The Supreme Court of South Carolina

In the Matter of Loy E. Bryant, Respondent.

ORDER

The Office of Disciplinary Counsel petitions this Court for an order transferring respondent to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Jack W. Lawrence, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other accounts into which respondent may have deposited client or trust monies. Mr. Lawrence shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lawrence has the authority to make disbursements from respondent's trust, escrow, and/or

operating account(s) as is reasonably necessary and may apply to the Chair of the Commission on Lawyer Conduct for authority to make any disbursements that appear to be unusual or out of the ordinary.

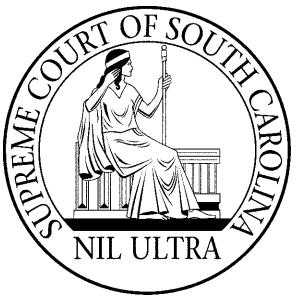
IT IS FURTHER ORDERED that this Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as notice to the bank or other financial institution that Jack W. Lawrence, Esquire, has been duly appointed by this Court.

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

James E. Moore A.C. J.
FOR THE COURT

Columbia, South Carolina
January 29, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

February 3, 2003

ADVANCE SHEET NO. 4

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marguerite A. Bakala Respondent,

v.

Zdenek Bakala, Appellant.

Appeal from Beaufort County
Robert S. Armstrong, Family Court Judge

Opinion No. 25586
Heard November 19, 2002 - Filed January 27, 2003

AFFIRMED

Fleet Freeman, of Freeman & Freeman, of Mt. Pleasant; and John B. Kern, of Charleston, for appellant.

Robert N. Rosen and Donald B. Clark, both of Rosen, Rosen, & Hagood, L.L.C., of Charleston; and Alexandra D. Varner, of Mt. Pleasant, for respondent.

ACTING JUSTICE FLOYD: In this domestic case, appellant (Husband) appeals three family court orders regarding contempt, equitable division, and divorce on the ground of adultery. We affirm.

FACTS

Husband was born in the Czech Republic, which was formerly part of Czechoslovakia, and came to this country as a political refugee. He holds dual U.S. and Czech citizenship. Husband and respondent (Wife) met while both were business graduate students at Dartmouth College. They married after graduation in 1990 while living in New York City.

After marrying, the parties moved to London and then Prague where they both worked. Wife quit working sometime before the birth of their son in 1994. When Czechoslovakia was divided in the early 1990's, Husband co-founded the first full-service investment bank in the Czech Republic, Patria Finance, and was very successful. He also invested in several restaurants through his investment company, Hartig Company. According to Wife, during this time, the parties "traveled a lot and lived very, very well." They renovated a four-story house in one of Prague's most fashionable neighborhoods. Husband's average yearly income was $536,817.

In November 1996, Wife confronted Husband with information that he was having an affair. After a physical altercation, Wife left the marital residence. Two weeks later, she and Husband divided their savings account and, with $198,000, Wife moved back to the U.S. where she eventually settled in Beaufort County.

On May 1, 1998, while Husband was visiting from Prague, Wife had him personally served with a summons and complaint seeking a divorce on the ground of adultery or physical cruelty, custody of the parties' minor son, child support, alimony, and equitable division of the marital estate.

On May 7, Wife filed a motion for temporary relief. A hearing was held June 3, 1998, at which both parties and their attorneys appeared. Husband agreed to submit himself to the jurisdiction of the Beaufort County Family Court on all issues. Following this hearing, as part of its temporary order, the family court ordered Husband to deposit

in escrow $500,000 upon the pending sale of shares of Patria Finance in which he acknowledged owning a 34.5% interest. An additional $250,000 was to be deposited pro rata over the next eighteen months resulting in a payment schedule requiring equal payments of $83,333 each in December 1998, June 1999, and December 1999.

Husband answered and counterclaimed on the merits of Wife's action. He alleged that on the day of the temporary hearing, he had learned that Wife was engaged in an adulterous relationship and accordingly he was entitled to a divorce on the ground of her adultery. In Wife's reply, she admitted she was currently engaged in a relationship that began in June 1997 after the parties had separated. Wife subsequently withdrew her request for alimony.

Meanwhile, Husband returned to Prague while the litigation continued. On June 3, 1999, a pre-trial conference was held at which Husband's counsel appeared. A trial date was set for November 1, 1999. Effective August 13, 1999, counsel was relieved at Husband's request and Husband was ordered to appoint an agent for service or he would be served by mail in the Czech Republic.

The final hearing in the case was held as scheduled on November 1, 1999. Husband did not appear. By order dated December 21, 1999, the family court found Husband in contempt of the 1998 temporary order, ordered child support, equitably divided the marital estate 50/50, and awarded attorney's fees and costs. By order dated December 22, 1999, Wife was granted a divorce on the ground of adultery. These appeals followed.

ISSUES

1. Is the family court's order dividing the marital estate reversible because of an ex parte communication?

2. Were Husband's due process rights violated?

3. Did service in Prague violate international law?

4. Was the valuation of the marital estate proper?

5. Did the family court retain jurisdiction to determine the validity of the bench warrant?

6. Did the deposit of funds with the court purge Husband of contempt?

7. Was the award of attorney's fees excessive?

8. Should the family court have sua sponte dismissed Wife's complaint on the ground of recrimination?

DISCUSSION

1. Ex parte communication

Husband complains the family court relied on an ex parte communication in valuing the marital estate. He claims he was unfairly prejudiced because the evidence does not otherwise support the family court's findings.

As found in the 1998 temporary order, at the time of filing Husband held a 34.5% interest in Patria Finance, the investment bank he co-founded in Prague, and had pending contracts to sell some of his shares. As required by the temporary order, Husband made an initial escrow deposit of $500,000 and made a second deposit of $83,333 in December 1998. He did not make the June 1999 payment. At the time of the final hearing on November 1, 1999, Husband owed two payments of $83,333 each, for a total of $166,666.

The record indicates Husband received a total of $3,049,475 for the sale of a 14.5% interest in Patria; he retained a 20% interest valued at $3,000,000. The total value of the Patria stock in the marital estate is therefore $6,049,475.

After the final hearing on November 1, 1999, the family court faxed to Wife's counsel a hand-written list dividing the marital assets and requested counsel to call the judge. There is no evidence Husband was informed of this fax.

In response to the family court's fax, Wife's counsel forwarded a letter from her financial expert explaining that the court had omitted $2,265,809 from the marital estate. The explanation notes that in dividing the Patria stock, the family court considered only the escrow amounts previously ordered to be paid to Wife under the temporary order and the value of the 20% interest still held by Husband. This division did not take into account the evidence that Husband actually received a total of $3,049,475 from the sale of the Patria stock, or $2,265,809 more than the amount considered. The record indicates a copy of this letter was faxed to Husband.

The family court's final order conforms to the calculation faxed by Wife's counsel to the family court. The family court ordered Husband to transfer to Wife 10,909 shares from his remaining 20% interest in Patria or pay her $1,636,404, to complete Wife's 50% share of the total Patria asset.

Husband contends the only support for the family court's final order is the calculation by Wife's expert faxed to the family court after the final hearing. He contends this letter was an improper ex parte communication that prejudiced him. He asserts by affidavit that he had no knowledge of the communication between Wife's counsel and the family court until this appeal was filed.[1]

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[1] Husband's affidavit was submitted in response to Wife's motion to dismiss this appeal which was denied by the Court of Appeals. Our analysis assumes Husband had no notice of the ex parte communication until this appeal was pending. *Cf.* Ray v. State, 527 So.2d 166 (Ala. Crim. App. 1988); Sottile v. Carney, 596 N.E.2d 140 (Ill. App. 1992) (where a party knows of the ex parte communication but does not timely object, any objection is waived).

Generally, one who has notice and fails to appear cannot complain of an ex parte proceeding. *See* People v. Klovstad, 522 N.E.2d 803 (Ill. App. 1988); Repp v. Horton, 335 N.E.2d 722 (Ohio 1974). Here, Husband had notice[2] and intentionally absented himself from the entire evidentiary hearing. The communication between the family court and Wife's counsel introduced no new evidence and was simply a continued discussion of the same matter. Since the entire final hearing was ex parte because of Husband's intentional absence, Husband waived any objection to this post-hearing communication.

Further, although ex parte contacts are strongly disfavored, prejudice must be shown to obtain a reversal on this ground. Ellis v. Proctor and Gamble Distrib. Co., 315 S.C. 283, 433 S.E.2d 856 (1993); Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993). Husband has shown no prejudice.

As evidence of prejudice, Husband points to the family court's finding of a total marital estate of $8,384,809, which is greater than the $7,562,846 amount submitted by Wife as exhibit 36 at trial. This difference in the total marital estate, however, is not due to the recalculation of the Patria stock which was the subject of the ex parte communication.

The family court valued the marital residence at $1.5 million based on Wife's testimony and her request for admissions which Husband was deemed to admit by his failure to respond, rather than the $1 million valuation in exhibit 36. Further, the family court included in its calculation of the marital estate a credit of $198,000 to each party for the savings account they divided when they first separated. This credit was not calculated in Wife's exhibit 36 which accounts for only $74,037 from the parties' savings account. These differences in the valuation of the marital home and the savings account explain the difference between exhibit 36 and the order in the total marital estate.

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[2]As noted above, Husband still had retained counsel when the trial date was set and counsel was informed of this date.

In the family court's final order, neither the valuation of the house nor the $198,000 credit to each party is changed from the judge's hand-written note which issued before the ex parte communication from Wife's counsel. Further, these amounts are supported by the record. The division of the Patria stock, the only asset recalculated based on Wife's expert's letter, is also supported by the record. Accordingly, Husband cannot show prejudice from the ex parte communication between the family court and Wife's counsel.

In conclusion, we find Husband waived his objection to the ex parte communication between the judge and Wife's counsel and, further, that he has failed to show prejudice.

2. Due process

Husband claims his procedural due process rights were violated by Wife's mailing of various notices[3] pursuant to the family court's order allowing Husband to be served by mail in Prague.

On August 16, 1999, the family court signed an order granting Husband's counsel permission to withdraw from the case at Husband's request, and ordering Husband to appoint an agent for service in the U.S. "within two weeks, or, on or before August 13, 1999." Failure to appoint an agent as directed would render service on Husband effective as of the date of mailing to the Czech Republic for all documents subsequently served. *See* Rule 5(b)(1), SCRCP (service by mail complete upon mailing). This order was filed August 19.

Husband complains service by mail violated his procedural due process rights because he did not have timely notice of the order that he

[3] The documents mailed after August 13 were: Requests for Admission; Motion to Allow Plaintiff's Appraiser Access to the Marital Home; Motion to Compel Discovery; Motion to Lift Restraining Order; Motion for Emergency Relief; and Notice of Deposition of Marlene Arbess.

appoint an agent for service. As indicated in the record, mail to the Czech Republic takes ten to fourteen days. Further, the date for appointment of an agent (August 13) was before the order itself was filed (August 19).

We find Husband waived any objection to the family court's August 19 order allowing service by mail. Although, as Husband correctly points out, it would have been impossible for him to comply with the directive that he appoint an agent for service by August 13, there is no indication Husband ever attempted to appoint such an agent. Husband did not appeal the August 19 order, nor does he claim the directive to appoint an agent violated his due process rights. Husband never raised any due process issue to the family court, an issue which could have been raised by a Rule 59(e) motion. A due process claim raised for the first time on appeal is not preserved. Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

Further, the record indicates Wife's counsel both faxed and mailed to Husband every document served subsequent to the August 19 order. Evidence of mailing establishes a rebuttable presumption of receipt. Weir v. Citicorp Nat'l Servs. Inc., 312 S.C. 511, 435 S.E.2d 864 (1993). Here, there is no evidence rebutting this presumption to indicate Husband was deprived of actual notice by Wife's mailing of these various documents.

Finally, there is no evidence Husband was prejudiced by the evidence procured as a result of the discovery notices mailed to him in Prague. The evidence obtained was merely cumulative to other evidence or was not prejudicial in light of the 50/50 division of marital assets.[4] We conclude Husband has failed to show prejudice and we find no merit in his due process claim. Ross v. Med. Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1993) (one claiming a deprivation of procedural due process must show substantial prejudice).

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[4] For instance, Husband complains that the deposition of Marlene Arbess provided evidence of his fault. This evidence had no impact on the equal division of marital assets.

3. International law

Husband contends that service abroad of the various notices mailed after August 19 and service of the Rule to Show Cause underlying the contempt finding violated international law.

a. Notices

Husband claims service of the various notices by mail to Prague pursuant to the August 19 order violated the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (Hague Service Convention).

The Hague Service Convention is an international treaty that pre-empts inconsistent methods of service prescribed by state law in all cases where service abroad is required. Volkswagenwerk v. Schlunk, 486 U.S. 694 (1988). Essentially, the Hague Service Convention requires each country to establish a central authority that receives requests for service of documents from other countries, serves the documents, and provides certificates of service. A country may also consent to methods of service other than a request to its central authority. *See generally* Arts. 1-11. Specifically, Article 10(a) provides:

> Provided the State of destination does not object, the present Convention shall not interfere with—
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad….

According to our Department of State, the Czech Republic bound itself to the Hague Service Convention as of January 1, 1993, but objected to Article 10(a).

By its terms, service abroad by mail is allowed under Article 10(a) where no objection has been lodged by the receiving country. There is considerable controversy, however, regarding whether the Hague Service Convention applies to documents served subsequent to the service of process, and whether Article 10(a) applies to the original service of process or whether it applies only to subsequent documents as indicated by use of the word "send" rather than "serve." *Compare* Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989); ARCO Electronics Control Ltd. v. Core Internat'l, 794 F. Supp. 1144 (S.D. Fla. 1992) (art. 10(a) applies only to documents subsequent to service of process); *with* In re: Mandukich, 87 B.R. 296 (S.D.N.Y. 1988); Schiffer v. Mazda Motor Corp., 192 F.R.D. 335 (N.D. Ga. 2000) (Hague Service Convention applies only to service of process and not subsequent notices).

If, as some courts have found, the Hague Service Convention applies only to service of process, it is not applicable here. Original service of process in this case was accomplished in South Carolina by personal service and there is no challenge to its validity. Accordingly, the mailing of subsequent documents to Husband in Prague would not violate the Hague Service Convention.

On the other hand, if the Hague Service Convention applies and Article 10(a) allows only subsequent documents to be served by mail, a receiving country's decision to opt out of Article 10(a) amounts to a decision to forbid the use of the mails entirely. *See* Randolph v. Hendry, 50 F. Supp. 572, 577-78 (S.D.W.Va. 1999). Under this interpretation, Husband claims the mailings to Prague violate the Hague Service Convention.

There is no definitive precedent on the merits of this issue and we need not resolve the issue here. Like Husband's due process argument discussed above, the issue of service in compliance with the Hague Service Convention was never raised to the family court. Accordingly, we decline to address it. Smith v. Smith, 275 S.C. 494, 272 S.E.2d 797 (1980) (issue not raised to family court not preserved for review on appeal).

Similarly, Husband raises for the first time on appeal a violation of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Evidence Convention) to which the Czech Republic also bound itself as of January 1, 1993.

Unlike the Hague Service Convention, the Hague Evidence Convention is not mandatory. It essentially allows discovery abroad through Letters of Request executed by a central authority designated by the signatory country. Arts. 1-3. This procedure is not mandatory and simply provides a method of seeking evidence that a court may elect to employ. Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 484 U.S. 522, 541 (1987). By failing to raise the Hague Evidence Convention to the family court, Husband has waived any argument regarding its application. *See* Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360 (D. Vt. 1984) (party's delay in raising issue of Hague Evidence Convention during course of discovery a factor in declining to order compliance).

b. Rule to Show Cause

Husband complains he was not properly served the Rule to Show Cause heard by the family court as part of the final hearing on November 1, 1999, and upon which Husband was found in contempt for failure to make the June 1999 $83,333 payment from the proceeds of the sale of Patria stock. Husband contends service was invalid under the Hague Service Convention and therefore the family court had no jurisdiction to find him in contempt.

The record includes an affidavit of personal service of the Rule to Show Cause in Prague, signed by Wife's private investigator and notarized, indicating Husband saw the documents as they were being handed to him on the street and he refused to take them. The investigator picked up the documents from the ground and "desisted from further attempts to deliver the papers."

The Hague Service Convention clearly applies to the service of process. Volkswagenwerk, *supra*. A contempt proceeding regarding contemptuous conduct outside the presence of the court, as here, must be commenced by service of process, which includes a rule to show cause. State v. Johnson, 249 S.C. 1, 152 S.E.2d 669 (1967). The Hague Service Convention requires that such process be served through the Central Authority of the signatory country.

When service is challenged, the record must affirmatively show that service of process was correctly made. Jensen v. Doe, 292 S.C. 592, 358 S.E.2d 148 (Ct. App. 1987) *citing* Matheson v. McCormac, 186 S.C. 93, 195 S.E.122 (1938). Here, there is no indication that service was attempted through the Central Authority of the Czech Republic. Under Article 15 of the Hague Service Convention, process must be served "by a method prescribed by the internal law" of the signatory country or actually delivered to the defendant or to his residence. The record does not indicate either of these conditions was met and accordingly it appears service of the Rule to Show Cause was not accomplished in compliance with the Hague Convention.

Husband never raised this issue, however, which, assuming he never received notice of the contempt charge until entry of the final order, he could have raised by post-trial motion. Service of process under the Hague Service Convention relates to personal jurisdiction. Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised. Shinn v. Kreul, 311 S.C. 94, 427 S.E.2d 695 (Ct. App. 1993); *see also* Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993) (failure to timely assert improper service waives any issue regarding its validity); Republic Leasing Co. v. Haywood, 329 S.C. 562, 495 S.E.2d 804 (Ct. App. 1998) (lack of personal jurisdiction may always be waived). The family court was never asked to rule on whether service of the Rule to Show Cause was proper. Accordingly, Husband has waived this issue.

We note the better practice here would have been for the family court to appoint an agent for service when Husband's counsel was relieved. *See* Rule 4(e), SCRCP ("Whenever . . . an order of court

provides for service of a summons and complaint or of a notice, or an order upon a party not an inhabitant of or found within the State, service shall be made under the circumstances and in the manner prescribed by the . . . order"). In the alternative, counsel should comply with the Hague Service Convention when engaging in transnational domestic litigation.

4. Valuation of marital property

Husband complains the family court valuation of the Hartig stock at $300,000 was without evidentiary support. We disagree.

The Hartig company invested in several Prague restaurants. The $300,000 valuation for Husband's Hartig stock is supported by Wife's testimony based on her opinion as follows:

> A: Because the business owns this set of restaurants and basically if I were a buyer coming in and I wanted to buy them what would be attractive to me is that they have the sites. I don't have to go out and find them and set them up. They have the employees and staff and they have the franchise, the name or brand awareness and anything else. So I just cannot imagine that somebody most likely would either be a wealthy Czech investor or a foreign investor would come in and buy seven restaurants in, you know, choice areas of Prague for less than say a million dollars or so and probably more than that. Um, these are somewhat the femoral (*sic*) values as any pricing is but I just, um – given my knowledge of turnover in these types of areas and that – that's the assessment I would make.

Her testimony further indicates she was familiar with Prague real estate generally and the Hartig restaurants in particular.

Opinion testimony of a nonexpert who has sufficient knowledge of the value of the property in question or who has ample opportunity for forming a correct opinion of it is admissible. Whether a witness is properly qualified is a question primarily addressed to the sound

discretion of the trial judge. Newton v. Boggs, 274 S.C. 268, 262 S.E.2d 741 (1980). Here, no objection was made to Wife's testimony. The evidence supports her qualification to testify regarding the valuation of Husband's interest in Hartig.

Further, Husband did not respond to Wife's request to admit that his interest in Hartig had a value of $300,000 and this fact is therefore deemed admitted under Rule 36(a), SCRCP. Although Husband complains this request to admit was not properly served in compliance with the Hague Evidence Convention as discussed above, this issue was never raised to the family court and therefore is not preserved.

In conclusion, the family court's valuation of Husband's interest in Hartig is supported by the record.

5. Bench warrant

As part of the final December 21,1999, order, the family court found Husband in contempt for failure to make the June 1999 payment of $83,333 as required by the 1998 temporary order. In the December 21 order, the family court sentenced Husband to four months unless he purged himself by making the payment directly to Wife. As discussed above, Husband appealed this contempt finding on the ground service of the Rule to Show Cause was improper. That appeal was filed January 28, 2000.

Meanwhile, on January 26, 2000, a bench warrant was filed pursuant to the December 21 order. Husband subsequently obtained an order signed by Judge Smoak authorizing him to deposit $166,666 with the court in an interest-bearing account. This amount would cover two $83,333 payments -- the June 1999 payment for which Husband was held in contempt, and the December 1999 payment which by then had become due.

Husband then moved before Judge Segars-Andrews to quash the bench warrant based on his deposit of funds with the court. By order filed November 27, 2000, Judge Segars-Andrews denied the motion

finding the family court lacked jurisdiction since the contempt finding was on appeal. Husband moved for the same relief before Judge Armstrong. By order filed March 19, 2001, Judge Armstrong denied the motion to quash for the same reason given by Judge Segars-Andrews.

Husband contends Judge Armstrong erred in finding the family court had no jurisdiction to quash the bench warrant because of the pending appeal. We agree but find the motion to quash was properly denied.

An order of civil contempt is not automatically stayed on appeal. In re: Decker, 322 S.C. 212, 471 S.E.2d 459 (1995). An order that is not automatically stayed remains enforceable while pending appeal unless the party seeks a stay. *See* Rule 225(c)(1), SCACR. The lower court has jurisdiction to determine a party's motion for a stay in the first instance. Rule 205, SCACR. Further, the lower court retains jurisdiction "over matters not affected by the appeal including the authority to enforce any matters not stayed." Rule 225(a), SCACR. Here, the continued viability of the bench warrant is a matter within the family court's authority to enforce its unstayed contempt order. The family court therefore retained jurisdiction to decide the merits of Husband's motion to quash.

In this case, however, Judge Armstrong could not overrule the prior order of Judge Segars-Andrews. Charleston County Dept. of Soc. Servs., 317 S.C. 283, 454 S.E.2d 307 (1995). Judge Segars-Andrews's unappealed ruling finding no jurisdiction is therefore the law of the case. In re: Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996). Moreover, as discussed below, we find on the merits the motion to quash was properly denied.

6. Deposit of funds as purging contempt

Husband contends his deposit of funds with the family court amounted to a purge of his contempt and therefore the bench warrant should have been quashed. We disagree.

First, the December 21 order specifically directed Husband to pay the outstanding $83,333 directly to Wife. Judge Smoak's order allowing the deposit of funds did not, and in fact could not, alter Judge Armstrong's prior order requiring that Husband pay Wife directly in order to purge himself of contempt.

Further, Rule 67 may not be used as a means of altering the legal duties of the parties. Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 334 S.C. 324, 513 S.E.2d 617 (1999). Where payment has been ordered and not appealed, and a contempt order is issued to compel payment, a deposit of funds under Rule 67 will not constitute a purge. Husband never contested the original order that he pay Wife from the proceeds of the sale of Patria stock and he remains legally obligated to make these payments to Wife. The deposit of uncontested funds with the court does nothing but delay payment of funds that are legally due. This is not the intent of Rule 67.[5]

In conclusion, we find Husband did not purge himself of contempt by depositing the funds with the court and the motion to quash was properly denied. Further, in light of our affirmance of the contempt finding as discussed in Issue 3b above, we order the funds dispersed to Wife and, upon payment to Wife, the bench warrant shall be quashed.

7. Attorney's fees

In conjunction with his order denying Husband's motion to quash the bench warrant, by order filed April 30, 2001, Judge Armstrong awarded Wife's counsel attorneys' fees and costs -- to Mr. Rosen, $2,500, and to Ms. Varner, $7,500. Husband contends these amounts are excessive and the judge failed to consider whether Wife could pay her own fees.

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[5]Husband's contention that he deposited the funds under Rule 67 to preserve his appeal of the contempt finding is unpersuasive. Husband could have sought a stay of that order to preserve his appeal.

In support of the request for attorney's fees and costs, Mr. Rosen submitted an affidavit of $2,970 in fees and costs for defending Husband's motion to quash. Ms. Varner submitted an affidavit of $8,065.85. These amounts exceed the amounts awarded. There is no basis to find the fees awarded excessive as a matter of law.

Further, in awarding these fees, Judge Armstrong considered the factors set forth in Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991). While noting the case was not "complex," Judge Armstrong emphasized that Husband had previously brought the same motion to quash which was denied by Judge Segars-Andrews. By bringing the same motion twice, Husband had forced Wife to expend these amounts in fees and costs. A claim for fees and costs may be properly awarded irrespective of whether the requesting party is financially able to pay where the litigation is unfounded. Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974), *overruled in part on other grounds,* Glasscock v. Glasscock, *supra*.

In conclusion, the amount of fees and costs awarded is supported by the record and Judge Armstrong did not abuse his discretion in making the award. Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988) (an award of attorney's fees will not be overturned absent an abuse of discretion).

8. Recrimination

The divorce decree was issued on December 22, 1999, granting Wife a divorce on the ground of Husband's adultery. One year later, on December 22, 2000, Husband filed a motion to vacate the decree under Rule 60(b), SCRCP, on the ground the evidence of Husband's adultery was fraudulent and Husband lacked notice of the November 1, 1999, hearing.[6] By order dated April 19, 2001, the family court denied the motion. Husband appeals that denial.

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[6] As discussed above, Husband was represented by counsel when this trial date was set. His claim of lack of notice is without merit.

Husband contends the family court should have sua sponte dismissed Wife's complaint seeking a divorce on the ground of Husband's adultery because Wife's own admitted adultery amounted to recrimination. Recrimination is a defense to an action for divorce if the acts of recrimination charged constitute in themselves a ground for divorce. Jeffords v. Jeffords, 216 S.C. 451, 58 S.E.2d 731 (1950); Allen v. Allen, 287 S.C. 501, 339 S.E.2d 872 (Ct. App. 1986). Although recrimination was never ruled on below,[7] Husband contends it is a jurisdictional issue and is therefore properly before us on appeal. This argument is without merit.

Husband raised the defense of recrimination in his answer. The fact that recrimination was pled, however, does not affect the family court's subject matter jurisdiction to enter a divorce decree. *See* Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994) (subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong). Recrimination is not a jurisdictional issue and we decline to address it for the first time on appeal. Smith v. Smith, *supra.*

Further, although in equitably dividing the marital estate the family court referred to Husband's marital misconduct, the court ultimately divided the marital assets 50/50. In light of the family court's finding that the parties started out equally and contributed jointly to the acquisition of assets, the equal division of property was not affected by the finding of Husband's fault.

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[7] The grounds for Husband's Rule 60(b) motion do not include recrimination and the order on appeal denying this motion does not address it. Further, Husband never presented evidence of Wife's admitted adultery at the final hearing.

CONCLUSION

We conclude Husband's appeals are without merit. His decision to forego participation in the family court proceedings inevitably resulted in his failure to properly preserve for appeal any complaint regarding those proceedings. The orders of the family court are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronald F. Gardner, Daryl S. Gardner, Nancy D. Helton a/k/a Nancy Foster, Robert S. Helton, James R. Bonner, David A. Hart, W. Denise Reeder, George R. Donnels, Patricia C. Donnels and Shunda Cureton, Plaintiffs/Respondents,

v.

South Carolina Department of Revenue, Woodruff-Roebuck Water District, Spartanburg Regional Medical Center, B.J. Workman Memorial Hospital, Gaffney Board of Public Works, Laurens County Hospital, Greenville Hospital System, Self Memorial Hospital, the Municipal Association of South Carolina, the South Carolina Association of Counties and all related affiliates and subsidiaries of such entities and all other entities in the State of South Carolina that have purported to avail themselves of any provision of the South Carolina Setoff Debt Collection Act, Defendants/Appellants,

Abbeville County Memorial Hospital, Allendale County Hospital, Bamberg County Hospital, Barnwell County Hospital, Beaufort Memorial Hospital, Charleston Memorial Hospital, Chester County Hospital, Clarendon Memorial Hospital, Edgefield County Hospital, Fairfield Memorial Hospital, Hampton Regional Medical Center, Kershaw County Medical Center, Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Loris Community Hospital, Marion County Medical Center, Newberry County Memorial Hospital, Palmetto Health Alliance as assignee of Richland Memorial Hospital, and the Regional Medical Center of Orangeburg and Calhoun Counties, Intervenors/Appellants.

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

Opinion No. 25587
Heard November 19, 2002 - Filed January 27, 2003

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

C. Mitchell Brown and B. Rush Smith, III, of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for Named and Class Defendants/Appellants.

General Counsel & Deputy Director Harry T. Cooper, Jr., Chief Counsel for Revenue Litigation Ronald W. Urban, and Counsel for Revenue Litigation Joe S. Dusenbury, Jr., all of Columbia, for Named Defendant/Appellant South Carolina Department of Revenue.

Robert E. Stepp and Elizabeth Van Doren Gray, of Sowell Gray Stepp & Laffitte, LLC, of Columbia, and H. Spencer King of Leatherwood Walker Todd & Mann, of Spartanburg, for Named Defendant/Appellant Municipal Association of South Carolina.

Thornwell F. Sowell of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Named Defendant/Appellant South Carolina Association of Counties.

H. Sam Mabry, III, J. Derrick Quattlebaum, and Matthew P. Utecht, of Greenville, for Named Defendant/Appellant Greenville Hospital System.

Edwin E. Evans and Henry J. White, of Columbia, for Class Defendant/ Appellant State Budget and Control Board, South Carolina Retirement Systems.

Attorney General Charles M. Condon, Deputy Attorney General Treva G. Ashworth, Assistant Deputy Attorney General J. Emory Smith, Jr., of Columbia, for Defendant/Appellant State Class Defendants; James R. Allen of Barnes, Alford, Stork and Johnson, LLP, of Columbia, for Defendant/Appellant State Education Assistance Authority.

William C. Hubbard and Dwight Drake of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for Class Defendant/Appellant South Carolina Public Service Authority; C. Mitchell Brown and B. Rush Smith, III, of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for Intervenors/Appellants; Wilburn Brewer, Jr., and Thomas C.R. Legare of Nexsen Pruet Jacobs & Pollard, LLP, of Columbia, for Class Defendants/Appellants 42 Putative Class Members.

James W. Sheedy and W. Chaplin Spencer, Jr., of Spencer & Spencer, P.A., of Rock Hill, for Class Defendants/Appellants York County Natural Gas Authority of Rock Hill, South Carolina Lancaster County Natural Gas Authority, Rock Hill Housing Authority, and Fort Mill Housing Authority.

Charles E. Carpenter, Jr., and Sam G. Stathos, of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia, for Class Defendants/Appellants Morris College, Voorhees College, and Newberry College.

Steve A. Matthews, Manton M. Grier, and Phillip Florence, Jr., of Haynsworth Sinkler Boyd, P.A., of Columbia, for Class Defendants/Appellants Local Entities.

David S. Black, of Howell, Gibson & Hughes, of Beaufort, for Appellant Beaufort County EMS.

David L. Morrison, of Davidson, Morrison & Lindeman, of Columbia, for Defendants/Appellants City of Irmo, City of Williamston, Sumter County Clerk of Court, Abbeville County, Chester County, Greenwood County, and McCormick County.

Michael N. Duncan, of Whiteside-Smith Firm, of Spartanburg, Appellant City of Chesne, City of Cowpens and City of Wellford.

Emma Ruth Brittain, of Thompson Law Firm, of Myrtle Beach, for Appellant Claflin University.

James R. Thompson, of Saint-Amand, Thompson & Brown, of Gaffney, for Appellant Gaffney Board of Public Works.

J. Michael Turner, of Turner, Able & Burney, of Laurens, for Appellant Laurens County Hospital.

Steven M. Pruitt, of McDonald, Patrick, Tinsley, Baggett & Poston, of Greenwood, for Defendant/Appellant Self Memorial Hospital.

Edwin C. Haskell, III, Smith & Haskell, of Spartanburg, for Appellants Spartanburg Regional Medical Center and B. J. Workman Memorial Hospital.

D. Garrison Hill, of Hill & Hill, of Greenville, for Unnamed Class Defendants/Appellants Greer Commission of Public Woks and Seneca Light and Water Plant.

Nancy T. Hobbs of McDonald, Patrick, Tinsley, Baggett & Poston, L.L.P., of Greenwood, for Class Defendants/Appellants Greenwood Commissioners of Public Works and Erskine College.

Kenneth C. Anthony, Jr., of the Anthony Law Firm, and Patrick E. Knie, of Patrick E. Knie, P.A, both of Spartanburg for Plaintiffs/Respondents.

JUSTICE BURNETT: This appeal concerns the 1995 Setoff Debt Collection Act (1995 Act)[1] and 1999 amendments[2] thereto. The 1995

[1] Act No. 76, 1995 S.C. Acts 521.

[2] Act No. 1144, 1999 S.C. Acts 1177.

Act permits a "claimant agency" to seize the South Carolina income tax refund of a taxpayer who has a delinquent debt with the claimant agency. We affirm in part, reverse in part, and remand.

FACTS

Plaintiffs/Respondents (Plaintiffs) brought this declaratory judgment action against Defendants/Appellants (Defendants) asserting Defendants, as claimant agencies, improperly seized their income tax refunds. Plaintiffs sought injunctive relief, the return of their seized tax refunds, and damages. In addition, Plaintiffs sought to be certified as class representatives of all taxpayers who incurred a reduction in their income tax refund in the amount of $100 or more and requested the Defendants be certified as class representatives of all claimant agencies which had availed themselves of the 1995 Act by recovering debts of $100 or more.

The trial judge granted Plaintiffs' motion for summary judgment. Through a series of orders, the trial judge 1) held certain notices did not substantially comply with the 1995 Act 2) refused to presently consider the Named Defendants' counterclaims against the Named Plaintiffs, 3) ordered the return of seized income tax refunds for 1996, 1997, and 1998, plus related administrative fees and interest, 4) ordered a return of administrative fees, plus interest, collected by Defendants/Appellants Municipal Association of South Carolina (MASC) and South Carolina Association of Counties (SCAC)[3] in 1999, and 5) enjoined the South Carolina Department of Revenue (DOR) from collecting any claims submitted by the Associations for tax year 1999. In addition, the trial judge certified a bilateral class action. Thereafter, the trial judge denied Intervenors/Appellants (Intervenors) petition to intervene as parties in the matter. Defendants appeal.[4]

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[3] At times, the MASC and SCAC are referred to jointly as "the Associations."

[4] At times, Named Defendants, Class Defendants, and Intervenors are referred to collectively as "Defendants." At other times, we refer to Defendants individually.

I. ISSUES RELATING TO THE 1995 ACT

In 1988, the General Assembly enacted the "Setoff Debt Collection Act." Act No. 474, 1988 S.C. Acts 4020. This Act permits "claimant agencies" to seize the South Carolina income tax refunds of taxpayers who owe delinquent debts to the agencies.[5] Defendants are currently defined as "claimant agencies." In relevant part, § 12-56-60(A) of the 1995 Act provides:

> A request for setoff [by the claimant agency to the DOR] may be made only after the claimant agency has notified the debtor of its intention to cause the debtor's refund to be set off. This notice must be given in person, left at the dwelling or usual place of business of the debtor, or sent by certified or registered mail to the debtor's last known address no less than thirty days before the claimant agency's request to the [DOR]. The notice shall include a statement which sets forth administrative appeal procedures available to the debtor and alternatives available to the debtor which could prevent setoff. The claimant agency promptly shall notify the debtor when the liability out of which the set off arises is satisfied.

(Underline added).

Section 12-56-60(B) provides:

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[5] In the 1995 Act, "claimant agency" is defined as "a state agency, board, committee, commission, public institution of higher learning, political subdivision, and the Internal Revenue Service. It also includes a private institution of higher learning for the purpose of collecting debts related to default on authorized educational loans made pursuant to Chapters 111, 113, or 115 of Title 59. 'Political subdivision' includes the Municipal Association of South Carolina and the South Carolina Association of Counties when these organizations submit claims on behalf of their members or other political subdivisions." S.C. Code Ann. § 12-56-20(1) (Supp. 1996).

> Upon receiving the certification of the claimant agency of the amount of the delinquent debt, the [DOR] shall determine if the debtor is due a refund. If the debtor is due a refund of more than twenty-five dollars, the DOR shall set off the delinquent debt against the amount of the refund in excess of twenty-five dollars and transfer the amount set off to the claimant agency. The department may retain an amount not to exceed twenty-five dollars of each refund set off to defray its administrative expenses. . . The [DOR] shall consider any certified delinquent debt and debtor list provided by a claimant agency as correct. Reviews of refund setoffs are with the claimant agency. If, after appropriate review the claimant agency determines that the setoff amount is excessive, it shall refund the appropriate amount to the taxpayer. If, after appropriate review, the claimant agency determines that it is entitled to no part of the amount set off, it shall refund the entire amount plus the administrative fee retained by the [DOR]. That portion of the refund reflecting the administrative fee must be paid from claimant agency funds. If a refund has been retained in error, the claimant agency shall pay interest to the taxpayer calculated as provided in Section 12-54-20 from the date provided by law after which interest is paid on refunds until the appeal is final . . .

The trial judge held those claimant agencies whose 1996, 1997, or 1998 notices were included on lists designated as "Category 1" or "Category 2" failed to substantially comply with the statutory notice requirement of § 12-56-60(A). The trial judge described Category 1 notices as those "without mention of an 'administrative appeal' but at best a name and phone number to call in case that taxpayer had a question" and Category 2 notices as "those notices which make some mention of an appeal but do not 'include a statement which sets forth administrative appeals procedures available to the debtor'."

A. Notice

Defendants argue the trial judge erred by holding the Category 1 and Category 2 notices did not substantially comply with § 12-56-60(A). They contend the information provided by the Category 1 and Category 2 notices

adequately set out the "review procedure" as contemplated by the statute. Accordingly, Defendants contend the notices complied with due process and, therefore, substantially complied with § 12-56-60(A). We disagree.

Initially, we note the issue is not whether the Category 1 or 2 notices complied with the requirements of constitutional due process.[6] Instead, the issue is whether the notices complied with the requirements of § 12-56-60(A).[7] The General Assembly legislatively established the due process required by the 1995 Act.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Mid-State Auto Auction of Lexington v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). Where the terms of the relevant statute are clear, there is no room for construction. Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 355 (1995).

The plain language of § 12-56-60(A) requires that the notice of a tax refund setoff "shall include a statement which sets forth administrative review procedures available to the debtor. . .". The Category 1 notices which provided a telephone number and, perhaps, the name of a contact person, clearly did not meet the mandatory provision of the statute. While the Category 2 notices informed the taxpayer he/she could "request a review" by calling or writing the claimant agency's Setoff Debt Collection department within a specified length of time, the notices did not "set forth administrative appeal procedures available" as specified by § 12-56-60(A). Advising the taxpayer he/she may "request a review" within a declared deadline is not the equivalent of "set[ting] forth administrative appeal procedures."

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[6] The trial judge expressly declined to rule whether the Category 1 or Category 2 notices complied with due process.

[7] Anderson v. White, 888 F.2d 985 (3rd Cir. 1989), cited by Defendants, is inapposite. In Anderson, the taxpayers argued the pre-offset notices did not satisfy due process, not whether the notices satisfied the applicable United States Code provision.

Defendants rely on South Carolina Second Injury Fund v. American Yard Products, 330 S.C. 20, 496 S.E.2d 852 (1998), and Davis v. Nationscredit Fin. Servs. Corp., 326 S.C. 83, 484 S.E.2d 471 (1997), to suggest that, while the Category 1 and Category 2 notices may not have specified the administrative appeal procedures available as provided by § 12-56-60(A), the notices were nonetheless adequate. The cited cases hold that compliance with the technical requirements of a notice statute may be excused where the parties received the substance of the statutorily required notice. Here, however, the Category 1 and 2 notices did not provide Plaintiffs with the substance – the claimant agency's administrative appeal procedure – required by the statute. Accordingly, American Yard Products and Davis are inapplicable.

Finally, some Defendants claim that subsequent amendments to the 1995 Act demonstrate the legislative intent of the 1995 Act was not to require an explanation of all administrative appeal procedures in the notice. We disagree.

In 1999, the General Assembly substantially amended the Setoff Debt Collection Act. Act No. 114, 1999 S.C. Acts 1177. That portion of the 1995 Act requiring "[t]he notice shall include a statement which sets forth administrative appeal procedures available to the debtor" was deleted in the 1999 Act. Section 12-56-62 was added to the 1999 Act. This provision states:

> . . . The notice must include a statement of appeal procedures available to the debtor substantially as follows:
>
> > According to our records, you owe the (claimant agency) a debt in the amount of (amount of the debt) for (type of debt). You are hereby notified of the (claimant agency's) intention to submit this debt to the South Carolina Department of Revenue to be set off against your individual income tax refund. Pursuant to the Setoff Debt Collection Act, this amount, plus all costs, will be deducted from your South Carolina individual income tax refund unless you

file a written protest within thirty days of the date of this notice. . . The protest must contain the following information:

(1) your name;
(2) your address;
(3) your social security number;
(4) the type of debt in dispute; and
(5) a detailed statement of all the reasons you disagree or dispute the debt.

The original written protest must be mailed to the (claimant agency) at the following address:

(address of the entity requesting the setoff).

In addition, the 1999 Act established a uniform procedure governing the protest of setoff claims. Under the 1999 Act, a claimant agency is required to appoint a hearing officer to consider the protest of a taxpayer before submitting the claim to the DOR. Further, the claimant agency is required to notify the DOR that it has received a protest and it must hold an informal hearing before the DOR may proceed with the setoff. If the hearing officer rules in favor of the claimant agency, the DOR may proceed with the setoff, even though the taxpayer may appeal the adverse decision to the Administrative Law Judge Division or, in some circumstances, file a summons and complaint with the circuit court. S.C. Code Ann. § 12-56-63; § 12-56-65; § 12-56-67 (2000).

Under the 1995 Act, a claimant agency could proceed with its claim with the DOR after giving the taxpayer thirty days notice of its intent to seek setoff, regardless of whether the taxpayer sought review. § 12-56-60(A) and (B) (Supp. 1996). Review was with the claimant agency in accordance with its own procedures. § 12-56-60(B).

While Defendants correctly assert that subsequent amendments may be interpreted as clarifying the legislative intent behind existing law, Hyde v. South Carolina Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994), the 1999 Act does not clarify the notice provisions of the earlier legislation as the two versions of the Setoff Debt Collection Act are significantly different.

Because each claimant agency had its own unique review procedure under the 1995 Act, that Act reasonably required the claimant agencies to include "a statement set[ting] forth administrative appeal procedures" in the notice. Because the 1999 Act established a standard review procedure for all claimant agencies, it eliminated the need for providing the administrative appeal procedures of the particular claimant agency. Taxpayers can obtain the uniform review procedure by referring to the statute.

We conclude the trial judge properly held the Category 1 and Category 2 notices did not substantially comply with the notice requirements of the 1995 Act.

B. Prejudice

Defendants argue that, even if the pre-setoff notices were statutorily inadequate, each Plaintiff is required to establish prejudice in that he/she would have taken action upon receipt of a sufficient notice and had a valid defense to the underlying debt. We agree.

As a general rule, a party must establish prejudice as the result of another's failure to follow mandatory statutory procedure. See Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997) (where statutory pre-removal hearing was not provided, party nonetheless failed to establish prejudice where received post-removal hearing); see also Porter v. South Carolina Public Serv. Comm'n, 338 S.C. 164, 525 S.E.2d 866 (2000) (Court reversed agency decision where it found substantial prejudice from lack of notice). Where a party receives inadequate notice, he must demonstrate prejudice resulting from the insufficient notice. Ballenger v. South Carolina Dep't of Health and Envtl. Control, 331 S.C. 247, 500 S.E.2d 193 (Ct. App. 1998) (even though applicant's notice was misleading, opposing party was not prejudiced); Long v. Bd. of Governors of the Federal Reserve Sys., 117 F.3d 1145 (10th Cir. 1997) (although party did not receive adequate notice of potential penalty, he failed to establish he could have obtained better outcome, therefore, failed to establish prejudice). Even where a party receives no notice, he must establish that, had he received notice, he would

have taken pertinent action and could have reduced his liability. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

In granting summary judgment in favor of the Named and Class Plaintiffs, the trial judge did not specifically address the issue of prejudice, but apparently determined violation of the notice provision of the 1995 Act constituted prejudice in and of itself. This was erroneous. It may well be that, had some taxpayers received a notice which complied with the 1995 Act, they would have opted not to protest their income tax setoff for various reasons, one being they owed the delinquent debt to the claimant agency. Further, we find it likely that, if they had filed protests, some taxpayers would not have prevailed: they would not have established their debts were not due and owing.

C. Collection Costs

Defendants argue the trial judge erred by holding claimant agencies were not entitled to add collection costs to Plaintiffs' underlying debts.

Since its inception in 1988, the Setoff Debt Collection Act has provided that "claimant agencies may submit for collection under the procedure established by this article all delinquent debts which they are owed." Act No. 474, 1988 S.C. Acts 4022 (underline added); Act No. 76, 1995 S.C. Acts 521 (substituted "chapter" for "article").

As originally enacted, the Setoff Debt Collection Act did not include the Associations within the definition of "claimant agency." S.C. Code Ann. § 12-54-420(1) (Supp. 1989). In 1992, the General Assembly amended the definition of "claimant agency." Under the amended provision, the MASC and SCAC were defined as "political subdivisions" (and, therefore, claimant agencies) "when these organizations submit claims on behalf of their members." S.C. Code Ann. § 12-54-420(1) (Supp. 1993). In 1994, the legislature again amended the Setoff Debt Collection Act, adding the MASC and SCAC are "political subdivisions" (and, therefore, claimant agencies) "when these organizations submit claims on behalf of their members and other political subdivisions." Act No. 516, 1994 S.C. Acts 5916.

Originally, the Setoff Debt Collection Act defined "delinquent debt" as:

> [A]ny liquidated sum due and owing any claimant agency, including court costs, fines, penalties, and interest which have accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding judgment for that sum which is legally collectible and for which a collection effort had been or is being made.

Act No. 474, 1988 S.C. Acts 4022.

In 1994, the General Assembly amended the definition of "delinquent debt" as follows:

> [A]ny liquidated sum due and owing any claimant agency, including collection costs, court costs, fines, penalties, and interest which have accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding judgment for that sum which is legally collectible and for which a collection effort has been or is being made.

Act No. 516, 1994 S.C. Acts 5916 (underline added).[8]

Since 1992 the MASC and SCAC have participated in the setoff collection process by consolidating and forwarding delinquent debts on behalf of claimant agencies to the DOR. In exchange for their collection efforts, the MASC and SCAC add $25 and $15, respectively, as an administrative fee to each "successful setoff" submitted on behalf of a claimant agency to the DOR. Some claimant agencies which avail themselves of the Associations' procedures also add a collection fee to the underlying debt. Not all claimant agencies pursue collection through the

[8] "Delinquent debt" was again revised in 1996. In relevant part, the amendment deleted the requirement that the delinquent debt be liquidated. Act No. 395, 1996 S.C. Acts 2415.

MASC or SCAC. Some agencies which pursue tax setoffs on their own add a collection fee.

The trial judge ruled the 1995 Act did not permit automatic recovery of collection costs or administrative fees assessed by the Associations or claimant agencies. Instead, he held the recovery of costs or fees was permissible only if they "accrued through contract, subrogation, tort, operation of law, or any other legal theory . . .".

Defendants argue the trial judge misconstrued the provisions permitting recovery of collection costs. Specifically, they claim the statute provides for the recovery of "any liquidated sum due and owing a claimant agency" and "collection costs" is not limited by the phrase "accrued through contract, subrogation, tort, operation of law, or any other legal theory." We disagree.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Mid-State Auto Auction of Lexington v. Altman, supra. Where the terms of the relevant statute are clear, there is no room for construction. Parsons v. Georgetown Steel, supra.

The language of the 1995 Act indicates the legislature's clear intent to define "delinquent debts" expansively. As originally provided by the Setoff Debt Collection Act, "delinquent debt" was defined as any liquidated sum due and owing any claimant agency, including . . . which have accrued through contract, subrogation, tort, operation of law, or any other legal theory . . .". Act No. 474, 1998 S.C. Acts 4022 (underline added). The only "limitation" is that the cost be legally recognizable (i.e., that the cost accrues through a legal theory). The legislature later added "collection costs" to its definition of recoverable debt and retained the "legally recognizable" requirement. Act No. 516, 1994 S.C. Acts 5916. Accordingly, we conclude the trial judge did not err by holding, in order to be recoverable through the Setoff Debt Collection Act, collection costs must accrue via some legal theory.

D. Associations' Liability

Associations argue the trial judge erred by holding them liable to the Named and Class Plaintiffs for return of the seized income tax refunds and interest. We agree.

The 1995 Act required the claimant agency seeking the income tax setoff to provide the statutorily required notice to the delinquent taxpayer. § 12-56-60(A). In addition, it provided any review of refund setoffs was through the claimant agency. § 12-56-60(B). If the claimant agency determined a setoff was excessive, the claimant agency was to provide the refund and interest. Id.

These statutory provisions indicate the legislature clearly intended the refund of any excessive income tax setoff be made by the claimant agency who collected the setoff. Similarly, any claimant agency's failure to follow the statutory procedure should result in liability by the claimant agency, not the Associations.[9]

[9] We question whether the 1995 Act creates a private right of action which can be enforced by taxpayers. The statute does not expressly provide a cause of action for taxpayers. Moreover, it appears the 1995 Act does not create an implied right of action. See Camp v. Springs Mortgage Corp., 310 S.C. 514, 426 S.E.2d 304 (1993) (test to determine whether right of private action in favor of certain party is created by implication under civil statute is whether legislation was enacted for special benefit of the party). The Setoff Debt Collection Act was created for the benefit of claimant agencies who are owed delinquent debts by taxpayers. While the Act provides for notice prior to the setoff of income tax refunds, violation of the notice provision does not evince a legislative intent to create a private right of action. The "remedy" provided by § 12-56-60(B) only suggests refund by the claimant agency "if the setoff amount is excessive," not for failure to follow the setoff procedures. Nevertheless, we decline to rule on this issue.

II. ISSUES RELATING TO THE 1999 ACT

The Associations, DOR, and other Defendants argue the trial judge erred by holding the collection fees assessed by the Associations pursuant to 1999 amendments to the Setoff Debt Collection Act are unconstitutional. We agree.

As noted above, the General Assembly substantially amended the Setoff Debt Collection Act in 1999. In part, the legislature added § 12-56-63(B) as follows:

> An association defined as a political subdivision in Section 12-56-20(1) may contract with another political subdivision for the processing of debts to be submitted to the [DOR]. These services may be funded through an administrative fee. . . .

The trial judge held "[t]he portion of the 1999 Act which purports to allow the Associations to seize from taxpayers' refunds a collection fee unspecified and unlimited in amount . . . is unconstitutional, as a denial of due process and equal protection." [10] The trial judge ordered a return of fees, plus interest, collected for tax year 1999 to Plaintiff class members.[11]

All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). The substantive due process guarantee

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[10] At the hearing, the trial judge allowed Plaintiffs to amend their complaint to add a cause of action stating the fee provision of the 1999 Act was unconstitutional.

[11] Since the plaintiff class is "composed of all persons who had their 1996, 1997, or 1998 South Carolina income tax refund seized" by certain enumerated agencies, we assume the trial judge meant only the Named Defendants would reimburse those Named Plaintiffs who had their 1999 taxes seized.

ensures legislation which deprives person of a life, liberty, or property right has, at a minimum, a rational basis, and is not arbitrary or overly vague. Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2000). The burden of showing that a statute is unreasonable falls on the party who attacks it on due process grounds. State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997).

Named Plaintiffs have not established the 1999 Act's failure to provide a cap on the administrative fees assessed by the Associations violates substantive due process. Named Plaintiffs did not establish the General Assembly had no rational basis for permitting the Associations to assess taxpayers for processing setoffs for claimant agencies. Instead, we find the General Assembly determined the Associations' ability to consolidate and process setoff claims was of administrative benefit both to the claimant agencies and to the DOR. Furthermore, Plaintiffs failed to establish the fees actually charged ($15 or $25) were arbitrary or unreasonable. The failure of the statute to set a cap for a particular charge does not, standing alone, violate substantive due process.

Further, Named Plaintiffs failed to establish that that portion of the 1999 Act which permits the Associations to assess a fee for processing claims on behalf of claimant agencies violates equal protection. Murphy v. Richland Memorial Hospital, 317 S.C. 560, 455 S.E.2d 688 (1995) (party asserting unconstitutionality of statute on equal protection grounds has burden of showing classification is essentially arbitrary and without any reasonable basis). While those taxpayers whose claimant agencies did not use the Associations' services would not be assessed a fee, there is clearly a reasonable basis to permit the disparate treatment – the Associations should be permitted to recover a reasonable fee from taxpayers for consolidating and processing the setoffs for claimant agencies. Using the Associations' services results in cost savings and administrative convenience for both the DOR and those claimant agencies who use the Associations' service. Id. (to satisfy equal protection, statutory classification must bear reasonable relation to legislative purpose sought to be achieved, members of class must be treated alike under similar circumstances, and classification must rest on some rational basis).

We conclude the trial judge erred by holding the fee provision of the 1999 Act violated due process and equal protection.

III. ISSUES RELATING TO CLASS CERTIFICATION

Defendants argue the trial court erred in granting class certification. We agree.

Proponents of class certification bear the burden of proving five prerequisites under South Carolina law. See Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRCP. The prerequisites are: 1) the class must be "so numerous that joinder of all members is impracticable;" 2) there must be "questions of law or fact common to the class;" 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;" 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and 5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class." Rule 23(a), SCRCP. The first four criteria are often referred to as the requirements for numerosity, commonality, typicality and adequacy of representation.

In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied. Waller v. Seabrook Island Property Owners Ass'n, supra. We generally defer to the trial court's discretion in granting class certification absent an error of law.[12] Id.

[12] This case is significantly more complex due to the fact it is a bilateral class action. That is, Named Plaintiffs seek to have the court certify both a plaintiff class and a defendant class. Both the Federal Rules and the South Carolina Rules allow for bilateral class actions. See Rule 23(a), SCRCP, and Rule 23(a), FRCP (both using the introductory phrase "One or more members of a class may sue or be sued as representative parties on behalf of all. . .").

Because failure to satisfy even one prerequisite is fatal to class certification we limit our discussion to the Named Plaintiffs' inability to prove commonality.[13] See id. (failure to satisfy all five prerequisites is fatal to class certification). To establish commonality, a party must show that "there are questions of law or fact common to the class." Rule 23, SCRCP. In practical terms this means the party must articulate the existence of "significant common, legal, or factual issues" which bind the proposed class together. Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 64 (S.D. Ohio 1991).

Critically, "[n]ot every issue in the case must be common to all class members." O'Connor v. Boeing North Amer., Inc., 184 F.R.D. at 311, 329 (C.D.Cal.1998). Commonality is met only where the class shares a determinative issue. See Stott v. Haworth, 916 F.2d 134, 145 (4th Cir.1990) ("certification is proper only when a determinative critical issue overshadows all other issues; and "question[s] [that are] in no way dispositive and [which] simply propel the action into a posture where judicial scrutiny is necessary for just adjudication" are insufficient to establish commonality under Rule 23(a)(2), FRCP); see also Peoples v. Wendover Funding Inc., 179 F.R.D. 492, 498 (D. Md.1998) ("a representative plaintiff cannot establish commonality . . . if the court must investigate each plaintiff's individual claim.").

Plaintiffs assert a "common thread" exists among its class members concerning whether Defendants' actions were proper in seizing income tax refunds without proper notice. We disagree.

There are at least two common questions of law in this case relating to the 1995 Act: 1) whether the Defendants' notices pursuant to the 1995 Act were deficient and 2) whether Plaintiffs were prejudiced by the alleged

[13] During oral argument, Named Plaintiffs asserted they were properly certified as class representatives of taxpayers who had been improperly assessed a collection fee during tax years 1996, 1997, and 1998. We disagree. We note the collection fees do not meet the monetary threshold of $100. Rule 23(a), SCRCP.

deficiency. Even if the notices were deficient, Plaintiffs cannot prevail unless they establish they were prejudiced by the insufficiency. See Rose v. Beasley, supra; Porter v. South Carolina Public Serv. Comm'n, supra; Ballenger v. South Carolina Dep't of Health and Envtl. Control, supra.

This is not a typical class action where minor factual differences exist among the individualized cases of class members. See, e.g., Monaco v. Stone, supra. Instead, the factual differences (whether prejudice exists) are the crux of a predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case. Requiring such individualized examination negates the benefits of a class action suit. See O'Quinn v. Beach Associates, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C. 1978) ("The very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action.").

Likewise, Named Plaintiffs cannot show that commonality exists for the defendant class. A court determines the existence of commonality among defendants by examining the plaintiffs' claims and the defendants' anticipated defenses. See Kline v. Coldwell Banker & Co., 508 F.2d 226 (9th Cir. 1974). As with Plaintiffs, Defendants' anticipated defenses center upon the predominant issue of whether Plaintiffs were prejudiced by the deficient notices. Such a defense necessitates forming legal arguments around the individual facts of each case to show whether prejudice may or may not exist.

We conclude the trial judge erred by certifying both a plaintiff and a defendant class.[14]

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[14] While we decline to specifically address the requirement of typicality, we reject Named Plaintiffs' request for us to adopt the "juridical links doctrine." See La Mar v. H & B Novelty and Loan Co., 489 F.2d 461 (9th Cir. 1973); Doss v. Long, 93 F.R.D. 112 (N.D. Ga. 1981). We note the doctrine has recently come under close scrutiny primarily due to its conflict with Article III standing issues. See, e.g., William D. Henderson, Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III, 67 U. Chi. L. Rev. 1347 (2000). The doctrine also

CONCLUSION

In summary, the trial judge abused his discretion by granting Plaintiffs' request to certify this matter as a bilateral class action. Accordingly, the Named Plaintiffs and Named Defendants are the proper parties in this matter.

Furthermore, while Named Defendants' setoff notices failed to comply with the requirements of the 1995 Act, the trial judge erred by failing to determine whether each Named Plaintiff was prejudiced by the inadequate notice. Accordingly, we reverse the entry of summary judgment. This matter is remanded to the circuit court which shall then remand the matter to the Named Defendant claimant agencies. The claimant agencies are hereby ordered to determine whether the Named Plaintiff whose income tax refund was setoff by the agency in tax years 1996, 1997, or 1998 was prejudiced by the inadequate notice. This determination involves consideration of the Named Defendants' defenses and counterclaims. If the claimant agency concludes the Named Plaintiff was prejudiced, it shall issue a refund of the setoff tax return in accordance with the Setoff Debt Collection Act. If the claimant agency concludes the Named Plaintiff was not prejudiced, the Named Plaintiff may appeal in accordance with the provisions of § 12-56-65 (2000).

The trial judge properly held the Named Defendants and Associations were not entitled to assess collection fees against the Named Plaintiffs under the 1995 Act unless the fees accrued through contract, subrogation, tort, operation of law, or any other legal theory. Accordingly, in addition to the

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runs counter to this Court's previous decisions which hold that a plaintiff may not sue a defendant unless the plaintiff has suffered an injury at the hands of the defendant. Edisto Fleets, Inc., v. South Carolina Tax Commission, 256 S.C. 350, 182 S.E.2d 713 (1971) (A plaintiff cannot maintain a class action where record indicates he was not directly harmed by defendants actions); Furman University v. Livingston, 244 S.C. 200, 136 S.E.2d 254 (1964) (only a taxpayer directly affected by erroneously paying taxes has a right to seek a refund).

issue of prejudice, each Named Defendant claimant agency shall determine whether it or, if applicable, the Associations, were authorized to assess a collection fee from the Named Plaintiff.[15] If the claimant agency determines it was not authorized to collect all or a portion of the assessed fee, the Named Defendant shall refund the excess amount.

Accordingly, the orders of the trial judge are **AFFIRMED IN PART, REVERSED IN PART, and REMANDED** for further action in compliance with this opinion.

TOAL, C.J., WALLER and PLEICONES, JJ., and Acting Justice Henry F. Floyd, concur.

[15] We recognize the trial judge considered whether some Named Defendants had legal theories which permitted them to assess collection costs against the Named Plaintiffs. Because it is unclear which Named Defendants the trial judge considered, this issue is remanded for consideration by all Named Defendant claimant agencies.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Malcolm Lonnie Green, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Bamberg County
Luke N. Brown, Jr., Trial Judge
Rodney A. Peeples, Post-Conviction Relief Judge

Opinion No. 25588
Submitted January 14, 2003 - Filed January 27, 2003

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of S.C. Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, and Senior Assistant Attorney General Ken Woodington, all of Columbia, for Respondent.

PER CURIAM: Petitioner pled guilty to voluntary manslaughter on March 19, 1997, and was sentenced on March 20, 1997, to thirty years imprisonment. His plea and sentence were affirmed. State v. Green, Op. No. 99-MO-025 (S.C. Sup. Ct. filed March 10, 1999), and the remittitur was sent on April 1, 1999.

Petitioner filed an application for post-conviction relief (PCR) on November 20, 2000. After a hearing, where petitioner was represented by counsel, the PCR judge granted the State's motion to dismiss on the ground the application was barred by the statute of limitations. Petitioner now seeks review of that order. We grant the petition for a writ of certiorari, dispense with further briefing and affirm the PCR judge's order.

Petitioner contends that his application was improperly dismissed because he had been pursuing federal habeas corpus relief prior to filing his application. Petitioner contends that the time for filing the application should have been tolled during the pendency of the federal proceedings. We disagree.

South Carolina Code Ann. § 17-27-45(a) (Supp. 2001) states that an application for PCR must be filed within one year of the sending of the remittitur. The statute does not provide any exception for tolling the statute of limitations where an applicant seeks federal habeas relief prior to exhausting his state remedies. Accordingly, the PCR judge properly dismissed the application on the ground the statute of limitations had run.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Ray Westmoreland, Respondent.

Opinion No. 25589
Submitted December 31, 2002 - Filed February 3, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

John J. McKay, Jr., of Hilton Head Island, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the issuance of an admonition or a public reprimand. We accept the agreement and find a public reprimand is the appropriate sanction. The facts, as set forth in the agreement, are as follows.

Facts

Bright Acres Associates was a partnership consisting of the following four equal partners: John Leutwiler, Henry Massey, John Brainard, and Leo Zabinski. The partnership was created in 1980 in order to buy, renovate, and sell thirty apartments and approximately twenty-six acres of land on Hilton Head Island. Respondent prepared the partnership agreement, which expressly provided for arbitration of all controversies or claims arising out of the partnership agreement. However, notice of the arbitration clause was not typed in underlined capital letters or rubber-stamped prominently on the face of the partnership agreement as required by the South Carolina Arbitration Act, S.C. Code Ann. § 15-48-10(a) (Supp. 2002). See Zabinski v. Bright Acres Associates, 346 S.C. 580, 553 S.E.2d 110 (2001).

Respondent represented the partnership, or individual partners, between 1980 and 1991, in matters involving (1) the acquisition of property, (2) Brainard's assignment of his interest to his children, and (3) Massey's agreement to purchase Leutwiler's 25% interest in Bright Acres. Respondent prepared the Massey/Leutwiler agreement.

In 1990, Leutwiler sued Massey over a dispute concerning the obligations, terms, and conditions of the sale document respondent had drafted for Leutwiler. Respondent represented Leutwiler (and later, Leutwiler's Estate) in this suit, and that litigation continued for over ten years. Respondent failed to disclose his involvement to Massey and obtain Massey's consent prior to commencing the litigation on behalf of Leutwiler.

In 1998, Zabinski and Brainard brought an action against Bright Acres, Massey and the Leutwiler Estate to compel arbitration pursuant to the arbitration clause in the partnership agreement. Respondent filed an answer, counterclaim, cross-claim and third-party complaint on behalf of the Leutwiler Estate claiming the arbitration clause in the partnership agreement he prepared was not valid under section 15-48-10. At no time did respondent consult Zabinski, Brainard or Massey about conflicts of interest arising from his representation of the Leutwiler Estate nor did he obtain their consent to proceed against them.

When it became apparent respondent would be required to testify in the trial of the matter both as a witness to some events and as a party-defendant to others, he failed to withdraw from representation of the Leutwiler Estate. On September 21, 2000, an order was issued disqualifying respondent from further participation as attorney for the Leutwiler Estate. That order was affirmed by this Court. Zabinski v. Bright Acres Associates, Op. No. 2001-MO-050 (S.C. Sup. Ct. filed September 4, 2001).

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(c) (a lawyer may limit the objectives of the representation if the client consents after consultation); Rule 1.2(e) (when a lawyer knows a client expects assistance not permitted by the Rules of Professional Conduct, the lawyer shall consult with the client regarding relevant limitations on the lawyer's conduct); Rule 1.7 (a lawyer shall not represent a client if the representation of that client is directly adverse to another client or it may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests); Rule 1.8(b) (a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation); Rule 1.9(a) (a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation); Rule 1.9(c) (a lawyer who has formerly represented a client in a matter shall not thereafter use information relating to the representation to the disadvantage of the former client); Rule 3.7 (a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct) and Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law) .

Conclusion

We find that a public reprimand is the appropriate sanction in this case. We do so after considering the mitigating circumstances, including respondent's belief that his involvement in representing the partnership itself was so limited as to not create a conflict, his efforts to find substitute counsel for the Leutwiler Estate after determining there was a conflict, and his reluctance to abandon his client, as well as the fact that the litigation at issue did have some legitimate basis. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Wayne C. Hooks, Petitioner

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 25590
Submitted December 5, 2002 - Filed February 3, 2003

REVERSED

Assistant Appellate Defender Aileen P. Clare, of Columbia; for Petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Chief, Capital & Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General Allen Bullard, Assistant Attorney General William Bryan Dukes, all of Columbia; for Respondent.

JUSTICE BURNETT: We granted Wayne C. Hooks ("Hooks") petition for certiorari from denial of his post-conviction relief ("PCR") and now reverse.

FACTS

Hooks was indicted for murder, accessory after the fact of murder, accessory after the fact of assault and battery with intent to kill, distribution of marijuana and distribution of marijuana within proximity to a school. He pled guilty to accessory after the fact of murder and distribution of marijuana. The court sentenced Hooks to concurrent terms of imprisonment of fifteen years for accessory and five years for distribution.

In his petition for certiorari Hooks alleges, for the first time[1], the trial court lacked subject matter jurisdiction of his accessory plea because the indictment omitted essential elements of the offense.

ISSUES

I. Did the trial court lack subject matter jurisdiction to accept a guilty plea because the indictment was insufficient?

II. Did Hooks waive his right to object to the sufficiency of the indictment by not complying with S.C. Code Ann. § 17-19-90 (1985)?

I

Sufficiency of the Indictment

A circuit court lacks subject matter jurisdiction and may not

[1] We may review this case although Hooks failed to raise the indictment issue until his petition for certiorari to this Court. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001) (subject matter jurisdiction may be raised at anytime).

accept a guilty plea if the indictment does not sufficiently state the offense.[2] Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995). We judge the sufficiency of an indictment against whether it contains the necessary elements of the offense to be charged and whether it sufficiently appraises the defendant of what he must be prepared to meet. State v. Adams, 277 S.C. 115, 125, 283 S.E.2d 582, 587 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45 , 406 S.E.2d 315 (1991). We do not judge an indictment's sufficiency based upon inquiring whether it could be more definite or certain. State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972)

At the time of Hooks's plea, the crime of accessory after the fact to murder contained the following elements: 1) the felony had been completed; 2) the accused had knowledge that the principal committed the felony; 3) the accused harbored or assisted the principal; and 4) the accused was not present at the scene of the crime. State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998).[3] The indictment presented to Hooks read:

> That Wayne Christopher Hooks did in Florence County on or about January 28, 1995, render assistance to a felon, namely,

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[2] Two exceptions apply to the general rule that an indictment must sufficiently state the offense to confer jurisdiction on a court. The first applies if the defendant waives presentment. The second applies where the charge to which the defendant pleads guilty is a lesser-included offense of the crime charged in the indictment. See Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995). Nothing in the record indicates Hooks waived presentment of the indictment. Further, accessory after the fact of murder is not a lesser-included offense of the charge of murder for which Hooks was indicted. See State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998).

[3] We held in Collins that the absence of the accused from the scene of the crime would no longer be an element of accessory after the fact and declined to apply the new rule retroactively. For purposes of this case the absence prong is an element of accessory after the fact.

> Marcel Andre Ervin, who, on or about January 28, 1995, committed the crime of murder of James Jonathan Brown.

R.p. 91.

The State argues the indictment is sufficient to put Hooks on notice of the charges pending against him although it fails to allege he knew the principal committed murder or that he was not present at the crime scene. We disagree.

The knowledge element is critical because the State bears the burden of proving Hooks's assistance was for the purpose of enabling the principal to avoid detection or arrest. State v. Legette, 285 S.C. 465, 330 S.E.2d 293 (1985). Such assistance is only illegal if Hooks had knowledge of the principal's prior actions. Unless the State can prove Hooks knew he was helping a murderer avoid arrest he could not be guilty of accessory after the fact of murder.

An argument may be made, however, that the indictment's inclusion of the word "felon" to describe Ervin along with the verb "murder" to describe Ervin's action is sufficient to notify Hooks that he was charged with helping a felon who had murdered someone. The two words viewed in the context of the entire sentence may allow for such a reading. However, even if we were to accept such a reading, the indictment is deficient because it did not specify Hooks was not present at the scene of the crime.

The presence element is critical in the pre-Collins context. Prior to our decision in Collins a person who was with the principal at the scene of the crime would himself be a principal to the crime and not an accessory. State v. Whitted, 279 S.C. 260, 305 S.E.2d 245 (1983), overruled by Collins, supra. Hooks pled guilty prior to the Collins decision, therefore, the State was required to prove he was not at the scene when the crime occurred in order to be guilty of accessory after the fact of murder.

Pre-Collins case law required the indictment inform Hooks of the presence element. The omission of this element renders the indictment insufficient.

II

Waiver of Objection

The State argues Hooks waived his right to object to the sufficiency of the indictment by failing to comply with S.C. Code Ann. § 17-19-90 (1985). We disagree.

This statute provides: "Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." S.C. Code Ann. § 17-19-90 (1985). The statute applies to guilty pleas as well as those actions tried by jury. State v. Phillips, 215 S.C. 314, 54 S.E.2d 901 (1949).

It is settled, however, that lack of subject matter jurisdiction is fundamental and may not be waived even by consent of the parties. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). A judgment by a court cannot be affirmed where the court had no right to act. The actions and judgment of the court in the absence of subject matter jurisdiction are void. Id.; see also, State v. Smalls, 336 S.C. 301, 519 S.E.2d 793 (Ct. App. 1999) (general rule that lack of subject matter jurisdiction may be raised at anytime supercedes S.C. Code Ann. § 17-19-90). The State concedes in brief, and case law suggests, the statute applies to only non-jurisdictional defects in the indictment. See State v. Mitchum, 258 S.C. 52, 187 S.E.2d 240 (1972); State v. Lewis, 321 S.C. 146, 467 S.E.2d 265 (Ct. App. 1996). Here the lack of subject matter jurisdiction is a jurisdictional defect not covered by the statute.

CONCLUSION

Accordingly we REVERSE the PCR court's dismissal of Hooks's petition and vacate the portion of his guilty plea for accessory after the fact of murder.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Charles O. Shuler, Appellant.

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

Opinion No. 25591
Heard December 3, 2002 - Filed February 3, 2003

AFFIRMED

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Walter M. Bailey, Jr., of Summerville, for respondent.

JUSTICE BURNETT: Appellant was convicted of three counts of murder and first degree burglary. He was sentenced to death for the murders and life imprisonment for burglary. We affirm.

GUILT PHASE[1]

During his opening statement, defense counsel admitted appellant killed Linda Williams, her thirteen year old daughter Stacy, and Linda's mother, Dorothy Gates. He stated appellant had tried to cope with a complicated relationship but "snapped."

Evidence indicated appellant lived with Linda for two years. On September 3, 1999, Linda asked appellant to move out of her home. The following day, the police were summoned to Linda's home and a deputy told appellant to leave. Over the next day or two, appellant telephoned Linda's home numerous times and left threatening messages on her answering machine. In one message, he stated: "you can run, and you can hide, but you can't go on forever, because Charles is coming for your g___d___ ass. Because you, Linda Gates, Dot Gates, Terry Gates, Lori Gates, and all you m_____f____, because I am coming for *you*! I am coming for you. You know what I mean? . . .". (italic in original).

On September 6th, a police officer was again dispatched to Linda's home. While listening to the answering machine tapes, the telephone rang. The officer answered the telephone; appellant stated, "[p]ut that whore on the phone. She owes me $40,000." The officer told appellant not to call again and appellant responded, "I'll see her later."

Buster, Linda's nine-year-old son testified that around 7:00 p.m. on September 8, 1999, he saw appellant's car circle the block three times before driving into his yard. Appellant exited the vehicle carrying a "long gun" and "busted through" a front window of Buster's home. Buster testified he ran

[1] While appellant's issues arise solely from the penalty phase of trial, we recite the guilt phase evidence in order to place the penalty phase issues in context.

inside and heard appellant tell his mother "put the mother f___ phone down" and "I got you now, you bitch." While running to his neighbor's home, Buster heard a shot.

Over appellant's objection, the State played a redacted tape recording of several 911 calls.[2] Screaming and three gunshots are heard on the first call. The 911 operator states, "we've been going to this house all weekend."[3] During another call, a neighbor states her neighbor's child had come over and reported his mother's boyfriend was trying to kill his mother. On the last call, Stacy states five people have been shot by appellant. In response to a question from the operator, Stacy says she cannot feel below her waist and does not know where she has been shot.

Sheriff's Department officers arrived at Linda's home. Linda, Stacy, and Dorothy had been shot. Appellant had also been shot.[4] Initially, Linda appeared to be alive. Stacy, wounded in the back, was moving on the living room floor; she inquired about her brother. She stated "Charles" had shot them. Dorothy was dead.

Appellant was lying on the floor in the hallway. An officer testified a shotgun lay beside him; appellant's finger was in the trigger release. Appellant stated, "F___ them. F___ them all. Let them die." The officer took the shotgun from appellant and removed a live shell.[5] Another officer stated appellant stated "Kill me. Finish me off. Finish the job."

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[2] The tape consists of several calls to 911. Appellant requested a large portion of the third call which had been placed by Stacy and which reflects her distress be redacted. Over the State's objection, the trial judge agreed the bulk of the third call should be redacted for purposes of the guilt phase.

[3] A second call is unclear. The operator asks "were they fighting?" The response is inaudible.

[4] Testimony indicated appellant had a self-inflicted gunshot wound.

[5] Four live shotgun shells were found in appellant's pockets.

A paramedic testified Stacy asked about her brother and begged not to let her die. She stated she was having trouble breathing. The paramedic estimated Stacy died within ten minutes of his arrival.

A detention center nurse testified, while arguing over who would receive medical treatment first, appellant told another inmate, ". . . I've killed three people and don't mind making it four." A detention center officer stated, on the one year anniversary of the shootings, appellant pointed to the newspaper picture of Dorothy and stated, either "I killed this witch" or "I killed this bitch" and referred to her as the devil. He stated he loved Linda and Stacy.

PENALTY PHASE

At the beginning of the three-day sentencing proceeding, appellant moved to exclude the admission of the unredacted 911 tape, arguing the tape's probative value did not outweigh its prejudicial impact. The trial judge overruled the objection, concluding the tape, while "extremely prejudicial," was relevant to the aggravating circumstance of torture.[6]

After the State played a portion of the 911 tape, Stacy's father identified the scream on the tape as belonging to his daughter. Thereafter, the State played the tape in its entirety. In addition to identifying appellant as the

[6] The State alleged the following statutory aggravating circumstances: with regard to Dorothy, two murders by one act or pursuant to one scheme or course of conduct and during the commission of burglary; with regard to Linda, two murders by one act or pursuant to one scheme or course of conduct and during the commission of burglary; with regard to Stacy, two murders by one act or pursuant to one scheme or course of conduct, the murder was committed during the commission of burglary, and the murder was committed while in the commission of physical torture. S.C. Code Ann. § 16-3-20 (C) (a)(1)(c) & (h) and (a)(9) (Supp. 2001).

shooter, the tape contains several minutes of Stacy's conversation with the 911 dispatchers. Stacy's breathing is labored and she has difficulty speaking. Several times, Stacy states "I'm hurting" and "please hurry." Her pain and suffering are evident.

Appellant offered several witnesses in mitigation. An expert in clinical social work testified appellant lacked socialization skills, was emotionally immature, dependent on relationships, and that chronic alcohol problems ran in his family. An expert in psychopharmacology testified appellant suffered from chronic depression, anxiety, and alcohol dependency. He suggested alcohol usage may have caused some brain damage. An expert in neurology testified appellant's MRI revealed a loss of brain tissue.

An expert in psychiatry diagnosed appellant with depression, possible post-traumatic stress syndrome as a result of the shootings, and possible malingering. An expert in forensic psychiatry diagnosed appellant with "adjustment disorder with depressed mood" as a result of the shootings.

Detention center witnesses testified appellant had not caused any problems in jail while awaiting trial. An expert in the field of prisons and corrections testified appellant could be confined in a correctional environment for the rest of his life without harm to himself or others.

Appellant did not testify. He did not make a final statement to the jury.[7]

[7] The trial judge instructed the jury on the following statutory mitigating circumstances: 1) appellant had no significant history of prior criminal convictions involving the use of violence against another person, 2) the murder was committed while appellant was under the influence of mental or emotional disturbance, 3) appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and 4) appellant's mentality at the time of the crime. S.C. Code Ann. § 16-3-20(b) (1)(2)(6)(7) (Supp. 2001).

During closing argument, the solicitor played a portion of the 911 tape (apparently the beginning of the tape with screaming and gunshots). He later played all of the tape.

ISSUES

I. Did the trial judge err by allowing the solicitor to "exploit" portions of the unredacted version of the 911 tape during the sentencing proceeding?

II. During closing argument, did the solicitor improperly comment on appellant's constitutional right not to testify?

III. Did the solicitor's closing argument inject an arbitrary factor into the jury's deliberations?

I.

Appellant argues the trial judge erred by allowing the solicitor to "exploit" that portion of the 911 tape which depicts Stacy's pain and suffering. We disagree.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999).

The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Evidence which would ordinarily be inadmissible in the guilt phase

of trial may be introduced during the penalty phase. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), cert. denied 480 U.S. 940 (1987). During the sentencing phase, the trial judge may permit the introduction of additional evidence of aggravation in order to aid the jury in determining whether to recommend a death sentence. Id.

The 911 tape was properly admitted as its probative value outweighed its prejudicial nature for two reasons. First, Stacy's recorded statements were relevant as they describe the crime scene immediately after she and her family were shot. Like photographs which are generally admissible in the penalty phase of a capital trial, Stacy's comments show the circumstances of the crime and the character of the defendant. Id. (in sentencing proceeding, trial court may admit photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them in order to show the circumstances of the crime and the character of the defendant).

Second, Stacy's apparent physical distress as revealed by the tape was relevant to establish the aggravating circumstance of physical torture.[8] Even though the pathologist described Stacy's gunshot wounds as painful, Stacy's own expression of her pain and suffering more fully chronicles the last few minutes of her life. See State v. Rosemond, supra (use of photographs to corroborate pathologist's testimony victim lived for ten minutes after shooting properly admissible in penalty phase). The 911 tape was properly admitted as it was relevant to the aggravating circumstance of physical torture. See State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, cert. denied 531 U.S. 840 (2000) (crime scene photographs relevant to physical torture); State v. Franklin, 318 S.C. 47, 456 S.E.2d 357, cert. denied, 516 U.S. 856

[8] The statutory aggravating circumstance of physical torture occurs (1) when the victim is subjected to serious physical abuse before death or (2) when the victim is subjected to an aggravated battery before death. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

(photographs admissible in penalty phase of capital proceeding as relevant to issue of physical torture).

Furthermore, the 911 tape was not so unfairly prejudicial so as to substantially outweigh its probative value. While difficult to hear, Stacy's physical and emotional distress is not so disturbing as to suggest appellant's sentence was made on an improper basis. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) (unfair prejudice exists where evidence creates tendency to suggest decision on an improper basis, commonly though not necessarily, an emotional one).

Finally, the solicitor did not unduly exploit the 911 tape during the penalty phase of trial. We agree with appellant that excessive use of an otherwise admissible exhibit could result in a denial of due process. See Payne v. Tennessee, 501 U.S. 808, 825 (1991) ("[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."). Nevertheless, we conclude the use of the 911 tape during the penalty phase of appellant's trial did not result in a denial of fundamental fairness. During the three day proceeding, the prosecution played an excerpt from the 911 tape for identification purposes[9] and the entire tape during the presentation of its evidence. During closing argument, the solicitor again played a portion of the 911 tape and the entire tape. Under the circumstances, the use of the 911 tape did not result in a denial of due process.

II.

Appellant argues the solicitor improperly commented on his constitutional right not to testify during closing argument. We disagree.

During closing argument, the following transpired:

[9] See Rule 901, SCRE.

Solicitor: I'm going to go ahead and play [the answering machine] tape[10] again, and when you listen to that tape, I want you to think about the circumstances of the crime and the characteristics of the Defendant, which is what you all will need to base your decision on.

[Played answering machine tape].

Solicitor: Where is the mitigation evidence in this case? Where is evidence that [appellant] has ever done one good deed or had one decent thought?

Defense Counsel: Your honor, I believe that is burden shifting. He's starting to really - - -

The Court: No, sir. I'll note your objection. I overrule it. Thank you.

(Underline added).

In part, the trial judge charged the jury as follows:

Ladies and gentlemen, I tell you now, and I emphasize to you again that the fact that the Defendant did not testify in this portion of the trial of this case is not a factor to be considered by you in your deliberation and in your consideration on the question of his sentence. It must not be considered by you in any way. It must not mitigate [sic] against him in any respect because the Defendant has a constitutional right to remain silent, and if he chooses to assert that right, that fact cannot and must not be considered by you in your deliberations; and so, please reach no inference and draw no conclusion whatsoever from the fact that the Defendant did not testify in this portion of the case. That should not even be discussed by you. The burden of proof on issues that are in dispute, as I have told you, is upon the State, and the Defendant has no obligation to take the stand or testify, and the fact that he did not take

[10] See recitation of guilt phase evidence.

the stand and testify is not a factor to be considered by you in your decision in this case.

Appellant's argument that the solicitor's comment implicitly referred to his constitutional right not to testify is not preserved for review. At trial, appellant claimed the solicitor's comment improperly shifted the burden of proof; he now claims the comment improperly referred to his right to remain silent. Accordingly, whether the solicitor's comment improperly referred to appellant's right to remain silent is not preserved for review. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (a party cannot argue one basis in support of motion at trial and another ground on appeal).

In any event, the solicitor's statement did not refer to appellant's decision to remain silent. Instead, the statement was a comment on the evidence which had been presented by the prosecution -- appellant's hateful and intimidating threats shortly before the murders -- and the mitigating evidence which had been presented by appellant. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) (court considers context in which remark was made).

Assuming the comment did refer to appellant's decision not to testify, the error was harmless. While the State may not comment on the defendant's right to remain silent, see Griffin v. California, 380 U.S. 609 (1965), an improper reference is subject to harmless error analysis. Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000).

The trial court's instruction to the jury that it could not consider appellant's failure to testify in any way and could not use it against him cured any potential error. Johnson v. State, supra (even if comment on defendant's failure to testify was improper, trial court's instruction that jury could not consider defendant's failure to testify in any way and could not use it against him was sufficient to cure any potential error); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978) (possibility jury might have interpreted solicitor's comment as indicating State's evidence was conclusive proof of defendant's guilt was negated by charge). The lone remark did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process."

Darden v. Wainwright, 477 U.S. 168, 181 (1986), citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

III.

Appellant argues by telling jurors they would be personally responsible for future murders if they did not sentence him to death, the solicitor improperly diverted the jury's attention from consideration of the circumstances of the crime and of his character and improperly injected an arbitrary factor into its consideration. We disagree.

The following transpired during the solicitor's closing argument:

> Solicitor: We know that [appellant] didn't snap. We know that he planned this. It was premeditated. He thought about it for days beforehand.
>
> Defense Counsel: Your honor, object to any arguments of deterrence.
>
> The Court: Excuse me. I'm sorry, the objection is to what?
>
> Defense Counsel: I object to any argument that goes into the line of deterrence, Your Honor.
>
> The Court: I don't think it's going to do to that. That's not where you're going with it.
>
> Defense Counsel: Yes, sir, Your Honor.
>
> The Court: All right, under the law he's allowed to argue general deterrence, I think as I understand. Thank you.
>
> Solicitor: He thought about it before he did it. If you impose the death penalty on [appellant] maybe it will cause somebody else thinking of murder not to do it, and you might spare an innocent life or save a life.

(Underline added).

At the conclusion of the closing arguments, the trial judge noted appellant objected to the State's reference to deterrence. The trial judge overruled the objection.

The solicitor's comment was clearly an argument on general deterrence. General deterrence arguments are admissible in the penalty phase of a capital trial. See State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000), overruled on other grds. 532 U.S. 36 (2001). The argument did not inject an arbitrary factor (fear or personal responsibility) into the jury's consideration. The solicitor's remark did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, supra.

PROPORTIONALITY REVIEW

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of statutory aggravating circumstances for each of the three murders is supported by the evidence. See S.C. Code Ann. § 16-3-25 (1985). Further, the death penalty is neither excessive nor disproportionate to that imposed in similar cases. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721, cert. denied 531 U.S. 882 (2000); State v. Rosemond, supra; State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998), cert. denied, 525 U.S. 1150 (1999); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), cert. denied 525 U.S. 1077 (1999); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990), cert. denied 501 U.S. 1259 (1991).

AFFIRMED.

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

The Supreme Court of South Carolina

O R D E R

Pursuant to Article V, §4, of the South Carolina Constitution, Rule 402, SCACR, is amended as follows:

(1) Rule 402(a) is amended to read:

(a) Board of Law Examiners.

(1) Members. The Board of Law Examiners shall consist of seven (7) members of the South Carolina Bar who are actively engaged in the practice of law in South Carolina and who have been active members of the South Carolina Bar for at least seven (7) years. The Board members shall be appointed by the Supreme Court for three (3) year terms and shall be eligible for reappointment. At least one member shall be appointed from each Congressional District. In case of a vacancy on the Board, the Supreme Court shall appoint a member of the South Carolina Bar to serve the remainder of the unexpired term. The Supreme Court shall appoint a Chair of the Board from among the members of the Board.

(2) Associate Members. The Supreme Court may appoint associate members to assist the members of the Board. These associate members must be members of the South Carolina Bar who are actively engaged in the practice of law in South Carolina and who have been active members of the South Carolina Bar for at least five (5) years. These associate members shall assist the members

of the Board in preparing the essay examinations and model answers, administering the bar examination, and grading the examination, and shall have such additional duties as may be determined by the members of the Board. While the Supreme Court shall not be limited in whom it appoints, the members of the Board shall nominate persons to serve as associate members.

(3) Secretary. The Clerk of the Supreme Court shall serve as secretary of the Board ex officio.

(4) Duties of the Board. It shall be the duty of the Board of Law Examiners to determine whether applicants for admission to the practice of law in South Carolina possess the necessary legal knowledge for admission. Subject to the approval of the Supreme Court, the members of the Board are authorized to make rules and regulations for conducting the examination, including a list of the subjects upon which applicants may be tested and regulations providing for the accommodation of disabled applicants. These rules and regulations shall not become effective until at least ninety (90) days after they are approved by the Supreme Court.

(2) The second sentence of Rule 402(e) is replaced with the following: "Six (6) of these sections shall be composed of essay questions prepared by the members of the Board of Law Examiners. The Chair of the Board shall assign a member of the Board to prepare and grade or supervise the preparation and grading of each essay section."

These changes shall be effective immediately.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 27, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jimmie D. McMillan, Respondent,

v.

Gold Kist, Inc., Appellant.

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

Opinion No. 3593
Heard December 11, 2002 - Filed January 27, 2003

REVERSED

Joseph Gregory Studemeyer, of Columbia; for Appellant

Clyde A. Eltzroth, Jr., and John E. Parker, of Hampton; for Respondent.

HEARN, C.J.: Gold Kist, Inc. appeals from two circuit court orders finding it was prohibited from enforcing an arbitration agreement

adopted by an amendment to its bylaws. Gold Kist argues that by signing a membership agreement, McMillan was bound by Gold Kist's subsequently adopted arbitration policy. We agree and reverse.

FACTS

Gold Kist is an agricultural cooperative organized under and governed by the Georgia Cooperative Marketing Act and the Georgia Non-Profit Code. Gold Kist's membership consists of farmers, and the members elect the Board of Directors, which governs the cooperative. Gold Kist maintained a retail facility in Allendale, South Carolina, which sold farming supplies until October 13, 1998. The stock of the retail facility was delivered from out of state.

McMillan, a farmer, applied for membership with Gold Kist on January 24, 1986, by signing a "Membership, Marketing, And/Or Purchasing Agreement of Gold Kist." The Agreement provided that by signing up for a membership, new members agreed to abide by the bylaws of Gold Kist then in effect as well as any bylaws the board of directors adopted in the future.

On April 4, 1991, McMillan signed an acknowledgment that he received a copy of his membership agreement with Gold Kist. The agreement provided, among other things, that by signing a membership agreement:

> [t]he member will be eligible for the benefits of membership and also that the member will honor and abide by the rules of membership as contained in the cooperative's Articles of Incorporation, By-Laws, and Board of Directors' policies, <u>all of which may be changed from time to time.</u>

(emphasis added).

Although no arbitration policy had previously existed, Gold Kist's Board of Directors adopted an arbitration policy on October 28, 1993.

The policy stated that any disputes between Gold Kist and its members were subject to arbitration governed by the Federal Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association. The policy also provided that it did not apply to "any purchases or sales between Gold Kist and members, or any contracts for such purchases or sales, if the transactions were completed or the contracts executed prior to the effective date of this policy." The policy became effective January 1, 1994.

On the same date, Gold Kist amended its bylaws to reflect the new arbitration policy. The amendment to the bylaws provided:

> Section 7. **Disputes Between Gold Kist and Members: Remedies**.
>
> a) Arbitration. Gold Kist and members will submit to binding arbitration all disputes between the parties, whether governed by federal, state, or international contract law, tort law, statute or treaty, and irrespective of the form of relief sought, relating to or arising out of matters of a type declared by Gold Kist's Board of Directors before the dispute arises to be of a type covered by Gold Kist's arbitration policy. All such arbitrations shall be according to rules and procedures adopted from time to time by Gold Kist's Board of Directors.

The board of directors amended the bylaws again on October 25, 1996, and the arbitration section included in the 1993 amendment was also included in the 1996 amendment.

McMillan purchased lime for use on his farm from Gold Kist's Allendale, South Carolina, store in 1996 and 1997. The lime originated in Tennessee. McMillan apparently failed to pay for the products purchased from Gold Kist.

On November 27, 2000, Gold Kist sent McMillan a demand for arbitration, alleging that McMillan owed it $57,337.40. On January 30, 2001, McMillan filed two actions in circuit court against Gold Kist: (1) an action seeking damages for $75,000 in losses allegedly caused by defective lime sold by Gold Kist or negligently applied by Gold Kist, resulting in damage to his farm and decreased crop yield; and (2) an action seeking a declaratory judgment that McMillan was not required to arbitrate his dispute with Gold Kist. He also sought a restraining order prohibiting Gold Kist from proceeding with the arbitration. Gold Kist denied McMillan's allegations and filed motions to stay McMillan's action for damages and to compel arbitration.

Following a hearing, the circuit court issued two orders. Regarding Gold Kist's motion to stay McMillan's action for damages and to compel arbitration, the circuit court found that Gold Kist had failed to prove McMillan was aware of the arbitration policy in the bylaws or that he had agreed to be subject to the amendment. Looking to the section of the Georgia Code of Laws governing agricultural cooperatives, the circuit court noted that section 2-10-86 did not authorize bylaws mandating arbitration. The circuit court determined that because Gold Kist failed to show McMillan consented to change the terms of the original membership agreement to include a mandatory arbitration clause, the arbitration policy did not apply to McMillan. The court denied Gold Kist's motion to stay damages and to compel arbitration.

On May 24, 2001, the circuit court issued an order ruling on McMillan's declaratory judgment action. Relying on the same considerations from the previous order, the circuit court determined the arbitration policy was not binding upon McMillan. Gold Kist appeals from both orders.

STANDARD OF REVIEW

Where, as here, the existence of a membership agreement is not in question, the construction of the agreement is a matter of law. See Watts v. Monarch Builders, Inc., 272 S.C. 517, 252 S.E.2d 889 (1979) (holding that in the absence of fraud, the construction of a clear and unambiguous contract

is a matter of law). If the membership agreement is construed to contain an arbitration clause, whether McMillan's claims are subject to arbitration is an "issue for judicial determination, unless the parties provide otherwise." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Determinations of arbitrability are subject to de novo review." Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002) (citing U.S. v. Bankers Ins. Co., 245 F.3d 315, 319 (4th Cir. 2001)); see also General Equip. & Supp. Co. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) ("[T]he determination of whether a party waived its right to arbitrate is a legal conclusion subject to de novo review."). Nevertheless, a circuit court's factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999).

LAW/ANALYSIS

Gold Kist argues the circuit court erred in finding McMillan was not bound by the amendment of the bylaws, and thereby finding the arbitration clause inapplicable to McMillan. We agree and reverse.

I. Validity of Gold Kist's Arbitration Policy

Initially, we note that South Carolina law generally favors arbitration. See Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 464, 556 S.E.2d 397, 399 (Ct. App. 2001) (citing Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995)). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999).

A. Amending Bylaws To Include an Arbitration Clause

First, we consider whether Gold Kist could amend its bylaws to include an arbitration policy. Because Gold Kist is an agricultural cooperative formed in Georgia, actions it may take are governed by the

Georgia Cooperative Marketing Act. Section 2-10-86 of the Act requires a cooperative to adopt bylaws within thirty days of incorporation. Ga. Code Ann. § 2-10-86 (a) (Supp. 2001). However, the section does not specifically list arbitration clauses. Georgia law also provides that "[i]t is a general rule that a corporation may enact any bylaw for its internal management so long as such bylaws are not contrary to its charter, a controlling statute, its articles of incorporation, or violative of any general law or public policy." Booker v. First Federal Sav. and Loan Ass'n, 110 S.E.2d 360, 362 (Ga. 1959).

The Georgia Court of Appeals recently addressed issues very similar to the present action in Rushing v. Gold Kist, Inc., 567 S.E.2d 384 (Ga. App. 2002). There, Gold Kist and a collection company filed a motion to compel Rushing, a farming cooperative member, to arbitrate based on his default on a note. As in the present case, the membership agreement provided that Rushing agreed to be bound by future amendments to the bylaws, and it was signed by Rushing several years before Gold Kist adopted the amendment to the bylaws mandating arbitration. Although Rushing argued the arbitration clause was not binding upon him because he did not agree to it, the court held Rushing agreed to be bound by future amendments to the bylaws when he signed the membership agreement, thus agreeing to bind himself to arbitration. Id. at 387-88.

We agree with this result[1] and find the circuit court erred in determining that Gold Kist's arbitration clause was not validly adopted into its bylaws. In making its determination, the circuit court relied heavily on the fact that arbitration clauses are not specifically listed under section 2-10-86(a) of the Georgia Code, which addresses cooperatives' bylaws. However, this silence also indicates that Georgia law does not specifically *forbid* agricultural cooperatives from having arbitration clauses in their bylaws or from amending their bylaws to include such clauses. Therefore, where, as here, the arbitration clause is not contrary to the cooperative's charter, its articles of incorporation, a controlling statute, or public policy, the

[1] Whether or not Georgia law allows cooperatives to amend their bylaws to include an arbitration policy was not precisely argued in Rushing; however, the case's holding implies that such amendments are valid. Id.

cooperative can amend its bylaws to include such a clause. See Booker, 110 S.E.2d at 262.

B. Governing Law

Next, we address whether Gold Kist's arbitration clause is governed by the requirements of the South Carolina Arbitration Act or the Federal Arbitration Act.

The South Carolina Arbitration Act delineates specific notice requirements for arbitration clauses. The Act provides that "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10 (a) (Supp. 2001). This section is strictly construed and failure to comply with its terms renders the arbitration clause unenforceable. See Zabinski, 346 S.C. at 588, 553 S.E.2d at 114 (finding that this section of the South Carolina Arbitration Act must be strictly construed).

However, the Federal Arbitration Act (FAA) preempts state arbitration law in some instances. "Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); Cox, 347 S.C. at 464, 556 S.E.2d at 400. Section 2 of the FAA provides that a written provision in a contract requiring parties to submit to arbitration arising out of controversies surrounding the contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, the FAA does not impose specific procedures regarding how notice of arbitration must be given in contracts.

The parties do not dispute that the arbitration clause failed to meet the technical requirements of South Carolina law in that the notice of

arbitration was not in bold letters or stamped on the first page of the contract. However, because evidence in the record shows that some of the stock for Gold Kist's store came from Tennessee,[2] interstate commerce was involved. Thus, the FAA, which does not require special fonts or lettering in the arbitration clause, preempts state law in this instance.

We therefore hold that Gold Kist was permitted to amend its bylaws to include an arbitration clause and that the arbitration clause is valid under the FAA.

II. Applicability of the Arbitration Agreement to McMillan

Finally, we consider whether the arbitration clause was binding upon McMillan. As a condition of membership, McMillan agreed that future amendments to the bylaws would be binding on him. We find that this agreement did in fact bind McMillan to the subsequent amendment requiring arbitration. See, e.g., Davis v South Carolina Cotton Growers' Co-op. Ass'n, 127 S.C. 353, 358, 121 S.E. 260, 261 (1924) (finding that where bylaws allowed the director to determine the voting procedures, a subsequent resolution regarding voting procedures was thereafter binding on all members); 18 Am.Jur.2d Cooperative Associations § 14 (1985) ("A member of a cooperative association may enter into a contract to be bound by articles, bylaws, rules, and regulations of the association theretofore or thereafter

[2] McMillan argues Gold Kist failed to establish that the lime originated outside the state because the affidavit attached to Gold Kist's motion to compel arbitration only alleged that the lime "would have originated in Tennessee"; it did not allege the lime *did* originate in Tennessee. However, the affidavit also states that Gold Kist's store in Allendale, South Carolina, "sold . . . farm production supplies to local farmers, which were delivered to the facility from out of state, either by tractor trailer or by rail." Therefore, we find the affidavit sufficiently establishes that the transaction between McMillan and Gold Kist involved interstate commerce. See generally BLACK'S LAW DICTIONARY 263 (7th ed. 1999) (defining interstate commerce as "[t]rade and other business activities between those located in different states").

passed by the association . . . [and it is] binding upon the association and its members."). Although McMillan did not specifically consent to the adoption of the arbitration policy into the bylaws, his agreement in his membership application to confer the power to amend bylaws upon the directors amounted to consent to the amendment and did not affect the substance of his contract with Gold Kist. See Rushing, 567 S.E.2d at 387-88. Further, although there is no evidence in the record that McMillan was given actual notice of the amendment of the bylaws to include an arbitration policy, he is still bound by the amendment because it did not affect the validity of his contract with Gold Kist. Roach v. Farmers' Mut. Ins. Ass'n of Oconee Co., 102 S.C. 478, 481, 86 S.E. 950, 952 (1915) (stating that a member is bound by amendments to or changes in the bylaws even if the member had no notice of the changes except when the amendments affect the terms of the contract).

McMillan's membership contract with Gold Kist provided, in part, that he would provide agricultural products to Gold Kist for marketing purposes and that he would purchase equipment or fertilizer from Gold Kist. The terms of this contract were not affected by the subsequent adoption of the arbitration clause. Since arbitration is favored, we find the circuit court erred in holding Gold Kist's arbitration policy was not applicable to McMillan.

CONCLUSION

Because the circuit court erred in finding the arbitration policy was not binding on McMillan, we **REVERSE.**

CURETON and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Second Injury Fund,

Appellant,

v.

Liberty Mutual Insurance Company,

Respondent.

IN RE:
Gilford R. Etheredge,

Claimant,

and

Gasque Farms,

Employer.

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

Opinion No. 3594
Submitted May 6, 2002 - Filed January 27, 2003

AFFIRMED

P. Brooks Shealy, of Columbia, for appellant.

Pope D. Johnson, III, of Columbia, for respondent.

SHULER, J.: In this workers' compensation case, the South Carolina Second Injury Fund appeals from a circuit court order affirming the full commission's finding that Liberty Mutual Insurance Company was entitled to reimbursement for death benefits paid to the estate of Gilford R. Etheredge. We affirm.

FACTS/PROCEDURAL HISTORY

In May 1994, Gasque Farms owned and operated approximately 2,700 acres of farmland in and around Elloree, South Carolina. At the time, the business employed 62-year-old Gilford Etheredge to assist in managing its farming operations. Etheredge's usual duties included running errands, carrying fuel and dinner to field hands, and other similar tasks. Etheredge, however, normally did not operate farm equipment.

On May 24, 1994, Gasque Farms employees intentionally set fire to a 104-acre cut-over wheatfield. Although the burning of cut-over fields was standard practice, in this instance the fire blazed out of control. Shortly after noon, the fire jumped across a ditch and highway and began consuming a 55-acre field of unharvested wheat.

Manager Everett Gasque enlisted Etheredge to assist in controlling

highway traffic affected by the heavy smoke. Gasque also sent Etheredge to retrieve a chainsaw to be used in containing the fire; Etheredge made two trips but returned with non-operational saws on both occasions. After a reprimand from Gasque, Etheredge spent the better part of the afternoon dealing with the fire and its aftermath. At approximately 5:30 p.m., he climbed into the cab of the farm pickup truck. As he cranked the engine, Etheredge suffered a fatal heart attack and the truck rolled down an embankment and into a nearby ditch.

Etheredge's widow filed a claim against Gasque Farms for workers' compensation death benefits. Liberty Mutual Insurance Company, Gasque Farms' compensation carrier, accepted the claim and paid benefits to Etheredge's estate. Liberty subsequently sought reimbursement from the South Carolina Second Injury Fund. The Fund denied Liberty's reimbursement claim and Liberty requested a hearing before the workers' compensation commission.

Following a hearing in December 1999, the single commissioner found Etheredge did not suffer an injury by accident arising out of and in the course of his employment and therefore agreed with the Fund that Liberty was not entitled to compensation pursuant to S.C. Code Ann. § 42-9-400(a) (1985). In addition, the commissioner noted the evidence was insufficient to establish Gasque Farms' knowledge of Etheredge's preexisting physical impairment as required by subsection (c) of the statute.

Liberty appealed and the full commission reversed. By order dated August 15, 2000, the commission held Etheredge's fatal heart attack was a compensible accident caused by unusual and extraordinary circumstances in his employment. The commission further concluded the knowledge prerequisite of § 42-9-400(c) was satisfied because Etheredge never knew he had a heart condition. Finding the company met the conditions for reimbursement, the commission ordered the Fund to reimburse Liberty, pursuant to § 42-9-400(a), for all aspects of the claim arising out of Etheredge's death.

The Fund petitioned the circuit court for review. Following a hearing on January 3, 2001, the circuit court issued an order affirming the full commission. This appeal followed.

LAW/ANALYSIS

Standard of Review

The Administrative Procedures Act establishes the applicable standard of review for decisions of the workers' compensation commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Adkins v. Georgia-Pacific Corp., 350 S.C. 34, 564 S.E.2d 339 (Ct. App. 2002). Pursuant to the Act, an appellate court

"shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (1986). Thus, in reviewing a commission decision, this Court will not overturn factual findings unless "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Id. at § 1-23-380(A)(6)(e); see Adams v. Texfi Indus., 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000). "Substantial evidence" is evidence which, considering the entire record, would allow reasonable minds to arrive at the same conclusion reached by the administrative agency. See Adams, 341 S.C. at 404, 535 S.E.2d at 125; Lark, 276 S.C. at 135, 276 S.E.2d at 306.

Discussion

The South Carolina Second Injury Fund is intended to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995). Reimbursement from the Fund is governed by section 42-9-400, which provides in pertinent part:

> If an employee who has a permanent physical impairment . . . incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation . . . for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury . . . than that which would have resulted from the subsequent injury alone . . . [the employee's] employer or his insurance carrier shall be reimbursed from the Second Injury Fund . . . .

S.C. Code Ann. § 42-9-400(a) (1985). The statute also contains a "knowledge" provision that requires an employer seeking reimbursement to demonstrate it either knew of the employee's preexisting permanent physical impairment or did not know because the employee concealed the condition or was unaware of it himself. Id. at § 42-9-400(c).

The Fund first argues the circuit court erred in affirming the commission's determination that Etheredge had a preexisting permanent physical impairment as defined in § 42-9-400(d). This issue is not preserved.

The Fund's petition for review listed forty-nine exceptions to the decision of the full commission. Although the transcript from the hearing before the circuit court reveals the Fund challenged the commission's finding that Etheredge's preexisting heart condition was a permanent physical impairment as defined in § 42-9-400(d), the circuit court's order fails to address the issue. As the Fund did not file a Rule 59(e), SCRCP motion requesting a ruling, the issue is not preserved for appellate review. See Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (affirming court of appeals' conclusion that issue that had been raised to but not ruled upon by the trial court was not preserved for review where the appellant failed to make a Rule 59(e) motion to alter or amend the judgment); Fraternal Order of Police v. South Carolina Dep't

of Revenue, 332 S.C. 496, 501, 506 S.E.2d 495, 497 (1998) (finding argument on appeal not preserved even where raised to the circuit court because "that court failed to rule on the issue and [appellants] failed to call this omission to the circuit court's attention in a Rule 59(e), SCRCP, motion").

The Fund next asserts the circuit court erred in affirming the commission's conclusion that Etheredge had no prior knowledge of his heart condition. We disagree.

At autopsy, Dr. Joel Sexton determined Etheredge had severe coronary atherosclerosis and concluded Etheredge died from acute coronary insufficiency, i.e., a heart attack, as a result. In deposition testimony, Etheredge's wife of thirty-four years, Connie, stated neither she nor Etheredge was aware of any significant health problems prior to the heart attack. She further testified Etheredge did not have high blood pressure, and related that a physical examination by his personal physician in December 1993 revealed no health problems other than a usual admonition for Etheredge to watch his weight.

Although Connie testified her husband complained of chest pain the evening before he died, she stated he told her it was "like when you fell out of the tub . . . like a pulled muscle or something . . . a bad rib." Etheredge advised Connie he thought the pain stemmed from a job repairing an irrigation pump because the other employee with whom he had been working "complained about the same thing." In testimony before the commission, farm manager Everett Gasque also averred he was unaware Etheredge, whom he had employed for seven years, had any heart problems prior to the fatal attack.

The Fund presented no evidence contradicting either Gasque or Connie Etheredge's testimony and the obvious conclusion that Etheredge was unaware of his coronary problems. We therefore agree with the circuit court that the evidence presented would allow a reasonable mind to reach the same result as the commission on this issue.

The Fund further contends the circuit court erred in affirming the commission's finding that Etheredge's employment conditions on May 24, 1994 were unusual or extraordinary. We discern no error.

An employee who becomes sick or dies of natural causes on the job "does not suffer an accident arising out of employment because the condition is a natural result or consequence that might be termed normal and to be expected." Jennings v. Chambers Dev. Co., 335 S.C. 249, 255, 516 S.E.2d 453, 456 (Ct. App. 1999). However, an employee who dies of a heart attack or other vascular injury while working may be entitled to workers' compensation benefits if it is shown "the death arose out of employment, in that it was brought about by unexpected strain or over-exertion, or as a result of unusual and extraordinary conditions of employment." Id.; see Lockridge v. Santens of Am., Inc., 344 S.C. 511, 520, 544 S.E.2d 842, 847 (Ct. App. 2001) (stating a claimant must prove a heart attack was induced by unexpected strain or by unusual and extraordinary conditions or there is no injury by accident). Although the record here discloses that, for the most part, Etheredge's job involved running errands and otherwise assisting in general farm management, it also reveals that the events of May 24, 1994 turned what was a usual task for farm employees—the burning of harvested fields—into the extraordinary task of managing an out-of-control fire threatening fifty-five acres of unharvested wheat.

As noted by the full commission and circuit court, Etheredge spent several hours that afternoon helping contain the fire and its effects. The fire was extinguished but revived on three separate occasions. Gasque twice sent Etheredge for a chain saw to cut away dead trees; when Etheredge retrieved non-operational saws both times, Gasque raised his voice and cursed him. According to Gasque's testimony before the commission, the whole area was "very smokey" [sic] and everyone working, including Etheredge, was subjected to "a good bit of smoke all day." Gasque explained that despite being about fifty yards away at the time Etheredge's truck went into the ditch, "there was so much smoke there I could not see."

All told, Gasque related it had been a stressful day for him and appeared stressful to others as well. He stated he had experienced only one other similar fire in forty years of farming and that he would "never forget it." Based on this testimony and evidence indicating an abnormally stressful work environment on May 24, we affirm the circuit court decision holding substantial evidence supports the full commission's determination of unusual or extraordinary employment conditions. See Brown v. La France Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985); Poulos by Poulos v. Pete's Drive-In No. 3, 284 S.C. 264, 325 S.E.2d 583 (Ct. App. 1985).

Lastly, the Fund argues it was error for the circuit court to affirm the commission's conclusion that these conditions caused Etheredge's fatal heart attack. We disagree.

The requisite showing for compensability in heart attack cases consists of two distinct parts—medical and legal—each of which relates to causation. See 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 46.03[1] (2002). In general, the legal component is established when the law defines what type of exertion or circumstance of employment satisfies the "arising out of" test, while the required medical showing resolves the question of whether the exertion or particular circumstance in fact caused the injury. Id. Successful claimants must satisfy both. See Shealy, 341 S.C. at 459, 535 S.E.2d at 444 (applying the "heart attack standard" to mental-mental injuries and holding that "[i]n order for Shealy to recover workers' compensation benefits, he must prove *both*: (1) that he was exposed to unusual and extraordinary conditions in his employment; *and* (2) that these unusual and extraordinary conditions were the proximate cause of his mental breakdown") (emphasis added); Moore v. City of Easley, 322 S.C. 455, 462, 472 S.E.2d 626, 630 (1996) ("[A]ngina is compensable only to the extent that it causes disability *and* arises out of extreme or unusual work circumstances."); Owings v. Anderson County Sheriff's Dep't, 315 S.C. 297, 433 S.E.2d 869 (1993) (stating that where substantial evidence supported finding claimant's heart problems were not

causally related to his employment activities, there was no error in concluding the injury did not arise out of his admittedly physically demanding job training).

Undoubtedly, the record must evince a causal connection between any extreme exertion or extraordinary or unusual conditions of employment and a claimant's heart-related injury or death. See Lorick v. SCE&G, 245 S.C. 513, 518, 141 S.E.2d 662, 664 (1965) ("The mere fact of death during employment is not a basis for an award. The death must be proximately caused by an accident that arose out of the employment[,] and the burden is on the claimant to establish such fact."). The burden lies with the claimant to demonstrate causation by a preponderance of the evidence. Id. Whether any causal connection exists between a claimant's employment and an injury is a question of fact for the single commissioner or full commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

In this case, the Fund contends "[t]here is no evidence that anything done . . . or experienced by [Etheredge] brought about his death." A close inspection of the Fund's brief, however, reveals the crux of its argument to be the lack of *direct* evidence, either testimonial or documentary, lay or medical, connecting Etheredge's heart attack to the unusual conditions of his employment on the afternoon of the fire. This argument is misplaced.

It is well settled that evidence tending to establish causation may be circumstantial or inferential in nature. As our supreme court long ago stated:

> "Proof that the claimant sustained an injury and that it arose out of and in the course of employment may be established by circumstantial as well as by direct evidence where the circumstances surrounding the occurrence of the injury are such as to lead an unprejudiced mind reasonably to infer that it was caused by [the] accident . . . ."

Hewitt v. Cheraw Cotton Mills, 217 S.C. 90, 94-95, 59 S.E.2d 712, 714 (1950) (quoting Woodson v. Kendall Mills, 213 S.C. 395, 400, 49 S.E.2d 597, 599 (1948)), *cited with approval in* Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 341, 513 S.E.2d 843, 846-47 (1999); see Robinson v. City of Cayce, 265 S.C. 441, 445, 219 S.E. 2d. 835, 836 (1975) (stating that factual findings in workers' compensation cases "may be based on reasonable inferences drawn from" the evidence); Eagles v. Golden Cove, Inc., 260 S.C. 113, 116, 194 S.E.2d 397, 398 (1973) (sustaining factual finding that bee sting caused employee's death despite absence of an opinion as to cause of death in the record; court specifically noted that "[c]ircumstantial evidence may be used in establishing [a] causal connection between injury . . . and death"); Arnold v. Benjamin Booth Co., 257 S.C. 337, 341, 185 S.E.2d 830, 832 (1971) ("Circumstantial evidence and lay testimony can be sufficient to support a finding of causal connection in a Workmen's Compensation case . . . if the facts and circumstances proved give rise to a reasonable inference that there was a causal connection between the disability and the injury.").

Here, the commission found, and the circuit court reiterated, the following:

> Normally, [Etheredge] was involved in assisting in the management of the farm, running errands, carrying fuel and dinner to the men in the field, and tasks of that nature. He had performed those tasks, on a regular basis, without difficulty for some seven years, notwithstanding his severe coronary disease. The duties that [he] was performing on the afternoon of his death were clearly different. . . . Mr. Etheredge was found dead as a result of a heart attack after a long afternoon of dealing with the fire. Considering all of the evidence, including the evidence of his pre-existing severe coronary artery disease, we find that the

> evidence establishe[s] a causal connection between the unusual and extraordinary circumstances in the employment and the fatal heart attack.

Because substantial record evidence supports this conclusion, we find no error.

AFFIRMED.

CURETON and STILWELL, JJ., concur.