OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 15, 2002

ADVANCE SHEET NO. 11

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anne S. Parker, Petitioner,

v.

Winfield W. Shecut and
Marion A. Shecut, III, Defendants,

of whom Marion A.
Shecut, III, is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
Olin D. Burgdorf, Master-in-Equity

Opinion No. 25444
Heard January 10, 2002 - Filed April 15, 2002

REVERSED AND REMANDED

William O. Pressley, Jr., of Perrin, Perrin, Mann & Patterson, LLP, of Spartanburg, for petitioner.

A.F. Carter, III, of Carter Law Firm P.A., of Orangeburg, for respondent.

JUSTICE PLEICONES: We granted certiorari to consider the Court of Appeals' decision affirming the Master-in-Equity's determination that Respondent Marion A. Shecut, III, ("Bo") did not oust his co-tenant, Petitioner Anne S. Parker ("Anne"), from their jointly-owned beach house. Parker v. Shecut, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000). We reverse and remand.

FACTS

In October 1992 Mary Shecut died, leaving her estate of approximately $1.3 million dollars to her three children, Anne, Bo, and Defendant Winfield W. Shecut ("Win"). Mary's will named Bo and Win executors of the estate. On April 6, 1993, Anne, Bo, and Win executed a written agreement ("private agreement") delineating how the substantial real property inherited from their mother would be divided. Under the private agreement, Win received the bulk of the family's farm property adjacent to his own residence, while Anne and Bo received, as tenants in common, some farmland, a beach house at Edisto Island (which is at the heart of the issue on appeal), and a number of commercial properties in Orangeburg County. Anne and Bo agreed to manage their properties together, and each deposited $3,000.00 in a banking account under the name Shecut Investments. The two apparently did not execute a partnership agreement or otherwise reduce their management agreement to writing.

Correspondence in the record suggests problems with the property arrangement between Anne and Bo began by early 1994. On February 15, 1994, Anne wrote Bo a letter offering to sever the co-tenancy in some of their joint property, with each receiving sole ownership of a portion. She complained that some of the property was not "being utilized equally between us."

Despite Anne's complaints, she and Bo maintained the beach house as a rental property through 1995. Anne presented evidence that the beach house generated the following gross rents between 1993 and 1995:

YEAR	GROSS RECEIPTS
1993	$8,497.00
1994	$18,181.00
1995	$19,841.00

According to Bo, however, after taxes, insurances and other expenses, the beach house generated only $229.00 in income in 1995. Bo included this amount on his income taxes for 1995. He testified that he claimed no income for the years 1993 and 1994. A real estate appraiser, called by Anne, testified that the Edisto Island beach house was a break-even rental property. The appraiser added that the best use for the house, that is the most profitable use, was to sell it.

During the years the beach house was rented, Anne took one-half of its depreciation on her income tax returns. In 1995, Anne amended the agreement with Edisto Realty, the real estate company managing the beach house property, and had all rental checks mailed directly to her home in Atlanta.[1] Upon receipt of the rental checks, Anne endorsed them over to the attorney for the mother's estate. According to Bo, during the year Anne received rental checks, taxes and other expenses on the property were not paid, and Edisto Realty had to pay some of the expenses on the beach house. Bo also testified that he retrieved a check for about $4,000.00 from Edisto Realty in June 1995 and kept the check.

In January 1996 Bo, without consulting Anne, made the beach house his primary residence, and ceased renting the house. Anne testified that Bo told her in March 1996 that she was not welcome to use the beach house. He

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[1]Prior to this time rental checks had been mailed to Bo, payable to Shecut Investments.

also told her he changed the locks. Prior to this time, Anne had access to the beach house when it was not being rented.

Bo denied that he ever told Anne she was not welcome at the beach house. He testified she was always welcome as long as "she would behave." Anne testified that she visited the beach house as late as March 1997, and that she entered the house. She added that while there, she was confronted by police. She could not establish that Bo called the police or was in any way responsible for the police showing up at the house.

Anne visited the beach house on one occasion between May 1997 and November 1997 and discovered her keys no longer worked. As of the date of the second hearing, November 12, 1997, Anne no longer had a working key or access to the beach house.

Bo changed the locks after the house was vandalized on June 13, 1997. He admitted that after that date Anne no longer had a working key. Based on a conversation he had with Win, Bo suspected Anne committed the vandalism. Win testified that he had a telephone conversation with Anne wherein she admitted she vandalized the beach house. Anne denied vandalizing the house and maintained that she had not been at the house on or about June 13, 1997.

Following the November 12, 1997, hearing, the master ordered the property granted Anne and Bo in the private agreement divided in-kind, with the exception of the beach house, which he ordered sold at public auction. The proceeds were divided so as to equalize the in-kind distribution.[2] The master found Bo had not committed ouster and awarded Anne no rent for the time Bo was in exclusive possession of the house. The Court of Appeals affirmed, finding that "Anne offer[ed] no evidence of either ouster or exclusion. Accordingly, Bo does not owe Anne anything for his use of the

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[2]Specifically, the order practically awarded Bo $58,100 more of the proceeds of the beach house sale than Anne, not including attorney's fees.

beach house . . . ." Parker v. Shecut, supra, at 496, 531 S.E.2d at 566.

ISSUE

> Did the Court of Appeals err in determining Anne had failed to show ouster by Bo?

ANALYSIS

"'Ouster' is the actual turning out or keeping excluded a party entitled to possession of any real property." Freeman v. Freeman, 323 S.C. 95, 99, 473 S.E.2d 467, 470 (Ct. App. 1996). "By actual ouster is not meant a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits." Woods v. Bivens, 292 S.C. 76, 80, 354 S.E.2d 909, 912 (1987).

> The acts relied upon to establish an ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable. . . . Only in rare, extreme cases will the ouster by one cotenant of other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property.

Freeman, supra, at 99, 473 S.E.2d at 470 (citations omitted).

Where one co-tenant has ousted the other co-tenant, and kept them out by force, he is liable as a trespasser for the rental value of the property beyond his ownership share. Jones v. Massey, 14 S.C. 292, 307-08 (1880).

We do not agree with the Court of Appeals' conclusion that Anne produced no evidence of ouster or exclusion. In our view, the preponderance of the evidence demonstrates ouster. Bo's own testimony establishes that on or about June 13, 1997, he changed the locks to the beach house. Further, he

testified that he had not given Anne a working key, nor did he have any intention of giving Anne a key unless the master ordered him to do so. Bo's actions in changing the locks and refusing to provide Anne with a key are so distinctly hostile to Anne's rights that Bo's intention to disseize is clear and unmistakable. See Freeman, supra. Further, Bo's actions clearly evince his claim of exclusive right and a denial of Anne's right to use the property. See Woods, supra. Accordingly, we find that Bo ousted Anne on June 13, 1997.[3]

Because the evidence adduced at trial shows Anne was ousted from the beach house on June 13, 1997, we REVERSE the Court of Appeals' decision on this issue and REMAND to the master for a determination of damages, if any, due Anne from the date of ouster.

We note that neither party appealed that portion of the master's judgment ordering that the beach house be sold. Thus, Anne's appeal did not stay the sale of the house, and it appears the sale should have proceeded. See Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . . . Nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal."). Even had Anne or Bo appealed the sale, judgments directing the sale of real property are not automatically stayed on appeal. See Rule 225, SCACR; S.C. Code Ann. § 18-9-170 (1985). However, according to representations made by both parties at oral argument, the beach house has yet to be sold. On remand, the master is to proceed forthwith with the sale of the beach house pursuant to his unappealed order.

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[3]We disagree with the holding implicit in the master's order that because Bo believed Anne vandalized the beach house, he was justified in excluding her from the property. A co-tenant's suspicion that another co-tenant has vandalized jointly-owned property does not permit the suspicious co-tenant to take the law into his own hands and forcibly exclude his co-tenant. If Bo believed his co-tenant Anne wasted the property, he should have sought to enjoin her from doing so, rather than resorting to self-help.

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

The Supreme Court of South Carolina

In the Matter of Charles
E. Feeley, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the relief sought by Disciplinary Counsel.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that James E. Chellis, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Chellis shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Chellis may make disbursements from respondent's

trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that James E. Chellis, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James E. Chellis, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Chellis' office.

James E. Moore A.C.J.

FOR THE COURT

Columbia, South Carolina
April 11, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State of South Carolina,

Respondent,

v.

Terry Lee Grace,

Appellant.

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

Opinion No. 3476
Heard March 7, 2002 - Filed April 15, 2002

AFFIRMED

L. Morgan Martin and George M. Hearn, Jr., both of Conway, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Attorney General Charles H. Richardson and Senior Assistant Attorney

General Harold M. Coombs, Jr., all of Columbia; and Solicitor J. Gregory Hembree, of Conway, for respondent.

CURETON, J.: Terry Lee Grace ("Grace") was convicted of the offense of lewd act on a minor and three charges of simple assault and battery upon the same minor. Grace appeals his convictions arguing the circuit court erred in consolidating the four indictments for trial, and in limiting the testimony of his brother and the cross-examination of his ex-wife. We affirm.

FACTS

Grace and Julie Wilkinson Cowens ("Julie") were husband and wife and had custody and care of their fourteen-year-old niece ("the niece") and fifteen-year-old nephew. During the early morning hours of October 17, 1997, Julie went into the niece's bedroom and did not see her. While searching for her, Julie entered the guest bedroom upstairs, where Grace frequently slept, to look for the niece. Julie pulled the bed covers off the bed, and discovered Grace lying naked in the bed with the niece, who was clad only in a tee shirt. Julie became enraged and asked Grace and the niece whether they had sexual intercourse. The niece responded they had, but Grace denied having sex with the niece.

Upon discovering Grace and the niece together in bed, Julie called 911 and told the operator what had occurred. The 911 operator notified the police who dispatched sheriff's deputies to the scene. The deputies arrested Grace. Lieutenant Hunt, the sexual assault investigator for the Georgetown County Sheriff's Department, investigated the allegations. Hunt asked the niece about the events of October 17 and also whether any similar prior events between the niece and Grace had occurred. The niece responded that they had engaged in sexual intercourse on two prior occasions, and that on October 17 Grace digitally penetrated her. Hunt examined the mattress that Grace and the niece were found lying on and noticed what she thought were old blood stains on the

mattress. She cut out the stained portion of the mattress and had it tested to see if the stain matched the niece's DNA. The DNA test results were inconclusive. Also Hunt arranged for the niece to be examined by a doctor. The results of this examination were also inconclusive.

Grace was charged and separately indicted on three counts of criminal sexual conduct with a minor under the age of sixteen, and one count of lewd act on a minor. The jury convicted Grace on the lewd act on a minor charge and three counts of simple assault and battery. This appeal followed.

LAW/ANALYSIS

I. Joinder Issue

Grace argues the trial judge abused his discretion in not requiring the State to try the criminal sexual conduct charges separate from the lewd act with a minor charge because the joinder made the jury more likely to convict him on the lewd act charge. We disagree.

The circuit court has wide discretion when deciding whether to consolidate charges for trial and its decision will only be overturned when an abuse of discretion has occurred. State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). There are several factors to consider when deciding whether the consolidation of charges was proper. "Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place, and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996). When offenses are interconnected they are considered to be of the same general nature. Id.

There were four separate indictments issued against Grace. The first was for criminal sexual conduct alleging sexual battery by committing the act of fellatio between the dates of August 18 and September 30, 1997. The second

was for criminal sexual conduct alleging sexual battery by intercourse between the dates of August 18 and October 12, 1997. The third was for criminal sexual conduct by committing a sexual battery by digital penetration between August 18 and September 30, 1997. The fourth was for lewd act with a minor on or about October 16, and 17, 1997.

The niece testified that on three occasions during the August 18 to October 17, 1997 time span, Grace propositioned her to engage in a sexual encounter. Each time, the events occurred in the same place and in the same manner. The niece testified that Grace approached her the first time and stated that he wished to have sex with her. Grace then instructed the niece to come up to the guest bedroom, where Grace slept, when she was certain everyone else in the house was asleep. When the niece complied with Grace's instructions and went to the guest bedroom, Grace kissed the niece, performed oral sex on the niece, had the niece perform oral sex on him, digitally penetrated the niece, had intercourse with her and ejaculated on her stomach.

The second encounter occurred in mid-September in the same manner, and the same sequence of sexual events occurred. On both occasions, Grace asked the niece "Did she need attention?" which the niece testified was a code for whether she wanted sex. On the evening of October 16, 1997, Grace once again asked the niece to come to his room in the same manner as before; however, this time only digital penetration occurred.

The indictments in this case involved charges of the same general nature. The crimes alleged were all sexual misconduct crimes and were interconnected. All incidents concerned the same parties, Grace and the niece, and took place in the same location, the guest bedroom, within a relatively short time period. The underlying evidence shows a pattern of sexual abuse and was essentially the same for all charges.[1] We reject Grace's argument that the jury could have

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[1]Although Grace argues the witnesses are not the same for the lewd act charge as for the criminal sexual conduct charges, they are the same except for Julie. The niece testified Grace's modus operandi was the same on the night of

been improperly influenced by the criminal sexual conduct charges in considering the lewd act charge. The jury had no trouble sorting out the evidence regarding the criminal sexual conduct charges by convicting Grace on simple assault charges only. There is no reason it could not have done the same for the lewd act charge. In addition, there was ample evidence in the record for the jury to convict Grace on the lewd act charge without considering any evidence from the events which led to the criminal sexual conduct charge. Under the facts of this case the circuit court did not abuse its discretion by consolidating the charges for trial. Moreover, judicial economy was fostered by the consolidation. See United States v. Hines, 39 F.3d 74, 79 (4th Cir. 1994), vacated in part on other grounds, Hines v. United States, 516 U.S. 1156 (1996).

II. Limitation on Grace's Presentation of His Defense

A. Exclusion of Mike Grace's Testimony

Grace claims the circuit court erred in excluding testimony of his witness Mike Grace regarding prior instances of abuse by Julie against the niece. The circuit court excluded Mike Grace's testimony finding Grace was attempting to attack Julie's credibility on the basis of extrinsic evidence, in violation of Rule 608, South Carolina Rules of Evidence, and allowed only testimony regarding Julie's reputation for truthfulness or untruthfulness.

Grace's theory of defense was that the niece was so fearful of Julie's use of physical force to discipline her that the niece concocted the stories of being sexually abused by Grace to escape the household. Grace argues that there was a lack of physical evidence in the case to establish the niece had been sexually assaulted. As a result, the evidence necessary to convict Grace would have to

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October 17 as on the other occasions, except for the fact that the performance of oral sex and sexual intercourse did not occur. The other witnesses at trial testified to their investigation concerning all charges. Moreover, the lewd act charge is integrally connected to the prior charges because it was the vehicle through which the other charges were discovered.

be established through the testimony of the niece and Julie. Therefore, Grace argues, it was essential to his defense that he be allowed to present evidence of Julie's violent nature, and the niece's motive for lying about the sexual assaults. Grace contends the circuit court's ruling limiting his presentation of evidence effectively denied him his right to present his defense.

> The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. . . . The Amendment essentially "constitutionalizes" the right to present a defense in an adversary criminal trial.

State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986).

As we read Grace's argument at trial for the admission of Mike Grace's testimony, it was based on Rule 608, SCRE. Rule 608(b) provides when specific acts evidence may be used to impeach a witness's testimony.

> **(b) Specific Instances of Conduct**. Specific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

Rule 608(b), SCRE.

Rule 608(a) permits the credibility of a witness to be impeached in the form of opinion or reputation testimony, but only for "truthfulness or untruthfulness." Mike Grace was permitted to state without objection that Julie did not have a reputation "as being a truthful and honest person." As noted above, Rule 608(b) provides, for the purpose of attacking credibility, that specific instances of conduct, other than the conviction of a crime, may not be proven by extrinsic evidence. Moreover, we do not see in the record where Grace proffered the testimony of Mike Grace as required by Rule 103, SCRE.[2]

Even if the circuit court erred by not permitting Mike Grace to testify about specific instances of alleged physical abuse, such error is harmless because it is cumulative to other testimony regarding Julie's acts of physical abuse of the niece. See State v. Patterson, 290 S.C. 523, 528, 351 S.E.2d 853, 856 (1986) (holding that excluding medical records was harmless when evidence was cumulative to testimony of the pathologist). The niece testified, "I was kind of afraid of her, because she did have a temper, and she did yell, and she did hit sometimes. And I think she went overboard sometimes about things, because she did have - - she does have bipolar." During the niece's cross-examination, the following colloquy occurred:

> Q: Did he ever - - was your Aunt Julie always kind and caring towards you?
>
> A: She was the disciplinary person, so she - - no, she wasn't always kind and caring.

[2] Grace's attorney at trial, who is not his attorney on appeal, did state at the conclusion of Mike Grace's testimony: "Your Honor, what I anticipated doing was – or attempting to do was have this witness, Mr. Grace, testify as to acts of physical abuse, and domestic violence, and verbal abuse directed toward the two teenagers, or children, that were living in the house."

> Q: I think you testified that she had - - earlier you testified that she had - - that you were afraid of her?
>
> A: Yes, when she got angry.
>
> Q: Why would you be afraid of your Aunt?
>
> A: Because she was the one who did the disciplinary things. I didn't like getting spanked. I didn't like getting smacked in the mouth.

During Julie's cross-examination, Julie admitted holding the niece's head under water in the bathtub, trying to drown the niece. She also testified that she peppered the niece's tongue when the niece used profanity. Mike Grace testified that he had witnessed Julie being abusive toward her niece. Finally, Grace testified that he had to intervene in Julie's punishment of the niece because he felt that Julie was going too far. Based on the above testimony, there was plenty of evidence in the record for the jury to have fully considered Grace's defense and any potential error by excluding Mike Grace's testimony is harmless beyond a reasonable doubt.

B. Cross-Examination of Julie Cowens

During the trial, Grace sought to question Julie about two prior suicide attempts to impeach Julie's testimony that she felt she "was the most stable force in the relationship." Grace also attempted to introduce testimony regarding Julie's arrest for criminal domestic violence, which charges emanated from conduct occurring in December 1998, over a year after the October 1997 incidents, and were subsequently dismissed by the court. The court refused to allow Grace to question Julie on these matters, concluding that Julie's prior suicide attempts and criminal domestic violence arrest did not constitute specific acts related to the witness's character for truthfulness or untruthfulness.

Both the United States and South Carolina Constitutions provide that every criminal defendant has the right to cross examine the witnesses testifying against him. U.S. Const. amend VI; S.C. Const. art. I § 14. South Carolina courts have discretion to limit the scope of cross-examinaton. See State v. Saltz, 346 S.C. 114, 131, 551 S.E.2d 240, 249 (2001). However, before the court may limit a criminal defendant's cross-examinaton of a witness, the record must show that the cross-examination is somehow improper. See State v. Graham, 314 S.C. 383, 385-86, 444 S.E.2d 525, 527 (1994). If not, then the circuit court abuses its discretion by limiting the cross-examinaton. Id. at 386, 444 S.E.2d at 527.

Evidence of specific bad conduct must go to the witness's credibility. State v. Knox, 98 S.C. 114, 117-18, 82 S.E. 278, 279 (1914). Acts of violence are generally not those types of acts which go to a witness's credibility. See Danny R. Collins, South Carolina Evidence 155 (2nd ed. 2000). A criminal domestic violence charge is an act of violence towards another. As such, this prior act is not related to Julie's character for truthfulness or untruthfulness, and the circuit court did not err when it limited introduction of evidence regarding the criminal domestic violence charge, as allowing inquiry into this conduct would have been improper under Rule 608(b).

The court concluded under Rule 403, SCRE that the prejudicial effect of admitting the testimony regarding the suicide attempts would outweigh its probative value. A trial court's decision regarding the comparative probative value versus prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 594 (Ct. App. 2001). Moreover, the circuit court did not preclude all reference to questions regarding Julie's stability. The court ruled:

> I will allow you to go into the question of – any question regarding her stability, mental health treatment, or anything of that nature, because I think that is probative of the issue of her mental stability; and she has testified that she was the most stable one in the home.

The exclusion of this testimony was also tempered by Julie's explanation why she was "the more stable of the relationship." She testified on redirect:[3]

> Terry was never there for them. The children and I, contrary to what the counselor or the other counselor wants to say, had a very close knit relationship. We did things together. We went places together. We worked as a family.
>
> Terry had his own itinerary, Terry did what Terry wanted to do. If Terry wanted to golf, that left the three of us at home. If Terry wanted to go out, that left the three of us at home.
>
> And we spent a lot of quality, good time, we worked hard together at the place that we lived in Ohio. We had – we were a very close knit.
>
> I interceded on many, many times, and many occasions for these children because of the wrath of Terry when he would come home. I had to play the buffer and the brunt—.

At this point, Grace objected, "based on the court's rulings previously." Whereupon the court stated "I thought I had ruled that questions of stability could go– could be inquired into and you did not inquire into it."

[3]Julie was not cross-examined on this specific testimony.

Under the facts of this case, we conclude the trial court did not err in excluding cross-examination of Julie regarding her prior suicide attempts[4] and her arrest on criminal domestic violence charges.

Accordingly, Grace's conviction is

AFFIRMED.

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

[4]We note that Julie and a police officer testified to a suicide attempt that occurred after the incident of Julie finding the niece in bed with Grace. Additionally, much evidence was adduced regarding Julie's depression and the treatment of her depression.

ANDERSON, J. (dissenting): I vote to **REVERSE** and **REMAND**. In the case sub judice, Julie Wilkinson Cowens, the former wife of Terry Lee Grace ("Appellant"), testified she was "the most stable force" in the family and the victim of abuse by Appellant. In response to her averments, Appellant attempted to question Cowens about her previous suicide attempts and arrest for criminal domestic abuse. The circuit judge refused to admit any of this testimony. This was error.

I. The Rule: Criminal Defendant's Right to "Meaningful" Cross Examination

A trial court's ruling on the proper scope of cross examination will not be disturbed absent a manifest abuse of discretion. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998). This rule, however, is subject to the Sixth Amendment's guarantee of a defendant's right to "**meaningful**" cross examination. Id.; see also State v. Cheeseboro, 346 S.C. 526, 544, 552 S.E.2d 300, 309 (2001), cert. denied ("The right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accuser.") (citations omitted). In Mitchell, the Supreme Court articulated the necessary showing required from an appellant who asserts an infringement on his right to meaningful cross examination:

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which the jurors ... could appropriately draw inferences relating to the reliability of the witness."

Id. at 196, 498 S.E.2d at 645-46 (quoting State v. Smith, 315 S.C. 547, 551-52, 446 S.E.2d 411, 414 (1994)).

II. Cowens' Prior Suicide Attempts

During cross examination by Appellant, Cowens testified that in regard to her family's home life, she was "the most stable force in [the] relationship." Appellant then attempted to question Cowens about her two prior suicide attempts. The solicitor objected and the jury was immediately excused. At that time, Appellant proffered testimony in which Cowens admitted she had attempted suicide on two separate occasions by taking sleeping pills. Following the proffer, the trial judge sustained the State's objection to the admission of this testimony, and stated: "In my view, [the testimony concerning the suicide attempts] does not go to the truthfulness or untruthfulness of the witness."

Rule 608(b), SCRE provides:

> **Specific Instances of Conduct**. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

This Court has stated the focus of Rule 608(b) is not on the type of evidence that is admitted; rather, **the focus of the rule is on the purpose for which the evidence is introduced**. Mizell v. Glover, 339 S.C. 567, 529 S.E.2d 301 (Ct. App. 2000), cert. granted (emphasis added). The trial judge's exclusion of testimony regarding Cowens' prior suicide attempts under Rule 608(b) was error. Appellant only attempted to elicit this testimony to rebut

Cowens' declaration that she was "the most stable force in [the] relationship."

Generally, "any matter is [a] proper subject of cross-examination which is responsive to testimony given on direct examination, **or which is material or relevant thereto, and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness**." State v. Taylor, 333 S.C. 159, 174, 508 S.E.2d 870, 878 (1998) (emphasis added) (citation omitted). Additionally, "[t]he cross-examination of matters which were addressed in direct-examination is not objectionable, even if the answers affect a witness' credibility and character." Id. at 174-75, 508 S.E.2d at 878 (citation omitted). Cowens testified during direct examination that she had a nervous breakdown after finding Appellant and the victim in bed together. She also discussed her diagnosis and longtime history of depression. Notwithstanding these experiences, Cowens claimed to be "the most stable force in [the] relationship," thus implying Appellant was unstable. Evidence of her prior suicide attempts was therefore relevant.

Appellant's theory of the case was that Cowens' mental instability and physical abuse motivated the victim to make the allegation of sexual abuse in a desperate attempt to escape from Cowens. Cowens' testimony that she was "the most stable force in [the] relationship" contradicted Appellant's theory. Therefore, testimony regarding Cowens' prior suicide attempts should have been admitted because it was probative as to the issue of stability within the home. See State v. Finley, 300 S.C. 196, 200, 387 S.E.2d 88, 90 (1989) (reciting the rule that a criminal defendant's right to "confront and cross examine witnesses against him and to present a full defense to the charges makes relevant [the] evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness."). Cowens' mental condition was relevant; concomitantly, instances of her conduct that illustrated her state of mind were within the proper scope of cross examination.

While the trial court agreed Appellant's inquiry into Cowens' past suicide attempts was relevant, he ruled the testimony was inadmissible because

"the prejudicial effect outweigh[ed] the probative value." This determination was also an improper basis on which to exclude the testimony. Cowens' testimony was neither misleading nor confusing; rather, it gave a complete picture as to the issue of her stability and significantly impacted on her statement that she was "the most stable force in [the] relationship." The only party to suffer prejudice was Appellant. This is because the trial judge's exclusion of Cowens' testimony denied him the opportunity to fully present his defense. See State v. Ford, 334 S.C. 444, 453, 513 S.E.2d 385, 389 (Ct. App. 1999) ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.") (citations omitted).

III. Cowens' Arrest for Criminal Domestic Violence

Appellant additionally attempted to question Cowens regarding an incident of domestic violence between her and Appellant, which ultimately resulted in her arrest. The State objected to this questioning and Appellant proffered Cowens' testimony outside the presence of the jury. Appellant asserted this testimony was relevant because of Cowens' previous assertion that she was "the most stable force in [the] relationship" and that she had been the victim of abuse by Appellant. The trial judge ruled the testimony was inadmissible under Rules 403 and 608:

> In my view, I do not think that that is admissible as being probative of the issues in this case. I don't think that it is admissible under 608, as impacting on truthfulness or untruthfulness, and I don't think you can make that quantum leap of saying that somebody that's arrested for criminal domestic violence is unstable.
>
> . . .
>
> So in my view, under Rule 608(b) and under 403(b) that — I just think the probative value is outweighed by the prejudicial

> [e]ffect, so I'm not going to allow the testimony about the release, the arrest and release, for CDV from — of this lady.

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) (citation omitted). "Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citation omitted). The trial judge committed prejudicial error when he excluded relevant

testimony regarding Cowens' arrest for criminal domestic violence, which Appellant offered to show her capacity for violent behavior.

Appellant's credibility was essential to his defense. Any error that substantially damages a criminal defendant's credibility cannot be held harmless where such credibility is essential to his defense. State v. Outlaw, 307 S.C. 177, 414 S.E.2d 147 (1992). In the case at bar, there was no physical evidence to support the victim's claims of Appellant's sexual abuse; thus, the State relied primarily on the credibility of the witnesses. Appellant's right to present a defense mandates that he be permitted to freely cross examine the witnesses about the credibility issues relevant to his defense.

Cowens professed that she was "the most stable force in [the] relationship." Additionally, she testified "there [were] times of abuse … violence. [Appellant was] more of a verbal abuser, very controlling." This testimony presented a picture that Appellant was abusive toward Cowens, an allegation similar to the charge leveled against him by the State in the instant case. Cowens' statements that Appellant abused her therefore arguably bolstered her testimony that she was the "the most stable force in [the] relationship." However, Cowens' arrest for criminal domestic violence was evidence of her abusive nature, which Appellant attempted to have admitted as part of his defense. This evidence was relevant because it rebutted Cowens' testimony concerning her stability and Appellant's history of abuse towards

her. Moreover, it impacted directly on her credibility. The trial judge's exclusion of testimony relating to Cowens' arrest resulted in prejudicial error to Appellant.

CONCLUSION

Cowens placed at issue her mental stability and own capacity for violence when she averred she was "the most stable force in [the] relationship" and the victim of abuse by Appellant. Appellant was therefore entitled to question her about this statement and test her veracity and reliability as a witness under the aegis and ambit of the Sixth Amendment and Rule 608(b). By refusing to admit testimony regarding Cowens' prior suicide attempts and arrest for criminal domestic violence, the trial judge impermissibly prejudiced Appellant. I would vote to **REVERSE** Appellant's conviction and **REMAND** for a new trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Teresa Ann Adkins, Claimant,

Appellant,

v.

Georgia-Pacific, Corporation, Self-Insured Employer,

Respondent.

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

Opinion No. 3477
Submitted December 19, 2001 - Filed April 15, 2002

REVERSED

Frank A. Barton and H. Wayne Floyd, both of West Columbia, for appellant.

Grady L. Beard, of Sowell, Gray, Stepp and Laffitte, of Columbia, for respondent.

HOWARD, J.: In this worker's compensation action, Teresa Ann Adkins appeals from a circuit court order reversing the full commission's award of future medical costs for recurring ear infections resulting from an admitted injury to Adkins's right ear. We reverse and reinstate the award of the full commission.

FACTS/PROCEDURAL HISTORY

Adkins was employed by Georgia-Pacific Corporation ("GPC"). On August 22, 1994, Adkins's right eardrum was perforated when a nail gun discharged compressed air in close proximity to her right ear. GPC admitted Adkins suffered an injury to her right ear in the course of and arising out of her employment.

According to Adkins's treating physician, Adkins reached maximum medical improvement ("MMI") with no permanent disability.[1] The physician explained Adkins suffered a weakening of the tympanic membrane as a result of the perforation of the eardrum, which caused a small hole to reappear from time to time, leading to chronic ear infections. However, the physician opined these infections could be controlled by medication, eliminating nausea and dizziness and allowing Adkins to work at her normal occupation without interruption.

The single commissioner ruled Adkins had no permanent physical disability, but was nevertheless entitled to ongoing medical benefits for her chronic condition. He premised this award upon his finding that the work-related injury weakened Adkins's tympanic membrane, making it susceptible to periodic infections. The commissioner further found this condition was painful and troublesome, but did not interfere with Adkins's ability to work, except

[1] Although neither party could agree on what date Adkins reached MMI, they both acknowledged during oral argument that the issue was moot. Therefore, we need not address it.

during those times when the infection flared up. Finally, the commissioner determined Adkins reached MMI on April 24, 1998. The full commission adopted the single commissioner's report as its final decision.

GPC appealed the award to the circuit court, arguing South Carolina Code Annotated section 42-15-60 (1985) only allows for future medical costs beyond ten weeks when the commission finds these benefits will tend to lessen the period of disability. Because the full commission ruled Adkins had no disability, GPC contended there was no basis for the conclusion that future medical benefits would tend to lessen the period of disability.

The circuit court agreed with GPC, ruling Adkins was not entitled to future medical costs. Adkins appeals.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). An appellate court may reverse or modify a decision if the findings or conclusions of the commission are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2001); see Adams v. Texfi Industries, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000).

DISCUSSION

The circuit court concluded future medical costs could not be awarded to Adkins because the full commission determined she suffered no permanent disability. We disagree.

Once it is determined the claimant suffered a compensable injury, South Carolina law provides future medical costs can be awarded if the commission determines the award will tend to lessen the time during which the claimant is unable to earn, in the same or other employment, the wages he or she received

at the time of the injury. See S.C. Code Ann. § 42-15-60 (1985) (indicating an employer must provide "[m]edical, surgical, hospital and other treatment . . . for a period not exceeding ten weeks from the date of an injury . . . and for such time as in the judgment of the Commission will tend to lessen the period of disability"); Rice v. Froehling & Robertson, Inc., 267 S.C. 155, 159, 226 S.E.2d 705, 706 (1976); see also Dykes v. Daniel Constr. Co., 262 S.C. 98, 110, 202 S.E.2d 646, 652 (1974) (holding a claimant who sustained a one hundred percent loss of vision to his eye was nevertheless properly awarded future medical treatment because it controlled his pain and, therefore, tended to lessen the period of disability within the meaning of section 42-15-60).

In Rice, 267 S.C. at 159, 226 S.E.2d at 706, our supreme court held section 42-15-60 equated the liability of an employer to the time during which an employee is statutorily incapacitated. In Rice, the claimant sought to be paid for medical expenses tending to lessen his pain and dependency on catheterization. The employer contested Rice's claim arguing Rice had already received all weekly compensation to which he was entitled based on his one hundred percent disability rating. Nevertheless, our supreme court upheld the commission's determination that the treatment would tend to lessen the period of disability because it allowed him to become more economically self-sufficient.

In Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 580, 514 S.E.2d 593, 596 (Ct. App. 1999), this Court considered limitations placed on the award of future medical expenses. In that case, the commission awarded future medical expenses for management of the claimant's pain medication because it permitted him to take less pain medicine, thus, allowing him to work. On appeal, the employer in Dodge argued section 42-15-60 did not apply because the claimant had reached MMI. This Court disagreed. Substantial evidence in that record supported the commission's conclusion that future medical treatment would tend to lessen the time during which the claimant would be statutorily incapacitated.

In the present case, the treating physician testified by deposition that Adkins's injury weakened her tympanic membrane, making it difficult for the

original hole in the membrane to heal. Thus, when the pressure on the membrane changes the wound reopens, resulting in drainage and infection. These infections cause dizziness and nausea, affecting Adkins's ability to work. The treating physician opined Adkins's condition would not be disabling in the future if the infections were controlled with medication.

Given these circumstances, the evidence supports the full commission's finding that even though Adkins is not disabled, future medical treatment would tend to lessen her period of disability by keeping her from becoming disabled.

CONCLUSION

Since the record contains substantial evidence to support the full commission's award, we find the circuit court erred when it reversed the full commission. See S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2001); see Adams v. Texfi Industries, 341 S.C. at 404, 535 S.E.2d at 125. Therefore, the decision of the circuit court is reversed, and the award of the Workers Compensation Commission is reinstated.

REVERSED.

HUFF and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Earl L. Leopard,

Respondent.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3478
Submitted January 23, 2002 - Filed April 15, 2002

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Melody J. Brown, all of Columbia; and Druanne D. White, of Anderson, for appellant.

Deputy Chief Attorney Joseph L. Savitz, III, of SC Office of Appellate Defense, of Columbia, for respondent.

STILWELL, J.: The State appeals the circuit court's dismissal of a charge of criminal domestic violence. We reverse.[1]

FACTS

Earl L. Leopard moved to dismiss the charge of criminal domestic violence on the basis that the victim did not fit within the statutorily defined class because she was never physically part of his household. The charge arose out of an altercation at a family barbeque when Leopard's adult stepdaughter intervened in an argument between Leopard and his wife (her mother), and Leopard pushed her. The parties stipulated that the victim is related by the second degree of affinity, but has never resided in the same household as Leopard. The magistrate denied the motion to dismiss. On appeal, the circuit court, relying partially on a 1994 amendment and finding the victim had to be both a member of the household as well as related in the degree set forth in the statute, reversed the magistrate and granted the motion to dismiss.

LAW/ANALYSIS

The sole issue on appeal is the statutory construction of the definition of "Household Member" set forth in the criminal domestic violence statute.

> As used in this article, "household member" means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in

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

> common, and a male and female who are cohabiting or formerly have cohabited.

S.C. Code Ann. § 16-25-10 (Supp. 2001).[2] The basic principles of statutory construction as applied to criminal statutes have been clearly and repeatedly set forth by our supreme court and by this court.

> It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.

State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citations omitted); see also Kerr v. State, 345 S.C. 183, 188, 547 S.E.2d 494, 496-97 (2001); State v. Johnson, 347 S.C. 67, 70, 552 S.E.2d 339, 340 (Ct. App. 2001); accord Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). "'All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.'" State v. Baucom, 340 S.C. 339, 342, 531 S.E.2d 922,

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[2] The State relies on South and Storch, two New Jersey cases with similar facts, to assert that the statute should be construed expansively to extend its protection, consistent with the legislative purpose. South v. North, 698 A.2d 553 (N.J. Super. Ct. 1997); Storch v. Sauerhoff, 757 A.2d 836 (N.J. Super. Ct. 2000). The New Jersey act does not define the term "household member" as does the South Carolina statute; thus the New Jersey cases are not helpful.

923 (2000) (quoting Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

> If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute. When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.
>
> While it is true that the purpose of an enactment will prevail over the literal import of the statute, this does not mean that this Court can completely rewrite a plain statute.

Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (citations omitted). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.'" Wade v. State, Op. No. 25409 (S.C. Sup. Ct. filed Feb. 11, 2002) (Shearouse Adv. Sh. No. 3 at 33, 36) (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992); accord Rainey at 85, 533 S.E.2d at 581.

The history note to the statute section states, "[t]he 1994 Amendment deleted 'family or' preceding 'household member' and substituted 'persons who have a child in common, and a male or female who are cohabiting or formerly have cohabited' for 'and persons cohabitating or formerly cohabitating.'" History to S.C. Code Ann. § 16-25-10 (Supp. 2001) (amended by 1994 Act No. 519, § 1, eff. Sept. 23, 1994). As recently noted, we must "presume the legislature did not intend a futile act" when construing a statutory amendment. State v. Knuckles, Op. No. 3438 (S.C. Ct. App. filed Jan. 28, 2002) (Shearouse Adv. Sh. No. 2 at 67, 71) (citing TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998)). The debate, then, arises out of the amendment which changed the controlling language from "family or household member" to simply "household member." However, because "household member" is expressly defined within the statute, we need look no further to attempt to determine the legislature's intent.

Leopard urges us to look at what he characterizes as the obvious purpose or clear intent of the legislature. "However, we refuse to delve beyond the clear and unambiguous words of the statute." Johnson at 70-71, 552 S.E.2d at 341. If the General Assembly had intended to require that "persons related by consanguinity or affinity within the second degree" cohabit to fall within the ambit of the statute, it would have said so. See id.

The last clause of the definition does contain a cohabiting requirement. The fact that it is included in one phrase but not in the other implies it should not be read into the other.[3]

> The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' The maxim should be used to accomplish legislative intent, not defeat it. The maxim 'is a rule of statutory construction; it is not a rule of substantive law. Accordingly, [it] 'should be used with care.'

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[3] See Baucom at 345, 531 S.E.2d at 924 ("[E]xceptions are noteworthy because they demonstrate the General Assembly's readiness to expressly address" such situations for the law as written to have intended effect.); Rainey at 87, 533 S.E.2d at 582 ("'Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed.'"); State v. Zulfer, 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001), cert. granted (Jan. 10, 2002) (Where legislature in other laws limited use of convictions to "of this State," fact that legislature did not do so in burglary statute implied by silence that out-of-state convictions could be used to enhance penalty.); Scholtec v. Estate of Reeves, 327 S.C. 551, 559, 490 S.E.2d 603, 607 (Ct. App. 1997) (Where legislature extended some statutory exemptions to persons other than the debtor, the absence of such language in a subsection significantly indicates the legislature did not intend the exemption to be similarly extended.).

S.C. Dep't of Consumer Affairs v. Rent-a-Center, Inc., 345 S.C. 251, 256, 547 S.E.2d 881, 883-84 (Ct. App. 2001), cert. granted (Nov. 29, 2001) (alterations and quotations in original) (quoting Rainey at 86 & 96 n.1, 533 S.E.2d at 582 & 587 n.1 and citations omitted).

We are thus constrained to hold that, as defined by § 16-25-10, Leopard's stepdaughter is within the statutorily defined class designed to be protected from domestic violence, and the circuit court erred in dismissing the charge. This result may be an unintended consequence of the statutory language. However, the plain language of the statute cannot be contravened. Scholtec at 560, 490 S.E.2d at 607 ("Despite this possibility of frustrating legislative intent, however, we are confined to the statutory language. . . ."). If it is desirable public policy to limit the class to those physically residing in the household, that public policy must emanate from the legislature. See Bray v. Marathon Corp., 347 S.C. 189, ___, 553 S.E.2d 477, 483 (Ct. App. 2001).

REVERSED.

HUFF and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Converse Power Corporation,

Appellant,

v.

South Carolina Department of Health and Environment Control and South Carolina Board of Health and Environmental Control,

Respondents.

Appeal From Greenville County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 3479
Heard March 6, 2002 - Filed April 15, 2002

AFFIRMED

Gregory J. English and William M. Wilson, of Wyche, Burgess, Freeman & Parham, of Greenville, for appellant.

General Counsel Samuel L. Finklea, III, of South Carolina Department of Health and Environmental

Control, of Columbia, for respondents.

CURETON, J: Converse Power Corporation (Converse) appeals the denial of its petition for an aquaculture permit to the South Carolina Department of Health and Environmental Control (DHEC). We affirm.

FACTS/PROCEDURAL BACKGROUND

On May 30, 1997, Converse applied to DHEC for an aquaculture[1] permit for a proposed shellfish culture farm located at 130 Venture Boulevard, Spartanburg, South Carolina. The petition provided a sparse outline explaining Converse's proposed shellfish operation. On July 18, 1997, Converse requested a contested case hearing before an Administrative Law Judge (ALJ) alleging DHEC "acted arbitrarily, capriciously, and/or unreasonably in not acting upon, or even acknowledging the application" for the permit. DHEC subsequently filed a motion to dismiss based on Converse's failure to exhaust its administrative remedies. DHEC's motion was granted September 3, 1997, without prejudice.

In the interim, Converse and DHEC communicated at least three times by letters. On July 31, 1997, Converse supplemented its application identifying the proposed location site. In the section reading "This facility will be available for INSPECTION on or after ____ (date)," Converse entered: "one year after permit is issued." In a responsive letter dated August 25, 1997, Michael Coker, Program Manager for DHEC's Shellfish Sanitation Program, asked Converse for more specific information regarding the operational plan of the proposed facility. Coker included three and a half pages of questions and suggestions regarding the requirements for a proper application. Coker closed his letter, in part, stating:

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[1] "Aquaculture means the cultivation of shellfish in land based artificial growing or harvest areas, or confined in natural growing or harvest areas . . . ." S.C. Code. Ann. Regs. 61-47(A)(2)(d) (Supp. 1999).

> In addition to the final site inspection required **prior to permit issuance**, my staff is available to visit your facility and provide technical assistance as necessary. Your application noted that your facility would be available for inspection one year from permit issuance. Please note that no permit to construct is required pursuant to R.61-47.[2] The referenced permit is an operational permit required prior to sale and distribution of product. In essence, you may begin construction at any time. (emphasis added).

Converse responded on August 30, 1997, stating it believed its original aquaculture permit application satisfactorily complied with all applicable regulations. Converse closed this letter stating, "We will not begin construction until we have a permit."

On September 24, 1997, Converse filed a petition for mandamus with the ALJ Division in response to the September 3, 1997, dismissal of the action. On November 14, 1997, the ALJ ordered DHEC to respond to Converse's August letter. On November 18, 1997, Coker addressed Converse's application and concluded:

> I will be happy to discuss any of the above items with you. Please note that Regulation 61-47, Section G(2)(b) requires that "*the Department shall make inspections of the Shellfish Operation as may be necessary to determine compliance with the applicable provisions of this regulation.*" As stated in previous correspondence, my staff is available to conduct a preliminary site inspection at your request; however,

[2] Although subsequently amended by State Register Volume 24, Issue No. 5, eff. May 26, 2000, the applicable language at all times pertinent to the present appeal is found in 24A S.C. Code Ann. Regs. 61-47 (Supp. 1999).

> the referenced permit is an operational permit required prior to sale and distribution of product and no aquaculture permit can be issued until construction of your facility is complete.

By letter dated November 21, 1997, Converse submitted a plat showing the boundary lines of the Venture Boulevard property. Converse reiterated its opinion that it had already furnished the information necessary to secure a permit. By letter dated December 15, 1997, Converse questioned DHEC's failure to respond to its application. On January 5, 1998, Converse filed a new Petition for Administrative Review based on DHEC's failure to issue a permit.

On January 14, 1998, Coker responded to Converse's November letter. Coker notified Converse that "the information provided lack[s] specifics and should be further refined prior to permit issuance" and that nothing in the regulations prevents Converse from "constructing a facility or conducting necessary operational testing and process verification . . . ." Converse replied on February 4, 1998, expressing its "position . . . that our application satisfies the law."

On April 24, 1998, DHEC denied Converse's permit application on the basis it was unable to conduct an inspection of the aquaculture facilities. Coker referenced Regulation 61-47(G)(2)(b), which DHEC "interprets . . . to include the requirement [for DHEC] to conduct an inspection prior to permit issuance. . . ." Coker concluded, "Since you have not constructed a facility, and you request a decision, the Department has no choice but to deny the permit."

Converse requested a contested hearing and on May 12, 1998, the ALJ conducted a hearing. At the start of the hearing, DHEC identified the absence of a facility to inspect as the sole basis of its denial of Converse's permit. During the hearing, Coker testified, however, that the management plan submitted by Converse failed to contain the detail necessary to support an application. Coker stated that although the application was insufficient, DHEC reviewed it and "the bottom line, the stopper, was the fact that there was no facility and [DHEC] could not conduct that initial permit issuance inspection."

E.D. Sloan, Jr., president of Converse, testified on Converse's behalf at the hearing. Sloan introduced the various documents Converse submitted for its permit application. He maintained that "those papers speak for themselves" and they complied with all regulatory requirements necessary for obtaining an aquaculture permit. On cross-examination, Sloan admitted that there was a small office building on site but that no aquaculture facility had been constructed. DHEC also questioned Sloan regarding the lack of specificity in the permit application. In response to the ALJ's questions, Sloan stated he did not have blueprints or a design because until he had a permit, he did not know what to build.

Coker testified the aquaculture permit is required for the operation of an aquaculture facility and is not required for construction prior to issuance of the permit. He explained the permitting requirements are "public health based" and designed to "make sure a healthy product reaches the market." He explained shellfish are "filter feeders," absorbing organisms and contaminants in the water, thus the need to properly regulate aquaculture facilities to protect the public's health is heightened. Coker stated that when inspecting an aquaculture facility, DHEC looks to the construction of the facility, its water flow, its materials, its water source, the type of shellfish cultivated, the facility's operating plan, and anything else that could "have an impact on the quality of the shellfish."

Coker explained that the regulations allow a facility to be constructed and shellfish to be grown to test the facility before an initial inspection and issuance of a permit as long as no shellfish are marketed for sale. Coker testified DHEC provided "any technical assistance necessary" during the construction of the applicant's facility before the permit is issued to ensure compliance with the regulations. Coker explained that the regulations refer to the National Shellfish Sanitation Program Manuals. DHEC relies on the national guidelines in assisting applicants in designing and building their facilities. Coker explained that DHEC denied the permit primarily because no facility had been constructed and secondarily because Converse's application was insufficiently detailed.

Thereafter, on June 15, 1998, the ALJ filed a final order denying

Converse's application for an aquaculture permit. The ALJ found that Converse's application: 1) failed to comply with the governing regulations requiring DHEC to inspect prior to issuance of a permit, and 2) was incomplete as it lacked information required by an applicant seeking an aquaculture permit.

Converse appealed the ALJ's order to the Board of Health and Environmental Control (the "Board").[3] Converse's permit application was discussed at a regular Board meeting conducted May 13, 1999. On June 29, 1999, the Board issued its order concluding "the Final Order and Decision of the Administrative Law Judge, including its findings of fact and conclusions of law, should be, and hereby is, adopted as the Order of the Board."

Converse appealed the Board's order to the circuit court. By order filed March 16, 2000, "[h]aving found sufficient evidence in the record" and finding DHEC reasonably interpreted its own regulations, the circuit court affirmed the Board's order. Converse appeals.

STANDARD OF REVIEW

Pursuant to the Administrative Procedures Act,[4] the ALJ presided as the fact-finder in the hearing of this contested case. See Brown v. S.C. Dep't of Health & Envtl. Control, Op. No. 25420, (S.C. Sup. Ct. filed Feb. 25, 2002) (Shearouse Adv. Sh. No. 6 at 13, 16) (finding the ALJ presided as the fact-finder in a similarly postured contested action against DHEC). The Board reviewed the ALJ's order in its appellate capacity, limited by the scope of review

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[3] Prior to a review of the merits, the parties litigated the issue of which party had the responsibility to provide a transcript of the ALJ hearing to the Board. On appeal, the circuit court determined the Board was required to consider the merits of Converse's appeal "as soon as [Converse] provides the Board with the transcript of the hearing before the Administrative Law Judge."

[4] S.C. Code Ann. §§ 1-23-310 to -660 (1986 & Supp. 2001).

established in § 1-23-610(D) (Supp. 2001).[5] The circuit court, pursuant to § 1-23-380(A)(6) (Supp. 2001), reviewed the Board's order to determine whether it properly applied its scope of review.

We likewise review the circuit court order to determine if it properly applied its standard of review. Our review is also governed by § 1-23-380(A)(6) (Supp. 2001), which is similar to that established in § 1-23-610(D). See Reliance Ins. Co. v. Smith, 327 S.C. 528, 535-36 n.6, 489 S.E.2d 674, 678 n.6 (Ct. App. 1997) (noting the standards of review established under § 1-23-380(A)(6) and § 1-23-610(D) are essentially identical). Under our standard of review, we may not substitute our judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record. Lark v. Bi-lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Stokes v. First Nat'l Bank, 306 S.C.

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[5] The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner [have] been prejudiced because . . . the finding, conclusion, or decision is:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

46, 50, 410 S.E.2d 248, 251 (1991).

The ALJ, as the fact-finder, must make sufficiently detailed findings supporting the denial of a permit application. See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n, 338 S.C. 92, 95-96, 525 S.E.2d 863, 865 (1999). Detailed findings enable this court, as a reviewing court, to determine whether such findings are supported by the evidence and whether the law has been applied properly to the findings. Id. at 96, 525 S.E.2d at 865.

DISCUSSION

Converse argues DHEC arbitrarily and capriciously denied its application for an aquaculture permit. We disagree.

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). DHEC is charged with enforcing the provisions of Regulation 61-47 "to protect the health of consumers of shellfish" in South Carolina. 24A S.C. Code Ann. Regs. 61-47(A)(1) (Supp. 1999). See also S.C. Code Ann. § 44-1-140(5) (2002) (authorizing DHEC to promulgate sanitation regulations for the harvesting, storing, processing, handling, and transportation of molluscan shellfish). "The delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public." City of Columbia v. Bd. of Health & Envtl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987).

At the time Converse applied for a permit, DHEC's Regulation 61-47(G)(1)(b) required an aquaculture permit to operate a facility distributing shellfish to the public. 24A S.C. Code Ann. Regs. 61-47(G)(1)(b) (Supp. 1999). Regulation 61-47(G)(2)(b) provided: "Upon receipt of a completed application form, the Department shall make inspections of the shellfish operation as may be necessary to determine compliance with the applicable provisions of this

Regulation." 24A S.C. Code. Ann. Regs. 61-47(G)(2)(b) (Supp. 1999).[6]

Regulation 61-47(G)(2) (Supp. 1999), entitled "Issuance of Permits," provides:

> (b) Upon receipt of a completed application form, the Department shall make inspections of the shellfish operation as may be necessary to determine compliance with the applicable provisions of this Regulation[.]

When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation's operation. Byerly v. Connor, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992). See Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (Where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself.). The construction of a regulation by the agency charged with executing the regulations is entitled to the most respectful consideration and should not be overruled without cogent reasons. Faile v. S.C. Employment Sec. Comm'n, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976).

DHEC interprets the regulations as requiring a facility to exist and be inspected before a permit to operate is issued. We find DHEC's interpretation of the regulations is reasonable and not arbitrary or capricious. Regulation 61-47(G)(2) requires DHEC to inspect "an operation" prior to issuing a permit. The language requiring inspections prior to issuance clearly anticipates an operating facility at the time of inspection. Converse applied for an aquaculture

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[6] As amended, the regulations now require petitioning parties to obtain both an "Aquaculture Facility Construction Permit" as well as an "Aquaculture Facility Operating Permit." 24A S.C. Code Ann. Regs. 61-47(G)(1)(b)(7) & (8) (Supp. 2001).

permit in order to cultivate and sell shellfish to the public. Converse's intended future operation plainly falls within the regulatory definition of an aquaculture operation. As such, before Converse supplies its product to the public, it must obtain a valid aquaculture permit. S.C. Code Ann. Regs. 61-47(G)(1)(b) & (O)(1)(b)(1) (Supp. 1999). We find no ambiguity in the regulations supporting Converse's argument that the regulation does not require them to build their facility prior to inspection.

Converse also argues the amendment to the regulations providing for construction permits in addition to operations permits supports its argument that the regulations existing at the time of Converse's application did not require them to construct their facility prior to issuance of an operations permit. We disagree.

In interpreting a regulatory amendment, we presume a regulatory agency, in adopting an amendment to a regulation, intended to make a change in the existing law. Cf. Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964) (presuming the legislature, in adopting an amendment to a statute, intended to make some change in the existing law); State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("In seeking the intention of the legislature, [the court] must presume that it intended by its action to accomplish something and not to do a futile thing."). Although prior to and after the amendment the regulations do not permit an operational permit without inspection of the proposed site, an applicant is now entitled to apply for a construction permit prior to constructing a facility. We find the amendment lends further support to DHEC's belief that, at the time of Converse's application, the regulations required the construction of the facility prior to issuance of the operational permit.

Converse additionally argues DHEC's interpretation is inequitable to applicants. We disagree. Throughout the application process, Coker offered assistance to Converse in developing its plans and providing technical assistance in the construction of a facility. In addition to changing the regulatory requirements for receiving aquaculture permits, the amendment somewhat conforms to DHEC's actual practice prior to the amendment in assisting its

applicants in designing and building an appropriate facility.

CONCLUSION

We find DHEC's denial was based on its own reasonable interpretation of the regulations. Accordingly, we do not find the decision arbitrary or capricious.[7] The parties agreed at oral argument that Converse could now proceed under the amended regulations and apply for a construction permit. For the foregoing reasons, the decision of the trial court upholding DHEC's decision is

AFFIRMED.

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

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[7] Because we find support in the record for DHEC's denial of Converse's application for a permit, we need not reach Converse's argument that the ALJ erred in finding its application insufficient. Under the amended regulations, and citing State ex rel Carter v. State, 325 S.C. 204, 481 S.E.2d 429 (1997), DHEC argues Converse's action is now moot. We distinguish Carter from this case. In Carter, a taxpayer was challenging the constitutionality of certain capital gains tax legislation first enacted by the General Assembly in 1988 and amended in 1989. Carter, 325 S.C. at 205-07, 481 S.E.2d at 429-30. As the taxpayer never challenged the Act as *amended,* the supreme court found the action was moot. Id. at 205-07, 481 S.E.2d at 430-31. By contrast, the amendment to Regulation 61-47(G)(2) does not moot Converse's challenge that DHEC should have issued it an aquaculture permit without requiring the aquaculture facility to first be constructed.

ANDERSON, J. (dissenting): I vote to **REVERSE**. Converse Power Corporation ("Converse") was entitled to issuance of an aquaculture permit by the Department of Health and Environmental Control ("DHEC") under the provisions of the pre-amended Regulation 61-47.

FACTS/PROCEDURAL BACKGROUND

Converse appealed the denial of its aquaculture permit request and a contested case hearing was conducted before the Administrative Law Judge ("ALJ") on May 12, 1998.[8] At this hearing, DHEC identified as the "sole basis" for its denial of Converse's permit was its "inability to perform an inspection" in that there was no facility for DHEC to inspect.

Only two persons testified before the ALJ: E.D. Sloan, Jr., president of Converse, proceeding pro se, and Michael M. Coker, Manager of DHEC's Shellfish Sanitation Section in the Trident EQC District. During his direct testimony, Sloan introduced the various documents Converse submitted for its permit application. He maintained that "those papers speak for themselves" and they complied with all regulatory requirements necessary for obtaining an aquaculture permit. On cross examination, Sloan admitted that no aquaculture facility has yet been constructed and that he has never operated such a facility before. DHEC additionally questioned Sloan regarding the lack of specificity in the permit application. The ALJ also conducted the following examination:

The Court:	Mr. Sloan, if we were to go out and look at 130 Venture Boulevard now, the location, to inspect it, what exactly would we see?
Sloan:	You'd see a small, one-story office building and a parking lot and a grassy area behind it.
The Court:	Do you have blueprints or any type of plan that shows what you intend to build there?

[8] Docket No. 98-ALJ-07-0032-CC.

Sloan: No, sir, and for good reason.

The Court: And what is that reason?

Sloan: I'm unable to design it without knowing the conditions of the permit.

The Court: **So your position is that unless and until you have permit, you don't know exactly what you would build?**

Sloan: **That's correct.**

(emphasis added).

Coker, on the other hand, testified an aquaculture permit is required merely for the operation of the aquaculture facility and that construction can take place without the permit being issued. He explained the permitting requirements are "public health based" and designed to "make sure a healthy product reaches the market." Since shellfish are "filter feeders," i.e., entities that take up any organisms or contaminants in the water and retain it in their bodies, the need to properly regulate aquaculture facilities to protect the public's health is heightened. Coker testified that when inspecting an aquaculture facility, DHEC looks to the construction of the facility, its water flow, its materials, its water source, the type of shellfish cultivated, the facility's operating plan, and anything else "that could be constructed in such a manner it could have an impact on the quality of the shellfish." Coker then explained why Converse's permit was denied:

> Based on correspondence with Mr. Sloan's company, there has been **no facility constructed, was the primary reason**. Additionally, the S.O.P., I call it, the management plan, that was submitted did not contain all the detail we would like to see ultimately, however, we allowed the process, the application

process, to continue with what he had provided.

> So I would say **the bottom line, the stopper, was the fact that there was no facility and we could not conduct that initial permit issuance inspection**. There was nothing for us to go out, look at, and show compliance with his operational plan he had submitted.

(emphasis added).

Lastly, Coker opined, despite the specific language of the pre-amended Regulation 61–47(G)(1)(b)(5), which states "[i]t shall be unlawful for any person to relay, distribute in interstate commerce, distribute to a certified shipper, harvest for depuration, deplete, wet store, conduct aquaculture activities, or process shellfish who does not possess the appropriate valid ... Aquaculture Permit," that the regulation allows an aquaculture facility to be constructed and shellfish to be grown to test the facility before an initial inspection and permit is given as long as no shellfish are marketed for sale. Coker assured the ALJ that DHEC could provide "any technical assistance necessary" during the construction of the applicant's facility before the permit is issued to ensure compliance with the regulations.

On June 15, 1998, the ALJ filed its "Final Order and Decision" affirming DHEC's denial of the aquaculture permit.[9] The ALJ's last six conclusions of law were:

> 15. Petitioner's application for an aquaculture permit fails to comply with R. 61-47.G.1.(e).
>
> 16. Petitioner's application fails to meet the requirements of R. 61-47.O.1(d) for a shellfish aquaculture permit.

[9] Docket No. 98-ALJ-07-0032-CC.

17. Petitioner's application fails to meet the requirements of R. 61-47.O.4(d)[10] for a land based aquaculture permit.

18. Petitioner's application is incomplete because it does not include specific, relevant, and necessary information required to be detailed by an applicant seeking an aquaculture permit under R. 61-47.

19. DHEC is unable to make inspections of the proposed shellfish operation, pursuant to R. 61-47.G.2(b), as is necessary to determine compliance with the requirements of R. 61-47.

20. Without the ability to determine whether Petitioner's shellfish cultivation facility and operation will perform in a manner which produces shellfish safe for human consumption, Petitioner's application must be denied.

Converse appealed to the Board of Health and Environmental Control ("the Board") for quasi-judicial review of the ALJ's June 15th Final Order. After extensive correspondence between Sloan and the Board, including an appeal to the Circuit Court regarding which party had the duty to supply the transcript of the record before the ALJ to the Board,[11] Converse's permit application was considered at a regular Board meeting conducted May 13, 1999. On June 29, 1999, the Board issued its two paragraph "Order of the Board," which found "the Final Order and Decision of the Administrative Law Judge, including its findings of fact and conclusions of law, should be, and hereby is, adopted as the Order of the Board."

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[10] Although Regulation 61-47 (Supp. 1999) contains subpart (O)(4) for direction for "Land Based Shellfish Aquaculture permit applicants," it only contains subsections (a) through (c).

[11] In its Final Order filed January 27, 1999 (Case No. 98-CP-23-3744), the Circuit Court determined the Board was required to consider the merits of Converse's appeal "as soon as Converse provides the Board with the transcript of hearing before the Administrative Law Judge."

Converse appealed the Board's Order to the Circuit Court. By order filed March 16, 2000, "[h]aving found sufficient evidence in the record" and concluding DHEC had made a "reasonable interpretation of the regulation," the Circuit Court affirmed the Board's determination. Converse appeals.

LAW/ANALYSIS

Section 1-23-380 governs the standard of judicial review in this case. As is similar in a quasi-judicial review of any final decision of an ALJ,[12] this Court's review in the instant action is limited and it is "confined to the record." S.C. Code. Ann. § 1-23-380(A)(5) (Supp. 2001).

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

[12]S.C. Code Ann. § 1-23-610 (Supp. 2001).

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. at (A)(6).

Coker, in his capacity as the DHEC Section Manager for the Shellfish Sanitation Section, stated in his April 24, 1998, letter denying Converse's aquaculture permit application that the sole reason the permit was denied was because, under Regulation 61-47(G)(2)(b), DHEC was unable to inspect any facility. Likewise, in the ALJ hearing, DHEC confirmed that the sole basis for denial of the permit was its "inability to perform an inspection." No other issues regarding the sufficiency of Converse's permit application were identified as issues for review before the ALJ. In fact, after Sloan finished his presentation of his case, which consisted merely of introducing all of the application correspondence to the ALJ, the ALJ denied DHEC's motion for an involuntary nonsuit because the petition application made by Converse "at least meets the minimum requirements [of the regulation]." Therefore, the ALJ's findings of fact and conclusions of law regarding purported application deficiencies other than Converse's lack of any facility for inspection were clearly erroneous, beyond the scope of the ALJ's review of DHEC's initial order, and, therefore, not before this Court.

Converse argues DHEC committed an error of law and acted arbitrarily and capriciously in denying the aquaculture permit merely because Converse had not yet constructed an aquaculture facility for DHEC to inspect. I agree.

DHEC is charged with enforcing the provisions of Regulation 61-47 "to protect the health of consumers of shellfish" in South Carolina. 24A S.C. Code Ann. Regs. 61-47(A)(1) (Supp. 2001). Generally, the delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public. City of Columbia v. Board of Health & Envtl. Control, 292 S.C. 199, 355 S.E.2d 536 (1987). However, this delegation does not go unchecked. DHEC must follow its own

regulations and the provisions of the Administrative Procedures Act[13] in carrying out the legitimate purposes of the agency. Triska v. DHEC, 292 S.C. 190, 355 S.E.2d 531 (1987). Thus, any action taken by DHEC outside of its statutory and regulatory authority is null and void. Id.

"An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings." Kiawah Property Owners Group v. Public Serv. Comm'n of S.C., 338 S.C. 92, 95-96, 525 S.E.2d 863, 865 (1999) (quoting Porter v. S.C. Public Serv. Comm'n, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998)). That is, "[t]his Court will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." Id. at 96, 523 S.E.2d at 865 (citation omitted).

Regulation 61-47(G)(2) (Supp. 1999), titled "Issuance of Permits," provides:

> (a) An application shall be made on a form provided by the Department.
>
> (b) Upon receipt of a completed application form, the Department shall make inspections of the shellfish operation as may be necessary to determine compliance with the applicable provisions of this Regulation;
>
> (c) A permit of certificate may be suspended or revoked as stated in Items H.1(b) and H.1(d).

Regulation 61-47(G)(1)(b) (Supp. 1999) provides, among nine other named types of certificates and permits, only one version of "Aquaculture Permit." "Aquaculture means the cultivation of shellfish in land based artificial growing or harvest areas, or confined in natural growing or harvest areas as

[13] S.C. Code Ann. §§ 1-23-310 to -660 (1986 & Supp. 2001).

designated by permit from South Carolina Department of Natural Resources." 24A S.C. Code Ann. Regs. 61-47(A)(2)(d) (Supp. 1999).[14] Furthermore, "Growing area means an area which supports or could support live shellfish" and "Harvester means a person who gathers shellfish by any means from a growing area." 24 A S.C. Code Ann. Regs. 61-47(A)(2)(s) & (t) (Supp. 1999).[15]

As with other forms of statutory construction, the words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation. Byerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992); see also State v. Dickinson, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000), cert. denied ("[T]he cardinal rule of statutory construction is that the court must ascertain and effectuate the intent of the legislature, and in interpreting a statute, the court must give the words their plain and ordinary meaning without resorting to a tortured construction which limits or expands the statute's operation.") (citations omitted).

Converse, at all times, has been attempting to obtain an aquaculture permit from DHEC in order to begin cultivating and selling shellfish to the public. Converse's intended future business clearly falls within the above definitions for an aquaculture activity. As such, before Converse commences with any aquaculture activities of cultivating shellfish, it must obtain a valid aquaculture permit. 24A S.C. Code Ann. Regs. 61-47(G)(1)(b) & (O)(1)(b)(1) (Supp. 1999). In light of this lucent permitting requirement, Coker's opinion that cultivating shellfish as long as they never reach the human consumption market does not violate the regulation is clearly disingenuous. We must apply the regulation as written, not as merely applied by DHEC.

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[14] The amendment to this definition merely added: "For purposes of this regulation, aquaculture is synonymous with mariculture." S.C. Code. Ann. Regs. 61-47(A)(2)(d) (Supp. 2001).

[15] In the amended Regulation 61-47, the definition for "Growing area" is renumbered at (y) and for "Harvester" at (cc).

Nowhere, however, does the applicable regulation actually require the facility to be constructed before an aquaculture permit can be issued. The regulation merely requires the proper permit before any aquaculture activities are commenced. DHEC's correspondence clearly enunciates its desire for more specific information regarding Converse's plan for operation. Arguably, DHEC could have denied Converse's permit application for its lack of specificity,[16] as the ALJ apparently found convincing; however, that issue is not before this court for review. Instead, we are asked to review whether DHEC's decision to deny Converse's permit application based solely on the fact that there is not yet an operational facility to inspect. Coker testified that, during a facility inspection, DHEC examines many factors, including whether satisfactory building materials and building designs were used. Thus, if Converse completed a facility, but used inadequate building materials, no permit would be issued. Although Coker offered his assistance to Converse for interim inspections of the facility's construction, there is likewise no requirement for the permit petitioner to placate DHEC by making substantial investments into constructing an aquaculture facility with no guarantee that the facility will comply with DHEC's permitting requirements when construction is completed. DHEC's denial of Converse's permit request merely because no facility was completed was clearly arbitrary and capricious.

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. South Carolina State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) (citing Hatcher v. South Carolina Dist. Council of Assemblies of God, Inc., 267 S.C. 107, 226 S.E.2d 253 (1976) and Turbeville v. Morris, 203 S.C. 287, 26 S.E.2d 821 (1943)). None of the appellate proceedings below corrected DHEC's initial error in relying solely on its inability to inspect a facility. DHEC's basis for denying the aquaculture permit was not supported by Regulation 61-47 (Supp. 1999).

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[16] 24A S.C. Code Ann. Regs. 61-47(O)(1)(d) (Supp. 1999) provides: "Applications for Aquaculture Permits must contain a written operational plan detailing the scope and extent of the operation."

Indubitably, the majority opinion grants to the Department of Health and Environmental Control the unfettered and unlimited authority to construe its own regulations. This is error. I vote to **REVERSE** the decision of the circuit judge in affirming the Board's order.