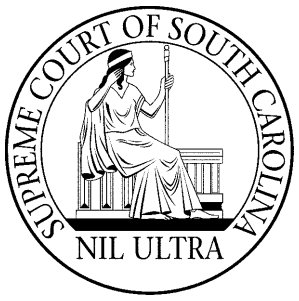

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

September 9, 2002

ADVANCE SHEET NO. 32

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Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3525 - Arscott v. Bacon	Pending
3528 - Tipton v. Tipton	Pending
3538 - Scott (Brunson) v. Brunson	Pending
3539 - State v. Charron	Pending
3540 - Greene v. Greene	Pending
2001-UP-522 - Kenney v. Kenney	Pending
2002-UP-358-The State v. Michael McGaha	Pending
2002-UP-380 - Crosby v. Smith	Pending
2002-UP-399 - EDY/Toto, Inc. v. Horry County	(2) Pending
2002-UP-472 - Cole v. Frei	Pending
2002-UP-480 - State v. Samuel Parker	Pending
2002-UP-484 - Surety Bank v. Huckaby & Associates	Pending
2002-UP-493 - Walker v. Walker	Pending
2002-UP-498 - Singleton v. Stokes Motors, Inc.	Pending
2002-UP-502- Resources Planning v. People's Federal	Pending
2002-UP-504-Thorne v. SCE&G	Pending
2002-UP-506- Ireland Electric v. Miller	Pending
2002-UP-509-Baldwing Const. V. Graham	Pending
2002-UP-513 - E'Van Frazier v. Athaniel Badger	Pending
2002-UP-514 – Frank McCleer v. City of Greer	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3250 - Alice Pilgrim v. Yvonne Miller	Pending
3314 - State v. Minyard Lee Woody	Pending
3362 - Johnson v. Arbabi	Pending
3382 - Cox v. Woodmen	Pending
3393 - Vick v. SCDOT	Pending
3404 - State v. Charles M. Stuckey, Jr.	Pending
3406 - State v. Yukoto Cherry	Pending
3408 - Brown v. Stewart	Pending
3411 - Lopresti v. Burry	Pending
3414 - State v. Duncan R. Proctor #1	Pending
3415 - State v. Duncan R. Proctor #2	Pending
3418 - Hedgepath v. AT&T	Pending
3420 - Brown v. Carolina Emergency	Pending
3422 - Allendale City Bank v. Cadle	Pending
3424 - State v. Roy Edward Hook	Pending
3431 - State v. Paul Anthony Rice	Pending
3440 - State v. Dorothy Smith	Pending
3445 - State v. Jerry S. Rosemond	Pending
3448 - State v. Corey L. Reddick	Pending
3449 - Bowers v. Bowers	Pending

3450 - Mixson, Inc. v. American Loyalty Inc.	Pending
3453 - State v. Lionel Cheatham	Pending
3454 - Thomas Sand Co. v. Colonial Pipeline	Pending
3459 - Lake Frances property v. City of Charleston	Pending
3465 - State v. Joseph Golson	Pending
3466 - State v. Kenneth Andrew Burton	Pending
3468 - United Student Aid v. SCDHEC	Pending
3472 - Kay v. State Farm Mutual	Pending
3475 - State v. Sandra Crawley	Pending
3476 - State v. Terry Grace	Pending
3477 - Adkins v. Georgia-Pacific	Pending
3479 - Converse Power Corp. v. SCDHEC	Pending
3481 - State v. Jacinto Antonio Bull	Pending
3485 - State v. Leonard Brown	Pending
3486 - Hansen v. United Services	Pending
3488 - State Auto v. Raynolds	Pending
3489 - State v. Sharron Blasky Jarrell	Pending
3491 - Robertson v. First Union National	Pending
3494 - Lee v. Harborside Café	Pending
3495 – Ferrell Cothran v. Alvin Brown	Pending
3497 - Paresha Shah v. Richland Memorial	Pending

3503 - State v. Benjamin Heyward	Pending
3520 – Alice Pilgrim v. Yvonne Miller	Pending
3539 - State v. Robert Charron	Pending
2001-UP-324 - State v. John Williams, III	Pending
2001-UP-391 - State v. Jerome Hallman	Pending
2001-UP-461 - Storage Trailers v. Proctor	Pending
2001-UP-476 - State v. Jeffery Walls	Pending
2001-UP-477 - State v. Alfonso Staton	Pending
2002-UP-478 - State v. Leroy Stanton	Pending
2001-UP-479 - State v. Martin McIntosh	Pending
2002-UP-012 - Gibson v. Davis	Pending
2002-UP-029 - State v. Kimberly Renee Poole	Pending
2002-UP-038 - State v. Corey Washington	Pending
2002-UP-062 - State v. Carlton Ion Brown	Pending
2002-UP-064 - Bradford v. City of Mauldin	Pending
2002-UP-066 - Barkley v. Blackwell's	Pending
2002-UP-079 - City v. Charleston v. Charleston City Board of Zoning	Pending
2002-UP-093 - Aiken-Augusta Auto Body v. Groomes	Pending
2002-UP-098 - Babb v. Summit Teleservices	Pending
2002-UP-124 - SCDSS v. Hite	Pending
2002-UP-131 - State v. Lavon Robinson	Pending

2002-UP-146 - State v. Etien Brooks Bankston	Pending
2002-UP-148 - Marsh v. Springs Industries	Pending
2002-UP-151 - National Union Fire Ins. v. Houck	Pending
2002-UP-160 - Fernanders v. Young	Pending
2002-UP-171 - State v. Robert Francis Berry	Pending
2002-UP-174 - RP Associates v. Clinton Group	Pending
2002-UP-189 - Davis v. Gray	Pending
2002-UP-192 - State v. Chad Eugene Severance	Pending
2002-UP-198 - State v. Leonard Brown	Pending
2002-UP-208 - State v. Andre China & Samuel A. Temoney	Pending
2002-UP-220 - State v. Earl Davis Hallums	Pending
2002-UP-223 - Miller v. Miller	Pending
2002-UP-230 - State v. Michael Lewis Moore	Pending
2002-UP-231 - SCDSS v. Temple	Pending
2002-UP-233 - State v. Anthony Bowman	Pending
2002-UP-236 - State v. Raymond J. Ladson	Pending
2002-UP-250 - Lumbermens Mutual v. Sowell	Pending
2002-UP-256 - Insurit v. Insurit	Pending
2002-UP-258 - Johnson v. Rose	Pending
2002-UP-259 - Austin v. Trask	Pending
2002-UP-266 - State v. John Lipsky	Pending

2002-UP-281 - State v. Henry James McGill	Pending
2002-UP-284 - Hiller v. SC Board Architectural	Pending
2002-UP-288 - Yarbrough v. Rose Hill Plantation	Pending
2002-UP-290 - Terry v. Georgetown Ice. Co.	Pending
2002-UP-313 - State v. James S. Strickland	Pending
2002-UP-319 - State v. Jeff McAlister	Pending
2002-UP-326 - State v. Lorne Anthony George	Pending
2002-UP-342 - Squires v. Waddington	Pending
2002-UP-363 - Curtis Gibbs v. SCDOP	Pending

PETITIONS - UNITED STATES SUPREME COURT

2001-UP-238 - State v. Michael Preston	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Gardner, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Anderson County
Frank Eppes, Trial Judge
H. Dean Hall, Post-Conviction Judge

Opinion No. 25528
Submitted February 21, 2002 - Filed September 9, 2002

REVERSED AND REMANDED

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General Elizabeth R. McMahon,

all of Columbia, for respondent.

CHIEF JUSTICE TOAL: This Court granted Charles Gardner's ("Petitioner") petition for a writ of certiorari to review the denial, after a hearing, of his application for Post-Conviction Relief ("PCR"). Petitioner argues the PCR court erred in finding he knowingly and intelligently waived his right to counsel. We agree.

FACTUAL / PROCEDURAL BACKGROUND

In February 1995, Petitioner was indicted on two counts: (1) for trafficking over 400 grams of cocaine; and (2) for trafficking over eighty grams of crack cocaine. Pursuant to a plea agreement, Petitioner plead guilty to trafficking twenty-eight grams or more, but less than 100 grams, of cocaine and to trafficking ten grams or more, but less than twenty-eight grams, of crack cocaine. Petitioner was not represented by counsel at the plea hearing. Pursuant to the State's recommendation, Petitioner received concurrent 10 year sentences.

In September 1995, Petitioner filed an application for PCR. After a hearing, the PCR judge denied Petitioner relief. Petitioner then petitioned this Court for a writ of certiorari. This Court granted certiorari, and the sole issue before this Court is:

> Did the PCR Court err in holding Petitioner knowingly and intelligently waived his right to counsel?

LAW/ ANALYSIS

Petitioner argues the record does not support the PCR court's finding that he understood the dangers of self-representation and knowingly and intelligently waived his right to counsel. We agree.

At the PCR hearing, Petitioner testified he retained an attorney after he was arrested. However, because he was unable to afford the legal fees, the

private attorney stopped representing Petitioner.[1] A public defender was never appointed.

Petitioner testified he spoke with Assistant Solicitor Jon Ozmint ("Ozmint") about his plea.[2] Petitioner stated Ozmint informed him that his bond would be revoked if he refused to plead guilty. According to Petitioner, Ozmint told him he would recommend a seven year sentence, of which he would only have to serve three years, if Petitioner would plead guilty and turn in three other drug dealers. Ozmint admits he discussed a plea with Petitioner, but denied he ever told Petitioner that his bond would be revoked or that he would only have to serve three years.

Petitioner's brother, Rick Gardner, also testified at the PCR hearing. He stated Ozmint offered Petitioner a seven year deal and promised him he would only have to spend four years in prison. He later testified Ozmint offered Petitioner a ten year deal and promised he would only spend three years in prison.

On cross-examination, Petitioner admitted Magistrate David Crenshaw[3]

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[1]The record is not clear at what point Petitioner's private attorney stopped his representation.

[2]Following the initial dismissal of Petitioner's PCR application, he filed a petition for a writ of certiorari. This Court issued an order remanding the case back to the PCR judge for a reconstruction of the record from the PCR hearing. The PCR judge then issued a second order finding an additional hearing to reconstruct was unnecessary because the first order was so detailed. Petitioner has not voiced an objection to this order. Accordingly, the testimony discussed comes from the Order of Dismissal.

[3]Judge Crenshaw also testified at the PCR hearing. He stated it was his usual practice to explain to those who appear before him that they have a right to a public defender. He further testified that he makes sure the accused understands his right to an attorney before he allows him to sign a "statement

informed him at his arraignment that he had a right to a public defender. Furthermore, he stated he was aware public defenders were available to represent people who could not afford to hire private counsel. In fact, Petitioner testified he had been represented by a public defender in 1993 on a charge of possession of cocaine.

The PCR court found Petitioner failed to prove that he did not knowingly and voluntarily waive his right to counsel. In its order, the PCR court stated Petitioner was of above average intelligence.[4] The court further stated the record indicated Petitioner was advised at his arraignment that he had a right to a public defender. In addition, the court found Petitioner was completely familiar with the court system.

According to the United States Supreme Court, in order to waive the right to counsel, the accused must be (1) advised of his right to counsel *and* (2) adequately warned of the dangers of self-representation. *Prince v. State,* 301 S.C. 422, 392 S.E.2d 462 (1990) (citing *Faretta v.California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1972)) (emphasis added). The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977) (citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). If the trial judge fails to address the disadvantages of appearing *pro se,* as required by the second prong of *Faretta,* "this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." *Prince,* 301 S.C. at 424, 392 S.E.2d at 463 (citing *Wroten v. State,* 301 S.C. 293, 391 S.E.2d 575 (1990)).

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of rights" form. However, Judge Crenshaw did not testify that he explained to Petitioner the dangers of self-representation.

[4]The record is unclear whether Petitioner actually graduated from high school. In his application for PCR, he stated he did not have a high school diploma. At his guilty plea hearing, when asked how far he went in school, Petitioner responded, "12th Grade."

> While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. If the *record demonstrates* the defendant's decision to represent himself was made with an understanding of the *risks of self-representation*, the requirements of a voluntary waiver will be satisfied.

Wroten, 301 S.C. at 294, 391 S.E.2d at 576 (citing *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986)) (emphasis added).

In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed *pro se*, with "eyes open," then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial. *See Watts v. State*, 347 S.C. 399, 556 S.E.2d 368 (2001); *Wroten; Prince; Bridwell v. State*, 306 S.C. 518, 413 S.E.2d 30 (1992). We find Petitioner was not adequately apprised of the dangers of self-representation. The plea judge never even acknowledged that Petitioner did not have counsel with him at the plea hearing. The judge did not inquire about why Petitioner had relieved his counsel, or if he wished to have counsel present. There is absolutely no mention by the judge of anything relating to the right to an attorney, the dangers of self-representation, or the like in the guilty plea transcript. Furthermore, Petitioner did not say anything about counsel. He never stated that he did not want an attorney, that he wished to waive this right, or that he wanted to represent himself.

Because of the absolute failure of the plea judge to ask Petitioner for a waiver and to apprise him of the dangers of appearing *pro se*, as is required by *Faretta*, this Court must look into the record to determine if Petitioner had sufficient background or was apprised of his rights by some other source. *Prince*; *Wroten* (absent a specific inquiry by the trial court into the hazards of proceeding *pro se*, this Court will examine the record to determine whether the accused was advised of his rights from some other source or had sufficient background to intelligently waive his right to counsel). When determining if an

accused has a sufficient background to understand the dangers of self-representation, the courts consider many factors including: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. *State v. Cash*, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992) (citations omitted).

While there is evidence in the record to indicate Petitioner was aware of his right to counsel, there is insufficient evidence to indicate he was aware of the dangers of self-representation. After weighing the factors above, we find the PCR court erred in finding Petitioner knowingly and intelligently waived his right to counsel.

First, the plea judge did not give Petitioner any warning about the dangers of proceeding *pro se.* He did not inform him of the nature of the charges or of the possible penalties. Petitioner did have a 12th grade education, and he had been represented by counsel on a previous charge to which he pled guilty. He also had a private attorney when he was first charged. However, the record gives no indication this attorney explained to him the dangers of self-representation. *See Wroten* (fact that petitioner had spoken with an attorney and fact that he had plead guilty to another charge in 1979 did not sufficiently demonstrate that he was aware of the dangers of self-representation).

Second, although the guilty plea proceeding did not consist merely of *pro forma* questions and answers, the transcript on its face poses several other problems which would indicate the plea itself was not knowing and voluntary.

This Court and the United States Supreme Court have held that before a court can accept a guilty plea, a defendant must be advised of the federal and state constitutional rights he or she is waiving. *Boykin v. Alabama*, 89 S. Ct. 1709, 395 U.S. 242, 23 L. Ed. 2d 274 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999). Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, the right to confront one's accusers, the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *Id.*

In this case, the plea judge did not even ask Petitioner for an admission of guilt. The transcript also indicates the trial judge did not advise Petitioner of the crucial elements of the charged offenses, or of the possible penalties if the recommended sentence was not accepted by the plea judge. In addition, the trial judge did not ask questions to ensure Petitioner's understanding of the consequences of his plea. Furthermore, any defect in the court's questioning was not cured by the accused conversation with another source, since Petitioner had no attorney. *See State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993) (a knowing and voluntary waiver of the constitutional rights which accompany a guilty plea "may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.")

CONCLUSION

Based on the foregoing, we **REVERSE** the PCR court's order of dismissal and **REMAND** for a new trial.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT-North America, Appellant.

Appeal From Horry County
John L. Breeden, Circuit Court Judge

Order No. 2002-OR-405
Filed September 4, 2002

APPEAL DISMISSED

Ronald E. Boston, of Columbia, and R. Wayne Byrd, of Florence, for appellant.

George M. Hearn, Jr., of Conway; James B. Van Osdell and Cynthia Graham Howe, both of Myrtle Beach; James R. Gilreath, of Greenville; and Scott M. Mongillo, of Mt. Pleasant for respondent.

PER CURIAM: Collins Music Company ("Collins Music") brought suit against IGT a/k/a/ IGT-North America ("IGT") in the circuit court. A jury awarded a fifteen million dollar judgment to Collins Music. IGT appeals the trial court's denial of its motions for judgment notwithstanding the verdict ("JNOV"), new trial, and new trial nisi remittitur. We dismiss the appeal as untimely.

FACTS/PROCEDURAL BACKGROUND

Collins Music filed suit against IGT asserting numerous causes of action arising out of a contract dispute. The parties had previously entered into a video machine distributorship agreement. A jury found in favor of Collins Music and awarded it a judgment of fifteen million dollars in actual damages.

On August 13, 2001, IGT timely filed and served post-trial motions pursuant to Rules 50(b) and 59, SCRCP. Specifically, IGT moved for JNOV, new trial, and alternatively, new trial nisi remittitur. IGT delineated twenty-eight grounds as support for its request for relief. The circuit court judge issued a written order denying all of IGT's post-trial motions, "[a]fter carefully reviewing the matter." IGT was served with a copy of this order on September 5, 2001.

Seven days later, on September 12, 2001, IGT served a Rule 59(e) motion to alter or amend the judgment. In the motion, IGT merely restated the arguments it made in the material filed with its first post-trial motions and requested the circuit judge to "make specific rulings, and the basis therefore [sic], as to each ground raised" in the earlier motions. On October 29, 2001, the circuit judge issued a written order denying the Rule 59(e) motion and specifically stating IGT failed to raise any issue not already considered. IGT received written notice of entry of the order on November 5, 2001. IGT served its notice of appeal on November 21, 2001.

ISSUE

Did IGT's second motion toll the time for serving an appeal?

LAW/ANALYSIS

Rule 203(b)(1), SCACR provides that a notice of appeal from a judgment of the Court of Common Pleas

> shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

IGT moved for relief under Rules 50(b) and 59 within ten days of the verdict, which the circuit judge denied. Following the circuit judge's denial, IGT filed and served a Rule 59(e) motion to alter or amend the judgment. The circuit judge denied this motion.

Collins Music argues this Court lacks subject matter jurisdiction because IGT's notice of appeal was not timely served. Collins Music contends IGT's Rule 59(e) motion did not toll the time for appeal because the Rule 59(e) motion was nothing but a restatement of the arguments IGT made in its initial post-trial motions.

A. Coward Hund Construction Company v. Ball Corporation

In Coward Hund Construction Company v. Ball Corporation, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), this Court addressed successive Rule 59(e) motions and the tolling of the time for appeal.

Coward Hund sued Ball and Carolina Glass, alleging claims for negligence, breach of express and implied warranties, and breach of contract. Coward Hund additionally sought indemnification arising from allegedly defective building repairs. The defendants moved for summary judgment.

The court granted summary judgment to both defendants on all of Coward Hund's claims. Coward Hund filed a motion for reconsideration, which was denied.

Thereafter, Coward Hund filed a second motion for reconsideration "seek[ing] clarification of the issue raised before the trial court on two occasions regarding Plaintiff's indemnity claim against Defendants." Id. at 2, 518 S.E.2d at 57. In response, the circuit court issued a supplemental order stating: "[T]he court granted summary judgment to Defendants Carolina Glass and Ball Corp. without the court referencing any prejudice regarding Coward Hund's indemnity claims, if any." Id. Coward Hund served its notice of appeal within thirty days of receiving written notice of the order denying the second motion for reconsideration but more than thirty days after receiving written notice of the order denying the first motion for reconsideration.

This Court concluded:

> "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)(quoting Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L. Ed.2d 178 (1988)). As one authority has noted, "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." James F. Flanagan, South Carolina Civil Procedure 475 (2d ed. 1996).

Id. at 4, 518 S.E.2d at 58.

The Coward Hund decision emphasized that a successive Rule 59(e), SCRCP motion, following the denial of a similar motion, did not toll the time for appeal, where the court's ruling on the first such motion did not change or alter its ruling at trial. This Court held: "[A] second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration." Id. at 3, 518 S.E.2d at 58.

B. Quality Trailer Products v. CSL Equipment Company

Our supreme court recently addressed the issue of whether a successive motion captioned as a Rule 59(e) motion to alter or amend tolls the time for appeal in Quality Trailer Products, Inc. v. CSL Equipment Company, 349 S.C. 216, 562 S.E.2d 615 (2002).

Quality Trailer Products ("Quality Trailer") brought suit against CSL Equipment Company ("CSL") and I Corp. Quality Trailer sought recovery against I Corp. for breach of the former Bulk Transfers Act, promissory estoppel, and successor liability. The circuit court granted I Corp.'s motion for directed verdict on Quality Trailer's statutory claim and submitted the remaining theories to the jury. The jury awarded judgment to Quality Trailer.

I Corp. made a timely motion for JNOV and new trial. By written order filed December 21, 1999, this motion was denied. I Corp. filed a subsequent post-trial motion captioned as a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial." Id. at 218, 562 S.E.2d at 616. The caption of this motion indicated it was made pursuant to Rules 52, 59, and 60. In actuality, this motion was almost a duplicate of the first motion for relief. The only alterations I Corp. made to the subsequent motion were to caption the motion differently and to change the relief sought to coincide with the second motion's caption. The circuit court recognized this successive motion was virtually identical to the first

post-trial motion and denied the second motion by order dated February 16, 2000. I Corp. appealed on March 17, 2000, almost three months after the circuit judge's denial of I Corp.'s first post-trial motion for relief.

In analyzing the timeliness of appeal, the court held:

> We agree with the rationale of Coward Hund and hold that **successive** new trial motions or motions for JNOV do not toll the time for serving notice of appeal. **The time for filing appeal is not extended by submitting the same motion under a different caption**. See Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its "substance and effect" rather than how it is captioned by movant). See also Sears v. Sears, 85 Ill.2d 253, 52 Ill.Dec. 608, 422 N.E.2d 610 (1981) (a successive motion that was little more than a slightly lengthened redraft of the first motion was improper and did not extend the time for filing appeal); Boughton v. McAllister, 576 N.W.2d 94 (Iowa 1998) (a party should not be allowed to extend the time for appeal indefinitely by filing successive motions that address the same issue).

Id. at 220-21, 562 S.E.2d at 617-18 (second emphasis added) (footnote omitted).

I Corp. argued on appeal that the second post-trial motion was required to preserve issues presented but not ruled upon in the trial court's order denying the motions for JNOV and new trial. Our supreme court disagreed stating:

> The second motion did not . . . identify a single issue raised but not ruled upon – it merely recites, verbatim, the arguments made in the earlier motions. **The trial court's denial of the JNOV and new trial**

> **motions was a ruling on all issues raised, and preserved for appellate review all issues raised therein**.

Id. at 221, 562 S.E.2d at 618 (emphasis added).

C. Applicability of Coward Hund and Quality Trailer

Coward Hund and Quality Trailer clearly stand for the proposition that although a successive post-trial motion for relief is permissible, the subsequent motion must seek relief on issues coming to light as a result of an order following an initial post-trial motion that **alters or amends** the judgment. The successive motion cannot be a motion to alter or amend that merely recites arguments in a previous Rule 59(e) motion, as was the case in Coward Hund, or the recaptioning of a previous Rule 50 or Rule 52 motion as a Rule 59(e) motion, as was done in Quality Trailer.

Here, IGT requested JNOV, a new trial, and alternatively, a new trial nisi remittitur in its first post-trial motions. IGT premised its motions upon twenty-eight separate grounds. The circuit court denied these motions. The court made no alterations or amendments to the judgment. At that point, all issues regarding JNOV, new trial, and new trial nisi remittitur were resolved by the circuit judge and were ripe for appellate review. The time for IGT to serve its notice of appeal began to run following its receipt of written notice of the judge's denial order. Nevertheless IGT filed a subsequent Rule 59(e) motion, seeking an order altering or amending the post-trial order to more specifically address each of the twenty-eight separate grounds.

The circuit judge, however, was not required to provide a detailed analysis respecting each of the twenty-eight grounds offered in support of JNOV, new trial, and new trial nisi remittitur. The requirement imposed upon the court by Rule 52(a), SCRCP to "find the facts specially and state separately its conclusions of law" is limited to cases tried without a jury or with an advisory jury and is inapplicable here. See, e.g., Rule 52(a), SCRCP ("In all actions tried upon the facts without a jury or with an advisory jury,

the court shall find the facts specially and state separately its conclusions of law . . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."); see also Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) ("We have . . . refused to require trial judges to explain reasons for ruling on [the request for a new trial as the thirteenth juror]."); Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001) (stating a form order denying a motion for JNOV and new trial coupled with the transcript of the proceedings was sufficient to allow appellate review and a Rule 59(e) motion was not required to preserve issues for appeal), cert. granted on other grounds (Jan. 10, 2002); Armstrong v. Union Carbide, 308 S.C. 235, 417 S.E.2d 597 (Ct. App. 1992) (stating that while order of the circuit court did not separately list and specifically address each of the twenty-nine exceptions raised, it was clear from reviewing the order that all grounds raised below were considered).

Additionally, IGT supported its Rule 59(e) motion not with arguments based upon the circuit judge's order, but by repeating verbatim the twenty-eight grounds found in the first motion and referencing analysis found in the first motion's memorandum of law. IGT failed to identify in its Rule 59(e) motion any issue raised but not ruled upon. The circuit judge recognized the Rule 59(e) motion as a request to revisit the grounds and arguments made in the earlier motions, and denied the motion.

IGT's second post-trial motion was not an appropriate Rule 59(e) motion; instead it was simply a successive motion for JNOV and new trial. For the reasons set forth in Coward Hund and Quality Trailer, the second post-trial motion did not toll the time for serving the notice of appeal.

CONCLUSION

The circuit judge denied IGT's motions for JNOV, new trial and new trial nisi remittitur in his first post-trial order. Accordingly, the underlying issues giving rise to these motions were preserved and ripe for appellate review.

We rule IGT's Rule 59(e) motion was nothing but a recapitulation of the arguments raised and previously ruled upon by the circuit court and did not toll the time for serving the notice of appeal. We therefore dismiss the appeal as untimely.

APPEAL DISMISSED.

GOOLSBY, CONNOR, ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frank Lauro, d/b/a Colonial Restoration,

Respondent,

v.

Kuldar Visnapuu, Sandra Visnapuu, and
Union Federal Savings Bank of Indianapolis,

Defendants,

Of Whom Kuldar Visnapuu and Sandra
Visnapuu are,

Appellants.

Appeal From Charleston County
Gerald C. Smoak, Sr., Circuit Court Judge

Opinion No. 3546
Submitted May 6, 2002 - Filed September 9, 2002

REVERSED

Richard S.W. Stoney and Jay T. Gouldon, of Charleston; and James B. Richardson, Jr., of Columbia, for appellants.

Richard S. Rosen and Kevin R. Eberle, of Charleston, for respondent.

HUFF, J.: This mechanic's lien foreclosure action was instituted by Frank Lauro, d/b/a Colonial Restoration (hereinafter Lauro). Kuldar and Sandra Visnapuu appeal from an order of the circuit court modifying an arbitration award in favor of Lauro. We reverse.[1]

FACTUAL/PROCEDURAL BACKGROUND

Frank Lauro owns and operates Colonial Restoration, a Charleston business which provides restoration and contractor services. The Visnapuus contracted with Lauro to perform a substantial restoration project on their home located on Charleston's Meeting Street.

Lauro delivered to the Visnapuus a blank American Institute of Architects (AIA) document contract form. At the time of delivery, Lauro also prepared and delivered a proposed fill-in document for the AIA contract which provided a guaranteed maximum cost of $346,115.00 for completion of the restoration project.

Subsequently, the parties executed a proposal on December 2, 1997. Attached to the proposal was a detailed, ten page description of a "limited scope of work for renovations" to the Visnapuus' home. Specifically, the proposal included the following language:

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

> We [Colonial Restoration] propose to furnish labor and material for renovation of the above referenced project for the maximum sum of Three Hundred and Forty-six Thousand, One Hundred and Fifteen dollars, ($346,115.00) with a limited scope of work.

The day after the Visnapuus executed the proposal, but prior to the execution of the AIA contract, Lauro met with his attorney regarding what would be necessary to make the arrangement between the parties a pure cost-plus contract without a guaranteed maximum. His attorney advised him on how to fill out the AIA contract to accomplish a cost-plus contract, and Lauro thereafter had his secretary fill out the contract. Lauro failed, however, to deliver this AIA contract back to his attorney for review. As a result, the document embodied numerous troublesome oversights in regard to the guaranteed maximum provision.

During the course of the restoration, Lauro periodically billed the Visnapuus for his work, and the Visnapuus paid approximately $257,901.00 as billed. A dispute arose between the parties, however, after Lauro submitted a July 2, 1998 invoice in the amount of $111,351.00, bringing the total cost of the project to date well above $346,115.00. Work was halted on the project and these proceedings were instituted.

On July 8, 1998, Lauro filed a mechanic's lien against the Visnapuus' home and commenced this mechanic's lien foreclosure action seeking $197,560.00, together with interest, costs and attorney's fees, alleging the Visnapuus improperly refused to pay the full amount due under a cost-plus contract. Lauro further asserted causes of action for slander, interference with economic relationships, and breach of contract accompanied by a fraudulent act. The Visnapuus answered, alleging that the contract was a guaranteed maximum sum contract, not a cost-plus contract, and that they refused to permit Lauro to complete the work because the invoice exceeded the maximum contract price and Lauro had failed to comply with the contract terms. The Visnapuus also counterclaimed alleging, among other things, Lauro was guilty of negligent

construction, wrongfully filing the mechanic's lien, breach of contract, fraud, negligent misrepresentation, and breach of warranty of workmanlike services.

In July of 2000, the parties consented to submit the case for arbitration. The arbitrator issued his award on August 23, finding the parties agreed to a guaranteed maximum sum contract in the amount of $346,115.00. He concluded, however, the maximum cost provision encompassed only a limited scope of work as outlined in the ten page proposal, and Lauro was entitled to payment for work he performed outside the original scope on a separate, implied contract. The arbitrator assigned a value of $39,074.00 to work Lauro performed under this separate agreement, and awarded him that sum plus interest for one and one-third years in the amount of $4,563.19. The arbitrator specifically found interest for the entire period of a little more than two years was inappropriate because "the value of Colonial's performance was not clearly transmitted to the [Visnapuus]."

The arbitrator further found the Visnapuus had agreed to increase the original guaranteed maximum sum for work that was within the original scope of the project by $27,600.00. Accordingly, the effect of this increase was to raise the amount of the guaranteed maximum sum to $373,715.00. Having determined Lauro earned this full additional sum, he found Lauro was entitled to $27,600.00 plus interest of $5,188.85 on that amount. In addition, the arbitrator ordered the Visnapuus to pay $9,943.12 and $2,175.35, respectively, to two local suppliers for materials they provided to the project.

The arbitrator found insufficient evidence to support Lauro's claims for defamation and intentional interference of contract. He also determined the Visnapuus had failed to present sufficient evidence of deficient work by Lauro, and that the Visnapuus were not entitled to damages for increased financing charges that resulted from the filing of the mechanic's lien.

The arbitrator concluded the Visnapuus were to pay a total of $88,544.51, which included the work performed under the separate, implied contract with interest ($43,637.19), additional work performed pursuant to agreement of the parties under the contract with interest ($32,788.85), and

payment to the two local material suppliers ($9,943.12 and $2,175.35). He further found Lauro had claimed a lien in the amount of $177,352.17 and the Visnapuus had offered nothing. He determined the differences between his award and the statutory fictional demand and counteroffer under S.C. Code Ann. § 29-5-10 were equal, and neither party was the prevailing party under the mechanic's lien statute. Therefore, he declined to award either party attorney's fees.

In September 2000, Lauro requested that the arbitrator modify his award to address the unpaid balance between the amount of the original guaranteed maximum sum ($346,115.00) and the amount the Visnapuus actually paid in satisfaction of that amount ($257,901.00). Lauro requested that the unpaid balance of the maximum sum contract in the amount of $88,214.00, including $22,934.00 of retainage, be added to the arbitration award, together with interest of $16,600.54. He also sought additional interest of $2,764.15 on the original award of $39,074.00 under the implied contract. He argued the addition of these amounts would render him the prevailing party in the action, thereby entitling him to an award of attorney's fees under the mechanic's lien statute. He also argued the statute required the Visnapuus be assigned a negative value to their counteroffer by taking into account their counterclaims, which would result in him being the prevailing party in any event.

On October 9, 2000, the arbitrator held a hearing on Lauro's motion to modify the award. In response to Lauro's argument that he was entitled to the difference between the original contract amount and the sum paid by the Visnapuus, the arbitrator stated as follows:

> The question becomes -- and I struggled with this; it wasn't something that was an oversight -- was this: He was paid 257. We are dealing with a figure of 346 that I found and was convinced of -- and I think it was unfortunate, but I was convinced of he agreed to. He did not perform the entire contract. That's undisputed.

> So the fact that there's a guaranteed maximum price contract does not guarantee the performer of the contract the guaranteed maximum sum. That was my thought process.
>
> Now I will say this, I toyed with this idea. . . . There was a difference of -- between 346 and 257, roughly $90,000. I struggled. Maybe Mr. Lauro would be entitled to 12 percent on that, since it was a cost plus issue. He certainly shouldn't be entitled to recover his entire guaranteed maximum when he didn't perform all the work. That was the basis of my award.
>
> * * *
>
> . . . . I did not overlook those things, but finding that it was a maximum guaranteed contract does not become, in my judgment, a self-fulfilling prophecy, and he's entitled to the maximum guaranteed sum.
>
> * * *
>
> So I want you to understand my thought process on it. It was not an oversight. . . . I think I put, apparently, he exceeded the maximum sum that was agreed on. I weighed that. Should he be entitled to the full amount? I had to conclude no, since he didn't complete the contract.

The arbitrator concluded he would not modify the award to include the difference between the guaranteed maximum sum and the amount paid, based on the fact that the total contract was not performed. He indicated he would look at the issue of retainage and make a determination based on that decision whether he needed to readdress the attorney's fees issue.

By letter dated October 10, 2000, the arbitrator notified the parties that he was "not inclined to change the order to allow Colonial to recover all of the 'guaranteed maximum amount,' since when Colonial left the job, the job was not complete." He indicated he was concerned with the retainage issue, and the effect a determination of that issue might have on the determination of a prevailing party for purposes of attorney's fees.

Thereafter, on October 30, 2000, the arbitrator issued his arbitration award modification. He found the only oversight he needed to address was the omission of any award of retainage. He determined relief was not warranted as to the other issues raised. As to the retainage issue, the arbitrator stated the agreement between the parties allowed for a monthly draw based on the amount of the work completed, less five percent retainage. At the last payment, the Visnapuus had remitted a total of $257,901.00, at which point $13,598.00 had been withheld as retainage. He noted that retainage has been defined as security for protection against failure of completion, and that Lauro did not fully complete the project. The arbitrator found, however, that failure to complete the project was based on Lauro's good faith but erroneous belief that the contract was not a guaranteed maximum amount. Thus, although Lauro had no legal entitlement to the retainage expenses, he determined, pursuant to equitable considerations, that Lauro was entitled to one-half of the retainage plus interest for a total amount of $8,782.00. With the addition of this amount to the award, the total award to Lauro was now $97,326.51. The arbitrator also indicated the correct amount that should have been attributed to Lauro for purposes of a demand in considering attorney's fees under the mechanic's lien statute was actually $197,560.00, the amount pled in Lauro's complaint. Thus, he found neither party was the prevailing party, even when consideration was given to the additional $8,782.00 award.

On October 31, 2000, the Visnapuus moved the circuit court to confirm the arbitrator's award. On November 3, 2000, Lauro moved the circuit court to modify, correct, or vacate the arbitrator's award. He asserted, among other things, that the arbitrator manifestly disregarded the law in denying him attorney's fees, and that the arbitrator miscalculated the total amount due him,

which should have included the unpaid amounts under the contract plus interest on that amount, as well as additional interest owing on the implied contract.

By order dated December 3, 2000, the circuit court modified the arbitrator's award based on a perceived manifest disregard of the law and evident miscalculations. Specifically, the circuit court found a miscalculation of damages and modified the award by adding to the arbitrator's award the $88,214.00 difference between the $346,115.00 contract price and the $257,901.00 in payments the Visnapuus made toward the total price, and interest on this figure in the amount of $16,600.55. The circuit court also determined the arbitrator miscalculated the interest on the separate, implied contract, and that Lauro was entitled to additional interest in the amount of $2,764.15 on that award. He thus determined Lauro was entitled to a total award of $177,886.27. He further found the arbitrator manifestly disregarded the law when he refused to apply the amended mechanic's lien statute in regard to the award of attorney's fees, which required the negative value of the Visnapuus' counterclaim be considered in determining the prevailing party. The circuit court deemed Lauro the prevailing party, entitling him to attorney's fees under § 29-5-10, and ostensibly retained jurisdiction to determine the amount of attorney's fees due.[2] This appeal followed.

LAW/ANALYSIS

On appeal, the Visnapuus assert the circuit court erred in modifying the arbitrator's award. Specifically, they contend the court erred in finding the arbitrator made an evident miscalculation of figures in regard to (1) his failure to award the full maximum sum of the contract and (2) his failure to award interest on the implied contract for a two year, one month and twenty-two day

[2] In a subsequent hearing on the Visnapuus' motion for reconsideration, the circuit court judge stated, contrary to his written order, that he was not going to decide the issue of the amount of attorney's fees.

period. They further assert the court erred in reversing the arbitrator's refusal to award Lauro attorney's fees. We agree.

Arbitration is not litigation carried on by other means, but is an alternative means for resolving disputes without the cost and delay of a lawsuit. White v. Preferred Research, Inc., 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 1993). Judicial review of an arbitration award is limited in scope, and any attempt to convert arbitration into a trial-like judicial proceeding is looked upon with disfavor. Id.

> Arbitration is a favored method of settling disputes in South Carolina. When a dispute is submitted to arbitration, the arbitrators determine questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.

Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997) (citations omitted). Review of an arbitration award is limited and the decision of the arbitrator will be vacated only under certain grounds as provided by statute, or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law. Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998).

I. Miscalculation of Figures

South Carolina Code Ann. § 15-48-140 (Supp. 2001), entitled "Modification or correction of award" provides in pertinent part as follows:

> (a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

> (1) There was an evidence [sic] miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

The circuit court determined the arbitrator's failure to award Lauro the difference between the full maximum sum of the contract and the amount the Visnapuus paid was a "miscalculation." The court found the arbitrator "recognized the problem, but only corrected the award by adding just one-half of only the retainage." We disagree. The arbitrator found as a fact that Lauro failed to perform the entire contract and was, therefore, not entitled to the full amount of the difference. He repeatedly expressed that he had not overlooked the matter, but had simply concluded Lauro was not entitled to the difference between the original contract sum and the amount paid, because Lauro had not completed the contract. Further, the one-half retainage the arbitrator ultimately awarded Lauro was a portion of that retained up to the point of payment of $257,901.00 by the Visnapuus. It does not encompass any portion of the difference between the maximum sum of the contract and the $257,901.00 amount paid, as the arbitrator determined Lauro was not entitled to payment on this since the work was not completed. In other words, the retainage modification was separate from the arbitrator's conclusion on the issue of the full maximum contract sum. Even if the arbitrator's decision in this regard were erroneous, it does not constitute an evident miscalculation of figures as envisioned under § 15-48-140. That is, the arbitrator did not commit a mathematical error in computing the total amount of the award. Rather, the arbitrator consciously declined to award Lauro the full amount of the contract.

The circuit court also found the arbitrator miscalculated the interest on the $39,074.00 award for work performed outside the scope of the project pursuant to an implied contract. As noted by the Visnapuus, the award of interest would not necessarily be dictated by the terms of the contract between the parties, since the arbitrator awarded this amount based on a separate, implied contract. See Mills v. William Clarke Jeep Eagle, Inc., 321 S.C. 150, 153, 467 S.E.2d 268, 269 (Ct. App. 1996) ("[A]rbitrators need not specify their reasoning or the basis for the award as long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'"). At any rate, the arbitrator clearly stated he declined to award interest for the entire period in question, based on the fact he found the value of the work was not clearly transmitted to the Visnapuus. We likewise conclude, therefore, there was no evident miscalculation of this figure. Rather, it was, again, a conscious decision of the arbitrator to award interest for a shorter period of time.

II. Determination of Prevailing Party

We are also compelled to agree with the Visnapuus that the circuit court erred in finding the arbitrator's failure to award Lauro attorney's fees pursuant to the mechanic's lien statute evidenced a manifest disregard of the law.

Prior to June 11, 1999, S.C. Code Ann. § 29-5-10 provided, where a written offer of settlement is made by both parties, for purposes of determining which party has offered a settlement closer to the verdict reached and is thus the prevailing party under the mechanic's lien statute, if the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer, and if the defendant makes no written offer of settlement, his offer is considered to be zero. S.C. Code Ann. § 29-5-10(b) (1991). If neither party made a written offer of settlement under the pre-amended version of the statute, § 29-5-10 would not apply, and the determination of a prevailing party would be within the sound discretion of the trial judge. Seckinger v. The Vessel Excalibur, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997). Subsequently,

the statute was amended to provide that if the defendant makes no written offer of settlement and makes a counterclaim, the value of his counterclaim is considered to be his negative offer of settlement. S.C. Code Ann. § 29-5-10(b) (Supp. 2001).

In his original award, the arbitrator found no written offers or counteroffers were made pursuant § 29-5-10. He found § 29-5-10 was amended effective June 11, 1999, and this action was commenced well before the effective date of the amendment. He thus concluded the Visnapuus' fictional statutory demand was zero. After considering his total modified award to Lauro of $97,326.51 and his determination that Lauro's demand in his complaint was for $197,560, the arbitrator concluded neither party was the prevailing party for purposes of attorney's fees under the statute.

The circuit court found there was a procedural amendment to the statute which must be given immediate effect, and the arbitrator "manifestly disregarded the law when he refused to apply the amended statute." We agree with the Visnapuus that it makes no difference whether the pre-amendment or post-amendment law applied, as there was no manifest disregard or perverse misconstruction of the law warranting modification of the arbitrator's award.

An arbitrator's award may be vacated where there has been a "manifest disregard or perverse misconstruction of the law." Batten v. Howell, 300 S.C. 545, 548, 389 S.E.2d 170, 172 (Ct. App. 1990). However, this non-statutory ground requires something more than a mere error of law, or failure on the part of the arbitrator to understand or apply the law. Id. at 549, 389 S.E.2d 172. "[T]he case law presupposes something beyond a mere error in construing or applying the law," and "even a 'clearly erroneous interpretation of the contract' cannot be disturbed." Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 108, 333 S.E.2d 781, 787 (1985), *cert. denied*, 474 U.S. 1060, 106 S. Ct. 803, 88 L.Ed.2d 779 (1986). While it is true the courts have not hesitated in appropriate cases to vacate an arbitration award where there is a manifest disregard or perverse misconstruction of the law, "those cases have been exceedingly rare, requiring circumstances far more egregious than mere errors in interpreting or applying the law." Id. "[T]he non-statutory ground of

'manifest disregard' of the law as a basis for vacating arbitration awards . . . presuppose[s] 'something beyond and different from a mere error of law or failure on the part of the arbitrators to understand or apply the law.'" Id. at 108-09, 333 S.E.2d 787.

Here, the circuit court found the arbitrator's award evidenced a manifest disregard for the law inasmuch as the arbitrator committed an error of law by erroneously applying the pre-amendment statute and thereby determining Lauro was not the prevailing party in the action. An erroneous application of the law, however, does not constitute manifest disregard. Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998). Under the strictures set forth in Trident and subsequent case law construing "manifest disregard" in an arbitration case, we hold the circuit court erred in modifying the arbitrator's award to find Lauro was the prevailing party and thereby entitled to attorney's fees.[3]

For the foregoing reasons, the order of the circuit court modifying the arbitrator's award is reversed and the award of the arbitrator reinstated.[4]

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[3] We find no merit to the circuit court's finding that the arbitrator was also prohibited from changing the figure for Lauro's demand (and thus his settlement offer under the statute) in the original award from $177,352.17, to $197,560.00 in his modified award. The statute clearly directs the amount prayed for in the plaintiff's complaint to be considered his final offer where no written offer of settlement is made by the plaintiff. The demand in Lauro's complaint for foreclosure on the mechanic's lien was for $197,560.00. It was Lauro himself who sought modification of the award, necessitating the arbitrator revisit the issue. The arbitrator did not modify his award in this respect, but merely reevaluated his findings, which did not change the result on the attorney's fees issue. Further, we find the decision by the arbitrator to assign a new value to Lauro's demand does not amount to a manifest disregard of the law.

[4] In light of our determination that the circuit court erred in reversing the arbitrator's denial of attorney's fees to Lauro, we need not address the Visnapuus' alternative argument that the circuit court should have remanded the

REVERSED.

HOWARD, J., concurs.

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

HEARN, C.J.: I concur but write separately to explain why I believe the decision by the arbitrator not to award attorney fees to the prevailing party was mere error and not manifest disregard of the law. Although vacating arbitration awards should not be taken lightly, manifest disregard of the law is established when the arbitrator recognizes the law and refuses to apply it. In South Carolina, the best definition of when this ground applies comes from this court's opinion in Harris v. Bennett, 332 S.C. 238, 246, 503 S.E.2d 782, 787 (Ct. App. 1998), stating:

> We cannot say the arbitrators appreciated the existence of a clearly governing legal principle and decided to ignore it. See, e.g., Marshall v. Green Giant Co., 942 F.2d 539 (8th Cir.1991) ("manifest disregard of the law" which allows court to intrude upon arbitrator's decision exists when arbitrator commits error that was obvious and capable of being instantly perceived by average person qualified to be an arbitrator; "disregard" implies the arbitrator appreciates the existence of a clearly governing legal principle, but decides to ignore or pay no attention to it).

Under our statutory scheme, the award of fees to the prevailing party in a mechanic's lien action is automatic and mandatory. S.C. Code Ann. §§ 29-5-10 & 20 (1991 & Supp. 2001); T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 402-03, 450 S.E.2d 87, 95 (Ct. App. 1994). Under the statute as amended in 1999, the method of determining the prevailing party reads in part:

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issue of the appropriate amount of attorney's fees to the arbitrator.

"*If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement*. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero." S.C. Code Ann. § 29-5-10(b) (Supp. 2001) (emphasis added). However, the previous version of section 29-5-10 did not apply if neither party made a written settlement offer. See Seckinger v. Vessel Excalibur, 326 S.C. 382, 391, 483 S.E.2d 775, 779 (Ct. App. 1997) (holding that if no written offers are made, section 29-5-10 does not apply and prevailing party, if any, is determined as a discretionary matter for the trial judge). In this case, the arbitrator found that no written offer was made by either side and believed the case was subject to the pre-amendment statute.

Under the 1999 amendment, I believe it would be manifest disregard of the law for an arbitrator to refuse to award attorney fees to the prevailing party. In this case, although I think the arbitrator erred in applying the old law, he did so under the theory that this action was filed before the 1999 amendment. Under the older version of the statute, the arbitrator had the discretion whether or not to award fees because neither side made a written settlement offer. Accordingly, I would hold the arbitrator's order falls into the mere error category and should have been confirmed by the circuit court. See Trident Technical Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 108, 333 S.E.2d 781, 787 (1985) ("[T]he case law presupposes something beyond a mere error in construing or applying the law.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Doug Mathis, as trustee of the Firemen's Insurance and Inspection Fund for the City of Sumter Fire Department,

Appellant,

v.

Elizabeth C. Hair, Sumter County Treasurer, and Elizabeth C. Hair, Joe Floyd, and Wayne Hunter, as trustees for the Sumter County Firemen's Insurance and Inspection Fund,

Respondents.

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

Opinion No. 3547
Heard June 4, 2002 – Filed September 9, 2002

REVERSED AND REMANDED

Charles E. Carpenter, Jr. and S. Elizabeth Brosnan, of Columbia; and Jack W. Erter, Jr., and David C. Holler, of Sumter, for appellant.

Andrew F. Lindemann, of Columbia, for respondents.

STILWELL, J.: Doug Mathis, as a trustee of the Fireman's Insurance and Inspection Fund for the City of Sumter Fire Department, brought this action against the Sumter County Treasurer and others seeking disbursement of $84,500 to the City's Fireman's Insurance and Inspection Fund. The circuit court denied the request for relief and the City appeals. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

The South Carolina Fireman's Insurance and Inspection Fund (the fund) is a unique fund established for the benefit and enjoyment of firefighters throughout the State. See S.C. Code Ann. § 23-9-410 (1989). Fund monies must be used solely "for the betterment and maintenance of skilled and efficient fire departments within the county." Id. Fund monies may not be used to purchase items for which the governmental unit the fire department serves is legally liable, such as fire trucks or equipment. S.C. Code Ann § 23-9-460 (1989).

The fund is financed by a percentage of fire insurance premiums. Every fire insurer in South Carolina is required to pay one percent of its premiums to the state treasurer and to file a report allocating the collected premiums to the county in which the insured property is located. S.C. Code Ann. §§ 38-7-40 (pay one percent), -70 (report) (2002). The state treasurer forwards the allocated funds to the treasurers of each county. § 23-9-410. The county treasurers then make disbursements to the trustees of the local fire departments based on the "assessed value of improvements to real estate within the service areas of the fire department. . . ." S.C. Code Ann. § 23-9-420 (1989) (emphasis added). The controversy in this case focuses on the meaning of "service area" as used in the statute.

There are 72 full-time firefighters and some part-time firefighters with the City fire department. The County fire department consists of 240 volunteer firefighters who have the option of responding to fires after being

notified. Mathis is the chief of both the City and County fire departments, as well as a trustee of the fund for the city.

Sumter County has seven tax districts, all of which are served by either the City or County fire departments. Five of the districts are in unincorporated areas of Sumter County. The two remaining districts are within the City limits and receive fire protection services from the City's fire department. Additionally, the City provides primary fire protection to some areas outside its corporate boundaries in exchange for payment from the County. The value of the property Mathis contends is primarily served by the City's fire department accounts for approximately 69% of the total assessed value of real property in Sumter County.

Sumter County's treasurer historically distributed the fund money to the department that provided primary services or "first response" to a fire within a particular district. Using this approach, the treasurer historically awarded the City fire department 65% and the County fire department 35% of the proceeds. In July 1999, the state treasurer distributed approximately $130,000 to Sumter County Treasurer Elizabeth Hair for distribution to the local fire departments. The City sought 65% of the funds, or $84,500. However, Hair chose to distribute the funds according to geographic boundaries rather than the primary service area. Based upon the assessed property values within the City's limits, she proposed the City receive 43% of the funds, or $58,167.90, and the County receive the remainder.

Mathis initially sought a writ of mandamus but later amended this action to seek a declaratory judgment. Mathis sought disbursement of $84,500 of the total $130,000 to the City fire department. Hair and the trustees of the County's fund answered, alleging the City's department was only entitled to 43% of the fund.

In a deposition presented at trial, Robert Colvin, Executive Director of the South Carolina State Fireman's Association, explained the association considers the "service area" of a fire department to be where the department provides first response fire services rather than strict geographic boundaries.

Colvin stated that where two fire departments share a coverage area, the association believes the departments should equally share the monies collected from that area. Colvin testified that every other county in South Carolina distributes the fund based on which particular fire department provides services in the particular area.

Hair testified that although the funds were historically distributed to the fire departments according to which department was responsible for the first response services in a particular district, she determined upon review of the statute that the funds had been wrongly distributed in the past. She determined that the phrase "service areas of the fire department" referred to the City fire department for the areas within, or incorporated into, the City limits and to the County fire department for the unincorporated areas outside the City limits. Although the City fire department exclusively served District 1 located in an unincorporated area of the county, Hair decided to treat the district as the County fire department's service area because it was outside the City limits. Hair acknowledged the County's oral contract with the City fire department to provide services to some of the unincorporated areas of the County. She testified that the County paid the City $955,000 in exchange for the City providing firemen to a station in an unincorporated area, with the County government providing the equipment. Hair believed the contract did not affect which fire department received the funds because it was silent on that issue and absent an agreement to the contrary the funds were "a benefit for the firemen."

Sumter's city manager testified the longstanding contract between the City and the County was oral because of the good working relationship between the entities. Importantly, the contract called for the City fire department to be primarily responsible for certain unincorporated areas so those areas could receive more favorable insurance ratings, and thus attract industry. Because the governments relied upon the first response formula in place for many years, they never discussed the allocation of the fund.

The circuit court found the phrase "service areas of the fire department" in the statute to be ambiguous, and further found there was no contract for the County fire department to give up a portion of its service area or the 1% premiums attributable to those areas. The court agreed with Hair that the City's "service area" was limited to its corporate limits absent an agreement to the contrary, and thus the City was only entitled to the portion of the funds representing the assessed property values within the City's geographical limits. As those property values represented only 43% of the total assessed property values in Sumter County, the circuit court found Hair correctly awarded the City fire department only 43% of the fund.

DISCUSSION

Mathis argues the circuit court's interpretation conflicts with the plain meaning of the statute, ignores the purpose and legislative intent of the statute, and ignores the traditional use of "first response" area to mean the "service area" of the fire department. We agree.

The primary purpose in construing a statute is to ascertain legislative intent. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). The legislature intends to accomplish something by its choice of words, and not do a futile thing. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964).

Although the term "service area" has not been defined in the statute creating and governing the fund, it has been defined in other statutes. Section 5-7-60 provides in part that any municipality may provide its services outside its corporate limits by contract, and the statute defines a designated "service area" to mean the area in which a particular service is being provided. S.C. Code § 5-7-60 (1977); see also City of Darlington v. Kilgo, 302 S.C. 40, 43,

393 S.E.2d 376, 378 (1990) (area outside cities' boundaries that cities provided limited fire protection to pursuant to contract was a "service area" of the cities and thus could not be included in the county fire district plan without prior agreement with the city). Further, counties can cede responsibility for the fire protection services of certain areas to cities via contract. Section 4-19-10(b) provides that counties have the power to

> designate, subject to the provisions of § 4-19-20, the areas of the county where fire protection service may be furnished by the county under the provisions of this chapter (referred to in this chapter as service areas); provided, however, that these service areas shall exclude those areas where fire protection is then being furnished by some other political subdivision unless an agreement be entered into between the county and such other political subdivision for the joint exercise of fire protection powers within the service area of such political subdivision and the sharing of costs thereof.

S.C. Code Ann. § 4-19-10(b) (1986) (emphasis added).

It is apparent the legislature intended the 1% premiums collected in a particular location to benefit the fire fighters risking their lives in that particular "service area." Although "service area" is not defined in the statute, its plain and ordinary meaning is the area where the fire department provides services. This definition is bolstered by the legislature's use of the same definition in other fire protection statutes and by common usage in the industry.

Because the circuit court concluded Hair correctly distributed the funds by geographic boundaries, it made no findings regarding which department provides primary service to any particular district. The parties dispute which department provides primary service to particular areas. Therefore we

remand for factual determinations necessary to disburse the fund consistently with this opinion.

REVERSED AND REMANDED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Diana Mullis, M.D., Respondent,

v.

Trident Emergency Physicians, a South Carolina general partnership, Appellant.

Appeal From Charleston County
Daniel E. Martin, Sr., Circuit Court Judge

Opinion No. 3548
Submitted May 20, 2002 – Filed September 9, 2002

AFFIRMED

G. Dana Sinkler, of Charleston; for Appellant

E. Paul Gibson and Allison A. Stover, both of N. Charleston; for Respondent.

PER CURIAM: Diana Mullis filed this action for conversion against Trident Emergency Physicians (Trident). A jury awarded Mullis $20,000 in actual damages. Trident moved for judgment notwithstanding the verdict arguing Mullis failed to establish a cause of action for conversion as a matter of law. By order dated June 20, 2000, the trial court denied Trident's motion finding Mullis sufficiently proved conversion. The trial court also denied, in relevant part, Trident's subsequently filed motion for reconsideration. Trident appeals.

FACTS

Mullis is a medical doctor practicing emergency medicine and psychiatry. In February or March of 1993, Trident hired Mullis as an emergency room physician at Trident Hospital in North Charleston, South Carolina. Mullis testified she was told at the time of hiring that Trident would withhold 10% of her salary to cover administrative expenses. When Mullis received her paycheck in May of 1993, she noticed an additional 10% was withheld. Mullis testified Trident's partners, Drs. Malaney and Cook, informed her the extra 10% would be withheld until a total of $20,000 was collected. The $20,000 would then be used as a "buy-in" to pay for Mullis' share in the Trident partnership. Trident withheld the extra 10% through November of 1994 until $20,000 had been withheld from Mullis' pay.

In May of 1995, the Trident partners voted against making Mullis a partner. When Mullis requested her $20,000, the partners refused to return the money. They informed Mullis the money was allocated among the partners. At that time, the partners showed Mullis a "Partnership Agreement" explaining that Trident would withhold 10% of an associate doctor's pay up to $20,000, which would be payable to the partnership. The Partnership Agreement provides that an associate doctor is entitled to 90% of his net pay until $20,000 is collected, which "shall be payable to the Partnership and considered net profits thereof." The agreement further provides: "Once the Partnership has received $20,000 from the net collections of an Associate . . . and [such Associate] has completed three (3) years of service, such Associate shall be eligible to become a Partner."

Mullis repeatedly requested Trident refund the $20,000 and continued working for Trident until November of 1996, when she left for health reasons. Eventually, Mullis hired an attorney to assist her in obtaining a refund of the money. By letter dated March 31, 1998, Trident acknowledged they had refunded $20,000 to another associate, but claimed it "was a special case." Trident acknowledged the money as a "buy-in" but refused to refund the money relying on the Partnership Agreement and claiming there was "no stipulation for refunding the buy-in."

Dr. Malaney testified at trial that, upon hiring, new employees receive an employment agreement with Trident, an informational packet, the Partnership Agreement, and a credentialing packet. Malaney stated she "believed" she gave a complete packet, including the Partnership Agreement, to Mullis at hiring. Malaney also claimed she discussed the Partnership Agreement at length with Mullis, as they were friends. Malaney admitted she had no written record that she gave the Partnership Agreement to Mullis upon hiring. Moreover, although Mullis signed an agreement to be bound by the terms of the agreement with Trident, she signed no agreement to be bound by the terms of the Partnership Agreement. According to Malaney, at least seven associates had paid the $20,000 without either becoming partners or receiving a refund of the money.

Both parties moved for a directed verdict. The trial court denied the motions. The jury entered a verdict for Mullis of $20,000 in actual damages. The jury did not award punitive damages. Trident moved for judgment notwithstanding the verdict. The trial court denied the motion.

LAW/ANALYSIS

Trident argues the trial court erred in denying its motion for judgment notwithstanding the verdict on the basis Mullis failed to prove the elements of a conversion. Trident alleges Mullis' consent to the withholding, and the failure to prove an identifiable fund, prevent her from establishing conversion. We disagree.

First, we find the question of Mullis' consent was properly for the jury. See Fredericks v. Commercial Credit Co., 145 S.C. 380, 387, 143 S.E. 179, 181 (1928) (finding question of consent in an action for conversion a matter for the jury).

Next, we find Mullis need not specifically identify the money as a separate and distinct account. "Conversion" is defined as the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner. Green v. Waidner, 284 S.C. 35, 37, 324 S.E.2d 331, 333 (Ct. App. 1984). See Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975) (Conversion may arise by the illegal detention of another's property.). "There can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff." Richardson's Rests., Inc. v. Nat'l Bank of S.C., 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991). Money, however, may be the subject of conversion if "it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990).

We find Mullis need not specifically identify the money as a separate and distinct account under SSI Med. Servs. The buy-in amount was a determinative sum. The fact that the partnership commingled the money does not change its nature as a determinative sum.

Accordingly, the order on appeal is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Bonnie Nelson Brown,

Appellant.

Appeal From Abbeville County
J. Ernest Kinard, Jr. Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3549
Heard June 17, 2002 – Filed September 9, 2002

VACATED

Assistant Appellate Defender Tara S. Taggart, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor W.

Townes Jones, IV, of Greenwood, for respondent.

_____

ANDERSON, J.: Bonnie Nelson Brown appeals his convictions for two traffic-related offenses in the Abbeville County Magistrate's Court. We vacate the convictions.

FACTS/PROCEDURAL BACKGROUND

A state trooper cited Brown for operating an uninsured vehicle and failure to register his vehicle during a traffic stop in Greenwood County. Brown elected to contest the charges and exercised his right to a trial in the Greenwood County Magistrate's Court.

The matter was called for trial before Joe C. Cantrell, chief magistrate of Greenwood County; however, Brown requested a change of venue so that a different Greenwood County magistrate would hear the case. Magistrate Cantrell granted Brown's request and reassigned the case to Magistrate Bart S. McGuire.

In a jury trial, Brown was convicted of both charges; however, Magistrate McGuire ordered a new trial due to irregularities in the jury selection process. Magistrate McGuire subsequently recused himself from any further proceedings.

The case was then assigned to the Magistrate Lasonia C. Williams. Brown was tried by a jury, which returned guilty verdicts.

Asserting nine exceptions, Brown appealed his convictions to the Circuit Court. Circuit Judge James W. Johnson, Jr. heard Brown's appeal. Concluding Magistrate Williams had erred in refusing to give a charge requested by Brown, the circuit judge reversed Brown's convictions and remanded the case "to the lower court for a new trial."

On remand, the chief magistrate of Greenwood County arranged to have the matter transferred to Abbeville County for disposition. Brown did

not initially contest this transfer.

At the pre-trial stage, Brown moved for separate trials on each charge, which the presiding Abbeville County magistrate, G. Thomas Ferguson, denied. Brown appealed the magistrate's decision to the Circuit Court. Circuit Judge J. Ernest Kinard, Jr., affirmed the magistrate's decision. Brown was subsequently tried by a jury, which found Brown guilty of both offenses.

Brown appealed his convictions to the Circuit Court. On appeal, Brown argued the magistrate erred by refusing to grant separate trials on each charge and denying his motions for directed verdict and JNOV. Brown additionally contended subject matter jurisdiction was lacking in Abbeville County. Circuit Judge Johnson affirmed the verdict in a Form 4 order. Regarding the issue of subject matter jurisdiction, the judge wrote:

> Venue was proper in Abbeville County since Defendant had previously requested a change of venue in Greenwood. Greenwood County has only one magistrate district. The only place to change venue was an adjoining county.
>
> Brown appeals.

ISSUES

I. Whether Brown's appeal of the verdict following his trial before Judge Williams was timely?

II. Whether county-to-county transfers of Magistrate's Court cases are legally permissible?

LAW/ANALYSIS

I. Subject Matter Jurisdiction and Appealability

Subject matter jurisdiction is the power of a court to hear and determine cases of a general class to which the proceedings in question belong. City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). The failure of a party to timely serve its notice of appeal will divest the reviewing tribunal of subject matter jurisdiction, thus resulting in dismissal of the appeal. See First Carolina Nat'l Bank v. A&S Enters., Inc., 272 S.C. 339, 251 S.E.2d 762 (1979) (holding appellants' failure to serve their notice of appeal of the Circuit Court's judgment within the statutory period necessitated dismissal of their appeal for want of jurisdiction); Burnett v. South Carolina State Highway Dep't, 252 S.C. 568, 167 S.E.2d 571 (1969) (stating that without a timely notice of appeal, the reviewing court has no jurisdiction); Canal Ins. Co. v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999) (Court of Appeals ruled it was without subject matter jurisdiction to consider appeal because appellant failed to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment). The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court. Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999); Lake v. Reeder Const. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998); see also State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998) (holding issues related to subject matter jurisdiction may be raised at any time.

II. Timeliness of Appeal to Circuit Court Following Brown's Convictions in Greenwood County

As a general rule, a criminal defendant convicted in the Magistrate's Court must serve his or her notice of appeal on the magistrate who presided at trial within ten days of the verdict. S.C. Code Ann. § 18-3-30 (1985). The time for appeal, however, is extended to thirty days following the

magistrate's grant or denial of a motion for new trial. S.C. Code Ann. § 22-3-1000 (Supp. 2001);[1] see also State v. Sullivan, 310 S.C. 311, 426 S.E.2d 766 (1993) (applying ' 22-3-1000 in examination of whether party's appeal from decision in the Magistrate's Court was timely).

Following the grant of the new trial motion by Magistrate McGuire, Brown was again tried and convicted in the Greenwood County Magistrate's Court. The date of these convictions was July 16, 1997. Brown appealed. Brown's notice of appeal, which was included in the record initially submitted to the Court of Appeals, was received by Magistrate Williams, on August 6, 1997 — twenty-one days after judgment had been rendered. The initial record on appeal was devoid of any mention of a motion for new trial. Facially, Brown appeared to have served his notice of appeal out of time.

At oral argument, the Court raised the issue of the timeliness of Brown's appeal to the Circuit Court. The responses by counsel did not resolve the issue. The Court gave both parties ten days to file supplemental affidavits regarding the issue of whether Brown moved for a new trial after the jury verdict. Within the affixed time, counsel for Brown filed two affidavits — one from Brown and another from Daniel A. Richardson, a third party in attendance at the trial proceedings. Both affidavits contained averments Brown had made an oral motion for new trial immediately following the jury verdict, which Judge Williams instantly denied.

The State submitted no affidavits or any other materials disputing the truth of Brown's and Richardson's asseverations. The State did, however, file a "Motion Objecting to Consideration of Affidavits." Within this motion, the State asserts the Court of Appeals is prohibited from considering the

[1] Brown's convictions were in 1997. At that time, the deadline to serve an appeal was twenty-five days after the magistrate's grant or denial of a motion for new trial. S.C. Code Ann. § 22-3-1000 (Supp. 1996). The General Assembly extended this period to thirty days in 1999. See Annotation, S.C. Code Ann. § 22-3-1000 (Supp. 2001).

affidavits supplied by Brown. The State supports its argument with citation to § 18-3-70 and State v. Richardson, 98 S.C. 147, 82 S.E. 353 (1914).

Section 18-3-70 pertains to the scope of a circuit judge's review of an appeal from the Magistrate's Court. The State apparently asserts the Court of Appeals is bound in the same fashion. The section states:

> The appeal [from the Magistrate's Court] must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under [Chapter 3 of Title 18], without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it or grant a new trial, as to the court may seem meet and conformable to law.

In Richardson, the defendant was convicted in the Magistrate's Court of trespassing. The defendant sought review of his convictions by the Circuit Court, but the appeal was dismissed. The defendant then appealed to the Supreme Court. At issue was, inter alia, whether the circuit judge erred by refusing to consider several affidavits submitted by the defendant from persons in attendance at the Magistrate's Court trial who disputed the magistrate's recollection of the testimony given by a key State's witness, as memorialized in his report to the Circuit Court. Relying upon the statutory predecessor to § 18-3-70, the Supreme Court held the circuit judge did not err by refusing to consider the affidavits, stating "the affidavits constituted no part of the proceedings upon which the appeal was to be heard, and that there was no error on the part of the presiding judge in refusing to consider them." Id. at 151, 82 S.E. at 353.

The State's argument fails on three grounds. First, justice dictates that the resolution of issues pertaining to subject matter jurisdiction be a paramount concern for our courts. In the instant case, the materials and information found within the record on appeal and the briefs initially submitted by the parties did not provide this Court with a definitive answer

regarding whether Brown had timely appealed his Magistrate's Court conviction to the Circuit Court. Granting the parties the right to file affidavits following oral argument was a measure necessary to settling the question. The Court of Appeals' action was proper and within its purview. See Windham v. Sanders, 287 S.C. 170, 337 S.E.2d 205 (1985) (applying former rules governing appeals from a master-in-equity, the Supreme Court permitted appellant to supplement record on appeal following its submission with documentation demonstrating that direct appeal from the master was authorized by order of the Circuit Court or by consent of parties for the purpose of conclusively establishing whether subject matter jurisdiction in the appellate court existed); cf. Gray v. The Club Group, 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000), cert. denied (stating in a Workers' Compensation case, subject matter jurisdiction is a question of law, which in turn permits the court to make findings of fact relating to jurisdiction).

Second, issues concerning the existence of subject matter jurisdiction may be raised at any time and by any party or the court. Therefore, whether the issue had been briefed is immaterial. In other words, matters regarding subject matter jurisdiction are an exception to the rule found in § 18-3-70.

Third, an obvious distinction exists between the scenario in Richardson and the one found in the instant case. In Richardson, the affidavits were in an unsolicited response by the defendant amounting to an attack of the magistrate's summary of a witness' testimony. In the case sub judice, the affidavits were submitted pursuant to the Court's invitation and were necessary for the crucial determination of whether subject matter jurisdiction existed. The affidavits submitted by Brown are therefore deemed a part of the record.

The affidavits provided by Brown demonstrate the following: Brown made an oral motion for new trial following his convictions; Judge Williams immediately denied this motion from the bench; and the date of the magistrate's denial was July 16, 1997. Accordingly, the deadline for service of Brown's notice of appeal was twenty-five days thereafter, as provided by

the 1997 version of § 18-3-70. Judge Williams received Brown's notice twenty-one days later. Factually and legally, Brown's notice of appeal was timely served upon Judge Williams.

III. Parameters of Subject Matter Jurisdiction – Magistrate's Court - County-to-County Transfers

As a rule, a criminal case brought in the Magistrate's Court must be prosecuted in the county where the charged offense occurred. This principle is firmly established within our law.

A. The State Constitution

The Magistrate's Court is a component of the Article V unified judicial system. See S.C. Const. art. V, § 1. Under Article V, the General Assembly was conferred with the responsibility of establishing the legal and geographic bounds of a magistrate's jurisdiction. Article V, § 26 of the State Constitution states:

> The Governor, by and with the advice and consent of the Senate, shall appoint a number of magistrates for each county as provided by law. The General Assembly shall provide for their terms of office and their civil and criminal jurisdiction. The terms of office must be uniform throughout the State.

B. 1976 Code of Laws

Pursuant to the authority granted it by the State Constitution, the General Assembly has promulgated numerous statutes pertaining to a magistrate's geographic or territorial jurisdiction.

As an initial matter, the bounds of a magistrate's geographic or territorial jurisdiction authority have been clearly defined. Section ' 22-3-520, which is entitled, "Jurisdiction limited to county," declares:

> Magistrates shall have and exercise within their respective counties all the powers, authority and jurisdiction in criminal cases herein set forth.

See State ex rel McLeod v. Crowe, 272 S.C. 41, 249 S.E.2d 772 (1978) and State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995) (analyzing the language and meaning of Article V and confirming magistrates possess countywide jurisdiction).

Additionally, the legislature has enacted §§ 22-2-170 and 22-3-920, which define the proper venue for criminal proceedings in the Magistrate's Court. In counties that have been divided into jury areas, criminal matters must be prosecuted in the area where the offense was committed. In all other counties, a criminal case may be brought anywhere within the county. As a rule, a defendant may move for a change of venue. Therefore, a magistrate located in an area of the county different from where the offense occurred can be assigned to hear the case. No provision exists within these statutes, however, that permits the transfer of the case to another county.

Section 22-2-170 states:

> **Magistrates shall have jurisdiction throughout the county in which they are appointed. Criminal cases shall be tried in the Jury Area where the offense was committed, subject to a change of venue, pursuant to the provisions of § 22-3-920 of the 1976 Code**; provided, however, that the chief magistrate for administration of the county, upon approval of the county governing body, may provide for the selection of magistrates' jurors countywide upon the affirmative waiver by the defendant of his right to be tried in the jury area where the offense was committed.

(emphasis added).

Section 22-3-920 reads:

> Whenever in a case in the court of a magistrate (a) either party in a civil case, after giving to the adverse party two days' notice that he intends to apply for a change of venue or (b) the prosecutor or accused in a criminal case shall file with the magistrate issuing the warrant or summons an affidavit to the effect that he does not believe he can obtain a fair trial before the magistrate and setting forth the grounds of such belief, the papers shall be turned over to **the nearest magistrate not disqualified from hearing the cause in the county**, who shall proceed to try the case as if he had issued the warrant or summons. But in counties in which magistrates have separate and exclusive territorial jurisdiction the change of venue shall be to another magistrate's district in the same county. One such transfer only shall be allowed each party in any case.

(emphasis added).

C. Case Law

Though precedent regarding the propriety of county-to county transfers of Magistrate's Court cases is sparse, our courts have ruled in several cases that a suit prosecuted before a magistrate who does not possess the necessary geographic or territorial jurisdiction is invalid.

In Dill v. Durham, 56 S.C. 423, 35 S.E. 3 (1900), the Circuit Court reversed civil judgment entered in the Magistrate's Court. At the Circuit Court hearing, the defendant, a resident of Spartanburg County, disputed the validity of the trial proceedings, which were held in Greenville County by a resident magistrate. At the time, the then-Article V, § 23 of the State Constitution mandated that "[e]very civil action cognizable by magistrates shall be brought by a magistrate in the county where the defendant resides."

On appeal, the Circuit Court concluded the Greenville County magistrate had no jurisdiction to try the case and reversed the magistrate's decision. The Supreme Court, quoting Article V, § 23, concurred and upheld the reversal.

Additionally, in Turner v. Harris, 104 S.C. 134, 88 S.E. 379 (1916), the plaintiff instituted a civil action in the Magistrate's Court in his county of residence against an individual living in another county. On appeal, Circuit Court remanded the case. At issue before the Supreme Court was whether the remand was proper. The Court concluded remand was unquestionably necessary because "[t]he Code does not give a magistrate power to change the place of trial from one county to another; and he has no such power without it is given by statute." Id. at 135, 88 S.E. at 380. Further, "[w]hen the circuit court found the magistrate had no jurisdiction of the defendant, the circuit court ought to have directly dismissed the case, or at least directed the magistrate to do so." Id.

D. Other Authority

Though not binding, opinions generated by the Attorney General's Office constitute secondary authority that many people consult when researching a particular area of law. We note with interest that the Attorney General issued an opinion in 1963 addressing the issue of proper venue in the Magistrate's Court. See Op. Att'y Gen. June 27, 1963. Applying the statutory predecessor of § 22-3-920, the Attorney General informed an inquiring Chesterfield County magistrate that the magistrate was permitted to change the venue of a case to the "nearest magistrate not disqualified from hearing the cause in the county …."; however, the Attorney General cautioned, **"[y]our jurisdiction is necessarily limited to cases arising in Chesterfield County, and you do not have authority to transfer a case to a magistrate in another county."** Id. (emphasis added).

E. Application of Law to the Facts of the Instant Case

Subject matter jurisdiction is the power of a tribunal to hear and determine a specific class of cases. Our statutes clearly identify the class of

criminal cases magistrates are permitted to hear. Those cases are: (a) offenses falling within the aegis and ambit of §§ 22-3-540 to –580 that were; (b) **committed in the magistrates' respective counties of appointment.** Therefore, a magistrate lacks the requisite subject matter jurisdiction to preside over a criminal case emanating from a county other than the one of his appointment.

In the case at bar, the offenses charged were appropriate matters for disposition by the Magistrate's Court. The situs of the offenses was Greenwood County. Apodictically, the Greenwood County Magistrate's Court was the tribunal with exclusive jurisdiction over the case. No magistrate located in any other county had the authority to hear the matter. Therefore, the transfer of the case to Abbeville County after remand from the Circuit Court was erroneous. Because subject matter jurisdiction was lacking, Brown's subsequent prosecution in that county was improper. Concomitantly, Brown's convictions must be vacated.

CONCLUSION

We hold that a criminal action must be brought before a magistrate with jurisdiction in the county where the alleged offense occurred. A magistrate appointed to serve in a county other than the county of occurrence does not have such jurisdiction. Accordingly, Brown's convictions in Abbeville County for offenses occurring within Greenwood County are

VACATED.[2]

GOOLSBY, J., concurs.

CONNOR, J., dissents in a separate opinion.

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[2] Because the issue of whether subject matter jurisdiction existed in the Abbeville County Magistrate's Court was dispositive, we need not address Brown's additional issues on appeal.

CONNOR, J.: (Dissenting) Because I believe this Court is without subject matter jurisdiction over Brown's appeal, I respectfully dissent. I would not have reached the issue of whether county-to-county transfers of magistrate court cases are legally permissible.

A magistrate's court jury found Brown guilty on July 16, 1997. The magistrate did not receive Brown's notice of appeal until August 6, 1997. It was necessary for Brown to serve notice of appeal upon the magistrate who tried the case within ten days of the verdict. S.C. Code Ann. § 18-3-30 (1985). This time limitation would have been extended to thirty days if Brown moved for a new trial. S.C. Code Ann. § 22-3-1000 (Supp. 2001).

The record on appeal affirmatively demonstrates Brown did not make a motion for a new trial. The record does not include a written motion and the magistrate's answer to Brown's appeal stated the "Court never received such motion from the Defendant."[1] Nevertheless, during oral argument, we granted Brown ten days to provide us with a copy of Brown's new trial motion.[2] Brown instead supplied us with affidavits attesting he made an oral new trial motion immediately following the jury verdict.

An appeal from magistrate's court must be heard "upon the grounds of exceptions made and upon the papers required under this chapter,

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[1] I interpret this statement from the magistrate as meaning she received neither a written nor an oral new trial motion from Brown.

[2] Contrary to the majority's assertion, we did not request affidavits attesting to the new trial motion; we specifically offered to "delay any further action on this until you've had an opportunity to further supplement the record and provide us with a copy of the motion for a new trial" and gave Brown "another ten days within which to provide this Court with a copy of the motion for a new trial that he filed."

without the examination of witnesses . . . ." S.C. Code Ann. § 18-3-70 (Supp. 2001). The appeal is not *de novo.* The appellate court is limited in its review to the "papers" filed with the clerk of court by the magistrate, exclusively "the record, a statement of all the proceedings in the case and the testimony taken at the trial . . . ." S.C. Code Ann. § 18-3-40 (Supp. 2001).

We allowed Brown to submit a copy of any motion he made for a new trial. Therefore, we asked for something which should have been included in the record transmitted from the magistrate to the circuit court. The affidavits considered by the majority did not form any part of the record and therefore cannot now be made part of the record for our review. Post-verdict "affidavits constituted no part of the proceedings upon which the appeal was to be heard" and should not now be considered by this Court. State v. Richardson, 98 S.C. 147, 82 S.E. 353 (1914); see also State v. Funderburk, 130 S.C. 352, 126 S.E. 140 (1925) (stating the appellate court had no right to consider statements extraneous to the magistrate's record).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Donovan Williams,

Respondent.

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

Opinion No. 3550
Submitted May 6, 2002 - Filed September 9, 2002

AFFIRMED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh , Assistant Deputy Attorney General Robert E. Bogan and W. Rutledge Martin, all of Columbia; and Solicitor Ralph E. Hoisington, of N. Charleston, for appellant.

Peter David Brown, of Mount Pleasant, for respondent.

SHULER, J.: The State appeals the trial court=s ruling suppressing twenty-five pounds of marijuana found in Donovan Williams= possession as the product of an illegal search. We affirm.

FACTS/PROCEDURAL HISTORY

On Sunday April 4, 1999, Officer Robert Blajszczak of the Moncks Corner Police Department was conducting stationary radar on Highway 52 in Berkeley County. Around 9:00 a.m. he received a Abe on the lookout@ dispatch involving a Agreen on tan@ Ford Explorer allegedly being operated without the owner=s consent. Soon afterward Blajszczak spotted a similar Explorer and followed it.

Because Blajszczak did not know the tag number of the suspect Explorer, he ran a license plate check. The check revealed the vehicle was registered to Dwayne Anthony Barbour and that it was not the vehicle in question. It did, however, disclose that the vehicle=s license tag had been suspended for lack of insurance. As a result, Blajszczak stopped the Explorer for a possible insurance violation.

Blajszczak approached and asked the driver, Dwayne Barbour, for his driver=s license, registration, and proof of insurance. As part of his standard procedure, Blajszczak ran a driver=s license check and discovered that although Barbour=s recent driving record was clean, his license previously had been suspended in 1995 for a controlled substance violation. Blajszczak returned and asked Barbour to step outside the vehicle while he issued a citation for the tag violation. Barbour=s passenger remained seated in the vehicle.

At the rear of the vehicle, Blajszczak wrote and explained the ticket to Barbour. He then returned Barbour=s license and registration and stated: A[B]efore you leave, let me ask you a few questions.@ Blajszczak proceeded to ask Barbour a series of questions, such as where he was coming from and

where he was headed. He also asked Barbour the name of his passenger and what their relationship was.

As Blajszczak was speaking with Barbour, a K-9 officer in a marked patrol unit whom Blajszczak had radioed arrived as backup. Blajszczak directed this officer to stand with Barbour while he questioned Barbour=s passenger, Donovan Williams. According to Blajszczak, he became suspicious when Barbour and Williams gave inconsistent answers to his questions. These inconsistencies, combined with Barbour=s previous license suspension, led Blajszczak to request consent to search the vehicle.

Barbour consented to the search and Blajszczak discovered an open bottle of cognac behind the driver=s seat. In the Explorer=s cargo area, he found a black suitcase; Williams acknowledged ownership and consented to a search of its contents. He gave Blajszczak the key, and when Blajszczak had trouble opening the case, Williams opened it for him. Inside, Blajszczak found miscellaneous clothes and a large white block of an unknown substance. Williams admitted it was marijuana. Following verification by the canine at the scene, Blajszczak seized the item and immediately arrested Barbour and Williams. He also cited both men for the open container violation. Subsequent analysis revealed the substance to be twenty-five pounds of marijuana.

On June 30, 1999, a Berkeley County grand jury indicted Williams for trafficking more than ten pounds of marijuana. Williams moved to suppress the drug evidence, arguing it was obtained as the result of an illegal search. The trial court held a suppression hearing on July 18, 2000.

At the hearing, Blajszczak testified his normal procedure when issuing a traffic citation is to return the driver=s license, explain the ticket, ask the driver if he has any questions, and then advise him to have a good or a safe day and allow him to leave. Blajszczak, however, admitted he did not follow his normal procedure in this case. In addition, Blajszczak agreed his only basis for

questioning Barbour further was Barbour=s prior license suspension for a drug violation. According to Blajszczak, that was a Awarning sign . . . or a flag.@

The trial court granted Williams= motion to suppress, finding the search illegal because Blajszczak lacked reasonable suspicion to question Barbour and Williams beyond the scope of the traffic stop. The court specifically found they were not free to leave under the totality of the circumstances, because Aonce they get past the ticket . . . anything from that point forward is an investigation and is custodial.@ The State appeals this ruling.

LAW/ANALYSIS

Standard of Review

In State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000), our supreme court articulated the standard of review to apply to a trial court=s determination that a search was private such that it did not fall within the parameters of the Fourth Amendment. In so doing, the court specifically rejected the de novo standard set forth in Ornelas v. United States, 517 U.S. 690 (1996) for reviewing determinations of reasonable suspicion and probable cause in the context of warrantless searches and seizures. Instead, the court stated it would Areview the trial court=s ruling like any other factual finding and reverse if there is clear error,@ and would therefore Aaffirm if there is any evidence to support the ruling.@ Brockman, 339 S.C. at 66, 528 S.E.2d at 666.

Subsequently, in State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000), this Court declared that Brockman Adetermined the appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court=s finding and the appellate court may only reverse where there is clear error.@ Green, 341 S.C. at 219 n.3, 532 S.E.2d at 898 n.3. Accordingly, we will apply an Aany evidence@ standard to the ruling below.

Discussion

The State argues the trial court erred in suppressing the marijuana because Blajszczak Awas not required to have reasonable suspicion to question@ Barbour and Williams. According to the State, Blajszczak merely engaged the men in a consensual encounter and thus properly obtained consent to search. We disagree.

The Fourth Amendment guarantees A[t]he right of the people to be secure . . . [from] unreasonable searches and seizures.@ U.S. Const. amend IV; see State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000). ATemporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a >seizure= of >persons= within the meaning of [the Fourth Amendment].@ Whren v. United States, 517 U.S. 806, 809-10 (1996). Thus, an automobile stop is Asubject to the constitutional imperative that it not be >unreasonable= under the circumstances.@ Id. at 810. Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se. Id.

Williams concedes Blajszczak had probable cause to stop the Explorer. He contends, however, that once the traffic stop was concluded, Blajszczak needed a reasonable suspicion that some further criminal activity was afoot in order to begin questioning Barbour.

Once a motor vehicle is detained lawfully for a traffic violation, the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures. Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977). In carrying out the stop, an officer A>may request a driver=s license and vehicle registration, run a computer check, and issue a citation.=@ United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998) (citation omitted). However, A[a]ny further *detention* for questioning is beyond the scope of the [] stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime.@ Id. (emphasis added); see Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion) (A[A]n investigative detention must be temporary and last no longer than is

necessary to effectuate the purpose of the stop.@); Ferris v. State, 735 A.2d 491, 499 (Md. 1999) (AOnce the purpose of [the] stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.@).[1] The question, then, is whether Blajszczak detained, i.e. Aseized@ Williams anew, thereby triggering the Fourth Amendment and possibly rendering his consent invalid, or simply initiated a consensual encounter invoking no constitutional scrutiny. See Ferris, 735 A.2d at 500 (stating the difficult question was whether the trooper=s questioning of Ferris after he issued a citation and returned his driver=s license and registration Aconstituted a detention, and hence raise[d] any Fourth Amendment concerns, or was

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[1] Other federal and state courts have reached a similar conclusion. See, e.g., United States v. Jones, 234 F.3d 234, 241 (5th Cir. 2000) (AThe basis for the stop was essentially completed when the dispatcher notified the officers about the defendants= clean records, three minutes before the officers sought consent to search the vehicle. Accordingly, the officers should have ended the detention and allowed the defendants to leave. And the failure to release the defendants violated the Fourth Amendment.@); United States v. Beck, 140 F.3d 1129, 1136 (8th Cir. 1998) (ABecause the purposes of [the officer=s] initial traffic stop of Beck had been completed . . .[the officer] could not subsequently detain Beck unless events that transpired during the traffic stop gave rise to reasonable suspicion to justify [the officer=s] renewed detention of Beck.@); United States v. Mesa, 62 F.3d 159, 162 (6th Cir. 1995) (AOnce the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention.@); People v. Refiner, 906 P.2d 81, 85-86 (Colo. 1995) (*en banc*) (AWhen, as here, the purpose for which the investigatory stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is no justification for continued detention and interrogation of citizens.@);
Davis v. State, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997) (*en banc*) (A[O]nce the reason for the stop has been satisfied, the stop may not be used as a >fishing expedition for unrelated criminal activity.=@) (citations omitted).

merely a ›consensual encounter[]‹ . . . implicating no constitutional overview@).[2]

It is well settled that Amere police questioning does not constitute a seizure@ for Fourth Amendment purposes. Florida v. Bostick, 501 U.S. 429, 434 (1991); see State v. Culbreath, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990) (ANot all personal encounters between policemen and citizens involve ›seizures‹ of persons thereby bringing the Fourth Amendment into play.@) (citations omitted), *abrogated on other grounds by* Horton v. California, 496 U.S. 128 (1990). To the contrary, A[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ›seizure‹ has occurred.@ Terry v. Ohio, 392 U.S. 1, 19-20 n.16 (1968). ASo long as a person remains at liberty to disregard a police officer=s request for information, no constitutional interest is implicated.@ Sullivan, 138 F.3d at 132 (citations omitted).

The test for determining if a particular encounter constitutes a seizure is whether A›in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.‹@ Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (citation omitted); see Sullivan, 138 F.3d at 132 (AThe test . . . [is] whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect=s position ›would have felt free to decline the officer=s requests or otherwise terminate the encounter.‹@) (citations omitted). It is necessarily imprecise, Abecause it is designed to assess the coercive effect of police conduct@ taken as a whole. Chesternut, 486 U.S. at 573. Thus, exactly what constitutes a restraint on liberty sufficient to lead a reasonable person to conclude he is not free to leave varies with the setting in which the police conduct occurs. Id.

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[2] AA consensual encounter has been defined as simply the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official. Because an individual is free to leave at any time during such an encounter, he is not ›seized‹ within the meaning of the [Fourth] Amendment.@ Ferris, 735 A.2d at 500 n.4 (citations omitted).

Reasonableness Ais measured in objective terms by examining the totality of the circumstances.@ Ohio v. Robinette, 519 U.S. 33, 39 (1996). As a result, the nature of the reasonableness inquiry is highly fact-specific. Id. Although no single factor dictates whether a seizure has occurred, courts have identified certain probative factors, including the time and place of the encounter, the number of officers present and whether they were uniformed, the length of the detention, whether the officer moved the person to a different location or isolated him from others, whether the officer informed the person he was free to leave, whether the officer indicated to the person that he was suspected of a crime, and whether the officer retained the person=s documents or exhibited threatening behavior or physical contact. See United States v. Beck, 140 F.3d 1129 (8th Cir. 1998); Ferris, 735 A.2d at 502 (citations omitted).

In deciding whether Williams was seized for purposes of the Fourth Amendment, it must be noted that Athe detention associated with roadside searches is unlike a >mere field interrogation@ where an officer may question an individual >without grounds for suspicion.= Roadside consent searches are instead more akin to an investigatory stop that does involve a detention.@ State v. Carty, 790 A.2d 903, 908 (N.J. 2002) (citations omitted). As the Maryland Court of Appeals has stated, a traffic stop, or pre-existing seizure, Aenhance[s] the coercive nature of the situation and the efficacy of the other factors in pointing toward the restriction@ of liberty. Ferris, 735 A.2d at 502. Such a situation, therefore, is Amarkedly different from that of a person passing by or approached by law enforcement officers on the street, in a public place, or inside the terminal of a common carrier.@ Id. (citations omitted).

When asked at the suppression hearing if Barbour was free to leave before answering the additional questions, Blajszczak replied that A[t]here was nothing stopping him from leaving.@ While that may technically be correct, we believe
Blajszczak, by prolonging the initial stop beyond its proper scope, rendered the ensuing encounter more coercive than consensual. As the Ohio Supreme Court

explained:

> AThe transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.@

State v. Robinette, 685 N.E.2d 762, 770-71 (Ohio 1997) (citation omitted); see Ferris, 735 A.2d at 503 (AThe moment at which a traffic stop concludes is often a difficult legal question, not readily discernible by a layperson. It is not sound to categorically impute to all drivers the constructive knowledge as to the precise moment at which, objectively, an initially lawful traffic stop terminates, *i.e.*, the time at which the driver may depart.@).

The facts encompassing Blajszczak=s questioning of Barbour and Williams support the conclusion that the men were in fact seized. Blajszczak admitted he initially asked Barbour to step to the rear of the Explorer so that he could speak with him privately. When asked why, Blajszczak responded that it was because of his law enforcement training. In particular, Blajszczak testified he brought Barbour to the rear of the vehicle so that Williams would not Ahear any questions or any answers to any questions@ he was asking. He explained that he was taught to follow a line of questioning that might build to a point where he had sufficient reasonable suspicion to ask for consent to search. Hence, at this point the encounter began to assume the tenor of an investigation.

We recognize the Constitution does not require an officer to inform a motorist he is free to leave before obtaining consent. See Robinette, 519 U.S. at 35 (rejecting per se rule that would render consent involuntary if an officer failed to advise a motorist he was free to go before requesting consent). However, the Supreme Court in Robinette reiterated that such advice was one factor to consider in the overall analysis. Id. at 39. Significantly, in this case

not only did Blajszczak fail to tell Barbour the traffic stop had concluded and he could go, he specifically stated: A*[B]efore you leave*, let me ask you a few questions.@ In our view, this statement indicated Barbour was not free to leave, despite Blajszczak=s contrary testimony at the suppression hearing.

Furthermore, the following circumstances surrounding the encounter lend additional support to our conclusion: the roadside traffic stop; the presence of two uniformed patrol officers in marked, flashing vehicles, one of them part of a K-9 unit; the fact Blajszczak detained Barbour and Williams between twenty-five and forty minutes, as opposed to a normal stop which Blajszczak testified would last approximately nine to eleven minutes, and otherwise did not follow his usual procedure for a traffic stop; the fact Blajszczak asked Barbour to exit the Explorer so that he could talk to him and Williams separately; that Blajszczak asked the K-9 officer to stand beside Barbour at the rear of the vehicle while he questioned Williams; and the seemingly innocuous but immediate transition from the valid traffic stop such that Barbour and Williams may not have realized the initial seizure had ended.

We believe these circumstances were sufficiently intimidating such that Williams Acould reasonably have believed that he was not free to disregard the police presence and go about his business.@ Chesternut, 486 U.S. at 576; see People v. In Interest of H.J., 931 P.2d 1177, 1181 (Colo. 1997) (*en banc*) (AIt strains credulity to imagine that any citizen, directly on the heels of having been pulled over to the side of the road by armed and uniformed police officers in marked patrol cars, would ever feel >free to leave= or >at liberty to ignore the police presence and go about his business.=@) (citations omitted); compare Ferris, 735 A.2d at 502-03 (enumerating several factors that transmuted a valid traffic stop into an unlawful detention, including the trooper=s failure to inform Ferris he was free to leave, the trooper=s Arequest@ that Ferris step Ato the back of his vehicle to answer a couple of questions,@ the detention seamlessly followed a pre-existing lawful stop, the trooper removed Ferris from his automobile and separated him from his passenger, the presence of two uniformed law enforcement officers, and the fact that the police cruiser

emergency flashers remained operative throughout the entire encounter) (footnote omitted), with Sullivan, 138 F.3d at 133 (finding brief questioning of defendant after officer returned driver=s license and registration was consensual and did not constitute a seizure under the Fourth Amendment; court noted that defendant remained in his own car throughout the questioning and found it significant that there was no indication the officer Aemployed any physical force or engaged in any outward displays of authority@ indicating the defendant was being detained).

Even under the court=s analysis in Sullivan, however, a routine stop Aconstitute[s] a Fourth Amendment seizure so that when the purpose justifying the stop is exceeded, the detention becomes illegal unless a reasonable suspicion of some other crime exists.@ Sullivan, 138 F.3d at 131; see State v. Robinson, 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991) (ATo justify a brief stop [or] detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity.@). Here, the only indication of a possible further crime, according to Blajszczak=s own testimony, was the prior suspension of Barbour=s license for a drug-related offense. This fact, of course, was in no way probative of a present crime, and thus could not serve as the basis for a reasonable suspicion. See United States v. Jones, 234 F.3d 234 (2000) (stating there was no reason to further detain defendants following a traffic stop because a prior arrest or criminal record alone does not amount to reasonable suspicion).

Having determined Williams was seized without reasonable suspicion, we now review the circumstances of the detention to decide whether his consent to search the suitcase was valid.

It is well settled that A[w]arrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent.@ Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search *after* an unconstitutional detention, the consent procured is per se invalid unless it is Aboth voluntary *and* not an exploitation of the unlawful

[detention].@ State v. Robinson, 306 S.C. 399, 402, 412 S.E.2d 411, 414 (1991); see Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (AWe need not hold that all evidence is >fruit of the poisonous tree= simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is >whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.=@) (citation omitted); Brown v. State, 372 S.E.2d 514, 516 (Ga. Ct. App. 1988) (A[I]n order to eliminate any taint from an [illegal] seizure or arrest, there must be proof both that the consent was voluntary and that it was not the product of the illegal detention.@). As the Georgia Court of Appeals stated in Brown:

> Proof of a voluntary consent alone is not sufficient. The relevant factors include the temporal proximity of [the] illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct.

Brown, 372 S.E.2d at 516.

In the instant case, we need not determine whether Williams= consent was voluntary, because the record clearly reflects it was obtained through Blajszczak=s exploitation of the unlawful detention. Blajszczak=s testimony before the trial court revealed that a minimal amount of time passed between the seizure and ensuing consent, there were no intervening or attenuating circumstances, and, as we have already decided, Blajszczak=s actions in detaining Barbour and Williams had no legal basis. Although the trial court failed to reach the issue of consent, the record unquestionably supports finding Williams= consent invalid. See id.; Robinson, 306 S.C. at 402, 412 S.E.2d at 414; Brown, 372 S.E.2d at 516 (A[W]e find that there was no significant lapse of time between the unlawful detention and the consent, that no intervening circumstances dissipated the effect of the unlawful detention and that the deputy=s conduct had no arguable legal basis. Therefore, we hold

that the consent was the product of the illegal detention, and that the taint of the unreasonable stop was not sufficiently attenuated.@); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (stating an appellate court may affirm for any reason appearing in the record on appeal).

The marijuana found in Williams= suitcase was discovered through an illegal detention accompanied by a lack of valid consent. The trial court, therefore, did not err in suppressing the evidence. See Robinson, 306 S.C. at 402, 412 S.E.2d at 414 (suppressing drug evidence as the fruit of an unlawful stop because no attenuating circumstances removed the taint of the illegality from the consent to search); State v. Greene, 330 S.C. 551, 559, 499 S.E.2d 817, 821 (Ct. App. 1997) (AThe fruit of the poisonous tree doctrine holds that where evidence would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality, the evidence must be excluded.@); People v. Brownlee, 713 N.E.2d 556 (Ill. 1999) (suppressing marijuana as fruit of an illegal detention, where officers legitimately stopped vehicle for investigation of a traffic violation but after returning driver=s license and insurance card and stating no citation would be issued officers paused for a couple of minutes and then asked for and obtained consent to search the vehicle, because during this time the driver and his passengers were detained without reasonable suspicion of any criminal activity).

AFFIRMED.

HEARN, C.J., and CONNOR, J., concur.