OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 2, 2001

ADVANCE SHEET NO. 12

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Darrell Lester Diggs, Respondent.

Opinion No. 25272
Heard February 7, 2001 - March 26, 2001

SUSPENSION

Henry Richardson, and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

D. Lester Diggs, Pro Se Respondent.

PER CURIAM: We suspend Darrell Lester Diggs ("Diggs") from the practice of law for 90 days for supplying incorrect information on his CLE compliance report.

FACTUAL/PROCEDURAL BACKGROUND

Diggs admits he submitted incorrect information to the Commission on Continuing Legal Education ("Commission") on his CLE compliance report,

which he signed and had notarized. Specifically, on December 29, 1997, Diggs submitted a CLE compliance report claiming 7.5 hours of credit for CLEs that were to occur on January 10, 1998, and January 23, 1998. On January 2, 1998, the Commission advised Diggs he could not claim CLE credit for courses he planned to attend in the future, and he should reexecute the report once the CLE hours had been properly earned. Diggs reexecuted the report, which still claimed credit for the January 10, 1998, and January 23, 1998, seminars. The Commission selected Diggs' compliance report randomly for attendance verification. The sponsor of the January 10, 1998, seminar informed the Commission he had no record of Diggs' attendance.

Diggs admitted by letter that he did not attend the legal ethics seminar due to alleged extenuating circumstances, even though he registered and pre-paid for the seminar. According to Diggs, he planned to attend the Columbia CLE, but he did not realize the seminar was only two hours. He was under the mistaken belief the CLE was being held via satellite at Aiken Technical College and it would last most of the day. When he arrived at Aiken Technical College, he realized the seminar was scheduled live at the law school. Diggs drove to Columbia and when he arrived, the two hour ethics CLE was completed. According to Diggs, he believed at the time he traveled to the CLE that he would be able to claim the hours even though the seminar was over. At the time he filed his CLE compliance report, he did not think a late arrival to a CLE was a basis to nullify the hours.

Diggs refiled his application for CLE credit, omitting the January 10, 1998, seminar and adding a February 20, 1998, seminar. He also re-signed the report and had it notarized.

On September 11, 1998, the Commission served Diggs with a Notice of Filing of Formal Charges, which alleged Diggs violated Rule 7 of the Rules of Lawyer Disciplinary Enforcement, Rule 413, SCACR, and the Rules of Professional Conduct, Rule 407, SCACR. Diggs filed an Answer on October 14, 1998, admitting he committed misconduct with respect to his CLE requirements, but denying those allegations made out a case of attorney misconduct.

Diggs argues that certain rules are inapplicable to his disciplinary matter because they concern the representation of clients, and no clients were involved. He acknowledges his original CLE compliance report contained incorrect information. Specifically, that he attended a January 10, 1998, seminar when he never had the opportunity to sign the attendance roll at the seminar. According to Diggs, "I point out that having made an effort to attend (arriving shortly after its conclusion), having preregistered for and paid for the seminar, I reasonably believed that I could claim credit." According to his Reply, Diggs does not think claiming credit for a CLE he did not attend was wrong, he thinks his only mistake was not signing the roll. Diggs states: "In retrospect, I am not so sure that I had, at that time, instant consideration of my failure to sign the roll on January 10th. Also in retrospect, I may have compared my situation with lawyers, who largely without impunity [sic], travel to a seminar, arrive before it actually begins, sign the attendance roll, and leave without actually participating." Diggs claims he would consent to a private reprimand in this matter if the Commission found it desirable to use his case "to send a message to attorneys that honesty-in-fact is the gravaman of compliance in the annual reports . . ."

On November 18, 1998, a hearing was held before a subpanel of the Commission. The subpanel recommended a public reprimand, but did not direct Diggs to pay for the costs incurred by the Commission in this matter. Both Disciplinary Counsel and Diggs filed exceptions. On September 29, 2000, the full panel adopted the subpanel report and recommended a public reprimand. The following factors were considered as mitigation by the full panel: (1) Diggs has been practicing law for eighteen years with no apparent prior record of difficulties from a grievance perspective; (2) he candidly admitted wrong doing in this matter; and (3) he cooperated in all aspects of the investigation. The full panel concluded as a matter of law Diggs violated: (1) Rule 408, SCACR, which requires mandatory attendance at CLEs; (2) Rule 407, SCACR, which prohibits engaging in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law; (3) Rule 3.3 of Rule 407, which provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal; and (4) Rule 8.4(a) of Rule 407, which prohibits an attorney from engaging in

conduct involving dishonesty, fraud, deceit, or misrepresentation.

On October 14, 1999, the Commission received a letter from Disciplinary Counsel requesting the full panel adopt the findings of fact and conclusions of law of the subpanel, but impose a harsher sanction, such as a definite suspension of 90 days or less from the practice of law, as allowed by Rule 7(b) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

The following issue is before this Court:

I. Should the panel have recommended a sanction harsher than a public reprimand for Diggs' CLE misconduct?

LAW/ANALYSIS

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. *In re Yarborough*, 337 S.C. 245, 524 S.E.2d 100 (1999). In an attorney disciplinary proceeding, this Court is not bound by the findings made by the panel of the Commission on Lawyer Conduct or by the Commission itself. *Id.* However, these findings are entitled to great weight. Therefore, this Court may make its own findings of fact and conclusions of law in an attorney disciplinary proceeding. *Id.* Furthermore, an attorney disciplinary violation must be proven by clear and convincing evidence. *Id.*

I. CLE Misconduct

Disciplinary Counsel argues the full panel should have recommended a sanction harsher than a public reprimand, given the level of Diggs' misconduct proven by the clear and convincing evidence standard. We agree.

Initially, Diggs submitted a CLE compliance report that included credit for two seminars which had not been held. By submitting this report, Diggs made a false statement under oath because the report was sworn and subscribed to before a notary public. Diggs swore to the following statement: "I hereby

swear or affirm that the information in this Report is, to the best of my knowledge, complete and accurate and that I did, in fact, participate for the number of hours indicated in the courses listed in Part II." This statement was false because Diggs swore he attended two seminars which had not occurred.

In January 1998, Diggs resubmitted the same CLE compliance report, still bearing the notarized signature from the original report, claiming credit for two seminars held by the South Carolina Bar on January 10 and January 23, 1998. The second submission contained two false statements. First, Diggs submitted a false statement under oath because he did not attend the January 10, 1998, seminar. Further, his statement was false because it bore a notary date prior to the date of the two January seminars. However, Diggs submitted an amended Report of Compliance on February 23, 1998, which deleted the January 10, 1998, seminar and included credit for another seminar.

Diggs has violated several Rules of Professional Conduct. First, Diggs knowingly made a false statement of material fact or law to a tribunal in violation of Rule 3.3(1) of the Rules of Professional Conduct, Rule 407, SCACR. Second, Diggs has engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation in violation of Rule 8.4(d) of the Rules of Professional Conduct, Rule 407, SCACR.

The sanction recommended by the subpanel and full panel was insufficient, given the nature of the misconduct. This Court has addressed the falsification of CLE compliance reports several times in the past. In *In re Iseman*, 290 S.C. 391, 350 S.E.2d 922 (1986), this Court issued a ninety-day suspension for misrepresentation in connection with reported attendance at a CLE seminar. Iseman submitted a compliance report that included 9.25 hours for a real estate seminar in New Orleans, Louisiana. Iseman used a colleague's proof of registration to attend only parts of the seminar, which he estimated was around 3.75 to 5.0 hours. However, in other cases involving false statements on a CLE compliance report, the Court has only issued a public reprimand. *See In re Pridgen*, 288 S.C. 96, 341 S.E.2d 376 (1986) (public reprimand for submitting a CLE compliance report signed under oath alleging attendance at seven CLE recertification hours without actual attendance). *But see In re*

Rowland, 293 S.C. 17, 358 S.E.2d 387 (1987) (unauthorized practice of law after administrative suspension for failing to comply with CLE requirements warrants a two year suspension). *Cf. In re Wyllie*, 957 P.2d 1222 (Or. 1998) (finding misrepresenting compliance with CLE requirements and failing to cooperate with the disciplinary investigation warranted a two year suspension from the practice of law).

The authority to determine the appropriate sanction for attorney misconduct rests solely with this Court. *In re Padgett*, 290 S.C. 209, 349 S.E.2d 338 (1986). A sentence harsher than a public reprimand is warranted for submitting a false sworn document to a tribunal. Therefore, Diggs is suspended from the practice of law for 90 days – the same penalty given in the *Iseman* case for CLE misrepresentation. *See In re Iseman, supra.*

Truthful representations on CLE compliance reports are essential to the successful operation of the South Carolina CLE program. Our CLE program operates on a honor system. The Commission does not check the accuracy of every attorney's CLE compliance report. The Commission audits the accuracy of approximately 2% of the CLE compliance reports. In order for the CLE program to be successful, and provide the public with competent, educated attorneys, South Carolina attorneys must complete the required number of CLE hours. Diggs argues it is a common practice for attorneys to receive full CLE credit for seminars when they leave early. Diggs also claims attorneys receive CLE credit when they just pay the CLE registration fee, show up to sign the roll, and leave. We emphasize that any attorney who provides false information on a notarized CLE compliance report commits a false swearing to a tribunal, which constitutes perjury.

The Court does not consider the fact Diggs eventually complied with the CLE requirements as mitigation because such compliance is required for an attorney to continue practicing law. Furthermore, if Diggs continued to practice law during the time when he was not in compliance with the CLE requirements, he practiced without being properly approved by the Commission, and engaged in the unauthorized practice of law. We, therefore, suspend Diggs from the practice of law for 90 days.

CONCLUSION

Based on the foregoing, we hereby: (1) suspend Diggs from the practice of law for 90 days commencing on the date of filing of this decision; and (2) find Diggs responsible for $193.50, the cost incurred by the Commission in this matter.

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

The Supreme Court of South Carolina

In the Matter of Darrell
Lester Diggs, Respondent.

ORDER

We ordered Darrell Lester Diggs ("Diggs") to appear at the South Carolina Supreme Court on February 7, 2001 to show cause why he should not be held in civil or criminal contempt for failing to comply with a subpoena issued by the Office of Disciplinary Counsel. We find Diggs in civil contempt for failing to produce documents requested in the December 1, 2000, subpoena issued by the Office of Disciplinary Counsel.

The power to punish for contempt is inherent in all courts and is essential to the preservation of order in judicial proceedings. *In re Brown*, 333 S.C. 414, 511 S.E.2d 351 (1998) (citations omitted). Wilful disobedience of an order of the Court may result in contempt. *Id.* A wilful act is defined as one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or disregard the law." *Id.* at 420-421, 511 S.E.2d at 355 (quoting *Spartanburg County Dep't of Social Servs. v. Padgett*, 298 S.C. 79, 370 S.E.2d 872 (1988)).

Diggs has not fully complied with the subpoena personally served on him on December 1, 2000. According to Special Investigator Huffstetler's Affidavit, Diggs has not produced the bank statements and cancelled checks from Regions

Bank for the months of October 1998, February 1999, March 1999, December 1999, July 2000, and September 2000. Diggs has also not produced bank statements and cancelled checks from Security Federal Bank for the months of March 1999, September 1999 through December 1999, or any months for the year 2000. Furthermore, Diggs has failed to produce statements and cancelled checks from Bank of America for the months of February through December 1999, or any month for the year 2000. Finally, no documents, including ledger sheets, cancelled checks, or other similar documents, have been produced concerning a pending disciplinary matter. Therefore, Diggs failed to comply with the subpoena. Rule 15(d) of Rule 413 provides that the wilful failure to comply with the subpoena issued under Rule 15 may be punished as contempt.

Disciplinary Counsel asked the Court to place Diggs on interim suspension and hold him in contempt for failing to comply with a subpoena issued by Disciplinary Counsel. On December 14, 2000, this Court placed Diggs on interim suspension from the practice of law pursuant to Rule 17, RLDE, Rule 413 SCACR, because he poses a threat of serious harm to the public or to the administration of justice. The Court also ordered Todd James Johnson, Esq. ("Johnson") to assume responsibility for Diggs' files and accounts.

The January 11, 2001 order, with attached Petition for Interim Suspension and Contempt, were hand delivered to SLED for service on Diggs. SLED officers have been unable to personally serve Diggs. On January 24, 2001, the Order and Petition for Interim Suspension were sent by certified mail to four addresses.

On January 24, 2001, Disciplinary Counsel sent a letter requesting the Court hear all matters relating to Diggs at the Rule to Show Cause on February 7, 2001. Particularly, Disciplinary Counsel wants the Court to be aware that Johnson, the court-appointed attorney responsible for Diggs' clients, has had difficulty getting cooperation from Diggs. Diggs has only released approximately twelve client files to Johnson. As a result, Disciplinary Counsel sent an order to Diggs requiring that he immediately relinquish to Johnson all client files and bank records in order to protect the clients involved. On January

26, 2001, the Court sent Diggs a letter and a copy of documents filed by Disciplinary Counsel concerning his client files and bank records.

The Rule to Show Cause in this contempt matter was mailed to Diggs' last known address, and someone other than Diggs signed for it. According to Rule 410(d), SCACR, "[i]t shall be the responsibility of all members of the Bar to promptly notify the Secretary of the South Carolina Bar of any change of address. The member's address which is on file with the South Carolina Bar shall be the address which is used for all purposes of notifying and *serving* the member." (emphasis added). We, therefore, find Diggs was properly served in this matter. While Disciplinary Counsel has enough evidence to proceed with the matters against Diggs, we hold Diggs in civil contempt for wilfully failing to provide the documents requested in the December 1, 2000, subpoena and, most importantly, for wilfully failing to provide client files to Johnson, the court-appointed attorney responsible for Diggs' clients. We, therefore, sentence Diggs to an indefinite term of imprisonment, and direct law enforcement officers to apprehend Diggs in accordance with this order. Diggs may purge himself of contempt and be released upon the production of the required documents. In light of this civil contempt sentence, we decline to decide the criminal contempt matter at this time.

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
March 26, 2001

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dorothy Yoho, Petitioner,

v.

Marguerite Thompson, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
David H. Maring, Sr., Circuit Court Judge

Opinion No. 25273
Heard November 14, 2000 - Filed March 26, 2001

REVERSED

Gene M. Connell, Jr., of Kelaher, Connell & Connor, of Surfside Beach, for petitioner.

G. Michael Smith and M. Mark McAdams, of The Thompson Law Firm, of Conway, for respondent.

JUSTICE BURNETT: We granted certiorari to review a decision of the Court of Appeals holding the trial court properly limited cross-examination of a witness to exclude any reference to insurance. Yoho v. Thompson, 336 S.C. 23, 518 S.E.2d 286 (Ct. App. 1999). We reverse.

FACTS

Petitioner Dorothy Yoho sued respondent Marguerite Thompson to recover damages for injuries she sustained when Thompson's car struck Yoho's car from behind. Prior to trial, Thompson's insurer paid Yoho the policy limits of $50,000 and Yoho's underinsured motorist carrier, Nationwide Insurance Company (Nationwide), then assumed Thompson's defense. At trial, Thompson admitted liability, leaving damages as the only issue for the jury.

Prior to trial, Thompson indicated she would call Dr. William Brannon as a witness. Dr. Brannon had reviewed Yoho's medical records and would give an opinion as to the extent of her injuries.

In motions made before trial and prior to Dr. Brannon's testimony, Yoho asked the trial judge to allow her to cross-examine Dr. Brannon regarding his relationship with Nationwide to establish possible bias. Yoho presented Dr. Brannon's deposition testimony from another case that he did "a fair amount of consulting work with Nationwide" and had given lectures to Nationwide agents and adjusters. Yoho also presented information that ten to twenty percent of Dr. Brannon's practice consisted of reviewing records for insurance companies, and that his yearly salary was based on the amount of money his practice earned, which included his consulting work. The trial court denied Yoho's motion on the basis that the probative value of the content of the cross-examination would be outweighed by the prejudicial effect of injecting the issue of insurance into the proceedings. The court informed Yoho that she could discuss Dr. Brannon's bias by using generic terms such as "defense," "defendants," and "defense lawyer," but that she could not discuss his possible bias by using the word

"insurance."

On direct examination, Dr. Brannon testified he was employed by the University of South Carolina School of Medicine as a professor and was hired by Thompson's attorney to review Yoho's medical records. During cross-examination, Yoho established that Dr. Brannon had worked for Thompson's attorneys on three prior occasions. She also asked Dr. Brannon about the fees he charged for the records review.

The jury awarded Yoho $20,000 in damages. Yoho's motions for a new trial absolute or a new trial *nisi additur* were denied. The Court of Appeals affirmed. Yoho v. Thompson, 336 S.C. 23, 518 S.E.2d 286 (Ct. App. 1999).

ISSUE

Did the trial court err in denying Yoho's request to cross-examine Dr. Brannon regarding his possible bias?

DISCUSSION

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Rule 611(b), SCRE. Considerable latitude is allowed in cross-examination to test a witness's bias, prejudice, or credibility. See State v. Johnson, 338 S.C. 114, 124, 525 S.E.2d 519,524, cert. den., __ U.S. __, 121 S.Ct. 104 (2000). An appellate court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion. Id. at 124-25, 525 S.E.2d at 524. An abuse of discretion occurs when the trial court's ruling is based on an error of law. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). The trial court's ruling in this case was controlled by an error of law, namely, a misunderstanding of new Rule 411, SCRE.

Prior to the adoption of Rule 411 in 1995, the long-standing rule

in South Carolina was that a defendant's insurance against liability in an action for damages should not be revealed to the jury. Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 426 S.E.2d 756 (1993). Rule 411 modified this rule by providing that the admissibility of evidence of insurance depends upon the purpose for which such evidence is introduced. Rule 411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. *This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.*

Rule 411, SCRE (emphasis added). As Thompson admitted liability, the unquestioned purpose of the requested cross-examination was to prove bias, and not liability. Moreover, the evidence Yoho sought to introduce was relevant to the issue of Dr. Brannon's bias.

Because Rule 411 did not require the exclusion of the evidence in this case, we must determine whether the probative value of the evidence was substantially outweighed by its prejudicial effect and potential for confusing the jury. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."). In making this determination, we are mindful that "Rule 403 was not designed to allow the blanket exclusion of evidence of insurance absent some indicia of prejudice. Such a result would defeat the obvious purpose of Rule 411." Charter v. Chleborad, 551 F.2d 246 (8th Cir. 1977).

A majority of jurisdictions addressing this issue apply a "substantial connection" analysis to determine whether an expert's connection to a defendant's insurer is sufficiently probative to outweigh the

prejudice to the defendant resulting from the jury's knowledge that the defendant carries liability insurance. See, e.g., Bonser v. Shainholtz, 3 P.3d 422 (Colo. 2000) (expert's relationship with insurance Trust was admissible to show bias where expert was a co-founder and previous board member of Trust, and expert believed dentists insured by Trust were better quality than other dentists); Mills v. Grotheer, 957 P.2d 540 (Okla. 1998) (insufficient connection between expert and insurer to justify admission where expert was merely a policyholder).

We adopt the substantial connection analysis and conclude the connection between Dr. Brannon and Nationwide was sufficient to justify admitting evidence of their relationship to demonstrate Dr. Brannon's possible bias in favor of Nationwide. Dr. Brannon was not merely being paid an expert's fee in this matter. Instead, he maintained an employment relationship with Nationwide and other insurance companies. Dr. Brannon consulted for Nationwide in other cases and gave lectures to Nationwide's agents and adjusters. Ten to twenty percent of Dr. Brannon's practice consisted of reviewing records for insurance companies, including Nationwide. Further, Dr. Brannon's yearly salary was based in part on his insurance consulting work. The trial court erred in refusing to allow Yoho to cross-examine Dr. Brannon about his relationship with Nationwide.

Moreover, the trial court's error was not harmless. Although the court gave Yoho permission to discuss Dr. Brannon's bias by using generic terms such as "defense," "defendants," and "defense lawyer," Yoho sought to show specifically that Dr. Brannon consulted for Nationwide and lectured Nationwide's agents and adjusters. This evidence is qualitatively different from showing Dr. Brannon works for "the defense" generally, and is much more indicative of possible bias in favor of the defendant.

We reverse and remand for a new trial. On remand, Yoho may attempt to show bias on Dr. Brannon's part through cross-examining him about his relationship with Nationwide. The cross-examination must be carefully tailored, however, so as not to confuse the jury by revealing that Nationwide, while defending in the name of Thompson, is actually Yoho's

underinsured motorist carrier. Moreover, the defense, if it so requests, is entitled to a limiting instruction stating that evidence of insurance is admissible only to show Dr. Brannon's possible bias or prejudice as a witness. See Rule 105, SCRE ("When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

REVERSED AND REMANDED.

WALLER and PLEICONES, JJ., concur. TOAL, C.J., and MOORE, J., concurring and dissenting in a separate opinion.

JUSTICE MOORE (concurring and dissenting): I agree with the majority's adoption of the substantial connection analysis and the conclusion that the connection between Dr. Brannon and Nationwide was sufficient to justify allowing evidence of that relationship to demonstrate Dr. Brannon's possible bias in favor of Nationwide. I do not believe, however, the trial court abused its discretion in excluding the testimony because Yoho was provided alternative means to establish Dr. Brannon's alleged bias without injecting insurance into the trial. Yoho was informed she could discuss Dr. Brannon's bias by using generic terms such as "defense," "defendants," and "defense lawyer," but she could not use the word "insurance." Yoho chose not to use this alternative. If she had fully utilized the trial court's suggestions, the result of the cross-examination would have been just as effective as cross-examining Dr. Brannon by using the word "insurance."

Accordingly, I believe the trial court acted within its discretion by limiting Yoho's cross-examination of Dr. Brannon to exclude any mention of insurance.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Life and Accident and Health Insurance Guaranty Association, Respondent,

v.

Liberty Life Insurance Company, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 25274
Heard October 3, 2000 - Filed April 2, 2001

AFFIRMED

David W. Robinson, II, and Kevin K. Bell, both of Robinson, McFadden & Moore, of Columbia, for petitioner.

John C. Bruton, Jr., and Frank W. Cureton, both of Haynsworth Sinkler Boyd, PA, of Columbia, for respondent.

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' affirmation of the trial court's ruling that certain investment contracts were not covered by the South Carolina Life and Accident and Health Insurance Guaranty Association ("the Association"). South Carolina Life & Accident & Health Ins. Guar. Ass'n v. Liberty Life Ins. Co., 331 S.C. 268, 500 S.E.2d 193 (Ct. App. 1998). Liberty Life Insurance Company ("Liberty") contends the contracts are annuities entitled to coverage. We disagree and affirm.

BACKGROUND

The Guaranty Act

The Association was created in 1972 when the legislature passed the South Carolina Life and Accident and Health Insurance Guaranty Act ("the Act"), codified at S.C. Code Ann. §§ 38-29-10, *et seq* (Supp. 1999). The Association guarantees, assumes or reinsures contractual obligations of insurers who become financially unable to meet their obligations. See S.C. Code Ann. § 38-29-70. To provide this protection, the Association assesses member insurers at rates based on the value of policies or contracts held by the respective insurer.[1] See S.C. Code Ann. § 38-29-80. Only certain policies come within the protection afforded by the Act. See S.C. Code Ann. § 38-29-40. The Act defines those policies as "direct life insurance policies,

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[1]At oral argument, the Association indicated that no assessments have ever been levied against Liberty or Investment based on the value of the contracts at issue in this case.

accident and health policies, annuity contracts, and contracts supplemental to life and accident and health insurance policies and annuity contracts issued by persons authorized to transact business in this State. . . ." Id.

The Act's purpose is "to maintain public confidence in the promises of insurers by providing a mechanism for protecting policy owners, insureds, beneficiaries, annuitants, payees, and assignees of [covered policies] against failure in the performance of contractual obligations due to impairment of the insurer issuing these policies or contracts." S.C. Code Ann. § 38-29-30. The Act is to be liberally construed. See S.C. Code Ann. § 38-29-200. The Association may "[t]ake legal action to avoid payment of improper claims." S.C. Code Ann. § 38-29-70(11)(f).

While the Act does not define "annuity contracts," "annuity" is defined elsewhere in the insurance code as "every contract or agreement to make periodic payments, whether in fixed or variable dollar amounts, or both, at specified intervals." S.C. Code Ann. § 38-1-20(6) (Supp. 1999). The interpretation of this definition and the intent of the legislature in promulgating the Act are at the heart of the instant dispute. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, Op. No. 25191 (S.C. Sup. Ct. filed August 28, 2000)(Shearouse Adv. Sh. No. 34 at 29).

Liberty and RDFA

Early in the 1980s, Liberty entered into a number of contracts, called Reserve Deposit Fund Agreements ("RDFA"),[2] with trustees of various

[2]This opinion refers to "unallocated annuities" at times. The National Association of Insurance Commissioners Life and Health Insurance Guaranty Association Model Act ("N.A.I.C. Model Act") defines "unallocated annuity contract" as "an annuity contract or group annuity certificate which is not

privately funded employee retirement plans whereby the trustees periodically deposited money with Liberty, the money ultimately to be used to fund retirement benefits to participating employees. For the first ten years of the contracts, Liberty guaranteed a minimum four percent interest rate, or such greater rate as determined by Liberty.

The terms of the RDFA allowed the plan trustee to terminate the contract at any time and require Liberty to return the entire amount deposited, with accrued interest, to the retirement plan. Additionally, partial withdrawals were permitted for any of four purposes: (1) *to purchase an annuity*, from Liberty or any third party, for a retiring employee; (2) to purchase a paid-up life insurance policy for an employee; (3) to pay any benefit due a retiring employee under the retirement plan, e.g., a lump sum payment, an installment payment, or *an annuity*, at the option of the retiring employee; or, (4) if an employee terminated her employment prior to retiring, the trustee could recover the departing employee's non-vested interest in the retirement plan. These withdrawal options were guaranteed during the first ten years of the contract.

Liberty subsequently sold the contracts to Investment Life Insurance Company of America ("Investment"). Investment, initially a South Carolina insurer, later redomesticated in North Carolina, while maintaining a license to sell insurance in South Carolina.

In 1993 Investment was declared insolvent by the State of North Carolina. When Investment's assets were not sufficient to meet its obligations under the RDFA, a number of plan trustees applied to the Association for reimbursement. The Association denied coverage. This

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issued to and owned by an individual, except to the extent of any annuity benefits guaranteed to an individual by an insurer under the contract or certificate." While the RDFA arguably meet this definition, such characterization is not dispositive of the question whether they meet our statutory definition.

litigation ensued after Liberty paid the shortfall and accepted an assignment of the trustees' claims against the Association.

ISSUE

Are the RDFA covered under the Act?

ANALYSIS

The crux of Liberty's argument is that because the RDFA contractually obligated Liberty either to sell annuities to plan trustees for the benefit of retiring employees, or to return funds to the trustee for use in purchasing an annuity from some third party, the RDFA meet the statutory definition of annuity.

The trial court and Court of Appeals determined that, since the RDFA contemplate an additional requirement, i.e. that the trustee enter into a contract separate and apart from the RDFA in order to initiate a stream of payments to a retiring employee, the RDFA themselves are neither covered contracts nor contracts supplemental to covered contracts. We agree.

Annuity Purchase Option

Liberally construing the Act, the RDFA are not, in our opinion, annuities. As pointed out by the Court of Appeals, the RDFA do not "make periodic payments at specified intervals." Instead, they provide the trustees with *an option* to purchase annuities.

The Supreme Court of Virginia found that "an undertaking to purchase an annuity in the future is not a present guarantee of annuity benefits." Bennet v. Virginia Life, Accident & Sickness Ins. Guar. Ass'n, 468 S.E.2d 910, 914 (Va. 1996). The court in Bennet held that Guaranteed Interest Contracts (GIC), contracts similar to the RDFA in the instant case, were not annuities covered by the State's guaranty association. Our Court of Appeals

cited Bennet as support for its conclusion that the RDFA were not entitled to coverage as annuities.[3] While Bennet's reasoning is sound, the Virginia statutory definition of annuity is significantly different from our own. The Virginia guaranty act excluded from coverage annuities "not issued to or owned by an individual . . . ." Id. at 912. The Bennet court based its holding that the GIC were not covered by the guaranty act upon the fact that the plan trustee, and not the individual employees, owned the GIC.

The Court of Appeals also relied on Arizona Life & Disability Ins. Guar. Fund v. Honeywell, Inc., 927 P.2d 806 (Ariz. Ct. App. 1996),[4] wherein the Arizona Court of Appeals held that GIC were not annuities covered by that State's guaranty act. There the controlling statute defined annuities as "all agreements to make periodic payments . . . where the making or continuance of all or some of a series of such payments, or the amount of such payment, is dependent upon the continuation of human life."[5] Id. at 811. The Arizona court determined that the GIC were not annuity contracts because the payments under the GIC were not contingent on the continuation of human life. The court further held that the GIC were not annuities because the existence *vel non* of an annuity was entirely speculative and dependent on the trustee's decision to exercise one of a number of options under the

[3]See Liberty Life Ins. Co., at 273, 500 S.E.2d at 196.

[4]See Liberty Life Ins. Co., at 273, 500 S.E.2d at 196.

[5]This definition is virtually identical to the South Carolina definition of "annuity" in effect at the time Liberty entered into the contracts at issue. The definition was amended in 1990 to delete the requirement that the payments be "dependent upon the continuation of human life." The change in the statutory definition does not affect the outcome of this dispute.

contract, i.e. the option to purchase an individual annuity.[6] Much of the court's reasoning applies to the RDFA here:

> Whether an annuity would be purchased was entirely speculative. First, an employee who invested in the fixed income fund must have retired. Second, the employee would had to have selected the annuity option from the number of options available under Honeywell's retirement plan. Third, the trustee must have elected to direct [the insurer] to purchase the annuity by withdrawing money from the fund value of the [GIC], as opposed to purchasing an annuity from other funding sources.

Id. at 814. Similar procedures were required to initiate a stream of payments to a plan participant in the case *sub judice*.

As pointed out by Liberty, the decision of the Arizona Court of Appeals was subsequently overruled by the Arizona Supreme Court. Arizona Life & Disability Ins. Guar. Fund v. Honeywell, Inc., 945 P.2d 805 (Ariz. 1997). However, the Arizona Supreme Court based its reversal on the lower court's finding that the GIC's payment provisions were not life contingent. The supreme court agreed with the lower court that "[e]ven though the GIC allows the Trustee to purchase an annuity contract upon the participant's retirement, we find this alone cannot qualify the GIC contract as an annuity. . . . Instead, we conclude that the [GIC] are annuities . . . *only* because required payments under the contracts are life contingent." Id. at 813 (emphasis added).[7]

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[6]In fact, the court afforded weight to the fact that the annuity purchase option contained in the GIC had *never* been exercised by a plan trustee. In the present dispute, the Association received no response to discovery requests asking Liberty to identify any instances where the annuity purchase option had been exercised by a plan trustee.

[7]The Arizona legislature, in 1995, prospectively excluded GIC from guaranty fund coverage. See Ariz. Rev. Stat. Ann. § 20-682(B)(4) (West 1995).

Liberty does not argue that the RDFA are annuities because they make payments which are dependent upon the continuation of human life, but because the RDFA obligated Liberty to make periodic payments should the trustee and plan beneficiary so elect. With that in mind, it is not clear how Honeywell, supra, provides support for its position.

The New Mexico Court of Appeals agreed that an option to purchase an annuity was not an annuity, stating:

> [u]nder the [GIC], a plan participant held an option to purchase an annuity after retirement. This option is perhaps the clearest demonstration that the [GIC] were not themselves annuities. An option to purchase an annuity does not create an annuity contract, only the possibility of a separate contract for an annuity in the future. . . . Since only an exercise of the option to purchase an annuity contract could create an annuity, it follows that the Executive Life [GIC] were not themselves annuity contracts.

Krahling v. First Trust Nat'l Ass'n, 944 P.2d 914, 918 (N.M. Ct. App. 1997). The statutory definition of "annuity" in Krahling was synonymous with that in Honeywell, supra, and is distinguishable from our current definition. However, we are persuaded by the court's opinion that an option to purchase an annuity in the future does not constitute a present annuity.

In Oklahoma Life & Health Ins. Guar. Ass'n v. Hilti Retirement Sav. Plan, 939 P.2d 1110 (Okla. 1997), the Oklahoma Supreme Court noted that twenty-two states statutorily provide guaranty coverage for unallocated annuity contracts[8] similar to those involved in the instant dispute. See id. at

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[8]The Oklahoma guaranty act expressly excludes unallocated annuity contracts (see fn. 1) from coverage. In addition to those cited by the Oklahoma court, our research reveals another eight states which either limit or deny coverage for unallocated annuities. See Colo. Rev. Stat. Ann. § 10-20-104 (1999)(no coverage); Idaho Code § 41-4303 (2000)(no coverage); Iowa Code § 5808C.8 (1998)($1,000,000 limit); Ky. Rev. Stat. Ann. § 304.42-030 (1998)(no

1112. All of the states cited limit the maximum coverage by the guaranty associations to amounts ranging from $1,000,000 to $7,500,000 per contract. Georgia and North Carolina have limits of $5,000,000.[9] See id. The absence of a limitation of coverage for unallocated annuities in our statute supports our conclusion that the legislature did not contemplate coverage for this type of funding mechanism when it passed the Act.

We are cognizant of those decisions which have found similar contracts to be within the protection afforded by the particular state's guaranty act and do not find them compelling. See, e.g., Board of Trustees of the Md. Teachers & State Employees Supplemental Retirement Plans v. Life & Health Ins. Guar. Corp., 642 A.2d 856 (Md. 1994); Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce, 400 N.W.2d 769 (Minn. Ct. App. 1987); and Unisys Corp. v. Pennsylvania Life & Health Ins. Guar. Ass'n, 667 A.2d 1199 (Pa. Commw. Ct. 1995), *aff'd* 684 A.2d 546 (Pa. 1996). Our review of these cases indicates that they were decided under statutory or judicial definitions of "annuity" or "annuity contract" distinguishable from our own. It is also noteworthy that subsequent to these decisions, the state legislatures of Minnesota[10] and Pennsylvania[11] amended their guaranty acts to limit the coverage afforded unallocated annuities akin to RDFA, while the Maryland legislature excluded them from coverage.[12]

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coverage); Nev. Rev. Stat. § 686C.035 (1999)(no coverage); N.J. Stat. Ann. § 17B:32A-3 (1996)($2,000,000 limit); S.D. Codified Laws § 58-29C-4 (1989)(no coverage); and W. Va. Code § 33-26A-3 (1993)($1,000,000 limit).

[9]The current version of the N.A.I.C. Model Act limits exposure to $5,000,000, per contract-holder, for unallocated annuity contracts. See N.A.I.C. Model Act § 3(C)(2)(e). It also contains opt-out provisions whereby a state may elect to completely exclude unallocated annuity contracts from coverage.

[10]See Minn. Stat. Ann. § 61B.19 (West 1996).

[11]See Pa. Stat. Ann. tit. 40, § 991.1703 (West 1999).

[12]See Md. Code Ann., Insurance § 9-403 (1996).

Liberty advances the additional argument that the Insurance Commissioner's approval of the RDFA indicates they were approved for sale as annuity contracts. It arrives at this conclusion employing a process of elimination, reasoning that since the contracts were not life insurance contracts and not health insurance contracts, they must have been approved as annuity contracts. However, Liberty presented no evidence that the RDFA were approved as annuity contracts and its conclusion is purely speculative. In any event, this Court is not bound by the Insurance Commissioner's determination. Cf. Wilkes v. Freeman, 334 S.C. 206, 512 S.E.2d 530 (Ct. App. 1999), *cert. denied* (insurer's form offering underinsured motorist coverage did not comply with statute despite the fact the form had been approved by the Insurance Commissioner). The Insurance Commissioner's approval is entitled to some deference, but it is not dispositive. See Richland County Sch. Dist. Two v. S.C. Dep't Educ., 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999).

CONCLUSION

We hold that the RDFA are not annuities entitled to coverage under the Act. The statutory definition of "annuity" does not explicitly encompass options to purchase annuities; we decline to expand the statutory definition to include such options. The requirement that the trustee take the additional step of purchasing an annuity, separate and apart from the RDFA, prior to initiating a stream of payments convinces us these contracts are not annuities. If unallocated annuities are to be afforded guaranty act coverage, the General Assembly is the appropriate forum to assess the attendant policy consequences and to act based on its assessment.

Based upon the foregoing, we AFFIRM the decision of the Court of Appeals.

MOORE, WALLER and BURNETT, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. I would hold the Reserve Deposit Fund Agreements ("RDFA") are covered under the South Carolina Life and Accident and Health Insurance Guaranty Act ("Guaranty Act"), codified at S.C. Code Ann. §§ 38-29-10, *et seq*. (Supp. 2000).

The Guaranty Act creates the South Carolina Life and Accident and Health Insurance Association ("Association"). S.C. Code Ann. § 38-29-50. The Association is comprised of all insurers authorized to transact business in this State. It guarantees, assumes, or reinsures the contractual obligations of insurers who become financially unable to meet their obligations. S.C. Code Ann. § 38-29-70. However, the Guaranty Act only affords protection to defined policies as set forth in section 38-29-40. The question now before this Court concerns whether the RDFA's issued by Liberty Life are "covered policies" included in the definition of section 38-29-40.

Section 38-29-40 (1) provides:

> This chapter applies to direct life insurance policies, accident and health insurance policies, annuity contracts, and contracts supplemental to life and accident and health insurance policies and annuity contracts issued by persons authorized to transact insurance in this State at any time.

At issue here is the provision in the RDFA contracts which allow the trustee to partially withdraw funds "to pay any benefit under the retirement plan such as a lump sum distribution, installment payment, or any annuity." The condition specifically provides:

> Under the terms of the Trust, life insurance coverage is being purchased from the Company on the lives of the individual participants covered by the Trust. We guarantee for a period of up to ten years from the Effective Date of this Agreement that the Settlement Option provisions contained in such policy or policies *may be used as the basis for the annuity purchase guarantees* whereby a single

> sum may be applied to purchase a stated amount of life income. . . .(emphasis added)
>
> In order to provide for the accumulation of the supplementary amounts necessary to purchase the *retirement annuities to which participants will become entitled* under the Trust there is hereby established in the name of the Trustee a [RDFA] to which the Employer . . . through the Trustee will make contributions. . . (emphasis added)

In deciding whether the RDFA's are covered policies, the Court should consider the legislative intent behind the Act in its entirety. *Joiner v. Rivas*, 342 S.C. 102, 536 S.E.2d 372 (2000) (a cardinal rule of statutory construction is to ascertain the intent of the legislature). The legislature has clearly directed that "[t]his chapter must be liberally construed to effect the purpose under section 38-29-30 which constitutes an aid and guide to interpretation." S.C. Code Ann. § 38-29-200. The purpose of the Guaranty Act is expressed by the legislature as follows:

> The purpose of this chapter is to maintain public confidence in the promises of insurers by providing a mechanism for protecting policy owners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, accident and health insurance policies, annuity contracts, and supplemental contracts against failure in the performance of contractual obligations due to the impairment of the insurer issuing these policies or contracts.

S.C. Code Ann. § 38-29-30 (Supp. 2000).

The Majority hold the Guaranty Act only covers annuity contracts or agreements which "make periodic payments . . . at specific intervals" but does not cover contracts or agreements *to purchase* annuities which "make

periodic payments . . . at specific intervals." This is a distinction without a difference. The Association was set up to protect the beneficiary, and under either scenario above, the effect on a beneficiary when an Insurance Company fails is the same. The loser is always a beneficiary who has no control over the decisions of the trustee. If the trustee chooses unwisely, or purchases from an inadequately funded source, the beneficiary will suffer the loss of his retirement benefits. This is the exact situation the Guaranty Association was set up to prevent. The Association was designed to protect the policy holder from an insurance company's failure or inability to honor its contractual obligations. In the instant case, Liberty Life has assumed the responsibility for Investment Life Insurance Company's failure. However, in the future, there may not be such a company to step in and honor the contracts, which here consisted of a policy holder's retirement benefits. Retirement benefits are a necessity for many citizens of this State, and allowing contracts such as the RDFA's to escape coverage on the technical distinction between an "annuity contract" and a "contract to purchase an annuity" undermines the purpose of the Act and would have a dramatic impact on the financial stability of many retirees.

Furthermore, it is important to consider that these RDFAs are annuity insurance products, sold only by licensed insurance companies after approval by the South Carolina Department of Insurance. What possibly could the legislature have intended the Guaranty Association to cover if not insurance products, sold by licensed insurance companies and approved by the Insurance Commission?

Finally, the Majority attempts to distinguish those decisions of other states which have found similar contracts to be within the protection afforded by the particular state's guaranty act. *See, e.g., Board of Trustees of the Md. Teachers & State Employees Supplemental Retirement Plans v. Life & Health Ins. Guar. Corp.*, 642 A.2d 856 (Md. 1994); *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769 (Minn. Ct. App. 1987); *and Unisys Corp. v. Pennsylvania Life & Health Ins. Guar. Ass'n*, 667 A.2d 1199 (Pa. Commw. Ct. 1995), *aff'd* 684 A.2d 546 (Pa. 1996). The Majority finds these cases were decided based on definitions of "annuities"

which are distinguishable from our own. However, the Majority adopts much of the reasoning of the courts in *Bennet v. Virginia Life, Accident & Sickness Ins. Guar. Ass'n, supra, Arizona Life & Disablility Ins. Guar. Fund v. Honeywell, Inc., supra,* and *Krahling v. First Nat'l Ass'n, supra,* where similar contracts were found not to be covered under their state's respective guaranty acts. Yet these states, as the majority admits, also have definitions of "annuities" which are distinguishable from our own. Again, the Majority is attempting to make a distinction without a difference.

Consistent with policy, purpose, and legislative intent, I would hold the RDFA's are "annuity contracts" covered under South Carolina' Guaranty Act.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lois Eargle, in her capacity as Horry County Auditor, Respondent,

v.

Horry County, a Body Politic Subdivision of the State of South Carolina, and Linda Green Angus, in her capacity as Horry County Administrator, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25275
Heard November 15, 2000 - Filed April 2, 2001

AFFIRMED

John P. Henry and Emma Ruth Brittain, both of the Thompson Law Firm, of Myrtle Beach, for petitioners.

Sandra J. Senn, of Charleston, and Stephanie P. McDonald, of Mount Pleasant, for respondent.

John Hamilton Smith, of Young, Clement, Rivers & Tisdale, of Charleston, for amici curiae.

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' decision in Eargle v. Horry County, 335 S.C. 425, 517 S.E.2d 3 (Ct. App. 1999), wherein that court affirmed the trial court's determination that South Carolina law does not authorize a county administrator to suspend employees of elected officials. The Court of Appeals reversed the trial court's award of attorney's fees, remanding for a determination whether the county was substantially justified in pressing its claim. We affirm.

FACTS/PROCEDURAL HISTORY

This dispute arose after Lois Eargle, ("the Auditor") the elected auditor of Horry County, and three of her employees were involved in an automobile accident while en route to a co-worker's father's funeral. The accident involved a county owned vehicle and occurred during normal county business hours. Two of the employees were paid hourly, while the third was a salaried worker with supervisory responsibilities. In violation of established County policy, neither hourly employee clocked out of work prior to leaving their jobs. After the accident, but prior to the initiation of disciplinary proceedings, the two hourly employees submitted leave forms for the time they were away from their jobs.

Upon learning of the accident and the employees' failure to clock out, Horry County Administrator Linda Angus Green ("the Administrator") met with the Auditor to discuss disciplining the three employees.[1] When the two could not reach an agreement on the appropriate discipline, the Administrator purported to suspend the employees.[2]

Ultimately, the Auditor brought a declaratory judgment action against Horry County ("the County") and the Administrator (collectively, "Petitioners") seeking a determination whether the County, through the Administrator, had the statutory authority to suspend employees of the Auditor's Office. The parties agreed to stay enforcement of the suspensions pending the outcome of this litigation. The trial court determined the County lacked such authority and ordered the County to reimburse the Auditor's attorneys' fees.

Petitioners appealed. A divided panel of the Court of Appeals reversed, and the Auditor petitioned for rehearing. After granting the Auditor's petition, the Court of Appeals, *en banc*, affirmed the trial court's ruling that the Administrator's authority to enforce county personnel policies did not include the authority to suspend employees of elected officials. The court reversed the award of attorney's fees to the Auditor and remanded for express findings as required by S.C. Code Ann. § 15-77-300 (Supp. 1999). We granted certiorari to review both rulings.

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[1]Horry County operates under the council-administrator form of government pursuant to S.C. Code Ann. §§ 4-9-610, *et seq.* (1986).

[2]The hourly employees were to be suspended for three days without pay for violating the County's time clock policy. The salaried employee was to be suspended for five days without pay for failing to supervise the hourly employees and for unauthorized use of a County automobile.

ISSUE I

Does a County Administrator have authority to suspend employees of an elected official?

DISCUSSION

Resolution of this dispute involves construction of three sections of the Home Rule Act ("the Act"), codified at S.C. Code Ann. §§ 4-9-10, *et seq.* (1986 and Supp. 1999). Under one provision of the Act, county governments are empowered

> (7) to develop personnel system policies and procedures for county employees by which *all county employees are regulated except those elected directly by the people*, and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government. *This employment and discharge authority does not extend to any personnel employed in departments or agencies under the direction of an elected official or an official appointed by an authority outside county government*. . . .

S.C. Code Ann. § 4-9-30(7) (Supp. 1999) (emphasis added).

Another section of the Act sets forth the powers and duties of the County Administrator as follows:

> (1) to serve as the chief administrative officer of the county government;
> (2) to execute the policies, directives and legislative actions of the council;
> . . .

> (7) to be responsible for the administration of county personnel policies including salary and classification plans approved by council;
> (8) to be responsible for employment and discharge of personnel subject to the provisions of subsection (7) of § 4-9-30;
> . . . .

S.C. Code Ann. § 4-9-630 (1986). Addressing the Administrator's authority over elected officials, the Act provides "[w]ith the exception of organizational policies established by the governing body, the county administrator shall exercise no authority over any elected officials of the county whose offices were created either by the Constitution or by the general law of the State." S.C. Code Ann. § 4-9-650 (1986). Under the council-administrator form of government, county auditors are elected officials. See S.C. Code Ann. § 4-9-60 (1986).

In construing the above statutes, we recognize that "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, Op. No. 25191 (S.C. Sup. Ct. filed August 28, 2000)(Shearouse Adv. Sheet No. 34 at 29). We note further that "[t]he decision to grant a declaratory judgment is a matter which rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse." Garris v. Governing Bd. of South Carolina Reinsurance Facility, 319 S.C. 388, 390, 461 S.E.2d 819, 820 (1995). "An abuse of discretion occurs where the trial court is controlled by an error of law . . . ." City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, __, 531 S.E.2d 518, 521 (2000).

Petitioners argue the Court of Appeals erred in determining §§ 4-9-30(7) and 4-9-630 do not permit the Administrator to impose temporary suspensions upon persons employed by elected officials when enforcing County personnel policies. For support, they rely on this Court's decision in Heath v. County of Aiken, 295 S.C. 416, 368 S.E.2d 904 (1988) ("Heath I").

In Heath I, the Court determined that, with the exception of sheriff's deputies, all other employees hired and fired by the County Sheriff were entitled to grievance rights as provided in S.C. Code Ann. § 4-9-30(7).[3] The Court could discern no reason why the legislature could not

> grant a sheriff the power to hire and fire personnel yet limit that power through the grievance hearing procedure. . . . The legislature's intent to include sheriff's department personnel other than deputies as "employees" under Section 4-9-30(7) is clear from the statutory language itself.

Id. at 420, 368 S.E.2d at 906. Petitioners would apparently expand the Court's holding in Heath I to grant an Administrator authority to suspend elected officials' employees. We do not agree that Heath I supports this position. Heath I construed an unambiguous portion of the Act which limited elected officials' authority; it did not expand a county's authority beyond that explicitly granted in the statute.

The Administrator contends that the power granted her in S.C. Code Ann. § 4-9-630(7) to administer county personnel policies necessarily encompasses the power to suspend the Auditor's employees, as she sought to do here. It is noteworthy that a number of the Horry County personnel policies call for dismissal of the employee for a first or second violation.[4] The plain language of § 4-9-30(7) precludes the Administrator from imposing such a punishment upon any employee of an elected official. The

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[3]At the time Heath I was decided, § 4-9-30(7) provided that "[a]ny employee discharged by the administrator, elected official or designated department head shall be granted a public hearing before the entire county council [upon request] . . . ." It further granted county council the authority to sustain the discharge, subject to judicial review, or to reverse the dismissal, in which case the employee would be reinstated.

[4]The violations for which employees were to be suspended in the instant case are punishable by dismissal in the case of a second violation.

fact that the Administrator could not legally enforce the maximum punishment calls into question Petitioners' argument that granting the Administrator suspension powers is necessary to insuring fiscal accountability and employee morale. The argument ignores the fact that many provisions of the County's personnel policies are simply not enforceable by the Administrator against elected officials' employees under the explicit language of § 4-9-30(7).

Petitioners also cite several opinions of the Attorney General in support if their position. Most of these opinions address the counties' authority to set county work hours and to enact personnel policies for all county employees. The opinions do not address a county's ability to enforce these policies against elected officials' employees. Moreover, this Court is not bound by opinions of the Attorney General. Price v. Watt, 280 S.C. 510, 313 S.E.2d 58 (Ct. App. 1984).

The Auditor testified the suspensions would adversely affect her ability to perform her duties. She claimed that staggering the suspensions or providing her with temporary staff would not alleviate these problems. Petitioners did not dispute these claims. Taking the Auditor's assertions as true, the suspensions could be construed as an exercise of authority by the Administrator over the Auditor in violation of S.C. Code Ann. § 4-9-650.

The Court of Appeals correctly determined that the County's authority to promulgate personnel policies applicable to all county employees does not cloak the Administrator with the power to suspend employees of elected officials. The policy considerations cited by the Court of Appeals in support of its decision are persuasive. The facts of this case bear out some of these concerns. It is undisputed that the employees the Administrator sought to suspend were acting with the permission of and under the direction of their elected supervisor. Granting the Administrator the authority to suspend in this case would require employees of elected officials to choose whose directives they will follow, those of the elected official or those of the Administrator. This result could not have been intended by the legislature. See Broadhurst v. City of Myrtle Beach Election Comm'n, supra (statutes are

to be construed to effectuate legislative intent).

The Court of Appeals pointed out that the Auditor is directly elected by and accountable to the public, while the Administrator is not elected and only indirectly accountable to the public, through the County Council. These facts weigh in favor of denying the Administrator the authority sought herein.[5] If the electorate is dissatisfied with the manner in which the elected Auditor operates her office, it can express its dissatisfaction at the ballot box.

For the reasons given by the Court of Appeals in Eargle v. Horry County, supra, and for the reasons given above, we affirm the determination that the Administrator lacked the authority to suspend the Auditor's employees.

ISSUE 2

Did the Court of Appeals err in remanding the case to the trial court for a determination on the issue of attorney's fees?

DISCUSSION

Petitioners argue the Court of Appeals erred in remanding to the circuit

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[5]Apparently, the dissent would have this Court forego its duty to interpret statutes and delegate that responsibility to the General Assembly. Unfortunately, we do not have that luxury. Curiously, while criticizing the majority for impermissibly adding to the language of the statute, the dissent is adding its own language, transforming the county's authority "to develop personnel system policies and procedures . . ." by which employees of elected officials are regulated, into authority "to develop **and enforce**" its policies against such employees. This is not what the statute says. The statute does say that the county is not to exercise "employment authority" over these employees. The suspensions sought to be imposed here clearly constitute exercise of such authority.

court the question of attorney's fees because the Auditor is not entitled to recover attorneys' fees as a matter of law. We disagree and affirm the Court of Appeals' decision to remand.

The issue is controlled by S.C. Code Ann. § 15-77-300 (Supp. 1999) which provides in part:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The Court of Appeals reversed the trial court's award of attorney's fees to the Auditor, finding the trial court did not make specific findings as to the requirements of "substantial justification" and "special circumstances." The court found

> the trial court stated in its order that "this action was necessary and beneficial to the citizens of Horry County to avoid future interruption of County business, and, therefore, attorneys fees are warranted and should be paid." Whether an action was "necessary" or "beneficial" is not the proper standard for awarding attorney's fees . . . and the circuit court's order makes no mention of any of the factors required by section 15-77-300.

Id. at 434, 517 S.E.2d at 8.

We find that the trial court's order adequately addresses the issue of

special circumstances: the order expressed the court's opinion that the Auditor's actions enured to the benefit of the citizenry of Horry County. See Heath II, supra, (where litigation enured to the benefit of the citizens of Aiken County, any special circumstances were circumstances making it unjust not to award attorney's fees). In light of these findings, a determination on special circumstances is not necessary on remand; however, a finding on substantial justification is required.

CONCLUSION

We hold that the Home Rule Act does not empower a county administrator to impose suspensions upon employees of elected officials. We remand to the trial court for a determination of the issue of attorney's fees.

AFFIRMED.

TOAL, C.J., MOORE and WALLER, JJ., concur. BURNETT, J., dissenting in a separate opinion.

Justice Burnett, dissenting: For the reasons expressed in Judge Cureton's dissent from the Court of Appeals' opinion in this case, I respectfully disagree. I also wish to add some concerns of my own about what I perceive to be the majority's overly broad construction of the relevant statutes.

The cardinal rule of statutory construction is that the Court is to ascertain and effectuate the actual intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). This Court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's meaning. Paschal v. State of South Carolina Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995).

S.C. Code Ann. § 4-9-30(7) (Supp. 1999) authorizes the county to

> develop personnel system policies and procedures for county employees by which *all county employees* are regulated ***except those elected directly by the people***, and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government. This *employment and discharge authority* does not extend to any personnel employed in departments or agencies under the direction of an elected official. . . .

(emphasis added). Section 4-9-650 provides that "[w]ith the exception of organizational policies established by the governing body, the county administrator shall exercise no authority over *any elected officials* of the county whose offices were created either by the Constitution or by the general law of the State." (emphasis added). There is no contention of any ambiguity in either of these statutory provisions. Therefore, we cannot ignore the statutes' plain and ordinary meaning or resort to a subtle or forced construction in an attempt to expand their meaning.

The majority reads § 4-9-30(7) as if it said: "employment, discharge, ***and disciplinary*** authority" and § 4-9-650 as if it said: "the county administrator shall exercise no authority over any elected officials ***or their staff***." Plainly, those words are nowhere to be found in the statute. When read together, §§ 4-9-30(7) and 4-9-650 provide that

> (1) a county administrator has authority over all county employees except elected officials, and
>
> (2) elected officials hire and fire their own staff.

The statutes in no way exempt the staff of elected officials from the rules applicable to all other county employees, nor from the enforcement of those rules by the county administrator.

The elected official's exclusive power to discharge does not include the power to suspend. See Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997) (rejecting the Governor's argument that the power to suspend was an incident of his statutory power to remove from office). Arguably, nor does the elected official's power to discharge members of her staff deprive her staff of the protections of county policies, such as grievance procedures. See Heath v. Aiken County (Heath I), 295 S.C. 416, 368 S.E.2d 904 (1988) (sheriff's department personnel other than deputies are county employees under § 4-9-30(7) and therefore subject to reinstatement by the county grievance committee). Thus, while county employees working under the direction of an elected official remain subject to county rules, they also benefit from the security provided by those rules.

I am aware of the difficulties created by permitting the county administrator to discipline members of the auditor's staff. A person cannot serve two masters. But the lack of a clear chain of command is a systemic problem that should be resolved in the legislative forum. Moreover, I am equally aware of the difficulties created by *not* permitting the county administrator to discipline members of the auditor's staff, among them the morale problems that would result from effectively exempting some county

employees, and not others, from rules purportedly applicable to all.

Although I believe the legislature clearly intended to give county administrators the authority to enforce county policies against all county employees not directly elected by the people, I recognize that the statute leaves many unanswered questions regarding the respective disciplinary roles of the supervising elected official and the county administrator. This is yet another reason this issue should be decided in the General Assembly, and not by judicial fiat.

A responsible elected official should not ask his or her staff members to violate county policy. Once county policy has been violated, however, to construe these statutes to immunize an elected official's staff from discipline by the county administrator is to read language into the statutes which they do not contain.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Charles Irick, Appellant.

Appeal From Orangeburg County
Luke N. Brown, Jr., Special Circuit Court Judge

Opinion No. 25276
Heard February 6, 2001 - Filed April 2, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of 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, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; Solicitor Walter M. Bailey, of Summerville, all for respondent.

CHIEF JUSTICE TOAL: The jury found Charles Irick ("Irick") guilty but mentally ill ("GBMI") of murder and sentenced him to life imprisonment. This appeal follows.

FACTUAL/PROCEDURAL BACKGROUND

On June 8, 1995, Orangeburg County Sheriff's Deputy Cecil Carson ("Carson") was "flagged down" in Holly Hill by a driver in a car. The driver told Carson someone had been shot and was laying in the street six blocks away. When Carson found the victim, Melvin Jacques ("victim"), he was laying on the side of the street in a large puddle of blood. The victim had been shot, and there were no signs of life.

Two individuals witnessed the shooting: Altron Jacques ("Jacques"), the victim's fourteen-year-old nephew, and Paul Jenkins ("Jenkins"). Jacques testified he saw Irick, armed with a shotgun, park his white Cadillac on the side of the road beside the victim. Jacques testified he could see the victim standing next to the car having a conversation with Irick. The victim's voice was low, so Jacques could not hear what was said. However, Jacques stated Irick's voice was loud, and he could hear Irick tell the victim, "Boy, I'll kill you." Jacques then started to run, got about six houses up the street, heard a gunshot, and turned to see the victim fall to the ground. According to Jacques, Irick then pulled into a driveway and drove away towards his house.

Jenkins witnessed the shooting from the roof of his home. Jenkins testified he saw the victim walking down the street between five and six p.m. on June 8, 1995. Jenkins spoke briefly with the victim from his roof. He then saw Irick drive up behind the victim and begin a conversation. The conversation between Irick and the victim lasted between five and ten minutes. Jenkins could not hear most of the conversation, but he testified he did hear Irick tell the victim that he would kill him. Jenkins then heard a gun shot and saw Irick immediately turn his car around. After seeing the victim on the ground, Jenkins called 9-1-1.

Officer Leroy Ravenel ("Ravenel") of the Orangeburg County Sheriff's Department talked to the witnesses, and then proceeded to Irick's residence. Irick answered the door, was read his Miranda rights, and placed under arrest. Ravenel testified Irick verbally stated he understood his rights. After Irick stated he wished to talk to the police, he said, "I didn't shoot anybody." However, after a few questions Irick said, "I'll show you where the gun is at." Irick took Ravenel to the pond where he claimed he threw the gun, but the gun was never recovered.

Irick was indicted at the October 1995 term of the Orangeburg County grand jury for the offense of murder. Prior to trial, in an *in camera* hearing, defense expert Dr. Valerie Holmstrom ("Dr. Holmstrom") testified Irick has been diagnosed since 1946 with chronic schizophrenia and post-traumatic stress disorder related to Irick's service in the military. In Irick's Final Brief of Appellant, his attorney lists episodes of mental illness, including paranoia, chronic nervousness, and anxiousness. After a trial, the jury found Irick guilty of murder, but mentally ill. This appeal followed.

The following issue is before this Court on appeal:

> Did the trial court err by refusing to allow Irick's expert, Dr. Holmstrom, to testify about the effect the victim's use of cocaine and alcohol may have had upon Irick's chronic paranoid schizophrenia when Irick confronted the victim prior to the murder?

LAW/ANALYSIS

Irick argues the trial court erred by refusing to allow Dr. Holmstrom, who evaluated Irick and studied the VA records of his mental illness dating back to 1947, to testify how a victim intoxicated on crack cocaine and alcohol likely exacerbated Irick's chronic paranoid schizophrenia. We disagree. The trial judge properly refused to allow Dr. Holmstrom to testify as to how Irick would have reacted when he confronted the unarmed victim, who had cocaine and alcohol in his bloodstream, because Dr. Holmstrom's testimony amounted to speculative propensity evidence where there was no evidence of what the victim

allegedly said or did to provoke Irick.

A trial judge is accorded broad discretion in ruling on the admissibility of testimony. *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000). The admission of expert testimony is within the discretion of the trial court. *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996). The trial judge's determination of admissibility will not be disturbed absent abuse of discretion resulting in prejudice to the complaining party. *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000). An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support. *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995).

Dr. Holmstrom, Irick's expert witness, is a clinical psychologist with expertise in forensic psychology. Irick made an *in camera* proffer of Dr. Holmstrom's expert opinion as to what effect, if any, the use of alcohol and crack cocaine by a victim would have upon Irick's chronic schizophrenia. Dr. Holmstrom testified *in camera* that the victim's blood alcohol level was 233.3 milligrams per deciliter and crack cocaine was present in his bloodstream. She testified that the victim's level of intoxication could have adversely affected Irick's perception at the time of the crime. She explained:

> If Mr. Irick was confronted with someone who was – since that level of alcohol intoxication would indicate that someone is well beyond being legally drunk, and also under the influence of crack cocaine, one would expect that their behavior could have been quite different than the normal person who is not under the influence of alcohol and drugs. For that – and since under the influence of alcohol and crack cocaine people often can behave in a hostile or provocative way or in a subtle threatening way, that kind of behavior could have impacted on Mr. Irick, given that he has difficulty with dealing with perceived threats from others.

The trial judge refused to allow the proffered testimony to be presented to the jury. Nevertheless, the trial judge ruled Irick could introduce evidence concerning the victim's blood alcohol level and the amount of crack cocaine

present in the victim's system on cross examination of the State's pathologist. Further, Dr. Holmstrom was also able to present some of this information in her testimony before the jury during her cross examination by the State. Dr. Holmstrom testified that Irick's family indicated he was not acting maliciously towards them shortly before the murder. Dr. Holmstrom concluded that during the time of the homicide "[Irick] was . . . in some situation that provoked his psychiatric symptomatology."

Dr. Holmstrom's opinion on this matter is highly speculative because it is based on no factual predicate in the record. Defense counsel presented no testimony or evidence concerning any behavior or statements by the victim that may have provoked Irick. The two eyewitnesses to the shooting, Jacques and Jenkins, did not overhear the conversation between Irick and the victim, other than Irick's threat to kill the victim. No evidence was presented that indicated the victim made any threatening movements or gestures towards Irick. Even Dr. Holmstrom admits that information concerning the victim's actions and speech would have been useful in determining whether Irick was provoked. According to Dr. Holmstrom on direct examination:

> [I]t is very hard, with no, no concrete memory, or not having heard the verbal interaction which apparently went on for, it sounded like for possibly several minutes, if we had that information we might know a great deal more about perception and about whether the victim was in any way provocative to Mr. Irick or was saying things that Mr. Irick was perceiving directly as threatening in any way. It's just, we are without that information, but that information could have provided a lot of help in that area.

Without any eyewitness testimony concerning any actions by the victim that may have impacted upon Irick's perception, and thereby triggering his mental illness, the proffered testimony of Dr. Holmstrom concerning how the victim's interaction with Irick may have caused Irick to react in a psychotic manner is merely conjectural and speculative.

An expert's opinion is admissible if it is relevant and based on some

factual predicate in the record. Dr. Holmstrom's opinion would be admissible if there were evidence in the record the victim threatened Irick in any manner. However, in this case, where the only evidence presented was the fact the victim was intoxicated, the trial judge did not abuse his discretion by finding the evidence inadmissible. The evidence's limited probative value is substantially outweighed by the prejudicial effect the evidence could have on the jury. Rule 403, SCRE. Furthermore, a reversal in this case would create precedent contrary to public policy because a mentally ill defendant would have an argument he was provoked to commit murder simply by showing the victim had drugs or alcohol in his system.

CONCLUSION

Based on the foregoing, we **AFFIRM**.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ralph Schurlknight,

Appellant,

v.

City of North Charleston, and State Accident Fund,

Respondents.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinon No. 3324
Heard October 10, 2000 - Filed March 26, 2001

AFFIRMED

Thomas M. White, of Steinberg Law Firm, of Goose Creek, for appellant.

Andrew F. Haselden, of Howser, Newman & Besley; and General Counsel Rose Mary McGregor, of State Accident Fund, both of Columbia, for respondents.

SHULER, J.: In a decision affirmed by the workers' compensation commission and the circuit court, the single commissioner found Ralph

Schurlknight's claim for benefits barred by the statute of limitations. Schurlknight appeals. We affirm.

FACTS

Schurlknight worked as a fireman for the City of North Charleston from 1973 until August of 1997.[1] Between 1976 and 1997, Schurlknight served as a captain and rode in the passenger seat of the fire truck between five and fifteen times per week. On each call, Schurlknight was exposed to the sirens and air horns which were several feet from his seat. Schurlknight would leave his window down to listen for traffic and other emergency vehicles, and turned the radio up to a volume that could be heard over the sirens and horns.

Schurlknight had a hearing test performed on April 14, 1995 as part of a routine physical. Dr. Weissglass, Schurlknight's physician, reported Schurlknight had "some hearing loss that fits the pattern of noise induced." Schurlknight testified he was told he had a "slight, slight hearing impairment" which the physician would monitor each year. Prior to the physical, Schurlknight had not noticed any hearing loss. Dr. Weissglass recommended Schurlknight wear hearing protection and referred him to the Charleston Speech and Hearing Center (the Center).

Schurlknight received counseling at the Center regarding the adverse communication effects of his hearing impairment and was subsequently referred to vocational rehabilitation services for funding assistance for hearing aids. The Center's report, which was mailed to Schurlknight on May 3, 1995, indicated that Schurlknight's hearing loss was moderate and imposed a communication handicap. Dr. Fenwick, who reported on Schurlknight's condition, described "a history of bilateral hearing loss which has slowly progressed over the last several years." On May 10, 1995, Dr. Fenwick recommended Schurlknight obtain annual audiograms concluding the "hearing loss will likely continue to worsen and [Schurlknight] may ultimately need hearing aids in the future, although I would expect that this would be 10 years away."

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[1] Schurlknight worked for the North Charleston District until their merger with the City of North Charleston in approximately 1996.

Schurlknight continued his work as a fireman and did not file a claim as he was still able to perform his job and he believed Dr. Weissglass would monitor his hearing at his annual physicals.

Schurlknight had another physical and hearing test performed in February of 1996, in anticipation of the North Charleston District's merger with the City of North Charleston. Dr. Weissglass again performed the physical and the hearing test and, according to Schurlknight, described his hearing loss as "minor, go back to work." Dr. Weissglass reported "[Schurlknight] needs protective gear for hearing and annual audiograms." Schurlknight testified that he did not wear his hearing protection because he could not hear the radio transmission while in the fire truck if he wore ear plugs. Schurlknight continued to work until August of 1997, when he left the fire department due to unrelated medical problems.[2] Schurlknight has not worked since 1997.

After leaving the fire department, Schurlknight noticed more severe hearing loss. In December of 1997, Dr. Fenwick performed another audiogram. Schurlknight's understanding of the results is that his hearing loss is severe. Dr. Fenwick reported Schurlknight's loss as 22.5% to the right ear and 37.5% to the left ear resulting in a binaural hearing impairment of 12.5%, describing the loss as "mild to moderately - severe."

Schurlknight filed his Form 50 claim for benefits on March 6, 1998. The City of North Charleston and the State Accident Fund filed a Form 51 denying the claim based, *inter alia*, on the statute of limitations. The single commissioner denied the claim, finding it barred by the two year statute of limitations. The single commissioner concluded Schurlknight "knew that he had a workers' compensation claim for a hearing loss at least by May 1995."

Schurlknight appealed to the full commission arguing essentially four issues: 1) Schurlknight was not aware he had a compensable claim until much later than May of 1995; (2) Schurlknight timely filed his claim as he continued to incur damage until his last exposure in August of 1997 and it was thus not

[2] Schurlknight suffered from cluster migraine headaches.

barred by the statute of limitations; 3) Schurlknight suffered from permanent partial disability; and 4) Schurlknight's hearing loss is causally related to his employment.

In a two-to-one decision, the full commission affirmed the single commissioner. The dissenting commissioner concluded, *inter alia*, the City of North Charleston and the State Accident Fund were estopped from denying the claim as they gave Schurlknight sufficient reason to believe they would provide yearly testing and take care of his hearing problems.

Schurlknight appealed to the circuit court raising the same issues raised to the full commission. The circuit court concluded the issues were: 1) the statute of limitations; and 2) estoppel. Concluding the discovery rule applied, the circuit court affirmed the commission's ruling that the statute of limitations barred the claim. The circuit court did not rule on the estoppel issue. This appeal follows.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). In an appeal from the commission, this Court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2000); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); see also Smith v. Union Bleachery/Cone Mills, 276 S.C. 454, 456, 280 S.E.2d 52, 53 (1981) (court may reverse or modify agency's decision "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . affected by other error of law."); Lyles v. Quantum Chem. Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (in reviewing decision of workers' compensation commission, [the] court of appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

LAW/ANALYSIS

Schurlknight argues the commission erred in barring his claim based upon the statute of limitations. We disagree. South Carolina Code Annotated Section 42-15-40 provides in part:

> The right to compensation under this title is barred unless a claim is filed with the commission within two years after an accident, or if death resulted from accident, within two years of the date of death.

S.C. Code Ann. § 42-15-40 (Supp. 2000). In Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992), the supreme court held the discovery rule applied in workers' compensation actions. Under the discovery rule, the statute would begin to run from the date Schurlknight either knew or should have known of his compensable injury.[3] Id. The commission, adopting the single commissioner's findings, concluded Schurlknight knew he had a claim for a hearing loss by May of 1995.

Schurlknight's medical records indicate that in May of 1995, he was

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[3] Our supreme court further explained the discovery rule in Dean v. Ruscon Corp., :

> According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Dean, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996) (citations omitted).

counseled at the Center in regard to the "adverse communication effects of his hearing impairment" and was "referred to vocational rehabilitation for funding assistance for hearing aids." Schurlknight's medical records also indicate that his hearing loss was moderate and imposed a communications handicap." We agree with the commission that Schurlknight knew or should have known of his compensable injury by May of 1995. Even assuming that Schurlknight was unaware of his compensable injury by May of 1995, Schurlknight certainly knew or should have known of his compensable injury after his audiogram in February of 1996.[4] Accordingly, Schurlknight's Form 50, filed on March 6, 1998, is barred by the two-year statute of limitations.

Schurlknight also argues that in repetitive trauma claims to which the limitation period for accidents applies, the date on which the claim occurs is the last date of exposure to the repetitive trauma. That is, Schurlknight proposes that the statute of limitations should begin to run only after the date of Schurlknight's last exposure to his noisy environment. We disagree.

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[4] Defense Counsel: And you were again told that you had a hearing loss. I believe you said a slight hearing loss.

Schurlknight: Slight hearing loss but that they would monitor it.

Q: And at that visit on February 29th of 1996 , Dr. Weissglass also told you that your hearing loss was probably caused from being around sirens and air horns for 20 years?

A: Yes, sir.

Q: So, in February of '96 you were aware that you had a hearing loss?

A: Yes, sir.

Q: And that it was probably caused by loud noises on the job?

A: Right.

This Court is bound by the holding in Mauldin and must apply the discovery rule. We are unaware of any case overruling the supreme court's ruling in Mauldin. Additionally, in Pee v. AVM Inc., Op. No. 3280 (S.C. Ct. App. 2001, filed January 8, 2001) (Shearouse Adv. Sh. No. 2 at 40), this Court stated in dicta that Mauldin is applicable to repetitive trauma injuries:

> [O]ur supreme court ruled that the two-year limitation provided in section 42-15-40 begins to run from the date the claimant first discovers the compensable injury. It is this discrete event which provides the necessary certainty as to time.

Pee, Shearouse Adv. Sh. No. 2 at 48.

Schurlknight also argues because he was led to believe he need not take action to pursue his claim, the City of North Charleston should be estopped from asserting the statute of limitations. The issue of estoppel was not ruled upon by the circuit court. In addition, Schurlknight did not move to alter or amend the order of the circuit court for failure to consider the issue under Rule 59(e), SCRCP. Therefore, this issue is not preserved for appeal. See Talley v. S.C. Higher Educ. Tuition Grants Comm'n, 289 S.C. 483, 347 S.E.2d 99 (1986) (an issue raised to but not ruled on by the trial court is not preserved unless the complaining party moves to amend the judgment pursuant to Rule 59(e), SCRCP).

For the foregoing reasons, the order on appeal is

AFFIRMED.

STILWELL, J., concurs.

HOWARD, J., concurs in a separate opinion.

HOWARD, J., concurring: I concur in the reasoning and decision of the majority opinion. I write separately to clarify what I believe to be the distinction between the date of discovery of a compensable injury in Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992), and the date of discovery of a compensable injury in this case.

In Mauldin, the claimant first injured her knee on January 2, 1985. She reported it and received emergency room treatment paid for by her employer/worker's compensation carrier. She was diagnosed with a knee sprain, and the injury was handled as a "medical only" claim, minor injury, and was then closed. Id. at 20, 416 S.E.2d 640. During the next two years, she experienced intermittent swelling, which was diagnosed by her family physician as arthritis. Id. It was not until October 1987 that she experienced swelling which did not subside, at which time she was first diagnosed with a torn medial meniscus in the knee. Our supreme court ruled that under those circumstances, the claimant first discovered a compensable injury in October 1987 with the diagnosis of torn medial meniscus.

In contrast, Schurlknight was first told he had a permanent hearing loss significant enough to require a hearing aid in May 1995. By its very nature, this condition was not transient or minor. Furthermore, he was advised to protect his ears when the siren was blaring, which he felt he could not do without missing radio transmissions or traffic indicators. Therefore, under his own version of his job duties, this injury adversely impacted Schurlknight's ability to perform as a fireman. Consequently, facts putting a reasonable claimant on notice of a compensable injury were available to Schurlknight in May 1995.

Although I agree that the above resolution is mandated by our Workers' Compensation Act and caselaw, it is a harsh rule to apply in a repetitive trauma case. See Pee v. AVM, Inc., Op. No. 3280 (S.C. Ct. App. filed January 8, 2001) (Shearouse Adv. Sh. No. 2 at 40). The employee is punished for continuing to perform the job during the early stages of the injury by denial of the right to make a legitimate claim for benefits when the injury finally renders the claimant unable to perform the job. Furthermore, it

is likely to undermine the employee/employer relationship by requiring the employee to file an early claim even though he or she is still able and ready to work.

Repetitive trauma cases fall in between the traditional concept of "injury by accident" and "occupational disease." They have some characteristics of each. See Pee, Op. No. 3280 (S.C. Ct. App. filed January 8, 2001) (Shearouse Adv. Sh. No. 2 at 40). Other states have addressed this problem by ruling in repetitive trauma cases that the statutory period for filing a claim begins to run at such time as the employee is no longer able to work at his job. See, e.g., Ross v. Oxford Paper Co., 363 A.2d 712, 714 (Me. 1976); Barker v. Home-Crest Corp., 805 S.W.2d 373, 373-74 (Tenn. 1991); 3 Arthur Larson & Lex K. Larson Larson's Workers' Compensation Law § 50.05 (2000). However, without further guidance from our supreme court, Mauldin cannot be extended to reach this result. Of course, the clearest resolution would be through legislative action that comprehensively addresses repetitive trauma injuries such as that involved here and carpal tunnel syndrome as found in Pee.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Father,

Respondent/Appellant,

v.

South Carolina Department of Social Services,

Appellant/Respondent.

In Re:
Child 1, born 1/19/84
Child 2, born 9/26/86

Appeal From York County
Jamie L. Murdock, Jr., Family Court Judge

Opinion No. 3325
Heard February 8, 2001 - Filed March 26, 2001
Refiled March 27, 2001

AFFIRMED IN PART, REVERSED IN PART

Assistant General Counsel Susan Anderson, of SC Department of Social Services, of Columbia, for appellant/respondent.

Connie H. Payne, of Burnette & Payne and Debbie S. Mollycheck, both of Rock Hill, for respondent/appellant.

Tony M. Jones, of Elrod, Jones, Leader & Benson, of Rock Hill, Guardian ad Litem.

GOOLSBY, J.: The South Carolina Department of Social Services appeals an award to the respondent/appellant (Father) under the South Carolina Frivolous Civil Proceedings Sanctions Act.[1] Father cross-appeals, alleging he is entitled to sanctions against the Department under Rule 11 of the South Carolina Rules of Civil Procedure. We affirm in part and reverse in part.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Father received legal custody of his two minor sons, Child 1 and Child 2, pursuant to a divorce and custody decree dated March 2, 1995. The custody issue was strongly contested by the children's mother. In an unpublished opinion dated February 9, 1998, this court affirmed the custody decision.

On June 8, 1998, the Department received a report of suspected child abuse concerning Child 2, the younger child, who was then twelve years old.[2] Among other things, the reporter of the alleged incident stated to the Department that Father had shoved a pot scrubber brush into Child 2's mouth and hit him in

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[1] S.C. Code Ann. §§ 15-36-10 through -50 (Supp. 2000).

[2] As noted in the excerpt from the appealed order quoted later in this opinion, the Department knew the reporter was the children's mother.

the chest.[3] Another intake report, dated June 10, 1998, noted additional concerns.[4] After receiving these reports, the Department initiated an investigation.

On June 22, 1998, a Department investigator met with both Father and the children in Father's home. After interviewing both children together without Father being present in the room, the investigator discussed the matter with Father. Early in his interview with the investigator, Father signed a treatment plan presented by the investigator after being assured by the investigator that the plan would not go into effect until a thorough investigation was done. Father also signed a release authorizing any hospital, physician, school, clinic, or law enforcement agency to furnish information regarding the children to the investigator.

As the interview progressed, however, Father began to have concerns that the investigator was unwilling to review information he had sent her earlier about the custody suit. Consequently, Father contacted his attorney, who that same day sent a letter to the Department stating Father was rescinding the release and his agreement regarding the treatment plan, but both he and counsel

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[3] The maltreatment factors enumerated in the intake sheet were as follows:

> R/S physical violence in the home by Dad. Saturday afternoon Dad shoved a pot scrubber brush in child's mouth and hit the child in the chest. R/S [Child 1] heard what was going on – he is not abused by the Dad. R/S child was upset and crying.

[4] The intake sheet dated June 10, 1998, stated:

> R/S Gun in the home. R/S Dad screams all the time; was taking tranquilizers in the past. Dad is very strong and is a control freak. Boys are afraid of dad. Child has run away in the past out of fear of dad. Dad destroys anything given to the children. The younger child would rather be in foster care.

would cooperate in the investigation. On July 2, 1998, Father's attorney hand-delivered to the investigator various documents from the prior custody action and subsequent appeal.

The Department concluded its investigation on July 29, 1998, and determined the case was indicated[5] for threat of physical abuse and mental injury. A Determination Fact Sheet dated July 31, 1998, cited certain "FACTS/OBSERVATIONS"[6] to support its decision and noted these facts or observations were supported by the children's statements and "collaterals."

On August 12, 1998, Father's attorney sent a letter to counsel for the Department, requesting an internal appeal of the Department's determination that the report was founded.[7] The Department, however, transferred the case to a caseworker, who designed a treatment plan requiring counseling and continued

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[5] See S.C. Code Ann. § 20-7-650(C) (1985 and Supp. 2000) (requiring the local child protective agency to investigate a report of suspected child abuse or neglect to determine whether the report is "'indicated' or 'unfounded.'").

[6] The "FACTS/OBSERVATIONS" cited on the Determination Fact Sheet to support the Department's decision were as follows:

> [Father] pushed a toilet brush into [Child 2's] mouth that had been used to clean the toilets before.
>
> [Father] cusses [sic] at the children and calls them "faggots."
> [Child 2] and [Child 1] are scared of [Father].
> [Father] pushed the children w/ his fingers in their chest.

[7] See S.C. Code Ann. § 20-7-655(A) (Supp. 2000) (requiring the South Carolina Department of Social Services to "provide a child protective services appeals process for review of indicated reports not otherwise being brought before the family court for disposition").

monitoring.[8] In August 1998, the Department prepared a "court information sheet" in anticipation of seeking judicial approval for intervention.

On September 2, 1998, Father's attorney wrote to counsel for the Department, noting among other things that "DSS did not communicate with the children's counselor or their prior Guardian ad Litem." On or about September 18, 1998, counsel for the Department left a voice message for Father's attorney stating the action would proceed in family court.

On September 22, 1998, however, before the Department initiated any court action, Father filed the present lawsuit, seeking an order determining the case to be unfounded. On September 25, 1998, the family court, after a hearing on September 23, issued an order: (1) appointing Dr. Jane Rankin, the guardian ad litem for the children in the custody matter, to serve in the same capacity in the present action; (2) appointing Tony M. Jones to serve as attorney for the guardian ad litem; and (3) restraining all Department employees from contacting the children without obtaining permission at least two days in advance from Rankin, Jones, and Father's attorneys. On November 9, 1998, the Department answered, seeking an order dismissing the action.[9]

The family court held a final hearing on March 3, 1999. At the hearing, Father submitted an affidavit in support of attorney fees and costs and moved for sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act and Rule 11 of the South Carolina Rules of Civil Procedure.

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[8] The treatment plan form noted Father was not cooperating and contained a handwritten notation stating "client fighting finding."

[9] Correspondence included in the record indicates the Department received another report against Father on or about September 28, 1998, concerning events that allegedly occurred on September 27, 1998. It appears from this correspondence that Father's attorneys were made aware that the reporter was the children's mother. It is not clear how the Department handled the charges in this subsequent report.

By order dated May 17, 1999, the family court found that "[t]he DSS case shall be unfounded and dismissed." In the order, the family court also declined to award Father attorney fees, costs, and sanctions. In support of its decision to deny this request, the family court cited Spartanburg County Department of Social Services v. Little to support its holding that "S.C. Code Ann. § 15-77-300 . . . disallows recovery of attorney's fees against the State in all child abuse and neglect actions, regardless of whether the State lacked substantial justification to press the claim."[10] As to the applicability of the South Carolina Frivolous Civil Proceedings Sanctions Act, the family court held "that statute does not specifically override the provisions of S.C. Code Ann. § 15-77-300 . . . , which specifically precludes the award of fees against the State in child abuse and neglect actions." Similarly, the family court held "Rule 11 does not specifically provide that it is applicable to the award of attorney's fees against the State in child abuse and neglect actions."

Pursuant to Father's motion to alter or amend, however, the family court awarded Father $22,000 in attorney fees pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act. In granting Father relief under the Act, the family court held the Department "failed to conduct a proper or suitable investigation and the limited investigation it did conduct was performed in a grossly negligent manner." In so holding, the family court reasoned:

> DSS did not act to secure a proper purpose. I find and conclude that if DSS had thoroughly investigated this matter, they could not have reasonably believed in the existence of the facts upon which its claims and defenses have been based. The findings of DSS against [Father] were frivolous. I further find and conclude that this litigation was extended because of the failure of DSS to properly investigate the allegations, and then they continued a vigorous defense of this case, despite the lack of credible evidence

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[10] See Spartanburg County Dep't of Social Servs. v. Little, 309 S.C. 122, 123, 420 S.E.2d 499, 500 (1992) ("We conclude that the award of attorney's fees against the State is inappropriate in child abuse and neglect actions . . . .").

> of abuse and neglect. . . . DSS form 3027 indicates DSS had full knowledge at the beginning of its investigation that the children's mother . . . was making the report, that she had lost custody as a result of the Family Court trial and an appeal. DSS also had full knowledge at the beginning of its investigation that the mother had psychological problems and had been attempting to alienate the children from their father. DSS failed to conduct a proper or suitable investigation and failed to consider the evidence provided by [Father] prior to indicating the case. Because DSS was aware that the mother was the reporter, the prior litigation between the parents and the circumstances surrounding that litigation were relevant for consideration in the investigation of the abuse allegations.

DISCUSSION

The Department's Appeal

1. The Department first asserts the family court erred in reversing its initial ruling that attorney fees are not available under South Carolina Department of Social Services v. Little.[11] In support of its position, the Department contends that, notwithstanding the South Carolina Frivolous Civil Proceedings Sanctions Act, it is statutorily exempt from the assessment of sanctions in the form of attorney fees in child abuse and neglect actions. We disagree.

"The Court's primary function in interpreting a statute is to ascertain the intent of the General Assembly."[12] That intent must be gleaned from the

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[11] 309 S.C. 122, 420 S.E.2d 499 (1992).

[12] Busby v. Moore, 330 S.C. 201, 203, 498 S.E.2d 883, 884 (1998), overruled in part on other grounds by Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999).

language chosen by the legislature.[13] Statutes, however, should be "construed with reference to the whole system of law of which they form a part."[14] A statute as a whole "must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."[15]

Under South Carolina Code section 15-77-300, a prevailing party who has contested state action may "recover reasonable attorney's fees to be taxed as court costs against the appropriate agency" upon findings by the trial court "that the agency acted without substantial justification in pressing its claim" and "there are no special circumstances that would make the award of attorney's fees unjust."[16] The statute, however, further provides that "[t]he provisions of this section do not apply to . . . child abuse and neglect actions."[17]

In Little, the South Carolina Supreme Court held section 15-77-300 precluded the family court from assessing attorney fees and costs against the state in a child abuse and neglect action notwithstanding the enactment of South Carolina Code section 20-7-420(38), which allows for the assessment of "suit money, including attorney's fees . . . for or against a party to an action brought

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[13] See Glover v. Suitt Constr. Co., 318 S.C. 465, 469, 458 S.E.2d 535, 537 (1995) ("The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in the language used construed in light of the intended purpose.").

[14] Roche v. Young Bros., Inc., 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (citing 82 C.J.S. Statutes § 362 (1953)); see also Glover, 318 S.C. at 469, 458 S.E.2d at 537 ("Sections which are part of the same general statutory law of the state should be construed together and each given effect if it can be done by any reasonable construction.").

[15] TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

[16] S.C. Code Ann. § 15-77-300 (Supp. 2000).

[17] Id.

in or subject to the jurisdiction of the family court."[18] Recovery under section 20-7-420(38), however, does not require a showing of bad faith on the part of the party against whom fees and costs are sought.

In contrast, the South Carolina Frivolous Civil Proceedings Sanctions Act provides for the assessment of attorney fees and court costs against "[a]ny person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding if: (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs."[19] The Act expressly defines the term "person" to include "any governmental entity."[20] Unlike section 15-77-300, it has no provisions prohibiting its application against the state in child abuse and neglect actions.

The text of sections 15-36-10 through -50 refers only to assessments in the form of attorney fees and court costs. Nevertheless, we believe these provisions can be reconciled with section 15-77-300. The very fact that the legislature entitled this chapter the "South Carolina Frivolous Civil Proceedings Sanctions Act" indicates the chapter was not enacted solely to compensate an aggrieved party for expenses incurred to fight a baseless claim.[21] Moreover, this

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[18] S.C. Code Ann. § 20-7-420(38) (Supp. 2000). Item (38) took effect June 7, 1990, almost five years after the effective date of section 15-77-300.

[19] S.C. Code Ann. § 15-36-10 (Supp. 2000).

[20] Id.

[21] See Joytime Distrib. & Amusement v. State, 338 S.C. 634, 649, 528 S.E.2d 647, 655 (1999) ("[I]t is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature[.]") (citing Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972)); 73 Am. Jur. 2d Statutes § 98, at 322 (1974) ("[I]t is a generally accepted view of the United States that resort may be had to the title of an act as an aid in its

legislation is unique in that it requires a litigant seeking relief under its provisions to show the adverse party acted to further a purpose that is not a legitimate objective of good faith litigation. This requirement goes beyond showing the adverse party "acted without substantial justification in pressing its claim," the prerequisite for recovering against a governmental agency under section 15-77-300.

In view of the designation of sections 15-36-10 through -50 as a "sanctions act" and the stringent requirements for recovery under these provisions, we hold an award of sanctions against the South Carolina Department of Social Services in a child abuse and neglect action is not necessarily barred by section 15-77-300. Although awards under the South Carolina Frivolous Civil Proceedings Sanctions Act are limited to attorney fees and costs, this limitation serves only as a measure of the sanctions allowable under the Act and does not undermine the fundamental objective of deterring egregious misuses of the court system by governmental agencies as well as by private parties.[22]

2. We disagree with the Department's argument that the family court did not have jurisdiction to determine what constitutes a negligent child protective services investigation. Liability under the Act can attach upon the requisite

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interpretation.").

[22] See Rule 54(e)(1), SCRCP ("Costs Authorized by Statute and Sanctions Imposed in Favor of Prevailing Party. All sanctions including reasonable attorneys fees, if ordered, imposed upon another party and in favor of the prevailing party under any statute or Rule of Civil Procedure are taxable . . . .") (emphasis added); cf. Dixon v. Home Indem. Co., 426 S.E.2d 381, 382 (Ga. Ct. App. 1992) ("Though an award arising from a judgment under [Georgia's statute authorizing litigation costs and attorney fees for frivolous actions and defenses] also serves the incidental purpose of providing compensation to the injured party, this does not diminish the reality that awards made under it are 'sanctions' under the accepted definition of the term.").

showing of inappropriate conduct in "any civil proceeding."[23] Without question, the family court has jurisdiction to interpret and apply the South Carolina Frivolous Civil Proceedings Sanctions Act.[24]

3. The Department further contends that an award of attorney fees was error because its case decision was not an adjudication of civil proceedings. In our view, this argument evidences a misunderstanding of the procedural history of this case and the reasoning behind the family court's decision to impose sanctions. The sanctions were based not only on the family court's finding that the Department "failed to thoroughly investigate this matter . . . and . . . [Father] was unable to have the case unfounded by any other means," but also on its determination that, even after the lawsuit was filed, the Department and its attorneys failed to further investigate the allegations against Father despite numerous opportunities to do so.[25]

4. Regarding the merits of the Department's appeal, however, we hold the facts of this case do not warrant the harsh sanctions imposed by the family court.

"The determination of whether attorney's fees should be awarded under the Frivolous Proceedings Act is treated as one in equity."[26] In reviewing such an award, an appellate court may take its own view of the evidence.[27]

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[23] S.C. Code Ann. § 15-36-10.

[24] See Kilcawley v. Kilcawley, 312 S.C. 425, 440 S.E.2d 892 (Ct. App. 1994) (affirming an award under the Act in a family court matter).

[25] See S.C. Code Ann. § 15-36-10 (stating a person who takes part in the continuation or defense of a civil proceeding can be subject to liability under the South Carolina Frivolous Civil Proceedings Sanctions Act).

[26] Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997).

[27] Id.; Kilcawley, 312 S.C. at 427, 440 S.E.2d at 893.

A litigant seeking relief under the Act "has the burden of proving" all the statutory prerequisites for recovery, including a showing that "the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings . . . ."[28] Moreover, the Act expressly provides that a person "must be considered to have acted to secure a proper purpose . . . if he reasonably believes in the existence of the facts upon which his claim is based and . . . reasonably believes that under those facts his claim may be valid under the existing or developing law . . . ."[29]

We are mindful of the problems cited by both Father and the family court concerning the Department's investigation of the serious allegations in the report. Nevertheless, we hold the preponderance of the evidence shows Father failed to meet his burden of proving the Department did not act to secure a proper purpose.

It is apparent from Father's own testimony that he held a device used to clean the household toilets two or three inches from Child 2's face, at which time the child "swung at" his father. Despite the confusion as to whether the device was a pot scrubber or a toilet brush, the conflicting evidence as to whether the device was actually placed in the child's mouth, and the Department's failure to make certain inquiries requested by Father and his attorneys, it is our view, after reviewing the record in its entirety, that Father did not show the Department's decision to pursue the matter further was unreasonable or improperly motivated.

First, regardless of whether the device involved was a pot scrubber or a toilet brush, it was undisputed that it had been used to clean toilets. We cannot fault the investigator for her concern "that they could receive e-coli from a toilet brush after it has been in a commode."

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[28] S.C. Code Ann. § 15-36-40(3).

[29] Id. § 15-36-20(1).

Second, the Department's decision to become involved in the case was based not only on Father's allegedly pushing a toilet brush into Child 2's mouth, but also on concerns of mental injury to both children. Whether or not the specific allegations of mental injury were true, the Department investigator testified in her deposition that, while she was interviewing Child 1 and Child 2, both children would "freeze" and "hush" when Father would walk back and forth. When the investigator asked the children whether they were "scared of somebody," both children became visibly upset.[30] The investigator described the "demeanor of the children and how they cringed every time [Father] would walk past the doorway" to other Department employees before a group determination as to how to proceed on the case was made.

Finally, notwithstanding vigorous arguments by Father's attorneys about the Department's alleged refusal to interview certain mental health professionals, the evidence at trial fails to convince us that the information these professionals would have given had they been consulted earlier would have been sufficient to alleviate the concerns raised in the report.

Dr. Tyson, who performed psychological examinations on the children for the custody action in 1994, was not actively involved with the family at the time of the present lawsuit, some four years later. He stated his current contact with

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[30] The investigator testified, "They were in tears. They were extremely scared of [Father]." She further testified that "they were very convincing to me. They were upset. And you don't - - - Obviously - - - How old is - - - [Child 1 is] 14 - - - for a boy to cry that old - - - Nobody can manipulate you to the point of somebody crying in front of a stranger that he doesn't even know."

Furthermore, we believe Father mischaracterizes the investigator's assessment of the children's statement that they were living with their father because "dad paid the judge off." Contrary to what Father says in his respondent's brief, the investigator never said she found this statement credible, only that she felt the children believed what they were saying and she could not rule out anything.

Father and the children consisted of "casual observation" and "regular feedback" from Dr. Marcus, the children's current counselor.[31]

From what we can tell, Dr. Marcus, the children's current counselor, did not testify at the hearing, either in person or by deposition, and the record on appeal does not include any reports or other documents from her about the case. Moreover, Dr. Tyson testified that Dr. Marcus was seeing the children only on an "as needed" basis, presumably as determined by Father, and appointments had become increasingly less frequent because the relationship between Father and the children had stabilized since the time Father and the children's mother had divorced.

Although Dr. Rankin served as guardian ad litem for the children in both the custody action and the present matter, the portion of her testimony reproduced in the record was unclear as to the extent of her involvement with the children at the time the matter first came to the Department's attention. Moreover, Dr. Rankin's testimony concerning what Child 2 told her about the altercation appears to support the Department's concerns that the child was afraid of his father.[32]

The specific factual circumstances of this case, then, warrant a finding by this court that Father did not show the Department abused its discretion in

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[31] In fact, Dr. Tyson's reports had been sent to the investigator by either Glenn or his attorneys, and the investigator testified she had considered them but did not give them any weight because "Dr. Tyson's statements were before this case."

[32] On direct examination by her attorney, Dr. Rankin stated, "As [Father] walked past [Child 2], [Child 2] said he put his hand up to defend himself because he thought he was going to push it at him, and that is all [Child 2] told me."

determining the reports it had received against him were "indicated."[33] We therefore reverse the family court's imposition of sanctions against the Department.

Father's Appeal

Father asserts the family court erred in failing to award sanctions in the form of attorney fees against the Department pursuant to Rule 11 of the South Carolina Rules of Civil Procedure. We disagree.

Rule 11(a), SCRCP, provides in part as follows:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.
>
> . . .
>
> If a pleading, motion or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

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[33] See South Carolina Dep't of Social Servs. v. Pritcher, 329 S.C. 242, 495 S.E.2d 242 (Ct. App. 1997), cert. denied (August 14, 1998) (stating the Department's duties in child abuse and neglect cases require the agency's exercise of discretion).

The criteria for Rule 11 sanctions are essentially the same as those for sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act.[34] Because we have held that the facts of this case do not warrant the imposition of sanctions against the Department pursuant to the Act, we likewise affirm the family court's refusal to sanction the Department under Rule 11.

AFFIRMED IN PART, REVERSED IN PART.

CURETON and CONNOR, JJ., concur.

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[34] Cf. Susan Taylor Wall & Joseph R. Weston, An Analysis of Current Theories of Liability, 45 S.C. L. Rev. 857, 871 (1994) ("Because many of the terms used in the Act also appear in Federal Rule 11, the South Carolina courts may look to decisions interpreting the Federal Rule to determine what constitutes a proper purpose and good faith with respect to potential liability of attorneys under the Act."). It appears that the principal difference between the Act and Rule 11 is that the application of Rule 11 is limited to "the person who signed [the document in violation of Rule 11], a represented party, or both," whereas the Act can be invoked against "any person who takes part" in frivolous litigation.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of Doris W. Thames:
Doris W. Verdery, Individually as an Interested party, and as Attorney-in-fact for Doris W. Thames,

Appellant,

v.

Betty Jane Daniels and C. Covert Daniels,

Respondents.

Appeal From Clarendon County
M. Duane Shuler, Circuit Court Judge

Opinion No. 3326
Heard October 12, 2000 - Filed March 26, 2001

AFFIRMED

A.F. Carter, III, of Carter Law Firm, of Orangeburg, for appellant.

Steven S. McKenzie, of Coffey, Chandler & Johnson, of Manning, for respondents.

STILWELL, J.: Doris W. Verdery brought this action seeking to set aside a power of attorney and a revocation of an earlier power of attorney, both executed by her mother, Doris W. Thames. Verdery alleges that on December 16, 1996, the date both documents were executed, Thames lacked mental capacity. The probate court dismissed Verdery's action, holding Thames was mentally competent when she executed the power of attorney in favor of Betty Jane Daniels and revoked the former power of attorney which appointed Verdery her attorney in fact. The circuit court affirmed. Verdery appeals, and we affirm.

BACKGROUND

Thames, who was in her late eighties at the time of trial, has been married to Harry A. Thames (Mr. Thames) since 1969. Verdery and Daniels are her daughters from a previous marriage, and Daniels' husband, C. Covert Daniels, is her son-in-law.

Thames had been living with her husband, but in the latter part of 1995 she began living at Verdery's home in Orangeburg. During March of 1996, Verdery attempted to have a guardian and a conservator appointed for her mother, apparently on the ground that her mother suffered from dementia and was mentally incompetent. After reviewing the medical evidence, the probate court declined Verdery's request, concluding Thames was mentally competent.

In May of 1996, Thames, while still living with Verdery, executed a durable power of attorney in Verdery's favor. In the summer of that year, Mr. Thames brought a family court action seeking visitation with or custody of his wife. Under a consent order in that case, Thames remained in Verdery's home, but other family members, including her husband, were granted limited visitation. The order also prohibited family members from discussing or transacting business during these visits. The court later held Mr. Thames in contempt after he, Daniels, and Daniels' son, during a visit with Thames, took her to a bank where she withdrew money and refused to return her to Verdery's

home. The family court's order included the following statements regarding Thames' competency:

> The Defendant, Doris O. [sic] Thames, is not competent to manage her affairs. Dr. Vann Beth Shuler expressed her medical opinion that Defendant Thames was not competent. The Court further finds from Defendant Thames' testimony that she is not competent and has very little memory.
>
> . . .
>
> It appears that Defendant Thames is not competent and constantly gives contradictory statements.

Mr. Thames later brought an action in probate court to have a guardian appointed for Thames, alleging she was an "incapacitated person." The court appointed him guardian, noting that the parties' counsel stipulated that she was incapacitated. In its order, the probate court discussed in detail the difference between a guardian and a conservator. The court did not appoint a conservator.

Less than one month later, Thames executed the documents which are the subject of this lawsuit. In addition to asking that the documents be set aside, Verdery asked the court to recognize her as the attorney in fact for Thames, enjoin Daniels and her husband from interfering with Verdery's management of Thames' business affairs, order Daniels and her husband to make an accounting to Verdery regarding transfers of Thames' real and personal property, and award Verdery attorney's fees and costs.

DISCUSSION

While Verdery raises several grounds for appeal, her arguments essentially boil down to two main issues: (1) what is the applicable standard of review for an appellate court in an action to set aside a power of attorney and a revocation of a power of attorney for lack of mental capacity; and (2) based on the appropriate standard of review, did the circuit court err in affirming the probate

court's finding that Thames was competent to execute the challenged documents on December 16, 1996?

I. Standard of Review

Verdery first argues the circuit court erred in concluding this was an action at law and thus applied the wrong standard of review. We agree.

The standard of review applicable to cases originating in the probate court is controlled by whether the underlying cause of action is at law or in equity. Howard v. Mutz, 315 S.C. 356, 361-62, 434 S.E.2d 254, 257-58 (1993) (noting the circuit court may not disturb the probate court's findings of fact on appeal in an action at law unless there is no evidence to support them as compared to an equitable action in which the circuit court may make factual findings according to its own view of the preponderance of evidence). The question of whether an action to set aside a power of attorney and a revocation of a power of attorney on the ground of mental incompetency is at law or in equity has not been previously addressed in South Carolina. Therefore, we must examine a power of attorney, and the capacity required to execute and revoke one, in light of other existing legal authority to determine the nature of Verdery's cause of action.

Both Verdery and Daniels compare the current lawsuit to actions to set aside other legal instruments or transactions on the basis of a lack of mental capacity. Verdery argues that her cause of action is akin to an action to set aside a deed or petition signature on the basis of mental incompetence, which is an action in equity. Vereen v. Bell, 256 S.C. 249, 251-52, 182 S.E.2d 296, 297 (1971) (applying an equitable standard of review on appeal for an action to rescind and cancel a deed for lack of capacity); Ballenger v. City of Inman, 336 S.C. 126, 130, 518 S.E.2d 824, 827 (Ct. App. 1999) (applying an equitable standard of review on appeal for an action to set aside the signature on land annexation petition for lack of mental capacity). Likewise, an action to rescind a contract is in equity. Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Daniels, on the other hand, equates the current action to a will contest, which is an action at law. Estate of Cumbee v. Cumbee, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999). This general principle applies even when the ground for setting aside the will is lack of mental capacity. Estate of Weeks v. Drawdy, 329 S.C. 251, 262, 495 S.E.2d 454, 460 (Ct. App. 1997) (applying a legal standard of review on appeal in an action to set aside a will on the sole ground of lack of capacity).

A durable power of attorney allows a person, the principal, to designate another as his or her attorney in fact to act on the principal's behalf as provided in the document even if the principal becomes mentally incompetent. S.C. Code Ann. § 62-5-501 (Supp. 2000); see also 3 Am. Jur. 2d Agency § 23 (1986) ("A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney." (footnotes omitted)).

With a durable power of attorney, a principal creates an agency in another that continues despite the principal's later physical disability or mental incompetency. See § 62-5-501; see also 3 Am. Jur. 2d Agency § 28 ("The only requirement is that an instrument creating a durable power contain language showing that the principal intends the agency to remain effective in spite of his later incompetency."). Moreover, in order for the principal to create the agency relationship in the first instance, the principal must have the mental capacity to contract. 3 Am. Jur. 2d Agency § 12 ("A person who is not in a mental condition to contract and conduct his business is not in a condition to appoint an agent for that purpose."). Therefore, in order to execute or revoke a valid power of attorney, the principal must possess contractual capacity.

South Carolina has defined contractual capacity as a person's ability to understand, at the time the contract is executed, the nature of the contract and its effect. In re: Nightingale's Estate, 182 S.C. 527, 542, 189 S.E. 890, 896 (1937) ("[A] mere infirmity of mind, if it does not amount to an incapacity to understand, at the time of the execution of a contract, the nature of the act done

and the effect thereof, . . . does not render a person incapable of executing a valid and binding contract."); see also 53 Am. Jur. 2d Mentally Impaired Persons § 156 (1996) ("The test for lack of [contractual] capacity is generally said to be whether an individual lacks sufficient mental capacity to understand in a reasonable manner the nature of the transaction in which he or she is engaging, and to understand its consequences and effect upon his or her rights and interests." (footnotes omitted)).

Other jurisdictions addressing this issue have found contractual capacity is required to execute a power of attorney. Younggren v. Younggren, 556 N.W.2d 228, 232 (Minn. Ct. App. 1996) (holding a person is competent when he signs a power of attorney if he has sufficient mental capacity to understand, to a reasonable degree, the nature and effect of his act); Testa v. Roberts, 542 N.E.2d 654, 658 (Ohio Ct. App. 1988) ("[For a power of attorney,] the test to be used to determine mental capacity is the ability of the principal to understand the nature, scope and the extent of the business she is about to transact.").

Because a person must possess contractual capacity to execute or revoke a valid power of attorney, we believe a cause of action to set aside such a document is more closely akin to an action to set aside a contract, deed, or petition than it is to a will contest. Additionally, the reasoning of courts from other jurisdictions analogizing powers of attorney to contracts lends persuasive influence to this conclusion.[1] Moreover, "[p]ersons of unsound minds, like infants, are under the special protection of the courts of equity with respect to their persons, property, and legal transactions." Shepard v. First Am. Mortgage Co., 289 S.C. 516, 518, 347 S.E.2d 118, 119 (Ct. App. 1986). Therefore, we hold that an action to set aside a power of attorney and an instrument revoking a power of attorney on the ground of a lack of mental capacity sounds in equity.

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[1] See Testa, 542 N.E.2d at 658 (recognizing a power of attorney is derived from the law of contracts); see also Younggren, 556 N.W.2d at 234 (upholding the trial court's determination that the rescission of a power of attorney on grounds of mental incapacity was an equitable cause of action).

In an equitable action, tried by the judge alone, without a reference, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Townes Assoc. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); Greer v. Spartanburg Technical Coll., 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999). However, this broad scope of review does not require the appellate court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses. Greer, 338 S.C. at 79, 524 S.E.2d at 858; see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996). In addition, the appellant still has the burden of convincing this court the trial judge committed error in his findings. Greer, 338 S.C. at 79, 524 S.E.2d at 858; see also Dorchester County, 324 S.C. at 452, 477 S.E.2d at 480. Even though the circuit court applied an erroneous scope of review, that does not end the inquiry because we are at liberty to find the facts in accordance with our own view of the preponderance of the evidence.

II. Thames' Competency

Although Verdery poses some twenty-two issues on appeal, they all hinge on the question of Thames' mental capacity as of December 16, 1996.

Having carefully reviewed the record, we find ample evidence to support the probate court's finding that Thames possessed the requisite mental capacity to execute the challenged instruments on the date in question. Where a transaction is challenged on the ground of mental incompetency, the individual's competency on the date of that transaction must be determined. Grapner v. Atlantic Land Title Co., 307 S.C. 549, 551, 416 S.E.2d 617, 618 (1992). Furthermore, the party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence. Id. We agree with the circuit court and the probate court that Verdery failed to meet her burden.

At trial, Verdery relied primarily on the probate court's order appointing Thames' husband her guardian as evidence of her lack of mental capacity on the date in question. Verdery's reliance on this order is misplaced. In that action,

counsel for the parties stipulated Thames was incapacitated and in need of a guardian. The probate court, however, discussed the difference between a guardianship and a conservatorship, including the respective duties of each.[2] Because the court appointed a guardian for Thames and not a conservator, the court's reference to her as incapacitated can only be seen as an adjudication of her physical condition. We do not view the probate court's order in this action as an adjudication of Thames' mental capacity.

Verdery also points to the family court's October 1996 contempt order as proof that Thames lacked mental capacity to revoke her old power of attorney and issue a new one. Although the family court's order makes several references to Thames as incompetent and unable to manage her affairs, such language was mere dicta since it was irrelevant to the court's decision to hold Thames' husband in contempt. Furthermore, the family court lacks jurisdiction to declare an adult incompetent because the probate court has exclusive jurisdiction over such matters. S.C. Code Ann. § 62-1-302(a)(2) (Supp. 2000).

Even if we were to consider these two orders as adjudications of Thames' mental incompetency, they still would not be dispositive in this case. An adjudication of incompetency is merely prima facie evidence of that fact. Grapner, 307 S.C. at 551, 416 S.E.2d at 618. A prior adjudication of an individual's incompetence does not conclusively bind the trial court in another action where the person's competency is directly at issue. Church v. Trotter, 278 S.C. 504, 506, 299 S.E.2d 332, 333 (1983) ("In a contract setting, particularly, this Court has looked specifically to the condition of a party at the time of a transaction.").

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[2] The court noted, "A guardian, unlike a conservator, is appointed to protect the person of the incapacitated person. This means . . . making provision[s] for the care, comfort and maintenance of the incapacitated person. . . . A conservator, on the other hand, is named to act for an incapacitated person in dealing with property and business affairs . . . ." See also S.C. Code Ann. §§ 62-5-301 to -313 (1987 & Supp. 2000); S.C. Code Ann. §§ 62-5-401 to -435 (1987 & Supp. 2000).

In addition to the probate court and family court orders, Verdery offered the testimony of Dr. Vann Beth Meyers Shuler, who examined Thames upon a prior probate judge's request and found her mentally incompetent to make decisions regarding her welfare or finances. Doctor Shuler reported Thames' mental deficiencies were permanent, thus supporting Verdery's claim that Thames lacked capacity to execute the challenged documents. However, Dr. Shuler also testified Thames had been incompetent since the first time she saw her in February 1996. This testimony, if found to be credible, is in direct conflict with the finding of the probate court in March 1996 that Thames was mentally competent and would also invalidate the May 1996 power of attorney in Verdery's favor that Verdery now seeks to enforce. Verdery subpoenaed Thames to testify, but the trial court quashed the subpoena after hearing testimony from Thames' personal physician that the stress of testifying would be hazardous to Thames' physical health.[3]

Finally, Verdery herself testified that her mother lacked mental capacity to revoke the earlier power of attorney and to issue a new one on December 16, 1996. She also testified Daniels knew her mother lacked mental capacity to execute such instruments.

In contrast to Verdery's offer of proof, Daniels and her husband produced five witnesses who testified to Thames' mental capacity in December of 1996. Rebecca Bryant, a certified nursing assistant, and Dorothy Josey, a registered psychiatric nurse, visited Thames in her home in December 1996 to care for and examine her. Bryant testified that around Christmas of 1996, she saw Thames five times a week in visits lasting forty-five minutes to an hour. Bryant recalled Thames' mental state was "good" for her age when she saw her. Josey testified Thames was oriented to person, place, and time during her December 19 and 20, 1996 visits. Likewise, when Josey saw Thames on December 23 and 25, 1996,

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[3] Although Verdery challenged the court's decision to quash Thames' subpoena at trial, she has not asserted this as error on appeal. The unappealed decision of the trial court, right or wrong, is the law of the case. Town of Mount Pleasant v. Jones, 335 S.C. 295, 298, 516 S.E.2d 468, 470 (Ct. App. 1999).

Thames was "cooperative and talkative" in addition to being oriented to time, place and person. Doctor Lea B. Givens, Thames' personal physician, saw Thames on December 12, 1996, and approximately thirteen other times between September 1993 and August 1997. While Dr. Givens said he had not conducted a detailed mental exam of Thames, he testified that each time he saw her, Thames was pleasant, answered his questions, and was oriented to time and place.

The other two witnesses, Angela Hester and Daniels, were present on December 16, 1996, when Thames revoked her prior power of attorney and executed a new one. Hester, a legal assistant at the law firm where Thames executed the challenged instruments, signed the documents as a witness. She specifically recalled explaining the documents to Thames and, when asked, Thames told Hester she understood. Daniels testified she went with her mother to the attorney's office and Thames "knew exactly what she was doing" when she signed the disputed documents on December 16, 1996.

Thus, under either a legal or equitable standard of review, we find the evidence contained in the record fully supports the probate court's finding that Thames possessed the requisite mental capacity to execute the documents in question on December 16, 1996.

The dispositive issues having been decided, any remaining issues on appeal need not be addressed. Rule 220(b)(2), SCACR.

For the reasons discussed, the order of the circuit court affirming the order of the probate court is

AFFIRMED.

ANDERSON and HOWARD, JJ., concur.