Judicial Merit Selection Commission

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

M E D I A R E L E A S E

June 18, 2001

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

Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6610

The commission will not accept applications after **12:00 noon on Tuesday, July 17, 2001**.

The term of the office currently held by the Honorable John H. Waller, Jr., Associate Justice of the Supreme Court, Seat 4, will expire on July 31, 2002.

The term of the office currently held by the Honorable H. Samuel Stilwell, Judge of the Court of Appeals, Seat 7, will expire on June 30, 2002.

A vacancy exists in the office currently held by the Honorable J.C. Nicholson, Jr., Judge of the Circuit Court, At-Large Seat 7, whose term will expire on June 30, 2003.

The term of the office currently held by the Honorable Alison Renee Lee, Judge of the Circuit Court, At-Large Seat 11, will expire on June 30, 2002.

The term of the office currently held by the Honorable James E. Brogdon, Jr., Judge of the Circuit Court, At-Large Seat 12, will expire on June 30, 2002.

The term of the office currently held by the Honorable John L. Breeden, Jr., Judge of the Circuit Court, At-Large Seat 13, will expire on June 30, 2002.

A vacancy will exist in the office currently held by the Honorable Ruben L. Gray, Judge of the Family Court for the Third Judicial Circuit, Seat 1, upon Judge Gray's retirement on July 5, 2002. The successor will fill the unexpired term of Judge Gray, which expires on June 30, 2004.

The term of the office currently held by the Honorable James A. Spruill, III, Judge of the Family Court for the Fourth Judicial Circuit, Seat 3, will expire on June 30, 2002.

The term of the office currently held by the Honorable Walter B. Brown, Jr., Judge of the Family Court for the Sixth Judicial Circuit, Seat 2, will expire on June 30, 2002.

A vacancy exists in the office currently held by the Honorable Deadra L. Jefferson, Judge of the Family Court for the Ninth Circuit, Seat 5, whose term will expire on June 30, 2002.

A vacancy will exist in the office currently held by the Honorable Amy C. Sutherland, Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 3, upon Judge Sutherland's retirement on June 30, 2002. The successor will fill the unexpired term of Judge Sutherland, which expires on June 30, 2004.

The term of the office currently held by the Honorable Robert N. Jenkins, Sr., Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 5, will expire on June 30, 2002.

The term of the office currently held by the Honorable Haskell T. Abbott, III, Judge of the Family Court for the Fifteenth Judicial Circuit, Seat 3, will expire on June 30, 2002.

The term of the office currently held by the Honorable C. Dukes Scott, Judge of the Administrative Law Judge Division, Seat 2, will expire on June 30, 2002.

The term of the office currently held by the Honorable John B. Williams, Master-in-Equity for Berkeley County, will expire on November 7, 2002.

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The Supreme Court of South Carolina

NOTICE OF PUBLIC HEARING AND REQUEST FOR WRITTEN COMMENTS

The Court is considering the repeal of the current Administrative and Procedural Rules for Magistrate's Court and the adoption of the attached South Carolina Rules of Magistrates Court. The Court will hold a public hearing regarding the proposal on October 8, 2001, at 2:30 p.m. in the Supreme Court Courtroom and solicits the input of the bench, bar, and public.

Persons desiring to submit written comments regarding this proposal may do so by filing an original and seven (7) copies of their written comments with the Supreme Court addressed to The Honorable Daniel E. Shearouse, Clerk of Court, P.O. Box 11330, Columbia, South Carolina 29211. Any written comments must be received by the Supreme Court by Friday, August 31, 2001.

Columbia, South Carolina
June 18, 2001

SOUTH CAROLINA RULES OF MAGISTRATES COURT

SCOPE & PURPOSE

These rules govern civil procedure in the magistrates courts. They are to be known and cited as the "South Carolina Rules of Magistrates Court." They shall be construed to secure the just, speedy, and inexpensive determination of every civil case within the jurisdiction of the magistrates court. All civil actions in the magistrates court shall be conducted in such a manner as to do substantial justice between the parties according to the rules of substantive law.

RULE 1
DEFINITIONS

"Amendment" means making a change in a complaint, answer, or counterclaim.

"Answer" means the paper filed by the party responding to the complaint.

"Complaint" means the paper containing the claim filed by the plaintiff.

"Counterclaim" means the paper containing a claim by a defendant against a plaintiff.

"Court" means the judge of the magistrates court.

"Default" means failure to respond to the complaint or failure to appear at trial.

"Defendant" means the party against whom the plaintiff has filed a complaint.

"Discovery" means a method of obtaining information regarding another party's claim or defense.

"Execution" means enforcement of the judgment.

"Judgment" means the decision of the court on the case.

"Party" means either a plaintiff or a defendant.

"Plaintiff" means the party filing the complaint.

"Subpoena" means an order of the court requiring a witness to attend and testify at a specified place and time.

"Summons" means the paper issued by the court which orders the defendant to respond to the complaint.

"Working day" means a day which is not a Saturday, Sunday, or legal holiday under state or federal law.

RULE 2
APPLICATION OF STATUTORY LAW AND CIRCUIT COURT PRACTICE IN ABSENCE OF RULE

These rules shall govern all civil suits in the magistrates court. If no procedure is provided by these rules, the court shall proceed in a manner consistent with the statutory law applicable to magistrates and with circuit court practice in similar situations but not inconsistent with these rules.

RULE 3
COMPUTATION OF TIME PERIODS

In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default after which the designated period begins to run is not to be included. The last day of the period so computed is to be included unless it is not a working day, in which event the period runs until the end of the next day which is a working day. When the period of time prescribed or allowed is less than seven days, only working days shall be included in the computation. A half holiday shall be construed as a working day.

RULE 4
FILING CIVIL ACTION; ACTION AGAINST CORPORATION; LONG ARM STATUTE

(a) A civil action may be filed in any magistrates court in the county in which at least one defendant resides, except that civil actions against corporations may be filed in any county where such corporation shall have or shall usually keep an office or agent for the transaction of its usual and customary business.

(b) A civil action may be filed in any magistrates court in the county in which the plaintiff resides or where the cause of action arose when the defendant does not reside in this State and jurisdiction is based upon South Carolina Code Ann. § 36-2-803.

RULE 5
COMPLAINT

(a) A suit is commenced by filing with the magistrates court a short and plain written statement of the facts showing what the plaintiff claims and why the claim is made. Provided, however, upon a personal appearance, the plaintiff may make an oral statement which shall be reduced to writing. The court or court personnel shall assist the plaintiff in reducing the statement to writing if the court determines assistance is required. This statement shall be called a complaint. A plaintiff may combine as many claims as the plaintiff has against a defendant in one case and may sue more than one

defendant in one case if the claim involves all of the defendants.

(b) The plaintiff shall state on the complaint the address to which the court may mail notices and correspondence concerning the case. If the plaintiff's mailing address changes, the plaintiff must advise the court in writing. The court may notify the plaintiff of all proceedings incident to the case by mailing the notice by regular mail to the plaintiff at the address provided.

(c) A plaintiff who desires to file an action without costs shall file a motion for leave to proceed *in forma pauperis*, together with the complaint proposed to be filed and an affidavit showing the plaintiff's inability to pay the fee required to file the action. If the motion is granted, the plaintiff may proceed without further application and file the complaint in the court without payment of filing fees.

RULE 6
SUMMONS; SERVICE

(a) Upon the filing of the complaint and a copy with any attachments for each defendant, the court shall issue a summons. A copy of the original summons, along with a copy of the complaint and any attachments, shall be served on each defendant.

(b) The summons shall contain the name of the State and county, the name of the court, the file number of the action, and the names of the parties, be directed to the defendant, and shall state the time within which these rules require the defendant to file an answer and any counterclaim, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant for the relief demanded in the complaint.

(c) Service of the summons may be made by the sheriff, the sheriff's deputy, a magistrate's constable, or by any other person not less than eighteen (18) years of age, who is not an attorney in or a party to the action. Service of all other process shall be made by the sheriff or the sheriff's deputy, a magistrate's constable, or any other duly constituted law enforcement officer, or by any person designated by the court who is not less than eighteen (18) years of age and who is not an attorney in or a party to the action.

(d) The summons and complaint must be served together. The plaintiff shall furnish the person making service with as many copies as are necessary. Voluntary appearance by the defendant is equivalent to personal service. Service shall be made as follows:

(1) Individuals. Upon an individual other than a minor under the age of fourteen (14) years or an incompetent person, by delivering a copy of the summons and complaint to the individual personally or by leaving copies of the summons and complaint at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion, or by delivering a copy to an agent authorized by

appointment or by law to receive service of process.

(2) Minors and Incompetents. Upon a minor under the age of fourteen (14) years, a person judicially declared incapable of conducting the person's own affairs, or an incompetent person, by delivering a copy of the summons and complaint to the minor or incompetent person personally and also a copy to (a) the person's guardian or committee or, if there is no guardian or committee within the State, upon (b) a parent or other person having the care and control of the person, or (c) any competent person with whom the person resides or (d) by whom the person is employed. If the individual upon whom service is made is a minor between the ages of fourteen (14) and eighteen (18) who lives with a parent or guardian, a copy of the summons and complaint shall also be served upon the parent or guardian if the parent or guardian resides within the State. Service on persons confined shall also conform to the provision of S.C. Code Ann. § 15-9-510.

(3) Corporations and Partnerships. Upon a corporation, a partnership, or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process, and if the agent is one authorized by statute to receive service and the statute requires it, by also mailing a copy to the defendant.

(4) Governmental Subdivision. Upon a municipal corporation, county, or other governmental or political subdivision subject to suit in the magistrates court, by delivering a copy of the summons and complaint to the governmental subdivision's chief executive officer or clerk, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any similar process upon this type of defendant.

(5) Statutory Service. Service upon a defendant of any class referred to in paragraph (d)(1) or (d)(3) of this rule is also sufficient if the summons and complaint are served in the manner prescribed by statute.

(6) Service by Certified Mail. Service of a summons, complaint, and any appropriate attachments upon a defendant of any class referred to in paragraph (d)(1) or (d)(3) of this rule may be made by certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default judgment unless the record contains a return receipt showing the acceptance by the defendant. Any default judgment shall be set aside pursuant to Rule 13 if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person. If delivery is refused or is returned undelivered, service shall be made as otherwise provided by these rules. When the service is by mail, double the time required in cases of personal service shall be given and the summons shall state that double the time is given.

(e) Summons: Other Service. Whenever a statute or an order of the court provides for service of a summons and complaint, a notice, or an order upon a party not an inhabitant or found within the county of the court's jurisdiction, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the State and, when a statute so provides, beyond the territorial limits of the State. A subpoena may be served within the county of the court's jurisdiction. Nothing in this subdivision is meant to extend the jurisdiction of the magistrates court beyond the limits otherwise established by law.

(g) Proof and Return. The person serving the process shall promptly make proof of service and deliver it to the court. If served by the sheriff, the sheriff's deputy, or a magistrate's constable, proof of service shall be made by certificate. If served by any other person, the person shall make an affidavit of service. If served by publication, the printer or publisher shall make an affidavit of publication, and an affidavit of mailing shall be made by the party or the party's attorney if mailing of process is permitted or required by law. Failure to make proof of service does not affect the validity of the service. The proof of service shall state the date, time, and place of service and, if known, the name and address of the person actually served at the address of the person to be served, and if not known, then the date, time and place of service and a description of the person actually served. If service was by mail, the person serving process shall show in the proof of service the date and place of mailing, and attach a copy of the return receipt or the returned envelope showing whether the mailing was accepted, refused, or otherwise returned. If the mailing was refused, the return shall also show proof of any further service on the defendant pursuant to paragraph (d)(6) of this rule. The return along with the receipt or envelope and any other proof shall be promptly filed with the court with the pleadings and become a part of the record.

(h) Proof of service outside the State. When the service is made outside of the State, the proof of service may be made by affidavit before:

(1) Any person in this State authorized to make an affidavit;
(2) A commissioner of deeds for this State;
(3) A notary public who shall affix to the proof of service an official seal;
(4) A clerk of court of record who shall certify the same by an official seal;

or,

(5) If made outside the limits of the United States, a consul, vice-consul, or consular agent of the United States who shall use in the certificate an official seal.

(i) Amendment. At any time in its discretion and upon terms it deems just, the court may, by written order, allow any process or proof of service to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the

party against whom the process issued.

(j) Acceptance of Service. No other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or the person's attorney and delivered to the court. The acknowledgment shall state the place and date service is accepted.

(k) Dismissal of Summons and Complaint. Subject to the provisions of any statute, rule, or order, a magistrate may dismiss a summons and complaint against any or all defendants without prejudice to the plaintiff if service of process cannot be obtained within ninety (90) days of the filing of the complaint.

RULE 7
TIME FOR FILING ANSWER AND COUNTERCLAIM

A defendant shall file an answer and any appropriate counterclaims with the court within thirty (30) days from the first day after the date of service. When service is by mail, as provided for in Rule 6(d)(6), the defendant shall file the answer and any appropriate counterclaims within sixty (60) days from the first day after the date of service, which time period shall be stated in the summons. When service is by some other means, as provided for in Rule 6, the defendant shall file the answer and any appropriate counterclaims with the court within the time period designated by the statute, rule, or order, and the time period shall be stated in the summons.

RULE 8
DELIVERY AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Delivery: When required. Every order, pleading after the original summons and complaint, written motion, written notice, appearance, demand, offer of judgment, interrogatory, or similar documents shall be delivered to each of the parties unless otherwise ordered by the court. Pleadings asserting new or additional claims for relief, however, shall be served in the manner provided for serving of the summons in Rule 6.

(b) Same: How Made. Whenever under these rules delivery of documents is required to be made upon a party represented by an attorney, delivery of the documents shall be made to the attorney unless otherwise ordered by the court. Delivery of a document to a party shall be made by delivering it to that party or by mailing it to the party's last known address or, if no address is known, by filing it with the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the office of the attorney or the party with a clerk or other person in charge of the office; or, if there is no one in charge, leaving it at the party's usual place of abode with a resident of suitable age and discretion; or mailing it to the last known address of that party. Delivery by mail of all pleadings and papers after service of the original summons and complaint is complete upon mailing.

(c) Service or Delivery on Sunday. Civil process may be served on Sundays, provided that no person may be served going to or from or attending a regularly or specially scheduled church or religious service on Sunday.

RULE 9
ANSWER

The defendant may reply to the plaintiff's complaint at any time within the period specified by these rules for filing an answer by filing a written statement in a form approved by the magistrate or by personally appearing and making an oral statement. This reply shall be called an "answer." If the defendant personally appears within the specified time period and makes an oral answer, it shall be reduced to writing. The court or court personnel shall assist the defendant in reducing the answer to writing if the court determines assistance is required. The defendant's answer may deny in total or in part any or all of the material allegations made in the plaintiff's complaint, and/or allege any new matter constituting a defense. The court shall deliver a copy of the answer to the plaintiff in a manner provided for in Rule 8.

RULE 10
COUNTERCLAIM

(a) At any time within the time period specified in these rules for answering the complaint, the defendant may assert a counterclaim which grows out of the same transaction or occurrence as the plaintiff's claim by filing a written statement in a form approved by the magistrate or by personally appearing and making an oral statement. If the defendant personally appears within the specified time period and makes an oral counterclaim, it shall be reduced to writing. The court or court personnel shall assist the defendant in reducing the counterclaim to writing if the court determines assistance is required. The counterclaim shall be delivered to the plaintiff by the court in a manner provided for in Rule 8. The claims contained in the counterclaim shall be deemed denied by the plaintiff and no answer or reply is required to be filed by the plaintiff in response to a counterclaim filed by the defendant.

(b) The defendant in a counterclaim may waive the excess of the claim over the jurisdictional maximum to bring it within the jurisdiction of the magistrates court. If the defendant elects to waive a portion of the counterclaim, a separate action for the remainder of the claim may not be maintained. If the defendant does not waive the excess, the entire action shall be transferred to the circuit court of the county to be considered and tried as if the action had been originally filed in the circuit court as provided for in Rule 13(j), SCRCP.

RULE 11
TRIAL DATE; NOTICE; FAILURE TO ANSWER

(a) Upon the filing of an answer by the defendant, the magistrate shall set the

date of trial and deliver notice of the trial date to both parties in a manner provided for in Rule 8.

(b) If the defendant has failed to answer within the time period specified by these rules, the magistrate shall set a hearing date and shall deliver notice of the hearing date to both parties in a manner provided for in Rule 8 when the hearing is necessary for the entering of a default judgment in a manner consistent with Rule 12. At the default hearing, the defendant may participate only by cross-examining witnesses and objecting to evidence.

RULE 12
DEFAULT JUDGMENT; DISMISSAL OF ACTION; DAMAGES

(a) If the defendant does not answer the complaint within the time period specified by these rules or answers within the specified time period but then fails to appear at the time set for trial, judgment may be given for the plaintiff by default if the amount of the claim is liquidated. If the claim is unliquidated, and the defendant fails to answer within the time period specified by these rules or answers within the specified time period but then fails to appear at the time set for trial, judgment may be given to the plaintiff by default as in the case of liquidated claims if (1) the plaintiff itemizes the account and attaches an affidavit that it is true and correct and that no part of the sum sued for has been paid by discount or otherwise and (2) a copy of the account and affidavit was served with the summons on the defendant. In all other cases when the defendant fails to appear or answer, the plaintiff cannot recover without proving damages.

(b) If the plaintiff does not appear at trial or if neither the plaintiff nor the defendant appears at the time and place specified for trial, the court may enter an order dismissing the action.

(c) If the defendant has filed a counterclaim against the plaintiff and the plaintiff fails to appear at the time set for trial, judgment may be given for the defendant by default if the claim is liquidated. If the claim is unliquidated, and the plaintiff fails to appear at the time set for trial, judgment may be given to the defendant by default as in the case of liquidated demands if (1) the defendant itemizes the account and attaches an affidavit that it is true and correct and that no part of the sum sued for has been paid by discount or otherwise and (2) a copy of the account and affidavit is filed with the answer and is delivered to the plaintiff as provided for in Rule 8. In all other cases when the plaintiff fails to appear, the defendant cannot recover on a counterclaim without proving damages.

(d) If a default hearing is conducted at the time set for trial because either the plaintiff or the defendant failed to appear, no further notice need be given of the default hearing, provided both parties were properly delivered notice of the time set for trial in a manner provided for in Rule 8.

(e) For good cause shown, the court may set aside a default or a default judgment in accordance with Rule 13.

RULE 13
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical mistakes and errors arising from oversight or omission in judgments, orders, or other parts of the record may be corrected by the court at any time of its own initiative or on the motion of any party and after any notice that the court orders. During the pendency of an appeal, leave to correct the mistake must be obtained from the appellate court.

(b) On motion and upon terms that are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 16; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules, by appeal, or by an independent action.

RULE 14
CONDUCT OF TRIAL; JURY TRIAL; WITNESSES; SUBPOENAS

(a) Trials should be conducted in an informal manner and the South Carolina Rules of Evidence shall apply but shall be relaxed in the interest of justice.

(b) If either party wants a jury trial, it must be requested in writing at least five (5) working days prior to the original date set for trial.

(c) All testimony shall be given under oath or affirmation.

(d) The court shall have the power to issue subpoenas to compel the attendance of witnesses.

RULE 15
AMENDMENT OF COMPLAINTS, ANSWERS, AND COUNTERCLAIMS; CONTINUANCES

The court shall be lenient in the allowance of changes or amendments to complaints, answers, and counterclaims, and in granting continuances of trials for good cause shown when necessary to serve the ends of justice. However, except in unusual circumstances, no party shall be allowed more than one continuance in any case and all continuances must have the specific approval of the court. Continuances shall be for as short a period as possible, and, where feasible, the wishes of the party not requesting the continuance shall be considered in scheduling a new hearing date. Raising a claim, defense, or counterclaim for the first time at trial shall constitute grounds for a continuance when necessary to serve the ends of justice.

RULE 16
EXCHANGE OF INFORMATION BETWEEN PARTIES; SETTLEMENT

(a) Recognizing the unique nature of the court's jurisdiction and the need for a speedy determination of actions filed in the court, the prompt voluntary exchange of information and documents by parties prior to trial is encouraged. However, formal depositions or discovery shall be conducted only by stipulation of the parties or by court order upon written application. The order may prescribe the manner, time, conditions, and restrictions pertaining to the deposition or discovery. Only those interrogatories contained in Form 50 of Rule 25 may be required by the court to be answered.

(b) The court, with both parties present, shall confer with the parties before any trial whenever it appears that a conference might simplify the issues, shorten the trial, or lead to a voluntary exchange of information which might promote a settlement. The court in its discretion may order that a list of exhibits a party intends to offer into evidence at the trial be furnished to the opposing party and/or that the opposing party be given a reasonable opportunity to copy or examine the exhibits.

RULE 17
DIRECTED VERDICTS; JUDGMENT N.O.V.

(a) At trial, if the case presents only questions of law, the court may direct a verdict on its own motion or on motion of either party. The order of the court granting a directed verdict is effective without any assent of a jury.

(b) If, at the close of all the evidence, a directed verdict is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised during the trial of the case if the case is being tried before a jury. If a jury verdict is returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if a directed verdict had been granted. A jury verdict is final if no motion for a new trial or judgment notwithstanding the verdict is filed with the court within five (5) days of

the rendering of the jury verdict and the court has not on its own motion ordered a new trial or directed a verdict notwithstanding the jury verdict.

RULE 18
COSTS; JUDGMENT; ENFORCEMENT

(a) The party recovering judgment shall also recover those costs provided for by law.

(b) The court shall deliver written notice of judgment to all parties or their attorneys using the procedure described in Rule 8, except that no written notice need be delivered to a party if the judgment is announced at the trial in the presence of that party or the party's attorney.

(c) Upon payment in full, the judgment creditors should file a statement of collection with the magistrates court and with the Clerk of the Circuit Court, if the judgment had been previously filed with the Clerk of the Circuit Court.

RULE 19
APPEALS

(a) All appeals of judgments rendered by the magistrates court shall be to the circuit court of the county where the judgment was rendered. Within thirty (30) days after delivery of written notice of judgment to the parties or their attorneys, a party wishing to appeal shall file a notice of appeal with the magistrate rendering the judgment stating the grounds for appeal. If the judgment is announced at the trial in the presence of the parties or their attorneys, the notice of appeal shall be filed within thirty (30) days of the date the judgment is announced. The right of appeal from a judgment exists for thirty (30) days after the denial of a motion for a new trial.

(b) The magistrate shall file the notice of appeal with the Clerk of the Court of Common Pleas for the county wherein the judgment was rendered and shall deliver a copy of the notice of appeal to all opposing parties in the manner provided for in Rule 8.

(c) Within thirty (30) days after filing the notice of appeal with the circuit court, the magistrate shall file the appeal in the office of the clerk of court, together with the record, a statement of all proceedings in the case, and, if necessary, the testimony taken at trial.

RULE 20
NEW TRIAL; AMENDMENTS OF JUDGMENTS

(a) A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons for which new trials previously have been granted in

the courts of this state. On a motion for a new trial in an action tried without a jury, the court may open the judgment, if one has been entered, may take additional testimony, may amend findings of fact and conclusions of law, may make new findings and conclusions, and may direct the entry of a new judgment.

(b) The motion for a new trial shall be made in writing and filed with the court no later than five (5) days after notice of the judgment. The court shall notify the opposing party that the motion has been filed and shall provide that party a copy of the motion.

(c) Not later than five (5) days after entry of judgment, the court, on its own initiative, may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds for granting a new trial.

(d) A motion to alter or amend the judgment shall be filed no later than five (5) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion.

(e) Except by consent of the parties, argument on a motion for a new trial shall be heard by the magistrate before whom the trial was held.

RULE 21
OFFER OF JUDGMENT

(a) At any time, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the party for the money or property or to the effect specified in the offer with costs accrued to the date of the offer. If, within ten (10) days after service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the complaining party fails to obtain a judgment or a more favorable judgment, the party cannot recover costs but must pay the defending party's costs from the time of the offer.

(b) In an action on contract, the defending party may serve upon the complaining party an offer in writing that, if the defending party's defense fails, the damages will be assessed at a specified sum. If the complaining party accepts the offer in writing before trial and on the trial has a favorable verdict, the damages shall be assessed accordingly. If the complaining party does not accept the offer, the party shall prove damages as if the offer had not been made and no evidence of the offer shall be admissible. If no damages are assessed or the damages assessed in the complaining party's favor do not exceed the offer, the defending party shall recover the costs

incurred in necessary preparation and defense of the question of damages.

RULE 22
BUSINESS PARTIES

A business may be represented in civil magistrates court proceedings by a non-lawyer officer, agent, or employee, including attorneys licensed in other jurisdictions and those possessing Limited Certificates of Admission pursuant to Rule 405, SCACR. The representation may be compensated and shall be undertaken at the business's option and with the understanding that the business assumes the risk of any problems incurred as the result of the representation. The court shall require a written authorization from the entity's president, chairperson, general partner, owner, or chief executive officer, or in the case of a person possessing a Limited Certificate, a copy of that certificate, before permitting the representation.

RULE 23
ARGUMENTS ON MOTIONS AND AT TRIAL

The moving party upon a motion shall have the right, at that party's option, to both open and close argument, and the plaintiff shall have the option to have the right to open and close argument upon the trial; except that a party admitting the adverse party's claim in the pleading and taking the burden of proof shall have the same privilege.

RULE 24
SUBPOENAS

(a) Any magistrate, on the application of any party to a cause pending in the magistrates court, shall issue a subpoena citing any person whose testimony may be required in the cause to appear and give evidence. Every subpoena shall state the name of the court, and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place specified.

(b) A subpoena may be served by the sheriff of any county in which the witness may be found, by the sheriff's deputy, by a constable of the court, or by any other person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named in the subpoena shall be made as provided by Rule 6 and Rule 8(c).

(c) No subpoena shall require a witness to appear in any proceeding not held within the county where that witness resides.

(d) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court from which the subpoena issued.

(e) A witness subpoenaed to attend a proceeding under these rules shall receive

for each day's attendance and for the time necessarily occupied in going to and returning from the proceeding $25.00 per day and mileage in the same amount as provided by law for official travel of State officers and employees.

(f) In case it shall appear to the satisfaction of any magistrate that the attendance of any witness whose testimony may be required in any case pending before the magistrate cannot be had because of just cause for the witness' absence, extreme age, sickness or infirmity, or when the witness does not reside in the county of the court's jurisdiction, the magistrate may take the examination of such witness or cause it to be done by another magistrate or other officer authorized by law to administer oaths, to be used in evidence on the trial of the case. All parties to the cause shall have notice of the examination so that they may examine or cross-examine the witness. When the examination is made by another, it shall be recorded and sealed, with the title of the case endorsed, and conveyed by a disinterested person to the magistrate authorizing it or mailed postage prepaid to that magistrate.

RULE 25
FORMS

The use of the following forms in magistrates court is recommended. The magistrates court shall make these forms available without charge to any person who is a litigant in an action before the court. Subject to the approval of the Supreme Court, the Office of Court Administration shall make amendments to these forms and shall add forms as is deemed appropriate.

[1] SUMMONS
[2] COMPLAINT
[3] INSTRUCTIONS TO DEFENDANT
[4] ANSWER
[5] JUDGMENT
[6] COUNTERCLAIM
[7] INSTRUCTIONS TO PLAINTIFF
[8] AMENDMENT TO COMPLAINT
[9] SUBPOENA OF WITNESS
[10] DISMISSAL
[11] SATISFACTION OF JUDGMENT
[12] PARTIAL SATISFACTION OF JUDGMENT
[13] PETITION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM
[14] NOTICE OF INTENTION TO SEEK CHANGE OF VENUE
[15] AFFIDAVIT FOR CHANGE OF VENUE
[16] ORDER FOR CHANGE OF VENUE
[17] AFFIDAVIT AND ITEMIZATION OF ACCOUNTS
[18] AFFIDAVIT OF DEFAULT
[19] NOTICE OF EXCEPTION TO SURETIES
[20] NOTICE
[21] NOTICE OF CIVIL APPEAL

[22] NOTICE OF DEFAULT JUDGMENT
[23] JURY SUMMONS
[24] JURY DUTY CERTIFICATION
[25] BOND UNDERTAKING AND ORDER
[26] MEMORANDUM OF COSTS
[27] AFFIDAVIT (Claim and Delivery)
[28] AFFIDAVIT AND CLAIM FOR IMMEDIATE DELIVERY OF PROPERTY (Claim and Delivery)
[29] ORDER OF IMMEDIATE POSSESSION
[30] UNDERTAKING BY SURETY AND APPROVAL (Claim and Delivery)
[31] NOTICE OF RIGHT TO A PRESEIZURE HEARING (Claim and Delivery)
[32] ORDER RESTRAINING DAMAGE OR CONCEALMENT OF PROPERTY (Claim and Delivery)
[33] APPLICATION FOR EJECTMENT (Eviction)
[34] RULE TO VACATE OR SHOW CAUSE (Eviction)
[35] WRIT OF EJECTMENT (Eviction)
[36] AFFIDAVIT OF PLAINTIFF (Distraint)
[37] NOTICE OF PREDISTRESS HEARING (Distraint)
[38] AFFIDAVIT OF ABANDONMENT (Distraint)
[39] AFFIDAVIT (Attachment)
[40] BOND UNDERTAKING AND APPROVAL (Attachment)
[41] WARRANT OF ATTACHMENT
[42] MOTION AND AFFIDAVIT TO PROCEED *IN FORMA PAUPERIS*
[43] MOTION AND AFFIDAVIT FOR EMERGENCY HEARING (Protection from Domestic Abuse Act)
[44] SUMMONS (Protection from Domestic Abuse Act)
[45] PETITION FOR ORDER OF PROTECTION (Protection from Domestic Abuse Act)
[46] ORDER OF PROTECTION (Protection from Domestic Abuse Act)
[47] ORDER DENYING RELIEF (Protection from Domestic Abuse Act)
[48] TRANSMITTAL FORM FOR DOCUMENTS (Protection from Domestic Abuse Act)
[49] AFFIDAVIT OF SERVICE
[50] INTERROGATORIES

[50] INTERROGATORIES

STATE OF SOUTH CAROLINA	)	
	)	IN THE MAGISTRATES COURT
	)	
COUNTY OF _____	)	_____
		CIVIL CASE NUMBER
_____	)	
PLAINTIFF	)	
_____	)	
STREET ADDRESS	)	
_____	)	
CITY STATE ZIP	)	
_____	)	
TELEPHONE	)	
	)	
VS.	)	I N T E R R O G A T O R I E S
	)	
_____	)	
DEFENDANT	)	
_____	)	
STREET ADDRESS	)	
_____	)	
CITY STATE ZIP	)	
_____	)	
TELEPHONE	)	

TO THE PLAINTIFF/DEFENDANT: (circle one)

You are required to answer the following interrogatories within fourteen (14) days after service of them upon you. Any information concerning these interrogatories coming to your attention after your answer is filed must be provided to the party serving the interrogatories upon you. The answers to the interrogatories must be sent to the party at the address listed above unless another address has been provided to you for an attorney to receive those answers.

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of the party that relate to the claim or defense in this case.

3. In cases involving personal injury, set forth the names and addresses of all physicians who have treated the party and all hospitals to which the party has been

committed in connection with said injuries and also set forth a statement of all medical costs involved.

4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number(s) of each policy involved and the amount(s) of liability coverage provided in each policy.

5. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

6. List the names and addresses of any expert witnesses the party proposes to use as a witness at the trial of the case.

7. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness or provide a copy of any written or recorded statements taken from such witness.

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom these interrogatories have been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatories as for the party served, it is a sufficient answer to such interrogatories to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatories reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries.

Copies of these interrogatories have been served on the plaintiff/defendant and filed with the magistrate before whom this action is to be heard.

_____ _____

DATE SIGNATURE OF PLAINTIFF/DEFENDANT
OR ATTORNEY FOR PLAINTIFF/DEFENDANT

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

June 18, 2001

ADVANCE SHEET NO. 22

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

Page

None

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

25108 - Sam McQueen v. S.C. Dept. of Health and Environmental Control Pending

25226 - State v. William Arthur Kelly Pending

2001-OR-00171 - Robert Lamont Green v. State Pending

2001-OR-00360 - Robert John Schieble v. Dorchester County Pending

PETITIONS FOR REHEARING

25291 - Levone Graves v. County of Marion and Marion County Council Pending

25293 - Quality Towing v. City of Myrtle Beach Pending

25294 - State v. Morris A. Sullivan Pending

25298 - State v. Sammie Louis Stokes Pending

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

25133 - Glenn Kennedy, et al. v. S.C. Retirement Systems Granted

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

		Page
3299	Order - SC Property & Casualty v. Yensen (Opinion Withdrawn and Substituted)	29
3354	Murphy v. Owens-Corning Fiberglas Corp.	43
3355	State v. Leroy Wilkes	59
3356	Keeney's Metal Roofing, Inc. v. Palmieri, et al.	67
3357	The State v. Richmond Truesdale, Jr.	74
3358	S.C. Coastal Conservation League and Sierra Club v. SC Dept. of Health and Environmental Control, et al.	82

UNPUBLISHED OPINIONS

2001-UP-318	Dubose, et al. v. Reynolds, et al. (Sumter County - Linswood S. Evans, Jr., Special Circuit Judge)
2001-UP-319	The State v. Gregory A. Kay (Anderson County, Judge Joseph J. Watson)
2001-UP-320	Osbaldiston v. City of Columbia Landmarks Commission (Richland County, Judge Alison Renee Lee)
2001-UP-321	The State v. Randall Scott Foster (Newberry County - Judge William P. Keesley)

PETITIONS FOR REHEARING

3282 - SCDSS v. Basnight	Pending
3299 - SC Property & Casualty v. Yensen (Opinion Withdrawn & Substituted)	Denied
3329 - SC Dept. of Consumer Affairs v. Rent-A-Center	Pending
3330 - Bowen v. Bowen	Pending

3332 - SC Farm Bureau v. Kelly	Pending
3333 - State v. Dennis Zulfer	Pending
3335 - Joye v. Yon	Pending
3336 - SCDSS v. Cummings	Pending
3337 - Brunson v. Stewart	Pending
3338 - Simons v. Longbranch Farms	Pending
3343 - Langehans v. Smith	Pending
3344 - Henkel v. Winn	Pending
3345 - Cunningham v. Helping Hands	Pending
3346 - The State v. Thomas Ray Ballington	Pending
3348 - Angela Thomas v. Kevin Thomas	Pending
2001-UP-123 - SC Farm Buireau v. Cynthia Rabon	Pending
2001-UP-131 - Ivester v. Ivester	Pending
2001-UP-156 - Employers Ins. v. Whitaker’s Inc.	Pending
2001-UP-159 - State v. Darnell Hunter	Pending
2001-UP-176 - Ledbetter v. Ledbetter	Pending
2001-UP-212 - Singletary v. La-Z-Boy	Pending
2001-UP-220 - State v. Jimmy Lee Brown	Pending
2001-UP-232 - State v. Robert Darrell Watson	Pending
2001-UP-235 - State v. Robert McCrorey, III and Robert Dimitry McCrorey	Pending
2001-UP-237 - Roe v. James	Pending
2001-UP-239 - State v. Billy Ray Jackson	Pending

2001-UP-248 - Thomason v. Barrett	(2) Pending
2001-UP-249 - Hinkle V. National Casualty	Pending
2001-UP-250 - State v. Stephen Glover	Pending
2001-UP-252 - Marlboro County DSS v. Chestnut	Pending
2001-UP-257 - State v. Christopher Darby	Pending
2001-UP-261 - Sans Souci Owners Association v. Miller	Pending
2001-UP-269 - Wheeler v. Independent Revco	Pending
2001-UP-282 - Holland v. Gunn	Pending
2001-UP-292 - Frazello v. Bankhead	Pending
2001-UP-298 - State v. Charles Henry Bennett	Pending
2001-UP-300 - Robert L. Mathis, Jr. v. The State	Pending
2001-UP-304 - Jack McIntyre v. The State	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - State v. Edward M. Clarkson	Pending
3216 - State v. Jose Gustavo Castineira	Granted
3217 - State v. Juan Carlos Vasquez	Denied
3218 - State v. Johnny Harold Harris	Granted
3220 - State v. Timothy James Hammitt	Granted
3231 - Hawkins v. Bruno Yacht Sales	Pending
3242 - Kuznik v. Bees Ferry	Pending
3248 - Rogers v. Norfolk Southern Corp.	Pending
3252 - Barnacle Broadcast v. Baker Broadcast	Pending

3254 - Carolina First v. Whittle	Pending
3255 - State v. Larry Covington	Pending
3256 - Lydia v. Horton	Pending
3257 - State v. Scott Harrison	Pending
3264 - R&G Construction v. Lowcountry Regional	Pending
3267 - Jeffords v. Lesesne	Pending
3270 - Boddie-Noell v. 42 Magnolia Partnership	Pending
3271 - Gaskins v. Souther Farm Bureau	Pending
3272 - Watson v. Chapman	Pending
3273 - Duke Power v. Laurens Elec. Coop	Pending
3274 - Pressley v. Lancaster County	Pending
3276 - State v. Florence Evans	Pending
3280 - Pee v. AVM, Inc.	Pending
3284 - Bale v. SCDOT	Pending
3289 - Olson v. Faculty House	(2) Pending
3290 - State v. Salley Parker & Tim Kirby	Granted
3292 - Davis v. O-C Law Enforcement Comm.	Pending
3293 - Wiedemann v. Town of Hilton Head	Pending
3294 - State v. Nathaniel Williams	Pending
3297 - Silvester .v Spring Valley Country Club	Pending
3398 - Lockridge v. Santens of America, Inc.	Pending
3300 - Ferguson v. Charleston/Lincoln	Pending

3307 - Curcio v. Catepillar	Pending
3311 - SC Farm Bureau v. Wilson	Pending
3314 - State v. Minyard Lee Woody	Pending
3315 - State v. Ronald L. Woodruff	Pending
3319 - Breeden v. TCW, Inc.	(2) Pending
3331 - Wade Jenkins v. Janna Jenkins	Pending
2000-UP-503 - Joseph Gibbs v. State of SC	Pending
2000-UP-601 - Johnson v. Williams	Pending
2000-UP-607 - State v. Lawrence Barron	Pending
2000-UP-653 - Patel v. Patel	1 Granted 1 Denied
2000-UP-655 - State v. Quentin L. Smith	Pending
2000-UP-656 - Martin v. SCDC	Pending
2000-UP-664 - Osteraas v. City of Beaufort	Pending
2000-UP-677 - Chamberlain, et al. v. TIC	Pending
2000-UP-706 - State v. Spencer Utsey	Pending
2000-UP-708 - Federal National v. Abrams	Pending
2000-UP-717 - City of Myrtle Beach v. Eller Media Co.	Pending
2000-UP-719 - Adams v. Eckerd Drugs	Pending
2000-UP-724 - SCDSS v. Poston	Pending
2000-UP-738 - State v. Mikell Pinckney	Pending
2000-UP-775 - State v. Leroy Bookman, Jr.	Pending
2000-UP-783 - State v. Clayton Benjamin	Pending

2001-UP-015 - Milton v. A-1 Financial Services		Pending
2001-UP-019 - Baker v. Baker		Pending
2001-UP-022 - Thomas v. Peacock		Pending
2001-UP-038 - Gary b. American Fiber		Pending
2001-UP-049 - Johnson v. Palmetto Eye		Pending
2001-UP-050 - Robinson v. Venture Capital		Pending
2001-UP-054 - State v. Ae Khingratsaiphon		Pending
2001-UP-058 - State v. Brian Keith Nesbitt		Pending
2001-UP-066 - SCDSS v. Duncan		Pending
2001-UP-069 - SCDSS v. Taylor		Pending
2001-UP-076 - McDowell v. McDowell		Pending
2001-UP-078 - State v. James Mercer		Pending
2001-UP-091 - Boulevard Dev. V. City of Myrtle Beach		Pending
2001-UP-092 - State v. Robert Dean Whitt		Pending
2001-UP-111 - State v. James Tice		Pending
2001-UP-114 - McAbee v. McAbee		Pending
2001-UP-122 - State v. Robert Brooks Johnston		Pending
2001-UP-124 - State v. Darren S. Simmons	(2)	Pending
2001-UP-125 - Spade v. Berdish		Pending
2001-UP-126 - Ewing v. Mundy		Pending
2001-UP-161 - Meetze v. Forsthoefel		Pending
2001-UP-167 - Keels v. Richland County		Pending
2001-UP-186 - The State v. Coy L. Thompson		Pending

The South Carolina Court of Appeals

South Carolina Property and Casualty Guaranty Association and Jackie Cooper Ford, Inc.,	Plaintiffs,
v.	
Richard Scott Yensen, Michael Price Barnhill, State Farm Insurance Company, Nationwide Insurance Company, Jefferson-Pilot Fire & Casualty Company, Jackie B. Cooper, J. Daniel Cooper, Mark Cooper, Guy M. Moross, Theodore Huttner, Midland Risk Insurance Company, and The Insurance Reserve Fund of South Carolina,	Defendants,
of Whom Richard Scott Yensen and Michael Price Barnhill are	Appellants,
and South Carolina Property and Casualty Guaranty Association, State Farm Insurance Company, and Jefferson-Pilot Fire & Casualty Company, are	Respondents.

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 1994-CP-10-4195

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: The Court withdraws its original opinion and substitutes the attached opinion. After a careful consideration of the Petition for Rehearing En Banc, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing En Banc be denied.

s/ Kaye G. Hearn, C.J.

s/ Jasper M. Cureton , J.

s/ Carol Connor J.

s/Thomas E. Huff, J.

.

s/ M. D. Shuler J.

s/ Clyde N. Davis A.J.

May 23, 2001
Columbia, South Carolina
Filed: June 14, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Property and Casualty Guaranty Association and Jackie Cooper Ford, Inc.,

Plaintiffs,

v.

Richard Scott Yensen, Michael Price Barnhill, State Farm Mutual Automobile Insurance Company, Nationwide Insurance Company, Jefferson-Pilot Fire & Casualty Company, Jackie B. Cooper, J. Daniel Cooper, Mark Cooper, Guy Moross, Theodore Huttner, Midland Risk Insurance Company, and The Insurance Reserve Fund of South Carolina,

Defendants,

of whom Richard Scott Yensen and Michael Price Barnhill are,

Appellants

and South Carolina Property and Casualty Guaranty Association, State Farm Automobile Insurance Company, and Jefferson-Pilot Fire & Casualty Company, are,

Respondents.

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

Opinion No. 3299
Reheard January 9, 2001 - Filed June 14, 2001
Opinion Withdrawn and Substituted

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein; and Jerry N. Theos, of Uricchio, Howe, Krell, Jacobson, Toporek & Theos, both of Charleston, for appellant.

G. Mark Phillips, of Nelson, Mullins, Riley & Scarborough; and Henry E. Grimball, of Buist, Moore, Smythe & McGee, both of Charleston; Hoover C. Blanton and Ruskin C. Foster, both of McCutchen, Blanton, Rhodes & Johnson, of Columbia, for respondent.

HEARN, C.J: This is a declaratory judgment action involving issues of automobile insurance coverage among three insurers. The trial court granted summary judgment to Jefferson Pilot Fire and Casualty Company (Jefferson Pilot) and a directed verdict to South Carolina Property and Casualty Guaranty Association (Guaranty Association) and State Farm Insurance Company (State Farm). Richard Scott Yensen and Michael Price Barnhill appeal. We affirm with respect to Jefferson Pilot and State Farm, and reverse and remand with respect to Guaranty Association.

FACTS AND PROCEDURAL BACKGROUND

On June 15, 1991, Yensen's Camaro became disabled on Interstate 26 in Charleston County. The Camaro was on the shoulder of the highway. Yensen walked to a pay phone and called the highway patrol. Yensen was picked up by Officer Barnhill.

Yensen and Barnhill returned to Yensen's car. Barnhill parked his patrol car behind the Camaro and summoned a tow truck. A flatbed wrecker belonging to Specialty Towing arrived, and the driver of the wrecker parked in front of the Camaro to hook it up for towing. Yensen and Barnhill exited the patrol car and stood beside the driver's side of the Camaro while the tow truck driver hooked chains to it.

Theodore Huttner was driving a Chevrolet Beretta on Interstate 26 traveling toward Charleston. Huttner struck Yensen, Barnhill, and the tow truck driver, injuring them. Huttner did not stop, but was apprehended nearby after he ran off the road. The Beretta was owned by Huttner's employer, Jackie Cooper Ford Inc. (Jackie Cooper). Yensen and Barnhill subsequently filed negligence actions against Huttner. Yensen received a $900,000 verdict and Barnhill received an $85,000 verdict.

At the time of the accident, Specialty Towing was insured by Jefferson Pilot. Huttner owned a motorcycle and a van which were insured by State Farm. Jackie Cooper was insured by First Southern Insurance Company.[1] The trial judge granted summary judgment to Jefferson Pilot and directed verdicts in favor of State Farm and Guaranty Association.

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[1] First Southern was later placed into receivership and liquidated. In its place, the South Carolina Property and Casualty Guaranty Association took over handling of these claims.

DISCUSSION

I. Jefferson Pilot

Depending upon whether or not Huttner was a permissive driver of the Beretta, Yensen and Barnhill assert they are entitled to either uninsured or underinsured motorist coverage as insureds under the Jefferson Pilot policy. The policy provided both uninsured or underinsured motorist coverage of $300,000 to Specialty Towing. The policy defined "insured" as "anyone else 'occupying' a covered auto." According to the policy, "occupying" was defined as "in, upon, getting in, on, out or off."

The trial court granted summary judgment to Jefferson Pilot. The court concluded neither Yensen nor Barnhill was an insured under the policy because neither was "occupying" the tow truck as defined by the policy. Yensen and Barnhill argue the trial court erred as a matter of law in granting summary judgment to Jefferson Pilot because they were involved with the tow truck at the scene and were injured as a result of its "use."

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 320 S.C. 143, 463 S.E.2d 618 (Ct. App. 1995), rev'd in part on other grounds, 327 S.C. 238, 489 S.E.2d 470 (1997). An appellate court reviews the granting of summary

judgment under the same standard applied by the trial court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Viewing the evidence in the light most favorable to them, Officer Barnhill and Yensen were sitting in Barnhill's patrol car preparing an accident report for Yensen's Camaro when the tow truck arrived. The tow truck driver began hooking chains to Yensen's Camaro. Barnhill advised Yensen to retrieve his personal items from the car before it was lifted onto the tow truck. Both Barnhill and Yensen exited the patrol car and went to the driver's side of the Camaro. They were standing on the driver's side near the rear view mirror when Huttner struck them. In his deposition, Yensen testified he had called a friend to come pick him up. However, he also testified that he was planning to leave the scene with the tow truck driver. It is this testimony which Yensen asserts constitutes a genuine issue of material fact sufficient to survive summary judgment. Barnhill's position is that because he was acting in his official capacity of supervising the attachment of the Camaro to the tow truck, he was "occupying" the tow truck. We disagree with both assertions.

The trial judge correctly determined that Yensen and Barnhill were not insureds under the Jefferson Pilot policy. They were not occupying the tow truck as the policy defines that term.[2] Under the plain meaning of the words, neither Yensen nor Barnhill was "in, upon, getting in, on, out or off" the tow truck. While there was some testimony that Yensen intended to leave the scene in the tow truck, at the time of the accident, he was not in or on the tow truck, nor was he in the process of getting into it.

Further, under Whitmire, 254 S.C. at 187-92, 174 S.E.2d at 393-95, we do not find Yensen to have been alighting from the tow truck. Whitmire

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[2] See McAbee v. Nationwide Mut. Ins. Co., 249 S.C. 96, 152 S.E.2d 731 (1967) (holding discussion of term "upon" as synonymous with "contact with"); Whitmire v. Nationwide Mut. Ins. Co., 254 S.C. 184, 174 S.E.2d 391 (1970) (stating term "alighting from" extends to situation where the body has reached a point where there is no contact with the vehicle).

held that where a passenger was struck while within two or three feet of the car he had immediately "alighted from," that passenger may collect uninsured motorist coverage from the insurer of the car he had been riding in. Id. at 191-92, 174 S.E.2d at 394-95. Appellants argue that Whitmire is controlling in this case because Yensen intended to occupy the tow truck and should therefore be able to collect insurance from the tow truck's insurance provider. Whitmire is distinguishable because there, the plaintiff had unquestionably been occupying the car, whereas this case involves, at most, Yensen's *intent* to occupy the tow truck, expressed after the accident and during litigation. We are reluctant to extend Whitmire to these facts because Yensen was not "still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions." Id. at 191, 174 S.E.2d at 394.

Appellants' reliance upon Merck v. Nationwide Mut. Ins. Co., 318 S.C. 22, 455 S.E.2d 697 (1995) is unavailing. That case dealt with the issue of stacking of underinsured motorist coverage. In Merck, the insured's disabled vehicle was on a tow truck in the emergency lane. Id. at 23-24, 455 S.E.2d at 698. The insured was standing beside the tow truck with the tow truck driver when an intoxicated driver ran off the road, striking the insured, the tow truck driver, and the tow truck. Id. The supreme court affirmed this court's conclusion that the insured's vehicle was "involved in the accident" because it was present at the scene, and the accident had an effect on it when the car was thrown from the wrecker. Id. at 24, 455 S.E.2d at 698. In Merck, uninsured coverage on the tow truck was not an issue as it is in this case. Rather, Merck dealt with whether the victim's own vehicle was "involved in the accident," an issue not disputed here where all parties agree that Yensen's vehicle was involved in the accident. Moreover, in Merck the policy and S.C. Code Ann. section 38-77-160 (1989), provided coverage to vehicles "involved in the accident," while here, coverage is afforded to individuals "occupying the vehicle."

Appellants also argue they should collect under the Jefferson Pilot policy because they were "involved" with the tow truck at the time of their injuries, citing State Farm Mutual Automobile Insurance Company v. Bookert,

330 S.C. 221, 499 S.E.2d 480 (Ct. App. 1998). This reliance is misplaced. In Bookert, a gunman riding in a vehicle shot and injured a pedestrian. This court held the pedestrian could collect underinsured motorist insurance coverage from his policy because his injury arose out of the gunman's use of his own vehicle, making the gunman's vehicle an "active accessory" to the crime. Id. at 230-31, 499 S.E.2d at 485. In both Bookert and its predecessor Wausau Underwriters Insurance Company v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992), this court and the supreme court stated that the gunman's vehicle was an "active accessory" to the crime where there was a sufficient causal connection between the gunman's use of his vehicle and the other party's injuries. Bookert, 330 S.C. at 231, 499 S.E.2d at 485; Howser, 309 S.C. at 273, 422 S.E.2d at 108. Appellants seek to apply this reasoning to this case, suggesting the gunman's vehicle is akin to the tow truck in this case. However, unlike the shooter's use of his vehicle in Bookert and Howser, Huttner did not use the tow truck in any way that could be construed to make the tow truck an "active accessory" to this accident. In fact, Huttner had no contact with the tow truck, either before or after the accident. Further, there is no causal connection between the tow truck and the injuries Yensen and Barnhill suffered.[3]

In our view, neither Yensen nor Barnhill was occupying the tow truck as that term is defined in the policy. Accordingly, we affirm the trial court's grant of summary judgment.

II. State Farm

State Farm insured both a motorcycle and a van owned by Huttner. The State Farm policies provided liability coverage to Huttner to use other cars, specifically defined as a newly acquired car, a temporary substitute car, or a non-owned car. The trial judge granted a directed verdict to State Farm concluding the Beretta was not a newly acquired car, a temporary substitute car, or a non-owned car as defined by the State Farm policies.

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[3] Both Yensen and Barnhill were struck directly by Huttner's Beretta. Neither one was injured by the tow truck in any way.

In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. Adams v. G.J. Creel & Sons, 320 S.C. 274, 465 S.E.2d 84 (1995). The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. Id. The appellate court will reverse the trial court only when there is no evidence to support the ruling below. Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999).

Yensen and Barnhill contend the trial court erred in granting a directed verdict. They argue there is more than one reasonable inference to be drawn from the facts as to whether Huttner had permission from Jackie Cooper to drive the Beretta. They also argue State Farm's policy language contravenes South Carolina's mandatory insurance requirements by limiting the circumstances in which State Farm provides liability coverage for non-owned vehicles.

(a)

The State Farm policies state "the liability coverage extends to use, by an insured, of a newly acquired car, a temporary substitute car or a non-owned car." Yensen and Barnhill argue this contractual language violates South Carolina's mandatory insurance requirements, relying upon State Automobile Property & Casualty Insurance Company v. Gibbs, 314 S.C. 345, 444 S.E.2d 504 (1994).

Yensen and Barnhill cite language in Gibbs which states, "South Carolina law is clear that liability to third parties under an owner's automobile liability policy is absolute when injury occurs." Id. at 349, 444 S.E.2d at 506 (citing S.C. Code Ann. §§ 56-9-20(7)(b)(1) & (b)(3)). The supreme court made this statement in the context of its discussion of an exclusion contained in a non-owner's insurance policy. The court referenced specific statutes defining a motor vehicle liability policy. See S.C. Code Ann. § 56-9-20(5) and 5(b) (Supp.

1999). In the language of section 56-9-20, a motor vehicle liability policy is one that meets the requirements of sections 38-77-140 through 230. Yensen and Barnhill apply the language from Gibbs out of context because the case deals with statutorily required coverage. Liability coverage for non-owned vehicles is not statutorily required in this state and is provided by a voluntary contract between the insurer and the insured. Jackson v. State Farm Mut. Auto. Ins. Co., 288 S.C. 335, 337, 342 S.E.2d 603, 604 (1986). Accordingly, the parties may choose their own terms regarding coverage for non-owned vehicles. Id. Therefore, Gibbs is not applicable, and the State Farm policies do not violate South Carolina's mandatory insurance requirements.

(b)

The State Farm policies provide "the liability coverage extends to use, by an insured, of a newly acquired car, a temporary substitute car or a non-owned car." The parties do not contend the Beretta was a "newly acquired car." Thus, our only determination is whether the Beretta was a temporary substitute car or a non-owned car. We agree with the trial court that it was neither.

The State Farm policies define a temporary substitute car as "a car not owned by you or your spouse, if it replaces your car for a short time. Its use has to be with the consent of the owner. Your car has to be out of use due to its breakdown, repair, servicing, damage or loss." While Yensen and Barnhill have argued Huttner had permission to use the Beretta, they did not specifically address the trial court's additional ruling that there was no reliable evidence Huttner's motorcycle or van was out of use due to breakdown or servicing. Based upon their failure to address this additional ruling, we affirm the trial court. See Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996) (holding where the ruling of the trial judge is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds).

The State Farm policies define a "non-owned car" as "a car not owned by or registered or leased in the name of: (4) an employer of you, your spouse or any relative." (emphasis added) Based upon this definition, the

Beretta did not qualify as a non-owned car because it was owned by Huttner's employer, Jackie Cooper. Under the policy definition, coverage was excluded regardless of whether Huttner had permission from Jackie Cooper to drive the Beretta.

Accordingly, we affirm the trial judge's finding that State Farm was entitled to a directed verdict.

III. Guaranty Association

Yensen and Barnhill also contend the trial court erred in granting a directed verdict to Guaranty Association. They assert there is a question of fact as to whether Huttner had permission from Jackie Cooper to drive the Beretta.

Huttner worked in the body shop at Jackie Cooper. Initially, he was hired as "just a body man," but Huttner testified that he later took over as "manager". While working at Jackie Cooper, Huttner often drove cars he was working on for business purposes such as to pick up parts or to test drive them. He testified he also "kind of" drove cars for pleasure. He usually asked Jim Dill, a Jackie Cooper manager, for permission to drive a vehicle. Huttner admitted he had driven company cars out of town before, but not as far as Charleston. Huttner had access to the key and had used the Beretta before to pick up parts.

On the day of the accident, Huttner left work around 5:00 p.m. He had driven his truck to work that day. Huttner decided to drive to Charleston that night to see his family and possibly locate some parts for the Beretta. Although Huttner did not ask for permission to drive the Beretta, he did not feel there was a problem for him to use the car, since he occasionally used Jackie Cooper cars. Huttner stated that as far as he was concerned he had permission to drive the Beretta.

State Trooper Barry Watson investigated the Yensen/Barnhill accident after Huttner was arrested for felony DUI. According to Watson, Huttner made conflicting statements about whether he had permission to drive the Beretta. Watson initially charged Huttner with use of a vehicle without the owner's consent after Watson spoke to Jim Dill at Jackie Cooper and was told Huttner did not have permission to use the car. However, that charge was dropped after Watson spoke to Jackie Cooper. Watson testified Cooper stated Huttner had both access and consent to drive cars he was working on.

Viewing the evidence in the light most favorable to Yensen and Barnhill, more than one reasonable inference can be drawn from the evidence on the issue of permission. Accordingly, we conclude the trial court erred in granting a directed verdict to Guaranty Association and reverse and remand for a hearing on this issue.

IV. Proffered Testimony

Finally, Yensen and Barnhill also argue the trial court erred by failing to allow them to include certain portions of the deposition of a witness, Terry Meade, in the record on appeal. It is well-settled that the admission or rejection of proffered testimony is within the trial judge's discretion and will not be disturbed on appeal absent a showing of an abuse of discretion, legal error, or prejudice to the appellant. State v. Gay, 343 S.C. 543, 549, 541 S.E.2d 541, 544 (2001). However, all relevant evidence should be deemed admissible. Rule 402, SCRE. Because we are remanding this case to the trial court on the issue of whether Huttner had permission to drive the Beretta, we believe Yensen and Barnhill are entitled to present any relevant evidence on this issue. Since the trial judge gave no reason for excluding the proffered testimony and we can discern none from the record, we find the trial judge abused his discretion in excluding this testimony and remand this issue to the trial court.

CONCLUSION

We affirm the grant of summary judgment to Jefferson Pilot and the grant of a directed verdict to State Farm. We reverse the grant of a directed

verdict to Guaranty Association and remand to the trial court for further proceedings. We also reverse the exclusion of the proffered deposition testimony and remand this issue to the trial court.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

CURETON and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Janet B. Murphy and David M. Murphy,

Appellants,

v.

Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, ACandS, Inc., Rock Wool Manufacturing Co., Inc., The Anchor Packing Company, Rapid American Corporation, Garlock, Inc., Westinghouse Electric Corporation, Uniroyal, Inc., PPG Industries, Inc., Covil Corporation, E.I. Du Pont de Nemours and Company,

Defendants,

Of whom Rapid American Corporation and E.I. Du Pont de Nemours and Company are,

Respondents.

Appeal From Greenville County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3354
Heard November 7, 2000 - Filed June 11, 2001

REVERSED and REMANDED

L. Joel Chastain and William J. Cook, both of Ness, Motley, Loadholt, Richardson & Poole, of Barnwell; and Jeffrey T. Eddy, of Ness, Motley, Loadholt, Richardson & Poole, of Charleston, for appellants.

Ivan A. Gustafon and Christopher G. Conley, of Blasingame, Burch, Garrard, Bryant & Ashley, of Athens GA; Jackson L. Barwick, Jr., Valerie Palmer Williams, of Holmes & Thompson; and David E. Dukes, C. Mitchell Brown and Michael W. Hogue, all of Nelson Mullins, Riley & Scarborough, all of Columbia; and Carl E. Pierce, II, of Charleston, for respondents.

Amicus Curiae on Behalf of Owens-Illinois, Inc., R. Bruce Shaw and William C. Wood, Jr., both of Nelson, Mullins, Riley & Scarborough, of Columbia.

KITTREDGE, A.J.: Janet Murphy, a resident of Virginia, brought this action alleging she developed mesothelioma as a result of exposure to asbestos fiber trapped in the clothing of her father, Dr. Charles Baker, while he worked for E. I. Du Pont de Nemours at several locations, including the facility located in Camden, South Carolina. The trial court granted the respondents'

motion to dismiss for lack of subject matter jurisdiction based upon the Door Closing Statute.[1] Murphy and her husband appeal.[2] We reverse and remand.[3]

FACTUAL/PROCEDURAL BACKGOUND

Janet B. Murphy and David M. Murphy, who are wife and husband, brought this action seeking damages for injuries that they sustained after Janet developed mesothelioma from an alleged household exposure to asbestos. The Murphys allege Janet developed the disease as a result of inhaling asbestos fibers trapped in her father's clothing. From 1966 to 1969, Janet was a resident of South Carolina while her father, Dr. Charles Baker, worked for E.I. Du Pont de Nemours at its facility in Camden. Before and after that time, he worked at other Du Pont facilities in Virginia and Europe. Dr. Baker testified by deposition, however, that he was exposed to more asbestos in Camden than in the other locations.

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[1] S.C.Code Ann. §15-5-150 (1976); see also Nix v. Mercury Motor Express, Inc., 270 S.C. 477, 242 S.E.2d 683 (1978) (holding that the application of the Door Closing Statute is a question of subject matter jurisdiction).

[2] Janet's husband, David Murphy, claims loss of consortium.

[3] This case was originally heard by a panel of this court, which issued an opinion affirming the trial court's dismissal of the Murphys' claims. See Murphy v. Owens-Corning Fiberglas Corp., Op. No. 3203 (S.C. Ct. App. filed June 26, 2000). On October 5, 2000, the full Court of Appeals voted to rehear the case en banc pursuant to S.C. Code Ann. section 14-8-90 (Supp. 2000). Accordingly, the original panel opinion is hereby withdrawn and the following opinion substituted therefor.

Dr. Baker stated that one of his major projects at the Camden plant was the development of a larger, higher capacity spinning cell for spinning Orlon acrylic fiber. He stated that the equipment involved in the spinning process was continually reconfigured which exposed him to insulation material while he observed the removal and re-installation of the equipment. He was also exposed to asbestos in other areas of the Camden plant where various equipment changes were taking place. Dr. Baker stated there was always evidence of some dust in the area and he specifically recalled times when his clothes were dusty.

Janet, born in 1960, lived at home with her parents until she entered college in 1978. In 1982 she moved to Virginia where her condition was eventually diagnosed.[4] Shortly thereafter, Dr. Baker came to believe he had exposed his daughter to asbestos through his clothing. He held her as an infant and maintained a close relationship with her as she grew. Janet testified in her deposition that she would routinely crawl into his lap when he returned home from work and they would read stories or watch television.

Dr. Victor L. Roggli, a board certified pathologist with extensive experience with asbestos related diseases, examined Janet's tissue specimens, medical records, and exposure history. In an affidavit submitted to the court, he concluded: "Janet Murphy's exposure to the asbestos fibers in her father's clothes while he was employed by Du Pont at the Camden, South Carolina facility from January 1966 to July 1969 was a proximate cause of the development of [her] mesothelioma in that these Camden, South Carolina exposures significantly contributed to the development of her mesothelioma." Dr. Roggli also stated that Janet's "Camden, S. C. exposure from January 1966 to July 1969 was sufficient, in and of itself, to have caused mesothelioma."

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[4] Janet Murphy was diagnosed with mesothelioma in July, 1995. As a result of the disease, Janet died during the seven months that followed expedited oral argument.

The respondents moved to dismiss the action, asserting the circuit court lacked subject matter jurisdiction over the Murphys' complaint based upon the application of the Door Closing Statute. The trial court agreed and dismissed the Murphys' claims, finding that the South Carolina Door Closing Statute restricted its subject matter jurisdiction "for claims brought by non-resident plaintiffs against non-resident defendants to causes of action that shall have arisen in this state," and further that the Murphys' action did not arise in South Carolina because the injury–the impairment from the development of mesothelioma–was diagnosed in Virginia. This appeal followed.

STANDARD OF REVIEW

This is an appeal from the grant of a motion to dismiss for lack of subject matter jurisdiction. The question of subject matter jurisdiction is a question of law for the court. Woodard v. Westvaco Corp., 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993), vacated on other grounds by, 319 S.C. 240, 460 S.E.2d 392 (1995). In determining whether to dismiss based on lack of jurisdiction, the court may consider "affidavits and other evidence outside the pleadings . . ." without converting the motion into one for summary judgment. Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

DISCUSSION

I.

As a preliminary matter, the respondents contend the order of the circuit court is not immediately appealable because the Murphys' claims against one defendant still remain. The trial court did not grant the motion to dismiss with respect to Covil Corporation because it is a South Carolina corporation.

The respondents rely upon State ex rel. McLeod v. C&L Corp., 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984), in support of their argument. In that case, the trial court granted summary judgment to two defendants during the course

of the proceedings. Although an immediate appeal was not taken, after the entry of a final order, the Attorney General filed a cross appeal raising the issue of summary judgment. The two defendants argued the cross appeal should be dismissed because the summary judgment order was a final order from which an appeal had not been timely perfected. The supreme court denied the motion to dismiss and transferred the case to this court for disposition. Our opinion notes the supreme court's ruling on the motion to dismiss was binding on this court. Judge Bell, writing for this court, stated that the Attorney General's appeal from the final order was sufficient to bring the intermediate order granting summary judgment before the court for review. The opinion states that "[w]hen multiple defendants are joined in the same action, an order dismissing some but not all of them is ordinarily not final or appealable." Id. at 529, 313 S.E.2d at 340.

This particular point regarding dismissal of some, but not all, multiple defendants has not been cited subsequently by our courts. The McLeod case was cited as a general related authority in Plaza Dev. Services v. Joe Harden Builder, Inc., 296 S.C. 115, 370 S.E.2d 893 (Ct. App. 1988). In that case, this court held that an order granting a Rule 12(b)(6), SCRCP, motion as to some but not all claims against a single defendant was not immediately appealable. However, the Plaza Development case was overruled on that point by Link v. School Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176, nt. 2 (1990). In Link, the supreme court noted it had previously held in Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986) that an order granting a Rule 12(b)(6) motion as to one of multiple claims is directly appealable under S.C. Code Ann. Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading.

It is correct that the grant of the Rule 12(b)(1) motion in this case is not a final order as there is a remaining defendant. However, the practical effect of the grant of the motion is that it strikes out the Murphys' complaint with respect to the respondents. Viewing McLeod in light of Lebovitz and Link, we conclude an order granting a Rule 12 motion as to some, but not all of the

defendants in a case, is directly appealable under Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading.

II.

The Murphys contend the trial court erred in determining that their cause of action "arose" in the state where the diagnosis was made rather than where the exposure occurred for purposes of the South Carolina Door Closing Statute. We agree.

The South Carolina Door Closing Statute, S.C. Code Ann. § 15-5-150 (1976), provides in pertinent part:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court:
>
> * * *
>
> (2) By a plaintiff not a resident of this state when the cause of action shall have arisen or the subject of the action shall be situated within this state.

(Emphasis added). This statutory provision prohibits a non-resident from maintaining an action against a foreign corporation in a South Carolina court unless the cause of action arose in South Carolina or the subject of the action is located here.[5]

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[5] We note that "subject of the action" is typically inapplicable in personal injury actions. See Ophuls & Hill, Inc. v. Carolina Ice & Fuel Co., 160 S.C. 441, 450, 158 S.E. 824, 827 (1931) (quoting Columbia Nat'l Bank v. Rizer, 153 S.C. 43, 55, 150 S.E. 316, 320 (1929), "The subject of the action is . . . not the wrong which gives the plaintiff the right to ask the interposition of the court, nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is,

It is well settled that the Door Closing Statute serves three basic legislative objectives related to the state's interests. First, it favors resident plaintiffs over non-resident plaintiffs. Central R.R. & Banking v. Georgia Constr. & Inv. Co., 32 S.C. 319, 11 S.E. 192 (1890). Second, it provides a forum for wrongs connected with the state while avoiding the resolution of wrongs in which the state has little interest. Rosenthal v. Unarco Industries, Inc., 278 S.C. 420, 297 S.E.2d 638 (1982); Cox v. Lunsford, 272 S.C. 527, 252 S.E.2d 918 (1979). Third, it encourages activity and investment within the state by foreign corporations without subjecting them to actions unrelated to their activity within the state. Lipe v. Carolina, C. & O. Ry. Co., 123 S.C. 515, 116 S.E. 101 (1923).

The Door Closing Statute thus denies access to our courts to non-resident plaintiffs with claims that have, at best, a tenuous connection to this state. As evidenced in Rosenthal, the South Carolina Supreme Court employs, in part, a connectedness test to determine the applicability of the statute. Rosenthal, 278 S.C. at 424, 297 S.E.2d at 641.

Federal courts interpreting the Door Closing Statute have consistently recognized and followed our supreme court's emphasis on the alleged wrong's connection or nexus to South Carolina. See Proctor & Schwartz, Inc. v. Rollins, 634 F.2d 738, 739 (4th Cir. 1980) (noting that under the Door Closing Statute courts are denied subject matter jurisdiction to entertain a suit involving a "foreign cause of action brought by a foreign plaintiff against a foreign corporation"); Bumgarder v. Keene Corp., 593 F.2d 572 (4th Cir. 1979) (affirming the dismissal of an action under the South Carolina Door Closing Statute because the non-resident's exposure to asbestos occurred in North Carolina and the action could have been maintained there); Collins v. R.J.

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ordinarily, the property, or the contract and its subject-matter, or other thing involved in the dispute.") (emphasis omitted).

Reynolds Tobacco Co., 901 F. Supp. 1038, 1044 (D.S.C. 1995)[6] (granting defendant's motion for summary judgment under the Door Closing Statute because the non-resident plaintiff failed to submit proof "that [his] injuries were 'directly connected' to his cigarette purchases in South Carolina").

The trial court concluded: "South Carolina courts use the verbs 'arise' and 'accrue' interchangeably while determining *when* a cause of action comes into existence. . . . Thus a cause of action arises, accrues, and springs into action only when all of the elements exist and one has a right to seek relief . . . ." (Emphasis in original) (citations omitted).

To be sure, in the typical tort setting, the terms are often interchangeable. See Stephens v. Draffin, 327 S.C. 1 n.4, 488 S.E.2d 307 n.4 (1997). In Cornelius v. Atlantic Greyhound Lines, 177 S.C. 93, 180 S.E. 791 (1935), for example, our supreme court in a wrongful ejectment action equated "arise" with "accrue." There, the right of action arose and accrued simultaneously. The instant case, however, presents a situation that demonstrates the difference between the terms.

A cause of action "arises" when the act or omission that creates the right to bring suit happens or begins. Roques v. Continental Cas. Co., 135 So. 51, 52-53 (La. Ct. App. 1931) ("In 1 Words and Phrases, Second Series, page 267, we find the following: 'The word 'arise' is used in various senses with the words 'begin, mount, appear, happen, proceed from, exist.' It has not the same

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[6] The fourth circuit affirmed the decision in an unpublished opinion, reported in full at 1996 WL 452595. The court stated: "His purchase and use of cigarettes in South Carolina, which remains unproven except for an insignificant percentage of the total packages he bought and consumed . . . is too tenuous to qualify as 'causing' death in the instant case." Id. at *2. The present case is clearly distinguishable. The affidavit of Dr. Victor L. Roggli establishes a direct connection between Janet Murphy's South Carolina exposure to asbestos and her subsequent development of mesothelioma.

significance as the word 'accrue,' which signifies 'result, add, acquire, receive, benefit.' A cause of action 'arises,' *** when the obligation was created which gave rise to a right of action as soon as such right accrued thereon. Doughty v. Funk, 84 P. 484, 486, 15 Okl. 643, 4 L. R. A. (N. S.) 1029 [(Okla. 1905)].'").

A cause of action "accrues" when it becomes "complete so that the aggrieved party can begin and prosecute such action." New York Times Co. v. Conner, 291 F.2d 492, 495 (5th Cir. 1961); see also Heinrich ex rel. Heinrich v. Sweet, 118 F. Supp. 2d 73, 78 (D. Mass. 2000) ("According to Black's Law Dictionary . . . there is a subtle, yet important, difference between the two words. 'Accrue' means '[t]o come into existence as an enforceable claim or right.' Black's Law Dictionary 21 (7th ed. 1999). In contrast, 'arise' means '[t]o originate' as in 'a federal claim arising under the U.S. Constitution.'" (citation omitted)); Randy's Sanitation, Inc. v. Wright County, Minn., 65 F. Supp. 2d 1017, 1022 (D. Minn. 1999) ("As a general rule, a claim does not accrue until the plaintiff has 'a complete and present cause of action.'" (citations omitted)).

The record establishes that the alleged wrongdoing, from which the Murphys' right to bring this action proceeds, originated in South Carolina. Their claims, therefore, arose in this state even though they did not accrue until the mesothelioma was diagnosed.

In applying the Door Closing Statute, the manifestation of injury through diagnosis, while relevant, is not dispositive in every case for the purpose of determining whether a cause of action shall have arisen in South Carolina. Such an approach is too simplistic and would lead to results contrary to existing case law and the legislative goals of the statute.[7]

[7] For example, if a party were injured by a foreign corporation from exposure to asbestos solely in South Carolina, yet the diagnosis or manifestation of injury occurs only after the party moved to another state, the dissent's approach would foreclose that party from maintaining an action in our courts.

We hold that the Murphys may properly maintain their action in South Carolina, notwithstanding the fact that the injury was diagnosed in Virginia. The Murphys have demonstrated a sufficient connection to this state by showing that the act giving rise to their right of action occurred in South Carolina. We further believe that the exercise of jurisdiction under these circumstances would be entirely consistent with, and would serve, the laudable goals of the Door Closing Statute. Accordingly, South Carolina must open its courtroom doors to the Murphys' claims.

We, therefore, reverse and remand to the circuit court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

GOOLSBY, A.C.J., CURETON, SHULER, JJ., DAVIS, MOREHEAD, and WILLIAMS, A.J., concur.

HUFF, J., concurs in part and dissents in part in a separate opinion in which MCKELLAR, A.J., concurs.

Conversely, if a party were injured by exposure to asbestos solely in a state other than South Carolina, yet the diagnosis or manifestation of injury occurred here, the dissent's approach would permit the action to be filed and pursued in the South Carolina courts merely because the "element of injury" had been established in South Carolina. Such results would be contrary to existing law and recognized legislative objectives.

HUFF, J.: I respectfully concur in part and dissent in part. I concur in the majority's opinion with regard to Issue I. Issue II of the opinion involves the trial court's application of the Door Closing Statute. I do not agree with the majority's opinion on this point, and respectfully dissent.

This case involves the application of South Carolina's Door Closing Statute.[8] Janet Murphy, a Virginia resident, alleged she developed mesothelioma as a result of "household or familial" exposure to asbestos fiber on the clothing of her father, Dr. Charles Baker.

BACKGROUND

Janet Baker Murphy was born in Virginia in 1960. She lived with her parents, the Bakers, until 1978 when she entered college. After attending college, she returned to Virginia where she has resided since 1982. In July of 1995, Murphy was diagnosed with mesothelioma.

Janet Murphy's father, Dr. Charles Baker, is a chemical engineer who was employed by E. I. Du Pont de Nemours from 1951 until his retirement in 1984. He worked at the Du Pont facility in Waynesboro, Virginia from 1951 until 1966. From 1966 until 1969, Dr. Baker was employed at the Du Pont plant in Camden, South Carolina. He returned to the Waynesboro facility in mid-1969 and remained there until 1974. Dr. Baker spent the years from 1974 until the summer of 1978 at a Du Pont facility in the Netherlands. He returned to the Waynesboro plant in 1978 where he remained until his retirement in 1984.

[8] As relevant to this case, S.C.Code Ann. §15-5-150 (1977) provides "[a]n action against a corporation created by or under the laws of any other state, government, or country may be brought in the circuit court: (2) [b]y a plaintiff not a resident of this State when the cause of action shall have arisen . . . within this State."

According to Dr. Baker, his work over the years at various Du Pont facilities caused him to be exposed to asbestos dust and fibers. Dr. Baker testified by deposition that one of his major projects at the Camden plant was the development of a larger, higher capacity spinning cell for spinning Orlon acrylic fiber. The equipment involved in the spinning process was continually reconfigured. Dr. Baker stated he was exposed to insulation material while observing the removal and re-installation of the equipment. He was also exposed to asbestos in other areas of the Camden plant where various equipment changes were taking place. He stated there was always evidence of some dust in the area and he specifically recalled times when his clothes were dusty.

After his daughter was diagnosed with mesothelioma, Dr. Baker came to believe he had exposed his daughter to asbestos through his clothing. He held her as an infant and maintained a close relationship with her as she grew. Janet Murphy testified in her deposition that as a child she was "daddy's little girl." She would crawl into his lap and they would read stories or watch television on a daily basis. When her father came home from work, she would go through his coat pockets looking for mints.

In their motions to dismiss, the respondents asserted the circuit court lacked subject matter jurisdiction over the Murphys' complaint based upon application of the Door Closing Statute. After the receipt of memoranda of law and a hearing, the circuit court granted the motions.

The court stated that since the Murphys were not residents of South Carolina, jurisdiction rested on where the cause of action arose. The court held that a cause of action "arises, accrues, and springs into action only when all of the elements exist and one has a right to seek relief (i.e. a cause of action) based on such elements. Mere threat of future injury is too speculative to support present adjudication." The trial court concluded Janet Murphy's cause of action did not arise until she was diagnosed with mesothelioma in Virginia in 1995. At that point, the final element (i.e. injury) needed for a valid cause of action occurred.

DISCUSSION

The Murphys argue the trial court erred in its application of the Door Closing Statute. They assert that, with respect to an asbestos disease case, the cause of action arises in the state of exposure as opposed to the state of diagnosis. The Murphys argue the statute's requirement that the "cause of action shall have arisen . . .within this state" requires a geographical connection to South Carolina. Since some of Janet Murphy's exposure occurred in this state from 1966 through1969, the appellants contend they meet the jurisdictional requirements of the Door Closing Statute.

In support of their geographical nexus argument, the Murphys rely heavily upon three Door Closing Statute cases. In Bumgardner v. Keene Corp, 593 F.2d 572 (4th Cir. 1979), the federal appeals court held no countervailing federal considerations required it to ignore application of the South Carolina Door Closing Statute. Accordingly, the circuit court affirmed the district court decision to dismiss the asbestos disease case. The case states Bumgardner could have maintained his suit in North Carolina, "the state where he lived, worked and was allegedly exposed to asbestos." Id. at 573. In Collins v. R. J. Reynolds Tobacco Co., 901 F. Supp. 1038 (D.S.C. 1995), the federal district court held the Door Closing Statute jurisdictionally barred a wrongful death suit by a Georgia resident against several foreign corporations. The cause of action allegedly arose from Collins's development of emphysema as a result of smoking cigarettes manufactured by the various corporate defendants. The district court concluded Collins's claims arose in Georgia "[b]ecause any cigarette purchases by Collins in South Carolina were incidental to his job as a truck driver and were minimal in nature, and because all of the remaining connections to plaintiff's claims are with Georgia. . . ." Id. at 1044. In that regard, the court noted Collins lived in Georgia; worked for a Georgia trucking company; and was diagnosed, treated, and died in Georgia. Finally, in Rosenthal v. Unarco Industries, Inc., 278 S.C. 420, 297 S.E.2d 638 (1982), the South Carolina Supreme Court held the Door Closing Statute was constitutional as it did not violate equal protection. In the opinion, the court noted the Door Closing

Statute barred the plaintiff's claims as he was a New York State resident and it was undisputed "the plaintiff has sustained no exposure and has not been employed within the state of South Carolina." Id. at 425, 297 S.E.2d at 642.

I do not believe these three cases offer definitive support for the appellants' position. The Bumgardner case is a two paragraph opinion which provides no specific analysis of the facts as they relate to application of the Door Closing Statute. The Collins case notes the facts of geographical nexus with South Carolina, but it also makes a conclusion that "one test for determining where a cause of action arises is to ascertain where the delict or wrong has its effect." Collins, 901 F. Supp. at 1044. Such an argument cuts against the appellants' position since undoubtedly the delict in this case has its effect in Virginia. Finally, the Rosenthal case is not dispositive because the focus of that opinion was the constitutional law question.

The Door Closing Statute relates to the subject matter jurisdiction of the circuit courts. Nix v. Mercury Motors Express Inc., 270 S.C. 477, 242 S.E.2d 683 (1978). Our supreme court has stated the Door Closing Statute accomplishes several legislative objectives rationally related to the state's interest. These objectives are (1) favoritism to resident plaintiffs over nonresident plaintiffs, (2) provision of a forum for wrongs connected with the state while avoiding the resolution of wrongs in which the state has little interest, and (3) encouragement of activity and investment in the state by foreign corporations without subjecting them to actions unrelated to their activity within the state. Rosenthal v. Unarco Industries Inc., 278 S.C. 420, 297 S.E.2d 638 (1982).

The crucial language in the statute is "when the cause of action shall have arisen . . . within this [s]tate." In Ophuls & Hill v. Carolina Ice & Fuel Co., 160 S.C. 441, 158 S.E. 824 (1931), the supreme court defined the term "cause of action" in the context of the Door Closing Statute. The court stated "the *cause of action* has been described as being a legal wrong threatened or committed against the complaining party." Id. at 450, 158 S.E. at 827. See also

Knight v. Fidelity & Casualty Co. of New York, 184 S.C. 362, 192 S.E. 558 (1937). With respect to the term "arise" in the Door Closing Statute, the supreme court in Cornelius v. Atlantic Grey Hound Lines, 177 S.C. 93, 180 S.E. 791 (1935), equated "arise" with "accrue" and stated that a "cause of action accrues when facts exist which authorize one party to maintain an action against another." Id. at 96, 180 S.E. at 792. (quoting 1 C.J. 1146). Beyond the context of the Door Closing statute, the supreme court has stated that our cases have used the verbs "arise" and "accrue" interchangeably and a cause of action in tort accrues at the moment when the plaintiff has a legal right to sue on it. Stephens v. Draffin, 327 S.C. 1, 488 S.E.2d 307 (1997).

The elements of a cause of action in tort are (1) duty, (2) breach of that duty, (3) proximate causation, and (4) injury. Shipes v. Piggly Wiggly St. Andrews, 269 S.C. 479, 238 S.E.2d 167 (1977). In the factual context of this case, all of those elements were met when Janet Murphy was diagnosed with mesothelioma. Prior to that point, the element of injury had not been established. Once injury was established, the cause of action or "legal wrong" had "arisen" and Murphy could maintain an action in tort against the respondents. Accordingly, the cause of action arose in Virginia, not South Carolina.

For the above stated reasons, I would affirm.

MCKELLAR, A.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Leroy Wilkes,

Appellant.

Appeal From Chester County
Costa M. Pleicones, Circuit Court Judge

Opinion No. 3355
Heard April 2, 2001 - Filed June 11, 2001

VACATED

Chief Attorney Daniel T. Stacey and Assistant Appellate Defender Eleanor Duffy Clearly, both of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Assistant Attorney

General Melody J. Brown, all of Columbia; and Solicitor John R. Justice, of Chester, for respondent.

SHULER, J.: Leroy Wilkes appeals his convictions for assaulting two correctional facility employees, arguing the indictments did not confer subject matter jurisdiction on the trial court.[1] We agree and vacate.

With limited exceptions, "[n]o person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . . ." S.C. Const. art. I, § 11; S.C. Code Ann. § 17-19-10 (1985). This provision has been interpreted to mean that, in the absence of an indictment by the grand jury or a valid waiver of presentment, the circuit court lacks subject matter jurisdiction over the offense. State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992); State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986); Summerall v. State, 278 S.C. 255, 294 S.E.2d 344 (1982). A circuit court, therefore, has subject matter jurisdiction only if: (1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the offense is a lesser included offense of the crime charged in the indictment. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998).

> An indictment is sufficient if the offense is stated with [enough] certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.

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[1] Wilkes was also convicted of resisting arrest, but that conviction is not part of this appeal.

Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) (citations omitted). Ordinarily, an indictment "phrased substantially" in the language of the pertinent statute is sufficient. State v. Shoemaker, 276 S.C. 86, 88, 275 S.E.2d 878, 879 (1981).

Wilkes was indicted and subsequently convicted of violating S.C. Code Ann. section 16-3-630, which provides criminal penalties for any "assault upon an employee of a state or local correctional facility performing job-related duties . . . ." S.C. Code Ann. § 16-3-630 (Supp. 2000). Thus, in order to contain the necessary elements of the offense, an indictment must allege first, that an assault occurred; second, that the victim of the assault was a state or local correctional facility employee; and third, that the employee was performing job-related duties.

In the present case, the body of the first indictment charges: "That Leroy Wilkes did in Chester County on or about April 24, 1999 assault Officer Marilyn K. Givens while she was attempting to process him after arrest." The body of the second indictment is identical to the first, except that it identifies a male officer, Eric Schmid, as the victim of the assault. Although both indictments allege Wilkes assaulted officers who were processing him, and thus performing job-related duties, they fail to identify the officers as correctional facility employees. See Brown v. State, 343 S.C. 342, 350, 540 S.E.2d 846, 850 (2001) (vacating convictions for lack of subject matter jurisdiction where "the indictments on their face failed to contain a necessary element of the offense").

Despite this failure, the State asserts two grounds for finding the indictments in question conferred jurisdiction. First, the State argues the body of each indictment alleges the crime in the language of the statute. Specifically, the State contends the officer's status as correctional facility employees is contextually implied in the indictment. We disagree.

Although the indictments allege Wilkes assaulted officers who were attempting to process him after his arrest, we do not think this implies that the officers were employees of a correctional facility. They could easily have been the arresting officers, who were not employees of such a facility.

Next, the State argues the indictments are sufficient when the charging language in the body of each indictment is considered in conjunction with its caption. Both of the indictments are captioned, "ASSAULT ON CORRECTIONAL FACILITY EMPLOYEE §16-3-630."[2] The State contends the bodies of the indictments, combined with the statutory reference in the captions, enabled Wilkes to know what offenses he was "called upon to answer" as well as what plea he should enter on the charges. Carter, 329 S.C. at 362, 495 S.E.2d at 777. Again, we must disagree.

Clearly, the caption of an indictment is not part of the grand jury's findings. Wilson v. State, 327 S.C. 45, 488 S.E.2d 322 (1997); State v. Lark, 64 S.C. 350, 42 S.E. 175 (1902); State v. Warren, 330 S.C. 584, 500 S.E.2d 128 (Ct. App. 1998), *rev'd on other grounds*, 341 S.C. 349, 534 S.E.2d 687 (2000). For purposes of conferring jurisdiction, the grand jury presents upon its oath only that which appears below the caption in the charging body of the indictment. Cf. State v. Bennett, 156 S.E.2d 725, 726 (N.C. 1967) ("The caption of an indictment . . . is not part of it and the designation therein of the offense sought to be charged can neither enlarge nor diminish the offense charged in the body of the instrument.").

Reliance upon a caption to bolster a fatally deficient indictment is, therefore, contrary to the constitutional mandate that, for most offenses, a defendant may only be required to answer an indictment of the grand jury. S.C. Const. art. I, § 11; cf. State v. Tabory, 262 S.C. 136, 141, 202 S.E.2d 852, 854 (1974) (holding the State "may not support a conviction for an offense intended to be charged by relying upon a caption to the exclusion of the language contained in the body of the indictment").

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[2] Additionally, the words "assault on correctional officer" and "assault on correctional facility employee" appear in the titles of the first and second indictments respectively.

> The indictment or information does not have to expressly allege each element of the crime if the statute violated is referred to in the information or indictment and the missing element is set forth in the statute. However, a reference to the statute and the class of crime in the caption of the information is not part of the information and cannot supply a missing essential element in the information.

42 C.J.S. *Indictments and Informations* § 113 (1991) (citations omitted).

Moreover, this case is distinguishable from State v. Assmann, 46 S.C. 554, 24 S.E. 673 (1896), where an indictment that failed to allege the county in which the crime occurred was held to confer jurisdiction because the county's name appeared in the caption and margin. Id. at 559-60, 24 S.E. at 675. In that case, as well as in numerous cases cited therein, the indictment was held valid because the county named in the caption and margin was incorporated by reference into the body itself with language such as "the county and state aforesaid." Id. at 559-60, 24 S.E. at 673-75; see also State v. Nelson, 514 S.W.2d 581 (Mo. 1974) (holding that the person named as the defendant in the caption and referred to in the body of the indictment by the words "the defendant" was clearly the party charged with the offense stated); State v. Johnson, 335 S.E.2d 770, 771 (N.C. 1985) (holding that the use of referencing language such as "the defendant named above" is sufficient to satisfy the requirement that a valid indictment must name or otherwise identify the defendant, where the defendant's name appeared in the caption). Here, no such reference exists.

CONCLUSION

Because the indictments failed to allege the victims were correctional facility employees, a necessary element of the offense, the trial court lacked subject matter jurisdiction to convict Wilkes of the assaults. Accordingly, the resulting convictions and sentences are

VACATED.

CURETON, J., concurs.

HEARN, C.J., dissents in a separate opinion.

HEARN, C.J.: Respectfully, I dissent. In evaluating the sufficiency of an indictment, this court should "look at the issue with a practical eye in view of the surrounding circumstances." State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993); see also State v. Thompson, 305 S.C. 496, 501 n.1, 409 S.E.2d 420, 423 n.1 (Ct. App. 1991) (giving "a common sense reading [to] the indictment as a whole"). If the offense is stated with sufficient certainty and particularity to enable the trial court to know what judgment to pronounce, and the defendant to know what he is called upon to answer, the indictment passes legal muster. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998); State v. Hamilton, 344 S.C. 344, —, 543 S.E.2d 586, 597 (Ct. App. 2001). When these indictments are viewed in their entirety with a practical eye, I believe they were sufficient to enable both the trial court and Wilkes to know what crimes they alleged.

The indictments state that Givens and Schmid were"officers" and that the assault occurred while they attempted to process Wilkes "after arrest." The majority holds the indictments are fatally defective because the language employed could be construed to identify Givens and Schmid as arresting officers rather than officers employed by a state or local correctional facility as provided by S.C. Code Ann. § 16-3-360 (Supp. 2000). I disagree. In my view, the indictments are not fatally defective simply because they fail to allege that Givens and Schmid were correctional facility employees. The caption of each indictment clearly states the charge as "assault on correctional facility employee." Moreover, the title, located just above the charging language on the same page, reads "assault on correctional facility employee" and refers to "§ 16-3-630."

I do not read State v. Tabory, 262 S.C. 136, 202 S.E.2d 852 (1974), as broadly as the majority opinion to hold that a reviewing court cannot consider a caption or a title in reviewing the sufficiency of an indictment. Tabory holds that "the State may not support a conviction for an offense intended to be charged by relying upon a caption *to the exclusion of the language contained in the body of the indictment*." 262 S.C. at 141, 202 S.E.2d at 854 (emphasis supplied). It does not hold that the caption of an indictment may not be considered when, as here, it is consistent with the charging language, nor does it prohibit the court from looking at the title of an indictment when scrutinizing it for legal sufficiency. In

the past, this court has looked to the title of an indictment as a factor in determining sufficiency. See Hamilton, 344 S.C. at —, 543 S.E.2d at 597 (considering title in finding indictment sufficient). If there was any doubt in the mind of the trial judge or Wilkes as to what type of "officers" Givens and Schmid were, it was clarified by the language in the title located immediately above the charging language. Viewing the indictments "with a practical eye," I would hold that where they specifically identify the victims as officers assaulted by Wilkes after his arrest, and the title cites the relevant statute and refers to correctional facility employees, the indictments are sufficient to confer jurisdiction on the trial court. Accordingly, I would affirm the trial judge.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Keeney's Metal Roofing, Inc.,

Respondent,

v.

Brian A. Palmieri, Cohn Development Group, Inc., First Palmetto Savings Bank, FSB, American Tool and Die Company, Inc., and American Manufacturers Mutual Insurance Company,

Defendants,

Of Whom

Brian A. Palmieri, First Palmetto Savings Bank, FSB, and American Tool and Die Company, Inc., are,

Appellants.

Appeal From Lexington County
Gary E. Clary, Circuit Court Judge

Opinion No. 3356
Heard June 4, 2001 - Filed June 18, 2001

REVERSED AND REMANDED

R. Bryan Barnes and Jennifer L. Wile, both of Rogers, Townsend & Thomas, of Columbia, for appellants.

Cary M. Ayer, of Nicholson, David, Frawley, Anderson & Ayer, of Lexington, for respondent.

ANDERSON, J.: In this civil action, Brian A. Palmieri, American Tool and Die Company, Inc. ("ATD"), and First Palmetto Savings Bank, FSB ("First Palmetto") (collectively "Appellants"), moved the Circuit Court for an award of attorney's fees and costs following their dismissal from the suit pursuant to Rule 12(b)(6), SCRCP. The court denied Appellants' motion, holding, in part: "[N]either the underlying policies of the mechanic's lien statutes nor the language of the statutes themselves contemplate or authorize awarding procedurally dismissed parties statutory attorney's fees and costs." We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Palmieri hired a general contractor, Cohn Development Group, Inc. ("Cohn") to construct a building on property he owned. Cohn then subcontracted with the respondent, Keeney's Metal Roofing, Inc., ("Keeney") to complete part of the work. Keeney later filed a mechanic's lien for the labor and materials used in constructing the building, claiming Cohn would not pay what was owed to it. Keeney named Palmieri and ATD as the owners, and Cohn as general contractor. After the lien was filed, Cohn posted a surety bond pursuant to S.C. Code Ann. § 29-5-110. As a result, the lien was transferred off the land and onto the bond. American Manufacturers Mutual Insurance Company ("American Manufacturers") issued the bond.

Despite the posting of the bond, Keeney sought to foreclose on the lien. Appellants, Cohn, and American Manufacturers were named as defendants in the action.

Pursuant to Rule 12(b)(6), the Circuit Court dismissed Appellants from Keeney's foreclosure action because the bond posted by Cohn discharged the lien on the property. Following their dismissal, Appellants filed a motion for attorney's fees and costs pursuant to § 29-5-20(A), asserting they had "defended and prevailed" against Keeney's mechanic's lien.

The court refused to grant attorney's fees to Appellants, finding:

- Cohn, having filed a bond discharging the property from the lien, assumed the owner's position and was the sole party entitled to attorney's fees;

- allowing attorney's fees to parties dismissed prior to a final resolution of the suit would frustrate the operation of § 29-5-20(A), because it "has the potential to reduce any award of attorney's fees to any other parties";

- "until a final verdict is reached, there remains the possibility that no party would be entitled to an award of fees"; and

- "neither the underlying policies of the mechanic's lien statutes nor the language of the statutes themselves contemplate or authorize awarding procedurally dismissed parties statutory attorney's fees and costs."

ISSUE

Did the Circuit Court err as a matter of law by failing to award attorney's fees and costs to Appellants?

STANDARD OF REVIEW

An action to foreclose a mechanic's lien is a law case in South Carolina. Adams v. B&D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989).

The determination as to the amount of attorney's fees that should be awarded under the mechanic's lien statute is addressed to the sound discretion of the trial court. D.A. Davis Constr. Co. v. Palmetto Props., Inc., 281 S.C. 415, 315 S.E.2d 370 (1984). The court's decision regarding such a matter will not be disturbed absent an abuse of discretion. Id. An abuse of discretion occurs when, inter alia, the trial judge's ruling is based upon an error of law. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001), cert. pending.

LAW/ANALYSIS

Appellants argue the Circuit Court erred in finding they were not entitled to attorney's fees and costs because they prevailed procedurally. We agree.

As a general rule, attorney's fees are not recoverable unless authorized by contract or statute. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997); Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993). Section 29-5-20(A) requires the court to award reasonable attorney's fees and costs to the party defending against the mechanic's lien if the defending party "prevails" in the action. See Utilities Constr. Co. v. Wilson, 321 S.C. 244, 248, 468 S.E.2d 1, 3 (Ct. App. 1996) ("[T]he Legislature … intended to afford a property owner [the] remedy [of recovering attorney's fees and costs] where a mechanic attempts to enforce a defective or wrongful mechanic's lien.") (citation omitted).

Our courts have defined "prevailing party." See Heath v. County of Aiken, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (defining "prevailing party" as: "[T]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention … the one in whose favor the decision

or verdict is rendered and judgment entered.") (citation omitted); Seckinger v. Vessel Excalibur, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997) (stating the defendant is entitled to an award of attorney's fees as the "prevailing party" if the trial court determines a mechanic's lien cannot be enforced against the defendant); Cedar Creek Props. v. Cantelou Assocs., Inc., 320 S.C. 483, 486, 465 S.E.2d 774, 776 (Ct. App. 1995) (finding property owner was entitled to attorney's fees from contractor who filed a mechanic's lien against property owner, but ultimately cancelled it before the property owner's action to dissolve the lien was taken up by the Circuit Court: "[The property owner] is the 'prevailing party' in this action. Although [the contractor] voluntarily cancelled the lien, it did so only after [the property owner] instituted an action to have the lien dissolved. Thus, although [the property owner] got the relief it sought, that is, avoidance of the lien, it still had to defend against the lien until the issue was resolved, and it incurred attorney fees and costs ...") (footnote omitted); Maddux Supply Co. v. Safhi, Inc., 316 S.C. 404, 450 S.E.2d 101 (Ct. App. 1994) (affirming the trial court's ruling that project owner who won on the merits of a mechanic's lien foreclosure action was the "prevailing party" and entitled to recover attorney's fees and costs on behalf of contractor who obtained a surety bond and provided for project owner's legal defense); Jasper County Bd. of Educ. v. Jasper County Grand Jury, 303 S.C. 49, 398 S.E.2d 498 (1990) (finding the definition of "prevailing party" clearly envisions a victory to some degree on the merits).

In the instant case, the Circuit Court determined the mechanic's lien could not be enforced against Appellants because, under § 29-5-110, the surety bond took the place of the property upon which the lien existed. That section states, in part:

> the owner or any other person having an interest in or lien upon the property involved may secure the discharge of such property from such lien by filing … his written undertaking, in an amount equal to one and one-third times the amount claimed … secured by … cash or by a surety bond executed by a surety company licensed to do business in the State, and upon the filing of such undertaking … the lien shall be discharged and the … surety

> bond deposited shall take the place of the property upon which the lien existed ….

Because there was no longer a lien against the property, Keeney could no longer recover from Appellants. See Shelley Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 30, 336 S.E.2d 488, 492 (Ct. App. 1985) (stating in its analysis of a mechanic's lien dispute: "If the property has been released from the lien by 'bonding out,' the lien is no longer enforced against the property"). Keeney's claim against Appellants was therefore terminated.

Additionally, although Appellants were dismissed pursuant to a procedural rule, the dismissal was not on a mere technicality. Instead, Appellants prevailed because, **as a matter of law**, they could not be held liable for the damages Keeney sought under any circumstance. We are satisfied Appellants were the "prevailing parties" within the ordinary meaning of the statute; consequently, Appellants are entitled to recover attorney's fees and costs within the parameters delineated in § 29-5-20(A).

CONCLUSION

Keeney named Appellants as defendants in its foreclosure action. Keeney did so knowing a surety bond had been purchased to discharge Appellants' property from the lien. Appellants incurred attorney's fees and costs defending against Keeney's suit. By suing Appellants under § 29-5-20(A), Keeney triggered the remedies available to the named defendants if they prevailed (i.e., recovery of attorney's fees and costs).

Pursuant to Rule 12(b)(6), the trial court determined Keeney was procedurally barred from obtaining relief from Appellants due to the posting of the surety bond. The Circuit Court's holding as to Appellants' dismissal motion was correct; however, its subsequent determination concerning their request for attorney's fees and costs was not. We rule a party may recover attorney's fees and costs under § 29-5-20(A) as a "prevailing party" even though the party obtained a dismissal via a procedural rule, provided the dismissal was not due to mere technicality. The decision of the Circuit Court denying Appellants' motion is reversed and remanded for determination of

the issue of reasonable attorney's fees and costs.

REVERSED AND REMANDED.

HUFF and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Richmond Truesdale, Jr.,

Respondent.

Appeal From Charleston County
Diane S. Goodstein, Circuit Court Judge

Opinion No. 3357
Submitted February 5, 2001 - Filed June 18, 2001

AFFIRMED

Deputy County Attorney Thomas E. Lynn, of North Charleston, for appellant.

Richmond Truesdale, Jr., of Adams Run, pro se.

CONNOR, J.: Richmond Truesdale, Jr., was convicted in magistrate's court of uttering a fraudulent check in violation of S.C. Code Ann. § 34-11-60 (1987 & Supp. 2000). He appealed and the circuit court ordered the

matter remanded for trial, finding there was no evidence Truesdale entered a valid guilty plea. The State appeals.[1] We affirm.

FACTS

On October 18, 1995, Truesdale was arrested for allegedly writing a fraudulent check in the amount of $168.00 to the South Carolina Department of Revenue and Taxation. Truesdale was scheduled to appear for trial before magistrate Bonnie Koontz-Stickels (now Koontz) on November 9, 1995.

On that day, Truesdale reported to Judge Koontz's court. It is undisputed that court was delayed that day, although there is some dispute about the reason. During the delay, the arresting officer and Judge Koontz's staff advised those present that anyone who wanted to plead guilty and make restitution could do so immediately, rather than waiting for the magistrate. Truesdale agreed to pay restitution of $168.00 for the check and a $25.00 returned check fee, plus court costs of $94.00. Truesdale paid $25.00 of his court costs and signed a Standard Time Payment form agreeing to pay the

[1] Initially, the magistrate was listed as a party in the caption for this appeal. Because we questioned whether the magistrate had standing, we requested the deputy county attorney and Truesdale to file supplemental briefs addressing this issue. These briefs confirmed that the appeal is properly on behalf of the State. See, e.g., State v. Barbee, 280 S.C. 328, 313 S.E.2d 297 (1984) (appeal by the State from circuit court's decision reversing and remanding respondent's magistrate court conviction); State v. Eaves, 260 S.C. 523, 197 S.E.2d 282 (1973) (same); State v. Adams, 244 S.C. 323, 137 S.E.2d 100 (1964) (same). Thus, we have amended the caption to reflect the proper parties and the caption as originally presented in the magistrate's court. See Rule 238(a), SCACR.

remaining balance of $71.82 by November 30, 1995.[2] Judge Koontz was not present during this time.[3]

On November 20, 1995, Truesdale timely filed a handwritten appeal with Judge Koontz asserting he was denied the right to a jury trial. According to Judge Koontz, Truesdale spoke to her sometime after he filed his appeal, indicating that he needed more time to pay the remaining court costs. Therefore, she reminded him that he had until the end of the month to pay the balance. Truesdale subsequently paid the remaining court costs on the November 30, 1995 due date. Judge Koontz stated she assumed the appeal was moot at that point and closed the file.

In contrast, Truesdale maintains he contacted the magistrate's office several times to inquire about the status of his appeal, and Judge Koontz advised him the papers regarding the disposition of his case were at the police department. Truesdale thereafter went to the circuit court and determined a return and other papers pertinent to the appeal had not been forwarded to the circuit court from the magistrate's office. In October 1996, Truesdale went to the Charleston County Police Department to check his criminal record. He had a conviction for a fraudulent check.

In March of 1998, Truesdale filed a petition for a writ of mandamus against Judge Koontz. The petition was dismissed by the circuit court for failure to properly serve the magistrate. Truesdale filed another petition and properly served Judge Koontz. On September 20, 1999, the circuit court construed Truesdale's petition as a motion to restore the appeal and directed the magistrate to file a return. Judge Koontz filed a return on September 30, 1999.

On October 6, 1999, the appeal was heard before the circuit court. Truesdale maintained that he was coerced into pleading guilty, after consistently

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[2] The Standard Time Payment added a 3% collection fee to the $94 court costs, or $2.82, leaving $71.82 due after Truesdale's payment.

[3] Truesdale has paid the restitution due to the Department of Revenue.

asserting his right to a jury trial. According to Truesdale, Officer Casale told him that if he did not pay restitution, the return fee, and court costs, he would go to jail. Truesdale states he never pled guilty before a judge and always made it clear that he desired a jury trial. The circuit court remanded the matter for trial, stating "[t]here was no evidence that a plea was entered before a judge." This appeal followed.[4]

DISCUSSION

The State contends the circuit court erred in reversing Truesdale's conviction for check fraud on the basis there was no evidence Truesdale entered a guilty plea to the charge.

"A defendant's knowing and voluntary waiver of a statutory or constitutional right must be established by a complete record; and may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). "Of course, a guilty plea may not be accepted unless

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[4] The circuit court did not address the timeliness of Truesdale's petition for a writ of mandamus and the issue is not argued here. Accordingly, we need not consider it. Although Truesdale should have proceeded with a mandamus much sooner than he did, there is not a per se time limit for filing a petition for a writ of mandamus. See State v. Barbee, 280 S.C. 328, 313 S.E.2d 297 (1984) (defendant allowed to petition for a writ of mandamus to compel magistrate to file with the circuit court a record of the trial proceedings even after the appeal reached the Supreme Court); State v. Eaves, 260 S.C. 523, 197 S.E.2d 282 (1973) (same); cf. State v. Adams, 244 S.C. 323, 326, 137 S.E.2d 100, 101 (1964) (It is the duty of the defendant as the moving party to prosecute an appeal with due diligence and have it promptly disposed of, and should the magistrate fail to perform the ministerial duty of filing a return, it is incumbent on the defendant to obtain the magistrate's compliance by a petition for a writ of mandamus, if necessary). We note, however, there is no dispute as to the timeliness of Truesdale's notice of appeal to the magistrate.

it is voluntarily entered with an understanding of the nature and consequences of the charge and the plea." State v. Lambert, 266 S.C. 574, 578, 225 S.E.2d 340, 341-42 (1976).

"[B]efore a court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000) (citation omitted). "[T]he trial judge usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." Id. at 34, 528 S.E.2d at 421. However, the trial judge need not "direct the defendant's attention to each and every constitutional right and obtain a separate waiver of each." Lambert, 266 S.C. at 578-79, 225 S.E.2d at 342.

In the current appeal, the arrest warrant indicates Truesdale was found guilty before Judge Koontz on November 9, 1995. However, both "bench trial" and "plea" are circled on the line designated for the type of disposition. On the line indicating the sentence imposed, the notation "94 STP" appears, which presumably stands for the $94.00 court costs and the Standard Time Payment form completed.

It is undisputed that Truesdale never appeared before Judge Koontz or any other magistrate to enter a formal guilty plea after having been advised of his constitutional rights. However, the State contends that Truesdale indicated to the clerk and the deputy that he wished to plead guilty and he posted the required bond, which included restitution in the amount of $193.00 ($168.00 plus a $25.00 returned check fee), and a portion of the court costs. The State asserts: "As clear evidence of this, the Defendant signed a Standard Time Payment and timely paid the remainder plus the required 3% fee." The State argues "[t]he requirement that the plea is voluntary and freely given can be verified by the Magistrate by the Respondent's payment of the restitution and court costs." The State maintains Truesdale's case is no different from the procedure for forfeiting bond and entering a conviction when a defendant is issued a Uniform Traffic Ticket and pays the bond before trial, and that the same procedure is appropriate here.

We agree with the circuit court that the Standard Time Payment form is insufficient evidence that Truesdale intended to enter a guilty plea to the fraudulent check charge. This situation is distinguishable from the procedures followed in disposing of charges under a Uniform Traffic Ticket. First, the Uniform Traffic Ticket statute enumerates certain offenses that can be charged under the ticket, such as littering, ticket scalping, parking on private property without permission, trespassing, etc. S.C. Code Ann. § 56-7-10 (Supp. 2000). Secondly, in the case of traffic offenses, South Carolina has a specific statutory provision that the payment of bond and the forfeiture of that bond prior to trial for traffic offenses shall have the same effect as a guilty plea and conviction. See S.C. Code Ann. § 56-5-6220 (1991); see also Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999) (discussing statutes where Legislature has defined bond forfeiture as the equivalent of conviction). However, the offense of uttering a fraudulent check cannot be charged with a Uniform Traffic Ticket. Moreover, Truesdale was properly charged with issuing a fraudulent check by a warrant.

At the hearing before the circuit court, the deputy county attorney could not identify any comparable provision allowing the entry of a guilty plea and a conviction without the judge in this instance, and no citation to authority has been provided on appeal. We note, however, that under section 34-11-70(c) of the South Carolina Code, a magistrate may properly dispose of a fraudulent check charge prior to trial upon the defendant's payment of restitution and court costs, but the statute specifically provides that the resulting disposition is a dismissal, not a conviction:

> Any court, including magistrates, may dismiss any prosecution initiated pursuant to the provisions of this chapter on satisfactory proof of restitution and payment by the defendant of all administrative costs accruing not to exceed forty-one dollars submitted before the date set for trial after the issuance of a warrant.

S.C. Code Ann. § 34-11-70(c) (Supp. 2000) (At the time of Truesdale's offense, the amount of administrative costs did not exceed twenty-five dollars. An amendment to the statute has since increased this amount.); cf. S.C. Code Ann. § 34-11-90(a) (Supp. 2000) (*conviction* for a first offense is punishable by a fine

of not less than $50 nor more than $200 or by imprisonment for not more than 30 days).

Accordingly, since we find there is no record of a guilty plea in this case, and the check charge was not dismissed, we affirm the order of the circuit court remanding the matter for trial.

We have considered the State's argument that our decision will essentially eliminate the quick disposition of magistrate cases. The State appears to interpret a decision affirming the circuit court to require all defendants to appear before the magistrate in every case. Although this decision will impact the procedure for certain cases, it will not have the far-reaching implications that concern the State. Specifically, it should only affect those cases which do not fall within the statutorily prescribed procedure permitting bond forfeitures or payment of restitution and fines prior to appearing before the magistrate.[5]

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[5] Moreover, contrary to the State's assertion, we do not foresee any impact on trials in absentia, given this mode of case resolution is decidedly different from the procedure employed in this case. In order for a criminal defendant to be tried in absentia, certain requirements must first be met. Rule 16, SCRCrimP. A trial judge must determine a defendant voluntarily waived his right to be present at trial in order to try the case in absentia. Id.; State v. Ritch, 292 S.C. 75, 354 S.E.2d 909 (1987); State v. Jackson, 288 S.C. 94, 341 S.E.2d 375 (1986); State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000). The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present; and (2) was warned that the trial would proceed in his absence should he fail to attend. Jackson, 288 S.C. at 96, 341 S.E.2d at 375; Castineira, 341 S.C. at 623, 535 S.E.2d at 451.

Our decision in no way limits this procedure. Although the instant case presents a different procedural posture in that a trial was not conducted, Truesdale did appear in magistrate's court. If Truesdale had not appeared and the magistrate was present to make the requisite findings, Truesdale could have properly been tried in his absence.

Based on the foregoing, the decision of the circuit court is

AFFIRMED.[6]

HUFF and HOWARD, JJ., concur.

[6] Because we find Truesdale should have been given the opportunity to either plead guilty before the magistrate or proceed to trial, we find it unnecessary to address the State's second issue concerning the factual basis of the circuit court's ruling.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Coastal Conservation League and Sierra Club,

Appellants,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management; Port Royal Plantation; and Town of Hilton Head Island,

Respondents.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Master-in-Equity

Opinion No. 3358
Heard April 5, 2001 - Filed June 18, 2001

REVERSED AND REMANDED

James S. Chandler, Jr., of South Carolina Environmental Law Project, of Pawleys Island, for appellants.

Curtis L. Coltrane, of Coltrane & Alford, of Hilton Head Island and Mary D. Shahid, of DHEC Office of Ocean & Coastal Resource Management, of Charleston, for respondents.

Amicus Curiae: C. C. Harness, III, and Grahame E. Holmes, both of Mt. Pleasant, for DeBordieu Colony Community Association, Inc.

SHULER, J.: The circuit court affirmed a summary judgment order of the Administrative Law Judge Division (ALJD), upholding a permit issued by the Department of Health and Environmental Control (DHEC) allowing Port Royal Plantation to refurbish a groin field and construct new groins along the beach on Hilton Head Island. South Carolina Coastal Conservation League (SCCCL) and Sierra Club appeal, arguing the South Carolina Beachfront Management Act prohibits such construction. We reverse.

FACTS/PROCEDURAL HISTORY

In April 1996 Port Royal Plantation applied to the Office of Ocean and Coastal Resource Management (OCRM), a division of DHEC, for a permit to construct four new groins and refurbish a series of seventeen existing groins (a "groin field") along approximately 8,000 feet of shoreline at Hilton Head.[1] OCRM issued the permit on October 2, 1996.

SCCCL and Sierra Club filed a petition for administrative review of the permit decision and requested a contested case hearing before the ALJD. The petition named Port Royal Plantation and OCRM as respondents, and the

[1] A groin is a structure built on the beach, often of large rocks or timber, running perpendicular to the shore and extending into the ocean. It is designed to retard erosion by trapping littoral drift, i.e., the shifting sand along the shore that results from wave action. See 23A S.C. Code Ann. Regs. 30-1(D)(23) (Supp. 2000). A "groin field" is a series of two or more groins in close proximity which exert overlapping areas of influence. Id.

administrative law judge (ALJ) granted the Town of Hilton Head's motion to intervene. Thereafter, the parties filed cross-motions for summary judgment. Prior to the hearing, the parties stipulated to the relevant facts and agreed that the only issue remaining was a question of law for the court: Whether the Beachfront Management Act prohibited the proposed construction.

By order dated June 16, 1998, the ALJ found the permit to refurbish the groin field and construct new groins valid. SCCCL and Sierra Club appealed this decision to the OCRM's Coastal Zone Management Appellate Panel, which adopted the order of the ALJ and affirmed on December 17. SCCCL and Sierra Club subsequently sought judicial review in the circuit court, which likewise affirmed DHEC's grant of the permit in an order filed February 7, 2000. This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper when "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 a judgment as a matter of law." Rule 56(c), SCRCP; see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). On appeal, a reviewing court may reverse the decision of an administrative agency if a party's substantial rights are prejudiced by a decision which "violate[s] constitutional or statutory provisions . . . ." Weaver v. S.C. Coastal Council, 309 S.C. 368, 374, 423 S.E.2d 340, 343 (1992); see also S.C. Code Ann. § 1-23-380(6) (Supp. 2000).

LAW/ANALYSIS

The sole issue in this appeal is whether the groin construction and refurbishment permit issued by DHEC to Port Royal Plantation violates the statutory provisions of the Beachfront Management Act. We believe it does.

In 1977 our Legislature passed the Coastal Zone Management Act (CZMA) to "protect, preserve, restore and enhance the coastal resources of

South Carolina." 23A S.C. Code Ann. Regs. 30-1(C)(1) (Supp. 2000); see Beard v. S.C. Coastal Council, 304 S.C. 205, 207, 403 S.E.2d 620, 621 (1991) ("Like the 1988 Beachfront Management Act, the purpose of the 1977 Act was to protect, restore and enhance the coastal environment."). To accomplish this goal, the CZMA created a state agency, the South Carolina Coastal Council, to administer and enforce its provisions.[2] Id. The Council's regulatory authority, however, was inadequate to forestall extensive private beachfront development along the coast and, as a result, erosion became a serious threat. See S.C. Code Ann. § 48-39-250(4) (Supp. 2000); 23A S.C. Code Ann. Regs. at 30-1(C)(1) & (2).

Realizing the gravity of the problem, the Legislature enacted the Beachfront Management Act in 1988.[3] Promulgated to further the coastal protection afforded under the CZMA, the Act was a direct response to a report by the Blue Ribbon Committee on Beachfront Management that determined South Carolina's beach/dune system was in crisis.[4] See 23A S.C. Code Ann. Regs. at 30-1(C)(3). Specifically, the report noted that "over fifty-seven miles of our beaches [were] critically eroding," thereby threatening "life, property, the tourist industry, vital State and local revenue, marine habitat, and a national treasure[.]" Id.

To combat the erosional threat, the Beachfront Management Act devised

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[2] A 1993 amendment to the CZMA merged the South Carolina Coastal Council with DHEC, creating the OCRM and Coastal Zone Management Appellate Panel. See § 48-39-40; 23A S.C. Code Ann. Regs. at 30-1(A)(1).

[3] In 1990 the Legislature amended the Act in response to litigation and the aftermath of Hurricane Hugo. See generally Newman Jackson Smith, *Analysis of the Regulation of Beachfront Development in South Carolina*, 42 S.C. L. Rev. 717 (1991).

[4] The beach/dune system is defined as "all land from the mean high-water mark of the Atlantic Ocean landward to the 40 year setback line described in § 48-39-280." 23A S.C. Code Ann. Regs. at 30-1(D)(5).

a statutory scheme to restore the beach/dune system by promoting gradual retreat from the beachfront over a forty-year period. See § 48-39-280; 23A S.C. Code Ann. Regs. at 30-1(C)(6). To this end, the legislation directed DHEC to "develop and institute a comprehensive beach erosion control policy," and prohibited the use of any "critical area," including the beach, without first obtaining a permit from DHEC. § 48-39-120(A) & 130(A).[5]

In general, three methods are used to manage the problem of shoreline erosion: armoring the beach with "hard" erosion control devices; renourishing the beach with sand; and retreating from the beach altogether.[6] 23A S.C. Code Ann. Regs. at 30-1(C)(5). Enactment of the Beachfront Management Act evidences a clear legislative choice favoring the latter two policies. See, e.g., § 48-39-290(B)(2) (governing all construction, reconstruction and alterations between the baseline[7] and the setback line,[8] thereby prohibiting the construction of new erosion control devices seaward of the setback line except for the

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[5] "Critical areas" are defined as any of the following: (1) coastal waters, (2) tidelands, (3) beach/dune systems, and (4) beaches. 23A S.C. Code Ann. Regs. at 30-1(D)(13).

[6] "Beach nourishment" is defined as "the artificial establishment and periodic renourishment of a beach with sand that is compatible with the existing beach in a way so as to create a dry sand beach at all stages of the tide." § 48-39-270(4); see also 23A S.C. Code Ann. Regs. at 30-1(D)(19)(d).

[7] The baseline of a standard [non-inlet] erosion zone generally is fixed at the crest of the primary oceanfront sand dune. Where alterations have occurred, either natural or man-made, DHEC must establish the baseline using the best scientific and historical data available indicating where the crest would have been located had the shoreline not been altered. See § 48-39-280(A)(1).

[8] The setback line is established by DHEC landward of the baseline at a distance forty times the average annual erosion rate or not less than twenty feet. See § 48-39-280(B).

protection of a pre-existing public highway and strictly regulating the repair or replacement of such devices if destroyed); § 48-39-250(5) ("The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proved effective. . . . In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry."); § 48-39-260(3) (stating that the policy of South Carolina is to "severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by [DHEC] which will provide for the protection of the shoreline without long-term adverse effects").[9]

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[9] DHEC regulations explicitly embrace this patent expression of legislative intent. See 23A S.C. Code Ann. Regs. at 30-1(C)(2) ("[H]ard erosion control devices can result in increased erosion, a lowering of the beach profile . . . and a decrease in the ability of the beach/dune system to protect upland property from storms and high tides. Often the result of attempting to protect upland property with hard erosion control structures is that dry sand beaches disappear, thereby placing many millions of tourist dollars in jeopardy and destroying this natural legacy for future generations."); 23A S.C. Code Ann. Regs. at 30-1(C)(4) ("It has been clearly demonstrated that the erosion problems of this State are caused by a persistent rise in sea level, a lack of comprehensive beach management planning, and poorly planned oceanfront development, including construction of hard erosion control structures, which encroach upon the beach/dune system."); 23A S.C. Code Ann. Regs. at 30-1(C)(6) (The CZMA, as amended, "rejects construction of new erosion control devices and adopts retreat and renourishment as the basic state policy towards preserving and restoring the beaches of our state."); 23A S.C. Code Ann. Regs. at 30-11(D)(2) ("[DHEC] shall promote soft-solutions to erosion within the context of a policy of retreat of development from the shore and prevent the strengthening and enlargement of existing erosion control structures.").

Reflecting this preference, the Beachfront Management Act expressly states that "[n]o new construction or reconstruction is allowed seaward of the baseline," as determined by DHEC, except the following:

> (1) wooden walkways no larger in width than six feet
> (2) small wooden decks no larger than one hundred forty-four square feet
> (3) fishing piers which are open to the public . . .
> (4) golf courses
> (5) normal landscaping
> (6) structures specifically permitted by special permit as provided in subsection (D)
> (7) pools may be reconstructed if they are landward of an existing, functional erosion control structure or device . . . .

§ 48-39-290(A).[10] We agree with SCCCL and Sierra Club that this section precludes OCRM from issuing *any* permits for the construction or refurbishment of groins, which clearly are constructed seaward of the baseline and do not fit within a statutory exception.[11]

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[10] Subsection (D) authorizes DHEC to issue "special permits" to build or rebuild structures other than erosion control structures or devices *only if* such structures are not located on the "active beach." § 48-39-290(D). The active beach is defined as "that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean." § 48-39-270(13). Groins, therefore, by definition constructed on the active beach, are excluded from this statutory exception.

[11] It cannot seriously be debated that the development or refurbishing of groins constitutes "construction" or "reconstruction" as contemplated by section 48-39-290(A). See Attachment A to Port Royal Plantation's Permit Application ("Work will consist of the addition of armor rock and bedding stone so as to reconstruct more meaningful structure elevations and cross-sections."); Joint Pub. Notice of the U.S. Army Corps of Eng'rs, Charleston Dist. and the S.C. Dep't of Health & Envtl. Control Office of Ocean & Coastal Res. Mgmt. (existing groin materials include "palm tree trunks,

Although Respondents acknowledge, as did the circuit court and ALJD, that this conclusion stems from a "literal reading" of section 48-39-290(A),[12] they argue the section should not be interpreted in isolation from other provisions of the Beachfront Management Act.[13] We agree. See, e.g., Williams v. Williams, 335 S.C. 386, 389-90, 517 S.E.2d 689, 690-91 (1999) ("[T]his Court's primary function is to ascertain the intention of the legislature. . . . The Court should consider not merely the language . . . being construed, but the word[s] and [their] meaning in conjunction with the purpose of the whole statute and the policy of the law."); Gardner v. Biggart, 308 S.C. 331, 333, 417 S.E.2d 858, 859 (1992) ("A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute.") (quoting Hay v. S.C. Tax Comm'n, 273 S.C. 269, 273, 255 S.E.2d 837, 840 (1979)); Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522,

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concrete rubble and granite stones"); DHEC Critical Area Permit (special condition allows "only rock material" to be used for "groin construction").

[12] Indeed, Respondents admit the plain language of the statute bars the construction of groins:

> If § 48-39-290(A) and (D) are interpreted literally, without reference to other portions of the Act, then it would appear that the construction or reconstruction of groins is prohibited. Groins are not mentioned in the enumerated exceptions found in § 48-39-290(A) and groins, by their nature, are constructed partially on the active beach and in intertidal areas, in contradiction to § 48-39-290(D).

Final Brief of Respondents at 11-12.

[13] We note here that because the brief of Amicus Curiae DeBordieu Colony Community Association sets forth essentially the same arguments as that of DHEC, Port Royal Plantation, and the Town of Hilton Head, we include DeBordieu in our use of the term "Respondents."

377 S.E.2d 569, 570 (1989) ("In ascertaining [legislative] intent, statutes which are part of the same Act must be read together."). However, even construing the Act as a whole, Respondents' arguments are unavailing.

Initially, we believe Respondents are correct in asserting that groins, as defined herein, are not "erosion control structures or devices" as defined in the Act. On its face, the statutory definition of "erosion control structures or devices" does not reference groins and enumerates only three types: seawalls, bulkheads, and revetments. See § 48-39-270(1). However, because the word "include" may be seen as one of limitation or enlargement, we must turn to rules of construction to ascertain the Legislature's true intent. See Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991) (citing N.C. Turnpike Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965) ("includes" is *ordinarily* a word of enlargement and not of limitation) (emphasis added); Frame v. Nehls, 550 N.W.2d 739, 742 (Mich. 1996) (stating that "[w]hen used in the text of a statute, the word 'includes' can be used as a term of enlargement or of limitation, and the word in and of itself is not determinative of how it is intended to be used," the court, upon reviewing the entire act containing the statute at issue along with its legislative history, construed "includes" followed by two descriptive provisions to be a term of limitation despite other, more expansive uses of the defined term throughout the act); Black's Law Dictionary 763 (6th ed. 1990) (depending on context "include" may express enlargement or limitation).

In our view, the statutory collocation suggests an intent to circumscribe the definitional meaning of "include" by stating:

> (1) Erosion control structures or devices include:
>
> (a) seawall: a special type of retaining wall that is designed specifically to withstand normal wave forces;
>
> (b) bulkhead: a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline;
>
> (c) revetment: a sloping structure built along an escarpment or in front of a bulkhead to protect the shoreline or bulkhead from erosion.

§ 48-39-270(1). In other words, the legislative decision to set forth each erosion control structure mentioned in a separate, individually-defined format reinforces the inference that lawmakers intended "include" to limit the definition. The statute, therefore, is interpreted best through application of the rule of construction known as "expressio unius est exclusio alterius," meaning "to express or include one thing implies the exclusion of another, or of the alternative." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (quoting Black's Law Dictionary 602 (7th ed. 1999)). Applying this rule, we may presume the Legislature meant to exclude other structures also designed to deter erosion when they only listed seawalls, bulkheads, and revetments in the statute.

This conclusion is supported by the fact that the three structures designated in the statute, namely seawalls, bulkheads, and revetments, parallel the shoreline and function as a barrier to "armor" it against the elements and retain sand in an effort to inhibit erosion, while groins are constructed perpendicular to the shore and operate to impede erosion by controlling the natural movement of sand that results from waves hitting the beach at an angle. See generally § 48-39-250(5) ("[A]rmoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proved effective. These armoring devices have given a false sense of security to beachfront property owners."); § 48-39-260(3) (policy of the state is to "severely restrict the use of hard erosion control devices to armor the beach/dune system"); 23A S.C. Code Ann. Regs. at 30-1(D)(23) ("Groins are usually perpendicular to the shore and extend from the shoreline into the water far enough to accomplish their purpose.").

Moreover, restricting the statutory meaning of erosion control structures to seawalls, bulkheads, and revetments corresponds to related provisions in the Act. See § 48-39-280(A)(1) ("In standard erosion zones in which the shoreline as been altered naturally or artificially *by the construction of erosion control devices, groins, or other manmade alterations . . . .*") (emphasis added); § 48-39-290(B)(2) (section governing the construction and reconstruction of erosion control devices and which by definition applies only to structures situated between the baseline and the setback line, thereby excluding anything built on

the active beach); § 48-39-290(B)(2)(b)(iv) (subsection strictly regulating the repair or replacement of "erosion control structures or devices" and setting forth specific assessment and measuring instructions solely for seawalls, bulkheads, and revetments); § 48-39-250(5) (stating that "[t]he use of armoring in the form of hard erosion control devices such as *seawalls, bulkheads and rip-rap* to protect erosion-threatened structures adjacent to the beach has not proven effective.") (emphasis added).[14]

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[14] We realize section 48-39-250(5)'s reference to "erosion control structures such as seawalls, bulkheads, *and rip-rap*" could be interpreted to expand the definition of erosion control structures beyond those enumerated in section 48-39-270(1) (emphasis added). The Beachfront Management Act does not define the term "rip-rap." However, although "rip rap" may be defined solely as "large rocks" or chunks of stone, see Seyler v. Burlington Northern Santa Fe Corp., 102 F.Supp.2d 1226 (D. Kan. 2000), it usually refers to a retaining wall made of rip rap material or, alternatively, the use of rip rap material to reinforce such a wall. See, e.g., Muir v. Coastal Res. Mgmt. Council, WL 345817 at n.1 (R.I. Super. March 21, 2001) ("A revetment is a structure built to armor a sloping shoreline face usually composed of one or more layers o[f] stone or concrete riprap. . . . A riprap consists of stone or concrete blocks that are dumped or placed and installed without mortar."); Steptoe v. True, 38 S.W.3d 213, 215 (Tex. App. 2001) (discussing a bulkhead made out of "rip-rap"); Oliver v. Amity Mut. Irrigation Co., 994 P.2d 495, 498 (Colo. Ct. App. 1999) (defining riprap as "a foundation or sustaining wall of stones"); Payne v. City of Galveston, 772 S.W.2d 473, 475 (Tex. App. 1989) ("On the beach at the base of the seawall are piles of granite and limestone boulders, called 'rip-rap,' which stabilize the sand at the base of the wall from erosion."); State v. Putman, 552 A.2d 1247, 1248 (Del. Super. Ct. 1988) (defining revetment as "rip-rapping"); Barrie v. Cal. Coastal Comm'n, 241 Cal. Rptr. 477, 485 (Ct. App. 1987) (discussing "riprap" located at the base of a seawall); Webster's New World College Dictionary 1237 (4th ed. 1999) (citing primary definition of rip rap as "a foundation or wall made of large chunks of stone thrown together irregularly or loosely"). The use of "rip-rap" in section 48-39-250(5),

Having determined groins are not "erosion control structures or devices" as contemplated by the Beachfront Management Act, it is readily apparent that some statutory sections are not relevant to our analysis. For example, section 48-39-290(B)(2), governing construction, reconstruction and alteration of erosion control devices, does not apply. Section 48-39-120(B), authorizing DHEC to issue permits for erosion control structures, similarly is inapplicable. On the other hand, subsection 48-39-290(A)(6)(D) does apply, because it concerns permits "to build or rebuild a structure other than an erosion control structure or device." However, because it bans all construction on the "active beach," the subsection still operates to preclude the development or refurbishment of groins. See § 48-39-290(A)(6)(D).[15]

Although Respondents do not rely on section 48-39-120(F) in their brief, both the circuit court and ALJD construed this section as authorizing DHEC to issue permits for the construction and reconstruction of new or existing groins. The section provides:

> [DHEC], for and on behalf of the State, may issue permits not otherwise provided by state law, for erosion and water drainage structure in or upon the tidelands,

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therefore, is consistent with the limited definition of erosion control structures or devices contained in section 48-39-270(1).

[15] Respondents are correct in asserting the Legislature purposely enacted the special permit provision contained in exception (6) of section 48-39-290(A) to prevent unconstitutional takings of the type ultimately struck down in Lucas v. S. C. Coastal Council, 505 U.S. 1003 (1992). Section 48-39-290 was enacted as part of the 1990 amendments to the Beachfront Management Act, originally enacted in 1988. According to Respondents, therefore, the plain language of the section should not control because it "is inconsistent with the historical basis for the 1990 amendments." To the contrary, we believe section 48-39-290's blanket prohibition on any construction on the active beach fully accords with Lucas, as the active beach, by definition, is not subject to claims of private ownership.

> submerged lands and waters of the State below the mean high-water mark as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare, the protection of public and private property from beach and shore destruction and the continued use of tidelands, submerged lands and waters for public purposes.

§ 48-39-120(F). The statute does not define "erosion and water drainage structure." Even assuming, arguendo, that the term "erosion and water drainage structure" could be interpreted to encompass groins, subsection (F) may not be employed to validate construction expressly prohibited by the clear language of section 48-39-290(A).

In finding the permit issued by DHEC in this case valid, the ALJD erroneously interpreted the phrase "not otherwise provided by state law." While no South Carolina case has construed this precise language, State v. Jenkins, 26 S.C. 121, 1 S.E. 437 (1887), is instructive.

In Jenkins, our supreme court held Article 4 § 18 of the state constitution, granting courts of general sessions exclusive jurisdiction in all criminal cases "which shall not be otherwise provided by law," governed jurisdiction in cases of petit larcency because no other provision of law limited punishment for the crime such that jurisdiction could be had by trial justices as specified in Article 1 § 19.[16] Jenkins, 26 S.C. at 123, 1 S.E. at 438. In so doing, the court further noted:

> If the general assembly had since [the enactment of the constitution] limited the punishment of petit larceny as mentioned in art. I., section 19, this, under the language

[16] This constitutional provision vested jurisdiction in trial justices, i.e., justices of the peace or "other officers authorized by law," for all non-felony offenses where the punishment did not exceed a $100 fine or thirty days imprisonment. See S.C. Const. 1868 art. I, § 19.

> of the section, would have conferred exclusive jurisdiction upon trial justices, and consequently would have ousted the jurisdiction of the General Sessions, as by such [legislative] act jurisdiction in such cases would have been "otherwise provided by law."

Id. at 123-24, 1 S.E. at 439.

Because we view subsection (F)'s reference to permits "not otherwise provided by state law" as synonymous with the phrase "shall not be otherwise provided by law" interpreted in Jenkins, we find the Legislature intended to restrict DHEC's authority to issue permits for erosion and water drainage structures to those circumstances in which no other provision of state law applies.[17] See id.; City of New York v. Dist. Council 37, Am. Fed'n of State, County & Mun. Employees, AFL-CIO, 692 N.Y.S.2d 593, 598 (1999) (language in city charter stating mayoral power exists only to the extent "not otherwise provided by law" implies that the mayor's powers "are subject to the constraints, if any, contained in the Taylor Law and other state laws"). Accordingly, since section 48-39-290(A) clearly pertains to *all* beachfront construction and reconstruction seaward of the baseline, section 48-39-120(F) cannot serve to ratify the groin permit issued to Port Royal Plantation.[18]

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[17] "Not otherwise provided by law" has been held analogous to "unless otherwise provided by law," Arends v. Iowa Select Farms, L.P., 556 N.W.2d 812, 815 (Iowa 1996), and "except as otherwise provided by law," Matthews v. Purcell Seed & Grain Co., 867 P.2d 1359, 1360 (Okla. Ct. App. 1993).

[18] Of course, had the Legislature desired to override the express prohibition of section 48-39-290(A), it could have amended subsection (F) and authorized DHEC to issue permits, *notwithstanding any other provision of state law,* for erosion and water drainage structures, see Mosteller v. County of Lexington, 336 S.C. 360, 364, 520 S.E.2d 620, 622 (1999) (finding the Legislature's use of the phrase "[n]otwithstanding any other provision of law" in a statute indicates a clear intention to exclude other provisions of law so that the section employing such language trumps the

The circuit court's analysis of subsection (F) is similarly misplaced. In finding the groin permit valid, the circuit court relied in part on DHEC's interpretation of the provision, which would "allow the construction or reconstruction of groins in conjunction with beach nourishment." While we agree with the circuit court that the construction given a statute by the agency charged with its administration is entitled to the utmost consideration on appeal such that it will not be overruled absent compelling reasons, see Captain's Quarters Motor Inn, Inc. v. S. C. Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991), an agency's construction "affords no basis for the perpetuation of a patently erroneous application of [a] statute." Monroe v. Livingston, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968). Thus, because DHEC's interpretation of section 48-39-120(F) conflicts directly with the express language of section 48-39-290(A), it cannot serve as a basis for upholding Port Royal's permit. See Hodges, 341 S.C. at 88, 533 S.E.2d at 582 ("[T]his Court should not completely disregard the text of an unambiguous statute based on an alleged conflict with an earlier statute.").

The circuit court further noted that DHEC has promulgated regulations specifically governing groins. See, e.g., 23A S.C. Code Ann. Regs. at 30-13(N) (setting forth standards for the "special permits" required of "[g]roins, jetties and offshore breakwaters," because such structures "interfere with the natural transport of sediment").[19] It is well settled, however, that "[a]lthough a

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requirements of other applicable sections), or, alternatively, included an exception in section 48-39-290 for groins and similar structures. See Berkebile v. Outen, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) ("A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject.").

[19] Interestingly, DHEC regulation 30-13(N) directly conflicts with other, more specific agency regulations. See 23A S.C. Code Ann. Regs. at 30-11(D)(4) ("No permit shall be issued which is inconsistent with the state [coastal management] plan . . . ."); 23A S.C. Code Ann. Regs. at 30-11(D)(5) ("[DHEC] shall be guided by the prohibitions against construction contained in Section 48-39-290 and Section 48-39-300 . . . .").

regulation has the force of law, it may not alter or add to a statute." Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995); Soc'y of Prof'l Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) (finding DHEC regulation that contravened statutory provisions invalid because a regulation "must fall when it alters or adds to a statute"); compare U.S. Outdoor Adver., Inc. v. S. C. Dep't of Transp., 324 S.C. 1, 481 S.E.2d 112 (1997) (upholding definition of statutory term provided by agency regulation where the statute specifically authorized DOT to enact regulations more limiting than the terms of the statute); Glover v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995) (employing agency regulation to aid statutory interpretation where both the regulation and statute evinced the *same* legislative intent).

Respondents urge this Court to uphold Port Royal's permit because groins purportedly extend the life of beach renourishment projects, a declared goal of the Beachfront Management Act.[20] See § 48-39-260(5) (stating policy of South Carolina is to "promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible"). In particular, Respondents claim an absolute ban on all groin construction and reconstruction would lead to "a result so absurd that it could not have been intended" by the Legislature, because groins are essential to the preservation of newly deposited beach sand. We need not decide whether groins in fact enhance such projects,

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[20] Respondents also claim that read literally, section 48-39-290(A) would proscribe renourishment altogether, because the process of artificially nourishing the beach with sand is a "construction" project that utilizes heavy equipment like trucks and backhoes. This argument is meritless. See Black's Law Dictionary 308, 1278 (7th ed. 1999) (defining "construction" as "[t]he act of *building*" or "the thing so *built*"; also defining "reconstruction" as "[t]he act or process of *rebuilding*") (emphasis added); Webster's New World College Dictionary 192 (4th ed. 1999) (defining parallel meaning of "build" as "to make by putting together materials, parts, etc."). Obviously, since the placing of sand on the open beach can in no way be described as "building" or "rebuilding," section 48-39-290(A) has no effect on clearly permitted nourishment projects.

a determination inappropriate for summary judgment, because, in the absence of ambiguity or contrary statutory provisions, the plain language of section 48-39-290 must control. See Hodges, 341 S.C. at 85, 533 S.E.2d at 581 ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.") (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)); City of Columbia v. ACLU of S.C., Inc., 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.").

Finally, Respondents argue the Court is required to read the 1999 South Carolina Beach Restoration and Improvement Trust Act, S.C. Code Ann. §§ 48-40-10 to - 70 (Supp. 2000), in conjunction with the Beachfront Management Act to glean the Legislature's true intent regarding the construction or reconstruction of groins. We disagree.

In making this argument, Respondents rely on language found in section 48-40-20, specifically a definition of renourishment which reads in part:

> "Beach renourishment" means the artificial establishment and periodic renourishment of a beach with sand . . . as described in Section 48-39-270, *to include where considered appropriate and necessary by [OCRM], groin construction and maintenance to extend the life of such projects*.

§ 48-40-20(3) (emphasis added). Although we agree this provision is indicative of some purposeful consideration of groins, this Court may not disregard the otherwise clear intent of the Legislature.

The General Assembly enacted the Beach Restoration and Improvement Trust Act for the express purpose of establishing a "trust" to provide matching funds to qualifying local governments for beach restoration projects. See § 48-40-30(1). In so doing, the Legislature chose not to amend the Beachfront Management Act, but rather to create the fund in a separate chapter of Title 48.

Indeed, the definition of beach renourishment therein is prefaced by the unambiguous phrase "*[a]s used in this chapter*." § 48-40-20 (emphasis added). In our view, these decisions evince a legislative intent to leave the mandatory provisions of the Beachfront Management Act intact.

Moreover, under our general rules of statutory construction, the Beach Restoration and Improvement Trust Act, a general statute, cannot supersede the more specific Beachfront Management Act. See Wooten ex rel. Wooten v. S. C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) ("A specific statutory provision prevails over a more general one."); Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) ("The general rule of statutory construction is that a specific statute prevails over a more general one.").

In the final analysis, we believe our construction of section 48-39-290 fully comports with the purpose and policy of the Beachfront Management Act. See, e.g., S.C. Coastal Mgmt. Program Document IV-53 to IV-54 (1977, 1979) (pursuant to section 48-39-90(D), the "final management plan for the State's coastal zone," states that the "trapping of sand by a groin can have *severe impacts* on the adjacent shoreline down the beach") (emphasis added); § 48-39-250(6) ("Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. *It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle.* This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.") (emphasis added); § 48-39-260(3) (the policy of South Carolina is to "severely restrict the use of hard erosion control devices to armor the beach/dune system and *to encourage the replacement of hard erosion control devices with soft technologies*[21] *as approved by [DHEC] which will provide for the protection of the shoreline without long-term adverse*

[21] "Soft" solutions or technologies, as defined by DHEC, consist of beach nourishment and sand scraping.

effects") (emphasis added); § 48-39-260(4) (the policy of our state is to "*encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system*") (emphasis added); 23A S.C. Code Ann. Regs. at 30-11(D)(5) ("[DHEC] shall be guided by the prohibitions against construction contained in Section 48-39-290 and Section 48-39-300 . . . . *These structures interfere with the natural system and impact the highest and best uses of the system*. . . .") (emphasis added).

CONCLUSION

Because we hold as a matter of law that the Beachfront Management Act prohibits DHEC from issuing permits for the construction or reconstruction of new or existing groins, the grant of summary judgment to Respondents is reversed and the case remanded to the circuit court for entry of an order granting summary judgment to SCCCL and Sierra Club.

REVERSED AND REMANDED.

HEARN, C.J., and GOOLSBY, J., concur.