The Supreme Court of South Carolina

In the Matter of Paul A. Knox, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Knox and the interests of Mr. Knox's clients.

IT IS ORDERED that James W. Boyd, Esquire, is hereby appointed to assume responsibility for Mr. Knox's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Knox may have maintained. Mr. Boyd shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Knox's clients and may make disbursements from Mr. Knox's trust,

escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Paul A. Knox, Esquire, shall serve as notice to the bank or other financial institution that James W. Boyd, Esquire, has been duly appointed by this Court.

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

Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

May 17, 2002

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

May 20, 2002

ADVANCE SHEET NO. 16

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

Patricia T. Antley, Petitioner,

v.

William M. Shepherd, individually, and Aiken County, Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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

Opinion No. 25465
Heard April 17, 2002 - Filed May 20, 2002

AFFIRMED AS MODIFIED

Herbert W. Louthian, Sr., and Deborah R. J. Shupe, both of Louthian Law Firm, of Columbia, for petitioner.

William H. Davidson, II, and James M. Davis, Jr., both of Davidson, Morrison & Lindemann, P.A., of Columbia, for respondents.

PER CURIAM: Petitioner contends she was wrongfully terminated from her position as Aiken County tax assessor. The circuit court granted respondents summary judgment and the Court of Appeals affirmed. Antley v. Shepherd, 340 S.C. 541, 532 S.E.2d 294 (Ct. App. 2000). We granted certiorari, and now affirm as modified.

We will not recite the factual background here nor recapitulate the Court of Appeals' analysis of petitioner's claim that her termination violated public policy. We recognize, as did that court, the tension between the assessor's statutory responsibilities, and the authority of the county government to promulgate policies which impact the assessor. The Court of Appeals correctly resolved the tension in favor of the county government.

Petitioner also contends that the Court of Appeals erred in analyzing her claim to the extent it rested on an alleged violation of the Freedom of Information Act (FOIA).[1] We agree, but affirm the conclusion in Part II of the LAW/ANALYSIS portion of the Court of Appeals' decision holding petitioner cannot prevail on her FOIA claim.

The Court of Appeals erred in finding the FOIA claim was properly before it because it had been "tried by consent" in the circuit court. In fact, the trial court held the FOIA claim was not properly before it, and refused to allow petitioner to belatedly litigate the issue. We hold that petitioner's FOIA claim was not properly raised in the circuit court and that the Court of Appeals erred in finding that it was, and in addressing the merits. We affirm the result reached by the Court of Appeals, however, which denied petitioner relief on this theory. Cf., I'On, L.L.C v Town of Mt. Pleasant, 338 S.C. 406,

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[1]S.C. Code Ann. §§ 30-4-10 et seq. (1991 and Supp. 2001).

526 S.E.2d 716 (2000)(court can affirm for any reason appearing in the record).

For reasons given above, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

St. Andrews Public Service District, Respondent,

v.

The City Council of the City of Charleston, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25466
Heard March 19, 2002 - Filed May 20, 2002

REVERSED

Gregg S. Myers, of Charleston, for respondent.

William B. Regan, Frances I. Cantwell, and Carl W. Stent, all of Regan, Cantwell & Stent, of Charleston,

for petitioner.

Robert E. Lyon, Jr., and M. Clifton Scott, both of Columbia, for Amicus Curiae S.C. Association of Counties.

JUSTICE PLEICONES: We granted certiorari to consider whether municipal annexations using roadways to achieve contiguity are "absolutely void as not authorized by law." The Court of Appeals held that they may be, and therefore respondent, an entity with no interest in the property annexed, had standing to challenge the annexations. St. Andrews Public Serv. Dist. v. City Council of the City of Charleston, 339 S.C. 320, 529 S.E.2d 64 (Ct. App. 2000). We reverse, and in so doing, overrule our decision in Quinn v. City of Columbia, 303 S.C. 405, 401 S.E.2d 165 (1991), to the extent it holds a non-statutory party[1] has standing to challenge a "void" annexation.

FACTS

Petitioner (The City) purported to annex certain parcels and "all adjacent public rights-of-way." Respondent challenges the annexation of six parcels and the concurrent annexation of portions of two roadways. Without the annexation of the roadways, these six parcels would not be contiguous to the City's borders.

The circuit court dismissed the complaint, holding respondent lacked standing to contest the annexations. The Court of Appeals reversed and remanded the matter for further proceedings.

ISSUE

Does a party who does not reside or own property in the annexed

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[1]That is, a party not authorized by the annexation statute to sue.

area, and whose proprietary interests or statutory rights are not infringed upon by the annexation, have standing to challenge a municipal annexation?

ANALYSIS

Respondent is a special purpose district (SPD) whose territory includes the parcels at issue here. It is well settled that a municipality may annex territory within an SPD. Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872 (1961).

The parcels were annexed using either the 75% method found in S.C. Code Ann. §5-3-150(1) or the 100% petition method set forth in §5-3-150(3) (Supp. 2001). A municipality's annexation of contiguous property under the 75% method can be challenged by a municipality or a resident, or a person residing in or owning property in the area to be annexed. In order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights. State by State Budget & Control Bd. v. City of Columbia, 308 S.C. 487, 419 S.E.2d 229 (1992).

The Court of Appeals held that respondent lacked statutory standing to challenge the annexation of these parcels. We agree. Under the 75% method, the challenger must be a municipality or one of its residents, or reside or own property in the annexed area. An SPD is neither a municipality nor a property owner for purposes of this provision. Tovey, supra; St. Andrews Public Serv. Dist. v. City of Charleston, 294 S.C. 92, 362 S.E.2d 877 (1987). Further, the Court of Appeals held that respondent had "not alleged a sufficient infringement of its proprietary interests or statutory rights" to meet the statutory standing test for challenges to 100% annexations. We agree.

Despite the lack of statutory standing, the Court of Appeals found respondent had standing under our decision in Quinn v. City of Columbia, supra. In Quinn, we adopted a rule that permitted a 'stranger' to the annexation to challenge that proceeding if the annexation ordinance was " 'absolutely void', i.e. *not authorized by law* . . . ." Id. at 407, 401 S.E.2d at

166-167. Nine years later, we held that "[T]he State, providing it is acting in the public interest, has standing to bring a quo warranto action challenging the annexation of property it does not own." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 528 S.E.2d 408 (2000).

We now overrule Quinn, and hold that the only non-statutory party which may challenge a municipal annexation is the State, through a quo warranto action. In our view, the better policy is to limit "outsider" annexation challenges to those brought by the State "acting in the public interest." Therefore, we reverse the Court of Appeals' holding that respondent has standing to challenge these annexations.[2]

In deciding the standing issue, the Court of Appeals called into question the legality of these annexations. We reiterate that the sole requirement for annexation is contiguity. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). The wisdom of an annexation is a legislative, not judicial, determination. E.g., Harrell v. City of Columbia, 216 S.C. 346, 58 S.E.2d 91 (1950); Pinckney v. City of Beaufort, 296 S.C. 142, 370 S.E.2d 909 (Ct. App. 1988).

We find contiguity here. The maps in the appendix indicate that

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[2]Respondent also relies on our decision in Glaze v. Grooms, 324 S.C. 249, 478 S.E.2d 841 (1996) to establish its standing. According to respondent, we held in Glaze that the City had standing to challenge an annexation by James Island because James Island purported to achieve contiguity by "crossing" property already annexed by the City. Here, respondent asserts, the City is achieving contiguity by crossing its SPD territory, and therefore it has "Glaze" standing. Respondent fundamentally misreads Glaze. In that case, the City had standing to challenge James Island's annexation not because James Island "crossed" the City's property, but because that municipality purported to annex property already within the City's borders. Respondent has no standing under Glaze. Cf. Tovey v. City of Charleston, supra (municipality can annex SPD property).

City property and roadways abut the roadways that were annexed. At the time of this annexation,[3] S.C. Code Ann. §5-3-110 (Supp. 2001) permitted the annexation of such abutting roadways upon prior consent of the entity maintaining the roadway. There is no contention consent was lacking here. Accordingly, the record establishes that all the challenged properties touch- albeit via annexed roadways in some cases- property already within the limits of the City of Charleston. The fact that the City and the properties share a common boundary is sufficient to establish contiguity. Bryant v. City of Charleston, supra.

We find contiguity existed at the time of these annexations and that respondent lacks standing to maintain this action. Accordingly, the decision of the Court of Appeals is

REVERSED.

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[3]S.C. Code Ann. §5-3-305 (Supp. 2001), which took effect approximately three and a half years after these annexations, defines contiguous property:

> For purposes of this [municipal annexation] chapter, "contiguous" means property which is adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy contiguity.

We express no opinion on the impact of this statute on annexations accomplished after May 1, 2000, the statute's effective date.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dennis Nelson,
Deceased Employee, By
and Through His Estate, Respondent,

v.

Yellow Cab Company,
Employer, and Travelers
Property Casualty
Company, Carrier, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25467
Heard March 19, 2002 - Filed May 20, 2002

AFFIRMED

Johnnie W. Baxley, III, of Pratt-Thomas, Epting &

Walker, of Charleston, for petitioners.

Carl H. Jacobson, of Uricchio, Howe & Krell, of Charleston, for respondent.

JUSTICE WALLER: We issued a writ of certiorari to review the Court of Appeals' opinion in Nelson v. Yellow Cab Co., 343 S.C. 102, 538 S.E.2d 276 (Ct. App. 2000).

FACTS

Nelson, a cab driver for Yellow Cab, was murdered while driving his cab on January 6, 1998. His estate filed for Workers' Compensation benefits. The single commissioner ruled Nelson was an independent contractor not entitled to benefits; the full commission reversed, finding Nelson was an employee. The circuit court reversed the full commission, finding him an independent contractor; the Court of Appeals reversed the circuit court, finding Nelson was an employee entitled to compensation.

As stated by the Court of Appeals, the relationship of Nelson and Yellow Cab was as follows:

> Yellow Cab hired Nelson in 1995 as a part-time taxi driver. During his tenure at Yellow Cab, Nelson gradually increased the number of shifts he worked. In addition, Nelson was employed as a postal worker.
>
> On January 6, 1998, Yellow Cab dispatched Nelson to pick up a passenger in North Charleston for transport to the West Ashley area. Nelson was murdered, apparently by the passenger. The sole question to be determined on appeal is whether Nelson was an employee or an independent contractor of Yellow Cab at the time of his death.

Yellow Cab requires taxi drivers to file an application for employment. The application form reads:

> This is to certify that although I drive a taxicab owned and/or operated by Yellow Cab Company ... I am in no way employed by the company:[1] that I receive [sic] no salary or other compensation from the company, and that my only financial relationship with the company is to pay rent on the cab I drive, to pay for the gasoline used by me on my shift, and to return the cab with all keys and equipment in good condition at the end of my shift. In consideration of the expense in my training and indoctrination, I agree and understand that I must drive a company car owned by Yellow Cab Co. and not a terminal fee contractor for at least six months after my indoctrination period.

All drivers must sign the application before working for Yellow Cab.

In conflict with the relationship expressed in the application form, Yellow Cab exercises control over the driver's behavior while in the taxi, and the manner in which the drivers perform their jobs. Yellow Cab's "Drivers Information and Training Package" includes numerous rules and regulations governing the drivers. For instance, although there is no uniform for the drivers, Yellow Cab imposes a dress code, prohibiting unbuttoned and/or sleeveless shirts, and requiring a neat, orderly appearance. Failure to observe the dress code is a ground for termination of employment.

Further, in accordance with fares set by the City of

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[1] This Court has recognized that language in a contract declaring the relationship is that of an employer/independent contractor is not dispositive of the issue. Kilgore Group Inc. v. South Carolina Employment Security Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993).

Charleston, Yellow Cab mandates a set fare, and drivers must transport four people for the price of one fare. The drivers are bound to use a Yellow Cab meter as opposed to an Ever Ready Dispatch, or charging flat rates. Yellow Cab is the only cab company in the area that uses meters to establish taxi fares. Yellow Cab acknowledged that a driver's failure to use a Yellow Cab meter constitutes a ground for termination. The drivers are subject to the Yellow Cab rule prohibiting drivers from transporting non-paying passengers ("dead-heading"). Yellow Cab admitted dead-heading by a driver was cause for termination.

There are numerous other grounds for termination of a taxi driver by Yellow Cab including: possessing a weapon of any kind in the taxi; drinking or using drugs while operating the taxi; failing to deliver packages; and filing a false application. Yellow Cab conceded it could fire a driver for any reason.

The drivers generally retain their fares. However, Yellow Cab makes payments to the drivers under special fare situations in which a driver picks up a certain fare or package, a blue card is issued by the company calling for the pickup, and the driver turns the card into Yellow Cab for payment. These customers are charge account customers billed directly by Yellow Cab. Yellow Cab neither withholds taxes from the drivers' fares nor issues W-2 or 1099 forms to the drivers. On his tax return, Nelson reported his taxi fares as income from a sole proprietorship.

The drivers lease their taxis from Yellow Cab, paying for either twelve or twenty-four hour shifts. Nelson leased his taxi for twenty-four hour shifts at $79 per day. The taxis are painted yellow and identified as Yellow Cab vehicles. Yellow Cab furnishes the radio and use of the dispatch service. The drivers pay for their own gas. The company pays for insurance, a portion of which is collected from the drivers, and repairs on the vehicles.

The drivers select the number of hours they want to work during the twenty-four hour shift. Whenever a driver checks in as operating the vehicle as a taxi, he is required to have the radio on and respond to the dispatcher. Yellow Cab allows the drivers to earn "vacation," which is paid in the form of Yellow Cab giving a car to a driver without requiring lease fees. Once the drivers pay the lease fee, they are entitled to personal use of the taxi whenever they are not checked in as operating the vehicle.

On the evening Nelson was murdered, Nelson was dispatched by a Yellow Cab dispatcher to pick up the fare.

ISSUE

Did the Court of Appeals err in ruling Nelson was an employee of Yellow Cab rather than an independent contractor?

DISCUSSION

Workers' compensation awards are authorized only if an employer-employee relationship exists at the time of the injury. Dawkins v. Jordan, 341 S.C. 434, 534 S.E.2d 700 (2000). Whether or not an employer-employee relationship exists is a jurisdictional question. Id.; South Carolina Workers' Compensation Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995). Where the issue involves jurisdiction, this Court can take its own view of the preponderance of the evidence. Id.. It is South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. Id.

Whether a worker is an employee or independent contractor is a fact-specific matter resolved by applying certain established principles. "The general test applied is that of control by the employer. It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its

accomplishment." Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). The Young Court stated,

> An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work. . . . [W]here one who performs work for another represents the will of that other, not only as to the result, but also as to the means by which the result is accomplished, he is not an independent contractor but an agent . . . .

Id. at 189, 165 S.E.2d at 802. There are four elements which determine the right of control: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Dawkins, supra; Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970). These factors, however, go only to the right of control. As we noted in Dawkins,

> [F]or the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all. 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 61.04 (2000).

341 S.C. at 439, 534 S.E.2d at 703.

As noted by the Court of Appeals in this case, there is a split of authority on whether a taxi driver, who leases a taxicab under a per diem payment agreement and keeps his fares and tips as compensation, is an employee or independent contractor. The majority of cases hold that under such circumstances, the cab driver is an employee by virtue of the cab company's exercise of control. See Central Management v. Industrial Comm'n of Arizona, 781 P.2d 1374 (Ariz. 1989); Yellow Cab Co. v. Workers' Comp. Appeal Board, 277 Cal. Rptr. 434 (1991); Bowdoin v. Anchor Cab, 643 So.2d 42 (Fla.Dist.Ct.App. 1994); Yellow Cab Co. v. Karwoski, 486 S.E.2d 39 (Ga. Ct.

App. 1997); Yellow Cab Co. v. Industrial Comm'n, 464 N.E.2d 1079 (Ill. 1984); Purchase Transp. Svcs v. Estate of Wilson, 39 S.W.3d 816 (Ky. 2001); White Top and Safeway Cab Co. v. Wright, 171 So.2d 510 (Miss. 1965); Walls v. Allen Cab Co., 903 S.W.2d 937 (Mo. 1995); Hemmerling v. Happy Cab Co., 530 N.W.2d 916 (Neb. 1995); Petition of City Cab of Manchester, 652 A.2d 1202 (N.H. 1995); Naseef v. Cord, Inc., 225 A.2d 343 (N.J. 1966); Scott v. Manzi Taxi Svcs, 579 N.Y.S.2d 225 (A.D.3d 1992); Yellow Cab Co. v. Wills, 185 P.2d 689 (OK. 1947); Nesbit v. Powell, 558 S.W.2d 436 (Tenn.1977); Dep't of Labor v. Tacoma Yellow Cab Co., 639 P.2d 843 (Wash. Ct. App. 1982); C & H Taxi Co. v. Richardson, 461 S.E.2d 442 (W.Va. 1995).[2]

Several jurisdictions have held, under certain factual scenarios, that cab drivers are not employees for purposes of Workers' Compensation statutes. See Hanson v. Transp. Gen'l, Inc., 716 A.2d 857 (Conn. 1998); LaGrande v. B&L Svcs, 432 So.2d 1364 (Fla. 1983); Cole v. Peachtree Cab Co., 173 S.E.2d 278 (Ga. 1970); Alford v. Victory Cab Co., 228 S.E.2d 43 (N.C. 1976); Walters v. Americab, 692 N.E.2d 234 (Ohio 1997).

Given the very fact-specific nature of our inquiry, we need not follow any one jurisdiction, nor adopt a majority or minority viewpoint.[3] Our determination

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[2] Cab drivers have also been held to be employees for purposes of unemployment compensation and/or social security purposes. See Salt Lake Transp. Co. v. Board of Review, 296 P.2d 983 (Utah 1956); Employment Sec. Comm'n of Wyoming v. Laramie, 700 P.2d 399 (Wyo. 1985).

[3] As noted by Yellow Cab, North Carolina has held cab drivers are not employees but independent contractors. Alford v. Victory Cab Co., 228 S.E.2d 43 (N.C. 1976). See also Fulcher v. Willard's Cab Co., 511 S.E.2d 9 (N.C. 1999). This Court generally accords North Carolina workers' compensation cases weight because the South Carolina statute was fashioned after North Carolina's. Anderson v. Baptist Medical Center, 343 S.C. 487, 541 S.E.2d 526 (2001). However, unlike South Carolina's four-prong test to ascertain employee status, North Carolina employs an eight-prong test. Fulcher, supra. Moreover, Alford has been criticized by Professor Larson. Accordingly, we decline to

today hinges upon a review of the factual circumstances concerning Yellow Cab's right to control the method and manner in which Nelson operated his cab. Under the specific factual circumstances presented, we agree with the Court of Appeals that Yellow Cab retained a sufficient degree of control as to warrant the conclusion that he was an employee.

A. Right of Control

Yellow Cab contends it lacked control over Nelson, asserting that once Nelson paid his $79.00 per day lease fee, he could work as little or as much as he wanted, and he could take the cab and drive it wherever he wanted. He could also decide which zone he wanted to drive on a given day and could set his own schedule. While these facts show that Yellow Cab exercised little control over Nelson's determination of when and where to drive his cab, we find the record abundantly demonstrates that, when and if Nelson did choose to drive his cab, Yellow had the right to control the method and means of his doing so.

Yellow Cab required Nelson use his meter on all runs except charge accounts and/or authorized flat rate runs; he was not authorized to charge "flat rates" except for plantation tours. Yellow also directed the fares to be charged. He was not allowed to "dead-head," i.e., have any non-paying passengers with him in the cab. He was prohibited by company rules from driving on the docks and picking up passengers at the airport.[4] He was required to comply with the company dress code while driving the cab, including no sleeveless shirts, no flip-flop shoes, and no unbuttoned shirts. He was required to keep a proper manifest sheet, and prohibited from carrying any weapons in the car. Yellow Cab had certain policies and procedures drivers were to follow if dispatched to a charge account fare, and set certain fare minimums. Drivers were awarded

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adopt the North Carolina view. Parrot v. Barfield Used Parts, 206 S.C. 281, 34 S.E.2d 802 (1945) (North Carolina workers' compensation decisions are not binding on this Court).

[4] Yellow Cab asserts this was a City of Charleston regulation. Nonetheless, it is specifically contained in Yellow Cab's "handbook."

"free days" and "vacation days" upon driving a sufficient number of days, and were required to bring cabs in for servicing and to purchase all gas from the "point." They were also required to report any accidents, and were prohibited from "stealing calls," "long-mixing," and "freezing stands." According to the testimony of Yellow Cab's manager, Kenneth Halley, if Nelson was operating as a cab driver for them, he was required to have his radio on and respond to the dispatcher. Drivers were not allowed to sleep while on duty and were subject to being sent home for the remainder of the shift to get some sleep if they did so. They were not allowed to use profanity or would be "off the air" for three days. Yellow Cab did all the advertising for the drivers, and Nelson was given business cards with the company's name on them. Yellow Cab also obtained the annual business license authorizing its drivers to operate a taxi in Charleston.[5] Yellow Cab maintained insurance on the cabs (which was included in the drivers' lease payments).

The amount of control Yellow Cab was able to exercise over Nelson in this case far outweighs the amount of control exercised in South Carolina Workers' Compensation Comm'n v. Ray Covington RealtorsInc., supra. There, although there is **some** factual similarity to this case in that the realtor determined the number of hours he worked each week, he also determined the manner in which he did so without direction or control by Ray Covington Realtors. Here, although Nelson decided whether and when he chose to drive, each and every time he exercised that option he was subject to substantial rights of control as to the method and manner in which he did so. Accordingly, we find Covington factually distinguishable.[6]

The Court of Appeals correctly held this factor leans heavily in favor of a finding of a right of control by Yellow Cab.

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[5] Drivers were required, however, to have their own chauffeur's permit.

[6] Moreover, unlike the present case, the Realtors in Covington provided all of their own advertising, and received no vacation days.

B. Furnishing Equipment

On this factor, although Nelson paid a $79.00 per day lease fee, the cabs were furnished by Yellow Cab.[7] Drivers were required to have maintenance and oil changes performed by Yellow Cab, and to purchase gas from it. Yellow Cab provided insurance, which was included in the $79.00 per day fee. Yellow Cab did the advertising and gave Nelson business cards. Yellow Cab also obtained the business license permit to operate cabs. Nelson was allowed to purchase a Yellow Cab t-shirt if he wanted. We find the furnishing of equipment element relatively neutral.

C. Right to Fire

This factor weighs in Nelson's favor. Yellow Cab had the right to terminate Nelson for a number of reasons, to wit: drinking and driving, too many accidents, failure to deliver packages, failure to comport with the dress code. They also had the right to fire him for providing any false or incomplete information on his application. It was within Yellow Cab's discretion whether to accept him as a driver. Yellow Cab's manager, Halley, testified it would be grounds for termination if Nelson were caught charging a flat rate instead of a meter rate, dead-heading, carrying a weapon in the cab, or failing to abide by the rules and regulations of Yellow Cab. He also testified that, at any time Yellow Cab wanted, it was free to decide not to lease a cab to Nelson. In addition to the right to fire, Yellow Cab had the right to discipline him for "long-mixing," "freezing stands," "deadheading," stealing calls, picking up calls at the naval base, refusing to pick up charge calls, sleeping on stands, profane and/or vulgar language, and failure to deliver packages.

Yellow Cab cites language in Ray Covington to the effect that "[w]hile the fourth factor, the right to fire, weighs here in favor of a finding that Chewning

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[7] Other courts have found drivers to be employees, notwithstanding the lease relationship. See Bowdoin, supra; Yellow Cab v. Industrial Comm'n, 606 N.E.2d 523 (Ill. 1992).

is an employee, the fact that Chewning believed appellant could fire him is not inconsistent with appellant's right to terminate the independent contractor relationship." 318 S.C. at 549, 459 S.E.2d at 303. As indicated above, the right of Yellow Cab to terminate Nelson went far beyond the right to simply terminate an independent contractor relationship.

D. Method of Payment

This factor weighs in favor of Yellow Cab. Once Nelson paid his $79.00 per day, he was entitled to keep all fares earned during the day. The only exception to this was "charge fares" and/or package pickups. Certain customers had an "account" with Yellow Cab and drivers would collect their fares directly from Yellow Cab. Drivers also received a certain minimum in the event of "running a blank," i.e., if the charge fare did not show up at the dispatched location. Yellow Cab did not provide him any W-2 forms or 1099's. Nelson's Income Tax Returns for 1996 and 1997 indicate he was self-employed.

Although this factor weighs in favor or Yellow Cab, it had **some** degree of control over payment inasmuch as it dictated the amounts Nelson could charge fares and required him to use a meter.

CONCLUSION

Under the specific facts of this case, consistent with the state's policy of resolving jurisdictional doubts in favor of inclusion of employees under the Workers' Compensation Act, we find the Court of Appeals correctly held Nelson was an employee rather than an independent contractor. Accordingly, the Court of Appeals' opinion is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jeffery Minnich, Plaintiff,

v.

Med-Waste, Inc., and
Incendere, Inc., Defendants.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
David Norton, United States District Court Judge

Opinion No. 25468
Heard January 24, 2002 - Filed May 20, 2002

CERTIFIED QUESTION ANSWERED

Coming B. Gibbs, Jr., of Gibbs & Holmes, and Paul N. Urrichio, III, both of Charleston, for plaintiff.

Gray Thomas Culbreath, of Collins & Lacy, P.C., of Columbia, for defendants.

JUSTICE PLEICONES: We accepted the following question on certification from the United States District Court:

> Does the Firefighter's Rule bar an emergency professional, such as a firefighter, police officer, or public safety officer, who is injured as a result of performing his or her duties, from recovering tort-based damages from the party whose negligence caused the injury?

FACTS

The District Court made the following factual findings:

Jeffrey Minnich ("Plaintiff") was employed by the Medical University of South Carolina ("MUSC") as a public safety officer. While working in this capacity, Plaintiff assisted in loading medical waste from the premises of MUSC onto a tractor-trailer truck owned by Defendant Med-Waste, Inc. Plaintiff noticed the unoccupied truck begin to roll forward, toward a public street. Plaintiff ran to the truck, jumped inside, and stopped the truck.

Plaintiff alleges he suffered serious injuries, proximately caused by the acts or omissions of the defendants' employees, for which he seeks to recover damages. The defendants assert that Plaintiff's claims are barred by the firefighter's rule. The firefighter's rule is a common law doctrine that precludes a firefighter (and certain other public employees, including police officers) from recovering against a defendant whose negligence caused the firefighter's on-the-job injury.

ISSUE

Does the Firefighter's Rule preclude Plaintiff's recovery?

ANALYSIS

While a number of states have adopted the firefighter's rule in some form,[1] there is no definitive pronouncement from this Court either adopting or rejecting the rule.

In Taylor v. Palmetto Theater Co., 204 S.C. 1, 28 S.E.2d 538 (1943), the plaintiff, a Columbia city firefighter, responded to a fire alarm at a building adjoining the Palmetto Theater ("Theater"). While performing his duties as a firefighter he was hurrying through a walkway owned by the Theater when he fell into an inadequately guarded pit and suffered injuries. According to the complaint, although the walkway was privately-owned, the Theater generally made it open to the public, and knew of the dangerous condition of the pit. The firefighter appealed after the trial court granted the Theater's motion to strike substantial portions of the complaint, including those alleging the walkway was open to the public.

In reversing the trial court, the Court distinguished between private property and property generally open to the public:

> Upon a careful analysis of the complaint . . . it alleges an invitation extended to the general public to use this passageway or walkway, and that relying on this invitation and the fact that such use was made thereof by the general public with the at least implied acquiescence of the [Theater], the [firefighter] entered thereupon while in the performance of his duties as a fireman, and suffered . . . injuries . . . . In other words, that the plaintiff entered upon the walkway or passageway as a member of the general public, although in the discharge of his duties as a fireman, and was therefore an invitee or licensee.

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[1] See Moody v. Delta Western, Inc., 38 P.3d 1139, 1140 n. 2 (Alaska 2002) (counting cases); Waggoner v. Troutman Oil Co., 894 S.W.2d 913, 914-15 (Ark. 1995) (counting cases).

> In the circumstances alleged in the complaint, the fact that the [plaintiff] was a fireman, and in the discharge of his duties as such, should not limit his cause of action to the right or permission to enter the premises of [the Theater] extended by the law. Of course, upon a trial of the case the [firefighter] will have to establish . . . that the general public (as the complaint alleges), 'used the alley in the rear of the [Theater's] premises, as well as the . . . passageway . . . , with the knowledge, acquiescence and consent of the [Theater]' at the place where the [firefighter] alleges he was injured; *otherwise any cause of action the [firefighter] may have against the [Theater] for his injuries will be governed by the law applicable to a fireman or other municipal employee who goes upon privately owned premises in the discharge of his duty*.

Id. at __, 28 S.E.2d at 541 (emphasis supplied). Despite its allusion thereto, the Taylor Court, did not define "the law applicable to a fireman or other municipal employee . . ." injured while discharging his duty on private property. The italicized language above, however, suggests that the Court would apply a different standard of care to the Theater based upon the firefighter's status as either an invitee or a licensee.

A later decision of this Court implies that a police officer can recover from a negligent party when the officer is injured while discharging his duties.

In Gardner v. Columbia Police Dep't, 216 S.C. 219, 57 S.E.2d 308 (1950), the Court held that a police officer, injured while on duty, could not maintain a worker's compensation action against his employer after having previously recovered from, and having executed a release in favor of, the negligent tortfeasor. By releasing the negligent trucking company, Gardner "deprived his employer . . . of the right of subrogation to enforce against the [negligent party] any legal liability for the injuries suffered by [Gardner] under . . . the Workmen's Compensation Act." Id. at 224, 57 S.E.2d at 310.

The facts in Gardner suggest that the officer's injury did not occur on private property, but on a public street. Thus, Gardner implies no basis for a distinction arising out of the police officer's status as an invitee or licensee, and does not mention Taylor, supra. Gardner implicitly suggests, however, that a police officer may recover from a negligent party for injuries suffered during the discharge of the officer's duties.

Finding no definitive answer to the certified question in the case law of this state, we examine the various rationales advanced in support of the rule, and its applications and limitations in other states.

Rationales for the Firefighter's Rule

The common law firefighter's rule originated in the case of Gibson v. Leonard, 32 N.E. 182 (Ill. 1892). There, the Illinois Supreme Court held that a firefighter who entered private property in the performance of his job duties was a licensee, and as such, the property owner owed the firefighter a duty only to "refrain from willful or affirmative acts which are injurious." Id. at 189. Practically, this meant that a firefighter, injured while fighting a blaze on private property, could not recover tort damages from the property owner whose ordinary negligence caused the fire.[2]

A number of courts reason that police officers and firefighters, aware

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[2]Those courts relying on premises liability principles to support their firefighter's rule found this rationale problematic. For instance, the Maryland Court of Appeals noted that a rule based on the premises liability theory could be applied only in the landowner context. Flowers v. Rock Creek Terrace Ltd. Partnership, 520 A.2d 361, 366-67 (Md. 1987). The court further observed the legal anomaly resulting from a rule based on this rationale: other public employees, such as postmen and building inspectors – who often enter land pursuant to legal authority rather than express invitation of the landowner – were entitled to due care, while their counterparts in the fire and police departments were not. Id.

of the risks inherent in their chosen profession, have assumed those risks. See e.g. Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979) (firefighter assumes all risks of the job); Berko v. Freda, 459 A.2d 663 (N.J. 1983) (nature of police work requires officers to recognize inherent dangers; police officer assumes the risks of the job). As such, the firefighter or police officer should not be allowed to recover when injured as a result of confronting these known and accepted risks.

A third rationale advanced is public policy. The Supreme Court of Virginia, in Pearson v. Canada Contracting Co., 349 S.E.2d 106, 111 (Va. 1986),[3] cited two fundamental policies in support of that state's firefighter's rule: First, injuries to firemen and policemen are compensable through workers' compensation. It follows that liability for their on-the-job injuries is properly borne by the public rather than by individual property owners. Second, firemen and policemen, unlike invitees or licensees, enter at unforeseeable times and at areas not open to the public. In such situations, it is not reasonable to require the level of care that is owed to invitees or licensees.

Still other courts reason that the public fisc pays to train firefighters and police officers on the ways to confront dangerous situations, and compensates them for doing so. If these public employees were permitted to bring suit against the taxpayers whose negligence proximately caused injury, the negligent taxpayer would incur multiple penalties in exchange for the protection provided by firefighters and police officers. See Kreski v. Modern Wholesale Elec. Supply Co., 415 N.W.2d 178, 187 (Mich. 1987).

The Various Forms of the Rule

Not only have courts been unable to agree on a consistent rationale for the rule, they have not been able to agree on the proper parameters for the

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[3]Pearson contains an extensive overview of the firefighter's rule and its historical development.

rule. A number of courts which recognize the firefighter's rule as a viable defense to negligence claims allow recovery for willful and wanton conduct resulting in injury. As one court observed, "a tortfeasor who acts wilfully and wantonly is so culpable that the fireman's rule ought not to preclude the injured officer from suing the egregiously culpable wrongdoer." Miller v. Inglis, 567 N.W.2d 253, 256 (Mich. Ct. App. 1997).

Courts have allowed police officers and firefighters to recover for injuries resulting from an act of negligence unrelated to the specific reason for which the officer or firefighter was originally summoned. As stated by the Supreme Court of New Jersey:

> The core of the "fireman's rule" is that a citizen's ordinary negligence that occasioned the presence of the public safety officer shall not give rise to liability in damages for the injuries sustained by the officer in the course of the response to duty. . . . The corollary of the rule is that independent and intervening negligent acts that injure the safety officer on duty are not insulated.

Wietacha v. Peoronard, 510 A.2d 19, 20-21 (N.J. 1986) (citation omitted) (Police officers were injured while investigating a traffic accident when drivers negligently hit parked police cars; officers could pursue action against drivers whose negligence occurred subsequent to officers' presence at the scene). See also Terhall v. American Commonwealth Assoc., 218 Cal. Rptr. 256, 260 (Cal. App. 1st Dist. 1985) ("Having an unguarded hole in the roof was not the cause of [the firefighter's] presence at the scene, and the firefighter's rule has never been applied to negligence which did not cause the fire."). According to one commentator, all jurisdictions allow recovery under these circumstances. See Jack W. Fischer, *The Connecticut Firefighter's Rule: 'House Arrest' for a Police Officer's Tort Rights*, 9 U. Bridgeport L. Rev. 143, 149 (1988).

More recently, a number of state legislatures have acted to limit or abolish the firefighter's rule. For instance, in 1987, only one year after the

Virginia Supreme Court's decision in Pearson, supra, the Virginia legislature passed a statute providing that:

> An owner or occupant of real property containing premises normally open to the public shall, with respect to such premises, owe to firefighters . . . and law-enforcement officers who in the performance of their duties come upon that portion of the premises normally open to the public the duty to maintain the same in a reasonably safe condition or to warn of dangers thereon of which he knows or has reason to know, whether or not such premises are at the time open to the public.
>
> An owner or occupant of real property containing premises not normally open to the public shall, with respect to such premises, owe the same duty to firefighters . . . and law-enforcement officers who he knows or has reason to know are upon, about to come upon or imminently likely to come upon that portion of the premises not normally open to the public. . . .

Va. Code Ann. § 8.01-226 (Michie 2001).[4] See also Cal. Civil Code § 1714.9 (West 2001) (allowing police officers and firefighters to recover where negligence occurred after negligent party knew of officer's or firefighter's presence, or where negligent act or omission violated statute, or was independent of reason officer or firefighter was summoned); Nev. Rev. Stat. Ann. § 41.139 (LEXIS L. Publg. 2001) (firefighter or police officer may maintain action for injuries suffered as a result of another's willful acts, as well as for negligent acts occurring after the person who caused the injury knew or should have known of the police officer's or firefighter's presence).

Effectively, the State of New York has statutorily abolished the firefighter's rule by providing that:

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[4]While not stated on the face of the statute, one could infer that the legislature acted in response to Pearson.

> In addition to any other right of action or recovery otherwise available under law, whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee, the police officer or firefighter suffering that injury or disease, or, in the case of death, a representative of that police officer or firefighter may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury, disease or death. . . .

N.Y. General Obligation Law § 11-106 (McKinney 2001). While the New York statute forecloses a tort action against a co-worker or an employer,[5] it virtually eliminates the firefighter's rule as it pertains to all other third-party tortfeasors, and allows police officers and firefighters to recover for ordinary negligence.

New Jersey similarly limits the scope of the firefighter's rule by statute. See N.J. Stat. Ann. § 2A:62A-21 (West 2001) (whenever any law enforcement officer or firefighter suffers injury while in the discharge of his official duties and that injury is the result of the neglect, willful omission, or willful or culpable conduct of any person or entity, other than that law enforcement officer's or firefighter's employer or co-employee, the injured law enforcement officer or firefighter may seek recovery from the person or

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[5]The legislative history of the New York statute indicates that the legislature excepted actions against employers or co-employees in an effort to foster, or at least do nothing to undermine, the teamwork so essential in these professions. We note that the employer/co-employee exception is also consistent with existing worker's compensation principles.

entity whose neglect, wilful omission, or wilful or culpable conduct resulted in that injury). See also Minn. Stat. Ann. § 604.06 (West 2001) (the fireman's rule shall not operate to deny any peace officer or public safety officer a recovery in *any action at law* or authorized by statute); Fla. Stat. Ann. § 112.182 (West 2001) (common-law firefighter's rule abolished).

CONCLUSION

As illustrated above, those jurisdictions which have adopted the firefighter's rule offer no uniform justification therefor, nor do they agree on a consistent application of the rule. The legislatures in many jurisdictions which adhere to the rule have found it necessary to modify or abolish the rule. The rule is riddled with exceptions, and criticism of the rule abounds.[6]

Against this backdrop, we answer the certified question in the negative. South Carolina has never recognized the firefighter's rule, and we find it is not part of this state's common law. See Gardner, supra. In our view, the tort law of this state adequately addresses negligence claims brought against non-employer tortfeasors arising out of injuries incurred by firefighters and police officers during the discharge of their duties. We are not persuaded by

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[6] See e.g., Jay Berger, *Note: Has the Michigan Firefighter's Rule Gone Up in Smoke? An Analysis of the Wilful and Wanton Exception*, 44 Wayne L. Rev. 1555 (1998) (concluding the wilful and wanton exception points out the inequities embodied in the firefighter's rule); David L. Strauss, *Comment: Where There's Smoke There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years*, 1992 Wis. L. Rev. 2031, 2061 (1992) (concluding that implementation of the rule has led to a "morass of legal analysis that has left judges and juries in the precarious position of continuously having to determine how far the rule reaches and who fits within its many ambiguous exceptions"); Louie A. Wright, *The Missouri "Fireman's Rule": An Unprincipled Rule in Search of a Theory*, 58 UMKC L. Rev. 329 (1990) (arguing the common-law firefighter's rule is outdated and an indulgence in legal fiction).

any of the various rationales advanced by those courts that recognize the firefighter's rule. The more sound public policy – and the one we adopt – is to decline to promulgate a rule singling out police officers and firefighters for discriminatory treatment.

CERTIFIED QUESTION ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Frank M. Gaster, Appellant.

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

Opinion No. 25469
Heard December 11, 2001 - Filed May 20, 2002

AFFIRMED

W. Gaston Fairey, of Fairey, Parise & Mills, P.A., of Columbia, for appellant.

Attorney General Charles M. Condon, Deputy Attorney General Treva Ashworth, Senior Assistant Attorney General Kenneth P. Woodington, and Assistant Attorney General Steven G. Heckler, all of Columbia, for respondent.

JUSTICE MOORE: Appellant appeals his commitment pursuant to the South Carolina Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10 to -170 (Supp. 2000). We affirm.

FACTS

Appellant was convicted of second degree criminal sexual conduct (CSC) with a minor and sentenced to twenty years imprisonment in July 1988. In 1999, he was scheduled for release after having satisfied the statutory requirements of his sentence. The State filed an action under the Sexually Violent Predator Act (the Act), to have appellant designated a sexually violent predator.

Following a trial, the jury found appellant to be a sexually violent predator. He was then committed to the South Carolina Department of Mental Health (DMH) for treatment.[1] Pursuant to S.C. Code Ann. § 44-48-100(A) (Supp. 2000), appellant's custody was transferred from DMH to the

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[1]S.C. Code Ann. § 44-48-100(A) (Supp. 2000) provides:

> The . . . jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If a jury determines that the person is a sexually violent predator, the determination must be by unanimous verdict. If the . . . jury determines that the person is a sexually violent predator, the person must be committed to the custody of the Department of Mental Health for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and has been released pursuant to this chapter.

Department of Corrections.[2]

ISSUES

(1) Does the Act violate the double jeopardy, *ex post facto*, and due process clauses of the United States and South Carolina constitutions?

(2) Was appellant properly found to be a sexually violent predator?

(3) Did the trial court violate appellant's right to due process by allowing the use of a motion appellant filed that challenged the constitutionality of the age of sexual consent to prove appellant's need for treatment?

I. Constitutional Questions

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

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[2]Section 44-48-100(A) provides:

> The [DMH] may enter into an interagency agreement with the Department of Corrections for the control, care, and treatment of these persons. A person who is in the confinement of the Department of Corrections pursuant to an interagency agreement authorized by this chapter must be kept in a secure facility and must, if practical and to the degree possible, be housed and managed separately from offenders in the custody of the Department of Corrections.

Ex post facto challenge

Article I, § 10, of the United States Constitution and Article I, § 4, of the South Carolina Constitution provide that no *ex post facto* law shall be passed. An *ex post facto* violation occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime. Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000). For the *ex post facto* clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature. State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990) (citing Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)).

We recently held the Act, which provides for the civil commitment of a sexually violent predator to the DMH's custody, is a civil, non-punitive scheme. *See* In re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001) (Act does not violate Double Jeopardy clause of federal or state constitutions because it does not constitute punishment). Appellant has the burden of providing the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the legislature's intention that the Act be civil. *See* In re Matthews, *supra* (citing Seling v. Young, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001)).

As noted in In re Matthews, *supra*, South Carolina's Act is modeled on Kansas's Sexually Violent Predator Act. The United States Supreme Court has previously determined the Kansas Act does not violate the *ex post facto* clause of the United States Constitution. Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The Hendricks Court held the application of the Kansas Act did not raise *ex post facto* concerns because the Kansas Act does not impose punishment. The Court further stated the Kansas Act

> clearly does not have retroactive effect. Rather, the Act permits involuntary confinement based upon a determination that the person *currently* both suffers from a "mental abnormality" or

> "personality disorder" and is likely to pose a future danger to the public. To the extent that past behavior is taken into account, it is used . . . solely for evidentiary purposes. Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act does not violate the *Ex Post Facto* Clause.

Hendricks, 521 U.S. at 370-371, 117 S.Ct. at 2086, 138 L.Ed.2d at 520-521 (emphasis in original).

Likewise, the South Carolina Act permits involuntary confinement based upon the determination the person currently suffers from both a mental abnormality or personality disorder and is likely to engage in acts of sexual violence. *See* S.C. Code Ann. § 44-48-30(1) (Supp. 2000) (sexually violent predator means person who has committed sexually violent offense and who suffers from mental abnormality or personality disorder which makes person likely to engage in sexually violent acts if not confined in secure facility for long-term control, care, and treatment).

Appellant argues the Act has crossed the line between civil commitment and punitive confinement. He points to the Act's requirement that all persons committed under the Act be kept "in a secure facility." S.C. Code Ann. § 44-48-100(A). He further points to the DMH's ability to enter into an agreement with the Department of Corrections for the control, care, and treatment of persons committed pursuant to the Act. Appellant argues this suggests that persons confined under the Act are being subjected to conditions identical to those of prisoners.

Appellant's contention has previously been addressed in In re Matthews, *supra*. Matthews argued he was subject to the conditions placed on state prisoners, and that he would not receive treatment for his alleged disease. We stated:

> The conditions of confinement are not prescribed by the Act, but result from administrative decisions. Therefore, the conditions of

> confinement cannot be used to determine legislative intent. . . . Furthermore, the Act expressly provides, "The involuntary detention or commitment of a person pursuant to this chapter shall conform to constitutional requirements for care and treatment." S.C. Code Ann. § 44-48-170.

In re Matthews, 345 S.C. at 650-651, 550 S.E.2d at 317.

Furthermore, appellant has failed to meet his burden of showing the Act is so punitive in effect as to negate the legislature's intention to create a civil statute. In re Matthews, *supra* (citing Seling v. Young, *supra*). There is no information in the record indicating persons committed pursuant to the Act are being treated as if they were prisoners instead of as civilly committed persons.

We find the United States Supreme Court's decision in Hendricks is controlling, and conclude South Carolina's Act does not violate the *ex post facto* clause.

Double jeopardy challenge

Appellant claims the Act violates the double jeopardy clause of the United States and South Carolina Constitutions. We have previously found the Act does not violate the double jeopardy clause. In re Matthews, *supra*.

Due process challenge

Appellant's claim the Act violates the due process clause of the United States and South Carolina Constitutions[3] is not preserved for review. This constitutional issue was not raised to or ruled upon by the trial court. In re

[3]The Fourteenth Amendment of the United States Constitution and Article I, § 3, of the South Carolina Constitution provide that no person shall be deprived of life, liberty, or property without due process of law.

McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (it is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required; a constitutional claim must be raised and ruled upon to be preserved for appellate review).

II. Sexually violent predator status

At trial, Sheriff Lane Cribb, who arrested appellant for the 1988 charge of second degree CSC with a minor, testified regarding conversations he had with appellant. Sheriff Cribb stated appellant obsessively tried to justify his behavior with his victim by stating he should be allowed to have sexual relations with a fourteen-year-old girl.

Sheriff Cribb further testified appellant stated he carried out fantasies of rape, kidnapping, and prostitution with his victim as evidenced by the videotapes he made of himself acting out these fantasies with the victim.

Next, Dr. Donna Schwartz-Watts (hereinafter referred to as Dr. Watts) testified. She stated she used the following to evaluate appellant: his past indictments; his Department of Corrections's record, which indicated good behavior; a 1973 vocational rehabilitation evaluation; a motion appellant filed for a ruling on the legal age of sexual consent; a transcript from the Georgetown County Sheriff's Office; 1988, 1993, and 1995 psychological evaluations, none of which indicated sexual disorders; psychological tests; a telephone interview with appellant's mother; and a two and a half hour psychiatric exam conducted by Dr. Watts herself.

Dr. Watts stated she discussed with appellant his 1973 conviction for contributing to the delinquency of a minor. Appellant told her the conviction arose because he gave a fifteen-year-old girl a key to his home. The girl did not attend school and remained in his home when she should have been at school. Appellant's Vocational Rehabilitation records indicated he encouraged the girl to not attend school and that they had a sexual relationship.

Dr. Watts and appellant also discussed his 1988 conviction for second degree CSC with a minor. Appellant told her he loved the fourteen-year-old victim and that he viewed the relationship as consensual.[4] He told Dr. Watts he and the victim would act out sexual fantasies with each other and sometimes they would videotape those fantasies. Appellant told Dr. Watts that sometimes the victim knew she was being taped and other times, she did not. These videotaped fantasies included a rape scenario where appellant entered the room wearing a mask and made it appear as if he was raping the victim, and a prostitution scenario where he had the victim act as a prostitute and he pretended to pay her afterwards.

From appellant's relationship history, Dr. Watts learned appellant had two previous marriages, both of which ended in divorce. She further learned that both wives were considerably younger than appellant.[5]

From one of the psychological tests, Dr. Watts was able to determine appellant had some abnormal sexual arousal that he had not mentioned. She stated he suffers from two major mental illnesses: sadism and paraphilia, both of which are sexual disorders.[6] Dr. Watts gave appellant the paraphilia diagnosis because appellant had videotaped his victim without her knowledge. Dr. Watts stated that type of activity was similar to voyeurism. She diagnosed appellant with sadism because he is aroused by producing

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[4]However, Dr. Watts testified the Victim Notification Form indicated the victim was upset by the relationship and viewed it as a traumatic experience.

[5]Dr. Watts testified both of his wives were fifteen years old at the time appellant married them. However, appellant testified his first wife was seventeen years old at the time of marriage and his second wife was eighteen years old at the time of marriage.

[6]Paraphilia is a category of sexual disorders reserved for behaviors that are not necessarily listed in any of the other sexual disorder categories, in other words, a "grab bag" for all kinds of deviant behavior.

pain in his sexual partners. Dr. Watts further testified appellant's preference for young girls is significant since it is easier for him to act out his fantasies because the girls are easier to control and more likely "to go along with . . . his fantasies."

By evaluating appellant pursuant to the Act, Dr. Watts concluded to a reasonable degree of medical certainty that appellant suffers from the sexual disorders known as sadism and paraphilia. Dr. Watts stated these disorders do not disappear and, in the case of sadism, get worse over time. She testified there was no outpatient treatment available in South Carolina to treat appellant given those diagnoses.

On re-direct, Dr. Watts testified appellant has a propensity to commit sexually violent acts, and that propensity poses a threat to society if he is not confined, controlled, and given the proper treatment, which would not consist of outpatient treatment. She further indicated there was no guarantee the public would not be in danger if appellant were to submit to outpatient treatment.

Appellant testified he was not interested in adolescent females and did not feel that if he were released from custody he would have a propensity to commit another sexual crime. He also stated, after serving eleven years in prison, he could resist any attraction to younger women. Appellant noted that due to his age, he was unsure whether an adolescent female would even be attracted to him. Regarding the videotapes, appellant testified he placed a mask over his face once so the victim could not see him as a way to act out a fantasy, which he indicated was the victim's fantasy and not his own.

The trial court charged the jury that the State must prove beyond a reasonable doubt that appellant suffers from a mental abnormality or a personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. The court further informed the jury of the statutory definition of "likely to engage in acts of sexual violence," which is that the person's propensity to commit acts of sexual violence is of such a degree as to pose a

menace to the healthy and safety of others.

The jury found appellant to be a sexually violent predator in need of treatment in a secure facility. Appellant now claims his motions for a directed verdict and a judgment notwithstanding the verdict (JNOV) were improperly denied.

On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling. In re Matthews, *supra*. In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight. *Id.* Further, a motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Gastineau v. Murphy, 331 S.C. 565, 503 S.E.2d 712 (1998).

S.C. Code Ann. § 44-48-30(1) provides that a sexually violent predator is a person who:

> (a) has been convicted of a sexually violent offense; and
>
> (b) suffers from a mental abnormality[7] or personality disorder that makes the person likely to engage in acts of sexual violence[8] if not confined in a secure facility for long-term control, care, and treatment.

Appellant's conviction for second degree CSC with a minor is a sexually

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[7]"'Mental abnormality' means a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. § 44-48-30(3) (Supp. 2000).

[8]"'Likely to engage in acts of sexual violence' means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9) (Supp. 2000).

violent offense as enumerated in S.C. Code Ann. § 44-48-30(2)(e). Therefore, the first prong of the sexually violent predator determination has been met.

Appellant also meets the second prong of the sexually violent predator determination. There is evidence pointing to the fact appellant suffers from a personality disorder and/or mental abnormality that makes him likely to engage in acts of sexual violence. Dr. Watts, after evaluating appellant, found to a reasonable degree of medical certainty that appellant suffers from the sexual disorders of sadism and paraphilia. She further testified that appellant has a propensity to commit sexually violent acts and that propensity poses a threat to society if he is not confined and given the proper treatment.

There was evidence to support the trial court's denial of appellant's directed verdict and JNOV motions. *See* In re Matthews, *supra*. Further, given the evidence, the jury reasonably concluded appellant was a sexually violent predator. *See* Gastineau v. Murphy, *supra* (JNOV motion may be granted only if no reasonable jury could have reached challenged verdict).

III. Right to due process violated by admission of motion

At trial, Dr. Watts indicated she used appellant's Motion for Ruling on the Legal Age of Sexual Consent in South Carolina (the motion), dated August 15, 1998, as one of the many sources to evaluate appellant. Dr. Watts testified the motion was significant because it indicated appellant's need for and probability of success in treatment. She stated the entire nature of the motion, the fact it was filed, and the complaint within it were significant.

Appellant testified he filed the motion in an attempt to have the proper age of consent in South Carolina clarified, and not because he was intending to pursue minors. According to appellant, the law since 1895 under the South Carolina Constitution empowers young women to consent at age fourteen. In the motion, appellant stated he did "not want to be arrested or harassed by the police if a woman 14 years of age or older chooses him as a sexual partner." Appellant testified he made that statement in an effort to

show he had standing to bring the suit.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998).

The trial court properly admitted the motion within its discretion. The motion was relevant because Dr. Watts used the motion in evaluating appellant's need for and probability of success in treatment, facts relevant to determining appellant's need for commitment. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Further, the possibility of unfair prejudice did not substantially outweigh the probative value of the motion. Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."). As for its probative value, Dr. Watts felt the motion was significant in her evaluation because it indicated appellant's need for and probability of success in treatment. Regarding possible prejudice to appellant, the motion was not the only source Dr. Watts used to evaluate appellant. Dr. Watts used many sources besides the motion to find that appellant suffered from the sexual disorders of sadism and paraphilia.

Because the motion was relevant and its probative value outweighed any prejudicial effect on appellant, the trial court properly admitted the motion within its discretion. *See* State v. McDonald, *supra*; Strother v. Lexington County Recreation Comm'n, *supra*.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Patricia Ferguson, individually and on behalf of the Estate of Howard Ferguson and in behalf of all other similarly situated, Petitioner,

v.

Charleston Lincoln Mercury, Inc., Respondent.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge
Daniel E. Martin, Sr., Circuit Court Judge

Opinion No. 25470
Heard March 19, 2002 - Filed May 20, 2002

AFFIRMED AS MODIFIED

Justin Lucey, John G. Brown, II, both of Justin O'Toole Lucey, P.A., and M. Lee Robertson, Jr., of Robertson Law Firm, all of Mount Pleasant for

petitioner.

Henry E. Grimball, of Buist, Moore, Smythe & McGee, of Charleston, for respondent.

CHIEF JUSTICE TOAL: This appeal is from a trial court's Order granting summary judgment in favor of Charleston Lincoln Mercury ("CLM"). The trial court found that Patricia Ferguson could not recover under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-130 (1991 & Supp. 2001) ("Dealers Act"), for allegedly fraudulent acts committed by CLM against her deceased husband, Howard Ferguson. The Court of Appeals affirmed on an additional sustaining ground. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

Howard Ferguson entered into an agreement with CLM to purchase a used car. The Buyers Order listed the purchase price of the automobile as $8,873.19. A $700 trade-in allowance was deducted, as was Mr. Ferguson's $200 down payment. The costs of taxes, title and tags were added, as was a $189.50 "closing fee." The total price of the automobile was listed as $8,491.69.

The security agreement that CLM sent to Eagle Finance Company ("Eagle") contained errors. The agreement stated an incorrect cash price and did not list the closing fee. However, the amount to be financed was $8,491.69, the same amount listed as the total price on the Buyers Order. After failing to receive a payment coupon book, Mr. Ferguson contacted Eagle and was told that because of the errors on the security agreement, he would have to execute new documents to complete the transaction. Apparently after discovering the closing fee, Mr. Ferguson refused to sign the new documents, and the car was repossessed.

In 1997, Mr. Ferguson filed suit under the Dealers Act. *See* S.C. Code Ann. § 56-15-10 (1991 & Supp. 2001). Mr. Ferguson alleged that assessing the

closing fee and failing to disclose it were unfair acts. Mr. Ferguson also filed for class certification. Mr. Ferguson subsequently died, and his wife, Mrs. Ferguson, was substituted by consent order as the named plaintiff.[1] CLM moved for summary judgment, claiming that charging the closing fee was not unfair or deceptive as a matter of law. CLM also alleged that the cause of action did not survive Mr. Ferguson's death under the general survivability statute, S.C. Code Ann. § 15-5-90 (1976), because it was based on fraud and deceit.

The trial judge ruled that charging the closing fee was not an unfair or deceptive practice and granted CLM's motion for summary judgment. The trial judge denied the class certification as moot. The trial judge did not rule on whether Mr. Ferguson's cause of action survived his death.

The Court of Appeals affirmed the trial judge's ruling based on an additional sustaining ground. The Court of Appeals found that the cause of action did not survive the death of Mr. Ferguson pursuant to S.C. Code Ann. § 15-5-90 because it was based on a theory of fraud and deceit. The Court of Appeals also found that the Dealers Act did not contain a survivability provision. The Court of Appeals further determined that Mr. Ferguson's death rendered the motion to certify the class moot. The Court of Appeals did not address the actual finding by the trial judge that charging a closing fee was not unfair or deceptive under the Dealers Act as a matter of law. *Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502, 544 S.E.2d 285 (Ct. App. 2001). Mrs. Ferguson appealed, and this Court granted certiorari to review the following issues:

> I. Did the Court of Appeals err in holding § 15-5-90 does not apply to fraud and deceit actions brought under the Dealers Act?

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[1]In the consent order, CLM specified that it was not waiving any defenses it could have asserted against Mr. Ferguson, including the defense that the cause of action did not survive Mr. Ferguson's death.

II. Did the Court of Appeals err in holding the issue of class certification was moot?

LAW/ANALYSIS

In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976).

I. Survivability of Fraud and Deceit Causes of Action under the Dealers Act

Mrs. Ferguson argues that Mr. Ferguson's cause of action survived his death under the general survivability statute, S.C. Code Ann. § 15-5-90 (1976). We disagree.

The general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions. "Causes of action for and in respect to . . . any and all injuries to the person or to personal property shall survive both to and against the personal or real representative . . . of a deceased person . . . any law or rule to the contrary notwithstanding." S.C. Code Ann. § 15-5-90 (1976). When the statute's terms are clear and unambiguous, there is no room for an alternate construction, and courts must apply them according to their literal meaning. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16

(1998). Generally, any cause of action which could have been brought by the deceased in his lifetime survives to his representative. *Layne v. International Bhd. of Elec. Workers*, 271 S.C. 346, 247 S.E.2d 346 (1978).

The language of the survivability statute is clear and unambiguous. Causes of action for injuries to a person survive the death of the person. The section contains no language that suggests causes of action brought under the Dealers Act would not survive the death of a person to whom the action has accrued.

Despite the clear language of the statute, this Court has created certain exceptions to the survivability statute. *See, e.g., Estate of Covington v. AT & T Nassau Metals Corp.*, 304 S.C. 436, 405 S.E.2d 393 (1991) (workers compensation claims); *Brown v. Bailey*, 215 S.C. 175, 54 S.E.2d 769 (1949) (actions for malicious prosecution); *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948) (actions for slander); *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941) (actions for fraud and deceit); *Chewning v. Clarendon County*, 168 S.C. 351, 167 S.E. 555 (1933) (actions against a county for pain and suffering accruing to a decedent as a result of injury caused by a defect in a highway). However, none of these cases suggest that a blanket exception exists for causes of action arising under the Dealers Act.

At common law, a personal action *ex delicto* did not survive the death of either party. *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189 (1914). In 1905, the common law prohibition was partially abrogated by statute to include "any and all injuries to the person or to personal property." S.C. Code of 1912 § 3963 (Civ. Code); *see also* Robert L. Wynn, III, Note, *Death of the Head of the Family - Elements of Damages under South Carolina's Lord Campbell's Act*, 19 S.C.L.R. 220, 221 (1967).

The survivability statute has survived with little change. As noted above, the statute's language is broad and ostensibly appears to include almost every conceivable cause of action. Causes of action relating to "any and all injuries to the person or to personal property" survive to the personal representative of the deceased. S.C. Code Ann. § 15-5-90 (1996). Despite this broad language,

South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud or deceit. *See Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941) (finding a cause of action for fraud did not survive the death of a person who was allegedly defrauded by an apparent cancellation of an insurance policy).

Although Mr. Ferguson's cause of action arose directly under the Dealers Act, his action was based upon a theory of fraud and deceit. Under the Dealers Act, fraud is defined in accordance with its normal legal connotation as including: (1) a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; (2) a promise or representation not made honestly and in good faith; and (3) an intentional failure to disclose a material fact. S.C. Code Ann. § 56-15-10(m) (1991).

The essence of Mr. Ferguson's allegation was that CLM included an improper fee in the purchase price and concealed the fee through fraudulent and deceptive actions. Whether Mr. Ferguson labeled CLM's actions as unfair, misleading, or deceptive is irrelevant. At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death.[2]

II. Mootness of the Class Certification

The Court of Appeals found that the issue of class certification was

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[2]We do not hold that all causes of action under the Dealers Act fail to survive the claimant's death, only those rooted in fraud and deceit. The Dealers Act has a wide ambit and covers causes of action not rooted in fraud and deceit, and those causes of action would not be covered by the fraud and deceit exception to the general survival statute.

mooted by the dismissal of Ferguson's claim. We agree.

Usually, an order denying class certification is interlocutory and not immediately appealable. *See Eldridge v. City of Greenwood*, 308 S.C. 125, 126-27, 417 S.E.2d 532, 534 (1992) ("Orders under Rule 23, SCRCP are interlocutory and thus, immediately appealable only in certain circumstances."). This Court reviews interlocutory orders when they contain other appealable issues. *See* Hite v. Thomas & Howard Co., 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991) ("[A]n order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation."), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995).

The prerequisites of a class action are set forth in Rule 23, SCRCP:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) *the representative parties will fairly and adequately protect the interests of the class*, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP (emphasis added).

We find that the class certification issue is moot because Mr. Ferguson no longer adequately represents the class.

Where the named plaintiffs' claims become moot after class certification by death or other means, the class claims become moot unless intervenors can be substituted as named plaintiffs. *See Swan v. Stoneman*, 635 F.2d 97 (2d Cir 1980) (class action not rendered moot by named plaintiff's death were other

plaintiffs had intervened before death of fellow plaintiff); *see also Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) (suggesting that, but for the intervention of a third inmate, prisoner class action in which one named plaintiff died and other was paroled before class certification would have been moot).

We hold that where a single named plaintiff in a class actions suit dies before class certification, the named plaintiff no longer adequately represents the class and the suit becomes moot, unless a suitable plaintiff intervenes and satisfies the requirements of Rule 23, SCRCP.[3]

CONCLUSION

For the foregoing reasons, we **AFFIRM AS MODIFIED** the decision of the Court of Appeals.

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

[3]This holding would not apply to a class action suit brought by more than one named plaintiff.

The Supreme Court of South Carolina

In the Matter of Joseph L. Smalls, Jr., **Respondent**

ORDER

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

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

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

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

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

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

James E. Moore A.C.J.
FOR THE COURT
Toal, C.J., not participating.

Columbia, South Carolina

May 16, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ferrell Cothran, Personal Representative of the Estate of Douglas H. McFaddin,

Respondent,

v.

Alvin Brown,

Appellant.

Appeal From Clarendon County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 3495
Heard January 9, 2002 - Filed May 13, 2002

AFFIRMED

William B. Woods, Donna Seegars Givens and Darra James Vallini, all of Woods & Givens, of Lexington; and Samuel R. Clawson and Timothy A. Domin, both of Clawson & Staubes, of Charleston, for appellant.

Gedney W. Howe, III, of Charleston; John C. Land, of Land, Parker & Reeves, of Manning; and Daniel H. Shine, of Dillon, for respondent.

HEARN, C.J.: Ferrell Cothran brought this action asserting wrongful death and survival claims against Alvin Brown as personal representative of the estate of Douglas H. McFaddin. The trial court granted Cothran partial summary judgment on the issue of liability. A panel of this court reversed. We granted Cothran's Petition for Rehearing *En Banc* to consider whether Brown should be judicially estopped from asserting comparative negligence. We affirm.

FACTS

While looking for his dogs, McFaddin parked his westbound truck on the eastbound shoulder near a curve of a road with the headlights on. According to Brown, as he approached the curve he saw headlights in his lane of travel, so he veered to the right to avoid a head-on collision. Brown struck McFaddin and his truck, resulting in McFaddin's death. Brown failed several field sobriety tests and registered a .17 on a breathalyzer test. He was indicted for felony driving under the influence (DUI) and pled guilty to reckless homicide.

As the personal representative of her husband's estate, McFaddin's wife brought this action asserting wrongful death and survival claims.[1] Brown answered, admitting that his vehicle ran off the paved portion of the highway and struck McFaddin but asserting that comparative negligence applied because McFaddin's actions caused Brown to believe the truck was approaching in his lane. Cothran moved for summary judgment as to liability, asserting there was no genuine issue of material fact regarding Brown's liability.

At the summary judgment hearing, the trial court considered three affidavits: two by Brown and one by Maechearda McCray. In an affidavit

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[1]The complaint was amended on April 28, 1998, at which time Cothran was substituted as the personal representative.

prepared at the time of his guilty plea, Brown stated: "There was nothing Mr. McFadden did to cause the accident, and there was nothing he could have done to avoid the accident. The accident was all my fault and was caused by the fact that I had had too much to drink and should have never been driving." Brown gave a second affidavit in connection with the instant civil action which painted a completely different picture of the accident. He there claimed: "The only reason this accident occurred was due to Mr. McFadden parking his vehicle in the position that he did which allowed his headlights to shine down the roadway at such an angle as to make it appear to any motorist traveling towards him that Mr. McFadden's vehicle was in their lane of travel." The affidavit of McCray, who was with Brown shortly before the collision, related her belief that Brown was not intoxicated when he left her. She also alleged that she returned to the accident scene with Brown and "observed that the lights of the McFadden vehicle appeared to be shining directly down the lane of travel . . . making it appear that the McFadden vehicle was traveling towards me in my lane of travel; it is my belief that this is the same view that Alvin Brown would have had as he approached the McFadden vehicle and that this is the reason Mr. Brown swerved to his right and off of the roadway in an effort to avoid a head-on collision."

The trial court granted Cothran partial summary judgment on the issue of liability based on the doctrines of judicial estoppel and collateral estoppel.[2] This appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; see Bessinger v. Bi-Lo, Inc., 329 S.C. 617, 619, 496 S.E.2d 33, 34 (Ct. App.

[2]The trial court later amended its order to include only the doctrine of judicial estoppel as a ground for granting summary judgment.

1998). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences from it must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

DISCUSSION

I. Judicial Estoppel

Cothran argues that the trial court's order granting summary judgment should be affirmed because Brown is judicially estopped from contesting liability in this action. We agree.

The doctrine of judicial estoppel evolved to protect the truth-seeking function of the judicial process by punishing those who seek to misrepresent facts to gain advantage. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); see also John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995) (stating goal of judicial estoppel "is to prevent a party from playing 'fast and loose' with the courts, and to protect the essential integrity of the process."). As explicitly embraced by our supreme court, "[j]udicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Hayne, 327 S.C. at 251, 489 S.E.2d at 477. "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." Id. However, the Hayne court only adopted the doctrine as it applies to facts, not law.

The application of judicial estoppel "is an equitable concept, depending on the facts and circumstances of each individual case, [and] application of the doctrine is discretionary." Carrigg v. Cannon, 347 S.C. 75, 83-84, 552 S.E.2d 767, 772 (Ct. App. 2001) (quoting Hawkins v. Bruno Yacht Sales, Inc., 342 S.C. 352, 368, 536 S.E.2d 698, 706 (Ct. App. 2000), cert. granted Sept. 27, 2001)). Generally, for the doctrine to apply, courts look to the following factors:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, . . . whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled, ...' A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

N.H. v. Me., 532 U.S. 742, 750-51 (2001) (citations omitted); see Lowery v. Stovall, 92 F.3d 219 (4th Cir. 1996).[3] "Judicial acceptance means only that the

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[3]The South Carolina Supreme Court has not adopted a precise test to be used in determining judicial estoppel. This court has previously suggested but never applied the following test:

> (1) two inconsistent positions must be taken by the same party or parties in privity with each other;
>
> (2) the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other;
>
> (3) the party taking the position must have been successful in maintaining the first position and must have received some benefit;
>
> (4) the inconsistency must be part of an intentional effort to mislead the court; and
>
> (5) the two positions must be totally inconsistent

first court has adopted the position urged by the party . . . as part of a final disposition." Lowery, 92 F.3d at 224-25. The above outlined approach emphasizes the potential for harm to the judicial process.

In this case, the same party presented two patently inconsistent sets of facts in two different courts. In the earlier proceeding, Brown and his attorney repeatedly told the court that the accident was entirely Brown's fault because he had been drinking and driving. In addition, Brown's affidavit and Brown's attorney both stated that McFaddin in no way caused the accident. Brown presented one set of facts at his guilty plea proceeding in the interest of receiving a more lenient sentence but now attempts to assert a different set of facts to lessen his civil liability. Based on the facts presented at his guilty plea, Brown was allowed to plead guilty to reckless homicide, an offense carrying a maximum ten year sentence, rather than felony DUI which carries a maximum twenty-five year sentence. See S.C. Code Ann. §§ 56-5-2910 & 2945 (Supp.2001) (providing sentences for reckless homicide and felony DUI respectively). In reliance on that set of facts, the plea judge sentenced him to only six years imprisonment. Permitting Brown to assert different facts in this action could result in the appearance that one court or the other was misled. Moreover, allowing Brown to change his story now might result in an unfair

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Carrigg, 347 S.C. at 83, 552 S.E.2d at 772 (citing 28 Am. Jur. 2d Estoppel & Waiver § 74 (2000)). Based on Hayne, it does not appear that the second prong of the test articulated above would apply because the parties were not all the same and the proceedings were completely unrelated. In Hayne, a father purchased a piece of property but titled it in his son's name. During his divorce, the father denied any legal interest in the property and claimed that it belonged to his son. The son then died, leaving the property to his wife, and the father did not file a claim against the estate. Thereafter, the father filed a claim in a foreclosure action asserting ownership of the property by way of a resulting trust. The court found the father was judicially estopped from claiming ownership of the property.

advantage to him. It would be unfair to allow him to reap the benefit of a lesser sentence by admitting culpability but avoid civil liability by denying it.

We agree with the trial court that Brown was judicially estopped from presenting facts inconsistent with those presented at his guilty plea proceeding, including the McCray affidavit. Those facts are conclusive as to liability. Therefore, there was no issue of material fact remaining on the issue. Accordingly, we affirm the trial court's grant of summary judgment.

II. Competing Affidavits and Summary Judgment

Cothran also argues that the trial court's order should be affirmed on its merits because when the evidence is viewed in the light most favorable to Brown, summary judgment is warranted. We agree.[4]

Brown contends that his conflicting affidavits together with McCray's affidavit, create an issue of fact that should preclude summary judgment. Cothran contends that Brown should not be permitted to create an issue of fact by submitting affidavits that conflict with his sworn statement prepared at the time of his guilty plea.

Because our courts have not spoken on this issue, we may seek guidance from federal cases. See Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure

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[4]The trial court based its ruling on the ground of judicial estoppel. This court, however, is not limited to that ground in affirming the trial court's order. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000); see Rule 220 (c), SCACR. However, this court should not base its decision on Rule 220(c) when the reason does not appear in the record or "when the court believes it would be unwise or unjust to do so in a particular case." Id.

are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."). Numerous federal courts have held that a party may not create an issue of fact for purposes of summary judgment by submitting an affidavit to contradict that party's own prior sworn affidavit. See generally 11 James W. Moore Moore's Federal Practice § 56.14[1][f] (3d ed. 2001) ("[P]arties may not intentionally create a triable issue of fact by submitting conflicting submissions."). Our own Fourth Circuit has held: "A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984).[5] We believe the federal precedent on this issue is sound and persuasive. Brown should not be permitted to create an issue of fact in order to survive summary judgment by submitting an affidavit that directly contradicts his own prior sworn testimony.

In cases of competing affidavits, we find that the trial court may disregard the later affidavit if it is submitted solely to create a factual issue to avoid summary judgment. See Rohrbough v. Wyeth Labs., Inc., 916 F.2d 970,

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[5]Other federal circuits have reached the same result. See Disc Golf Ass'n, Inc. v. Champion Disc, Inc., 158 F.3d 1002, 1008 (9th Cir. 1998) (stating that a party cannot create a triable issue of fact and thus escape summary judgment by contradicting his or her own testimony); Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998) ("Alas, not good enough: a party cannot create a triable issue by contradicting his own sworn testimony."); Hayes v. New York City Dep't of Corrs., 84 F.3d 614 (2nd Cir. 1996) (holding that a party may not create an issue of fact precluding summary judgment by submitting affidavit that, by omission or addition, contradicts affiant's previous testimony); Buckner v. Sam's Club, Inc., 75 F.3d 290, 292 (7th Cir. 1996) (stating a party may not create an issue of fact for purposes of summary judgment by submitting an affidavit contradicting prior testimony); Rios v. Bigler, 67 F.3d 1543 (10th Cir. 1995) (stating that a party may not create a sham factual issue to survive summary judgment by presenting an affidavit contrary to the affiant's prior testimony, and the subsequent affidavit should be disregarded))

975 (4th Cir. 1990) (affirming trial court's refusal to consider physician's conclusory affidavit issued in contradiction to his deposition testimony for the purpose of surviving summary judgment); Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986)("[C]ourts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue."). In this case, the second affidavit was not based on any facts unknown to Brown when he gave his first affidavit and was given only in the interest of furthering his comparative negligence claim. This situation is distinguishable from one in which the affiant's statements rely on newly discovered evidence or merely seek to explain earlier testimony. Franks at 1237. Accordingly, Brown's second affidavit should not have been considered by the trial court.

With respect to McCray's affidavit, we initially note that materials used to support or contravene a motion for summary judgment must be admissible at trial. See Moss v. Porter Bros., Inc., 292 S.C. 444, 448, 357 S.E.2d 25, 28 (Ct. App. 1987); Saro Invs. v. Ocean Holiday P'ship, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). The portion of her affidavit about what other people told her is inadmissible under the hearsay rule. See Rule 801, SCRE. Her statement "it is my belief that this is the same view that Alvin Brown would have had . . . and that this is the reason Mr. Brown swerved . . . ." is likewise inadmissible as opinion testimony of the ultimate fact at issue. See Richmond v. Tecklenberg, 302 S.C. 331, 334, 396 S.E.2d 111, 113 (Ct. App. 1990) ("The general rule is that opinion testimony which is determinative of the ultimate fact in issue should be excluded as an invasion of the province of the factfinder."). The remaining language in her affidavit does not create an issue of material fact.

With the exclusion of Brown's second affidavit and portions of McCray's affidavit, Brown's first affidavit leaves no issue of material fact as to liability. Accordingly, we also affirm the grant of summary judgment on this ground.

AFFIRMED.

CURETON, CONNOR, HUFF, JJ., and MANNING, A.J.,

concur.

GOOLSBY and STILWELL, JJ., concurring in part.

ANDERSON, J., concurring in result only.

PYLE, A.J., concurring in part and dissenting in part.

GOOLSBY, J. (concurring): I concur only in Part II of the majority opinion and would not reach the issue relating to judicial estoppel.

STILWELL, J.: I join in Judge Goolsby's concurring opinion.

ANDERSON, J. (concurring in result only): I respectfully concur in result only. I vote to **AFFIRM**.

This factual and legal scenario is imbued with a doleful and melancholic history. I disagree with the reasoning and analysis of the majority. The reliance by the majority on federal case law in analyzing Rule 56(c), SCRCP is unnecessary. The application of the judicial estoppel doctrine is dispositive. The case presents the paradigmatic judicial estoppel imbroglio.

I. Definition and Purpose of the Judicial Estoppel Doctrine

A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. See, e.g, Douglas v. Allen, 249 N.Y.S.2d 973, 977 (N.Y. Sup. Ct. 1964) ("[A] false oath smacks at the very foundation of our everyday moral code of human relations and to justice itself for without truth we could have no justice."). Therefore, a litigant cannot "blow both hot and cold." McDaniels v. General Ins. Co. of Am., 36 P.2d 829, 832 (Cal. Dist. Ct. App. 1934). Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements, or contentions made under oath, is prohibited from adopting an inconsistent posture in subsequent proceedings. See 28 Am. Jur. 2d Estoppel

and Waiver §74 (2000) ("The fundamental concept of judicial estoppel is that a party in a judicial proceeding is barred from denying or contradicting sworn statements made therein.") (footnote omitted); see also City of New York v. Black Garter, 685 N.Y.S.2d 606, 607-08 (N.Y. Sup. Ct. 1999) ("Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding … from assuming a contrary position in another action simply because his or her interests have changed.... The doctrine rests upon the principle that a litigant 'should not be permitted … to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.'") (citations omitted).

The purpose of judicial estoppel is to prevent the manipulation of the judicial system by the litigants. Case of Canavan, 733 N.E.2d 1042 (Mass. 2000); see also 31 C.J.S. Estoppel and Waiver § 139 (1996) ("The … function of judicial estoppel is to protect the integrity of the judicial process … rather than to protect litigants from allegedly improper conduct by their adversaries.") (footnotes omitted). A court invokes judicial estoppel to prevent a party from changing its position over the course of judicial proceedings. 31 C.J.S. Estoppel and Waiver § 139 (1996). The doctrine estops a party from playing "fast-and-loose" with the courts or to trifle with the proceedings. Id. (footnotes omitted).

A quintessential case illustrating the efficacy and application of judicial estoppel is Allen v. Zurich Insurance Company, 667 F.2d. 1162 (4th Cir. 1982). Allen was assisting Zurich's insured, Scruggs, in installing a mobile home when the home — which Scruggs had placed on blocks — shifted, fell, and crushed Allen's hand. Allen sued Scruggs in South Carolina state court on a negligence theory to recover for his injuries "while in the employment of the Defendant, Carl H. Scruggs …." Id. at 1163. Zurich defended Scruggs. The jury returned a verdict for Allen of $37,000, which Scruggs did not pay.

Allen then brought suit in federal court against Zurich to collect on Scruggs' automobile liability policy and alleged in the complaint he and Scruggs were joint venturers. Zurich claimed it was not liable because Allen was Scruggs' employee at the time of his injury and the policy expressly excluded

coverage for bodily injury to any employee. Allen testified he thought he was Scruggs' employee when the accident occurred, but now characterized their relationship as "working together." Id. During cross-examination, Allen admitted he had testified he was Scruggs' employee and was paid a weekly salary at the time of his injury in a South Carolina Industrial Commission hearing, in a deposition, and before the state court. A verdict was returned for Allen. Zurich moved for judgment notwithstanding the verdict on two grounds: (1) Allen's status as an employee of Scruggs was affirmatively adjudicated in state court and Allen was bound by that determination; and (2) the only reasonable inference to be drawn from the evidence presented at trial is that Allen was Scruggs' employee and acting within the scope of his employment when he was injured. The district court granted the motion on the second ground. Id. at 1164.

The Fourth Circuit affirmed the JNOV order on the grounds of judicial estoppel:

> Closely related to collateral estoppel, but dissimilar in critical respects, is another principle that we conclude should preclude Allen on the dispositive issue. In certain circumstances a party may properly be precluded as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation. "Judicial estoppel" is invoked in these circumstances to prevent the party from 'playing fast and loose' with the courts, and to protect the essential integrity of the judicial process.

Id. at 1166 (citations omitted).

The court was persuaded the doctrine was applicable in Allen's case: "Here is a party who, as the record conclusively shows, has earlier … asserted a legal position respecting his employment relationship with another that is completely at odds with the position now asserted." Id. at 1167 (footnote omitted).

Judicial estoppel's essential function and justification is "to prevent the use of 'intentional self-contradiction … as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" Id. (citation omitted).

II. History of the Application of Judicial Estoppel Doctrine by South Carolina State Courts

The South Carolina decision expressly embracing judicial estoppel is Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). However, several state court cases tangentially addressed judicial estoppel as a cognizable legal principle in South Carolina many years before the Hayne decision.

The Hayne Court explicitly adopted the doctrine, stating:

> In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

Id. at 251-52, 489 S.E.2d at 477.

While it noted some jurisdictions had expanded judicial estoppel to conclusions of law or assertions of legal theories, the Hayne Court held the doctrine's application applied only to inconsistent statements of fact. Id. at 251, 489 S.E.2d at 477 (citation omitted).

In Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971), the Supreme Court touched on the doctrine as it related to the case: "The defense of judicial estoppel has not been raised, and the facts appearing here would not

support it." Id. at 441, 179 S.E.2d at 601 (citation omitted).

In Zimmerman v. Central Union Bank, 194 S.C. 518, 8 S.E.2d 359 (1940), the dispositive issue was whether the Circuit Court or the state's banking board had jurisdiction over liquidation of the bank. In a prior matter, the receivers had successfully contended the banking board was empowered to govern the liquidation. In subsequent proceedings, the receivers took the opposite tack. The Court forbade the receiver's change in position by reciting a maxim promulgated by the United States Supreme Court in Davis v. Wakelee, 156 U.S. 680, 689, 15 S. Ct. 555, 558, 39 L. Ed. 578 (1895): "[W]here a party assumes a certain position in a legal proceeding … he may not thereafter, simply because his interests have changed, assume a contrary position." Id. at 532, 8 S.E.2d at 365.

This Court has applied judicial estoppel in several cases since the Hayne Court expressly adopted the doctrine. See, e.g., Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001) (per curiam); Quinn v. Sharon Corporation, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2001) (majority and concurring opinions); Hawkins v. Bruno Yacht Sales, 342 S.C. 352, 536 S.E.2d 698 (Ct. App. 2001), cert. granted.

III. Technical Application of the Judicial Estoppel Doctrine

Judicial estoppel is an equitable concept; therefore, its application is within the discretion of the court. 31 C.J.S. Estoppel and Waiver § 139 (1996). There is no fixed method or formula that courts must follow in the doctrine's application. Id.; Allen v. Zurich Insurance Company, 667 F.2d. 1162 (4th Cir. 1982). Nevertheless, an analytical construct has emerged to guide our courts' utilization of the doctrine.

The court must determine if the factual and procedural circumstances of a case at bar make application of judicial estoppel permissible. Proper application generally requires the satisfaction of the following five criteria:

(1) two inconsistent positions must be taken by the same party or parties in privity with each other;

(2) the two inconsistent positions were both made pursuant to sworn statements;

(3) the positions must be taken in the same or related proceedings involving the same parties in privity with each other;

(4) the inconsistency must be part of an intentional effort to mislead the court; and

(5) the two positions must be totally inconsistent — that is, the truth of one position must necessarily preclude the veracity of the other position.

Quinn v. The Sharon Corporation, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2001) (Anderson, J., concurring), discussed in John S. Nichols, Safeguarding the Truth in Court: The Doctrine of Judicial Estoppel, 13-FEB S.C. Law. 32 (2002).

These criteria have enjoyed the approbation of our appellate courts, as evinced by their recitation in several opinions following the Quinn concurrence. See, e.g, Carrigg, 347 S.C. at 83, 552 S.E.2d at 771-72.

The United States Supreme Court has recently addressed the issue of judicial estoppel. In New Hampshire v. Maine, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001), the Court presided over a boundary dispute between the two states. Specifically, New Hampshire contended its boundary with Maine ran along the Maine shore, such that the Piscataqua River and all of Portsmouth Harbor belonged to New Hampshire. The Court dismissed the suit, holding that under the doctrine of judicial estoppel, New Hampshire was equitably precluded from asserting the river's boundary ran along the Maine shore because the position was in contravention to the stance New Hampshire

took in litigation with Maine during the 1970's.

In the 1970's action, New Hampshire and Maine expressly agreed a 1740 decree fixed the boundary in the Piscataqua Harbor area. The states' quarrel was over the location of the 'Mouth of Piscataqua River,' 'Middle of the River,' and 'Middle of the Harbour' within the contemplation of the decree. The states drafted a settlement in which they agreed the words "Middle of the River" in the 1740 decree referred to the middle of the Piscataqua River's main channel of navigation. The United States Supreme Court accepted the agreement and issued a final decree, which defined "Middle of the River" as "the middle of the main channel of navigation of the Piscataqua River." Id. at 747, 121 S. Ct. at 1813 (citation omitted). Because of this previous litigation, New Hampshire was precluded from asserting a different argument concerning the boundary's location in the later action.

In its analysis, the Court articulated three factors it found beneficent when determining whether judicial estoppel should be applied against New Hampshire's claims:

> First, a party's later position must be "clearly inconsistent" with its earlier position.
>
> . . . .
>
> Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled[.]" Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity.
>
> . . . .
>
> A third consideration is whether the party seeking to assert an

> inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750, 121 S. Ct. at 1815 (citations omitted).

The New Hamphire Court's factor concerning a litigant's prior success in persuading a tribunal to accept the litigant's earlier position differs from the policy articulated within the Quinn concurrence. Quinn was influenced in large part upon the rule enunciated within the seminal case involving the judicial estoppel doctrine, Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39 (Tenn. 1857). Under the Hamilton rule, anytime a party asserts a position under oath, that party is precluded from repudiating that position in a later proceeding. Hamilton, 37 Tenn. (5 Sneed) at 47-48, analyzed in Rand G. Boyers, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw. U. L. Rev. 1244 (1986).

With the enumeration of the five factors in the Quinn concurrence and Carrigg, South Carolina clearly did not adopt the Hamilton rule in a wholesale manner. Limitations on the application of judicial estoppel do exist. Nevertheless, the Quinn concurrence demonstrates there is sanctity in the oath and whether the litigant enjoyed prior success with an earlier averment is immaterial:

> As originally conceived in Hamilton v. Zimmerman, the doctrine of judicial estoppel was based solely on the sanctity of the oath. Under this philosophy, the fact a litigant is using the court as a forum for his inconsistent statements injures the judicial system; therefore, such abuse must be avoided under all circumstances. Any perpetuation of untruth or misrepresentation eviscerates public confidence in the integrity of the judicial system. **Accordingly, whether a party was successful or not in propounding the validity of its initial position is immaterial: the party will be judicially estopped from assuming a different stance, relating to the facts, in subsequent proceedings.**

Id. at 422, 540 S.E.2d at 480 (emphasis added) (citations omitted).

In contrariety, the majority of jurisdictions that recognize the doctrine of judicial estoppel follow the "judicial integrity" policy. Boyers, supra, at 1252. This policy provides the rationale for the "prior success" condition. Id. at 1253. The policy is grounded in the following logic: If there was no previous judicial acceptance of the contrary position, then no risk of inconsistent results exists. If there is no risk of inconsistent results, then the integrity of the judicial process is not threatened. If the integrity of the judicial process is not threatened, then there is no policy justification warranting application of judicial estoppel. Id.

Support for application of the judicial estoppel doctrine without a showing of prior success can be found in Allen v. Zurich Insurance Company, 667 F.2d. 1162 (4th Cir. 1982), a federal appellate court case emanating from South Carolina. In Allen, the Fourth Circuit stated application of the judicial estoppel doctrine is "perhaps not necessarily confined to situations where the party asserting the earlier contrary position there prevailed …." Id. at 1167.

Additionally, our Supreme Court has arguably indicated prior success is not a criterion with its condition-less pronouncement regarding application of the doctrine in Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997): "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." Id. at 252, 489 S.E.2d at 477.

Moreover, the New Hampshire Court itself gives tribunals the discretion to examine whatever factors they desire when considering application of judicial estoppel:

> **In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel.** Additional considerations may inform the doctrine's application in specific factual contexts.

Id. at 752, 121 S. Ct. at 1815 (emphasis added).

A conclusive determination of the course South Carolina's state courts should follow concerning the prior success element is unnecessary for purposes of adjudicating the instant case. The appellant, Alvin Brown, averred at the guilty plea hearing that he was solely responsible for the accident. This asseveration was clearly a tactic Brown used to obtain a lesser sentence from the plea judge. A defendant's admission of guilt is a proper consideration for a plea judge when considering the defendant's sentence. See State v. Brouwer, 346 S.C. 375, 391, 550 S.E.2d 915, 924 (Ct. App. 2001) (Anderson, J., dissenting) ("A genuine admission of guilt may properly result in a lighter sentence than would be appropriate for an intransigent and unrepentant malefactor.") (citation omitted). Brown's admission at the plea hearing was arguably successful, especially in light of the egregiousness of his crime. Instead of receiving the ten-year maximum prescribed by statute, the plea judge sentenced Brown to a six-year term.

IV. Application of the Judicial Estoppel Doctrine in the Case Sub Judice

Respondent Ferrell Cothran, as personal representative of the Estate of Douglas H. McFaddin, contends this Court erred in its initial opinion by concluding Brown has not yet had a full and fair opportunity to dispute whether McFaddin contributed to the accident. To the contrary, the record clearly reveals the relative degree of culpability and Brown's lata cupla were at issue and decided at the guilty plea hearing. Brown is bound by the factual admissions and statements he made during those proceedings, which definitively show Brown was completely responsible for causing the accident. Accordingly, I find Brown has had a full and fair opportunity to contest the issue of McFaddin's relative fault.

Indubitably, Brown made the relative fault of the parties an issue in his guilty plea. He did so by specifically representing to the plea judge the accident was a result of his drinking and that no "blame whatsoever should be placed on Mr. McFaddin," who Brown declared did not have "anything to do

with the accident." Brown intentionally put this issue before the plea judge with the goal of obtaining a lesser sentence. Brown did obtain a lesser sentence — instead of receiving the ten-year maximum sentence authorized by statute for reckless homicide, he was sentenced to a six-year term of imprisonment.

Considering the fact the relative fault of the parties was at issue during the guilty plea and Brown specifically represented McFaddin was not to blame for the accident whatsoever, and further considering Brown obtained the benefit of a reduced sentence after having accepted responsibility for the accident, I conclude the Circuit Court was correct in holding Brown was judicially estopped from contesting liability in the civil suit. The circuit judge properly granted summary judgment to Cothran on the issue of liability.

PYLE, A.J. (concurring in part and dissenting in part): I would hold that the trial judge was correct in granting summary judgment against the defendant on the issue of liability but was in error in applying the doctrine of judicial estoppel to the facts of this case.

"Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1977). The trial judge erred in finding Brown's position, that McFaddin contributed to the accident, was inconsistent with his position during his guilty plea and that it was an intentional attempt to mislead the court in order to gain an unfair advantage in the civil proceeding. Brown's attorney, at his plea, conceded Brown's recklessness, asserted that McFaddin's headlights confused Brown. He had experts prepare a video of the scene as it appeared at the time of the accident to demonstrate Brown's confusion. Brown himself asserted he was blinded because McFaddin was parked in a curve facing him and that had he swerved to the left instead of the right he possibly would have hit another motorist head on.

I believe that:

1. McFaddin's negligence, if any, was not an issue that had to be considered by the court in connection with Brown's plea to reckless homicide.

2. Brown's recklessness did not have to be the sole proximate cause for him to be found guilty of reckless homicide so long as it is a proximate cause.

3. In the civil context, any negligence on the part of McFaddin would be used to reduce the amount of Cothran's recovery in direct proportion to the percentage of McFaddin's negligence under the concept of comparative negligence.

4. While Brown is bound by his factual admissions from his guilty plea, the relative degree of culpability was not at issue nor was it decided in the prior proceeding. Because plaintiff's relative fault, if any, was not an issue in his guilty plea, Brown has not yet had a full and fair opportunity to contest it.

5. The grant of summary judgment in Cothran's favor on the basis of judicial estoppel was inappropriate.

I disagree that the circuit court's grant of partial summary judgment on the issue of liability should be reversed and remanded. I would affirm the granting of partial summary judgment on the issue of Brown's liability, but would reverse the circuit court's application of judicial estoppel to this case.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Milton Herring,

Appellant/Respondent,

v.

Home Depot, Inc. and Deere & Company,

Respondents/Appellants.

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

Opinion No. 3496
Heard April 10, 2002 - Filed May 20, 2002

REVERSED

C. Steven Moskos, of North Charleston, for appellant/respondent.

M. Dawes Cooke, Jr., and Philip S. Ferderigos, both of Barnwell, Whaley, Patterson & Helms, of Charleston, for respondents/appellants.

GOOLSBY, J.: Milton Herring filed this action in magistrate's court asserting claims for revocation of acceptance, breach of warranty, violation of the Magnuson-Moss Warranty Act, and unfair trade practices against Home Depot, Inc., and Deere & Co. (Defendants), alleging a lawn mower he purchased was defective. The jury returned a verdict in Herring's favor on the claim for revocation of acceptance, but denied recovery on the breach of warranty claim. On appeal, the circuit court granted the Defendants a new trial on the ground the jury verdict was inconsistent. Herring and the Defendants cross-appeal. We reverse.

FACTS

On March 4, 1999, Herring purchased a 1999 Scotts Riding Mower at a Home Depot in Charleston County. The purchase price was $3,495.88. The mower was covered by a two-year, limited warranty issued by the manufacturer, Deere & Co. The limited warranty provided Deere would "repair or replace, at its option, any covered part which is found to be defective in material or workmanship during the applicable warranty term," and that warranty repairs had to be performed by an authorized repairman.

According to Herring, he advised the sales personnel at Home Depot that because of health problems, he needed an easy-to-ride mower that could cut his almost two-acre yard. Hip replacements in both hips made it impossible for Herring to use a push mower. According to Herring, a Home Depot salesperson advised him that the Scotts Riding Mower would be perfect for his needs.

The first few times Herring used the mower, he did not notice any problems. In July 1999, as Herring attempted to mow his yard, the mower made a loud noise, the engine smoked, and then it stopped running. Herring contacted Home Depot and later Deere. Deere directed Herring to take the mower to Whitesville Lawn and Farm Equipment, an authorized service center. Herring did so. Whitesville replaced the engine seal and returned the mower approximately two weeks later. When Herring picked up the mower, he noticed it rattled, vibrated, and smoked.

For several days, Herring tried unsuccessfully to speak to the service manager at Whitesville. Each time Herring called, the manager was either busy or out of the office. Within a few minutes of Herring's last attempt to call, when Whitesville told Herring the manager would not be in that day, Herring's wife was able to reach the manager by giving her maiden name to the person who answered the phone. When the manager was on the line, Herring's wife gave Herring the phone and Herring informed him the mower was still making noise. The manager stated he would call the factory to see if it would authorize a replacement engine. A few days later, the manager called back and said he had a replacement engine and would install it. Herring took the mower back to Whitesville on July 27, 1999.

On July 29, 1999, when Herring picked up the mower, he noticed it was still making the same loud noise, notwithstanding Whitesville's claim to have replaced the engine. Herring later testified, "I didn't say anything to [Whitesville] because I knew it wouldn't do any good."

Herring showed the mower to another mechanic, Ken Gusta, the owner of Gusta Outdoor Power Equipment. Gusta replaced the engine oil but did not make any mechanical repairs. Approximately ten minutes after Gusta started the engine, smoke started pouring out of the engine cover, the engine wires caught fire and melted, and the engine died. Gusta advised Herring the mower had an electrical problem.

Herring called Home Depot and asked for a refund. Home Depot denied any responsibility for the mower and referred Herring to Whitesville. Herring told them he had already taken the mower to Whitesville twice but it was not repaired properly. In Herring's opinion, Whitesville misrepresented that it installed a new engine.

In January 2000, Herring filed this action in the Charleston County Small Claims Court against Defendants, asserting causes of action for (1) revocation of acceptance, (2) breach of implied and express warranties, (3) violation of the Magnuson-Moss Warranty Act, and (4) violation of the Unfair Trade Practices

Act (UTPA). Herring further alleged nonconformities in the mower made it impossible to use for its intended purpose and Defendants "unreasonably and unfairly" refused to accept his return of the mower and give him a refund of the purchase price. Herring also alleged "Defendant John Deere has failed to correct the . . . mower's defects after attempting numerous times to do so" and, although John Deere attempted to limit his rights to repair or replacement of any defective parts, "this exclusive remedy has failed of its essential purpose." Defendants' answer denied the claims and asserted nineteen defenses.

At trial, the jury awarded Herring $3,695.88 on his claim for revocation of acceptance.[1] The magistrate later reduced this amount to $3,495.88, the purchase price of the mower. Defendants appealed to the circuit court.

The circuit court ruled the jury verdict permitting revocation of acceptance without a finding of breach of warranty was inconsistent as a matter of law and reversed, ordering a new trial. Herring and the Defendants cross-appeal from this order.

LAW/ANALYSIS

I. Herring's Appeal

Herring argues the circuit court erred in granting a new trial based on an inconsistent jury verdict. We side with Herring.

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[1] According to the circuit court's order in this case, the amount of the jury verdict represented the cost of the lawnmower ($3,495.88) plus $200.00 "in incidental/consequential damages." Herring testified he spent "several hundred dollars" repairing his old lawn mower so that he could use it when the Deere mower quit working.

Breach of warranty and revocation of acceptance are independent, discrete causes of action. In General Motors Acceptance Corp. v. Anaya,[2] the court explained, "[t]he theories 'are two distinct strands of buyer's remedies under the Code.' Although a buyer may pursue either or both, they are 'separate remedies treated in entirely different sections of the Code and they offer separate forms of relief.'"[3]

When an exclusive or limited warranty fails of its essential purpose, a party who purchases a product covered by such a warranty is not limited to an action for breach of warranty but may seek other remedies, including revocation of acceptance.[4] A warranty fails of its essential purpose if the seller is unwilling or unable to repair or replace the product or if there is an unreasonable delay in the repair or replacement of the product.[5]

Section 36-2-608[6] describes the elements of a cause of action for revocation of acceptance.

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
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> (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

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[2] 703 P.2d 169 (N.M. 1985).

[3] 703 P.2d at 171 (citation omitted).

[4] S.C. Code Ann. § 36-2-719(2) (1976).

[5] Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027 (D.S.C. 1993).

[6] S.C. Code Ann. § 36-2-608 (1976).

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

An action for breach of warranty requires the existence of an express or implied warranty as described in sections 36-2-313 and 36-2-314,[7] respectively, or an implied warranty of fitness for a particular purpose, as defined in section 36-2-315.[8]

Breach of warranty is an action affirming the contract.[9] In an action for breach of warranty, the buyer retains the goods.[10] Revocation of acceptance, on the other hand, requires the return of the goods and cancellation of the terms of a contract.[11]

Additionally, the tests for a cause of action for breach of warranty differ from those for revocation of acceptance.

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[7] Id. §§ 36-2-313 to -314.

[8] Id. § 36-2-315.

[9] Genetti v. Caterpillar, Inc., 621 N.W.2d 529 (Neb. 2001).

[10] Griffith v. Latham Motors, Inc., 913 P.2d 572 (Idaho 1996).

[11] Id. at 577.

> When goods do not conform to a promise or an affirmation of fact made by a seller, or the goods do not conform to a description, sample, or model, then a seller has breached an express warranty. If the goods are not merchantable, then the seller has breached an implied warranty. These are objective tests.
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> In contrast, to revoke acceptance, the goods must have a nonconformity that substantially impairs the value of the goods to the buyer. This is a subjective test.[12]

Other jurisdictions have held a finding of breach of warranty is not necessary to sustain an action for revocation of acceptance.[13] In Griffith v. Latham Motors, Inc.,[14] the Idaho Supreme Court specifically addressed whether a jury verdict permitting revocation of acceptance against a party was inconsistent with a jury finding that same party had not breached a warranty. The court concluded there was no inconsistency, finding "[w]hether an express or implied warranty has been breached is included in the revocation determination only in the sense that a breach of a warranty could substantially impair the value of the goods to the buyer. But the determinations each have a different standard." [15]

Because of the contradictory elements, if the facts sustain one cause of action, the other cannot be present. At least one court has noted that a verdict entitling plaintiff to recovery on both causes of action, as defendants argue was

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[12] Id. (citations omitted).

[13] See, e.g., Page v. Dobbs Mobile Bay, Inc., 599 So.2d 38 (Ala. Civ. App. 1992) (finding plaintiff not required to prove breach of warranty to recover under theory of revocation of acceptance); Seekings v. Jimmy GMC of Tucson, Inc., 638 P.2d 210 (Ariz. 1981); Griffith, 913 P.2d at 577.

[14] 913 P.2d 572.

[15] Id. at 577 (citation omitted).

required in this case, would itself be inconsistent because a finding of one extinguishes the other.[16]

In this case, the jury properly recognized that Herring was not entitled to recover on both causes of action and only permitted him to recover on the action for revocation of acceptance.[17] There was no error in this verdict.

Accordingly, we find the circuit court erred in granting a new trial on the ground that a jury award for revocation of acceptance is inconsistent with a jury's denial of a recovery under a breach of warranty theory. We therefore reverse the circuit court's order and reinstate the jury's verdict.

II. Defendants' Appeal

On appeal, Defendants contend the circuit court erred by granting a new trial because the remedy of revocation of acceptance is not a separate cause of action and by denying their motion for directed verdict on the grounds that (1)

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[16] In General Motors v. Anaya, the court observed:

> There was substantial and persuasive evidence to support the jury's finding of liability under the Anayas' claim of revocation of acceptance. Consequently, the additional finding of liability under breach of warranty by the jury is inconsistent as a matter of law, and j.n.o.v. on damages for breach of warranty was correct.

Id. at 172 (citations omitted).

[17] The general verdict form did not require the jury to make a specific finding the warranty failed of its essential purpose. Defendants make a conclusory argument that Herring is not entitled to recover "unless there is a breach of warranty and the warranty fails its essential purpose." (Emphasis added.) For the reasons discussed above, we disagree that Herring was also required to prove breach of warranty.

the evidence showed Herring purposely failed to provide a sufficient opportunity for Deere to repair or replace the mower and (2) there is no evidence the warranty failed of its essential purpose because the uncontroverted evidence showed the mower could be repaired.

A.

In finding above that the circuit court erroneously reversed the jury verdict, we have disposed of defendant's argument that the trial court erred in charging the jury as to both revocation of acceptance and breach of warranty.[18]

B.

Regarding the Defendants' argument concerning the magistrate's denial of their motion for directed verdict, our review of this issue is precluded by the fact that the circuit court did not rule on it.[19]

REVERSED.

HEARN, C.J., and HOWARD, J. concur.

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[18] Nonetheless, we note that in Adams v. Grant, 292 S.C. 581, 358 S.E.2d 142 (Ct. App. 1986), this court found the trial court did not err in submitting both causes of action to the jury. See also Official Comment, S.C. Code Ann. § 36-2-608 (1976).

[19] To preserve an issue for review on appeal, a party must raise the issue and obtain a ruling. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).