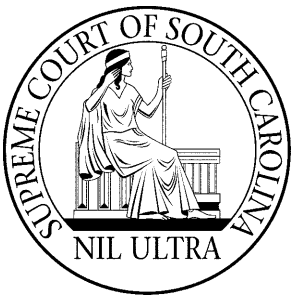

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

January 27, 2003

ADVANCE SHEET NO. 3

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Lee Burnett, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

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

Opinion No. 25582
Submitted December 5, 2002 - Filed January 13, 2003

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. Mcintosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for Petitioner.

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Respondent, Robert Lee Burnett ("Burnett"), filed an application for post-conviction relief ("PCR"). The PCR court granted relief, and the State filed a petition for writ of certiorari.

FACTUAL / PROCEDURAL BACKGROUND

Burnett pled guilty to malicious injury to personal property, assault and battery of a high and aggravated nature ("ABHAN"), and three counts of pointing a firearm. He was sentenced to thirty days on the property charge, and ten years consecutive on the ABHAN charge (suspended on service of five years in prison and five years of probation). In addition, he was sentenced to three years on the first firearm charge, four years on the second firearm charge, and five years on the third firearm charge, all to be served concurrently. Burnett's aggregate sentence was ten years imprisonment, and five years of probation.[1]

Burnett did not file a direct appeal. He filed an application for PCR, alleging that his guilty plea was involuntary. The PCR judge granted relief and this Court granted certiorari to review the following issue:

> Did the PCR court err in granting PCR on grounds that Burnett's guilty plea was involuntary?

LAW / ANALYSIS

The State argues that the PCR court erred in finding that Burnett's counsel was ineffective and that his guilty plea was involuntary. We agree.

---

[1] The charges against Burnett arose out of a single incident. Apparently, Burnett got angry with a driver in front of him on the highway and bumped his car from behind. The other driver pulled into a gas station to get help, and Burnett followed him. Burnett got out of his car and began beating the driver of the other vehicle. At some point, Burnett produced a gun, and pointed it at the driver and at two bystanders in the parking lot. He fired one shot into the driver's vehicle without injuring anyone, and then drove away.

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). This Court has held that, "in addition to the requirements of *Boykin*, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State,* 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991); *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980)). A plea made in ignorance of its direct consequences is entered in ignorance and is invalid. *Hazel,* 275 S.C. 392, 271 S.E.2d 602.

A defendant who pleads guilty on the advice of counsel may collaterally attack the voluntariness of his plea only by showing that (1) counsel was ineffective and that (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. *Wolfe v. State,* 326 S.C. 158, 485 S.E.2d 367 (1997). When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel. *Moorehead v. State,* 329 S.C. 329, 496 S.E.2d 415 (1998). The Court will uphold the PCR court's findings if there is *any* evidence of probative value to support them. *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989).

In *Moorehead*, the defendant pled guilty to criminal sexual conduct ("CSC") in the third degree, and was sentenced to ten years, suspended after service of seven years, and five years probation. 329 S.C. 329, 496 S.E.2d 415. At the PCR hearing, the defendant testified that he pled guilty to the CSC charge based on counsel's advice that he would receive only probation. *Id.* At the plea hearing, however, the judge asked the defendant if he understood that the possible sentence for CSC was ten years, and summarized the plea agreement on the record. *Id.* The defendant said he understood the possible sentence and the plea agreement as a whole. *Id.* Based on the colloquy between the defendant and the plea judge, this Court reversed the

PCR court's grant of relief, holding that "[e]ven if trial counsel erroneously informed [defendant] that his sentence would be probationary, any misconception was cured at the plea hearing." *Id.* at 333, 496 S.E.2d at 416-17.

In the case before the Court now, the colloquy between the plea judge and defendant was even more comprehensive than the one in *Moorehead.* In this case, the plea judge informed Burnett of the maximum penalties for each of his crimes (25 years if sentenced consecutively), and informed Burnett that he had not agreed to give him a particular sentence. The judge told Burnett, "there's been no promise by this Court as to what the sentence would be. You [could] get one after the other after the other. They could be concurrent, consecutive, jail time, combination. I just don't know." After asking if Burnett understood that he had not agreed to give him any particular sentence, the judge asked Burnett if anyone else had promised him anything about his sentence. Burnett indicated he understood the possible sentences, and answered that no one had made promises to him about his sentence.

At the PCR hearing, Burnett's trial counsel testified,

> I'm sure I didn't tell him that he was going to get three years because I didn't have a clue what he was going to get. I'm sure I told him he could get up to 25 as did the judge he had to plea in front of. It's possible that I told him you might get three years, but I meant that loosely and I hope by my saying you might get three years didn't mean that I thought that he was necessarily, but that was certainly within the range of possible sentences.

Trial counsel testified further, "I don't tell them what a judge is going to do. I tell them what the sentence range could be, that's my practice." Trial counsel admitted that he knew three years was what Burnett wanted, and that it was *possible* Burnett could have thought he was going to get three years, but reiterated that anything he might have said regarding three years would have been qualified by a statement that he didn't know what Burnett would get.

The plea judge accepted Burnett's guilty pleas only after a very thorough questioning of Burnett's understanding of what rights he was waiving by pleading guilty, what his possible sentences were, and that the judge had not agreed to give him any particular sentence.

In our opinion, the record in this case does not indicate that trial counsel promised Burnett a three-year sentence. Regardless, any possible misconceptions on Burnett's part were cured by the colloquy during the actual plea hearing. *See Moorehead; Wolfe*. For this reason, we find there is no probative evidence to support the PCR court's finding that Burnett received ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, we **REVERSE** the PCR court's grant of relief.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Beaufort County Board of Education, Respondent/Appellant,

v.

Lighthouse Charter School Committee and State of South Carolina ex rel. Charles M. Condon, Attorney General, Appellants/Respondents.

Appeal from Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 25583
Heard April 16, 2002; Reheard December 4, 2002
Filed January 27, 2003

VACATED

George E. Mullen and Michael S. Seekings, both of Mullin, Wylie & Seekings, of Hilton Head, for appellant/respondent Lighthouse Charter School Committee.

Attorney General Charles M. Condon, Deputy Attorney General Treva G. Ashworth, and Assistant Deputy Attorney General J. Emory Smith, all of

Columbia, for appellant/respondent State of South Carolina.
Kenneth L. Childs, William F. Halligan, John M. Reagle, and Keith R. Powell, all of Childs & Halligan; and Charles J. Boykin, of Duff, Turner, White & Boykin, L.L.C., all of Columbia, for respondent/appellant Beaufort County Board of Education.

JUSTICE MOORE: This appeal is from an order striking down as unconstitutional the racial composition requirement of S.C. Code Ann. § 59-40-50(B)(6) (Supp. 2001), originally enacted as part of the Charter Schools Act of 1996, and finding it unseverable from the remainder of the Act. Because the legislature has substantially amended this provision, we vacate the order of the circuit court.

FACTS

In 1996, appellant/respondent Lighthouse Charter School Committee (Lighthouse) submitted to respondent/appellant (Board) an application for a local charter school on Hilton Head Island. The Board denied the application on the ground Lighthouse failed to meet several requirements of the Charter Schools Act, including the racial composition requirement found in the original version of ' 59-40-50(B)(6) which provided in pertinent part: Aunder no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent.@

The case first reached this Court on appeal in 1999. We affirmed the denial of Lighthouse=s application but remanded for the circuit court to consider whether the racial composition requirement was unconstitutional as a violation of equal protection. Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm., 335 S.C. 230, 516 S.E.2d 655 (1999). On remand, the circuit court found the racial composition requirement of ' 59-40-50(B)(6) violated equal protection and this provision was not severable from the remainder of the Act. Accordingly, the Charter Schools Act in its entirety was declared unconstitutional.

Lighthouse and the Attorney General appealed the circuit court=s ruling on severability; the Board cross-appealed on the constitutional issue. While the appeal was pending, 2002 S.C. Act No. 265 was signed by the Governor on May 20, 2002. This Act amended the Charter Schools Act by adding a severability clause but did not change the existing racial composition requirement. On July 1, 2002, however, the Governor signed a second Act, 2002 S.C. Act No. 341, which rewrote several provisions of the Charter Schools Act including the racial composition requirement originally found in § 59-40-50(B)(6). Under Act No. 341, the Charter Schools Act now provides:

> **§ 59-40-50(B)** A charter school must:
>
> **(7)** admit all children eligible to attend public school in a school district to a charter school operating in that school district, subject to space limitations. However, it is required that the racial composition of the charter school enrollment reflect that of the school district or that of the targeted student population which the charter school proposes to serve, to be defined for the purposes of this chapter as differing by no more than twenty percent from that population. This requirement is also subject to the provisions of Section **59-40-70(D)**. If the number of applications exceeds the capacity of a program, class, grade level, or building, students must be accepted by lot, and there is no appeal to the sponsor.

Further, the new Act provides under **§ 59-40-70(D)**:

> In the event that the racial composition of an applicant's or charter school's enrollment differs from the enrollment of the local school district or the targeted student population by more than twenty percent, despite its best efforts, the local school district board shall consider the applicant's or the charter school's recruitment efforts and racial composition of

> the applicant pool in determining whether the applicant or charter school is operating in a nondiscriminatory manner. A finding by the local school district board that the applicant or charter school is operating in a racially discriminatory manner may justify the denial of a charter school application or the revocation of a charter as provided herein or in Section 59-40-110, as may be applicable. A finding by the local school district board that the applicant is not operating in a racially discriminatory manner shall justify approval of the charter without regard to the racial percentage requirement if the application is acceptable in all other aspects.

(Emphasis added). This second amendment also includes a severability clause.

ISSUE

> What effect do the amendments to the Charter Schools Act have on this case challenging the constitutionality of the original racial composition clause?

DISCUSSION

Act No. 341 applies generally to the "organization, operation, and governance" of all charter schools. As the latest enactment, it is the controlling legislation governing the charter application process and pre-existing charter schools. *See* I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (later legislation takes precedence over earlier). The racial composition provision originally found in § 59-40-50(B) has been superseded, not only here where Lighthouse is still in the application process, but also regarding existing schools which must comply with Act No. 341 as well. Accordingly, there is no reason for us to issue an opinion ruling on the constitutionality of the original racial composition provision.

Further, the new provisions regarding racial composition, §§ 59-40-50(B)(7) and –70(D), are substantially different in effect from the original provision. The original provision stated that "under no circumstances" could the racial composition of a charter school differ by more than ten percent from the district population. Under Act No. 341, the provision found in § 59-40-70(D) excuses the new twenty-percent racial composition requirement entirely if the charter school is not operating in a racially discriminatory manner. These new provisions have changed the character of the racial composition requirement by injecting a fact-based determination regarding discrimination rather than mandating a straightforward racial quota.

Because the original provision under which this case was brought is no longer applicable and the new requirements under Act No. 341 are substantially different, we vacate the order of the circuit court and dismiss this appeal as moot. *Cf.* Peterson Outdoor Advertising Corp. v. Beaufort County, 291 S.C. 533, 354 S.E.2d 563 (1987) (repeal or amendment of zoning ordinance during appeal renders the appeal moot). Lighthouse may continue the application process under the applicable provisions of Act No. 341.

VACATED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Greenville County, Respondent,

v.

Kenwood Enterprises, Inc., and Elephant, Inc., d/b/a Platinum Plus, and Ken Wood, Appellants,

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Greenville County, Respondent,

v.

HH&M, Inc., and First Five Management, Inc., d/b/a Heartbreakers, Appellants,

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Greenville County, Respondent,

v.

Pretty Woman, Inc., Appellant.

Appeal From Greenville County
Wyatt T. Saunders, Jr, Circuit Court Judge

Opinion No. 25584
Heard November 19, 2002 - Filed January 27, 2003

AFFIRMED

Harry T. Heizer, Jr., of Columbia, and Randall S. Hiller, of Greenville, for Appellants Kenwood Enterprises, Inc., and Elephant, Inc., d/b/a Platinum Plus, and Ken Wood.

Robert C. Childs and Laura W. H. Teer, of Greenville for Appellants HH&M, Inc., and First Five Management, Inc., d/b/a Heartbreakers.

Suzanne E. Coe, of Atlanta, for Appellant Pretty Woman, Inc.

W. Howard Boyd, Jr., Ronald K. Wray, II, and Andrea M. Hawkins, of Gallivan, White & Boyd, P.A., of Greenville for Respondent.

JUSTICE WALLER: Appellants appeal from the trial court's order granting summary judgment in favor of respondent Greenville County. We affirm.

PROCEDURAL BACKGROUND

Greenville County ("the County") brought lawsuits against appellants to enforce the County's ordinance regulating the location of sexually oriented businesses. The trial court granted summary judgment in favor of the County and enjoined appellants from operating their businesses. In addition, the trial court granted the County summary judgment on appellants' counterclaims.

Appellants Kenwood Enterprises, Inc., and Elephant, Inc., d/b/a Platinum Plus, and Ken Wood (collectively "Platinum Plus") and HH&M, Inc., and First Five Management, Inc., d/b/a Heartbreakers (collectively "Heartbreakers") together have filed a brief raising several issues on appeal. Appellant Pretty Woman, Inc., d/b/a Diamonds ("Diamonds") filed a separate brief raising a single issue.

FACTS

On February 7, 1995, the County enacted Greenville County Zoning Ordinance No. 2673 ("the Ordinance"). The Ordinance established both a licensing scheme and location restrictions for sexually oriented businesses. Several adult businesses (but none of the appellants in the instant case) challenged the constitutionality of the Ordinance in Harkins v. Greenville County, 340 S.C. 606, 533 S.E.2d 886 (2000), cert. denied, 531 U.S. 1125 (2001), and the Harkins Court invalidated the licensing portion of the ordinance. The Harkins opinion initially was filed on April 24, 2000. On June 12, 2000, the Court withdrew the April 24 opinion, denied a petition for rehearing, and refiled the opinion, stating that the "Conclusion section of the initial opinion has been **clarified** so that only the licensing portion of the Greenville County Ordinance is declared unconstitutional." Id. at 611, 533 S.E.2d at 888 (emphasis added). In August 2000, the County instituted the instant actions against appellants.

The Ordinance states that County Council considered, *inter alia*, several summaries of other cities' land use studies as well as court cases including City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). Based on these materials, County Council concluded that "in areas surrounding adult-oriented entertainment establishments crime increases, property values decrease, and the quality of life for residents declines." Moreover, the "Purpose and Intent" section of the Ordinance provides as follows:

> It is the purpose of this ordinance to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the county, and to establish reasonable

> and uniform regulations to prevent the continued deleterious location and concentration of sexually oriented businesses within the county. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials including sexually oriented materials. Similarly, it is not the intent or effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market…

Section 12 of the Ordinance governs the location of sexually oriented businesses, and subsection (a) provides that all sexually oriented businesses shall be located in an S-1 district. Subsection (b) establishes a 1500-foot setback requirement such that a sexually oriented business cannot be located within 1500 feet of nine enumerated types of properties, including a church, school, boundary of a residential district, and property line of a lot devoted primarily to residential use. Subsection (c) states that a sexually oriented business cannot be within 1500 feet of another sexually oriented business. In subsection (i), the provisions, with the exception of subsection (a), are made applicable to "those areas of the county that are not zoned."[1]

Initially, the Ordinance was proposed and drafted as an amendment to the County's Zoning Ordinance ("Zoning Ordinance").[2] Ultimately, however, the Ordinance was not passed as an amendment to the Zoning Ordinance, but instead was passed as a stand-alone ordinance applicable to both the zoned and unzoned areas of the County. John Owings, Jr., of the County's Planning Commission, explained that if the Ordinance had been applied only to the zoned areas of the County, then it would have encouraged the location and possible concentration of adult businesses on the edge of the

[1] In Harkins, this Court recognized that when read together, the subsections of Section 12 allowed sexually oriented businesses to locate in the County's unzoned areas, in addition to S-1 districts. Harkins, 340 S.C. at 620-21, 533 S.E.2d at 893.

[2] The County's Zoning Ordinance is part of the Record on Appeal.

zoned areas. Thus, Owings advised that the Ordinance should be county-wide and not as an amendment to the Zoning Ordinance.[3]

The Ordinance was given a first and second reading. At the recommendation of the Planning Commission, a workshop was held between the second and third reading. Upon the third reading, the Ordinance's location requirement, originally drafted at 1000 feet, was amended to the 1500-foot requirement, and then County Council adopted the Ordinance as amended.

Platinum Plus, Heartbreakers, and Diamonds are all "sexually oriented businesses," as that term is defined by the Ordinance.[4] Platinum Plus and Heartbreakers are both located in an S-1 district and did not exist when the Ordinance was enacted. Although located in an S-1 district, both Platinum Plus and Heartbreakers violate the Ordinance's 1500-foot location requirement. Diamonds is located in a C-2 district **and** is in violation of the 1500-foot location requirement. Because Diamonds was in existence when the Ordinance was enacted, it was entitled to a one-year moratorium pursuant to Section 12(g) of the Ordinance.

Platinum Plus leased a building in late 1999 and intended to open a nightclub. At the County's request, Platinum Plus advised the County Code Enforcement Administrator, Peter Nomikos, in December 1999 that it did not intend to operate an adult business at its location. However, after the initial Harkins decision was filed, Platinum Plus met with County representatives and was told that the Ordinance had been declared unconstitutional. Platinum Plus was issued a temporary certificate of occupancy on June 30, 2000, which indicated the business was going to be a nightclub only. In a July 27, 2000, letter, Platinum Plus was notified by Nomikos that the substituted Harkins opinion upheld the Ordinance's location provisions and that Platinum Plus would be prohibited from being operated as a sexually

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[3] We note, however, that language remained in the final version of the Ordinance that the Zoning Ordinance was being amended.

[4] Specifically, these businesses all feature adult entertainment by persons "who appear in a state of nudity," and therefore fall under the Ordinance's definition of "adult cabaret."

oriented business. On August 9, 2000, Platinum Plus responded stating the intent to open as a nightclub.

Platinum Plus alleged in its answer that it relied on the representations made by the County that there was no ordinance regulating sexually oriented businesses and modified its renovation plans, spending over $750,000 to construct Platinum Plus as an adult nightclub. Thus, Platinum Plus asserted that the County should be estopped from enforcing the Ordinance against it. In addition, Platinum Plus asserted a claim of gross negligence against the County and sought money damages.

Heartbreakers also had a certificate of occupancy issued to it during the time period between the two Harkins opinions. Nomikos testified that the certificate of occupancy was issued with the knowledge that Heartbreakers was going to operate as a sexually oriented business, but at a time when he mistakenly believed that the Ordinance had been declared unconstitutional by this Court. Heartbreakers alleged estoppel against the County and sought money damages.

APPEAL OF PLATINUM PLUS AND HEARTBREAKERS

ISSUES

1. Did the trial court err in finding that the Ordinance was properly enacted pursuant to the County's police power and thus did not need to be enacted pursuant to the Comprehensive Planning Act?

2. Is the Ordinance's location requirement constitutional?

3. Did the trial court err in finding the County was not estopped from enforcing the Ordinance?

4. Did the trial court err in granting summary judgment on the counterclaims?

5. Did the trial court err in quashing the subpoenas for County Council members?

DISCUSSION

1. The Ordinance Was Properly Enacted

The trial court ruled that the Ordinance was properly enacted pursuant to the police powers granted to the County by S.C. Code Ann. § 4-9-25 (Supp. 2001).[5] Further, the trial court found that the Ordinance is not part of the Zoning Ordinance and did not have to be enacted pursuant to the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. § 6-29-310 *et seq*. (Supp. 2001) ("Comprehensive Planning Act").

Platinum Plus and Heartbreakers argue that the trial court erred because the Ordinance is clearly a zoning ordinance. Furthermore, they argue that if the Ordinance is not a zoning ordinance, it should be "struck down as an

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[5] This section, entitled "Powers of Counties," provides as follows:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, **not inconsistent with the Constitution and general law of this State**, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. **The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties**.

§ 4-9-25 (emphasis added).

illegal land use control act" because the County cannot enact such ordinances unless it complies with the Comprehensive Planning Act. We disagree.

The trial court correctly concluded that the Ordinance was not part of the County's Zoning Ordinance. This does not mean, however, that the Ordinance itself could not fairly be characterized, **in general terms**, as a zoning ordinance.[6] The real issue is whether this type of ordinance must be adopted pursuant to the Comprehensive Planning Act. We agree with the trial court's conclusion that this type of ordinance may be adopted pursuant to the County's general police powers and that the Comprehensive Planning Act does not, in effect, preempt this particular type of local legislation.

"In order to pre-empt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 94, 530 S.E.2d 890, 893 (2000); accord Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990) (same).

In Fine Liquors, we held that while the Legislature gave the Alcoholic Beverage Control Commission the sole and exclusive authority to regulate the sale of beer, wine, and alcohol, it had not preempted the field to preclude Hilton Head from passing a zoning ordinance which prohibited internally illuminated "red dot" signs. Similarly, in Bugsy's, we held that the Legislature's enactment of a comprehensive regulatory scheme for video poker did not preempt a municipality from enacting a zoning ordinance that also regulated video poker. We commented as follows in Bugsy's:

> [W]hile the General Assembly has enacted a comprehensive scheme regulating many aspects of video poker machines, the scheme does not manifest an intent to prohibit any other enactment from touching on video poker machines. State regulation of video poker machines does not preclude a

[6] Indeed, as Platinum Plus and Heartbreakers observe in their own Reply Brief: "The mere fact that the County can enact land use ordinances under its police power does not mean this ordinance is not a zoning ordinance."

> municipality from passing a zoning ordinance which impacts businesses which have video game poker…

Bugsy's, 340 S.C. at 94, 530 S.E.2d at 893.

In the instant case, while the Comprehensive Planning Act governs zoning, it simply does not evince a legislative intent to completely prohibit any other local enactments from touching upon zoning or land use. See id. That fact, in conjunction with the liberal reading we are required to give section 4-9-25, compels us to conclude that this type of ordinance may be properly enacted pursuant to the County's police powers.

We note that North Carolina has addressed this issue under similar circumstances and arrived at the same conclusion. In Onslow County v. Moore, 499 S.E.2d 780 (N.C. Ct. App.), review denied, 525 S.E.2d 453 (N.C. 1998), the appellants argued that a county ordinance regulating the location of sexually oriented businesses was "a zoning ordinance, and as such is invalid since it was not adopted pursuant to a comprehensive zoning plan for the County." Id. at 784. The North Carolina Court of Appeals held that "'[c]ounties may enact ordinances regulating land use in two fashions: one, pursuant to a comprehensive zoning plan, … **and** two, pursuant to their police powers…'" Id. at 785 (quoting Maynor v. Onslow County, 488 S.E.2d 289 (N.C. Ct. App.), appeal dismissed, 493 S.E.2d 458, cert. denied, 496 S.E.2d 385 (N.C. 1997)) (internal citations omitted).

The trial court relied on both Maynor v. Onslow County and Onslow County v. Moore and we find that reliance appropriate.

Furthermore, we note the Comprehensive Planning Act does not require that counties zone their entire area. S.C. Code Ann. § 6-29-330 (Supp. 2001) ("A county **may** exercise the powers granted under the provisions of this chapter in the total unincorporated area **or specific parts of the unincorporated area**.") (emphasis added). Thus, the Act envisions that a county may, like the County in the instant case, have both zoned and unzoned areas. If we accepted Platinum Plus and Heartbreakers' contention that any land use regulation not enacted pursuant to the Comprehensive

Planning Act is unlawful, the effect would be to disallow a county from regulating its unzoned land in any way. We find the Legislature clearly could not have intended that result. Instead, it is logical that the County should be able to enact, pursuant to its police powers, one ordinance to regulate sexually oriented businesses and have the ordinance apply to **both** zoned and unzoned areas.

Platinum Plus and Heartbreakers also contend that the detailed specifications set out in the Comprehensive Planning Act, see §§ 6-29-710 through -960, indicate the only way a County can regulate land use is through a comprehensive plan; they cite I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), in support of their argument.

The I'On Court was faced with the issue of whether zoning by initiative and referendum is allowed in South Carolina. The Court concluded that the detailed nature of zoning acts like the Comprehensive Planning Act "indicates a legislative intent that zoning matters must be decided only in the manner specified in those acts." Id. at 415, 526 S.E.2d at 721. I'On held that by passing the Comprehensive Planning Act, the Legislature did not intend to allow voters to enact more complex zoning measures by initiative and referendum. Significantly, the Court stated the following:

> [T]he comprehensive and detailed nature of [the Comprehensive Planning Act's] provisions … reveals our Legislature's intent that zoning decisions **should be made by a cross-section of unbiased officials after careful deliberation**. Whether the zoning decisions involve the development of an overall zoning system or master plan, or the application of established rules in a particular case, [the Comprehensive Planning Act] is designed to allow ample planning and ensure due process for all interested parties.

Id. at 416, 526 S.E.2d at 721 (emphasis added).

I'On does not stand for the proposition that **any** ordinance affecting land use must be part of the comprehensive plan and enacted pursuant to the

Comprehensive Planning Act. Instead, I'On simply held that land use regulation cannot be effected via the referendum and initiative process. Thus, I'On is not dispositive. To accept Platinum Plus and Heartbreakers' expansive reading of I'On would necessarily eviscerate a County's ability to exercise its police power if that exercise in any way impacted land use. Moreover, we note that in the instant case, the Ordinance was passed "by a cross-section of unbiased officials after careful deliberation," with the involvement of the County Planning Commission, and therefore does not run afoul of the dangers with which I'On was concerned. See id. at 416-17, 526 S.E.2d at 721 (indicating that an initiative and referendum process could result "in arbitrary decisions and patchwork zoning with little rhyme or reason").

In sum, the Comprehensive Planning Act does not preempt passage of the Ordinance outside of the County's Zoning Ordinance. See Bugsy's, supra; Fine Liquors, supra. Therefore, we affirm the trial court's holding that the County permissibly enacted the Ordinance pursuant to its police powers.[7] See § 4-9-25; Onslow County v. Moore, supra; Maynor v. Onslow County, supra.

2. The Ordinance's Location Requirement is Constitutional

Platinum Plus and Heartbreakers argue that the Ordinance is unconstitutional because it violates: (1) Article VIII, section 14 of the South Carolina Constitution; and (2) the First Amendment of the U.S. Constitution. We disagree.

First, Platinum Plus and Heartbreakers contend that this Court's decisions in Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997), and Connor v. Town of Hilton Head, 314 S.C. 251, 442 S.E.2d 608 (1994), apply to the instant case. In both Diamonds and Connor, the Court held ordinances which were **absolute bans** unconstitutional; in Diamonds,

[7] Because we find the Ordinance is not part of the County's Zoning Ordinance, it is unnecessary to rule on Platinum Plus and Heartbreakers' arguments regarding the trial court's alternative rulings.

Greenville County banned public nudity, and in Connor, Hilton Head banned nude dancing. The Court found in both cases that Article VIII, § 14 of the South Carolina Constitution prohibited a municipality from proscribing conduct that is not unlawful under State criminal laws governing the same subject. Because state criminal laws addressing the subject of public nudity did not prohibit all public nudity, or nude dancing, the ordinances at issue criminalized conduct that was not unlawful under State law. Therefore, the Court concluded that Greenville County and Hilton Head had exceeded their power in enacting the ordinances.

In the instant case, however, the Ordinance does not outright ban either nude dancing or sexually oriented businesses. Instead, it regulates the location of such businesses. Accordingly, Diamonds and Connor are clearly inapplicable.[8]

Platinum Plus and Heartbreakers next argue the Ordinance violates their First Amendment rights. Primarily, Platinum Plus and Heartbreakers maintain that the County was not justified in increasing the location requirement from 1000 feet to 1500 feet because County Council did not have any data to rely on for this increased distance. Thus, they claim the Ordinance is not "narrowly tailored."

Platinum Plus and Heartbreakers' First Amendment arguments are governed by the United States Supreme Court's decisions in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). These decisions hold that ordinances designed to regulate the secondary effects of sexually oriented businesses are content-neutral and are properly analyzed as "time, place, and manner"

[8] In other words, while the ordinances at issue in Diamonds and Connor were content-based, the Ordinance in the instant case is content-neutral. See Connor, 314 S.C. at 255 n.2, 442 S.E.2d at 610 n.2 (where the Court noted that because Hilton Head's ordinance targeted the sexual or erotic message of nude dancing, the ordinance was not content-neutral, and then contrasted that with an ordinance justified by reference to the secondary effects of protected speech, which is content-neutral).

regulations. See, e.g., Renton, 475 U.S. at 48 (regulations which are **justified** without reference to the content of the regulated speech are "content neutral"); Centaur, Inc. v. Richland County, 301 S.C. 374, 379, 392 S.E.2d 165, 168 (1990). The appropriate inquiry,[9] therefore, is whether the Ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Renton, 475 U.S. at 50; see also Harkins 340 S.C. at 614, 533 S.E.2d at 890 ("sexually oriented business regulations will be upheld if they are designed to serve the substantial governmental interest of preventing harmful secondary effects and they allow for reasonable avenues of communication").

The Ordinance clearly meets the Renton standard. The County's interest in combating the secondary effects of sexually oriented businesses is, undoubtedly, a substantial one. See Renton, 475 U.S. at 50 ("A city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'") (citation omitted). Moreover, we note that in Harkins, the Court specifically decided that the Ordinance did not "zone the adult businesses out of existence." Harkins, 340 S.C. at 620-21, 533 S.E.2d at 893.

Nonetheless, Platinum Plus and Heartbreakers maintain that the County lacked evidence for the 1500-foot requirement. We disagree.

The First Amendment requires only that whatever evidence the County relies upon is "reasonably believed to be relevant to the problem" the County is addressing. Renton, 475 U.S. at 51-52. "This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's

[9] Although the parties discuss the four-pronged standard of United States v. O'Brien, 391 U.S. 367 (1968), in this context, the Renton standard is the appropriate one. See International Eateries of Am., Inc. v. Broward County, 941 F.2d 1157, 1161 n.2 (11th Cir. 1991), cert. denied, 503 U.S. 920 (1992) (noting the "considerable confusion" over whether to apply the O'Brien analysis or the Renton analysis, but concluding that Renton applied where the regulation was similar to that found in Renton, and in any event, that "the answer should be the same regardless of which analysis is used").

evidence must fairly support the municipality's rationale for its ordinance." Alameda Books, ___ U.S. ___, ___, 122 S.Ct. 1728, 1736 (2002) (plurality opinion). Furthermore, the County "'must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" Renton, 475 U.S. at 52 (quoting American Mini Theatres, 427 U.S. at 71).

Here, the County relied upon, *inter alia*, several summaries of other cities' secondary effects studies as well as the Renton decision itself. The evidence that County Council relied upon clearly supports its rationale for the ordinance. For instance, the Los Angeles study recommended more than 1000 feet separating sexually oriented businesses from one another and a minimum of 500 feet separation from schools, parks, churches, and residential areas. Thus, Platinum Plus and Heartbreakers are simply incorrect when they maintain there is not data in the studies to justify the 1500-foot requirement. Furthermore, it is undisputed that the record in the instant case reveals the County Planning Commission considered both the 1000-foot and 1500-foot requirements and concluded that, with either distance, there was a reasonable opportunity for these businesses to locate in the County.

As Justice Kennedy observed in Alameda Books:

> It is well documented that multiple adult businesses in close proximity may change the character of a neighborhood for the worse. Those same businesses spread across the city may not have the same deleterious effects. At least in theory, a dispersal ordinance causes these businesses to separate rather than to close, so negative externalities are diminished but speech is not.

Alameda Books, ___ U.S. at ___, 122 S.Ct. at 1740 (Kennedy, J., concurring in judgment). The County in this case has chosen to disperse sexually oriented businesses with a 1500-foot requirement. In our opinion, the County is free "to experiment" with this distance provided that reasonable avenues of communication remain. Renton, supra.

In sum, we find the Ordinance is constitutional.[10]

3. The County Is Not Estopped from Enforcing the Ordinance

Platinum Plus and Heartbreakers argue that the County should be estopped from enforcing the Ordinance against them because they received certificates of occupancy in between the time the original Harkins decision and the clarified Harkins decision were filed. We disagree.

As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy. Grant v. City of Folly Beach, 346 S.C. 74, 551 S.E.2d 229, (2001); South Carolina Dep't of Soc. Servs. v. Parker, 275 S.C. 176, 268 S.E.2d 282 (1980). However, this does not mean that estoppel cannot ever apply against a government agency. See, e.g., Landing Dev. Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985). To prove estoppel against the government, the relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth **as to the facts in question**, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position. E.g., Grant, supra.

Platinum Plus and Heartbreakers argue that because the County issued certain permits to them, the County should be estopped from enforcing the ordinance. This Court recently rejected a similar argument in Grant. See Grant, 346 S.C. at 82, 551 S.E.2d at 233 (issuance of a building permit did not estop the City since Grant had the means to ascertain the flood limitations on his building).

Platinum Plus and Heartbreakers also contend that because Nomikos and other County officials communicated to them that the Ordinance had been declared unconstitutional by this Court and therefore there was no ordinance regulating sexually oriented businesses, the County is estopped

[10] Although Platinum Plus and Heartbreakers raise constitutional arguments regarding both their "vested rights" and the Ordinance's amortization period, we decline to address them. Because neither club was in existence at the time the Ordinance was enacted, they have no standing to assert such arguments.

from enforcing the ordinance. However, we hold that estoppel against the County does not lie under the unusual facts of this case.

"The general rule is that administrative officers of the state cannot estop the state through mistaken statements of law." Kelso & Irwin, P.A. v. State Ins. Fund, 997 P.2d 591, 599 (Idaho 2000) (citing Austin v. Austin, 350 So.2d 102, 105 (Fla.Ct.App. 1977); Rainaldi v. Public Emp. Retirement Bd., 115 N.M. 650, 857 P.2d 761, 769 (1993)); see also Earl Township v. Reading Broad., Inc., 770 A.2d 794, 798 (Pa. Commw. Ct. 2001), appeal denied, 793 A.2d 910 (Pa. 2002) (where the Township's solicitor expressed his legal opinion that the broadcasting company was not required to obtain a permit for the construction of a new television broadcasting tower, the court held that the mutual mistake of law, as opposed to a mistake of fact, would not support a claim of estoppel); see generally 28 Am.Jur.2d *Estoppel and Waiver* § 142 (1966) ("In general, an estoppel cannot be asserted against a government entity based on mistaken statements of law…."); 31 C.J.S. *Estoppel and Waiver* § 91 (1996) (representations or opinions on matters of law not generally basis for estoppel).

The County's representation that the Ordinance had been declared **completely** unconstitutional was obviously a statement of law, and therefore cannot be the basis for estoppel. Id. The instant case is a perfect example of why estoppel against the government should not be based on an erroneous statement of the law, because neither the County nor the appellants could have had "the means of knowledge of the truth" while the Harkins opinion was on rehearing. Thus, we find the County should not be estopped based on its misunderstanding of **the law** handed down by this Court, which was subsequently **clarified** by this Court on denial of a petition for rehearing.[11]

An estoppel claim against the County for representations made in between the two Harkins opinions is simply unavailable as a matter of law.

[11] Furthermore, as Platinum Plus and Heartbreakers acknowledge in their brief, they received the permits while the constitutionality of the Ordinance was being questioned; hence, they had no right to rely on the misstatements made by the County.

Accordingly, the trial court correctly granted summary judgment to the County on the estoppel claims.

4. Summary Judgment Was Properly Granted on the Counterclaims

Next, Platinum Plus and Heartbreakers argue the trial court erred in granting summary judgment on their counterclaims because there were disputed material issues of fact which preclude summary judgment. In our opinion, however, these fact findings are either clearly undisputed or not material to resolution of the issues. See Rule 56(c), SCRCP (judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). In addition, we agree with the County that Platinum Plus has not appealed several of the trial court's rulings which preclude, as a matter of law, its negligence claim.[12] E.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is the law of the case).

5. The Trial Court Properly Quashed the Subpoenas for County Council Members

Platinum Plus and Heartbreakers sought to take depositions of those who were members of County Council when the Ordinance was passed. The trial court granted the County's request to quash the subpoenas. Platinum Plus and Heartbreakers argue this was error because they were entitled to discover from the Council members whether the Ordinance was designed to prevent harmful secondary effects. We disagree.[13]

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[12] The trial court found Platinum Plus' counterclaims were barred by the doctrine of illegality, the South Carolina Tort Claims Act, and the doctrine of unclean hands. The trial court also found no duty of care owed by the County to Platinum Plus.

[13] We reject the County's assertion that this issue is procedurally barred because Platinum Plus and Heartbreakers failed to notice the appeal of the trial court's order quashing the subpoenas. Because they are appealing from

In Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995), the Court of Appeals commented on the propriety of using Council members' deposition testimony regarding their decisions:

> We note that Bear deposed Council members and presented their testimony as evidence to support Bear's argument that Council's decision [against rezoning] was arbitrary. We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts. Although we feel it was inappropriate to examine Council members in this manner, the County did not object to the procedure in this case.

Bear Enterprises v. County of Greenville, 319 S.C. 137, 139 n.1, 459 S.E.2d 883, 885 n.1 (Ct. App. 1995). Moreover, the Supreme Court in Renton made clear that an "alleged illicit legislative motive" to suppress protected speech is not a proper basis for finding a statute unconstitutional. 475 U.S. at 47-48 (citation omitted); see also United States v. O'Brien, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter.").

What County Council members' motivations were for passing the Ordinance simply is not a proper inquiry. Id.; Bear Enterprises, supra. Accordingly, the trial court did not err in quashing the subpoenas.

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a final judgment, this Court is permitted to review any intermediate order or decree necessarily affecting the judgment not before appealed from. See S.C. Code Ann. § 14-3-330(1) (1976); Lancaster v. Fielder, 305 S.C. 418, 421, 409 S.E.2d 375, 377 (1991).

APPEAL OF DIAMONDS

Unlike Platinum Plus and Heartbreakers, Diamonds was in operation at the time the Ordinance was passed. It therefore fell under Section 12(g) of the Ordinance which provides in part: "Any sexually oriented business lawfully operating on the effective date of this ordinance that is in violation of subsection[s] (a) through (f) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed one (1) year…" Pursuant to this subsection, Diamonds was supposed to cease operating as a sexually oriented business by February 7, 1996. However, because of the Harkins litigation, the County did not begin to enforce the Ordinance until August 2000, when the County sought an injunction against Diamonds. Diamonds counterclaimed for injunctive and declaratory relief alleging that the Ordinance is unconstitutional. The trial court granted summary judgment in the County's favor on all claims.

In its statement of the issue on appeal, Diamonds argues that the Ordinance is unconstitutional as an impermissible taking because "it divests nonconforming use rights, which, under statutory law, may only be divested by zoning provisions." Diamonds appears to assert that because the Ordinance is not a "zoning ordinance," it cannot create a nonconforming use since a nonconforming use may only be accomplished via a zoning regulation enacted pursuant to the Comprehensive Planning Act. See § 6-29-730.

We reject Diamonds' argument, because, as discussed above, the Comprehensive Planning Act does not preempt the County from enacting an ordinance, pursuant to its police power, which impacts land use. Moreover, no taking has occurred since Diamonds "can continue in its existing location, the only restriction is that it cannot operate as an adult use…" Restaurant Row Associates v. Horry County, 335 S.C. 209, 218, 516 S.E.2d 442, 447, cert. denied, 528 U.S. 1020 (1999). Therefore, Diamonds cannot contend that the Ordinance has deprived it of all economically viable use of its land. See, e.g., Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 305-06, 534 S.E.2d 270, 274, cert. denied, 531 U.S. 1029 (2000) (if a land-use regulation substantially advances legitimate government interests and does not deny the

owner of all economically viable use of his land, it does not constitute a taking).

Accordingly, Diamonds' argument that a taking has occurred is without merit.

CONCLUSION

The trial court's grant of summary judgment to the County on all claims is

AFFIRMED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice Diane S. Goodstein, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Regina D. McKnight, Appellant.

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

Opinion No. 25585
Heard November 6, 2002 - Filed January 27, 2003

AFFIRMED

C. Rauch Wise, of Greenwood, Jodie L. Kelley, Matthew Hersh, Oliver A. Sylvain, all of Washington, and Lynn M. Paltrow, of New York, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and John Gregory Hembree, of Conway, for respondent.

Joseph M. McCulloch, Jr., of Columbia, Judith K. Appel and Daniel N. Abrahamson, of Oakland, Susan King Dunn, of Charleston, and William S. Bernstein, of New York, for amicus curiae.

JUSTICE WALLER: Appellant, Regina McKnight was convicted of homicide by child abuse; she was sentenced to twenty years, suspended upon service of twelve years. We affirm.

FACTS

On May 15, 1999, McKnight gave birth to a stillborn five-pound baby girl. The baby's gestational age was estimated to be between 34-37 weeks old. An autopsy revealed the presence of benzoylecgonine, a substance which is metabolized by cocaine. The pathologist, Dr. Proctor, testified that the only way for the infant to have the substance present was through cocaine, and that the cocaine had to have come from the mother.[1] Dr. Proctor testified that the baby died one to three days prior to delivery. Dr. Proctor determined the cause of death to be intrauterine fetal demise with mild chorioamnionitis, funisitis[2] and cocaine consumption. He ruled the death a homicide. McKnight was indicted for homicide by child abuse. A first trial held Jan. 8-12, 2002 resulted in a mistrial.[3] At the second trial held May 14-16, 2001, the jury returned a guilty verdict. McKnight was sentenced to twenty years, suspended to service of twelve years.

ISSUES

1. Did the Court err in refusing to direct a verdict on the grounds that a) there was insufficient evidence of the cause of death, b) there was no evidence of criminal intent, and c) there was no evidence the baby was viable when McKnight ingested cocaine?

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[1] He testified that because of the rapid breakdown of pure cocaine, a baby would always have benzoylecgonine in its system, rather than pure cocaine.

[2] He testified that chorioamnionitis and funisitis is the medical term given to the placenta and umbilical cord when they are inflamed, which can be caused by an underlying infection, but that most children with these conditions have live births.

[3] McKnight was also indicted for distribution of cocaine. The court dismissed the distribution charge. A separate appeal from that ruling remains pending in this Court.

2. Did the Court err in refusing to dismiss the homicide by child abuse indictment on the grounds that a) the more specific criminal abortion statute governs, b) the statute does not apply to the facts of this case, and c) the legislature did not intend the statute to apply to fetuses?

3. Does application of the homicide by child abuse statute to McKnight violate her due process right of adequate notice?

4. Does application of the homicide by child abuse statute to McKnight violate her constitutional right to privacy?

5. Did the trial court err in refusing to dismiss the indictment on eighth amendment cruel and unusual punishment grounds?

6. Does application of the homicide by child abuse statute to McKnight violate equal protection?

7. Did the trial court err in refusing to exclude evidence of the results of a urine specimen taken from McKnight shortly after the stillbirth, on grounds that the specimen was obtained in violation of her fourth amendment rights?

1. **DIRECTED VERDICT**

McKnight asserts the trial court erred in refusing to direct a verdict for her on the grounds that a) there was insufficient evidence of the cause of death, b) there was no evidence of criminal intent, and c) there was no evidence the baby was viable when McKnight ingested the cocaine. We disagree.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light

most favorable to the State. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000).

a. Cause of Death

McKnight asserts the state failed to introduce sufficient evidence demonstrating that cocaine caused the stillbirth. We disagree.

Dr. Proctor, who performed the autopsy and who was qualified as an expert in criminal pathology, testified that the only way for the infant to have benzoylecgonine present was through cocaine, and that the cocaine had to have come from the mother. Dr. Proctor determined the cause of death to be intrauterine fetal demise with mild chorioamnionitis, funisitis and cocaine consumption. Dr. Proctor ruled the death a homicide.

Another pathologist, Dr. Woodward, who was qualified as an expert in pediatric pathology testified that the gestational age of the infant was between 35-37 weeks, and that it was viable. He then described how one determines the cause of death of a viable fetus, by looking for abnormalities, placental defects, infections, and the chemical constituency of the child. He explained the effect that cocaine would have on both an adult and a child. He testified that the placenta was the major heart-lung machine while the baby was inutero and that cocaine usage can produce degeneration of the small blood vessels in the placenta. He stated that he found areas of pinkish red degeneration of the blood vessels which were consistent with cocaine exposure. He testified that he did not see any other indications of the cause of death, and found a lack of evidence of other infections, lack of other abnormalities, otherwise normal development of the child, it's size, weight, and lung development. Although Dr. Woodward agreed with Dr. Proctor that chorioamnionitis and mild funisitis were present, he testified that to a reasonable degree of medical certainty, those conditions had not caused the death of the infant. He also opined that neither syphilis, nor placental abruption killed the infant. He concluded that, to a reasonable degree of medical certainty, the cause of death was intrauterine cocaine exposure. Although Woodward could not

say the exact mechanism by which the cocaine had killed the infant, he testified the "mechanisms through cardiac function, placental functions, are seen as most probable." On cross-exam, Woodward testified that he believed the death was caused solely by the cocaine effect, and that the drugs could have caused the baby's heart to stop, or to have caused the baby's heart to rise precipitously putting the baby in congestive heart failure. He explained the lack of abnormalities in the heart found by Dr. Proctor's autopsy, stating, "I wouldn't expect to see specific indices in the heart if the heart just stopped or if the heart went into congestive heart failure." Finally, Woodward testified he had seen both children and adults dead with less benzoylecgonine in their systems than McKnight's baby.

Although McKnight's expert, Dr. Conradi, would not testify that cocaine had caused the stillbirth, she did testify that cocaine had been in the baby at one point. She also ruled out the possibility of chorioamnionitis, funisitis or syphilis as the cause of death.

Viewing the expert testimony in the light most favorable to the state, we find sufficient evidence to withstand a directed verdict. McHoney, supra. Any defect in the expert testimony went to its weight, a defect McKnight was free to challenge with her own evidence.

b. Criminal Intent

McKnight next asserts she was entitled to a directed verdict as the state failed to prove she had the requisite criminal intent to commit homicide by child abuse. We disagree.

Under S.C. Code Ann. § 16-3-85 (A), a person is guilty of homicide by child abuse if the person "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." McKnight claims there is no evidence she acted with extreme indifference to human life as there was no evidence of how likely cocaine is to cause stillbirth, or that she knew the risk that her use of cocaine could result in the stillbirth of her child.

Recently, in State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002), the Court of Appeals defined "extreme indifference," as used in the homicide by child abuse statute, stating:

> In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care. See State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (discussing the requisite mental state for recklessness); see generally Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999) ("Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as willful because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent."). At least one other jurisdiction with a similar statute has found that "[a] person acts 'under circumstances manifesting extreme indifference to the value of human life' when he engages in deliberate conduct which culminates in the death of some person." Davis v. State, 325 Ark. 96, 925 S.W.2d 768, 773 (1996). Therefore, we . . . hold that in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death.

Similarly, in reckless homicide cases, we have held that reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof. See State v. Tucker, 273 S.C. 736, 259 S.E.2d 414 (1979).

In Whitner v. State, 328 S.C. 1, 10, 492 S.E.2d 777, 782 (1997), cert. denied 523 U.S. 1145 (1998), this Court noted that "although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child." Given this common knowledge, Whitner was on notice that her conduct in utilizing cocaine during pregnancy constituted child

endangerment. Id. at 16, 492 S.E.2d at 785. Indeed, more than twelve years ago, Justice Toal wrote:

> The drug "cocaine" has torn at the very fabric of our nation. Families have been ripped apart, minds have been ruined, and lives have been lost. It is common knowledge that the drug is highly addictive and potentially fatal. The addictive nature of the drug, combined with its expense, has caused our prisons to swell with those who have been motivated to support their drug habit through criminal acts. In some areas of the world, entire governments have been undermined by the cocaine industry.

State v. Ball, 301 S.C. 181, 391 S.E.2d 235 (1990).

Here, it is undisputed that McKnight took cocaine on numerous occasions while she was pregnant, that the urine sample taken immediately after she gave birth had very high concentrations of cocaine, and that the baby had benzoylecgonine in its system. The DSS investigator who interviewed McKnight shortly after the birth testified that McKnight admitted she knew she was pregnant and that she had been using cocaine when she could get it, primarily on weekends. Given the fact that it is public knowledge that usage of cocaine is potentially fatal, we find the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life. Accordingly, the trial court correctly refused a directed verdict. State v. Pinckney, supra (if the State presents any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced, case must go to the jury).

c. Viability

Finally, McKnight asserts she was entitled to a directed verdict as there was no evidence the baby was viable at the time she ingested cocaine. This argument was not raised in McKnight's motions to dismiss. Nor was it ruled on by the trial court. Accordingly, this argument is unpreserved. State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, cert. denied, 525 U.S. 1022 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review).

2. DIMISSAL OF HOMICIDE INDICTMENT

McKnight next asserts the trial court erred in refusing to dismiss the homicide by child abuse indictment on the grounds that a) the more specific criminal abortion statute governs, b) the homicide by child abuse statute does not apply to the facts of this case, and c) the legislature did not intend the statute to apply to fetuses. We disagree.

a. Criminal Abortion Statute

Initially, McKnight asserts the criminal abortion statute, S.C. Code Ann. § 44-41-80, is a more specific statute which controls under the circumstances of this case. McKnight did not raise this contention to the trial court. Contrary to the assertions in her reply brief, although McKnight did argue that the statute was inapplicable to the circumstances of this case, at no time did she assert that the criminal abortion statute was the more specific, controlling statute. Accordingly, this issue is unpreserved. State v. Hicks, supra (issue must be raised to and ruled upon by trial court to be preserved for review).

b. Application of Homicide by Abuse Statute in This Case

McKnight next asserts the Legislature did not intend the homicide by child abuse statute apply to the stillbirth of a fetus. We disagree.

McKnight asserts the term "child," as used in the statute, is most naturally read as including only children already born. See S.C. Code Ann. § 16-3-85(B). In several cases this Court has specifically held that the Legislature's use of the term "child" includes a viable fetus. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984). McKnight cites to portions of the statute defining "harm" as relating to corporal punishment and/or abandonment; she asserts this demonstrates that the statute was clearly intended to apply only to children already born. However, section 16-3-85 (B) also defines "harm" as "inflicting or allowing to be inflicted on the child physical injury. . ." and "failing to supply the child with adequate health care. . ." Either of these provisions may clearly be applied to an unborn child. Accordingly, given the language of the

statute, and this Court's prior opinions defining a child to include a viable fetus, we find the plain language of the statute does not preclude its application to the present case.

c. Legislative History

McKnight lastly asserts that the legislative history of section 16-3-85 conclusively demonstrates that it does not apply to unborn children. We find this contention unpersuasive.

Section 16-3-85 was amended by 2000 Acts No. 261, § 1. The prior statute read that a person is guilty of homicide by child abuse who "causes the death of a child under the age of eleven while committing child abuse or neglect **as defined in Section 20-7-490,**[4] and the death occurs under circumstances manifesting an extreme indifference to human life." (Emphasis supplied). The effect of the 2000 amendment was the deletion of the reference to the definitions of "abuse" and "neglect" contained in section 20-7-490, and the addition of subsection (B), defining those terms as follows:

> (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
>
> (2) "harm" to a child's health or welfare occurs when a person:
>
> (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;
>
> (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or
>
> (c) abandons the child resulting in the child's death.

There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects. State v. Corey D., 339 S.C. 107, 529 S.E.2d 23 (2000); Berkebeile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993).

[4] Section 20-7-490 is contained in the Children's Code and defines "child" as a "person under the age of eighteen" and also defines "abused or neglected child," and "harm."

The homicide by child abuse statute was amended in May 2000, some three years after this Court, in Whitner, had specifically held that the term "child" includes a viable fetus.[5] The fact that the legislature was well aware of this Court's opinion in Whitner, yet failed to omit "viable fetus" from the statute's applicability, is persuasive evidence that the legislature did not intend to exempt fetuses from the statute's operation. Contrary to McKnight's assertion, we do not find the legislature's decision to define the terms "abuse and neglect" within the confines of section 16-3-85, deleting the reference to section 20-7-490 of the Children's Code, in any way evinces a retraction from our opinion in Whitner. Although Whitner did examine the policy and purpose of the Children's Code, that discussion was not central to our holding. More fundamentally, Whitner found no basis upon which to grant a viable fetus the status of a "person" for purposes of homicide and wrongful death laws, while denying such status in the context of child abuse. Indeed, if the legislature had intended to remove a fetus from the operation of the statute, it could have plainly said so. Stardancer Casino v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001); Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998) (if legislature had intended certain result in statute it would have said so).

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[5] We granted McKnight's motion to argue against the precedent of Whitner v. State, supra. We adhere to our opinion in Whitner. As did Whitner, McKnight forebodes a "parade of horribles" and points to commentators who object to the prosecution of pregnant women as being contrary to public policy and deterring women from seeking appropriate medical care and/or creating incentives for women to seek abortions to avoid prosecution. See e.g. Tolliver, Child Abuse Statute Expanded to Protect the Viable Fetus: The Abusive Effects of South Carolina's Interpretation of the Word "Child", 24 S.Ill.U.L.J. 383 (Winter 2000); DeLouth, Pregnant Drug Addicts As Child Abusers: A South Carolina Ruling, 14 Berkeley Women's L.J. 96 (1999).

However, not all of the commentaries concerning Whitner have been critical. See Miller, Fetal Neglect and State Intervention: Preventing Another Attleboro Cult Baby Death, 8 Cardozo Women's L. J. 71 (2001)(suggesting that the state's interest in protecting the life of the fetus takes precedence over any rights the mother may have and that the fetus has the right to be protected by the State as soon as the fetus is viable or when a woman can no longer obtain a legal abortion); Janssen, Fetal Rights and the Prosecution of Women For Using Drugs During Pregnancy, 48 Drake L.Rev. 741 (2000); Schueller, The Use of Cocaine by Pregnant Women: Child Abuse or Choice? 25 J. Legisl. 163 (1999). As noted by Janssen, although the threat of abortion or lack of prenatal care is real, "the burden placed on pregnant substance abusers is not the burden to get an abortion. Rather the burden is on the woman to stop using illegal drugs once she has exercised her constitutional decision not to have an abortion. . . . Once the mother has made the choice to have a child, she must accept the consequences of that choice. One of the consequences of having children is that it creates certain duties and obligations to that child. If a woman does not fulfill those obligations, then the state must step in to prevent harm to the child. As one judge aptly pointed out, there is simply 'no reason to treat a child in utero any differently from a child ex utero where the mother has decided not to destroy the fetus or where the time allowed for such destruction is past.'" 48 Drake L. Rev. at 762-763 (Internal citation omitted).

3. DUE PROCESS/NOTICE

McKnight next asserts application of the homicide by child abuse statute to her violates due process; she contends she had no notice the statute could be applied to a woman whose fetus is stillborn. We disagree.

In numerous cases dating since 1960, we have held that a viable fetus is a "person." Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984). In Whitner, supra, we reiterated the fact that a viable fetus is a "child" within the meaning of the child abuse and endangerment statute. Most recently, we held that a viable fetus is both "person" and "child" as used in statutory aggravating circumstances which provide for death penalty eligibility. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998).

A penal statute offends due process only when it fails to give fair notice of the conduct it proscribes. State v. Edwards, 302 S.C. 492, 397 S.E.2d 88 (1990); State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980). The statute must give sufficient notice to enable a reasonable person to comprehend what is prohibited. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61, cert. denied, 449 U.S. 883 (1980). In Whitner, we rejected the claim that application of the child endangerment and neglect statute did not give the defendant fair notice of the conduct proscribed, stating:

> The statute forbids any person having legal custody of a child from refusing or neglecting to provide proper care and attention to the child so that the life, health, or comfort of the child is endangered or is likely to be endangered. As we have found above, the plain meaning of "child" as used in this statute includes a viable fetus. Furthermore, it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in section 20-7-50. Whitner had all the notice the Constitution requires.

328 S.C. at 16, 492 S.E.2d at 784-785.

Similarly, a person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life. Under Whitner, taking cocaine while pregnant constitutes neglect and, as discussed in Issue 1 above, it was a jury question whether McKnight acted with "extreme indifference to human life." Given the ample authority in this state finding a viable fetus to be a person, we find McKnight was on notice that her conduct in ingesting cocaine would be proscribed.[6]

4. **RIGHT TO PRIVACY**

McKnight next asserts application of the homicide by child abuse statute to women for conduct during pregnancy violates the constitutional rights of privacy and autonomy.

McKnight asserts several policy reasons why women should not be placed in the position of fearing prosecution for conduct engaged in while pregnant (e.g., choosing abortion over pregnancy, foregoing medical care, etc.). While she raises a number of legitimate concerns, she is in reality attempting to assert the privacy rights of other pregnant women, something she does not have standing to do. Curtis v. State, supra (one cannot obtain a decision as to the invalidity of an act on the ground that it impairs the rights of others).

As to her own right to privacy, this Court specifically rejected the claim that prosecution for abuse and neglect of a viable fetus due to the mother's ingestion of cocaine violates any fundamental right. Whitner, supra. In Whitner we stated,

> It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right

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[6] McKnight also asserts the statute as interpreted to apply to pregnant women is void for vagueness as it is unclear what conduct by a pregnant woman is likely to result in the stillbirth of her fetus. As recently recognized by the Court in Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001), however, one to whose conduct the law clearly applies does not have standing to challenge it for vagueness. Given that the statute clearly applies to a stillbirth caused by ingestion of cocaine, McKnight lacks standing to raise a void for vagueness contention.

> of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.

328 S.C. at 18, 492 S.E.2d at 786. Accordingly, we find McKnight's right of privacy was not violated.

5. **EIGHTH AMENDMENT**

McKnight next asserts the trial court erred in refusing to dismiss the indictment on Eighth Amendment grounds. We disagree.

The cruel and unusual punishment clause requires the duration of a sentence not be grossly out of proportion with the severity of the crime. Solem v. Helm, 463 U.S. 277 (1983). Pursuant to Solem, this Court reviews three factors in assessing proportionality: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions. State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001).[7]

Here, the gravity of the offense is severe; McKnight is charged with homicide.[8] The sentence for homicide by child abuse under S.C. Code Ann. § 16-3-85(C)(1) is twenty years to life, and McKnight received a twenty year sentence, suspended upon service of twelve years. The penalty is no harsher than that imposed upon any other individual charged with murder. See S.C. Code Ann. § 16-3-20 (persons guilty of murder must be punished by death, life imprisonment, or mandatory minimum term of thirty years); Simmons v. State,

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[7] It is questionable, in light of the United States Supreme Court's opinion in Harmelin v. Michigan, 501 U.S. 957 (1991), whether the stringent three-factor Solem inquiry remains mandated in "cruel and unusual punishment" cases. See State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct.App.2000) (finding 3-prong inquiry no longer applicable and requiring only a threshold comparison of the gravity of the offenses against the severity of the sentence).

[8] To the extent McKnight attempts to compare the gravity of the offense with criminal abortion, she is, in reality, raising an equal protection claim. See Issue 6 below.

264 S.C. 417, 215 S.E.2d 883 (1975) (holding sentence of life imprisonment resulting from a wrongful killing caused by the use of an automobile is not cruel and unusual punishment).

Finally, although other states have not defined a viable fetus as a child for purposes of criminal prosecution of a pregnant mother, other states impose severe sentences on those who are guilty of the murder or neglect of a child. See e.g., Az. St. § 13-604.1 (B)(person convicted of attempted murder of a minor under twelve years of age may be sentenced to life imprisonment); Or. St. Ann. § 163.115 (1)(c)(when a person by abuse, recklessly under circumstances manifesting extreme indifference to the value of human life, causes the death of a child under 14 years of age, it is murder requiring mandatory life sentence); W.Va. Code § 61-8D-2 (parent who maliciously and intentionally fails to supply child with necessary food, clothing, shelter or medical care resulting in child's death is guilty of murder in first degree and penalized accordingly). We find no Eighth Amendment violation.

6. **EQUAL PROTECTION**

McKnight next asserts that application of the homicide by child abuse statute to her violates equal protection inasmuch as a person charged under the criminal abortion statute is subjected to a maximum of two years imprisonment, while one prosecuted under the homicide by child abuse statute is subjected to the possibility of life imprisonment.

This issue is procedurally barred from review. While McKnight did file a pre-trial motion to dismiss based upon equal protection, and renewed that motion at trial, her arguments at trial were premised upon the statute's applicability only to women and its disparate impact upon women. At no time did she raise the contention she now raises concerning the disproportionality of the criminal abortion statute. Accordingly, this argument is unpreserved and we therefore decline to address it. State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal); In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (constitutional claim must be raised and ruled upon to be preserved for appellate review).

7. **SUPRESSION OF URINE SAMPLE**

Finally, McKnight asserts the trial court erred in refusing to suppress the results of a urine sample taken at the hospital after the stillbirth, contending the sample was taken in violation of her fourth amendment rights. We disagree.

Pursuant to a Conway Hospital Protocol for the Management of Drug Abuse during Pregnancy, a medical urine drug screening **may** be ordered at the discretion of the attending physician if an obstetrical patient meets one of several criteria, including lack of prenatal care or unexplained fetal demise. If such a drug screening test turns up positive from the hospital's lab, then hospital personnel are to request consent from the patient for forensic (medical-legal) testing. If consent is obtained, the sample is sent to the hospital's reference lab and the nursery is notified. The Department of Social Services is to be notified of positive medical urine drug screening and the criteria causing the drug screen to be done, and whether forensic testing is being done on the mother or newborn. The protocol states that "As mandated by law, it is the obligation of every medical facility, as well as each individual, to report to DSS any suspected abuse or neglect involving an unborn, yet viable, fetus or newborn child." The hospital also has a Chain of Custody form and procedure for handling forensic samples.

Here, an initial drug screen was ordered by the obstetrician, Dr. Niles, due to McKnight's lack of prenatal care. When the initial screen tested positive for cocaine, Mary McBride, a labor and delivery nurse, was instructed to obtain a forensic urine sample from McKnight. Before doing so, McBride read an "Informed Consent to Drug Testing" form to McKnight. McBride testified she read the form to McKnight, and advised her that it could be used for legal purposes; she did not, however, specifically advise McKnight that police would possibly arrest her. The form states that McKnight acknowledges she has testified positive for cocaine, and is being requested to give consent for a "medical-legal (forensic) test which will confirm or deny the initial report. The form further states that "It has been explained to me that I may refuse consent for this test. It has been explained to me that this test may be used for legal purposes." McKnight signed the form indicating her consent. The second sample also tested positive for cocaine.

McKnight asserts the forensic/legal sample was taken in violation of her fourth amendment rights, contrary to the United States Supreme Court's opinion in Ferguson v. City of Charleston, 532 U.S. 67 (2001). We disagree. The issue in Ferguson, as framed by the Court, was as follows:

> In this case, we must decide whether a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. More narrowly, the question is whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.

532 U.S. at 69-70.

In Ferguson, staff members of MUSC developed a written policy, in conjunction with the solicitor and police, for obtaining evidence to prosecute women who bore children who tested positive for drugs at birth. These procedures provided a plan to identify and test pregnant patients suspected of drug use **without their knowledge or consent**. The plan (1) required that a chain of custody be followed when obtaining and testing patients' urine samples, (2) contained police procedures and criteria for arresting patients who tested positive, and (3) encouraged prosecution for drug offenses and child neglect, and specifically set forth the offenses with which the women could be charged, as well as procedures for police to follow upon arresting the women. Id. at 70-73.

The Supreme Court held MUSC's performance of diagnostic tests to obtain evidence of the women's criminal conduct for law enforcement purposes was an unreasonable search if the patient had not consented to the procedure. Id. at 84-85. The Court held that "[g]iven the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage," the policy did not fit with the closely guarded "special needs" category which would justify a warrantless, non-consensual search. Id.

Ferguson is distinguishable in several respects. First, there is no evidence that Conway Hospital's policy was in any way developed or implemented in conjunction with police, the solicitor, the Attorney General, or any other law enforcement personnel. Second, unlike the policy at issue in Ferguson, Conway Hospital's policy did not require hospital staff to turn drug screening results over to law enforcement personnel. On the contrary, the hospital's protocol merely requires that its department of social work services be notified and that a telephone referral be made to DSS when an assessment reveals suspicion of illegal drug use or reason to believe the unborn or newborn child is at risk. A DSS caseworker is not a law enforcement officer. State v. Sprouse, 325 S.C. 275, 478 S.E.2d 871 (Ct. App. 1996).

Third, unlike Ferguson, Conway Hospital's testing was not done surreptitiously, but was done with McKnight's knowledge and consent. The labor and delivery nurse specifically testified that she obtained a written consent form from McKnight to perform the second urine specimen; the consent form indicated to McKnight that she had the right to refuse the test, and that it could be used for legal purposes.

We find the state sufficiently demonstrated, through the testimony of Nurse McBride, that McKnight consented to the search. The only evidence in the record on this point is the testimony of McBride, who testified that she read the form to McKnight, and told her that the sample could be used for legal purposes. The form which was read to McKnight specifically advised that she may refuse consent, and that the test may be used for legal purposes. This is sufficient evidence upon which to find the consent was voluntary. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977) (whether a consent to search was voluntary is a question of fact to be determined from the "totality of the circumstances)."

Finally, even assuming *arguendo* that McKnight did not consent to the urine specimen, and that it was illegally obtained, we find any error in its admission was harmless. The DSS caseworker testified, without objection, that McKnight told her she knew she was pregnant and that she had been using crack cocaine when she could get it. Further, the defenses' own expert, Dr. Conradi,

testified that cocaine was in the baby at some point. Both of the state's expert pathologists testified that the only way for the infant to have the benzoylecgonine present was through cocaine, and that the cocaine had to have come from the mother. Given this evidence, even assuming the urine sample was erroneously admitted, it could not have impacted the jury's verdict. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), cert. denied, 507 U.S. 927 (1993) (error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained).

McKnight's conviction and sentence are affirmed.

AFFIRMED.

TOAL, C.J., and BURNETT, J., concur. MOORE, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE MOORE: I respectfully dissent. Once again, I must part company with the majority for condoning the prosecution of a pregnant woman under a statute that could not have been intended for such a purpose. Our abortion statute, S.C. Code Ann. § 44-41-80(b) (2002), carries a maximum punishment of two years or a $1,000 fine for the intentional killing of a viable fetus by its mother. In penalizing this conduct, the legislature recognized the unique situation of a feticide by the mother. I do not believe the legislature intended to allow the prosecution of a pregnant woman for homicide by child abuse under S.C. Code Ann. § 16-3-85(A)(1) (Supp. 2001) which provides a disproportionately greater punishment of twenty years to life.

As expressed in my dissent in Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997),[9] it is for the legislature to determine whether to penalize a pregnant woman's abuse of her own body because of the potential harm to her fetus. It is not the business of this Court to expand the application of a criminal statute to conduct not clearly within its ambit. To the contrary, we are constrained to strictly construe penal statutes in the defendant's favor. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

Because I disagree that § 16-3-85 applies in this case, I dissent.

PLEICONES, J., concurs.

[9] *See also* State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998) (Moore, J. dissenting).

The Supreme Court of South Carolina

The State, Respondent,

v.

John Edward Weik, Appellant.

ORDER

We granted appellant's petition for rehearing to reconsider our decision in State v. Weik, Op. No. 25526 (S. C. Sup. Ct. filed September 3, 2002). Following oral argument, we adhere to that decision.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
January 9, 2003

The Supreme Court of South Carolina

In the Matter of Charles
G. Vaughan, Petitioner.

ORDER

By order dated December 7, 2000, petitioner was transferred to disability inactive status. In the Matter of Vaughan, 343 S.C. 281, 540 S.E.2d 445 (2000). Petitioner has petitioned to be transferred to active status. The petition is granted.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
January 22, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Anthony Leroy Mattison, **Appellant.**

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

Opinion No. 3590
Submitted December 9, 2002 - Filed January 21, 2003

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Druanne D. White, of Anderson, for Respondent.

ANDERSON, J.: Anthony Leroy Mattison appeals his conviction for possession of crack cocaine. He argues the trial court erred in

denying his motion to suppress evidence where (1) his consent was coerced and involuntary; (2) the search exceeded the scope of his consent; (3) the search was not based on reasonable suspicion; and (4) the search exceeded any scope authorized by Terry v. Ohio.[1] We affirm.[2]

FACTS/PROCEDURAL BACKGROUND

On January 7, 2000, Patrol Officer William Jones, with the City of Anderson Police Department, stopped a car traveling in Anderson because the car had no rear license plate. There were three people in the car. Mattison was seated in the back of the car, while the driver and another passenger were seated in the front.

When Officer Jones approached the vehicle, he observed the front seat passenger "concealing something in his left hand and reaching between his legs." A consensual search of the front seat passenger revealed he possessed crack cocaine. He was subsequently arrested.

Officer Jones noticed Mattison in the back seat of the car. Jones opened his door and asked Mattison, "Do you have anything on you?" Mattison replied, "No." Jones then asked Mattison, "Do you mind if I check?" Mattison responded, "Go ahead." At Jones' request, Mattison exited the vehicle unassisted. Jones conducted a pat-down of Mattison. Officer Jones testified:

> When I got around to the waistband area, [Mattison] kept, in a nervous manner, reaching his hands back down, which led [to] more suspicion that there might be something down there. He kept putting them down. I told him several times, 'Keep your hands on the hood or on the trunk.' He complied. He was very cooperative.

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[1] 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

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

> At that point, I checked the crotch area and I felt a hard rock-like substance, which I immediately recognized to be crack cocaine.

Jones asked Mattison, "What do we have here?" Mattison replied, "Oh, that's my thing." As a safety precaution, Jones placed handcuffs on Mattison.

Jones unbuttoned the front of Mattison's pants and, while wearing a glove, retrieved a plastic bag wrapped in yellow tissue paper located near Mattison's genitalia. The plastic bag contained approximately 6 grams of crack cocaine.

At no time did Mattison verbally express a desire for the pat-down to cease. Officer Jones stated that Mattison did not appear to be under the influence of drugs or alcohol. Jones declared there was no question in his mind that Mattison "gave voluntary consent" to the pat-down. Jones asserted he did not have his gun drawn and used no coercion to solicit Mattison's consent.

With the assistance of a police dog trained to detect illegal drugs, officers found more crack cocaine under the driver's seat. The driver of the car was placed under arrest.

At the arrest scene, four police officers, including Officer Jones, were present. In addition, Staff Chaplain Lloyd Robinson was riding in the car with Officer Jones and was at the scene. Finally, Randall Human accompanied one of the officers to the scene. There were four police cars at the arrest location.

Mattison was charged with possession of crack cocaine with intent to distribute and possession of crack cocaine with intent to distribute within proximity of a park.

At trial, Mattison moved to suppress evidence found from his frisk by the police officer, claiming his consent was not given voluntarily. In denying Mattison's suppression motion, the trial court, considering the totality of the

circumstances, ruled Mattison freely and voluntarily consented to the search because he did not think police would search his genital area for drugs. Additionally, the court concluded that, after Mattison gave consent, he "stood by silently while the search occurred[,] without objection." At the close of evidence, Mattison moved for a directed verdict "on the basis that the evidence that has been identified as crack cocaine should have been excluded." He further requested "that Officer Jones and anybody else[']s testimony that [Mattison] consented should be excluded under all the arguments" he made at the previous motion to suppress hearing. The court denied the motions.

A jury convicted Mattison of simple possession of crack cocaine but found him not guilty of the charge of possession of crack cocaine with intent to distribute within proximity of a park.

ISSUES

I. Was Mattison's consent coerced and involuntary?

II. Did the pat-down search of Mattison exceed the scope of his consent?

III. Was the pat-down search based on reasonable suspicion?

IV. Did the pat-down search exceed any scope authorized by Terry v. Ohio?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Missouri, Op. No. 3563 (S.C. Ct. App. filed Nov. 12, 2002) (Shearouse Adv. Sh. No. 37 at 50). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). The appellate court does not re-evaluate the facts based on its own

view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

LAW/ANALYSIS

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. The South Carolina Constitution provides similar protection against unlawful searches and seizures. See S.C. Const. art. I, § 10. Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Missouri, Op. No. 3563 (S.C. Ct. App. filed Nov. 12, 2002) (Shearouse Adv. Sh. No. 37 at 50); State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991).

I. Voluntary Nature of Consent to Search

Mattison contends the consent to search was coerced, rendering it involuntary. We disagree.

Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001); State

v. Dorce, 320 S.C. 480, 465 S.E.2d 772 (Ct. App. 1995); see also Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) (existence of consent is determined from totality of circumstances). The State bears the burden of establishing the voluntariness of the consent. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Harris, 277 S.C. 274, 286 S.E.2d 137 (1982); Wallace, 269 S.C. at 550, 238 S.E.2d at 676; Brannon, 347 S.C. at 89-90, 552 S.E.2d at 775; Dorce, 320 S.C. at 482, 465 S.E.2d at 773; see also Palacio, 333 S.C. at 514, 511 S.E.2d at 66 (on motion to suppress, State has burden of proving validity of consent).

The "totality of the circumstances" test applies whether the consent was given in a non-custodial or custodial situation. Wallace, 269 S.C. at 550, 238 S.E.2d at 676; Brannon, 347 S.C. at 90, 552 S.E.2d at 775. In a custodial situation, the custodial setting is a factor to be considered in determining whether consent was voluntarily given. Wallace, 269 S.C. at 552, 238 S.E.2d at 677; Brannon, 347 S.C. at 90, 552 S.E.2d at 775. Custody alone, however, is not enough in itself to demonstrate a coerced consent to search. Brannon, 347 S.C. at 90, 552 S.E.2d at 775; see also United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (finding involuntary consent was not shown where defendant was arrested and in custody, but consent was given while on a public street and not in confines of a police station, he was given his Miranda warnings, and he was advised the results of the search of his car could be used against him); Wallace, 269 S.C. at 552, 238 S.E.2d at 677 (holding that custody itself is not enough to invalidate a consent search).

The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge. State v. Maybank, Op. No. 3566 (S.C. Ct. App. filed Nov. 12, 2002) (Shearouse Adv. Sh. No. 37 at 90); Dorce, 320 S.C. at 482, 465 S.E.2d at 773. A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) (dealing with voluntariness of a statement); State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997).

There is no dispute that Mattison consented to Officer Jones's request to search him without imposing limits on the scope of the search. No

evidence indicates Mattison gave consent while incompetent. Moreover, the record reveals no overt act, threat of force, or other form of coercion. Mattison claims the fact that he was "surrounded" by a drug dog and four police officers with squad cars flashing blue lights demonstrated a "show of force" that indicates coercion. This argument lacks merit, as their presence was necessary at a crime scene. Thus, we cannot say as a matter of law that this activity constituted coercion, because the drug dog was instrumental in finding drugs in the car and the multiplicity of suspects warranted the plethora of law enforcement officers.

Based on the evidence in the record, we find no abuse of discretion in the trial court's ruling that Mattison's consent was voluntarily given.

II. Exceeding Scope of Search

Mattison maintains that, if he did voluntarily consent to a search, Officer Jones exceeded the permissible scope when he proceeded to search Mattison's groin area. We disagree.

Under our state constitution, suspects are free to limit the scope of the searches to which they consent. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). "When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable." Id. at 648, 541 S.E.2d at 843. Even in a situation where police have received a general and unqualified consent, "'the police do not have carte blanche to do whatever they please.'" Id. at 648-49, 541 S.E.2d at 843 (quoting 3 Wayne R. LaFave, Search and Seizure § 8.1(c), at 612 (3d ed. 1996). The scope of the consent is measured by a test of "'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-04, 114 L.Ed.2d 297, 302 (1991).

Here, Mattison's co-passenger had just been searched and arrested after the police found crack cocaine. Immediately thereafter, in response to Officer Jones's question, "Do you have anything on you," Mattison replied, "No." Officer Jones then asked, "Do you mind if I check?" Mattison

responded, "Go ahead." Mattison imposed no limits on the scope of the search he granted in response to Officer Jones's request to search him. Mattison clearly consented to a search of his **body** for **drugs**. We conclude a reasonable person would have understood that consent to encompass a search of Mattison's groin area. See United States v. Rodney, 956 F.2d 295 (D.C. Cir. 1992) (noting that genital area is a frequent hiding place for drugs).

The United States Supreme Court has described a typical pat-down search as including a thorough search of the suspect's "arms and armpits, waistline and back, **the groin and area about the testicles**, and entire surface of the legs down to the feet." Terry v. Ohio, 392 U.S. 1, 17 n.13, 88 S.Ct. 1868, 1877 n.13, 20 L.Ed.2d 889, 903 n.13 (1968) (emphasis added). A suspect's "objectively reasonable" consent to a body search indicates consent to a "traditional frisk search," including a "sweeping motion" over the outer garments of the crotch area. See United States v. Ashley, 37 F.3d 678 (D.C. Cir. 1994). Mattison's generalized consent authorized the kind of "traditional frisk search" undertaken here. Furthermore, once Officer Jones identified the presence of the crack cocaine, he was allowed to remove it. See United States v. Mattarolo, 209 F.3d 1153 (9th Cir. 2000).

III. Withdrawal of Consent

Mattison asserts he withdrew consent when he attempted to lower his hands as the officer searched his groin area. However, Mattison verbally gave unequivocal consent and never stated that he withdrew his consent to the search.

Conduct falling short of "an unequivocal act or statement of withdrawal" is not sufficiently indicative of an intent to withdraw consent. United States v. Alfaro, 935 F.2d 64, 67 (5th Cir. 1991). Effective withdrawal of a consent to search requires unequivocal conduct, in the form of either an act, statement or some combination of the two, that is inconsistent with consent previously given. Burton v. United States, 657 A.2d 741 (D.C. 1994). We find Mattison's act of lowering his hands falls far short of an unequivocal act or statement of withdrawal, something found in most withdrawal of consent cases. See United States v. Dichiarinte, 445 F.2d 126, 128-29 (7th Cir. 1971) (stating defendant exclaimed, "The search is

over. I am calling off the search."); United States v. Miner, 484 F.2d 1075, 1076 (9th Cir. 1973) (finding a withdrawal of implied consent to airport search where prospective airline passenger balked at search of luggage, saying, "No, it's personal."); United States v. Bily, 406 F. Supp. 726, 728 (E.D. Pa. 1975) (holding that defendant's statement, "That's enough. I want you to stop," was a withdrawal of consent); United States v. Ibarra, 731 F. Supp. 1037 (D. Wyo. 1990) (noting motorist's act of closing and locking trunk of his car after a police officer's consensual warrantless search of trunk constituted withdrawal of that consent and barred further search); Cooper v. State, 480 So. 2d 8 (Ala. Crim. App. 1985) (ruling that although first search of airplane was pursuant to voluntarily and freely given consent of defendant, his act of locking plane after he taxied plane to hanger area and before being driven by police to nearby motel, effectively revoked defendant's consent to any future searches); State v. French, 279 N.W.2d 116, 119-20 (Neb. 1979) ("[D]efendant's unequivocal 'no' could only be reasonably interpreted as revoking whatever consent might have previously been given, if any."). Instead, Mattison's hand movement more closely resembles conduct within the ambit of United States v. Brown, 884 F.2d 1309 (9th Cir. 1989), where a defendant who consented to a search of his suitcase, but later became extremely reluctant to relinquish his suitcase keys, was held not to have withdrawn his consent.

IV. Reasonable Suspicion

Mattison alleges the officer's search was not based on reasonable suspicion as required under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). We do not reach this issue because we previously found Mattison voluntarily consented to a search of his person.

V. Exceeding Scope Under Terry

Mattison argues the officer's search exceeded the scope permissible under Terry. We do not reach this issue because we previously found Mattison voluntarily consented to a search of his person.

CONCLUSION

Accordingly, Mattison's conviction is

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Pratt,

Claimant/Appellant,

v.

Morris Roofing, Inc., Employer, and Transportation Insurance Company, Carrier,

Respondents.

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

Opinion No. 3591
Heard December 11, 2002 - Filed January 21, 2003

AFFIRMED

Darrell Thomas Johnson, Jr., of Hardeeville; and R. Thayer Rivers, Jr., of Ridgeland; for Appellant.

W. Hugh McAngus, of Columbia; for Respondents.

ANDERSON, J.: In this Workers' Compensation case, Richard Pratt appeals the Circuit Court's affirmance of the Workers' Compensation

Commission's order denying him benefits. The Commission found Pratt did not sustain an injury arising out of and in the course of his employment. We affirm.

FACTS/PROCEDURAL BACKGROUND

Richard Pratt was employed by Morris Roofing, Inc., a roofing and subcontracting business co-owned by Paul Morris and Ray Morris. Pratt was involved in a single-vehicle collision while driving a Morris Roofing truck to work on May 11, 1999, from his home in Savannah, Georgia, to his job location in Hilton Head.

Morris Roofing provided transportation to its employees in company trucks and vans. The employer charged the employees thirty-five dollars per week for this transportation, whether they rode in a work van or drove a company truck.

Before the accident, Pratt occasionally drove a Blazer owned by Morris Roofing. Because Pratt had been arriving late to work, Paul Morris had a conversation with Pratt on May 10, 1999, and specifically forbade him from taking the company vehicle home. Paul instructed Pratt to deliver the vehicle to another employee, Tony Wilson, after Pratt completed the job he was working on that day. Paul informed Pratt that Wilson would then drive Pratt home and bring him back to work the next day. Wilson overheard the colloquy between Pratt and Paul Morris and verified the conversation occurred. Wilson stated he waited with the construction crew for over two hours for Pratt to appear but he never showed up.

According to Ray Morris, Pratt advised him that Paul had prohibited Pratt from taking the vehicle home. Pratt asked Ray to overrule Paul's directive, but Ray refused to do so.

Despite contrary instructions from Paul Morris, which were then buttressed by Ray Morris, Pratt drove the company vehicle home the night of May 10, 1999. He was injured in a single-vehicle accident the next day as he returned to work.

Melanie Adams, a claims specialist with CNA Insurance Company, met with Pratt at his apartment the day he was released from the hospital. Adams declared Pratt admitted he was not supposed to take the vehicle home the night before the accident but decided to take it home anyway against Paul Morris' instructions.

Pratt testified that he was not forbidden to take the truck home, but merely instructed not to take it home if he could not arrive at the job site on time.

Pratt alleged he sustained a compensable injury in the accident. The Single Commissioner ruled the injury did not arise out of and in the course of Pratt's employment. The Commissioner found (1) Pratt knowingly violated his employer's instructions not to take the company vehicle home and (2) the transportation was not provided by the employer because Pratt was required to pay for it. The Full Commission,[1] by unanimous vote, affirmed the Commissioner's findings. The Circuit Court affirmed the Full Commission.

STANDARD OF REVIEW

Judicial review of a Workers' Compensation decision is governed by the substantial evidence rule of the Administrative Procedures Act. Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998). In an appeal from the Commission, this Court may not substitute its judgment for

[1] We use the term "Full Commission" to indicate the review of the Single Commissioner's order pursuant to § 42-17-50 (Supp. 2001). The regulations promulgated by the Workers' Compensation Commission and approved by the South Carolina Legislature provide for an Appellate Panel review. See 25A S.C. Code Ann. Regs. 67-709A (1989) ("Commission review may be conducted by a three or six member review panel either of which excludes the original Hearing Commissioner. An order of a three member review panel has the same force and effect as a six member review panel and is the final decision of the Commission.").

that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2001); see also Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (stating court may reverse or modify Commission's decision if substantial rights of appellant have been prejudiced because administrative findings, inferences, conclusions or decisions are affected by other error of law). This Court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); see also Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (in reviewing decision of Workers' Compensation Commission, Court of Appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Etheredge, 349 S.C. at 456, 562 S.E.2d at 681-82; Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995); Gibson, 338 S.C. at 517, 526 S.E.2d at 729. The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999). It is not within our province to reverse findings of the Commission which are supported by substantial evidence. Broughton, 336 S.C. at 496, 520 S.E.2d at 637.

LAW/ANALYSIS

I. Sphere of Employment

Pratt argues the Commission erred in finding that his injuries did not arise out of and in the course of his employment. Pratt contends he was acting within the scope of employment even though he had been instructed not to drive the vehicle. We disagree.

This Court, in Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994), articulated:

> Our Supreme Court has succinctly stated the applicable law on this question:
>
> > [N]ot every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act. . . . "Certain rules concern the conduct of the workman within the *sphere of his employment*, while others *limit the sphere itself*. A transgression of the former class leaves the scope of his employment unchanged, and will not prevent the recovery of compensation, while a transgression of the latter sort carries the workman outside of the sphere of his employment and compensation will be denied."
>
> Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941) (citations omitted) (emphasis added). When an employer limits the sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, not compensable. Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950).

Wright, 314 S.C. at 155, 442 S.E.2d at 188 (footnote omitted).

In Wright, the employee and all hourly wage earners were prohibited from approaching or apprehending suspected shoplifters. Wright ignored this rule. The Court found that "Wright left the sphere of his employment by violating the specific orders not to confront, pursue, or apprehend suspected shoplifters." Id. He was thus not entitled to Workers' Compensation benefits.

Pratt invites the Court's attention to Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975). In Howell, the Court affirmed an award of compensation to a grocery store bag boy who injured himself while chasing someone who had snatched a purse from a potential customer outside the store. The Court held that a good faith act outside the employee's regular duties is compensable if undertaken to advance the employer's interest, even if the act does not further the employee's assigned tasks. Acts furthering the employer's interest were identified: (1) recovery of the customer's money, thereby enabling her to spend it in the store; and (2) the customer good-will created by the bag boy's act. Most importantly, there is no indication in Howell that the employer had specifically prohibited the bag boy from chasing purse snatchers, shoplifters, or any other type of fleeing criminal suspect.

In the present case, the testimony reveals Pratt was acting against specific orders from his employer. During direct examination, Paul Morris stated:

> Q. So, [Pratt] drove it home at least on the 9th and he drove it to Moss Creek on the 10th?
> A. Yeah. Well, the 9th – on the 10th, the day before the accident, he – the homeowner called me. [Pratt] wasn't there. They told me he was going to be there at a certain time and he didn't get there on time. So, when he went and had communications with me, I told him that he couldn't drive the truck home because he was late to the job.
> Q. All right.
> A. That ended that conversation about the truck.
>
> . . .

Q. And the – what time did he leave Moss Creek [that night]?
A. I couldn't tell you the time he left Moss Creek. I told him to come to Sea Pines that – to meet the guys and Tony would take him home and he came and seen my younger brother at the office when he went to pick the sprayer up and he said that I told him not to drive the truck and wanted to know if he could and Ray told him he can't because I run the men.

On cross-examination, Paul declared:

Q. Had you had trouble with Ricky Pratt not being on time before?
A. Yes.
Q. All right. The day before this accident occurred, was he late?
A. Yes, he was.
Q. And is that what resulted in your conversation with him, that you couldn't have customers complain?
A. Yes. Absolutely, yes, it was.
Q. And as a result of that, you told him not to take the truck home again?
A. I did.
Q. Correct?
A. Yes, sir.
Q. And it was your intent that the van was going to pick him up and drive him to the shop?
A. Yes.

. . .

Q. And you found out at that point that Ricky [Pratt] had not showed up with the truck?
A. Absolutely.
Q. Now, that was in violation of your specific instructions to him?
A. Yes, it was.
Q. And that you had a business reason for doing that which is to keep your customers happy and get him to work on time?
A. Yes, it was.

Melanie Adams, the CNA claims specialist, testified regarding her conversation with Pratt at his apartment:

> Q. What did you ask him or what did you talk with him about, about the day before the accident?
> A. I asked him if he knew – I specifically asked him if he knew he was not supposed to take the company truck home that evening. And he said –
> Q. That's something you found out from –
> A. Well, I – yes.
> Q. Through investigation?
> A. The work comp adjustor had advised me that she had information that he was not supposed to use that truck and I had spoken with some of our insureds. I had spoken with Paul and several other people. And so, yes, I was aware that the information was he was not to use the truck. So, I asked him pointblank did you know you weren't supposed to use the truck.
> Q. And what was his response?
> A. He said he knew it.
> Q. Did he tell you why he took the truck?
> A. He said he didn't want to fool with having to take it back to meet the guys. Something to that effect. I didn't want to fool with it, it was too much trouble. Something to that effect.
> Q. That he knew he was not supposed to take the truck home?
> A. He did admit that he did – knew he was not to use the truck.

Tony Wilson stated:

> Q. I'll repeat the question. Did you overhear a conversation between Paul and Ricky about Ricky being able to use the truck and taking the truck?
> A. Yes, sir.
> Q. What did you hear discussed?
> A. Paul had finally gotten a hold of Ricky and Paul was on the job, I was standing right beside Paul Morris. He told Ricky, said that afternoon, because he was not getting to work on time, that it

would be – before he left the island to bring the Blazer to me at my job in Sea Pines and I was to take Ricky home and bring the Blazer to Paul Morris' house.
Q. Now, did you ever see Ricky Pratt that day?
A. No, sir.

Wilson further expounded:

Q. We've talked about a conversation Paul had with Ricky, right? You were – you heard that?
A. Yes, sir.
Q. And you've already testified that he told him not to take the truck home?
A. Yes, sir.
Q. But to deliver it to you, right?
A. Yes, sir.
Q. Did he discuss with him how he was supposed to get to work the next day?
A. Yes, sir, he did. He told me and he told Ricky on the phone that he would have someone come and pick him up the next morning.

Relying on Hines v. Hendricks Canning Co., 263 S.C. 399, 405, 211 S.E.2d 220, 222-23 (1975), which determined "the opinions of the Supreme Court of North Carolina construing [the Workers' Compensation A]ct are entitled to great weight," Pratt cites Hoyle v. Isenhour Brick & Tile Co., 293 S.E.2d 196 (N.C. 1982), to support his position. Hoyle is inapposite to the instant case. In Hoyle, the evidence showed the employee was faced with the choice of abandoning the furtherance of his employer's business or acting in contravention of a previous order. The Hoyle court enunciated:

Likewise, disobedience of a direct and specific order by a then present superior breaks the causal relation between the employment and the resulting injury. This is patently so; the employee's subjective belief concerning the advisability of his course of action becomes irrelevant since there would be no room for doubt as how best to serve his employer's interest in the face

> of the employer's direct and immediate order. Conversely, when there is a rule or a prior order and the employee is faced with the choice of remaining idle in compliance with the rule or order or continuing to further his employer's business, no superior being present, the employer who would reap the benefits of the employee's acts if successfully completed should bear the burden of injury resulting from such acts. Under such circumstances, engaging in an activity which is outside the narrow confines of the employee's job description, but which is reasonably related to the accomplishment of the task for which the employee was hired, does not ordinarily constitute a departure from the scope of employment.
>
> . . . We are therefore of the opinion that employee's election to disobey a prior given order did not break the causal connection between his employment and his fatal injury if the disobedient act was reasonably related to the accomplishment of the task for which he was hired. . . .

Hoyle, 293 S.E.2d at 202-203 (citations omitted). The court based its decision on the fact that the employee was acting in furtherance of the employer's business, even though he was disobeying the employer's order.

Here, the facts are dissimilar and contrastive. Thus, Hoyle has no precedential value.

We conclude the testimony in the record is sufficient to support the Commission's finding that Pratt chose to drive the truck home in violation of his employer's prohibition, thus acting outside the scope of his employment. We hold Pratt left the **sphere of his employment** by violating the specific order to deliver the vehicle to Tony Wilson. Consequently, Pratt was not entitled to Workers' Compensation benefits.

II. Efficacy of "Going and Coming Rule"/Furnishing of Transportation by Employer

Pratt maintains the Circuit Court erred in determining the employer did not furnish transportation to him. We reject this argument.

Pratt testified:

> Q. Okay. Were there any deductions from your hundred dollars a day?
> A. Just workman's comp, you know.
> Q. Okay. Were there any deductions or payments between you and the company relevant to transportation?
> A. Yeah. He took out for gas.
> Q. And how much was that?
> A. I think it was 25 a week. I think. I don't remember.
> Q. And was there any difference in the 25 or – dollars a week, or whatever figure was correct, when you drove than when you were not driving?
> A. No.

Ray Morris stated:

> Q. What was your arrangement for transportation of your employees?
> A. The ones that did not have a vehicle or no means of transportation to pick them up from their house and drop them off at their house. We charged them $35 a week.

Under the "going and coming rule," an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment, and, therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment. Medlin v. Upstate Plaster Serv., 329 S.C. 92, 495 S.E.2d 447 (1998); McDaniel v. Bus Terminal Rest. Mgmt. Corp., 271 S.C. 299, 247 S.E.2d 321 (1978); Gallman v. Springs Mills, 201 S.C. 257, 22 S.E.2d 715 (1942); Gray v. Club Group, Ltd., 339 S.C. 173, 528

S.E.2d 435 (Ct. App. 2000). "South Carolina has recognized a number of exceptions to this rule." Medlin, 329 S.C. at 95, 495 S.E.2d at 449. One exception states that the rule does not apply "[w]here, in going to and returning from work, the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages[.]" Id.; Sexton v. Freeman Gas Co., 258 S.C. 15, 187 S.E.2d 128 (1972); Gray, 339 S.C. at 188, 528 S.E.2d at 443.

In the case at bar, the testimony demonstrates the employer was not providing the transportation. On the contrary, each employee was required to pay for his own transportation, with thirty-five dollars being deducted from the employee's weekly paycheck. Accordingly, Pratt's argument is meritless.

III. Covered Contractor

Pratt avers he was a "covered contractor" and not subject to "detailed instructions and paternalistic discipline." Based on this assertion, Pratt alleges that his violation of his employer's orders did not void Workers' Compensation coverage.

It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000); Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000); Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998). See also Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997) (issue not raised to trial court is not properly before appellate court).

Pratt did not raise this issue before the Single Commissioner or in his Request for Commission Review of the Single Commissioner's order. The issue was not ruled upon by the Commissioner, the Full Commission, or the Circuit Court. Concomitantly, the issue is not preserved for our review.

Further, the "going and coming rule" does not apply to independent contractors. This rule relates to "an employee going to or coming from the place where his work is to be performed." Gray v. Club Group, Ltd., 339

S.C. 173, 188, 528 S.E.2d 435, 443 (Ct. App. 2000) (emphasis added). Thus, Pratt's argument relating to independent contractor status is without merit.

CONCLUSION

Based on the foregoing reasons, the order of the Circuit Court affirming the decision of the Workers' Compensation Commission is

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia B. Gattis, Claimant,

Respondent/Appellant,

v.

Murrells Inlet VFW# 10420, Employer, and National Union Fire Insurance Company, Carrier,

Appellants/Respondents.

Appeal From Horry County
Howard P. King, Circuit Court Judge
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 3592
Heard June 6, 2002 - Filed January 21, 2003

AFFIRMED IN PART AND REVERSED IN PART

Duke K. McCall, Jr. and Mark M. Trapp, both of Greenville, for appellants/respondents.

Everett Hope Garner, of Columbia for respondent/appellant.

CURETON, J.: In this workers' compensation action, the full commission awarded Patricia Gattis ("Claimant") temporary total disability payments (TTD) and ordered her employer, Murrells Inlet VFW #10420, to pay for medical treatment rendered by out-of-state medical providers. The circuit court affirmed the disability award and reversed the award of medical payments. Claimant appeals the circuit court's reversal of the award of medical payments. Murrells Inlet VFW #10420 and National Union Fire Insurance Company (collectively "Employer") also appeal. We affirm in part and reverse in part.

FACTS

Claimant suffered an admitted back injury on March 17, 1995, while performing her duties as a bartender. Employer paid workers' compensation benefits after the accident.

Claimant visited various doctors between 1995 and 1997 in South Carolina and North Carolina and was referred to Duke University Medical Center in North Carolina, Coastal Orthopaedics in South Carolina, and Emory University Spine Center in Georgia. In August of 1997, Dr. William Horton at the Emory Spine Center independently evaluated Claimant. Employer denied Claimant's request for authorization to receive treatment from Dr. Horton.

Claimant filed a Form 50 on November 6, 1997, seeking additional treatments from Dr. Horton. Employer admitted the accident, denied Claimant was entitled to medical payments for Dr. Horton's treatments, and argued Claimant had reached maximum medical improvement ("MMI"). After an August 19, 1998 hearing, the single commissioner found Claimant had not reached MMI and ordered Employer to pay for medical treatment provided by Dr. Horton. Employer appealed. The full commission found Claimant reached MMI on March 9, 1998, upon her release by her treating physician, Dr. Wilkins. At the hearing before the full commission, Claimant sought to introduce a letter from Dr. Horton, which was not included in the record before the single commissioner. The commission refused to admit the

letter, noting instead that the letter would provide Claimant with "the opportunity for a change of condition" request.

The commission found a 25% permanent impairment to Claimant's back. As explained by the circuit court: "The [commission] also found that the treatment rendered by Dr. Horton as indicated in the record at that time and considered by the Single Commissioner did not arise out of the accident, and also found that [Employer] was not responsible for such treatment. There was no appeal from this order."

On January 28, 1999, Claimant filed a Form 50 for a change in condition "as evidenced by attached medical documentation and additional medical documentation which may be submitted." As medical documentation, Claimant relied on patient notes and two letters from Dr. Horton, and patient notes and a letter from Dr. John Glaser, another treating physician. Dr. Horton's notes, dated June 12, 1997, stated that Claimant "might well be a candidate for endoscopic fusion." Dr. Horton reiterated in a letter to Claimant dated January 30, 1998: "I would tell you that surgery remains a possibility although I cannot yet definitely recommend it." In the second letter to Claimant's attorney, dated August 18, 1998, Dr. Horton wrote: "Assuming L5-S1 is the source of her pain, a successful fusion at L5-S1 would very likely decrease the tenure and/or severity of [Claimant's] pain and impairment." Dr. Glaser's patient notes and letter dated October 14, 1998, corroborated Dr. Horton's recommendation for surgery. In his notes, Dr. Glaser wrote: "I basically agree with what Dr. Horton had to say. I think surgery is an option for her."

On February 2, 1999, Employer filed a Form 51 denying a change of condition. The single commissioner found Claimant had experienced a change in condition effective August 18, 1998, the date of Dr. Horton's second letter and reinstated Claimant's TTD. The commissioner further found Employer should be responsible for Claimant's previous evaluations and treatment, and for further evaluation, diagnostic testing, treatment and surgery by Dr. William Horton or his designees as "it has been shown that

such treatment may tend to lessen the tenure and severity of Claimant's disability pursuant to 42-17-90."

By order filed January 11, 2000, the full commission affirmed the single commissioner. Employer appealed to the circuit court. While the matter was pending before the circuit court, Claimant filed a motion to compel reinstatement of TTD. By order dated June 12, 2000, the Honorable Howard P. King, circuit court judge, affirmed the finding of a change in condition but reversed the award of medical payments for out-of-state providers concluding "the Commission lacks the authority to order additional treatment outside the state." Judge King thus ordered further proceedings by the full commission regarding Claimant's treatment. Employer and Claimant appealed to this court.

By order filed November 1, 2000, the Honorable John L. Breeden, Jr. acted on the pending motion to compel past-due medical payments. Judge Breeden ordered Employer to pay accrued installment payments for TTD from August 18, 1998, and imposed a penalty. Employer appealed this order.

Employer's Issues

1. Is Judge King's order finding a change in condition, reinstating Claimant's TTD, and requiring Employer to cover future medical care and treatment, supported by substantial evidence?[1]

2. Did the commission exceed its authority in ordering Employer to pay for Claimant's medical bills under S.C. Code Ann. § 42-17-90?

[1] Employer's issues 1, 3, and 4.

3. Did Judge Breeden have jurisdiction to rule on Claimant's motion to compel payment of past due workers' compensation benefits?

Claimant's Issue

1. Did Judge King err in concluding any medical treatment to which Claimant is entitled should be performed only in South Carolina by a physician chosen by Employer?

STANDARD OF REVIEW

The determination of whether a claimant experiences a change of condition is a question for the fact finder. Krell v. S.C. State Hwy. Dept., 237 S.C. 584, 588, 118 S.E.2d 322, 323-24 (1961). In Krell, our supreme court stated:

> It is not the province of this Court to determine whether the greater weight of the evidence supported the finding that a change had taken place in the condition of the claimant such as would warrant an extension or enlargement of the award, or whether the greater weight of the evidence supported the finding that such change resulted from the injury . . . . Such facts must be determined by those whose duty it is to find the facts.

237 S.C. at 588, 118 S.E.2d at 323-24 (quoting Cromer v. Newberry Cotton Mills, 201 S.C. 349, 371, 23 S.E.2d 19, 28 (1942)). The Administrative Procedures Act establishes the substantial evidence standard of review for factual findings made by the commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). Under the substantial evidence standard of review, this court may reverse the commission's findings only when they are

unsupported by substantial evidence. S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2001). See Brayboy v. Clark Heating Co., 306 S.C. 56, 58, 409 S.E.2d 767, 768 (1991) (citing the substantial evidence standard of review in an action for change of condition).

"'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark, 276 S.C. at 135, 276 S.E.2d at 306. The "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Commn., 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

DISCUSSION

EMPLOYER'S APPEAL

1. Change of condition

Initially, Employer argues Judge King improperly considered Claimant's Form 50 regarding a change of condition rather than requiring Claimant to have appealed the commission's order of December 30, 1998, which found MMI effective March 9, 1998. Employer further argues the commission erred, in any event, by finding a change of condition entitling Claimant to further medical treatment and additional TTD payments.

In the change of condition action, the full commission found Claimant experienced a change of condition effective August 18, 1998, the date of the final letter from Dr. Horton in which he noted that additional surgery "would very likely decrease the tenure and/or severity of [Claimant's] pain and impairment." Employer argues Dr. Horton's letter "was presented at the first hearing. . . . [and] was explicitly rejected." Thus, the condition now asserted by Claimant existed when the commission entered its December 30, 1998 order.

Generally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award of the commission. Review for a change of condition is concerned with conditions that have arisen thereafter. Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 225, 228, 153 S.E.2d 697, 698-99 (1967). If the parties to the dispute fail to timely appeal the final award of the full commission, then its order "is conclusive and binding as to all questions of fact." S.C. Code Ann. § 42-17-60 (Supp. 2001). Review as a change of condition is not available as an alternative to, or substitute for, an appeal. Causby, 249 S.C. at 227, 153 S.E.2d at 698-99. However, where a claimant shows a change of condition, "the Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded. . . ." S.C. Code Ann. § 42-17-90 (1985).

At the initial hearing on December 16, 1998, the commission limited its determination to the facts considered by the commissioner, despite Claimant's attempt to supplement the record with Dr. Horton's August 18, 1998 letter. The commission's chairman, in excluding Dr. Horton's letter, opined that the letter was more appropriate in an action for a change of condition. Because the commission limited its order to a determination of Claimant's condition prior to August of 1998, subsequent events, including Dr. Horton's changed diagnosis in August of 1998, were appropriate for consideration in an action alleging a change of condition.

A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award. Causby, 249 S.C. at 227, 153 S.E.2d at 698. To justify a modification of an award based on a change of condition, the claimant must show the change in condition and its causal connection to the original compensable accident. Krell, 237 S.C. at 588, 118 S.E.2d at 323. "[T]he issue before the Commission is sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based." Id. at 588-89, 118 S.E.2d at 324. In Estridge v. Joslyn Clark Controls, Inc., this court explained:

> Our supreme court has recognized the purpose of . . . [permitting an action for a change of condition] is to allow the commission to terminate compensation in cases where the change in condition amounts to a complete recovery; to increase compensation where the facts of the case reveal that the change in condition is for the worse; and to allow it to diminish compensation where the change in condition is for the better.

325 S.C. 532, 537, 482 S.E.2d 577, 580 (Ct. App. 1997).

The commission found Claimant experienced a change in condition based in part upon the continued evaluations by Dr. Horton. Dr. Horton reviewed Claimant's updated diagnostic tests including a discogram, bone scan, and MRI, and opined that a surgical procedure would likely improve Claimant's pain level and function and very likely "decrease the tenure and/or severity of [her] pain and impairment."[2] Both Dr. Horton and Dr. Glaser recommended Claimant undergo further evaluation and back surgery. Dr. Horton further concluded that "a successful fusion at L5-S1 would very likely decrease the tenure and/or severity of [Claimant's] pain and impairment."

We find substantial evidence supports the commission's determination that Claimant experienced a change of condition entitling her to further treatment. See Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 583, 514 S.E.2d 593, 596-97 (Ct. App. 1999) (Although a claimant has reached MMI, if additional medical care or treatment would tend to lessen the period of disability, the full commission may be warranted in requiring such treatment.).

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[2] Claimant also visited Dr. Horton on December 11, 1998, visited Dr. Steven Poletti of the Carolina Spine Institute in Charleston, South Carolina, on June 16, 1999, and had another MRI on June 30, 1999.

2. Section 42-17-90

Employer next argues the commission exceeded its authority in ordering Employer to pay for Claimant's medical bills under S.C. Code Ann. § 42-17-90. We disagree.

Section 42-17-90 permits the commission to review an application for benefits based on a change of condition and "make an award ending, diminishing or increasing the compensation previously awarded . . . ." S.C. Code Ann. § 42-17-90 (1985) (emphasis added). Employer argues the commission is limited to a compensatory award and does not have the authority to order the payment of medical bills.

In Davis v. South Carolina Department of Corrections, our supreme court rejected a similar argument. 289 S.C. 123, 125, 345 S.E.2d 245, 246 (1986). Inmate Davis worked as a kitchen helper while serving his youthful offender sentence. He injured his back and sought workers' compensation benefits. The single commissioner and full commission concluded the injury was compensable and awarded Davis temporary total benefits and medical benefits. The circuit court reversed. Pursuant to S.C. Code Ann. § 42-1-480 (1976), our supreme court reinstated the full commission's award. Id.

Section 42-1-480 provides:

> Any inmate of the State Department of Corrections, . . . in the performance of his work in connection with the maintenance of the institution, . . . who suffers an injury for which compensation is specifically prescribed in this Title, may, upon being released from such institution[,] . . . be awarded and paid compensation under the provisions of this Title.

S.C. Code Ann. § 42-1-480 (1985) (emphasis added). The circuit court in Davis held the term "compensation" under section 42-1-480 excluded

medical payments. Davis, 289 S.C. at 124-25, 345 S.E.2d at 246. The supreme court disagreed stating:

> The Worker's Compensation Act should be liberally construed in furtherance of the purposes for which it was designed. Any reasonable doubts as to construction should be resolved in favor of the claimant by including him within the coverage of the Act rather than excluding him. It would require a strained construction of the Act to allow a former inmate compensation for permanent disability, yet deny him the medical treatment which may prevent his injury from resulting in permanent disability.

Id. at 125, 345 S.E.2d at 246 (citation omitted).

We likewise hold that the term "compensation" does not preclude the commission from awarding medical benefits to a clamant under section 42-17-90.

3. Motion to Compel

Employer finally argues Judge Breeden lacked jurisdiction to hear and issue an order on Claimant's motion to compel past-due total temporary disability payments for two reasons. First, Claimant failed to file a Rule 59(e) motion to preserve the issue after Judge King's order was filed. Second, once the final order was appealed to this court, the circuit court lost jurisdiction of the case. We disagree.

Claimant based her motion to compel payment of past-due TTD on the full commission's January 2000 order, which found a change in condition effective August 18, 1998. Though the initial circuit court hearing was identified as "[Claimant's] motion to compel the payment of benefits," the parties principally argued the merits. Because Claimant's right to receive arrearages was not resolved with finality until the order of June 12, 2000, it would have been premature to move to compel until then. The motion to

compel payments is a separate issue from the propriety of awarding them in the first place.

Circuit courts generally lose subject matter jurisdiction of a case when a notice of appeal is filed and served. However, our appellate court rules provide that "[n]othing . . . shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." Rule 204, SCACR (emphasis added). "Although service of notice of an intent to appeal divests the lower court of jurisdiction over the order appealed, the lower court retains jurisdiction over matters not affected by the appeal." Jackson v. Speed, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997) (After defendants' timely appeal of the jury's verdict, the trial judge had jurisdiction to determine attorney's fee award to plaintiffs where plaintiffs had requested attorney's fees prior to the appeal and defendants failed to appeal the propriety of awarding attorney's fees pursuant to the statute.).

Accordingly, we conclude Judge Breeden had jurisdiction to rule on Claimant's motion to compel payments, which need not be presented first to the full commission. See McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 472, 313 S.E.2d 38, 41 (Ct. App. 1984) (circuit court had jurisdiction over motion to compel disability payments).

CLAIMANT'S APPEAL

1. Out-of-State Medical Providers

Claimant argues Judge King erred in concluding that any medical treatments she receives must be performed in South Carolina. Employer argues the statutory and regulatory schemes require a claimant to accept the medical provider chosen by the employer.

Regulation 67-509 states that while a claimant is receiving temporary compensation benefits, "[t]he employer's representative chooses an authorized health care provider and pays for authorized treatment." S.C. Code

Ann. Reg. 67-509(A) (1990). However, section 42-15-60 of the Worker's Compensation Act provides, in part:

> Medical . . . treatment . . . shall be provided by the employer. In case of a controversy arising between employer and employee, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. . . . [T]he employer may, at his own option, continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept an attending physician, unless otherwise ordered by the Commission. . . . The refusal of an employee to accept any medical, hospital, surgical or other treatment when provided by the employer or ordered by the Commission shall bar such employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Commission the circumstances justified the refusal, in which case the Commission may order a change in the medical or hospital service.

S.C. Code Ann. § 42-15-60 (1985) (emphasis added).

"[T]he cardinal rule of statutory construction is that the court must ascertain and effectuate the intent of the legislature, and in interpreting a statute, the court must give the words their plain and ordinary meaning without resorting to a tortured construction which limits or expands the statute's operation." State v. Dickinson, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. S.C. Dept. of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

The full commission is afforded much discretion under Section 42-15-60. Where it deems it necessary, the commission may override an

employer's choice of medical provider and may excuse a claimant's "justified" refusal to seek treatment from employer's provider. In these circumstances, "the Commission may order a change in the medical or hospital service" provided the claimant. Section 42-15-60 does not require the commission to limit its choice of medical care to providers in South Carolina. Absent a specific directive by the legislature to the contrary, we decline to read such a requirement into the statute.

CONCLUSION

For the foregoing reasons, we affirm the portion of the circuit court's order finding substantial evidence in the record supported the full commission's finding of a change of condition. We likewise affirm the award of arrearages and penalties based on Claimant's motion to compel. Finally, we reverse that portion of the order concluding the commission did not have the discretion to order Employer to pay for medical treatment rendered to Claimant by her out-of-state medical providers and reinstate the full commission's award.

AFFIRMED IN PART and REVERSED IN PART.

SHULER, J. concurs.

STILWELL, J., dissents in a separate opinion.

STILWELL, J.: (dissenting). I respectfully dissent. I agree with the majority's analysis of and conclusion regarding the motion to compel, but disagree with the decision affirming the finding of a change of condition and reinstating temporary total disability (TTD). I would therefore find it unnecessary to address the issue concerning treatment by out-of-state medical providers.

The initial hearing before the single commissioner was held on August 19, 1998. The resulting order was appealed to the full commission which, among other things, refused to allow into evidence a letter from Dr. Horton, found Claimant sustained a 25% permanent impairment to her back and had reached maximum medical improvement (MMI) on March 9, 1998 when she

was released by her treating physician. No appeal was taken from that order. If the parties to a dispute fail to timely appeal the final award of the commission, then its order "is conclusive and binding as to all questions of fact." S.C. Code Ann. § 42-17-60 (Supp. 2001).

We are now asked to affirm an award for a change of condition based on that letter from Dr. Horton which was dated the day before the initial hearing. I have difficulty justifying an award for a change of condition based on a condition which admittedly existed prior to the initial award.

"[A] change in condition means a change in the physical condition of the claimant as a result of the original injury, occurring after the first award." Cromer v. Newberry Cotton Mills, 201 S.C. 349, 357, 23 S.E.2d 19, 22 (1942). It "can consist of either a change in the claimant's physical condition that impacts his earning capacity, a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or a change in the degree of disability even though claimant's physical condition remains unchanged." Blair v. Am. Tel. & Communications Corp., 477 S.E.2d 190, 192 (N.C. Ct. App. 1996) (citations omitted).
[1]

Not having appealed the full commission order finding MMI, Claimant is bound by it,

> subject of course to her right to review of it upon change of condition as prescribed by Section [42-17-90]. But her suggestion here that review under Section [42-17-90] was available to her as an alternative to, or substitute for, an appeal, is without merit. An appeal is concerned with conditions prior to and at the time of the original Opinion and Award, whereas

[1] "The decisions of North Carolina courts interpreting that state's workers' compensation statute are entitled to weight because the South Carolina statute was fashioned after North Carolina's." Adams v. Texfi Ind., 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995).

> review under Section [42-17-90] is concerned with conditions that have arisen thereafter.

Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 225, 228, 153 S.E.2d 697, 698-699 (1967).

"A change of condition refers to conditions different from those in existence when an award was originally made and a continued incapacity of the same kind and character and for the same injury is not a change in condition." Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996). In Lewis, where claimant complained of scar tissue, increased pain, and a continuing condition present during the first award, the court held no change of condition had been proven because "this development and continuing incapacity is 'of the same kind and character and for the same injury' that gave rise to plaintiff's [initial] compensation . . . ." Id.

Claimant admitted in testimony before the single commissioner on the change of condition that she had initially requested surgery, which was denied. She testified the pain was slightly worse but that she was essentially claiming the same treatment for the same condition on which the initial award was based. As Claimant's counsel conceded in the initial hearing before the full commission, "the condition is what it is now. It wouldn't constitute a change later." Dr. Horton's August 18, 1998 letter noted that additional surgery "would very likely decrease the tenure and/or severity of Ms. Gattis' pain and impairment." As Employer noted, this "evidence from Dr. Horton was presented at the first hearing . . . [and] was explicitly rejected." There is no evidence a medical change has occurred since the initial hearing, and Claimant produced no evidence about nor did she argue any change in her earning capacity.

I would, therefore, reverse that portion of the order reinstating TTD and authorizing additional and continuing treatment.