The Supreme Court of South Carolina

IN THE MATTER OF DAVID F. ADDLESTONE, RESPONDENT.

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 1, 1965, David F. Addlestone was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 3, 2001, Mr. Addlestone submitted his resignation from the South Carolina Bar. We accept Mr. Addlestone's resignation.

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

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

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

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 11, 2002

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

January 14, 2002

ADVANCE SHEET NO. 1

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

John M. Knotts, Jr., House of Representatives, District 88, in his official capacity as Chairman of the Lexington County Legislative Delegation and the Lexington County Legislative Delegation, Respondents,

v.

S.C. Department of Natural Resources, and Dr. Paul A. Sandifer, in his official capacity as Executive Director of the S.C. Department of Natural Resources, Appellants.

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

Opinion No. 25395

Heard November 14, 2001 - Filed January 7, 2002

REVERSED

Chief Counsel Buford S. Mabry, Jr., Deputy Chief Counsel Paul S. League and Assistant Chief Counsel James A. Quinn, all of South Carolina Department of Natural Resources, of Columbia, for appellants.

Heath P. Taylor, of Wilson, Moore, Taylor & Thomas, P.A., of West Columbia, for respondents.

PER CURIAM: Representative John M. Knotts, Jr., in his official capacity as Chairman of the Lexington County Legislative Delegation, along with the Lexington County Legislative Delegation (collectively "Delegation") sued the South Carolina Department of Natural Resources and Dr. Paul A. Sandifer in his official capacity as Executive Director of the Department of Natural Resources (collectively "D.N.R.") over allocating money from the Water Recreational Resources Fund ("W.R.R.F."). The trial court issued a writ of mandamus ordering D.N.R. to process Delegation's funding approval. For reasons set forth below we reverse the trial court's decision and vacate the writ of mandamus.

BACKGROUND

The facts of this case are undisputed. The statute at the center of this case provides, in part, all W.R.R.F. funds: "must be allocated based upon the number of boats or other watercraft registered in each county pursuant to law and expended, **subject to the approval of a majority of the**

county legislative delegation, including a majority of the resident senators, if any, for purpose of water recreational resources." S.C. Code Ann. § 12-28-2730 (a) (2000)(emphasis added).

The State funds the W.R.R.F. with a percentage of the gasoline tax revenue which is then disbursed to counties based on the number of watercraft registered in each. S.C. Code Ann. § 12-28-2730 (Supp. 2000). The State treasury holds the funds in a "Special Revenue Account" administered by D.N.R.

In July 2001, Delegation forwarded its approval to D.N.R. to disperse W.R.R.F. funds to constituent organizations. D.N.R. acknowledged receipt of the approved request. However, D.N.R. informed Delegation it would not process the request until it ascertained what W.R.R.F. funds the department would use to comply with provisos in the 2001-2002 Appropriations Act. See 2001 Act 66.

Provisos 72.110 and 72.111 direct D.N.R. to transfer money from various special funds, including the W.R.R.F., to the general fund.[1] The Act also authorizes D.N.R. to reduce its own budget reduction by transferring money from the special funds to its departmental budget. See 2001 Act 66 § 72.76.[2]

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[1] The Appropriations Act directed D.N.R. to transfer $1 million from "03 Earmarked Funds" and $2,042,243 from "Special Revenue Funds" to the general fund. 2001 Act 66 §§ 72.110 - 72.111. The W.R.R.F. is classified as an "03 Earmarked Fund" and a "Special Revenue Fund."

[2] Budget proviso 72.76 provides: "agencies are authorized for FY 2001-02 to spend from agency earmarked accounts designated as 'special revenue funds'... an amount equal to the general fund base reduction for FY 2001-02, to maintain critical programs previously funded with general fund appropriations." 2001 Act 66 § 72.76.

ISSUES

Does D.N.R. have discretion to administer the W.R.R.F. under S.C. Code Ann. § 12-28-2730 (Supp. 2000)?

Does the 2001-2002 Appropriations Act give D.N.R. discretion to allocate W.R.R.F. funds?

Does S.C. Code Ann. § 12-28-2730 (Supp. 2000) violate S.C. Const. art. I, § 8?

If so, are the unconstitutional provisions severable?

DISCUSSION

A writ of mandamus is the highest judicial writ and is coercive in nature. Ex parte Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2000). Delegation may obtain the writ after showing: (1) D.N.R. has a duty to perform the act; (2) the ministerial nature of the act; (3) Delegation has specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. Porter v. Jedziniak, 334 S.C. 16, 512 S.E.2d 497 (1999).

Much of Delegation's and D.N.R.'s arguments center on the ministerial nature of disbursing W.R.R.F. funds. Assuming arguendo that disbursement is a ministerial act, a writ of mandamus is improper because D.N.R.'s duty to perform is predicated on an unconstitutional statute. Because we find S.C. Code Ann. § 12-28-2730 is facially unconstitutional we do not address the other issues.

I

D.N.R. asserts S.C. Code Ann. § 12-28-2730 violates S.C. Const. art. I, § 8. This Court is reluctant to find a statute unconstitutional. Every presumption is made in favor of a statute's constitutionality. Gold v. South

Carolina Bd. of Chiropractic Exam'rs, 271 S.C. 74, 245 S.E.2d 117 (1978). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Joytime Distribs. and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999), cert. denied 529 U.S. 1087, 120 S.Ct. 1719, 146 L.Ed.2d 64 (2000) .

D.N.R. bears the burden of proving the statute unconstitutional. Home Health Serv., Inc. v. South Carolina Tax Comm'n, 312 S.C. 324, 440 S.E.2d 375 (1994). To carry this burden D.N.R. cites the following cases: Tucker v. South Carolina Dep't of Highways & Pub. Transp., 309 S.C. 395, 424 S.E.2d 468 (1992)(Tucker I); Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972); Bramlette v. Stringer, 186 S.C. 134, 195 S.E. 257 (1938).

This Court in Bramlette v. Stringer, supra, found unconstitutional a statute authorizing a bond issue to improve a county's roads. The statute impermissibly delegated a variety of powers to the county legislative delegation, including the ability to determine the amount of the bonds issued, the process for issuing the bonds, and which roads to improve.

This Court began its analysis by noting an act is presumed complete after leaving the hands of the Legislature. The Bramlette statute failed because it created the framework of a law whose interior would be finished by a legislative delegation assuming executive duties. We grounded the Bramlette holding in the basic concept of separation of powers that a legislative body cannot reserve for itself powers given solely to the executive branch.

Delegation attempts to distinguish Bramlette from the present case by focusing on who ultimately spends the funds. Delegation insists the Bramlette statute wrongfully gave the legislative delegation broad powers to expend the funds while S.C. Code Ann. § 12-28-2730 allows Delegation to merely approve requests leaving to the parties receiving the funds the unfettered discretion in spending the appropriation. We disagree with this interpretation of Bramlette.

Separation of powers is not predicated on differentiating between who actually spends the money, but on whether the legislative branch assumes powers belonging to another branch of government. Once the legislature enacts a law all that remains is the efficient enforcement and execution of that law. Bramlette, 186 S.C. at 134, 195 S.E. at 258. Regardless of who spends the money, § 12-28-2730 is unconstitutional because a legislative delegation may not execute or enforce a law.

This Court in Gunter v. Blanton, supra, found a statute unconstitutionally allowed a school board to adopt tax increases only with the approval of its county legislative delegation. We held the Legislature could delegate its taxing power to the school board, but it could not tie that power to the legislative delegation's approval. We ruled the statute could not "authorize the members of the delegation to participate in this determination as legislators, for they may exercise legislative power only as members of the General Assembly." Id., 259 S.C. at 441, 192 S.E.2d at 475. The statute impermissibly empowered a legislative delegation to effectively veto a tax increase with which it disagreed. See also Aiken County Bd. of Educ. v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980) (This Court adopted the Gunter analysis to find a similar statute unconstitutional).

Delegation distinguishes Gunter because it did not address a legislative delegation's power to approve expenditures. The Gunter rationale prohibits the Legislature from undertaking "to both pass laws and execute them by setting its own members to the task of discharging such functions by virtue of their office as legislators." Aiken County Bd. of Educ. v. Knotts, 274 S.C. at 149-50, 262 S.E.2d at 17.

Contrary to Delegation's assertions the rationale underlying Gunter and Aiken undermines the constitutionality of S.C. Code Ann. § 12-28-2730. The statute clearly permits the Legislature to execute a law it has passed by empowering its own members to administer the law by virtue of their office as legislators. See Gunter v. Blanton, 259 S.C. at 441, 192 S.E.2d at 475; see also, Aiken County Bd. of Educ. v. Knotts, 274 S.C. at 149-50,

262 S.E.2d at 17.

Delegation argues its approval under § 12-28-2730 is merely incidental to the Legislature's appropriation authority. See Aiken County Bd. of Educ. v. Knotts, 274 S.C. at 155, 262 S.E.2d at 17 (A Legislature may "engage in the discharge of such functions to the extent only that their performance is reasonably incidental to the full and effective exercise of its legislative powers."). We disagree because Delegation's interpretation undermines the doctrine of separation of powers.

The Legislature has the power to delineate how an executive department may fund a request under the W.R.R.F. The Legislature may statutorily outline how D.N.R. must expend money from W.R.R.F. by clarifying the term "water recreational purposes." The Legislature may allow legislative delegations to make suggestions on how to spend W.R.R.F. funds. See Tucker v. South Carolina Dep't of Highways and Pub. Transp., 314 S.C. 131, 442 S.E.2d 171 (1994)(Tucker II). However, the Legislature does not have the power to create a law then execute it. The power to execute a law is not incidental to the power to appropriate, but is a separate executive power.

In Tucker I, supra, this Court held a legislative delegation could not approve highway fund expenditures or enter into contracts for highway improvements on behalf of the county. We adopted the Gunter and Aiken rationale that separation of powers mandates the Legislature "may not undertake both to pass laws and to execute them by bestowing upon its own members functions that belong to other branches of government." Tucker I, 309 S.C. at 396, 424 S.E.2d at 469.

S.C. Code Ann. § 12-28-2730 unconstitutionally usurps executive powers for the benefit of legislative delegations.[3] The Legislature

[3] Delegation asserts all cases cited by D.N.R. have a common thread of dealing with delegations imposing their will on executive bodies operating

is constitutionally forbidden from undertaking to pass laws and then to execute them by bestowing upon its own members powers belonging to the executive branch.

II

Having found the statute unconstitutional we now turn our attention to whether the statute may survive after severing the unconstitutional requirement of legislative delegation approval. We recognize the principle that a statute may be constitutionally valid in part while unconstitutionally invalid in part. Aiken County Bd. of Educ. v. Knotts, supra; Dean v. Timmerman, supra. Townsend v. Richland County, 190 S.C. 270, 280-81, 2 S.E.2d 777, 781 (1939) sets forth the criteria for applying this principle:

> where a part of a statute is unconstitutional, if such part is so connected with the other parts as that they mutually depend upon

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under a statutory grant of authority. Delegation believes S.C. Code Ann. § 12-28-2730 does not give D.N.R. a role in administering the W.R.R.F., but does give legislative delegations a supervisory role in its administration. Based on this silence, Delegation argued in brief and oral argument that D.N.R. has no executive authority with regard to the W.R.R.F. and therefore, no infringement upon the executive branch has occurred.

Delegation confuses the holdings in the Bramlette line of cases and the theory behind the separation of powers doctrine. The fact the Legislature is infringing upon a particular executive body's authority is irrelevant to whether the Legislature improperly assumes executive branch powers. This Court has continually held the legislative branch may not reserve for itself the function of executing a law. See Tucker v. South Carolina Dep't of Highways & Pub. Transp. (Tucker I) supra; Aiken County Bd. of Educ. v. Knotts, supra; Gunter v. Blanton, supra; Bramlette v. Stringer, supra.

> each other as conditions and considerations for each other, so as to warrant the belief that the Legislature intended them as a whole, and if they cannot be carried into effect, the Legislature would not have passed the residue independently of that which is void, the whole act is void. On the other hand, where a part of the statute is unconstitutional, and that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution, then the courts will reject that which is void and enforce the remainder. (Citations omitted).

D.N.R. contends the purpose of the W.R.R.F. is to benefit the boating public. It argues this purpose can be served by severing the unconstitutional clause and leaving the rest of the W.R.R.F. intact. D.N.R. believes it can administer the program. We disagree.

Unlike the Bramlette line of cases, § 12-28-2730 does not grant any entity, other than legislative delegations, the power to direct spending from the fund. Removing the unconstitutional legislative delegation clause leaves the program without a body to direct expenditures. D.N.R. desires this Court read into the statute a legislative intent to give D.N.R. that power. We decline to do so.

The cardinal rule of statutory construction is for a court to ascertain the intent of the legislature and to give it effect. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 81 (2000).

This plain meaning rule ensures a court will not change the meaning of an unambiguous statute. Id.

The plain language of § 12-28-2730 evidences the Legislature's intent to affix its own county delegations as the sole authority to direct disbursement of W.R.R.F. funds. The statute does not meet the Townsend criteria for severability and must fail in its entirety.

While we conclude S.C. Code Ann. § 12-28-2730 is unconstitutional in its entirety we do not forbid D.N.R. from fulfilling its proviso obligations under the recent Appropriations Act. See 2001 Act 66 §§ 72.76, 72.110 and 72.111. The Legislature clearly intended to give D.N.R. discretion in using W.R.R.F. funds to comply with proviso obligations regardless of the constitutionality of the administration of the W.R.R.F.

We REVERSE.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Tommy Walls, Appellant.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 25396
Heard October 24, 2001 - Filed January 14, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Assistant Attorney General Melody J. Brown, of Columbia, and Solicitor Thomas E. Pope, of York, for respondent.

JUSTICE MOORE: Appellant appeals his conviction under the South Carolina Sex Offender Registry Act (the Act), S.C. Code Ann. § 23-3-400 to -530 (Supp. 2000), claiming an *ex post facto* violation. We affirm.

FACTS

Appellant was convicted in 1973 on the charge of assault with intent to ravish, and sentenced to three years imprisonment. In 1998, he was serving time on an unrelated conviction. Prior to his release, the Department of Corrections notified appellant, in verbal and written form, that he was required to register as a sex offender under the Act as a result of his 1973 conviction.[1] Appellant was given two forms: (1) a pre-registry form, signed and dated by appellant, advising him of the registration requirement; and (2) a pre-registry form requesting addresses where he planned to be. Appellant did not register as required.[2] Following a bench trial, appellant was

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[1]S.C. Code Ann. § 23-3-440(1) (Supp. 2000) provides that prior to an offender being released from the Department of Corrections, the Department must "notify the sheriff of the county where the offender intends to reside and SLED that the offender is being released . . ." Further, the Department must "provide verbal and written notification to the offender that he must register with the sheriff of the county in which he intends to reside within twenty-four hours of his release." The Department also must "obtain descriptive information of the offender, including a current photograph prior to release."

[2]S.C. Code Ann. § 23-3-450 provides:

> The offender shall register with the sheriff of the county in which he resides. To register, the offender must provide information as prescribed by SLED. . . . A copy of this information must be kept by the sheriff's department. . . . An

convicted for failing to register, and was sentenced to ninety days in prison.[3]

ISSUE

Does the Act violate the *ex post facto* clause?

DISCUSSION

When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001).

The United States and South Carolina Constitutions specifically prohibit the passage of *ex post facto* laws. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993) (citing U.S. Const. art. 1, § 10; S.C. Const. art. 1, § 4). For a law to fall within *ex post facto* prohibitions, two critical elements must be present. First, the law must be retroactive so as to apply to events occurring before its enactment. Second, the law must disadvantage the offender affected by it. State v. Wilson, supra. See also Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000) (*ex post facto* violation occurs when a

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> offender shall not be considered to have registered until all information prescribed by SLED has been provided to the sheriff.

The offender is required to register annually for life, and must re-register when moving within the same county, to another county, or to another state. S.C. Code Ann. § 23-3-460 (Supp. 2000).

[3]S.C. Code Ann. § 23-3-470 (Supp. 2000) provides that if a person is convicted for a first offense of failing to register, that person will be guilty of a misdemeanor and will be imprisoned for a mandatory period of ninety days, no part of which will be suspended nor probation granted.

change in the law retroactively alters definition of crime or increases punishment for crime). For the *ex post facto* clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature. State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990) (citing Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)).

The Act meets the first prong of determining whether it falls within *ex post facto* prohibitions. The Act is retroactive because it applies to events occurring before its enactment. In particular, it applies to appellant whose offense was committed in 1973,[4] prior to the enactment of the Act.[5]

Next, whether the Act disadvantages the offender affected by it, or in other words, is criminal or penal in purpose and nature, must be determined. As the United States Supreme Court stated, the determination whether a statute is civil or criminal is primarily a question of statutory construction, which must begin by reference to the act's text and legislative history. In re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001) (citing Seling v. Young, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001)). Where the General Assembly has manifested its intent that the legislation is civil in nature, the party challenging that classification must provide "the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the

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[4]The law existing at the time of the offense determines whether an increase of punishment constitutes an *ex post facto* violation. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); Elmore v. State, 305 S.C. 456, 409 S.E.2d 397 (1991).

[5]Pursuant to S.C. Code Ann. § 23-3-480(B) (Supp. 2000), a person convicted of an offense provided in S.C. Code Ann. § 23-3-430 (Supp. 2000) prior to July 1, 1994, and who was released from custody prior to that date will not suffer the penalties enumerated in section 23-3-470 for failing to register. However, if that person has been served notice of the duty to register, then section 23-3-470 does apply. Accordingly, because appellant was given notice of the duty to register, he was required to register.

[General Assembly's] intention." Id.

S.C. Code Ann. § 23-3-400 (Supp. 2000), provides:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.
>
> The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

From this language, it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes. Hence, the language indicates the General Assembly's intention to create a non-punitive act.

We find the Act is not so punitive in purpose or effect as to constitute a criminal penalty. Accordingly, the Act does not violate the *ex post facto* clauses of the state or federal constitutions.[6]

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[6]Most jurisdictions addressing this issue have found their particular registry acts do not violate the *ex post facto* clause. See, e.g., Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997), cert. denied, 522 U.S. 1122, 118 S.Ct. 1066, 140 L.Ed.2d 126 (1998); Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999),

AFFIRMED.

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

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cert. denied 529 U.S. 1053, 120 S.Ct. 1554, 146 L.Ed.2d 460 (2000); Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997), cert. denied sub nom. Stearns v. Gregoire, 523 U.S. 1007, 118 S.Ct. 1191, 140 L.Ed.2d 321 (1998); Lanni v. Engler, 994 F. Supp. 849 (E.D. Mich. 1998); Patterson v. State, 985 P.2d 1007 (Alaska App. 1999); State v. Noble, 829 P.2d 1217 (Ariz. 1992); Kellar v. Fayetteville Police Dep't, 5 S.W.3d 402 (Ark. 1999); Jamison v. People, 988 P.2d 177 (Colo. App. 1999); State v. Kelly, 770 A.2d 908 (Conn. 2001); People v. Malchow, 739 N.E.2d 433 (Ill. 2000); State ex rel. Olivieri v. State, 779 So.2d 735 (La.), cert. denied, __ U.S. __, 121 S.Ct. 2566, 150 L.Ed.2d 730, (2001); State v. Manning, 532 N.W.2d 244 (Minn. App. 1995); State v. Costello, 643 A.2d 531 (N.H. 1994); People v. Langdon, 685 N.Y.S.2d 877 (N.Y.A.D. 1999); State v. Burr, 598 N.W.2d 147 (N.D. 1999); Commonwealth v. Gaffney, 733 A.2d 616 (Pa. 1999); Meinders v. Weber, 604 N.W.2d 248 (S.D. 2000); Kitze v. Commonwealth, 475 S.E.2d 830 (Va. 1996), cert. denied, 522 U.S. 817, 118 S.Ct. 66, 139 L.Ed.2d 28 (1997); State v. Ward, 869 P.2d 1062 (Wash. 1994); Snyder v. State, 912 P.2d 1127 (Wyo. 1996).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Thomas Kennedy, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
John W. Kittredge, Circuit Court Judge

Opinion No. 25397
Heard December 12, 2001 - Filed January 14, 2001

AFFIRMED

Assistant Appellate Defender Tara S. Taggart, of S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Senior

Assistant Attorney General Charles H. Richardson, and Solicitor Warren B. Giese, all of Columbia, for respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals's decision in State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct. App. 2000). We now affirm pursuant to Rule 220(b), SCACR. *See* Rule 404(b), SCRE; State v. Brazell, 289 S.C. 42, 344 S.E.2d 611 (1986) (speedy trial issue).

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Mandel Sims, Appellant.

Appeal From Richland County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 25398
Heard November 13, 2001 - Filed January 14, 2002

AFFIRMED

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, and Solicitor Warren B. Giese, all of Columbia, for

respondent.

JUSTICE MOORE: Appellant appeals his conviction, claiming the trial court erred by allowing a police officer to give hearsay testimony and by limiting his cross-examination of a State witness regarding the witness's pending charges. We affirm.

FACTS

On the morning of March 1, 1998, police were dispatched to an apartment because a five-year-old boy (hereinafter referred to as the son), had been found upset and crying outside the apartment of his mother, who was feared to be dead. When the police arrived, they discovered the son's mother (the victim), on her bed in a pool of blood. She had jagged, gaping cuts in her throat, and the blade of a knife was found protruding from one of the wounds. The victim did not die immediately, but remained in a coma until her death on August 7, 1998.

At the conclusion of appellant's trial for murder, he was convicted and sentenced to life imprisonment.

ISSUES

I. Whether the trial court erred by allowing a police officer to give hearsay testimony?

II. Whether the trial court erred by limiting appellant's cross-examination of a State witness regarding the witness's pending charges?

DISCUSSION

I. Hearsay testimony

When police officer Sandra Thomas arrived at the scene of the crime, she assisted the victim's son. At appellant's trial, Officer Thomas testified the son answered her questions in a vague and automatic manner. She stated he did not give her any details and held his head down when answering questions. When the solicitor asked Officer Thomas about the son's answer to the question of who was in the apartment the night before, the defense objected on the grounds of hearsay. The question was withdrawn.

After being found competent to testify, the son, who was six years old at the time of trial, initially answered the solicitor's questions. He stated he remembered the night his mother was hurt and that someone else was in the home besides him and his mother that night. He also stated he saw his mother getting hurt. However, the son ceased answering questions and would not tell the jury the identity of the person who was in the apartment that night. He was excused from the stand.

Defense counsel moved for a mistrial because the solicitor, in opening argument, had stated the son had seen appellant attacking his mother and would identify appellant as the perpetrator. Counsel argued appellant had suffered insurmountable prejudice from that unfulfilled promise. The court denied the motion, but gave a curative jury instruction, to which appellant objected.

Officer Thomas was then recalled to the stand. She again testified regarding the son's demeanor. She stated he appeared withdrawn and answered questions vaguely while keeping his head down. The solicitor again asked if the son had indicated who was in the apartment with he and his mother the night of the attack. When Officer Thomas stated he had so indicated, defense counsel objected on hearsay grounds. The trial court overruled the objection and allowed the testimony, stating it was for grounds that he would put on the record later.

The solicitor then asked Officer Thomas who it was the son had

indicated was in the apartment the night of the victim's death. Officer Thomas gave appellant's name.

The trial court subsequently ruled the statement was hearsay; however, given the situation under which the son made the statement, it was admissible. The court pointed to the fact the son made the statement after he discovered his mother, and "in the throws [sic] of the police being there." The court further elaborated that "given the . . . traumatic circumstances under which this statement was made, and the age of the child, and particularly with his moral accountability . . . I think that gives credibility to what he said that would outweigh any objection as to hearsay."

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. A statement that is admissible because it falls within an exception in Rule 803, SCRE, such as the excited utterance exception, may be used substantively, that is, to prove the truth of the matter asserted. State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999).

The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication. State v. Dennis, *supra*. In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). Additionally, such a determination is left to the sound discretion of the trial court. State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999).

Officer Thomas's testimony that the son responded with appellant's name when she asked him who was in his home is hearsay. The testimony was offered to prove the truth of the matter asserted, that is, that appellant was in the victim's home the night of the attack. The question then becomes

whether the statement is an excited utterance, which is an exception to the hearsay rule.

Three elements must be met to find the statement to be an excited utterance. First, the statement must relate to a startling event or condition. Second, the statement must have been made while the declarant was under the stress of excitement. Third, the stress of excitement must be caused by the startling event or condition. *See* Rule 803(2), SCRE.

The statement here clearly meets the first element because it relates to the startling event of the son seeing his mother after she was attacked and possibly while she was being attacked. As for the third element, if the son was under the stress of excitement, then that stress was caused by the startling event of seeing his mother being attacked and not being able to wake her.

As for whether the son was "under the stress of excitement," we first note that the amount of time that passed between the startling event and the time the statement was made is one of several factors to consider when deciding whether a statement is an excited utterance. The time period that could have possibly passed between the time of the attack and the time of the son's statement was approximately twelve hours. The victim left her cousin's home about 10:30 p.m. to return home. She was attacked sometime after she returned home. The police arrived on the scene at 11:28 a.m. the next day, and after 11:28 a.m., the son told Officer Thomas appellant had been in the home the previous night.

While the passage of time between the startling event and the statement is one factor to consider, it is not the dispositive factor. Even statements after extended periods of time can be considered an excited utterance as long as they were made under continuing stress. *See, e.g.*, State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (noting that a time interval of over one hour, and up to eleven hours, did not necessarily eliminate a statement as part of the *res gestae*). In this case, a five-year-old child possibly saw his mother

being attacked and, at the very least, was left alone with his severely injured mother whom he could not wake, until he made his way outside to be found by a neighbor. Under these circumstances, we find the stress of excitement from those events lasts a longer period of time than would be likely to occur if the son had been an adult. *See, e.g.*, State v. Cude, 784 P.2d 1197, 1200 (Utah 1989) (excitement generally lasts longer in children and fabrication is less likely).

Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event. Clearly, the son's age and the severity of the startling event are factors that weigh in favor of finding his statement to be an excited utterance.

Regarding the son's demeanor, when the neighbor found the son, he could not be consoled and continued to cry. Police arrived soon thereafter. When Officer Thomas interacted with the son, his behavior was withdrawn and automatic, and he answered her questions in a vague manner. Officer Thomas also testified the son held his head down while answering questions. While the son was not crying or acting "excited" in the sense of being animated when he made the statement, we believe his demeanor can also be characteristic of someone who is under the "stress of excitement." *See, e.g.*, Dezarn v. State, 832 P.2d 589, 591 (Alaska Ct. App. 1992) (statement to mother by two-year-old child, who had been unusually quiet, concerning sexual abuse by defendant was excited utterance; extreme emotion can still a person's speech as well as evoke it); State v. Kay, 927 P.2d 897, 907 (Idaho Ct. App. 1996) (four-year-old child, who had dried tear tracks on face and was unusually subdued and quiet, was found to be under stress of abduction and molestation when making statements to mother and officer); People v. Nevitt, 553 N.E.2d 368, 376 (Ill. 1990) (statement to mother by three-year-old child, who was uncharacteristically silent and withdrawn, concerning sexual abuse by defendant was excited utterance); State v. Hobby, 607 N.W.2d 869, 876 (Neb. Ct. App. 2000) (victim, who was upset, nervous, withdrawn, and uncomfortable, was speaking under stress of nervous

excitement and shock produced by assault perpetrated by defendant); State v. Kaytso, 684 P.2d 63, 64 (Utah 1984) (child who gives statement under stress of nervous excitement need not be hysterical as long as still under emotional influence of the event); Braxton v. Commonwealth, 493 S.E.2d 688, 692 (Va. Ct. App. 1997) (statement by three-year-old child approximately one hour after discovered with mother's body was admissible as excited utterance; although record did not establish how much time had passed following mother's death, child remained visibly distressed, i.e., was quiet and dazed, through time of statement).

Given the totality of the circumstances, we find the son was under the continuing stress of excitement when he told Officer Thomas appellant was in the home the night of the attack. *See* State v. McHoney, *supra* (in determining whether statement falls within excited utterance exception, court must consider totality of circumstances).

Accordingly, the trial court did not abuse its discretion in admitting the son's statement to Officer Thomas because the statement falls under the excited utterance exception to the hearsay rule.[1] *See* State v. Burdette, *supra* (determining whether statement falls within excited utterance exception is left to sound discretion of trial court).

II. Limitation on cross-examination

Prior to the State's witness, Michael Peterson, taking the stand, defense counsel argued appellant should be allowed to ask Peterson about his

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[1]Although the son's statement was in response to a question, under the circumstances presented, we find this fact does not prevent his answer from being an excited utterance. *See*, *e.g.*, Zitter, Jay M., *When is Hearsay Statement "Excited Utterance" Admissible Under Rule 803(2) of Federal Rules of Evidence*, 155 A.L.R. Fed. 583 (1999) (statement made in response to question does not necessarily lack spontaneity, especially where declarant is a child).

pending charges. Defense counsel desired to question Peterson about what the pending charges were to show bias under Rule 608(c), SCRE, because Peterson had possibly been promised a deal in exchange for his testimony. The State responded there was no promised deal, but that Peterson had been told when he went to trial on the charges, the State would tell the trial judge he had cooperated by testifying in the instant case. The trial court ruled defense counsel could generally ask whether Peterson had pending charges and whether there was anything promised him with regard to those pending charges. However, defense counsel was not allowed to question Peterson as to the crimes with which he was charged.

Peterson's pending charges were: (1) possession of crack cocaine with intent to distribute (PWID); (2) PWID within proximity of a school; (3) robbery, two counts; (4) first degree burglary; (5) grand larceny; (6) malicious injury to real property, two counts; and (7) possession of a controlled substance. If convicted of the first degree burglary charge, Peterson was facing a possible sentence of life imprisonment. S.C. Code Ann. § 16-11-311(B) (Supp. 2000).

Peterson then took the stand. In response to questioning by the State, Peterson stated he had pending charges in the solicitor's office, but he had not been given a deal or promise of leniency. He acknowledged he had been told, when he proceeded to trial on his pending charges, the solicitor may tell the judge he cooperated.

Peterson then related what appellant told him while they were in a holding cell for their bond hearings. Peterson stated appellant said he choked his girlfriend, and

> [a]fter he choked her out, the little son come runnin' into the room and he pushed the little son out of the way. After that he say he got a knife and he started cuttin' on her neck. He said the knife was kinda dull so he started sawing with the knife. After that he decided to listen to her heart again to see whether it was

> still beating. Then after that he started stabbin' her in the neck with the knife. He say the knife broke off when he left.

Peterson stated when appellant was telling him about the crime, "he had a little smirk on his face like he was kinda proud of what he did." When an officer came to take them back to jail, Peterson stated he asked the officer to remove his handcuffs because he was angry and wanted to fight appellant.

On cross, defense counsel questioned Peterson as to what he expected to receive regarding his pending charges in exchange for his testimony. Defense counsel also questioned Peterson about his prior convictions.

Officer Thomas Hampe then testified that when he retrieved the prisoners to transport them back to the jail, Peterson approached him and stated he wished he could have his handcuffs and belly chains removed, so he could fight appellant because appellant had done something he did not like. Officer Hampe testified Peterson told him what appellant had said.

Appellant argues the trial court erred under Rule 608(c), SCRE, by preventing him from cross-examining Peterson about the specifics of the pending charges.[2]

Rule 608(c), SCRE, provides that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c) "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity

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[2]On appeal, appellant also argues the trial court's ruling violated the Sixth Amendment of the Constitution; however, this issue is not preserved for review because it was not raised at trial. *See* State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, *cert. denied,* 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998) (to be preserved for appeal, an issue must be raised to and ruled upon by the trial judge).

of a witness may be shown and considered in determining the credit to be accorded his testimony.'" State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

Appellant sought to expose Peterson's possible bias and prejudice by asking Peterson what the crimes were with which he was charged. Because of the number of charges pending against Peterson and the severity of the potential sentences, we find the evidence was probative on the issue of bias and should have been admitted. There was the substantial possibility Peterson would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case. The excluded evidence had "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of Peterson's testimony, State v. Jones, *supra*. Therefore, under these circumstances, we find the trial court committed error under Rule 608(c) by improperly limiting the scope of appellant's cross-examination.

However, the trial court's error of limiting the scope of appellant's cross-examination is harmless. *See* State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) (trial errors are harmless where they could not reasonably have affected result of trial). The State's case against appellant was strong without resorting to Peterson's testimony. For example, appellant's fingerprints were found on the headboard of the victim's bed. Further, the victim's mother testified when she informed appellant the victim was out of town on the day of the attack, appellant responded that he had told her not to go out of town. Finally, appellant approached two officers, who were at his home for questioning, with his hands "out in front of him" and spontaneously confessed, "I did it, I assaulted [the victim]."

Accordingly, while the trial court erred by limiting appellant's cross-examination of Peterson, the error was harmless because the error could not reasonably have affected the result of trial. *See* State v. Mitchell, *supra*.

AFFIRMED.

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

The Supreme Court of South Carolina

In the Matter of Dirk J. Kitchel, Respondent

O R D E R

On November 5, 2001, Respondent was suspended from the practice of law for a period of sixty days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

BY: s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

January 9, 2002

The Supreme Court of South Carolina

Barnacle Broadcasting, Inc., Petitioner,

v.

Baker Broadcasting, Inc., Respondent.

O R D E R

This Court granted the Petition for a Writ of Certiorari to review to Court of Appeals' opinion in Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc., 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000). Subsequently, this Court stayed the matter pursuant to a joint motion of the parties due to the potential for settlement.

Counsel for petitioner has filed a letter advising the Court that this matter has now been resolved and moves to dismiss the Writ of Certiorari. The request to withdraw the petition is granted and this matter is

dismissed. Costs and attorney fees shall not be awarded to either party under Rules 222 and 226, SCACR.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 9, 2002

The Supreme Court of South Carolina

Nathaniel H. Jones, Petitioner,

v.

State of South Carolina, Respondent.

O R D E R

Counsel for petitioner has filed a petition for a writ of certiorari from the denial of petitioner's application for post-conviction relief. Petitioner filed a motion asking the Court to allow him to file a pro se amended petition for a writ of certiorari despite the fact that he is represented by counsel. See Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). However, while the motion was pending, counsel for petitioner submitted the amended petition for a writ of certiorari on petitioner's behalf along with a letter stating he does not believe any of the issues in the amended petition are relevant but that he was submitting the amended petition at petitioner's request.

There is no constitutional right to hybrid representation either at trial or on appeal. Foster v. State, supra. At the appellate stage, particularly, succinct, relevant legal arguments are most likely to be persuasive. Counsel is best able to use professional judgment to determine which arguments are relevant and should be presented for appellate review. While counsel may choose to submit arguments urged by his client, counsel has an obligation to review those arguments for possible relevance and merit before submitting them. In other words, counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client. As stated by the Supreme Court of Pennsylvania, when faced with a situation similar to this one,

> [t]ails should not wag dogs. Merely because an appellant believes that the irrelevant is relevant is no reason to turn the system on its head and solemnly contemplate the wisdom of a person who does not have the sense to be guided by experts in an area where he himself possesses no expertise.

Commonwealth v. Ellis, 626 A.2d 1137, 1140 (Pa. 1993).

Therefore, while we have considered the pro se amended petition for a writ of certiorari forwarded to the Court in the case at hand, in the future

we will not accept pro se filings simply forwarded through counsel. Counsel shall instead use professional judgment in reviewing the documents and shall submit the client's arguments only if relevant and only after they have been edited by counsel for review by the Court.

The petition for a writ of certiorari and the amended petition for a writ of certiorari are denied.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 10, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roberta Barrett,

Respondent,

v.

Charleston County School District,

Appellant.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3430
Heard December 5, 2001 - Filed December 31, 2001

REVERSED

Alice F. Paylor and Donald B. Clark, both of Rosen, Rosen & Hagood, of Charleston, for appellant.

Deena Smith McRackan, of Charleston, for respondent.

ANDERSON, J.: Roberta Barrett, a teacher at Laing Middle School, was terminated from her job for manifesting an evident unfitness to

teach based on her dishonesty in handling the proceeds of an ice cream sales account and representations made on a Wal-Mart grant application. Barrett appealed her termination to the Charleston County School Board ("the School Board"), which voted 4-1 to terminate. Barrett appealed her termination to the Circuit Court, which reversed the School Board's determination and reinstated her to her teaching position. The School Board appeals the Circuit Court's ruling. We reverse.

FACTS AND PROCEDURAL HISTORY

In 1999, Barrett was terminated from her teaching position at Laing Middle School for dishonesty regarding her actions in handling an ice cream sales account and her representations on a grant application form to Wal-Mart to fund a drama club trip and related activities. Barrett appealed her termination to the Charleston County School Board, which affirmed her termination, 4-1. Barrett appealed the School Board's decision to the Circuit Court, which reversed the School Board's decision and reinstated Barrett. The Circuit Court also ordered that Barrett be compensated for executing her duties in preparing to teach in a 1999 summer program for gifted students. The School Board appeals the Circuit Court's decision.

Barrett began teaching at Laing Middle School in 1986. Her teaching roles were as the computer teacher, and then as the drama teacher. She also taught in the school's gifted student program during the summer months. During the 1993 school year, in an effort to raise money for the school for technology upgrades and other improvements, Laing Middle School, in conjunction with the Laing Parent Teacher Student Organization ("PTSO"), began a program selling ice cream to the Laing students after lunch. The ice cream was sold to the students at fifty cents a serving with an average unit cost of twenty-five cents a serving. A checking account was opened at NationsBank, which was dedicated solely to handling the ice cream proceeds and expenditures.

Since the lion's share of the profits from the ice cream account were earmarked for technology upgrades, and Barrett was the computer teacher,

Barrett was involved in the operation of the ice cream program from its inception. Her initial role was limited to rolling coins, counting the money, and making deposits into the account. From 1993-1995, Norma Kulseth maintained the books and was responsible for writing the checks to pay the ice cream vendor. During the school year of 1995-1996, Jennifer Coe assumed the duties of maintaining the books and writing the checks to pay the vendor. During their respective tenures, Kulseth and Coe kept specific records regarding the deposits made and checks written to and from the account. From 1993-1996, the ice cream account showed substantial profits and both Kulseth and Coe testified money was always available in the account to pay the ice cream vendor.

By 1996, the PTSO had spent a substantial amount of the ice cream proceeds on technology upgrades and a discussion was held about the future use of the ice cream monies. Barrett was now the drama teacher and in the summer of 1996, during a meeting between Kulseth, Barrett, and Walt Pusey, the Laing principal, Barrett assumed total control over the ice cream account. In addition to collecting and counting the money, Barrett's duties now included making the deposits, writing the checks, and accounting for the funds.

From the beginning, the technical operation of the ice cream program was a slipshod affair with no internal controls in place at any step of the operation. Pusey did not oversee the ice cream account, even though this task was within the purview of his duties as the principal. The ice cream was kept in a separate freezer dedicated solely to the ice cream sales program and was refilled by the ice cream delivery driver without anyone from the school checking the invoices to make certain that all the ice cream purchased was actually delivered. The money box used to make change by volunteers and teachers who sold the ice cream was kept in a cabinet that was unlocked during the day and was without a log-in/log-out procedure to know who had the box on a particular day. There was not even a standardized amount of change kept in the money box from day to day to determine if the person selling the ice cream on that particular day was stealing money. No records were kept of how much ice cream was sold to the children on a given day, given away, or sold at cost to the teachers. The lack of internal controls made it impossible to determine how much profit was made by the ice cream sales, or if any profit was made at all.

There were also isolated incidents of spoilage and vandalism that occurred throughout the ice cream sales program that were not recorded or taken into account when determining whether or not the program was profitable.

In October 1998, Pusey informed Barrett that the PTSO wished to have a more active role in the ice cream account and that the proceeds would now go into a PTSO account rather than the separate dedicated ice cream account. Christine Milroth took over the bookkeeping and check-writing duties while Barrett continued to collect, count, and deposit the funds. In December 1998, Milroth determined there were insufficient funds in the account to pay the outstanding ice cream bill. Milroth began investigating the account. Suspicions were raised regarding Barrett's handling of the account when the account balance fell extremely short of the expected profits during the 1997-98 school year. The method the school used to estimate profits was to take the number of units purchased from the vendor and multiply it by twenty-five cents.

Dianne Thomas, the Charleston County School District Auditor, was asked to audit the account for the years 1996-98, the period of time where Barrett had exclusive control over the account. Thomas determined the account revealed a $19,000 difference between actual money taken in and the amount of the expected profit. When Thomas reviewed the activities of the account during Barrett's tenure, she discovered Barrett had written personal checks to the account on several occasions. Barrett's very first act when coming into sole control of the account was to write a $2,000 check out of the ice cream account, emptying the account, to her mother-in-law's account, over which Barrett had the power to withdraw money. Also, Barrett did not keep detailed records about the amounts deposited into the account, nor did she record invoices, in contrast to the record keeping techniques used by Kulseth and Coe.

In an effort to determine Barrett's honesty, Milroth arranged a test situation where Barrett was given money to count and deposit into the PTSO account. Barrett was told that the money was uncounted. In actuality, the money had already been counted and the exact amount of the expected deposit was known. Barrett's actual deposit was less than the amount of money given to her to be deposited.

In 1997, Barrett wanted to take her drama club students on a field trip to New York City. Pusey denied her request for the trip to be a school-sponsored trip. In an effort to independently raise money for the trip, Barrett and her drama club students began selling candy outside of a local Wal-Mart. Barrett was informed that Wal-Mart had a matching grant program after a store manager noticed what Barrett and her students were doing. Wal-Mart instituted the grant program to foster good will in the community and to receive a tax break. However, Wal-Mart could only obtain the tax break by giving the money to certain types of organizations, not individuals. On the grant application form, Barrett checked the box stating she was representing a school organization, which was the option closest to a drama club.

Wal-Mart awarded Barrett $1,000 based on the grant application. Barrett took the money and deposited it into her personal account rather than the school account. Barrett kept close track of the proceeds and their distribution from her personal account. Each student who went on the trip received $50 and Barrett kept receipts that showed the remaining proceeds, $500, were spent on a production given at a local nursing home. These receipts were offered to Wal-Mart. The School Board cited the handling of the grant application and the discrepancies in the ice cream account as grounds for dishonesty warranting immediate termination.

STANDARD OF REVIEW

Using the proper standard of review is critical to determine the proper outcome in this case. Barrett argues the correct standard of review when evaluating a decision to terminate a teacher for evident unfitness is proof the conduct demonstrating the evident unfitness be undeniably and abundantly present. We disagree. South Carolina case law is clear and unambiguous respecting the proper standard of review regarding the propriety of a teacher's termination. It is the substantial evidence test. See Felder v. Charleston County Sch. Dist., 327 S.C. 21, 489 S.E.2d 191 (1997); Kizer v. Dorchester County Vocational Educ. Bd. of Trustees., 287 S.C. 545, 340 S.E.2d 144 (1986); Lexington County Sch. Dist. One Bd. of Trustees v. Bost, 282 S.C. 32, 316 S.E.2d 677 (1984); Laws v. Richland County Sch. Dist. No. 1, 270 S.C. 492,

243 S.E.2d 192 (1978); Barr v. Board of Trustees of Clarendon County Sch. Dist. No. 2, 319 S.C. 522, 462 S.E.2d 316 (Ct. App. 1995); Hendrickson v. Spartanburg County Sch. Dist. No. Five, 307 S.C. 108, 413 S.E.2d 871 (Ct. App. 1992); Hilliard v. Orangeburg County Sch. Dist. No. Three, 300 S.C. 123, 386 S.E.2d 628 (Ct. App. 1989).

Barrett cites Kizer v. Dorchester County Vocational Education Board of Trustees, 287 S.C. 545, 340 S.E.2d 144 (1986) and Hall v. Board of Trustees of Sumter County School District Number 2, 330 S.C. 402, 499 S.E.2d 216 (Ct. App. 1998), as authority to state that proof of conduct must be undeniably and abundantly present. Barrett misapprehends these cases. In Kizer, the Supreme Court was merely typifying the evidence as undeniably and abundantly present, not articulating a new standard: "Therefore, the officially enunciated public policy of this State is to provide for immediate removal of those whose conduct manifests evident unfitness. Such conduct is undeniably and abundantly present in this case." Id. at 550, 340 S.E.2d at 147. Earlier in the Kizer opinion, however, the Court stated that the substantial evidence test was the proper test. Id. at 548, 340 S.E.2d at 146. Although the Hall case references the "undeniably and abundantly present" language in Kizer, a reading of the entire Hall opinion makes clear that the court is not declaring a new standard of review but is applying the substantial evidence test.

Therefore, this Court is limited to examining the record to determine whether substantial evidence existed to support the School Board's decision to terminate Barrett for dishonesty in her dealings with the ice cream account and the Wal-Mart grant application. "The court cannot substitute its judgment for that of the school board." Felder, 327 S.C. at 25, 489 S.E.2d at 193 (citation omitted). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the Board reached or must have reached in order to justify its action." Laws, 270 S.C. at 495-96, 243 S.E.2d at 193 (citation omitted).

LAW/ANALYSIS

Barrett is a contract teacher. As such, the rules regarding her termination fall under the South Carolina Teacher Employment and Dismissal Act, S.C. Code Ann. §§ 59-25-410 to -530. It is undisputed that the School Board immediately terminated Barrett's employment without providing for a remedial corrective period. The statute provides for certain situations where a School Board can immediately terminate a teacher:

> Any teacher may be dismissed at any time who … manifest[s] an evident unfitness for teaching…. Evident unfitness for teaching is manifested by conduct such as, but not limited to, the following: persistent neglect of duty, willful violation of rules and regulations of district board of trustees, drunkenness, conviction of a violation of the law of this State or the United States, gross immorality, dishonesty, illegal use, sale or possession of drugs or narcotics.

S.C. Code Ann. § 59-25-430 (1990).

I. Ice Cream Account

There is substantial evidence in the record to support the School Board's finding that Barrett was dishonest in her dealings with the ice cream account.

A. The $2,000 Check

One of Barrett's first actions when she took over exclusive control of the ice cream account was to empty the account by writing a $2,000 check to her mother-in-law's personal checking account. Barrett had signatory power to withdraw money from her mother-in-law's account. When asked about her reason for writing the check to her mother-in-law's account, Barrett responded that it was to reimburse her mother-in-law for paying invoices that were due to the ice cream vendor. However, Barrett testified that she never called her mother-in-law's bank to verify whether her mother-in-law had actually paid the money to cover the ice cream account before writing her the $2,000 check.

There was also evidence in the record stating that the amount actually owed the ice cream vendor for the period of time the $2,000 check covered was only $1,100.

B. Barrett's Personal Checks Written to the Ice Cream Account

During Barrett's tenure of exclusive control over the ice cream account, a pattern emerged where she would periodically write checks from her personal account to the ice cream account. It is noteworthy that Kulseth and Coe did not write checks from their personal accounts to the ice cream account when they controlled the ice cream account. Testimony revealed Barrett wrote these personal checks to the ice cream account at times when funds were needed to cover checks written to the ice cream vendor, and always for an amount just enough to cover the amount due the vendor. This fact coincided with Barrett's practice of taking the proceeds from the ice cream sales home and not making deposits for weeks at a time. Barrett's stated reason for writing personal checks to the ice cream account was to reimburse the account for rolled coins she gave her daughter for her daughter's coin collection.

Although we are only concerned with the existence of evidence and not its weight, it strains the limits of credulity to think that Barrett gave her child $1,300 in coins over a two year period. Substantial evidence exists in the record to support the School Board's belief that Barrett was taking the money home and only putting enough money in to pay the bills, thus ensuring the ice cream account would break even while enabling her to keep any excess for herself.

C. Short Deposits

Even after Barrett relinquished exclusive control of the ice cream account, she remained involved by counting money and making deposits into the account. When examinations and audits of the ice cream account revealed suspicions about Barrett's handling of the account, Milroth and Cindy Hamlin, the PTSO bookkeeper, designed a scenario to test Barrett's honesty. They gave Barrett money from the ice cream proceeds and told her it had not been counted.

They then instructed Barrett to count the money and call the amount in to Milroth. In fact, the money had already been counted and the amount that Barrett should have submitted to Milroth was known. This method was used to test Barrett's veracity on two separate occasions. The first time, Barrett submitted a figure that was $30 less than the counted amount. The second time, Barrett reported an amount that was $14 less.

Just after Milroth took over the ice cream account and determined that there were insufficient funds to cover the pending ice cream bill, she took a comprehensive inventory and kept meticulous records about what had been sold to the children during the period. By doing this, Milroth knew exactly how much money should have been collected during this period. She called Barrett to find out how much money had been collected during this time. Barrett responded that the amount was $300. When Milroth stated the amount should be $460, Barrett increased her figure to $350 stating she had not counted all the coins. Five days later, Barrett actually deposited only $185 into the account, an amount just enough to cover the pending ice cream invoice. The evidence of the short deposits is the most damaging evidence to Barrett's position that substantial evidence did not exist to support the School Board's finding because these are specific instances where records were kept to determine exactly how much money should have been deposited and every time, the amounts actually deposited were significantly less.

D. Shoddy Recordkeeping

While cross-examining Barrett, the School Board's counsel asked Barrett questions regarding what records she kept of the account. Barrett admitted she did not keep a ledger, did not reconcile the bank statements, and did not keep specific track of the amount of money in the account. She did admit to maintaining a check register; however, she never recorded any of the personal checks she wrote as deposits to the ice cream account. Barrett testified that she was just following the procedures of her predecessors who handled the account. However, the testimony of Kulseth and Coe showed they both kept more complete records regarding the ice cream account than Barrett did.

Barrett also stated a reason for her method of keeping records for the account was she was not a good record keeper. The School Board could doubt this testimony in light of her handling the funds from the Wal-Mart grant that were deposited in her own personal account. When Barrett received the grant from Wal-Mart, she gave every student who went on the field trip $50 and spent the remaining $500 on the production costs for a play given at a nursing home. In contrast of her handling of the ice cream account, she kept and noted every receipt of the expenditures made from the grant. Her handling of the grant money is substantial evidence that Barrett could keep adequate financial records when it suited her to do so. The contrast in her handling of the grant money in combination with her lack of keeping adequate records of the ice cream account, especially her failure to record her personal checks made to the ice cream account as deposits, is substantial evidence supporting the School Board's finding that Barrett was seeking to conceal her activities regarding the ice cream account.

II. Wal-Mart Grant Application

Considering our decision that substantial evidence existed in the record to support the School Board's decision to terminate Barrett for dishonesty from her dealings with the ice cream account, we do not need to reach whether substantial evidence existed to show Barrett was dishonest in her representations on the Wal-Mart application.

CONCLUSION

Applying the substantial evidence test, we hold that substantial evidence existed in the record to support the School Board's decision to terminate Barrett because she manifested an evident unfitness for teaching based on her dishonesty in dealing with the ice cream account. Accordingly, we reverse the Circuit Court's decision to reinstate and reimburse Barrett.

REVERSED.

CONNOR and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Paul A. Rice,

Appellant.

Appeal From Fairfield County
William P. Keesley, Circuit Court Judge

Opinion No. 3431
Formerly Unpublished Opinion No. 2001-UP-564
Heard November 6, 2001 - Filed December 20, 2001

AFFIRMED

Glenn Walters, of Orangeburg, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and Assistant Attorney General Tracey C. Green, both of State Grand Jury, all of Columbia, for respondent.

STILWELL, J.: Paul A. Rice appeals his convictions for trafficking in crack cocaine and conspiracy to traffic in crack cocaine, arguing his prosecution was barred by S.C. Code Annotated section 44-53-410 (1985). We affirm.

BACKGROUND

A federal grand jury indicted Rice on charges that he possessed crack cocaine with the intent to distribute and that he conspired with others to do the same. After a district court dismissed the charges with prejudice for a violation of the Speedy Trial Act, the State Grand Jury indicted him on these charges which evolve from the same facts as the federal indictments.[1] A jury convicted Rice as charged and he was sentenced to two concurrent twenty-five year terms.

DISCUSSION

Rice argues that under section 44-53-410, the dismissal of his federal charges barred his prosecution in state court. Although he did not raise this issue in the trial court he asserts we may address it because it involves subject matter jurisdiction. See Brown v. State, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001) (issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal). We conclude the statute in question does not involve subject matter jurisdiction and thus Rice's issue is not preserved for our review.

Section 44-53-410 is entitled "Prosecution in another jurisdiction shall be bar to prosecution" and provides:

> If a violation of this article is a violation of a Federal law or the law of another state, the conviction or acquittal under Federal law or the

[1] Earlier state charges stemming from the same alleged conduct were nolle prossed at the onset of the federal prosecution.

> law of another state for the same act is a bar to prosecution in this State.

S.C. Code Ann. § 44-53-410 (1985).

This court has previously jointly analyzed claims based on this statute and double jeopardy, finding the issues "closely intertwined." State v. Harris, 342 S.C. 191, 198, 535 S.E.2d 652, 655 (Ct. App. 2000). However, the precise issue Rice now raises was not addressed in Harris. A claim of double jeopardy is not a question of subject matter jurisdiction and thus may not be raised for the first time on appeal. See Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001, 322 S.C. 127, 132, 470 S.E.2d 373, 376 (1996) (double jeopardy claim may not be raised for the first time on appeal). Therefore we must decide whether an alleged violation of section 44-53-410 involves subject matter jurisdiction even though a double jeopardy claim does not.

Essentially, section 44-53-410 extends protection against double jeopardy beyond the minimum constitutional requirements by barring the prosecution of a person under the narcotics and controlled substances statutes of this state when the person has been convicted or acquitted in federal court or the courts of another state of a violation based on the same conduct.[2] Section 44-53-410 provides that a person's conviction or acquittal under federal law or the law of another state "is a bar to prosecution in this State." § 44-53-410 (emphasis added). The statute's plain language indicates the legislature's intent to simply limit the State's right to prosecute in such circumstances. Allstate Ins. Co. v. Estate of Hancock, 345 S.C. 81, 86, 545 S.E.2d 845, 847 (Ct. App. 2001) (legislative intent is primarily determined by reference to the plain language of the statute). The legislature could have expressly circumscribed the jurisdiction of trial courts in such cases, but it did not do so. We therefore conclude section

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[2] Under the dual sovereignty doctrine, successive prosecution of the same conduct by separate sovereigns is not a violation of the federal constitutional prohibition against double jeopardy. Heath v. Alabama, 474 U.S. 82, 88 (1985).

44-53-410 is a limitation on the prosecutorial rights of the executive branch and not on the authority of the judicial branch. Because Rice raises this argument for the first time on appeal, and because it does not involve a question of subject matter jurisdiction, it is not preserved for our review. State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (issues not raised to the trial court are not preserved for appellate review). Accordingly, Rice's convictions for trafficking in crack cocaine and conspiracy to traffic in crack cocaine are

AFFIRMED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Estate of Ruby Bryant Moon, by Personal Representative Teresa Gregory and James Thomas Moon, Milton Smith, Gene Tapp, Deborah Tapp, Gladys Finley, Ronald Finley, Spurgeon West, sole heir of Joyce West, deceased and James Hodge,

Appellants,

v.

The City of Greer, a Municipal Corporation organized and existing under the laws of the State of South Carolina,

Respondent.

Appeal From Greenville County
Hicks B. Harwell, Jr., Circuit Court Judge

Opinion No. 3432
Heard December 5, 2001 - Filed January 14, 2002

AFFIRMED

H. Michael Spivey, of Mauldin, for appellants.

John B. Duggan and Andrew S. Culbreath, both of Love, Thornton, Arnold & Thomason, of Greer, for respondent.

Amicus Curiae: Roy D. Bates, of Columbia.

GOOLSBY, J.: This case involves a challenge to an annexation ordinance adopted by the City of Greer. Upon the City's motion, the trial court dismissed the complaint on the ground that certain statutory requirements had not been met. We affirm.

BACKGROUND

On August 24, 1998, the City began an annexation drive for seventeen tracts of property that were outside but adjoining the city limits. The annexation petition received the necessary signatures to proceed with the proposed annexation.[1] Included in the petition were the signatures from Milton T. Smith, James E. Hodge, Spurgeon R. West, Deborah Lynne Tapp, Gene L. Tapp, Gladys Finley, and Ruby Moon.

The first reading of the annexation ordinance took place August 27, 1998. This ordinance was read a second time and adopted by the City on September 3, 1998. On November 2, 1998, Appellants filed a summons and complaint with the Clerk of Court for Greenville County,[2] which was served on the City on the

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[1] See S.C. Code Ann. § 5-3-150(1) (1976 and Supp. 2000) ("Any area of property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by seventy-five percent or more of the freeholders . . . owning at least seventy-five percent of the assessed valuation of the real property in the area requesting annexation.").

[2] An amended summons and complaint was subsequently filed with the Clerk of Court on November 4, 1998. The amended complaint apparently only

next day. Thereafter, on November 10, 1998, the City adopted a zoning ordinance that classified the newly-annexed property.

On December 30, 1998, the City filed its answer along with a motion to dismiss Appellants' action. Attached to the City's pre-hearing brief were affidavits from the Clerk of the City of Greer and the Clerk of Court of Greenville County during the calendar year 1998. In her affidavit, the Clerk of the City of Greer stated no one filed with her office a notice of intention to contest the approval of annexation ordinance. Likewise, the Greenville County Clerk of Court stated no one filed with his office a notice expressing an intention to appeal or protest the proposed annexation. Appellants filed their response opposing the motion.

The trial court dismissed the action on two grounds: (1) Appellants failed to comply with one of the two statutory requirements for challenging a proposed annexation; and (2) Appellants essentially acquiesced in the annexation by actively participating in the subsequent zoning process involving the annexed land. Appellants unsuccessfully moved to alter or amend the trial court's order and filed this appeal.

DISCUSSION

South Carolina Code section 5-3-270 provides an interested party may not contest the adoption of an annexation order unless:

> the person interested therein shall, within sixty days after the result has been published or declared, file with both the clerk of the city or town and with the clerk of court of the county in which the city or town is situate, a notice of his intention to contest such extension, nor unless, within ninety days from the time the result has been published or declared an action shall be begun and the original

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corrects a mistake in the caption.

summons and complaint filed with the clerk of court of the county in which the city or town is situate.[3]

The trial court interpreted this provision as requiring a litigant to meet two contingencies in order to prosecute an action to challenge the validity of an annexation ordinance. First, within sixty days after the publication or declaration of the annexation, the litigant must file with both the appropriate municipal clerk and the county clerk of court a notice of intention to contest the annexation. Second, the litigant must file a court action contesting the validity of the annexation ordinance within ninety days of final approval of the annexation ordinance.

Appellants, however, contend the term "nor unless," as used in this particular section, is disjunctive rather than conjunctive, and the filing of their summons and complaint within the prescribed time limit was therefore all that was necessary in order for them to proceed with their action to challenge the annexation. We disagree.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature."[4] "In interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation."[5] "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the

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[3] S.C. Code Ann. § 5-3-270 (1976) (emphasis added). After the trial court dismissed the present lawsuit, the legislature amended the statute; however, the amendment resulted in no substantive change. 2000 Act. No. 250 § 3 (eff. May 1, 2000).

[4] Mid-State Auto Auction v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996).

[5] Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996).

purpose, design, and policy of lawmakers."[6] "Subtle or forced construction of statutory words for the purpose of expanding the operation of a statute is prohibited."[7] We should therefore give statutory provisions a reasonable construction consistent with the purpose of the statute.[8]

In Hite v. Town of West Columbia,[9] which was cited by the trial court in support of its decision, the supreme court, in affirming a demurrer in a suit to determine the validity of an annexation, noted the appellants, in failing to file protests with the clerk of the town council and with the county clerk of court, did not meet the requirements set forth in the 1946 version of section 5-3-270. Appellants contend Hite is distinguishable from the present case in that the version of the statute then in effect contained the wording "and, unless" rather than "nor unless," which appears in the present version.

We, however, accord no significance to the change in the wording of section 5-3-270 to substitute "nor unless" for "and, unless." Although the phrase "and, unless" was changed to "nor unless" when the entire code was revised in 1962, we found no indication in the legislative history that the South Carolina General Assembly intended any change in the substantive meaning of

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[6] TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998); see also Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997) (stating courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law).

[7] TNS Mills, 331 S.C. at 624, 503 S.E.2d at 479.

[8] Jackson v. Charleston County Sch. Dist., 316 S.C. 177, 447 S.E.2d 859 (1994).

[9] 220 S.C. 59, 66 S.E.2d 427 (1951).

the statute or its requirements. In our view, then, the alteration does not affect the interpretation of the statute.[10]

Moreover, despite Appellants' assertions to the contrary, the requirement that notice be filed with the municipal clerk and clerk of court is more than a mere formality. Rather, it is a condition precedent that an aggrieved party must satisfy before filing a summons and complaint[11] and is analogous to the filing of a proof of claim in an action against a governmental entity[12] and, to a lesser

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[10] See South Carolina Elec. and Gas Co. v. Public Serv. Comm'n, 272 S.C. 316, 321, 251 S.E.2d 753, 756 (1979) ("In the codification of a statute, as distinguished from amendment, changes in phraseology or the omission or addition of words do not necessarily require a change in the construction of the original act.") (emphasis added); 82 C.J.S. Statutes § 273, at 349 (1999) ("In the revision or codification of statutes, a mere change in phraseology or punctuation, or the addition or omission of words, is not regarded as changing the operation, effect, or meaning of the statutes, unless the intent to change is clear and unmistakable.").

[11] See Thomas v. Grayson, 318 S.C. 82, 456 S.E.2d 377 (1995) (recognizing a distinction between a condition precedent and a statute of limitations); cf. Craps v. Mercury Constr. Corp., 275 S.C. 546, 273 S.E.2d 770 (1981) (holding a showing of excusable neglect is a condition precedent to a grant of relief to file a late answer); Benton v. Logan, 323 S.C. 338, 474 S.E.2d 446 (Ct. App. 1996) (noting the exercise of due diligence in ascertaining the correct address of the property owner under a statute authorizing the foreclosure of a tax lien is a condition precedent to sending the requisite notice before the foreclosure sale).

[12] S.C. Code Ann. § 15-78-80 (Supp. 2000) (concerning the requirements of filing a verified claim under the South Carolina Tort Claims Act); Hazard v. South Carolina State Highway Dep't, 264 S.C. 386, 393, 215 S.E.2d 438, 441 (1975) ("Since the filing of a claim is a condition precedent to the accrual of a cause of action, no vested right could be obtained by a victim of the governmental tort until the claim provisions of the statute have been complied

extent, to the filing of a notice of appeal.[13] If we were to agree with Appellants that they needed to satisfy only one of the two requirements of section 5-3-270, it would follow that disgruntled property owners could indefinitely prolong a proposed annexation by merely filing notices with the municipal clerk and the clerk of court without ever having to file a lawsuit in order to perfect their challenge.[14] It defies logic, then, to read the two provisions of section 5-3-270 disjunctively.[15]

We therefore hold the trial court's interpretation is the only reasonable reading of section 5-3-270. A party wishing to challenge the adoption of an annexation ordinance must first, as a condition precedent, timely file a notice of intent to challenge the annexation. This requirement helps to promote a prompt resolution of the controversy and enables municipal authorities to plan

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with."), overruled on other grounds by McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

[13] See Rule 203, SCACR (requiring the service and filing of a notice of appeal by a party intending to appeal a decision); State v. Hinson, 303 S.C. 92, 399 S.E.2d 422 (1990) (holding the appellant's failure to timely serve a notice of intent to appeal deprived the supreme court of jurisdiction to consider the matter).

[14] As to any contention that satisfaction of the first requirement would have entitled Appellants to file their lawsuit within one of the time periods set forth in the statutes of limitations in Title 15, we note the supreme court has stated the ninety-day deadline for filing an action under section 5-3-270 prevails over any general statute of limitations. State ex rel. Condon v. City of Columbia, 339 S.C. 8, 526 S.E.2d 408 (2000).

[15] See Clemson Univ. v. Speth, 344 S.C. 310, 313, 543 S.E.2d 572, 573 (Ct. App. 2001) ("The goal of statutory construction is to harmonize statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd.").

appropriately with regard to the contested annexation and to minimize expenditures that might later prove to be unnecessary if the annexation eventually fell through.[16] Only when the required notice is given does an aggrieved party have leave to initiate a lawsuit, which must be filed within the ninety-day limitations period.

Because Appellants' failure to file the statutorily required notice with the city clerk and the clerk of court is an absolute bar to their action to contest the annexation, we do not address the other issues on appeal.

AFFIRMED.

HUFF and STILWELL, JJ., concur.

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[16] See Hite, 220 S.C. at 66, 66 S.E.2d at 430 ("[A]nnexation issues should be decided without undue delay, so that the town officials would be advised whether the affected area would become a part of the municipality. Many questions connected with municipal government, including that of taxation, would need to be known with reasonable promptness.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Laurens Emergency Medical Specialist, P.A.,

Respondent,

v.

M.S. Bailey & Sons Bankers, and Laurens County Health Care System,

Defendants,

of which Laurens County Health Care System is,

Appellant.

Appeal From Laurens County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3433
Submitted October 22, 2001 - Filed January 14, 2002

AFFIRMED

J. Michael Turner, of Turner, Able & Burney, of Laurens, for appellant.

A. Camden Lewis and Thomas A. Pendarvis, of Lewis, Babcock & Hawkins, of Columbia, for respondent.

GOOLSBY, J.: Laurens Emergency Medical Specialists (EMS) brought this action for, among other things, indemnification against M.S. Bailey & Sons Bankers and Laurens County Hospital Health Care System (collectively, Laurens County Hospital). The trial court granted summary judgment to EMS on the issue of liability, leaving only the amount of damages to be determined by a jury. Laurens County Hospital appeals. We affirm.[1]

Laurens County Hospital, a political subdivision, operates a hospital in Laurens County. EMS entered into an emergency services contract to furnish emergency room physicians and a medical director for the hospital's emergency department. The contract required Laurens County Hospital to employ and assign non-physician personnel to the emergency room to assist with administrative matters.

EMS brought this action after it discovered an administrative employee of the hospital who worked in the emergency department had embezzled funds belonging to EMS. EMS claimed its contract with Laurens County Hospital required the latter to indemnify it for all damages incurred as a result of the employee's theft.

Laurens County Hospital's principal argument is that the absence of a third-party claim precludes the claim by EMS for indemnification based on contract. It points to the definition of "indemnity" given by Judge Bell in Town

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[1] Because oral argument would not aid the court in resolving the issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

of Winnsboro v. Wiedeman-Singleton.[2] According to that definition, "[i]ndemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party."[3]

But that is only one form an indemnity may take. Parties may choose other forms of compensation in which a first party shall be liable to pay a second party for a loss or damage the second party might incur. A definition given to the term "indemnity contract" suggests other forms:

> A contract between two parties whereby the one undertakes and agrees to indemnify the other against loss or damage arising from some contemplated act on the part of the indemnitor, or from some responsibility assumed by the indemnitee, or from the claim or demand of a third person, that is, to make good to him such pecuniary damage as he may suffer.[4]

Moreover, in a recent case, the Texas Supreme Court similarly defined the term "indemnity agreement" to mean:

> A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person.[5]

The contract provision in issue reads in pertinent part:

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[2] 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990).

[3] Id. at 56, 398 S.E.2d at 502.

[4] Black's Law Dictionary 910 (4th ed. 1968) (emphasis added).

[5] Dresser Industries, Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993) (emphasis added).

> [Laurens County Hospital] will indemnify and hold [EMS] . . . harmless from and against any and all claims, actions, liability, or expenses (including judgments, court costs, and reasonable attorney fees) caused by or resulting from allegations of negligent or wrongful acts or omissions of hospital employees, servants, or agents. Upon notice by [EMS], [Laurens County Hospital] will resist and defend and at its own expense, and by counsel reasonably satisfactory to [EMS], such claim or action.

The general rules that govern the construction and interpretation of other contracts also apply to the construction and interpretation of a contract of indemnity.[6] As with other contracts, the principal question focuses on the intent of the parties. Their intention is determined from the language used in the contract. If that language is clear and unambiguous, it must be given its plain and usual meaning.[7] A contract of indemnity will cover all losses that reasonably appear to have been within contemplation of the parties.[8]

Looking at the clear and unambiguous language of the contract or agreement here, we are satisfied the parties intended Laurens County Hospital to indemnify EMS and save it harmless from losses suffered by EMS at the hands of hospital employees where the losses resulted from their negligent or wrongful acts or omissions. The term "expense," which the contract uses, means "the laying out or expending of money" and includes "loss."[9] The theft of funds is a "laying out of money" or "loss" in anybody's book. Noticeably absent from the indemnity agreement is any language limiting the expenses or

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[6] Campbell v. Beacon Mfg. Co., 313 S.C. 451, 438 S.E.2d 271 (Ct. App.1993).

[7] 42 C.J.S. Indemnity § 9a, at 88 (1991).

[8] Id. § 13, at 93.

[9] In re Bates' Will, 152 Misc. 627, 629 (N.Y. Sur. 1934).

losses for which Laurens County Hospital would be obligated to compensate EMS to only those resulting from third-party claims.

Laurens County Hospital also faults the trial court with granting summary judgment. It claims an issue of fact existed regarding whether EMS's "own negligence contributed to or allowed the damage to occur." This contention manifestly lacks merit. The clear and unambiguous language of the indemnity agreement does not condition the liability of Laurens County Hospital for losses on anything related to EMS's negligent actions or inactions. Any negligence on the part of EMS would not lessen the obligation of Laurens County Hospital to "indemnify and hold [EMS] . . . harmless from . . . expenses . . . caused by . . . [the] wrongful acts . . . of [h]ospital employees . . . ."[10]

AFFIRMED.

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

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[10] See United States v. Hollis, 424 F.2d 188, 190 (4th Cir. 1970) ("The courts have consistently enforced contractual indemnity provisions placing ultimate liability upon an indemnitor, even where the indemnitee's fault also contributed to the loss.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William W. McCuen,

Respondent,

v.

Gina Eidson McCuen,

Appellant.

Appeal From Aiken County
Peter R. Nuessle, Family Court Judge

Opinion No. 3434
Heard December 4, 2001 - Filed January 14, 2002

AFFIRMED

Tom G. Woodruff, of Aiken, for appellant.

Timothy S. Mirshak, of Augusta, for respondent.

SHULER, J.: Gina Eidson McCuen (the wife) appeals from the

family court's refusal to appoint a guardian ad litem to represent her interests in this divorce action. We affirm.

The wife and William W. McCuen (the husband) were married in 1985 and separated in 1995. They have two children, both of whom are minors.

The husband commenced this action against the wife in June of 1997 seeking a divorce on the ground of one year's continuous separation. The wife's attorney filed an entry of appearance and an answer and counterclaim seeking a divorce based on desertion, alimony, custody of the parties' children, and child support.[1] In August of 1998, the husband amended his complaint to include a plea for child custody and support.

At a temporary hearing held on October 27, 1998, the wife was present and represented by counsel. As a result of this hearing, the family court appointed a guardian ad litem for the two minor children and granted temporary custody to the paternal grandmother.

On March 29, 1999, the wife was incarcerated in Georgia on shoplifting charges. The family court scheduled a final hearing on the merits of this action for August 3, 1999. On the date of the hearing, the wife's attorney orally moved for appointment of a guardian ad litem to represent the wife's interests in the proceedings. The wife's attorney also moved for a continuance. The family court denied both motions and proceeded with the hearing. By order dated October 13, 1999, the family court awarded the husband a divorce on the ground of one year's continuous separation and custody of the children. The court held the issues of child support, visitation, alimony, and any remaining financial issues in abeyance pending the wife's release from incarceration and further hearing by the court. The wife's post-trial motion for reconsideration was denied. This appeal followed.

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[1] At the time of filing, the wife had care and custody of the parties' children and the husband was paying $150 per week in child support.

Standard of Review

In appeals from the family court, this court has the authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. Henggeler v. Hanson, 333 S.C. 598, 510 S.E.2d 722 (Ct. App. 1998). This broad scope of review does not, however, require this court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 279 S.E.2d 616 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981).

Discussion

The wife asserts the family court erred in failing to appoint a guardian ad litem to represent her interests in the divorce and child custody proceeding. We disagree.

Rule 17 (c), SCRCP provides, in pertinent part, as follows:

> A person imprisoned outside this State shall appear by guardian ad litem in an action by or against him; but if imprisoned in this State, and not a minor or incompetent, the court may, in its discretion appoint a guardian ad litem or order him to be brought personally to the trial to testify in accordance with Rule 43(a).

While the language of Rule 17 (c) does not expressly so provide, it is clear from applicable case law that the right to appearance by guardian ad litem is not absolute. Our Supreme Court has noted:

> Unlike an infant or insane person, a prison inmate is not legally incompetent to transact business. The basis for the appointment of a guardian ad litem for a prison inmate is not mental deficiency, but the physical restraint of imprisonment. Since this is true, an inmate

> may waive the appointment of a guardian ad litem. Green v. Boney, 233 S.C. 49, 103 S.E.2d 732; Cobb v. Garlington, 100 S.C. 51, 84 S.E. 302.

In the Matter of Bishop, 272 S.C. 306, 309, 251 S.E.2d 748, 750 (1979).

Because the right to the appointment of a guardian ad litem in such cases can be waived, our inquiry is not limited, as suggested by the wife, to whether or not a guardian was appointed to represent her in these proceedings; rather, our inquiry extends to whether there was a waiver in this case.

Despite being incarcerated in another state, the wife was represented by counsel at all stages of these proceedings. Notably, the wife appeared through her counsel prior to the final hearing and while she was incarcerated, but failed to move the court for appointment of a guardian ad litem until the day of the final hearing. See Gossett v. Gilliam, 317 S.C. 82, 452 S.E.2d 6 (Ct. App. 1994) (where a prisoner is represented by competent counsel, the appointment of a guardian ad litem would be superfluous); Green v. Boney, 233 S.C. 49, 103 S.E.2d 732 (1958) (prisoner represented by counsel waived his right to a guardian ad litem under former § 10-232 and § 10-237 where he entered answer and counterclaim without mentioning the appointment of a guardian); Cobb v. Garlington,100 S.C. 51, 84 S.E. 302 (1915) (an incarcerated defendant waived his right to the appointment of a guardian ad litem where counsel of his own choosing appeared for him).

Moreover, the wife had been imprisoned for over four months at the time the case was called to trial, but failed to move for appointment of a guardian until immediately before trial was to begin. See Green, 233 S.C. at 66, 103 S.E.2d at 741 (holding defendant in a civil action waived any right to appointment of guardian ad litem where defendant had been sentenced to term of imprisonment and was in custody of sheriff at the time summons and complaint was served and defendant had ample opportunity to apply for appointment of guardian ad litem, but instead filed an answer and counterclaim and raised no question about guardian ad litem until eve of trial).

The wife argues that a dual standard exists under the current Rule 17(c), SCRCP. Under this dual standard, if a party is imprisoned *within the state* the appointment of a guardian ad litem is discretionary. If the party is imprisoned *outside of the state* the appointment of a guardian ad litem is required. The wife further argues that because of this dual standard, the South Carolina cases finding a prisoner may waive his right to a guardian ad litem do not apply to the present situation because the cases involve parties imprisoned within the state.

At the time the Green case was decided, section 10-232 of the 1952 South Carolina Code was in effect. Section 10-232 provided "a person imprisoned *shall* appear by guardian ad litem in any action by or against him." S.C. Code § 10-232 (1952) (emphasis added). Section 10-232 did not distinguish between parties imprisoned within the state and outside of the state. The Green court found that the prisoner had waived his right to a guardian ad litem even though section 10-232 provided that a prisoner *shall* appear by guardian ad litem. Rule 17 does distinguish between parties imprisoned within the state and outside of the state. The rule provides that a person imprisoned outside of the state "*shall* appear by guardian ad litem in an action by or against him" but if imprisoned within the state "the court may, in its *discretion*, appoint a guardian ad litem . . . ." Rule 17(c), SCRCP. Nevertheless, the Green decision indicates that the use of the word "shall" does not signify that a prisoner's right to a guardian ad litem cannot be waived.

We think it clear that under the facts and circumstances attendant to this case, the wife waived any right she may have had to the appointment of a guardian ad litem.

Accordingly, the decision of the family court is

AFFIRMED.

CURETON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alice Mae Pilgrim
Respondent,

v.

Yvonne Wardlaw Miller,
Appellant.

Appeal From Spartanburg County
Donald W. Beatty, Circuit Judge

Opinion No. 3435
Submitted October 22, 2001 - Filed January 14, 2002

REVERSED AND REMANDED

Robert E. Davis, of Spartanburg, for appellant.

Andrew N. Poliakoff, of Spartanburg, for respondent.

GOOLSBY, J.: This action concerns an automobile accident that occurred on April 11, 1997. Alice Mae Pilgrim served a summons and complaint on Yvonne Wardlaw Miller almost three years later on March 24, 2000. The next day, Miller took the suit papers to an attorney, who advised her to take them to her insurance company. She did so, delivering the suit papers promptly to an agent for Allstate Insurance Company.

For reasons yet to be explained, Allstate failed to file a timely answer. Pilgrim obtained an entry of default on May 17, 2000. Miller thereafter moved for relief pursuant to Rule 55(c), SCRCP. The trial court refused to lift the entry of default.[1] At a subsequent damages hearing, the trial court awarded Pilgrim $50,000 in actual damages and denied Miller's motion to set aside the default judgment under Rule 60(b)(1), SCRCP, or, in the alternative, to grant her a new trial.

The order denying Miller's Rule 55(c) motion states, "No specific reason was offered for the lack of response to the Summons and Complaint" and "[i]t is the finding of this Court that the Court has been presented with no reason to set aside this Default." The order denying Miller's Rule 60(b)(1) motion states, "[neither] the defendant nor the insurer offered any explanation for the failure to answer the Complaint." Miller appeals. We reverse.[2]

The dispositive issue here is whether the trial court abused its discretion in not setting aside an entry of default. As Professor James F. Flanagan, the

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[1] The grant or denial of a Rule 55(c) motion is not directly appealable. Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988).

[2] Because oral argument would not aid the court in resolving the issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

reporter for the committee that drafted the new rules of civil procedure,[3] points out in his recent work South Carolina Civil Procedure, "The entry of default may be vacated upon a showing of good cause."[4] Indeed, "good cause" is the express requirement of the rule itself.[5]

Rule 55(c), this court has held, should be "liberally construed to promote justice and dispose of cases on the merits."[6] The question of whether a party seeking to set aside an entry of default has demonstrated "good cause" is one addressed to the sound discretion of the trial court.[7] This court, however, will set aside on appeal a trial court's discretionary ruling that lacks reasonable evidentiary support or is controlled by error of law.[8]

The findings by the trial court that Miller offered no "specific reason" or "explanation" for the failure to answer the complaint and that Miller gave the court "no reason" to set the default aside are simply wrong. As the record clearly shows, Miller's failure to answer the complaint resulted from Miller's expectation that Allstate would answer the complaint for her. The trial court

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[3] James F. Flanagan, South Carolina Civil Procedure, at ii (2d ed. 1996).

[4] Id. at 437.

[5] Rule 55(c), SCRCP, provides in pertinent part that "[f]or good cause shown the court may set aside an entry of default . . . ." See also Patterson v. McNeill-Patterson & Assocs., 312 S.C. 471, 472, n.2, 441 S.E.2d 328, 329 n.2 (Ct. App. 1994) (noting Rule 55(c) "requir[es] a showing of 'good cause' before the court may set aside an entry of default").

[6] Dixon v Besco Eng'g, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995).

[7] Id. at 178, 463 S.E.2d at 639; Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

[8] Wham, 298 S.C. at 465, 381 S.E.2d at 501.

should have accepted this explanation, especially in light of this court's decision in Ricks v. Weinrauch,[9] which relied on Sears, Roebuck & Co. v. Ramey,[10] a Georgia case in which the basic facts mirror the ones here.

In Ramey, Sears, the defendant, had received suit papers and turned them over to its insurer, believing the insurer would defend the action. The insurer, however, failed to answer the complaint. When Sears learned of this, it employed counsel and unsuccessfully moved to open the default. The Georgia Court of Appeals, applying the more rigorous standard of "excusable neglect," reversed, holding the trial court "abused its discretion in refusing to open the default."[11]

We believe Miller, like Sears, demonstrated good cause for setting aside the entry of default. She consulted a lawyer and followed his advice to deliver the suit papers to her insurance company. She had every right to believe Allstate would answer the complaint and defend her in the action. Her expectation was not in any way unreasonable. Once an insurer is made aware of a pending court action against its insured, the insured should be able to rely on the insurer to protect his or her rights. As the Georgia Court of Appeals reiterated in Ramey, "'[a] litigant should not unnecessarily be forced into default as a consequence of having reasonably relied upon the word of his fellow, particularly when no innocent party will suffer if the default is opened.'"[12] We find this principle even more compelling when, as here, the defendant has a meritorious defense to the plaintiff's claim for damages.[13]

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[9] 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987).

[10] 318 S.E.2d 740 (Ga. Ct. App. 1984).

[11] Id. at 742.

[12] Ramey, 318 S.E.2d at 742 (quoting Cobb County Fair Ass'n v. Boyle, 240 S.E.2d 136, 138 (Ga. Ct. App. 1977)).

[13] At the hearing to set aside the entry of default, counsel for Miller informed the court that, while Miller would admit liability, she would contest

Because Miller made a showing of good cause, we hold the trial court abused its discretion in refusing to set aside the entry of default and in not permitting her to respond to Pilgrim's allegations by answer or other proper pleading. The subsequent entry of default judgment against Miller, therefore, was erroneous.[14]

REVERSED AND REMANDED.

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

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the extent of damages that Pilgrim allegedly suffered as a proximate result of the accident. Counsel described the accident as "an extremely minor" one. One issue that Miller included on appeal, which we do not address, concerned Pilgrim's medical bills and how they were related to that particular accident. Pilgrim was involved in another motor vehicle accident in March 1998.

[14] We do not address the issue that Miller raises concerning Pilgrim's medical bills.