2002). However, the fact that a claimant has reached MMI does not preclude a finding the claimant still may require additional medical care or treatment. Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999).

If an employee has reached MMI and remains disabled, then his injury is permanent. Smith v. South Carolina Dep't of Mental Health, 335 S.C. 396, 517 S.E.2d 694 (1999). When a claimant receiving temporary benefits reaches MMI and is still disabled, temporary benefits are terminated and the claimant is awarded permanent benefits. Smith, 335 S.C. at 399, 517 S.E.2d at 696; Bass, 366 S.C. at 467, 622 S.E.2d at 585. Once the commission affirms a finding of MMI, it is appropriate to terminate temporary benefits in favor of permanent disability benefits, if warranted by the evidence. Smith, 335 S.C. at 399, 517 S.E.2d at 696.

Dr. Wingate was Gadson's authorized treating physician. Gadson was seen by Dr. Wingate on May 7, 2002 "as a worsening of condition for her low back pain." Prior to that date, she had been last seen on September 14, 2001, when she was having continuing low back and radiating left leg pain. The CT scan from March 25, 2002 showed a solid bony union at L5-S1. In the May 7 note, Dr. Wingate stated that Gadson could consider an L4-5 epidural injection but he doubted she would need any additional surgery.

Gadson returned to Dr. Wingate on May 22, 2002, the date she was determined to be at MMI. Dr. Wingate recommended exercise to manage her symptoms. Dr. Wingate noted he would be happy to see Gadson in the future but declared: "In my opinion she does not need any further surgical intervention or invasive spinal care." Gadson was not given a return appointment.

Defense counsel wrote Dr. Wingate on July 17, 2002, requesting an impairment rating for Gadson. Dr. Wingate responded by letter dated August 15, 2002. He opined:

> In my professional opinion, Ms. Gadson has sustained a 30% whole person impairment as a result of the significant injury to her lumbosacral spine, and the ongoing pain, parasthesias and motor weakness that she has to her right lower extremity. I do not feel that she will ever return to gainful employment. She has a sitting and standing intolerance of 15-20 minutes. She also has a severe deconditioning of her spine, and her medical condition in general.
>
> . . . .
>
> Future medical expenses will most probably include the cost of epidural steroid injections, and intermittent physical therapy. . . . She continues to take nonsteroidal anti-inflammatory and muscular relaxant medications, in combination with an antidepressant, which I think is absolutely indicated in clinical terms for her pain syndrome. It is my professional opinion that she will remain on these medications long term at a cost of $200-$250 per month total.
>
> At this point, she has no scheduled follow up visits to return and see me. I have offered her return follow up on a PRN basis if her low back and right thigh pain intensify to the point that she needs further invasive care. For now she will continue with the conservatively oriented medications. She'll return to see me on a PRN basis. Medical follow up will also include annual CBC, SMA-7 laboratory exams to rule out any damage to kidneys or

> liver as a result of her medical treatments. She's welcome to see me back for further medical follow up as needed.

Gadson returned to Dr. Wingate on January 9, 2003. She had an escalation in her pain "since [the weather] got cold." Dr. Wingate noted a "change in [Gadson's] overall pain picture." Gadson was "having more intense pain in the low back and down the legs." Dr. Wingate recommended a new MRI scan and wanted to see her after the scan.

Gadson saw Dr. Wingate on January 16, 2003. He reviewed the lumbar MRI scan and noted post-surgical changes at L5-S1. He "doubt[ed] that anything immediately would be needed surgically." Dr. Wingate recommended that Gadson do her back strengthening and stabilization exercises and continue her medications. He asked Gadson to return in two months.

Gadson's last appointment with Dr. Wingate before the hearing was March 19, 2003. Dr. Wingate noted the CT scan showed solid fusion even after the removal of her pedicle screws. He declared: "Unfortunately, I have very little to offer [Gadson]. There is nothing focal on her exam today. She has no new specific nerve pain or specific muscle weakness in either arm or leg." Dr. Wingate suggested Gadson stay on her medication and come back to see him in four to six months. He stated Gadson's primary physician should continue to provide her pain medications.

There is substantial evidence in the record that Gadson reached MMI as of May 22, 2002, and was totally and permanently disabled. MMI is a factual determination left to the discretion of the appellate panel. On May 22, 2002, Dr. Wingate released Gadson to be seen on a PRN basis. At that time, Dr. Wingate found Gadson had her hardware removed and she was going to need long term narcotics. He did not schedule her for a return appointment. He noted that she had no scheduled follow-up visits. According to Dr. Wingate, Gadson was not a candidate for any further surgical intervention or invasive spinal care, although it was anticipated that she would be having some ongoing medical care to include injections and possibly physical therapy. The continued treatment was nothing more than maintenance care to maintain

Gadson's condition. Her last MRI did not reveal that there was any further active medical treatment that could be done. Dr. Wingate gave Gadson an impairment rating. He found Gadson would never be able to return to gainful employment and that she had a severe sitting and standing intolerance of fifteen to twenty minutes. In January of 2003, Gadson had temporal escalation in her pain, which was to be expected. Two months later, Dr. Wingate again noted he had nothing further to offer her. Although Dr. Wingate did not specifically say that Gadson reached MMI, it is obvious from his report that he rated her, did not give her a return appointment and noted that she had permanent impairment and disability that would prevent her from being able to work in the future. Nothing in Dr. Wingate's later notes or records indicates that Gadson was no longer at MMI or that there had been a change in her condition after May 22, 2002.

Mikasa asserts the finding that Gadson reached MMI is unsupported by substantial evidence, primarily because the reports of Dr. Wingate dated January 9, 2003, January 16, 2003, and March 19, 2003 indicate that Gadson "needs further medical treatment so as to lessen her period of disability." This assertion has no merit. As in Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 397, 489 S.E.2d 219, 221 (Ct. App. 1997), "additional medical treatment may improve [Gadson's] overall quality of life and ability to cope, but not otherwise impact the finding on maximum medical improvement."

The circuit judge did not err in affirming the appellate panel's finding that Gadson reached MMI as of May 22, 2002, and is totally and permanently disabled.

II. Vocational Evaluation Consultant

Mikasa maintains the circuit court erred "in its adoption of the Workers' Compensation Commissioner's acceptance of the report of Ms. Jean Hutchinson as an expert under the Administrative Procedures Act without any evidence of her qualifications and/or expertise."

At the hearing before the single commissioner, Gadson submitted a vocational evaluation from Hutchinson, who found that Gadson was totally

disabled and unable to work in her present condition. Mikasa objected to the report of Hutchinson. Mikasa averred Hutchinson did "not qualify as an expert to render an opinion in the case." The commissioner overruled Mikasa's objection and admitted the report, noting she would "give it the appropriate weight and certainly in consideration of your objection."

A. Regulations 67-611 & 67-612

The utilitarian efficacy of admissibility under Workers' Compensation regulations is salutary and salubrious. Historically, the regulations allow for written reports and documentation in lieu of live testimony, concomitantly saving time and expense in the presentation of testimony before the single commissioner.

Regulation 67-611 of the South Carolina Workers' Compensation Commission requires that each attorney representing a party file a Form 58, Pre-Hearing Brief, with the commissioner and serve a copy on the opposing party at least ten days prior to the Workers' Compensation hearing. 25A S.C. Code Ann. Regs. 67-611(B) (Supp. 2005); Morgan v. JPS Automotives, 321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996). Form 58 requires the filing party to give the names and addresses of the persons known to the parties or counsel to be witnesses. On the Form 58, Gadson typed: "7. Witnesses (designate if expert): Jean Hutchinson – report to be submitted in lieu of live testimony."

Pursuant to Regulation 67-612, it is mandated that a moving party provide the report to the opposing party at least fifteen days before the scheduled hearing. 25A S.C. Code Ann. Regs. 67-612(B)(1) (Supp. 2005). Gadson served defense counsel with his Brief and APA submissions on April 3, 2003, nineteen days before the hearing. Regulation 67-612(D) notes: "Any report submitted to the opposing party in accord with (B)(1) [of 67-612] . . . shall be submitted as an APA exhibit at the hearing unless withdrawn with the consent of the other party." Included with the Form 58 in the instant case was a listing of all submissions under the APA, including Hutchinson's report. The regulations allow for a deposition to be taken should any party request it. Here, there was no such request by Mikasa.

Regulations authorized by the legislature have the force of law. Gaffney Ledger v. South Carolina Ethics Comm'n, 360 S.C. 107, 600 S.E.2d 540 (2004); McNickel's, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 629, 503 S.E.2d 723 (1998); Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995); cf. S.C. Code Ann. § 1-23-10(4) (2005) (defining "Regulation" as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law."). However, regulations may not alter or add to the terms of a statute. United States Outdoor Advertising, Inc. v. South Carolina Dep't of Transp., 324 S.C. 1, 481 S.E.2d 112 (1997).

Hutchinson's report was properly filed as an APA submission and timely served on Mikasa. The regulations allow for APA submissions. Gadson complied with the regulations by giving notice. Further, it was clear from the APA submission and the Brief that the vocational expert would not be testifying live but a report would be submitted in lieu of live testimony. After the service of the Brief on Mikasa, defense counsel made no attempt to depose Hutchinson so as to challenge her credentials or expertise nor did he attempt to subpoena her to the hearing or to subpoena any additional qualifications he may have desired. Mikasa objected to the report at the hearing but made no request to depose Hutchinson at a later date. Moreover, the Administrative Procedures Act, S.C. Code Ann. § 1-23-310, et seq., allows for submission of such a report. Thus, Hutchinson's report was admissible under the APA and Regulations 67-611 and 67-612.

B. Vocational Expert

Mikasa contends Hutchinson's report should have been excluded because "there is no indication that the individual making th[e] report is qualified as an expert or has the expertise to express the opinions set forth in her . . . report." We disagree.

The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d

506 (2005); Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998). The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004). Rule 702, SCRE, articulates guidelines for the admissibility of expert testimony. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997). For a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony. Ellis, 358 S.C. at 525, 595 S.E.2d at 825. An expert is not limited to any class of persons acting professionally. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596 (1997). There is no exact requirement concerning how knowledge or skill must be acquired. Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988).

The party offering the expert has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. Henry, 329 S.C. at 274, 495 S.E.2d at 466. Generally, however, defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility. Peterson v. National R.R. Passenger Corp., 365 S.C. 391, 618 S.E.2d 903 (2005); Henry, 329 S.C. at 274, 495 S.E.2d at 466; see also Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 580, 560 S.E.2d 624, 629 (Ct. App. 2001) ("Any defect in the

education or experience of an expert affects the weight and not the admissibility of the expert's testimony.").

On the cover of the APA submissions, it stated that Hutchinson has a Masters in Education and is submitting a vocational evaluation which was performed on Gadson on October 10, 2002. On page one of Hutchinson's report, she noted that she is a "Vocational Consultant." On page seven of her report, Hutchinson indicated she has a Masters in Education, is a "Certified Rehabilitation Counselor" and is "Certified in Vocational Evaluation."

At the hearing before the circuit judge, Gadson's attorney explained:

> As to the report of Jean Hutchinson, I think the Administrative Procedures Act under 1-23-310 clearly allows us to let it in. It's just a question of weight. You don't need Jean Hutchinson's report in this case because the authorized treating physician says she'll never return to work, but the report clearly is admissible. The commissioners can give it what weight they want. **Jean Hutchinson is someone who has appeared in front of them the last twenty years. I've used her the last twenty-five years. So they know who she is.** And her report is-- (Emphasis added).

The judge responded: "She's familiar to the Court."

Hutchinson's qualifications are set forth in her report. She was qualified to give an opinion as to Gadson's employability. Any defects in Hutchinson's qualifications go to the weight, not the admissibility, of her report. The appellate panel did not err by admitting Hutchinson's report.

CONCLUSION

Accordingly, we

AFFIRM.

HEARN, C.J., and KITTREDGE, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sabrina McComas, Appellant,

v.

Chris Ross, Respondent.

Appeal From Charleston County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4084
Heard January 9, 2006 – Filed February 21, 2006

REVERSED

Jarrel L. Wigger, of North Charleston, for Appellant.

Margaret M. Urbanic and Michael B. McCall, of Charleston, for Respondent.

CURETON, A.J.: This is an appeal from the trial court's dismissal of McComas' case for failure to prosecute. We reverse.

FACTS

Sabrina McComas filed this negligence action against Chris Ross on November 13, 2002 for medical bills, lost wages, physical injuries, and other damages, incurred as a proximate result of her injuries from a car accident. McComas' case was scheduled as number 15 on the trial docket for the week beginning September 7, 2004[1], and someone from her counsel's office attended the roster meeting that morning. According to McComas'counsel, he contacted the court on Wednesday morning to determine the status of McComas' case. Shortly thereafter, at approximately 10:00 a.m., McComas checked in with her counsel in regards to the status of her case. Counsel informed her that he had received no word from the court and to not "worry about it until tomorrow." He also reminded her to check back with his office in the afternoon. McComas' counsel indicated to the court that around 10:30 a.m. the clerk of court sent a message through the internet instant messaging system, notifying him that the case would be called to trial the next morning. At approximately 11 a.m., the clerk telephoned counsel and advised that the Administrative Judge set McComas' trial to begin at 2:00 p.m. Counsel attempted to call McComas several times through the only contact number he had for her, but was unable to get in touch with her. Counsel even sent a paralegal to McComas' home, but McComas was not there.

McComas' counsel arrived at the courthouse at 2:00 p.m., selected the jury, and indicated to the trial court that he had been unable to locate McComas, although he was still attempting to do so. Counsel requested that after the opening arguments the trial court continue the case until the next morning or until such time as McComas could be located. The trial court informed counsel that the trial would proceed. After hearing from three witnesses, counsel informed the trial court that McComas and the doctor were on their way to the courthouse, at which time the trial court recessed the trial for about ten minutes until 4:00 p.m., adding "[i]f this witness is not here I'm going to dimiss [the case] for lack of prosecution." Counsel informed the court that when McComas arrived home at 3:30 p.m., she called counsel and was advised that her trial had begun at 2:00 p.m. She immediately asked for a ride from a friend and left for the courthouse. However, she had trouble

[1] Monday, September 6, 2004 was Labor Day, and, therefore, a state holiday.

finding the courthouse and was further delayed. McComas' other witness, the doctor, was expected to arrive at 4:30 p.m. At 4:16 p.m., on Ross' motion, the trial court dismissed the case for failure to prosecute. According to McComas and her friend who drove her there, she arrived at the courthouse at approximately 4:18 p.m. and learned her case had been dismissed with prejudice.

McComas then filed a motion for a new trial or, in the alternative, to alter or amend the judgment. Based on Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970), the trial court then altered the judgment to a dismissal without prejudice.[2] This appeal followed.

STANDARD OF REVIEW

Whether an action should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and his decision will not be disturbed, except upon a clear showing of an abuse of discretion. Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970).

LAW/ANALYSIS

McComas claims the trial court erred in dismissing her case because (1) the sanction of dismissal was too harsh given the facts and circumstances, and (2) she did not fail to prosecute the case. We agree.

Rule 40(b) of the South Carolina Rules of Civil Procedure provides "[t]he first 20 cases on the Jury Trial Roster at the opening of court on the first day of a term, excluding those previously dismissed, continued or otherwise resolved before the opening of that term of court, may be called for trial." "For failure of the plaintiff to prosecute or to comply with these rules .

[2] "An order of dismissal for failure to proceed with the suit is in the nature of a discontinuance of the action and is not an adjudication of the merits." Small at 443, 175 S.E.2d at 804. Therefore, the supreme court modified the judgment of the trial court "so that its effect [was] to dismiss the action without prejudice." Id. at 444, 175 S.E.2d at 804.

. . a defendant may move for dismissal of an action or of any claim against him." Rule 41(b), SCRCP.

The plaintiff has the burden of prosecuting her action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with her cause. Don Shevey & Spires, Inc. v. Am. Motors Reality Corp., 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. See Small v. Mungo, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for hours); Bond v. Corbin, 68 S.C. 294, 294-95, 47 S.E.2d 374, 374 (1904). In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of the defendant. E.g., Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of willful disobedience when exclusion amounted to a judgment of default or dismissal).

Our Fourth Circuit Court of Appeals has also addressed this issue. The court in McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976) held that dismissal is a harsh sanction, which "should be resorted to only in extreme cases." Dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff. Id. The discretion should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal. Id.; Bush v. U.S. Postal Serv., 496 F.2d 42, 44 (4th Cir. 1974). The Fourth Circuit has said the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. Hillig v. Comm'r of Internal Revenue, 916 F.2d 171,

174 (4th Cir. 1990). See also Herbert v. Saffell, 877 F.2d 267, 270 (4th Cir. 1989); McCargo, 545 F.2d at 396; Chandler Leasing Corp. v. Lopez, 669 F.2d 919, 920 (4th Cir. 1982).

There is no dispute that McComas v. Ross was number fifteen on the trial roster for the court week of September 7, 2004. However, McComas contacted her attorney as he requested both in the morning and afternoon each day of court week. She also arranged for transportation and left for the courthouse immediately upon learning her case had been called to trial, arriving only minutes after the trial court dismissed the case. There is no indication McComas did not prosecute her case. She spent many months engaged in discovery and subpoened a total of five witnesses for trial. McComas actively pursued her case and was only personally delayed on the date of trial. Unlike other cases when the trial court has found unreasonable neglect by the plaintiff, McComas simply arrived late on the day of trial. See Small, 254 S.C. at 441, 175 S.E.2d at 803 (holding unreasonable neglect by plaintiff was inferable when, upon notification of the case being called to trial, neither plaintiff nor his attorney appeared at trial and simply informed the court that they would not be able to start the trial until some hours later).[3] Her attorney was in attendance and presented evidence to the jury regarding the case. Furthermore, McComas did not have a history of requesting continuances or abusing court rules to evidence a clear record of delay and contemptuous conduct, as required by the federal cases involving dismissal, or unreasonable neglect, as required by the South Carolina case law.

Ross also argues that Bond, 68 S.C. at 294, 47 S.E.2d at 374, further supports the dismissal. However, dismissals for failure to prosecute are fact-intensive issues, and the facts of Bond are easily distinguishable from the

[3] Small was decided under section 10-1502 of the South Carolina Code (1962), which has since been replaced by Rule 41(b) of the South Carolina Code of Civil Procedure, promulgated in 1985. Though Rule 41(b) does not require the defendant prove unreasonable neglect by the plaintiff to be granted a motion to dismiss for failure to prosecute, we find a reasonableness standard should apply in cases of this kind, as illustrated by the federal cases on point.

facts in the case sub judice. In Bond, counsel agreed to a fixed trial date. Id. However, the plaintiff failed to appear at court on the agreed-upon morning. Id. at 295, 47 S.E.2d at 374. The trial court continued the case until the afternoon, but the plaintiff still did not appear. Id. Though the defendants were present in court and demanded a trial, the trial court continued the case until the next morning, "stating that, if the plaintiff failed to appear, he would dismiss the cause for want of prosecution if the defendants still demanded a trial." Id. When the plaintiff failed to appear the next morning, the trial court dismissed the case for failure to prosecute. Id. The trial court gave the plaintiff in Bond two opportunities to correct his failure to appear, including the benefit of an extra day, although his counsel had agreed to the trial date. Id.

Under the facts of this case, dismissal of McComas' case was too harsh a sanction for her conduct or the conduct of her counsel. Therefore, we find the trial court abused its discretion in dismissing McComas' case.

CONCLUSION

For the reasons stated above, the trial court's decision is hereby

REVERSED.

GOOLSBY, J., concurs. ANDERSON, J., dissents in a separate opinion.

ANDERSON, J. (dissenting): I respectfully dissent. I disagree with the reasoning and analysis of the majority. The judge's decision to dismiss McComas's case for failure to prosecute was a proper exercise of discretion. I **VOTE** to **AFFIRM**.

FACTUAL/PROCEDURAL BACKGROUND

McComas and Ross were involved in a car accident on December 13, 1999. McComas initiated this action, and the case was number fifteen on the jury trial roster for the court week which began on Tuesday, September 7, 2004. The case was called to trial at 2:00 p.m. on the afternoon of September 8.

McComas was not present when the trial began. Her attorney explained to the court: "Well, we talked to her this morning about ten o'clock and said she hadn't heard anything from the court and told her don't worry about it until tomorrow and we got a call at eleven and we're still trying to find her." The judge instructed the attorneys to make their opening statements and informed McComas's counsel they could proceed in calling their witnesses. However, the judge warned, "Well, if you run out of witnesses, I'm sorry. I can't help you and what do you want me to do?"

Counsel made their opening statements and McComas's attorney called three witnesses, including the defendant. After the last witness stepped down, the court directed counsel for McComas to call their next witness. Counsel responded, "Your Honor, at this time we're still waiting for Sabrina McComas to arrive." The judge dismissed the jury to the jury room, and the following colloquy occurred:

> **The Court:** Mr. Wigger, when were you notified this case would be called for trial?
> **Mr. Wigger:** At eleven o'clock this morning, your Honor.
> **The Court:** When did you notify your client?

Mr. Wigger: Your Honor, I think we made contact with my client probably about 2:30 or three o'clock, my understanding.

The Court: What remedy do I have other than continuing it? I told you I was going to five o'clock today. Or dismissing it?

. . . .

I'm not—not criticizing your effort, I'm not criticizing your performance. I'm criticizing the fact your client is not here and how it's—the effect it's having on our—the whole situation. You have to bring jurors in, the cost, the room of the court, the rules.

. . . .

She doesn't even know how to get to the courthouse?

Mr. Wigger: No, sir. She called about ten minutes ago and said she was lost down here on Meeting Street.

I'd ask the Court, this case as far as I know has been continued over and I've got all these other folks down here to testify on a couple hours' notice and we've actually—

The Court: Who else we got besides the plaintiff and the chiropractor?

Mr. Wigger: That's it, your Honor. And I told the doctor to be here about 4:30 and as far as I know he's been on his way, too.

Ross's counsel made a motion to dismiss, which the court granted:

All right. Let the record reflect that the jury came in about—the jury came in at 2:30 and were selected by Judge Dennis and then they got to this courtroom . . . . [t]he court reporter has about 3:08, at which time I instructed all the parties we were going to go to about five this afternoon. We did the initial instructions to the jury. We did opening statements.

> Plaintiff put up one witness and then called the defendant and that was about ten minutes to four, at which time I was told they had no other witnesses available. I gave them to four o'clock. I was going to dismiss the case if the plaintiff did not show up by four.
>
> Came back in the courtroom at four o'clock and they had a three-minute witness in Miss Wease who was—simply testified about the lady's hourly wage.
>
> It is now 4:16 and the plaintiff has still not shown. Defense made a motion to dismiss for lack of prosecution, which I am granting.

Originally, the court dismissed McComas's case with prejudice. McComas filed a Rule 59 motion arguing (1) that dismissal was improper because there was no unreasonable neglect, and (2) dismissal with prejudice was improper since the applicable precedent requires dismissals for failure to prosecute to be without prejudice. The court amended its judgment so that the dismissal was without prejudice:

> **The Court:** So everybody understands that the dismissal will be without prejudice, and that is based on the ruling of Small v. Mingo, a 1970 case, and I find the facts in this case mirror that of Small v. Mingo.
>
> I think that is certainly grounds for me to rule like I did. It is discretionary, and I don't think there has been any abuse of discretion.

STANDARD OF REVIEW

The question of whether an action should be dismissed for failure to prosecute is left to the discretion of the circuit judge and his decision will not be disturbed except upon a clear showing of an abuse of such discretion. See Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970); see also Bond v. Corbin, 68 S.C. 294, 296, 47 S.E. 374, 375 (1904) ("From the earliest

adjudications to the present time, this matter is wisely left to the discretion of the circuit judge. Hort v. Jones, 2 Bay, 440; Sheppard v. Lark, 2 Bailey, 576; Hunter v. Glenn, 1 Bailey, 544; Cook v. Cottrell, 4 Strob. 62; Chalk v. McAlily, 11 Rich. Law, 153; State v. Atkinson, 33 S. C. 106, 11 S. E. 693; and many other cases, concluding with Heyward v. Middleton, 65 S. C. 496, 43 S. E. 956.").

LAW/ANALYSIS

McComas argues the court erred in dismissing her case because (1) dismissal is too harsh a sanction under the circumstances of this case, and (2) McComas did not fail to prosecute her case since her counsel began the trial and she was on her way to the courthouse.

Rule 40(b), SCRCP, addresses the calling of cases from the jury trial roster. Pursuant to Rule 40(b):

> The clerk initially shall place all cases in which a jury has been requested on the General Docket. A case may not be called for trial until it has been transferred to the Jury Trial Roster. . . . Cases shall be called for trial in the order in which they are placed on the Jury Trial Roster, unless the court in a Scheduling order has set a date certain for the trial, or, after the case has been set on the Jury Trial Roster, the court, upon motion, grants a continuance . . . . The first 20 cases on the Jury Trial Roster at the opening of that term of court, may be called for trial.

Rule 41(b), SCRCP, provides:

> **(b) Involuntary Dismissal: Non-Suit; Effect Thereof.**
>
> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

Our supreme court, in Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1997), enlightened that Rule 41 additionally provides for dismissal of counterclaims, cross-claims, and third-party claims for failure to prosecute. See id. at 211, 493 S.E.2d at 832 ("Rule 41(c), SCRCP, allows a trial judge to dismiss an action, upon a party's motion, for the other party's failure to prosecute a counterclaim, cross-claim, or third-party claim."). The Crestwood court further observed that the authority to dismiss for failure to prosecute emanates both from Rule 41, and from the inherent power of the court:

> [T]his Court has held that trial judges possess the inherent power to dismiss actions sua sponte for a party's failure to prosecute the relevant claims. See, e.g., Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 803 (1970) (noting that "it is within the inherent power of the court to dismiss an action for failure to prosecute."); see also 24 Am.Jur.2d Dismissal, Discontinuance, and Nonsuit 48 (1983) ("Provision is made in federal and state statutes or rules of practice for dismissal of civil actions for failure of prosecution by the plaintiff. However, the power of trial courts to dismiss a case for failure to prosecute with due diligence is generally considered inherent and independent of any statute or rule of court. Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.")[.]

Crestwood, 328 S.C. at 211-12, 493 S.E.2d at 832.

A review of the South Carolina precedent addressing dismissal for failure to prosecute demonstrates a trial judge is vested with the discretion to dismiss a case without prejudice when a plaintiff fails to appear to prosecute her case.

In Bond v. Corbin, 68 S.C. 294, 47 S.E. 374 (1904), the plaintiff's May 1902 trial resulted in a mistrial, and the case was scheduled to be retried during the November 1902 term. The case was the first on the docket, and

the parties agreed to fix the date of trial as Thursday. The plaintiff failed to appear at trial. His attorney explained he had written his client but had not heard back from him. The case was postponed until 3:00 p.m. on Thursday.

> Again the plaintiff failed to be in attendance upon the court. . . . The presiding judge again continued the further hearing until Friday morning; stating that, if the plaintiff failed to appear, he would dismiss the cause for want of prosecution if the defendants still demanded a trial.

68 S.C. at 295, 47 S.E. at 374.

The plaintiff failed to appear on Friday morning, but his counsel presented a telegram from him which read, "Will come tomorrow. Will try to be there by noon. J. A. Bond." 68 S.C. at 295, 47 S.E. at 374. The court, however, dismissed the action for failure to prosecute. The plaintiff arrived Friday afternoon and moved to vacate the order of dismissal, which the trial judge denied.

The South Carolina Supreme Court edified:

> In passing upon these grounds of appeal, we feel that it is our duty to emphasize what the court said in the case of State v. Box, 66 S. C., at page 404, 44 S. E. 970: "One of the strongest criticisms of the administration of the law relates to the many delays of the trial of the cases. Parties in the criminal and the civil courts should be ready to try their cases promptly." Every man is held to know the law. This November term of court was a regular term. The position of this case was the first on the docket. Counsel on both sides had fixed Thursday morning as the time for the trial of this cause. Yet, when the case was called, the plaintiff is not there. Delay is had till the afternoon session of the court. Still he is absent. On Friday morning it is called for trial, and still the plaintiff is absent. The circuit judge grants a nonsuit, refusing to continue any longer. Was this error? From the earliest adjudications to the present time, this matter is wisely left to the

> discretion of the circuit judge. Hort v. Jones, 2 Bay, 440; Sheppard v. Lark, 2 Bailey, 576; Hunter v. Glenn, 1 Bailey, 544; Cook v. Cottrell, 4 Strob. 62; Chalk v. McAlily, 11 Rich. Law, 153; State v. Atkinson, 33 S. C. 106, 11 S. E. 693; and many other cases, concluding with Heyward v. Middleton, 65 S. C. 496, 43 S. E. 956. We can see nothing in the conduct of the circuit judge in this matter which was erroneous.

68 S.C. at 296-97, 47 S.E. at 374-75.

Duncan v. Duncan, 131 S.C. 238, 126 S.E. 763 (1925), involved an action for breach of contract to cut and remove timber. "On the call of the cause for trial, plaintiff stated that he did not desire a jury trial and moved the court to hear the case without a jury." 131 S.C. at 240, 126 S.E. at 763. The defendant insisted on a jury trial, and the court decided to take testimony before a jury, noting that if only equitable issues were involved, "the case would be withdrawn from the jury and decided by the court[.]" 131 S.C. at 240, 126 S.E. at 763. The plaintiff, however, refused to participate in the case. The defense moved for a nonsuit. The motion was granted, and the supreme court affirmed.

> A circuit judge has the right to direct how a case shall be tried. If he is wrong in the mode of this trial, this court will correct on appeal. When the appellant refused to proceed with the trial when ordered by the court, nonsuit was proper. Cusack v. Southern R. R., 116 S.C. 142, 107 S.E. 30.

131 S.C. at 241, 126 S.E. at 763.

In Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970), Small's case was called to trial at 10:00 a.m.

> Neither plaintiff nor his counsel was present at that time, but defendant's counsel was present and announced that defendant was ready for trial. Plaintiff's counsel, who was in Pageland, South Carolina about twenty miles away, was called by

> the Clerk of Court, at the direction of the trial judge, and told that the court was ready to proceed with the case. In response, counsel for plaintiff requested the clerk to inform the court that it would be impossible for him to contact plaintiff and his witnesses and be ready for trial before 2 P.M. on that date. Upon being so informed, the trial judge, at 10:50 A.M., on the same day, upon defendant's motion, dismissed the action with prejudice for failure of plaintiff or his counsel to appear and prosecute the action when it was reached for trial. Subsequently, plaintiff moved, during the term of court, to vacate the order of dismissal upon the ground that his failure to appear for trial was not due to unreasonable neglect on his part or that of his counsel. The motion was denied on November 10, 1969 and this appeal by plaintiff followed.

Id. at 441, 175 S.E.2d at 803.

The Small court observed: "it is within the inherent power of the court to dismiss an action for failure to prosecute[.]" Id. at 442, 175 S.E.2d at 803. The case was additionally governed by section 10-1502 of the 1962 code, which the Small court stated, "provides that the court may dismiss the complaint in a pending action 'with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff * * * to proceed in the cause against the defendant or defendants served.'" 254 S.C. at 442, 175 S.E.2d at 804. The court explained,

> A broad discretion must be allowed the trial judge in arranging and calling the cases for trial and only in cases of manifest injustice will this court interfere. It is of course contemplated that the above rule will be reasonably applied so as to accomplish its purpose of expediting the orderly disposition of litigation on the merits.

254 S.C. at 442-43, 175 S.E.2d at 804. The court noted:

Under these circumstances, the failure of plaintiff and his counsel to appear when the case was called for trial constituted a failure to proceed with the cause under s 10-1502, supra, and a ground for dismissal of the action if such failure to appear was due to unreasonable neglect.

> Counsel for plaintiff was apparently in his office and the plaintiff and his witnesses were at their work when the case was called for trial. The court notified counsel through the clerk of court that the case had been reached on the trial roster. The only response made by counsel at that time to such notice was to inform the court through the clerk that he could not appear before 2 P.M., several hours later. We find no abuse of discretion in the dismissal of the action under the facts. Unreasonable neglect is inferable.

254 S.C. at 443, 175 S.E.2d at 804.

However, the court made a significant modification to the trial court's order:

> **While we sustain the order of the trial judge in so far as it dismisses the action, the dismissal with prejudice was improper. An order of dismissal for failure to proceed with the suit is in the nature of a discontinuance of the action and is not an adjudication of the merits. Ordinarily, it does not put an end to the cause of action, but merely terminates the suit itself. An order of dismissal with prejudice under the present facts was not justified.**
>
> **The judgment of the lower court is accordingly modified so that its effect is to dismiss the action without prejudice; and is affirmed as modified.**

254 S.C. at 443-44, 175 S.E.2d at 804 (emphasis added).

In Don Shevey & Spires, Inc. v. American Motors Realty Corp., 279 S.C. 58, 301 S.E.2d 757 (1983), the appellant's case was dismissed without prejudice for failure to prosecute. However, the statute of limitations had run. Thus, the appellant could not reinstitute the action. After serving the Summons, appellant neglected to file the document for fifteen months. "Appellant not only failed to timely file the Summons, it also failed to otherwise timely prosecute the case. Appellant took no action between August 1976 and March 1978, when a Complaint was finally served twenty months after service of the Summons." Id. at 60, 301 S.E.2d at 758. The supreme court affirmed: "The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause. Thomas & Howard Company v. Fowler, et al., 238 S.C. 46, 119 S.E.2d 97 (1961); Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970)." 279 S.C. at 60, 301 S.E.2d at 758.

Our supreme court has noted, "A dismissal of a case 'without prejudice means that the plaintiff can reassert the same cause(s) of action by curing the defects that led to dismissal. By contrast, dismissals with prejudice are intended to bar relitigation of the same claim.'" Collins v. Sigmon, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989). Nonetheless, the statute of limitations will bar another action after an involuntary dismissal without prejudice if the statutory limitations period has expired at the time the action is refiled. See Davis v. Lunceford, 287 S.C. 242, 335 S.E.2d 798 (1985); cf. Mende v. Conway Hospital, Inc., 304 S.C. 313, 404 S.E.2d 33 (1991) (recognizing the ruling in Davis, but finding the statute of limitations defense had been waived).

Joyner obtained a jury verdict of $2,500 against each of the two defendants in magistrate's court in Joyner v. Glimcher Properties, 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002). Glimcher appealed to the circuit court, but the magistrate did not file a return within thirty days as required by Rule 75, SCRCP. Joyner filed a motion to dismiss for failure to prosecute, and the circuit court granted the motion. The court of appeals affirmed, finding that when no return is filed, "the appellant from the magistrate's court must act

with due diligence and seek a writ of mandamus if necessary to compel the return." 356 S.C. at 463, 589 S.E.2d at 763 (footnote omitted).

Based on the foregoing review, I find the trial judge's dismissal of the case sub judice was within the proper ambit of his discretion.

First, it is not significant that McComas's attorney was present in court, or that McComas was on her way to the courthouse when the judge granted the defendant's motion. Bond makes clear that dismissal for failure to prosecute may be proper even when (1) the plaintiff's attorney makes an appearance in court, and (2) the plaintiff is currently in route to the courthouse. Trial judges are forced to make real-time decisions on the administration of cases. The authority to dismiss a case for failure to prosecute "is necessary if the courts are to control and efficiently manage an ever-expanding docket." Don Shevey & Spires, Inc. v. American Motors Realty Corp., 279 S.C. at 60, 301 S.E.2d at 758 (1983); see also Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211-12, 493 S.E.2d 826, 832 (1997) ("'Provision is made in federal and state statutes or rules of practice for dismissal of civil actions for failure of prosecution by the plaintiff. . . . Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditions disposition of cases.") (quoting 24 Am.Jur.2d Dismissal, Discontinuance, and Nonsuit 48 (1983)). The judge had no way of knowing when or if McComas would appear. I find no abuse of discretion.

McComas emphasizes the fact that she had engaged in discovery and had not been dilatory with respect to this case prior to her failure to make a timely appearance. However, Joyner demonstrates a singular instance of nonfeasance may be sufficient ground for dismissal for failure to prosecute. See Joyner, 356 S.C. 460, 589 S.E.2d 762 (affirming the trial court's dismissal for failure to prosecute where the appellant failed to seek a writ of mandamus compelling the magistrate court to file a return).

McComas attempts to distinguish the instant case from Small on the basis that here there was no showing of unreasonable neglect. Ross contends that a showing of unreasonable neglect is not necessary for dismissal under

Rule 41(b). Further, Ross maintains that even were a showing of unreasonable neglect required, the requisite neglect is inferable by McComas's failure to show—as was the case in Small.

Small was decided under former code section 10-1502 of the 1962 Code of Laws. That section expressly provided for dismissal "in case of unreasonable neglect on the part of the plaintiff . . . to proceed in the cause against the defendant or defendants served." The South Carolina Rules of Civil Procedure were promulgated in 1985. See McLain v. Ingram, 314 S.C. 359, 360, 444 S.E.2d 512, 512 (1994) ("The adoption of the SCRCP in 1985 heralded a new era in South Carolina's civil practice, modernizing and streamlining our system."). Rule 41(b), SCRCP, does not specifically require a finding of unreasonable neglect. Don Shevey & Spires, Inc. v. American Motors Realty Corp., 279 S.C. 58, 60, 301 S.E.2d 757, 758 notes that "the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause." However, Shevey was decided in 1983—after the repeal of the 1962 Code, but prior to adoption of the Rules. Joyner v. Glimcher Properties, 356 S.C. 460, 589 S.E.2d 762, which was decided in 2002—after promulgation of Rule 41(b)—does not mention the unreasonable neglect requirement.

Regardless whether the unreasonable neglect language applies to dismissals for failure to prosecute, I would rule that McComas's unreasonable neglect is inferable in this case. The Small court professed:

> Counsel for plaintiff was apparently in his office and the plaintiff and his witnesses were at their work when the case was called for trial. The court notified counsel through the clerk of court that the case had been reached on the trial roster. The only response made by counsel at that time to such notice was to inform the court through the clerk that he could not appear before 2 P.M., several hours later. We find no abuse of discretion in the dismissal of the action under the facts. Unreasonable neglect is inferable.

254 S.C. at 443, 175 S.E.2d at 804.

Rule 40(b) lucidly instructs that once placed on the jury trial roster, a case is subject to call. Here, counsel was informed at approximately 11:00 a.m. that the case would be called to trial. McComas failed to present herself over five and one-quarter hours later. She left her house with no means by which her counsel could contact her. Once she learned of her trial, she apparently did not know the location of the courthouse. Thus, she neglected (1) to keep open a means of communication with her attorney, and (2) to avail herself of the courthouse's whereabouts. Under these facts, unreasonable neglect is inferable.

Although McComas's counsel did call several witnesses prior to dismissal, McComas ultimately failed to prosecute her case. There was absolutely no evidence regarding damages presented at trial. Therefore, had McComas's attorney rested the plaintiff's case, a verdict would have been directed in favor of Ross for failure to present any evidence on damages. However, McComas did not rest her case. Rather, the trial judge instructed McComas to call her next witness, and the plaintiff could not proceed: she failed to prosecute. Under South Carolina precedent, the trial judge had the discretion to dismiss her case at that time.

The majority opinion essentially declares a court must wait for the plaintiff—the plaintiff need not trouble herself to wait for the court. This decision undermines the utility of Rule 40 and the ability of a circuit judge to effectively administer court. The unfortunate result will be the needless waste of time and state and county resources. I **VOTE** to **AFFIRM**.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sloan Construction Company, Inc., Appellant,

v.

Southco Grassing, Inc., Wanda Surrett, South Carolina Department of Transportation, and Greer State Bank, Defendants,

of whom South Carolina Department of Transportation is Respondent.

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

Opinion No. 4085
Heard January 10, 2006 – Filed February 21, 2006

AFFIRMED

T. S. Stern, Jr., of Greenville, for Appellant.

Beacham O. Brooker, Jr., of Columbia, for Respondent.

WILLIAMS, J.: Sloan Construction Company, Inc., ("Sloan") appeals the dismissal of its action against the South Carolina Department of Transportation ("SCDOT"), arguing South Carolina Code Sections 29-6-250 and 57-5-1660(a)(2) (Supp. 2004) give rise to a private right of action against a violating state agency. We affirm.

FACTS

The facts of this case are largely uncontested. SCDOT hired Southco Grassing, Inc., ("Southco") as the general contractor on state highway project no. 23.504 ("the Project"). Pursuant to South Carolina Code Sections 29-6-250 and 57-5-1660(a)(2) (Supp. 2004), Southco provided SCDOT with proof they acquired a payment bond valued at 100% of the $440,016.90 contract amount. Amwest Surety Insurance Company ("Amwest Surety"), a company qualified and licensed for surety authority by the South Carolina Department of Insurance with an A- rating from the A.M. Best Company, issued the bond.

In November 2000, Sloan entered into a subcontractor agreement with Southco in connection with the Project. Over the course of Sloan's contract performance, Amwest Surety was judged insolvent by the insurance commissioner of Nebraska, the company's home state. In June 2001, the Nebraska courts ordered Amwest Surety to liquidate all its assets. Upon notice of Amwest Surety's insolvency, SCDOT wrote to Southco requesting proof of a replacement payment bond within seven days. Southco did not respond to this request. Sloan properly performed its portion of the Project, but was not paid the $51,937.66 owed for the completed job. Sloan did not file a claim against Amwest Surety through the company's appointed receiver.

In January 2002, Sloan submitted written notice to SCDOT of its unpaid claim, recounting its hardships with the insolvent Amwest Surety. Several months later, Southco submitted an affidavit to SCDOT averring all subcontractors on the Project were paid in full. In accordance with the agency's contract closeout procedures, which require an affidavit sworn by a principal of the general contractor stating all subcontractor claims are paid in full, SCDOT released the balance of the contract price to Southco.

In December 2003, Sloan commenced the present action against Southco, SCDOT, and others for the unpaid contract price. Sloan based its claim against SCDOT on South Carolina Code Sections 29-6-250 and 57-5-1660(a)(2) (Supp. 2004), asserting these statutes create an enforceable duty on the part of SCDOT to assure the payment bonds on its projects are, in fact, obtained and remain in effect until full payment. SCDOT responded by filing a 12(b)(6), SCRCP, motion to dismiss. The circuit court granted SCDOT's motion, concluding the statutes in question do not give rise to a private action against a violating state agency. This appeal followed.

SCOPE OF REVIEW

"Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action." Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003) (citing Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999)). The circuit court, in a civil action, may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Id. The motion cannot be granted if the facts set forth in the complaint and the inferences reasonably drawn therefrom would entitle the plaintiff to any relief on any theory of the case. Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987).

DISCUSSION

The circuit court concluded South Carolina Code Sections 29-6-250 and 57-5-1660(a)(2) (Supp. 2004) do not grant Sloan a private right of action against SCDOT. We agree.

Section 57-5-1660 of the South Carolina Code reads in pertinent part:

> (a) The Department of Transportation shall require that the contractor on every public highway construction contract, exceeding ten thousand dollars, furnish the Department of Transportation, county, or road district the following bonds, which shall become binding upon the award of the contract to such contractor:
>
> > (2) A payment bond with a surety or sureties satisfactory to the awarding authority, and in the amount of not less than fifty per cent of the contract, for the protection of all persons supplying labor and materials in the prosecution of work provided for in the contract for the use of each such person.

S.C. Code Ann. § 57-5-1660 (Supp. 2004). This statute, enacted to protect subcontractors and materialmen on SCDOT projects, is often referred to as the "Little Miller Act," as it was modeled after the federal Miller Act, 40 U.S.C.A. §§ 270a & 270b (1986) (following 2002 amendment, these federal statutes are cited as 40 U.S.C.A. §§ 3131-3133). Syro Steel Co. v. Eagle Constr. Co., 319 S.C. 180, 182, 460 S.E.2d 371, 373 (1995). The Little Miller Act works in conjunction with Section 29-6-250, enacted in 2000, to require payment bonds for the protection of subcontractors on certain government projects for the full amount of the contract.[1]

[1] In 2002, the General Assembly amended the two code sections in tandem, reaffirming the statutes' dual application.

Section 29-6-250 reads in pertinent part as follows:

> (1) When a government body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the contract.
>
> . . . .
>
> (3) For the purposes of any contract covered by the provisions of this section, it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

S.C. Code Ann. § 29-6-250 (Supp. 2004).

Our analysis of whether these statutes grant an individual or corporation the right to sue a violating state agency begins with the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to -200 (2005). "The Tort Claims Act governs all tort claims against governmental entities." Hawkins v. City of Greenville, 358 S.C. 280, 292, 594 S.E.2d 557, 563 (Ct. App. 2004). The Act, a limited waiver of the State's sovereign immunity from lawsuits, provides that State agencies are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations and exemptions provided in the Act. S.C. Code Ann. § 15-78-40 (2005).

Applied to the present facts, it is clear Sloan has no right to sue under the South Carolina Tort Claims Act. Because the "Little Miller Act" and section 29-2-250 deal solely with government contracts, a private individual would never be in a position to require these statutorily mandated bonds, and thus could never be liable for the failure to require them. See, e.g., Arvanis v. Noslo Eng'g Consultants, Inc., 739 F.2d 1287, 1290 (7th Cir. 1984); Hardaway Co. v. United States Army Corps of Eng'rs, 980 F.2d 1415, 1416-1417 & n.3 (11th Cir. 1993) (adopting this rationale regarding the federal

Miller Act and Federal Tort Claims Act and acknowledging the application of similar analyses by the Fourth, Ninth, and Tenth Circuits). Because a private individual could never be liable under the bonding statutes, the South Carolina Tort Claims Act's limited waiver of sovereign immunity does not apply to suits brought against the government under the statutes in question.

We move now to the issue of whether South Carolina's statutory bonding scheme, in itself, constitutes a waiver of SCDOT's sovereign immunity from suit. Because the "Little Miller Act" is patterned after the federal Miller Act, cases construing the federal Miller Act, absent a contrary expression of legislative intent, will be given great weight in the interpretation of its South Carolina counterpart. Syro Steel Co., 319 S.C. at 182, 460 S.E.2d at 373. Federal cases construing the federal Miller Act are nearly unanimous in their interpretation. Under federal law, failure of a government agency to follow the bonding requirements of the Miller Act, without other authority evincing a waiver of sovereign immunity, does not give rise to a private right of action against the agency. See, e.g., Active Fire Sprinkler Corp. v. United States Postal Service, 811 F.2d 747, 752-753 (2nd Cir. 1987) ("The Miller Act does not provide subcontractors with a right of recovery against the United States."); Arvanis, 739 F.2d at 1290 ("[In the Miller Act] [t]here is clearly no waiver of sovereign immunity."); Devlin Lumber & Supply Corp. v. United States, 488 F.2d 88, 89 (4th Cir. 1973) ("[A] violation of the Miller Act does not create liability on the part of the government . . . ."); Acousti Eng'g Co. of Florida v. United States, 15 Cl. Ct. 698, 701 (Cl. Ct. 1988) ("The Miller Act does not give subcontractors a substantive right to directly sue the United States for monies owed by [a] prime contractor.").

As there is no clear expression of legislative intent in South Carolina contrary to the interpretation of the federal Miller Act applied by the federal courts, we likewise conclude the statutes do not constitute a waiver of sovereign immunity and that a violation of our own statutory bonding scheme does not give rise to a private right of action against a state agency.[2] In doing

[2] Because we decide this case on the grounds that South Carolina's bonding scheme on state projects does not grant a subcontractor the right to bring a

so, we share the concern of the circuit court judge that "such a result is at odds with the overall goal of Miller Act type legislation – i.e., the protection of subcontractors who have no right to lien on government work." Nevertheless, as stated by Seventh Circuit Court of Appeals:

> "[t]here does seem to be a gap in the statute; there is no provision for the contingency that both the contractor and the government contracting officer will ignore the bonding requirement. However, this is not a gap that we can fill with a remedy . . . ."

Arvanis, 739 F.2d at 1290. Should the General Assembly desire South Carolina's bonding scheme on state projects to allow private suits against the government, the statutes could easily call for such. See, e.g., Kelly Energy Systems, Inc. v. Brd. of Commissioners of Clarke County, 396 S.E.2d 498, 499-500 (Ga. App. 1990) ("[the Georgia bonding statute] provides that the governing body for which the work is done shall be liable to all materialmen for any loss resulting from the failure to require a payment bond.").

For the foregoing reasons, the circuit court's grant of SCDOT's motion to dismiss is

AFFIRMED.

STILWELL and KITTREDGE, JJ., concur.

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private action against a violating state agency, we need not address whether SCDOT complied with the statutes in question under the present facts.