OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

December 18, 2000

ADVANCE SHEET NO. 44

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Roy C. Roberts, Former Florence County Magistrate, Respondent.

Opinion No. 25219
Submitted December 5, 2000 - Filed December 18, 2000

PUBLIC REPRIMAND AND
BAR TO FUTURE JUDICIAL SERVICE

Henry B. Richardson, Jr., and Assistant Attorney General Tracey C. Green, both of Columbia, for the Office of Disciplinary Counsel.

David Michael Ballenger, of Harwell, Ballenger, Barth, and Hoefer, LLP, of Florence, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and Disciplinary Counsel have entered into an agreement under Rule 21, of the Rules of Judicial Disciplinary Enforcement (RJDE), Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. Respondent also agrees never to apply for judicial office in South Carolina without the express written permission of the Supreme Court of South Carolina. We accept the agreement. The facts as admitted in the agreement are as follows.

Facts

Respondent was a magistrate for Florence County from October 1987 until he was placed on interim suspension on October 27, 1999. Respondent resigned his position as magistrate on May 30, 2000.

From May 1999 until June 1999, a certified public accountant (CPA) working for Florence County conducted an internal audit of the financial records for respondent's office for the period of January 1998 until June 1999. The CPA determined that there was a difference of $13,700 between the amount of cash fines for which receipts were given and the amount of cash fines actually deposited into the criminal account. The CPA also determined that there was a deficiency in the civil cash account of $1,325 in filing fees. The CPA found that respondent's clerk maintained a petty cash fund for the office, consisting of funds receipted but not deposited, for the purpose of making change.

From March 12, 1998, through June 30, 1999, respondent cashed nine checks for himself and his wife out of public monies held in his office. Although respondent wrote at least six checks from his personal checking account and placed the checks in the criminal cash bag, those checks were never negotiated and cannot be located. One of the personal checks written from respondent's personal account was in the amount of $225 when respondent's personal checking account reflected a negative balance of $2.22. On March 6, 1998, the date listed on one of the personal checks placed in the cash bag, respondent made a deposit of $75 into his personal checking account, which is the amount written on the non-negotiated check in the cash bag.

Investigators from the Florence County Sheriff's Office discovered a file in respondent's office marked "Money Owed." Inside the file was a yellow Post-It note in respondent's handwriting reflecting "(1) $150 to civil; (2) $200 to crim; and; (3) $300 to crim."

According to the CPA's findings, there were at least fifteen instances during the audit period in which no fees were collected for the filing of civil papers. In each of these instances, there were no documents supporting the claimant's in forma pauperis status, contrary to requirements of Rule 3 of the South Carolina Rules of Civil Procedure. In at least two of

these instances, the party for which no fees were collected for the filing of civil papers was a business entity not entitled to in forma pauperis status.

The CPA also determined that respondent received payments totaling $1,496 as Non-resident Vehicle Compact funds but they were not properly entered into the computer. As a result, at least one of the payees had their drivers license suspended.

Respondent repeatedly failed to reconcile the accounts maintained by his office as required by the published procedures of the South Carolina Office of Court Administration. He also failed to regularly deposit office funds as required by Court Administration. Respondent often kept cash stashed in various locations within the office overnight. Respondent borrowed money from either the civil or criminal accounts maintained in his office, either directly or by having one of his clerks remove the money for him. Respondent failed to respond to indications that money from the civil and criminal accounts was short.

Law

By his conduct, respondent has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (failure to uphold the integrity and independence of the judiciary); Canon 2 (failure to avoid impropriety and the appearance of impropriety in all his activities); and Canon 3 (failing to perform the duties of his office impartially and diligently).

Respondent has also violated the following provisions of the Rules of Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7 (a)(1) (violating the Code of Judicial Conduct): and Rule 7 (a)(4) (persistently failing to perform judicial duties or persistently performing judicial duties in an incompetent or neglectful manner).

Conclusion

We accept the agreement for a public reprimand because respondent is no longer a magistrate and because he has agreed not to hereafter seek another judicial position in South Carolina unless first authorized to do so by this Court. Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

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.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Frederick Hopkins, Jr. Appellant,

v.

Carol G. Hopkins Respondent.

Appeal From Richland County
Berry L. Mobley, Family Court Judge

Opinion No. 25220
Heard October 3, 2000 - Filed December 18, 2000

AFFIRMED IN PART; REVERSED IN PART.

Frederick T. Hopkins, *pro se*, of Florence, for appellant.

Frank A. Barton, of West Columbia, for respondent.

JUSTICE WALLER: In this domestic case, Frederick Hopkins (Father), acting *pro se*, seeks reimbursement of overpayments of child support, attorneys'

fees,[1] and pre- and post-judgment interest from his ex-wife, Carol Hopkins (Mother).

FACTS

Mother and Father were married in 1967; they divorced in May 1983. They had two children: Sean, born May 26, 1972, and Fred, born December 4, 1969. Father was ordered to pay child support of $350.00 per month. In November 1986, Father was found to be $18,693.00 in arrears in his child support, and an order garnishing $432.60 per month of his military disability payments was entered.[2]

The younger son, Sean, went to live with Father for approximately 5 months, from late April, 1990, through September, 1990.[3] In early May 1990, Father instituted the instant action seeking custody of Sean; a hearing was held on May 13, 1990, three days prior to Sean's 18th birthday. Father sought termination of support for his older son Fred, claiming he was over age 18 and was not entitled to post-emancipation support;[4] Father did, however, request Mother be required to pay post-emancipation support for Sean. The family court

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[1] Although Father is currently *pro se*, he was represented at trial by his current wife, attorney Cheryl Turner Hopkins.

[2] Father was injured in the Vietnam war; his sole source of income is his disability check of $1127.00 per month. Seventy dollars of the garnished amount went toward arrears, and 3% went toward administrative costs. The garnishment order provided for a duration until the "child reaches 18, emancipated or married or under court order."

[3] Sean then left Father's custody without notice and returned to Columbia to live with Mother.

[4] See Risinger v. Risinger, 273 S.C. 36, 253 S.E.2d 652 (1979).

gave Father temporary custody of Sean but required Father to continue making his child support payments pending the final hearing.[5]

Due to circumstances beyond the control of the parties, a final hearing was not held until May 13, 1993.[6] The family court found 1) that Father's child support obligations ended Dec. 4, 1987 (Fred) and May 26, 1990 (Sean), and that Father had a "credit" on his child support of $6485.75. Although the family court found it was "inequitable" for Mother to retain the excess post-emancipation support, he declined to require Mother to repay it, believing Father was "in a better position to forego repayment." The family court held both parties should be responsible for their own attorneys' fees.

ISSUES

1). Did the family court err in refusing to require Mother to reimburse Father for excess payments of child support?

2) Did the family court err in ruling Father was not entitled to attorneys' fees?

3) Is Father entitled to pre- and post-judgment interest?

STANDARD OF REVIEW

On appeal from an order of the family court, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Epperly v. Epperly, 312 S.C. 411, 440 S.E.2d 884 (1994).

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[5] The family court noted Father still owed an arrearage, and that an adjustment could be made at the time of the final hearing if Father was entitled to any set-offs.

[6] The family court entered an order on May 13, 1993 immediately terminating the garnishment of Father's disability check.

1. REIMBURSEMENT OF EXCESS SUPPORT[7]

Father contends he is entitled to reimbursement of overpayments of child support. We agree.

The family courts of this state have authority to order reimbursement of child support expenses. See LaFitte v. LaFitte, 280 S.C. 473, 313 S.E.2d 41 (Ct. App. 1984)(remanding issues of reimbursement of past college expenses and payment of further college expenses). The question of child support is largely within the discretion of the trial judge whose decision will not be disturbed on appeal unless an abuse of discretion is shown. Hallums v. Hallums, 296 S.C. 195, 371 S.E.2d 525 (1988).

Here, according to the family court's temporary order from the hearing of May 23, 1990 (three days prior to Sean's emancipation), Father sought to terminate his child support payments, but Mother urged the Court to continue the *status quo* "with the understanding that if [Father's] position is correct pertaining to child support, then issues of arrearage and support can be established and adjusted at the merits hearing. In other words, if [Father] is entitled to a set-off, this can be calculated at the merits hearing and [Father] given proper credit."

At the final hearing, the family court ruled Father had indeed overpaid child support.[8] Notwithstanding the court specifically found it was inequitable

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[7] In addition to claiming entitlement to reimbursement for excess support payments, Father claims he is entitled to child support from Mother for the five-month period during which he had custody of the younger son, Sean. We disagree. The family court found neither child was entitled to post-emancipation support. Sean turned 18 years of age within three days of the 1990 hearing on this matter and was therefore emancipated during the majority of Father's custody. Accordingly, we decline to modify the family court's ruling in this regard.

[8] The family court found Father's overpayments totaled $6485.75. It found Father's child support obligations ended when each child reached age 18; therefore, as to Fred, Jr., the obligation ended 12/4/97; as to Sean, it ended 5/26/90. Our own view of the evidence indicates Father is entitled to only $4616.47 reimbursement. Father had an outstanding arrearage of $18,693.53

for Mother to retain the excess support, it found Mother's financial condition "too precarious" and that Father is in a better position to forego repayment. This assertion is simply not borne out by the record. While it is true that Mother subsequently filed for bankruptcy, the evidence at trial demonstrated Father had a net income of $794.40 per month and Mother had a net income of $5614.00 per month (including $412.00 child support). There is simply no evidence in the record Father was in fact in a better position to forego repayment. Accordingly, we find the court abused its discretion in refusing to require Mother to reimburse the excess payments. Bull v. Smith, 299 S.C. 123, 125, 382 S.E.2d 905, 906 (1989) (child support awards are reviewed for abuse of discretion); Watson v. Watson, 291 S.C. 13, 351 S.E.2d 883 (Ct. App. 1986)(requiring wife to repay husband amounts she received as *pendente lite* support where final hearing demonstrated she was not entitled to support). Accordingly, the family court's order is reversed on this issue.

2. ATTORNEYS' FEES

Father, who was represented at trial by his attorney/wife, contends the family court erred in denying his request for attorneys' fees. We disagree.

In Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.1d 14 (2000), we recently addressed the issue of whether a *pro se* attorney/litigant is entitled to attorneys' fees. In Calhoun, the Wife in a domestic proceeding, who happened to be an attorney, appeared *pro se* at trial. She sought to recover attorneys' fees for the 120.4 hours she spent defending the action. This Court acknowledged that a majority of states allow *pro se* litigants to recover attorneys' fees. However, we nonetheless chose to follow the minority rule and deny attorney's fees to such litigants. We found a *pro se* litigant, whether an attorney or layperson, does not become "liable for or subject to fees charged by an attorney." Accordingly, we held Calhoun was not entitled to recover attorneys' fees for time spent defending

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on Nov. 17, 1986; he paid a total of $5460 toward that arrearage from 1986 until the time of trial in 1993. He also paid a total of $17,850 post-majority support ($11550.00 for Fred, and $6300.00 for Sean). Accordingly, Father paid a total of $23,310 toward his arrearage of $18,693.53, resulting in an overage of $4616.47. Mother is therefore ordered to reimburse this amount.

herself.[9]

Similarly, here, we find no evidence Father actually became "liable for or subject to" attorneys' fees for his attorney/wife's service. There is no contract or fee agreement in the record, nor is there any indication or testimony that Father's wife/attorney has attempted or intends to collect the fees from Father. Accordingly, Father did not prove that he became liable for the fees, such that the family court properly denied Father's request. Cf. Lisa v. Strom, 904 P.2d 1239, 1242 (Ariz. 1995) (finding award of attorneys' fees has an "indispensable requirement . . .[there] be a genuine financial obligation on the part of the litigants to pay such fees," and that wife represented by her attorney/husband had no such genuine obligation).

3. INTEREST

Finally, Father asserts he is entitled to pre- and post-judgment interest. We disagree.

South Carolina Code Ann. § 34-31-20(B) (1987) states that money decrees and judgments of courts enrolled or entered shall draw interest at a rate of 14% per annum. Prior to this opinion, Father received no money judgment; accordingly, he is not entitled to post-judgment interest. Further, in Calhoun, supra, we recently held pre-judgment interest must be pled in order to be recovered. As no request for pre-judgment interest was made below, Father is not entitled to such an award.

CONCLUSION

Father is entitled to reimbursement of $4616.47 from Mother. The remainder of the family court's order is affirmed.

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[9] Attorneys' fees have also been denied to *pro se* attorney/litigants for the policy reason that it would simply be unfair to allow *pro se* **attorneys** to recover fees, while denying such fees to *pro se* **laymen**. See Lisa v. Strom, 904 P.2d 1239, 1243 (Ariz. 1995).

AFFIRMED IN PART; REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of George
B. Brown, former
Beaufort County
Magistrate, Respondent.

Opinion No. 25221
Submitted December 5, 2000 - Filed December 18, 2000

PUBLIC REPRIMAND AND
BAR TO FUTURE JUDICIAL SERVICE

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

Hutson S. Davis, Jr., of Beaufort, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, of the Rules of Judicial Disciplinary Enforcement (RJDE), Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. Respondent also agrees never to apply for a judicial office in South Carolina without the express written permission of the Supreme Court of South Carolina. We accept the agreement. The facts as admitted in the agreement are as follows.

Facts

Respondent served as a magistrate for Beaufort County from April 5, 1989, until his resignation on February 1, 2000. During his tenure as magistrate, respondent was responsible for depositing judicial funds received from operations of the Beaufort County Criminal/Traffic Court, and from Beaufort County Civil Magistrate's Court.

In 1988 or 1989, respondent had an extra-marital affair. The woman with whom he had the affair began requesting money from respondent. He sent both personal and court funds to her via money orders and cashier's checks.

On January 31, 2000, respondent admitted to Beaufort County administrators and to Chief Magistrate Rita Simmons that he had taken approximately $8,880.71 in cash from judicial deposits. This money was taken from several Criminal/Traffic Court deposits and from several Civil Court deposits all dated in December of 1999 and January of 2000. Respondent stated that he was being blackmailed by the woman with whom he had had the affair. On February 1, 2000, the deposits were received by BB&T Bank and all monies from the deposits were accounted for.

A search conducted of respondent's office on February 1, 2000, revealed numerous money orders and wire transfers from respondent to the woman. Money orders were discovered from each year between 1990 and 2000. SCE&G bills were found in the name of the woman but with respondent's mailing label on them. Also found at respondent's office was a criminal history of the woman.

On February 15, 2000, respondent was interviewed at the Beaufort County Law Enforcement Center. Respondent admitted using monies taken from judicial deposits to send to the woman with whom he had the extra-marital affair in 1988/1989. Respondent stated that during the summer of 1999 he began "kiting," or "floating," judicial deposits in order to obtain money to send to the woman. He stated that the woman had exhausted him of his personal funds and that he would use cash from a judicial deposit, then hold that deposit until he could use money from the next

deposit to pay back the first one. As a result, deposits were often made late to cover the cash taken from them. Eventually, respondent did not have the money to replace the funds he had taken from the deposits.

An initial review by Beaufort County showed a total of $17,587.71 missing from deposits, of which $8,890.71 was cash, the balance from checks and money orders. On February 2, 2000, respondent's attorney delivered $2,320.75 in cash to Judge Simmons, along with a Magistrate's Office receipt book. Those funds belonged to Beaufort County. The receipts in the receipt book totaled $2,342.03.

The law enforcement investigation concluded that a total of $12,374.74 had been embezzled. The sum of $11,537.46 was recovered after the investigation began, leaving $837.28 missing, as of February 22, 2000. Respondent repaid the remaining missing funds by March 15, 2000.

Respondent was indicted by a Beaufort County Grand Jury on February 4, 2000, and charged with embezzlement of $12,374.74 in public funds, a violation of S.C. Code Ann. § 16-13-210 (Supp. 1999). Respondent was allowed to enter the Pre-Trial Intervention Program (PTI) administered by the Solicitor's Office for the Fourteenth Judicial Circuit.

When Judge Simmons first brought this matter to respondent's attention, he failed to meet with her over the weekend of January 28, 2000. Over that weekend, respondent attempted to borrow funds from a relative to replace the funds in the court deposits. Judge Simmons then submitted a complaint to the Commission on Judicial Conduct.

The Commission wrote respondent a letter dated February 1, 2000, requesting a response. Respondent did not respond to the letter, but did, through his attorney, verbally communicate with the Office of Disciplinary Counsel. Thereafter, a full investigation was authorized by an Investigative Panel of the Commission on Judicial Conduct. A Notice of Full Investigation was sent to respondent, and although he replied, respondent failed to address or respond to the issues therein. Respondent did, however, appear before Disciplinary Counsel on September 14, 2000, and responded to all questions presented.

Respondent failed to follow rules, regulations, and court orders

from the Office of Court Administration and the Supreme Court regarding the handling of judicial funds and financial record keeping. Where respondent did keep records, information contained therein was false. Respondent commingled his personal funds with official funds, belonging to the State and/or Beaufort County. He misappropriated State and/or Beaufort County funds for his personal use. By these actions, respondent violated the criminal law of South Carolina.

Law

By his conduct, respondent has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (failure to uphold the integrity and independence of the judiciary); Canon 2(A) (failure to respect and comply with the law and failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2(B) (failure to avoid allowing family, social, political or other relationships to influence the judge's judicial conduct or judgment); Canon 3(A) (failure to insure judicial duties take precedence over all the judge's other activities); Canon 3(B)(2) (failure to be faithful to the law and to maintain professional competence in it); Canon 3(C)(1) (failure to diligently discharge the judge's administrative responsibilities without bias or prejudice and failure to maintain professional competence in judicial administration); Canon 4(A)(2) (failure to conduct extra-judicial activities so that they do not demean the judicial office); and Canon 4(D)(1) (engaging in financial dealings that may reasonably be perceived to exploit the judge's judicial position).

Respondent has also violated the following provisions of the Rules of Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (violating the Code of Judicial Conduct); Rule 7(a)(2) (willfully violating a valid order of the Supreme Court, Commission or panels of the Commission in a proceeding under these rules); Rule 7(a)(3) (being convicted of a crime of moral turpitude or a serious crime); Rule 7(a)(4) (persistently failing to perform judicial duties or persistently performing judicial duties in an incompetent or neglectful manner); and Rule 7(a)(6) (consistently failing to timely issue orders, decrees, opinions or otherwise perform official duties without just cause or excuse).

Conclusion

We accept the agreement for a public reprimand because respondent is no longer a magistrate and because he has agreed not to hereafter seek another judicial position in South Carolina unless first authorized to do so by this Court. Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND

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.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Glenn Yarborough, III, Respondent.

Opinion No. 25222
Submitted November 27, 2000 - Filed December 18, 2000

DISBARRED

Henry B. Richardson, Jr. and Deputy Disciplinary Counsel Susan M. Johnston, both of Columbia, for the Office of Disciplinary Counsel.

John P. Freeman, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and 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 disbarment from the practice of law in this state. We accept the agreement and disbar respondent.[1] The facts as admitted in the agreement are as follows.

[1]Respondent was transferred to incapacity inactive status by order of this Court dated September 1, 2000. In the Matter of Yarborough, ___ S.C. ___, 536 S.E.2d 870 (2000).

Facts

Respondent was holding $150,000 in criminal forfeiture funds in an escrow account for payment to the United States Government. Respondent purchased shares of stock "on the margin" for his personal use. The purchased stock declined in value and respondent was required to make payment on a margin call in the amount of $122,170. Respondent paid the margin call with funds out of the escrow account. When required to make payment of the $150,000 to the United States Government, respondent began a scheme of check kiting. Respondent pled guilty to one count of bank fraud under 18 U.S.C. § 1344.

Law

By his conduct, respondent has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(violating the Rules of Professional Conduct); Rule 7(a)(4)(being convicted of a crime of moral turpitude or a serious crime); 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); and Rule 7(a)(6)(violating the oath of office taken upon admission to practice law in this state).

Respondent has also violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (a lawyer shall hold and safeguard property of clients or third persons separate from the lawyer's own business or personal property); Rule 8.4(a)(violating the Rules of Professional Conduct); Rule 8.4(b)(committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); Rule 8.4(c)(engage in conduct involving moral turpitude); Rule 8.4(d)(engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e)(engage in conduct prejudicial to the administration of justice).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DISBARRED.

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.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of W. Allen Strait, Respondent.

Opinion No. 25223
Submitted November 27, 2000 - Filed December 18, 2000

DEFINITE SUSPENSION

Henry B. Richardson, Jr. and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Irby E. Walker, Jr., of Conway, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an agreement pursuant to Rule 21, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension of six months and one day.[1] We accept the agreement.

[1]Respondent was placed on interim suspension by order of this Court dated December 2, 1999. In the Matter of Strait, 337 S.C. 547, 525 S.E.2d 245 (1999).

Facts

I. Domestic Matters

On two separate occasions, respondent accepted retainers to represent clients in divorce proceedings. Respondent was not diligent in handling these matters. He failed to serve pleadings in one case and failed to forward the divorce order to his client in the other case. Respondent also failed to return phone calls and properly communicate with his clients in these matters.

II. Bankruptcy Matter

Respondent was retained to represent a client in a bankruptcy proceeding. Respondent was not diligent in his representation. He failed to submit paperwork to the bankruptcy court, which resulted in the dismissal of the client's case. Respondent did not inform the client of the dismissal. Respondent also failed to return phone calls and properly communicate with his client.

III. Court Reporter Fees

Respondent ordered a transcript from a court reporter, but was delinquent in paying the bill for more than one year. Respondent has since paid the court reporter's bill.

IV. Failure to Return Client Materials

There were three instances in which respondent failed to return client materials upon request.

In the first matter, respondent was retained to review the corporate books and records for several recently formed corporations. He failed to return these materials upon request of the client. These materials were eventually returned. Respondent also failed to return phone calls and properly communicate with his client.

In a second matter, respondent failed to return documents, upon

the client's request, for more than two years. The materials were eventually returned to the client after that client filed a complaint. Respondent also failed to return phone calls and properly communicate with his client.

In a third matter, respondent failed to return several documents to a client. Further, he states that he cannot now locate these materials.

V. Failure to Cooperate in Investigation

Respondent failed to respond to various items of correspondence from ODC. He failed to respond to letters of inquiry, notices of full investigation, a subpoena, and a notice to appear for examination. Though respondent eventually responded to the inquiries and notices, this did not occur until after the time for compliance had passed.

VI. Financial Assistance to a Client

Respondent advanced money to a client in order for her to pay her electric bill.

Law

By his conduct, respondent has 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).

Respondent has also violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.8 (e) (financial assistance to a client); Rule 1.15 (failure to safeguard client documents); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (conduct

prejudicial to the administration of justice).

Conclusion

Respondent has fully acknowledged that his actions in the aforementioned matters were in violation of the Rules of Professional Conduct. We hereby suspend respondent from the practice of law for six months and one day. Prior to petitioning for reinstatement to the practice of law, respondent must provide satisfactory evidence to ODC that he has refunded retainers in full. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, Rule 413, SCACR.

DEFINITE SUSPENSION.

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.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Margaret C. Tribert, Respondent.

Opinion No. 25224
Submitted November 27, 2000 - Filed December 18, 2000

DEFINITE SUSPENSION

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Robert J. Harte, of Aiken, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an agreement under Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension from the practice of law for a period of one year retroactive to the date of her interim suspension.[1] We accept the agreement.

FACTS

According to the facts as stated in the agreement, respondent was

[1]Respondent was placed on interim suspension by order of this Court dated July 9, 1999. In the Matter of Tribert, 335 S.C. 401, 517 S.E.2d 444 (1999).

charged with possession of cocaine and first offense driving under the influence. Thereafter, respondent voluntarily ceased practicing law and sought treatment for her problems with alcohol and drugs. She pled guilty to the driving under the influence charge, and the possession of cocaine charge was dismissed after respondent successfully completed the pre-trial intervention program. Although respondent asserts that she has recovered and is abstaining from the use of alcohol and illegal drugs and is fully capable of resuming the practice of law, she agrees that it would be to her benefit to continue rehabilitation through counseling, attending Alcoholics Anonymous, and drug screens for the time period mentioned in the attachment to the agreement.

LAW

By her conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (committing a criminal act reflecting adversely on her honesty, trustworthiness, or fitness as a lawyer); and Rule 8.4(e) (engaging in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the RLDE, Rule 413, SCACR: Rule 7(a)(1) (violating or attempting to violate the Rules of Professional Conduct); Rule 7(a)(4) (being convicted of a crime of moral turpitude or a serious crime); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or bringing the legal profession into disrepute, and engaging in conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

CONCLUSION

Respondent has acknowledged that her actions were in violation of the Rules of Professional Conduct. Accordingly, respondent is hereby suspended from the practice of law for a period of one year retroactive to her interim suspension. Respondent shall continue her counseling and screening programs for one year from the date of the agreement. Respondent shall forward results of her monthly drug screens to Disciplinary Counsel and respondent's counselor shall file quarterly reports with Disciplinary Counsel stating whether respondent is complying with the terms of this opinion.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Danny McDonald, Appellant.

Appeal From Darlington County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 25225
Heard September 19, 2000 - Filed December 18, 2000

REVERSED AND REMANDED

Daniel L. Blake, of Hartsville, for appellant.

Attorney General Charles M. Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Jay E. Hodge, of Darlington, for respondent.

JUSTICE PLEICONES: Appellant Danny McDonald ("Defendant") appeals his convictions of murder and attempted armed robbery in the death of Brock Hawkins. We reverse and remand.

FACTUAL BACKGROUND

Brock Hawkins ("Victim") and Olar Thorson ("Thorson") entered a residential area of Hartsville after dark on February 2, 1995. Thorson, who drove the vehicle, stopped alongside a group of men and asked directions to "Mitch's" house. According to Thorson's testimony, Defendant pointed to a residence a short distance up the street. Victim got out of the car and walked to the house, returning moments later after getting no answer at the door. Thorson remained in the car at all times. When Victim returned to the automobile, a number of men from the group gathered around the vehicle and one of them displayed crack cocaine to Thorson and Victim. Thorson testified that Defendant, who was not wearing a mask, approached the car from the rear, brandished a sawed-off shotgun and placed it to Thorson's head, demanding money from Thorson and Victim.[1] Victim pushed Thorson's head forward, into the steering wheel, and depressed the accelerator. A split second later the gun fired, striking Victim in the left side of the head and causing his death. Thorson put the car in gear and sped away.

A second eyewitness, Robert Jackson, testified for the State that Defendant carried the gun and fired the fatal shot. Jackson's testimony, in contrast to Thorson's, indicated that the shooter was wearing a black mask. Jackson's identification of Defendant was largely based on the clothing worn by the shooter. Both Thorson and Robert Jackson testified that Rodney McPhail ("McPhail") was present at the scene of the crime.

Defendant offered and the court admitted testimony from Timmy Jackson, also indicted in connection with the shooting, that immediately after hearing a gunshot he observed McPhail standing on the passenger's side of

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[1]Thorson made a statement to police shortly after the incident, but was unable to identify the shooter. Only after months had passed did he identify Defendant, a former high school classmate, as the shooter. Furthermore, Thorson did not identify the murder weapon as a sawed-off shotgun until months after the incident.

the vehicle holding a sawed-off shotgun.[2] Timmy Jackson further testified that Defendant was not present at the scene immediately after the shot was fired. The defense called McPhail to testify and McPhail asserted his Fifth Amendment[3] right against self-incrimination. Defense counsel then proffered testimony from Timmy Jackson that McPhail told Jackson he shot Victim because Victim would not part with his money. The court declined to admit this evidence, ruling it inadmissible hearsay.

The defense proffered testimony from two other witnesses, Michael Mungo ("Mungo") and Gary Hawkins ("Hawkins"). Mungo testified that while he and McPhail were both in custody at the Darlington County Detention Center, he overheard McPhail tell an unidentified person that McPhail shot Victim and that Defendant was not involved in the incident. Hawkins would have testified that shortly after the incident McPhail admitted committing the offense, and that McPhail's stated reason for shooting Victim was that Victim would not pay McPhail for drugs. The trial court refused to admit the statements of Mungo and Hawkins on hearsay grounds.

Defendant was convicted of murder and attempted armed robbery. He received sentences of life imprisonment and ten years respectively. On appeal, he argues the trial court erred by refusing to admit the testimony of Timmy Jackson, Mungo, and Hawkins.

LAW/ANALYSIS

The State argues that we cannot consider the issue of admissibility of the proffered testimony because it is not properly preserved for appellate review. We disagree and find the grounds for offering and admitting the testimony were apparent from the context of the proffer. See Rule 103(a)(2), SCRE, and Note to Rule 103(a)(2), SCRE.

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[2]McPhail was also charged with and indicted for murder in connection with this incident.

[3]The Fifth Amendment provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V.

Defendant called McPhail, the out-of-court declarant, as a witness. McPhail invoked his Fifth Amendment right to silence. A witness who invokes his Fifth Amendment right to silence is unavailable for hearsay purposes. Rule 804(a)(1), SCRE; State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992). Defendant then proffered the testimony of Timmy Jackson, Mungo and Hawkins that on separate occasions, they each heard McPhail admit to the offense.

From the context of the proffers it is clear that the testimony was offered under the hearsay exception found in Rule 804(b)(3), SCRE. To bring the evidence within this exception, Defendant must show that the proffered statements were made by an unavailable declarant, that the statements exposed the declarant to criminal liability, and that corroborating circumstances clearly indicate the trustworthiness of the statements. McPhail's unavailability and potential criminal exposure are not in dispute. Thus, admissibility turns on clear corroboration.

This Court recently addressed a similar issue in State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705 (2000). We declined to adopt a specific test to determine whether a statement has been sufficiently corroborated, deciding that the question should be left to the discretion of the trial judge "after considering the totality of the circumstances under which a declaration against penal interest was made." Id. at 391, 526 S.E.2d at 708 n.5. We cited *Weinstein's Federal Evidence* (2nd ed. 1999) for the proposition that "[R]ule [804(b)(3)] does not require that *the information within the statement* be clearly corroborated, it means only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement itself, i.e. that the statement was actually made." Id. at 389, 526 S.E.2d at 707 (emphasis in original).

It is true that in Kinloch we reviewed evidence corroborating not only the making of the statement, but also the truth of its content. We concluded that because "neither the making of the statement nor its truth were clearly corroborated, [there was] no abuse of discretion in exclusion of [the] testimony." Id. at 390-91, 526 S.E.2d at 708.[4]

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[4]The able trial judge did not have the benefit of our decision in Kinloch when presiding over this case. Kinloch was not decided until January 2000,

We take this occasion to reiterate and emphasize that the corroboration requirement contained in Rule 804(b)(3) goes not to the truth of the statement's contents, but rather to the making of the statement. In many instances, it is not possible to separate these two considerations in analyzing the matter of corroboration.[5]

Defendant argues that the trustworthiness of the excluded testimony is clearly corroborated by the fact that three witnesses attest to having heard McPhail confess at three different times; by Timmy Jackson's testimony that he saw McPhail at the scene holding a sawed-off shotgun only seconds after hearing a gunshot; and by the contents of the statements themselves. He stresses that the statements were made shortly after the incident occurred and that one of the witnesses, Gary Hawkins, is McPhail's close friend.

We agree that the statements purportedly made by McPhail are clearly corroborated and should have been admitted at trial. According to Timmy Jackson's proffered testimony, McPhail told Timmy Jackson he shot Victim because Victim "wouldn't give up the money." Thorson testified the shooter demanded money from him and Victim immediately prior to firing the shot. The State's other eyewitness, Robert Jackson, testified that he heard someone demand money from Thorson and Victim just before the shooting. Evidence that the shooter demanded money also corroborates the proffered testimony of Gary Hawkins who would have testified that McPhail admitted to shooting Victim because Victim would not pay McPhail for drugs.[6] The content of the statements indicates that the speaker had extensive knowledge of details of the crime.

Additionally, the State's witnesses placed McPhail at the scene of the crime and defense witness Timmy Jackson testified to seeing McPhail at the

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while this case was tried in 1997.

[5]We recognize that some of the evidence reviewed below tends to corroborate the truth of the statements, i.e. that McPhail actually shot Victim. As a practical matter the two inquiries are related, ordinarily requiring the trial court to examine the content of the statements as part of its analysis of the totality of the circumstances.

[6]Thorson testified that one of the men around the car displayed crack cocaine, apparently offering to sell drugs to Victim and Thorson.

scene with a sawed-off shotgun just seconds after hearing a shotgun blast. Furthermore, three different witnesses claim to have heard McPhail make similar statements on three separate occasions.[7]

After consideration of these facts, we conclude the statements were sufficiently corroborated and, therefore, were admissible under Rule 804(b)(3). "[T]he admission of evidence is within the discretion of the trial court and will not be reversed by this Court absent an abuse of discretion." State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999)(citing State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law. . . ." Clark v. Cantrell, __ S.C. __, __, 529 S.E.2d 528, 539 (2000). We find that the trial court committed an error of law when it refused to admit the testimony of Timmy Jackson, Mungo and Hawkins since the testimony came within a recognized exception to the hearsay rule. We further find that the error was prejudicial since the excluded evidence constituted non-cumulative support for Defendant's claim that he did not shoot Victim.

CONCLUSION

Based on the foregoing, we REVERSE AND REMAND.

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

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[7]This case is distinguishable from State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996) where we held there was insufficient corroboration despite the fact that five witnesses claimed to have heard similar statements. In the instant case, unlike Forney, there is a wealth of corroboration independent of the multiplicity of hearsay witnesses. Additionally in Forney, the proffered out-of-court statements did not exculpate the accused.

The Supreme Court of South Carolina

In the Matter of Darrell
Lester Diggs, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, because he poses a threat of serious harm to the public or to the administration of justice. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that Todd James Johnson, Esquire, is appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Johnson shall take action as

required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Johnson may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Todd James Johnson, 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 Todd James Johnson, 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. Johnson's office.

s/Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

December 14, 2000

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Boddie-Noell Properties, Inc.,

Respondent,

v.

42 Magnolia Partnership and Robert Mundy,

Defendants,

of whom 42 Magnolia Partnership is,

Appellant.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 3270
Heard November 8, 2000 - Filed December 18, 2000

AFFIRMED

Thornwell F. Sowell and A. Burns Jones, both of Sowell, Todd, Laffitte, Beard & Watson, of Columbia, for Appellant.

Mark W. Hardee, of Lewis, Babcock & Hawkins, of Columbia, for Respondent.

ANDERSON, J.: In this breach of contract action, 42 Magnolia Partnership (the Partnership) appeals the trial judge's denial of its motion for judgment notwithstanding the verdict (JNOV). We affirm.

FACTS/PROCEDURAL BACKGROUND

The Partnership developed an apartment complex in Columbia, South Carolina. In February, 1994, the Partnership borrowed $6.9 million from the Lincoln National Life Insurance Company (Lincoln) to permanently finance the complex. About four months later, Southport Financial Asset Management, Inc. (Southport) offered to purchase the complex for $10.6 million. The Partnership and Southport entered into a purchase and sale agreement on June 23, 1994, to this effect.

The agreement was negotiated on behalf of Southport by John Parker and on behalf of the Partnership by Robert M. Mundy, Jr. Mundy is the president of Estates, Inc., which was the developer of the complex and the managing partner of the Partnership.

Pursuant to the purchase and sale agreement, Southport paid the Partnership a $100,000 earnest money deposit. In addition, as part of the deal, $100,000 of the purchase price was to be paid to Estates, Inc. in order to purchase Estates' management agreement with the apartment complex. The purchase agreement provided Southport was to assume the mortgage, which was held by Lincoln. The loan had severe prepayment penalties, plus a "favorable" interest rate. The Partnership and Southport agreed the assumption of the mortgage was an essential part of the contract.

In September of 1994, Southport assigned its rights under the purchase and sale agreement to Boddie-Noell Properties, Inc. (BNP), a publicly traded company.[1] At closing, Southport was to receive back its $100,000 deposit and $288,000 in consideration of the assignment.

The Partnership, Southport, and BNP executed a "First Amendment to Purchase and Sale Agreement," which referenced the assignment to BNP of the Southport contract, extended the closing date from September 30, 1994, to October 31,

[1]BNP was going through a corporate restructuring during this time and is sometimes referred to in the record as BT Venture Corporation.

1994, and required a $100,000 extension deposit from BNP. The amendment permitted BNP, upon written notice prior to 5:00 p.m. on September 30, 1994, to receive a refund of the extension deposit based on, inter alia, the failure to receive a loan assumption agreement from Lincoln. The First Amendment further provided:

> In event such notice is received by the Extension Escrow Agent, this First Amendment will be null and void; provided, however, that the parties hereto agree that in such event, (i) the Purchase Contract shall remain in full force and effect, (ii) the parties hereto shall comply with the terms and conditions thereof, (iii) the Buyer shall remain obligated to perform all duties and obligations of the Buyer under the Purchase Agreement, and (iv) if the purchase and sale contemplated by the Purchase Agreement is not closed by September 30, 1994, such failure to close shall constitute a default under the Purchase Contract and the original Deposit shall remain non-refundable and the Buyer's (or Assignee's) right to purchase under the Purchase Contract shall be null and void; provided further, that after 5:00 p.m. on September 30, 1994, if no demand has been received by the Extension Escrow Agent, the Extension Deposit shall be fully non-refundable and the Purchase Contract shall remain in full force and effect as modified and amended by this First Amendment.

Bubba Ross, with Fleet Financial, Lincoln's servicing agent, instructed Southport by letter not to directly contact Lincoln or Fleet. Parker testified: "[T]hat letter . . . pretty well said all information about the assumption of the loan and the potential borrower was to flow through Estates, Inc., or 42 Magnolia Partnership." (Emphasis added.) Scott Wilkerson, BNP's President, stated: "We were told from day one, long before we actually had a legal agreement in place, that we had to go through Bob Mundy, that we were specifically not to contact Lincoln–initially, we didn't know about Fleet. Later we heard Fleet was the servicing agent–that we had to go through Bob Mundy." (Emphasis added.) Mundy acted as the "conduit" between BNP, Fleet, and Lincoln regarding Lincoln's approval of BNP's assumption of the loan. John Parker, who was authorized by Southport to act on its behalf, declared Mundy became the "mouthpiece of Lincoln."

On several occasions, Mundy inquired from Parker and Wilkerson as to the amount Southport was to receive from BNP for the assignment, referring to it as a "secret profit." Parker and Wilkerson refused to tell Mundy the terms of the assignment. Thereafter, according to Parker, Mundy acted "fishy."

Mundy told BNP that Lincoln would not agree to an assumption of the loan without a personal guaranty. Because BNP is a publicly traded corporation, a personal guaranty was impractical. Wilkerson related this information to Mundy and expected the information to be passed on to Lincoln. When BNP offered to provide Lincoln with a copy of its bond in lieu of the guaranty, which would protect Lincoln's interests, Mundy stated: "Well, that's not good enough. They want someone to personally sign." Wilkerson "was being told [by Mundy] that Lincoln was being contacted daily and that Lincoln was adamant that there had to be individual signers."

In addition, the loan included a requirement that there be no change in ownership of the company during the term of the loan. BNP explained that as a publicly traded corporation, it could not abide by that term as BNP's ownership constantly changed with the trade of its shares of stock. Thus, BNP would immediately be in technical default upon assumption of the loan. Mundy informed BNP that Lincoln would not change any of the terms of the loan, including the limitation on changes of ownership.

Parker visited Mundy on the eve of the final day BNP could rescind the contract without forfeiting the extension deposit. Parker testified that although it was urgent BNP and Mundy resolve the problems regarding the Lincoln loan, Mundy kept Parker waiting in his reception area for an hour and a half while Mundy stayed in his office "joking around and maybe talking sports scores . . . and killing time."

The following day, relying on Mundy's representations that Lincoln would not approve the assumption of the loan, BNP "terminated" the Assignment Agreement and the First Amendment to the Purchase and Sale Agreement. BNP already owed Southport $100,000 for its initial deposit, and was hesitant to deposit an additional $100,000 if the loan could not be assumed. According to Wilkerson, on September 30, he was "still being told . . . [BNP] cannot assume this loan unless [BNP] provide[s] an individual, a person, not the corporation." Wilkerson stated Mundy represented that if Lincoln subsequently permitted the assumption of the loan, BNP could continue under the contract.

Wilkerson said the Partnership was meeting the following week on October 5 to discuss a solution which would enable the parties to consummate the sale. On October 6, he learned the Partnership thought it could get a higher price and decided to sell the complex to someone else. Wilkerson contacted Calvin King, who works at Lincoln, to determine why Lincoln would not approve his company for the loan

assumption. According to Wilkerson, King acted as if he had never heard of the requirement alleged by Mundy regarding a personal guarantor. The next day Wilkerson was advised Lincoln approved the loan without requiring a guarantor.

At a BNP Board of Directors' meeting on October 11, Wilkerson received the Board's approval to close on the property by October 15. When BNP attempted to get the paperwork signed for the assumption of the loan, Mundy refused to cooperate. BNP received a letter from the Partnership's attorneys, which read: "In accordance with Paragraph 1 of the First Amendment, we have received written notice from [BNP] that [BNP] terminated its obligations under the First Amendment." According to the letter, BNP's right to purchase the complex was null and void. The letter provided the Partnership was entitled to retain the $100,000 deposit delivered by Southport under the terms of the purchase agreement.

Audrey Navarre, the Fleet employee responsible for corresponding with Lincoln regarding the loan, professed she related all information from Mundy to Lincoln and vice versa. Navarre was unaware there was a September 30 deadline for the loan assumption, therefore, she never passed that information on to Lincoln. Navarre said Mundy knew Lincoln required a personal guarantor. She never told Lincoln that BNP could not provide a personal guarantor, and had offered a bond instead because she had no knowledge of that fact herself.

Calvin King testified that Lincoln would expect to be notified of any changes in a purchase agreement, such as the deadline change in the First Amendment, and would try to work with the parties regarding the change. However, King averred he did not "remember Fleet ever telling" Lincoln about the September 30 deadline. The following exchange occurred between BNP's attorney and King:

> Q. Now, according to this e-mail [from Judy Litzenberg with Lincoln dated September 27th, 1994], Lincoln was being told that there would not be a personal guarantor for the carve-outs, is that true?
> A. Yes, sir.
> Q. And to your memory, is this the first time Lincoln was aware of that?
> A. I can't remember. But just by reading this, it would make me think that that was the case.
> Q. Okay. So before September 27th, 1994, you didn't know that [BNP] said no, there will not be a personal guarantor?
> A. That is probably the case.

King said Lincoln was not cognizant of the fact that BNP offered a bond in place of the guarantor until King prepared for a deposition for this litigation. King declared that if Lincoln had known about the deadline, Lincoln would have tried to "accommodate that deadline." According to King, once Lincoln was informed of BNP's requirements, the loan assumption involved "a one-day approval" transaction.

BNP filed a complaint against the Partnership and Mundy, alleging causes of action for fraud, breach of contract, and breach of contract accompanied by a fraudulent act. The trial judge denied the Partnership's motion for a directed verdict and submitted the case to the jury. During deliberations, the jury sent a note to the judge stating: "Most Important→(1) Did Lincoln Nat. have in its possession the 1st Ammendment [sic] contract prior to Sept. 30th 1994 [?]" The attorneys for the parties agreed Lincoln did not possess the First Amendment prior to September 30. The judge instructed the jury: "The question posed, the answer is no. The answer is no from the three attorneys. They all agree the answer would be no."

The jury returned a verdict for BNP on the breach of contract cause of action and awarded damages of $100,000. The Partnership filed a motion for JNOV, or in the alternative, a new trial. The judge denied the motion. The Partnership appeals.

STANDARD OF REVIEW

When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); Welch v. Epstein, Op. No. 3235 (S.C. Ct. App. filed July 31, 2000)(Shearouse Adv. Sh. No. 32 at 1). The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. Welch, supra. This Court will reverse the trial court only when there is no evidence to support the ruling below. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Welch, supra.

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C.

354, 415 S.E.2d 393 (1992). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Welch, supra.

ISSUES

I. Did the trial court err in denying the Partnership's motion for JNOV on BNP's breach of contract claim where BNP rescinded the contract?

II. Did the trial court err in submitting BNP's breach of contract claim to the jury?

LAW/ANALYSIS

I. Rescission

The Partnership argues the trial judge erred in denying its motion for JNOV on BNP's claim for breach of contract because BNP rescinded the contract and, as a matter of law, damages for an alleged breach of a rescinded contract cannot be recovered. We disagree.

Rescission is an "abrogation or undoing of [a contract] from the beginning, which seeks to create a situation the same as if no contract ever had existed." Government Employees Ins. Co. v. Chavis, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970). In First Equity Investment Corp. v. United Service Corp., 299 S.C. 491, 386 S.E.2d 245 (1989), a mortgagor brought an action against a mortgagee, alleging breach of contract accompanied by a fraudulent act and seeking the remedy of rescission. The Supreme Court explained:

> When a party elects and is granted rescission as a remedy, he is entitled to be returned to status quo ante. Kent Homes, Inc. v. Frankel, 128 A.2d 444, 446 (D.C. Ct. App. 1957). Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore him to the position occupied prior to the making of

> the contract. Bank of Johnston v. Jones, 141 S.C. 98, 115-116, 139 S.E. 190, 196 (1927); Baeza v. Robert E. Lee Chrysler, Plymouth, 279 S.C. 468, 472-473, 309 S.E.2d 763, 766 (Ct. App. 1983); Jennings v. Lee, 461 P.2d 161, 167 (Ariz. 1969).

First Equity Investment Corp., 299 S.C. at 496-97, 386 S.E.2d at 248. Rescission, as a remedy, returns the parties to the status quo ante. Government Employees Ins. Co., supra. A return to the status quo ante necessarily requires any party damaged to be compensated. See Ebner v. Haverty Furniture Co., 128 S.C. 151, 122 S.E. 578 (1924)(remedy of rescission is insufficient if parties cannot be returned to status quo ante).

Here, no issue is presented in regard to rescission being granted by the court as a remedy. Rather, this record encapsulates a factual scenario involving rescission exercised by a party when faced with a mandatory deadline. The breach of contract and resulting damages occurred before the rescission by BNP.

When a contract provides for rescission, and is rescinded pursuant to the right thus given, the rescission does not "extinguish liabilities that have already accrued under the contract, and this is so regardless of whether the liability is that of the party who exercised the option to cancel the agreement or is the liability of the party against whom the cancellation is made." 17A Am. Jur. 2d Contracts § 603 (1991)(footnotes omitted). Concomitantly, a voluntary cancellation of a contract under a rescission provision on account of a breach by the other party does not automatically release each party from all obligations under the contract. Id. Rather, "a recovery of damages for breaches which cause the cancellation may be had." Id.

BNP's rescission did not bar BNP from seeking damages for breach of contract. Thus, the trial court did not err in denying the Partnership's motion for JNOV.

II. Breach of Contract

The Partnership maintains the trial judge erred in submitting the breach of contract claim to the jury because there was no evidence to support a claim for breach of contract. We disagree.

The purchase and sales agreement provided in part:

> 17. Further Assurances. Each of the parties hereto agrees to do, execute, acknowledge and deliver and cause to be done, executed, acknowledged and delivered all such further acts, assignments, transfers and assurances as will reasonably be requested of it in order to carry out this Agreement and give effect thereto.

BNP presented overwhelming evidence from which the jury could infer that Mundy breached this provision of the agreement by withholding information from Lincoln. This provision imposed upon the Partnership a specific duty to act affirmatively to assist BNP in assuming the Lincoln loan, which was an essential term of the contract. Numerous parties testified Mundy in fact appeared to hamper BNP's efforts to assume the Lincoln loan rather than assist BNP in the assumption of the loan.

Furthermore, under South Carolina law, there exists in every contract an implied covenant of good faith and fair dealing. Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995); Parker v. Byrd, 309 S.C. 189, 420 S.E.2d 850 (1992). Our Supreme Court, in Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E.2d 481 (1966), articulated:

> [T]here exists in every contract an implied covenant of good faith and fair dealing. 17A C.J.S. Contracts § 328; 17 Am. Jur. 2d Contracts, Sec. 255, 256; 4 Williston on Contracts, 3d ed., Sec. 610B; 5 Id., Sec. 670.
>
> We quote from 17A C.J.S. Contracts § 328, pages 282--284:
>
> "A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used and external facts, such as the surrounding circumstances; and terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face.
>
> "In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made. * * *"

And from 17 Am. Jur. 2d Contracts, Sec. 255, pages 649--650:

> " * * * The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made. * * * "
>
> "It has been said that implied promises always exist * * * where the covenant on one side involves some corresponding obligation on the other; where, by the relationships of the parties and the subject matter of the contract, a duty is owing by one not expressly bound by the contract to the other party in reference to the subject thereof. * * * "

Commercial Credit Corp., 247 S.C. at 367, 147 S.E.2d at 484.

We find BNP introduced sufficient evidence the Partnership, via Mundy's efforts to thwart the closing, breached the implied covenant of good faith and fair dealing. Thus, the trial judge properly submitted the breach of contract issue to the jury.

CONCLUSION

We hold that when a contract provides for rescission, and is rescinded pursuant to the right thus given, the rescission does not extinguish liabilities that have already accrued under the contract. This principle is efficacious regardless of whether the liability is that of the party who exercised the option to cancel the agreement or is the liability of the party against whom the cancellation is made. We find a voluntary cancellation of a contract under a rescission provision on account of a breach by the other party does not automatically release each party from all obligations under the contract. Damages for breaches which cause the cancellation may be recovered. We conclude BNP's rescission did not bar BNP from seeking damages for breach of contract. Thus, the trial court did not err in denying the Partnership's motion for JNOV. Further, BNP presented overwhelming evidence from which the jury could infer Mundy breached the contract by withholding information from Lincoln.

Therefore, the judge properly submitted the breach of contract issue to the jury. Accordingly, the trial judge's order is

AFFIRMED.

HEARN, C.J., and STILWELL, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Randy Gaskins and Linda Gaskins,
. . . . . Appellants,

v.

Southern Farm Bureau Casualty Insurance Company, and South Carolina Farm Bureau Insurance Company and Timothy Brant, ... Respondents.

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

Opinion No. 3271
Submitted November 6, 2000 - Filed December 18, 2000

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Constance A. Anastopoulo, of Anastopoulo Law Firm, of Charleston, for appellants.

Robert J. Thomas, of Rogers, Townsend & Thomas, of Columbia, for respondent.

CURETON, J.: Randy and Linda Gaskins (the Gaskins) appeal the trial court's dismissal of their action against the Southern Farm Bureau Casualty Insurance Company, the South Carolina Farm Bureau Insurance Company (collectively "Farm Bureau"), and Timothy Brant, a claims representative for Farm Bureau. We affirm in part, reverse in part and remand.

FACTUAL/PROCEDURAL BACKGROUND

While hunting, Eugene Gaskins accidently shot his son, Randy Gaskins, with a high-powered rifle. Randy was admitted to the hospital and treated for a gunshot wound to the right flank and severe internal injuries. His medical bills exceeded $36,000.00.

The Gaskins filed a claim against the homeowner's insurance carrier for Eugene Gaskins, Farm Bureau. The claim alleged that in addition to Randy's injuries and medical bills, Linda suffered extreme emotional distress, loss of consortium, and lost wages as a result of the shooting.

The Gaskins alleged that Timothy Brant fraudulently induced them to settle their claims with Farm Bureau by informing them that Eugene Gaskins's policy would pay a maximum of $9,000.00 to cover their claims. Based on this misinformation, the Gaskins accepted a $9,000.00 payment and signed a Final Release and Settlement of their claims. The Gaskins subsequently learned Eugene Gaskins's policy provided for $100,000.00 in personal liability protection.

The Gaskins filed this action against Brant and Farm Bureau, alleging fraud, negligence, breach of the covenants of good faith and fair dealing, misrepresentation, unfair trade practices, wrongful adjustment under South Carolina Code Annotated Section 38-59-20, and the intentional infliction of emotional distress. They further sought a declaratory judgment that the release was null and void.

Brant and Farm Bureau moved to dismiss the action under Rule 12(b)(6), SCRCP, for the Gaskins' failure to state facts sufficient to constitute any of their causes of action. After a hearing on the motion, the trial court summarily dismissed all causes of action pursuant to Hopkins v. Fidelity Ins. Co., 240 S.C. 230, 125 S.E.2d 468 (1962). The Gaskins appeal. We affirm in part, reverse in part and remand.

LAW/ANALYSIS

Summary Dismissal Pursuant to Hopkins

The trial court issued a two-line ruling that apparently applies to all causes of action and the Gaskins' request for a declaratory judgment. The order stated: "[t]he court finds the case of Hopkins v. Fidelity Ins. Co., 240 S.C. 230, 125 S.E.2d 468 (1962) to be controlling. Therefore, it is ordered that this action is dismissed."

I.

The Gaskins argue the trial court erred in holding Hopkins barred all their actions against Brant and Farm Bureau. We agree as to the causes of action for fraud, negligence, misrepresentation, unfair trade practices, and the intentional infliction of emotional distress.

In Hopkins, the mother of a two year old girl, fatally crushed under a farm vehicle, filed suit alleging fraud and deceit by Fidelity Insurance Company in its settlement of the wrongful death claim. The complaint alleged a Fidelity agent took advantage of the mother's state of shock and coerced her into signing a release of her claim in exchange for two thousand dollars.

Our Supreme Court in Hopkins found the mother's action should have been dismissed. The court held the action vested in the child's personal representative rather than in the mother, and the claim failed as it was brought by the mother in her individual capacity.

In further remarks, the Court stated the complaint failed to allege the child's death resulted from negligent operation of the farm vehicle. The court reasoned the mere allegation that the child was fatally injured by the truck did not warrant an inference of negligence. The court next concluded that even if the complaint alleged the underlying negligence, the complaint failed because the mother alleged the release was fraudulently obtained. The court concluded the mother alleged no damages because a fraudulently obtained release would be void and would thus not bar the mother's cause of action.

Although Hopkins has been interpreted as standing for the proposition that South Carolina does not allow tort actions against insurers for acts of their adjusters in fraudulently procuring releases, our Supreme Court has not recognized this view and has applied Hopkins as a rule of pleading. Compare Gary D. Spivey, Annotation, Insurer's Tort Liability for Acts of Adjuster Seeking to Obtain Settlement or Release, 39 A.L.R.3d 739, 754 n.4 (1971)("The present availability of the action for fraud and deceit [in South Carolina] is in doubt in view of the decision in Hopkins . . . .") with Pilkington v. McBain, 274 S.C. 312, 314-15, 262 S.E.2d 916, 917-18 (1980)(The Court concluded that "strict reliance on Hopkins" was misplaced. Utilizing the rule that pleadings are to liberally construed, the Court found the plaintiff in Pilkington alleged damages, unlike in Hopkins in which the Court held the plaintiff failed to allege damages). See also Mutual Sav. and Loan Ass'n v. McKenzie, 274 S.C. 630, 266 S.E.2d 423 (1980)(citing Hopkins in concluding plaintiff failed to plead damages).

Accordingly, we review the law interpreting the sufficiency of pleadings.

The Hopkins case was decided in 1962 under the requirements of Code Pleading. The South Carolina Rules of Civil Procedure were adopted effective July 1, 1985. Rule 86, SCRCP. The rule governing a motion to dismiss for failure to state a cause of action, Rule 12(b)(6), SCRCP, replaces the Code Pleading rules regarding demurrers. See 1985 S.C. Acts 100.

Rule 12(b)(6), SCRCP, "retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules." Harry M. Lightsey, Jr. & James F. Flanagan, South Carolina Civil Procedure 93, 2nd ed. (1996). See also Justice v. The Pantry, 335 S.C. 572, 518 S.E.2d 40 (1999)(citing South Carolina Civil Procedure). However, "technical, restrictive or outmoded requirements of Code Pleading are not necessarily required." Lightsey, Jr. & Flanagan at 93-94. Furthermore, Rule 8(f), SCRCP, states that all pleadings are to be construed to do substantial justice to all parties.

To ensure substantial justice to the parties, the pleadings must be liberally construed. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991). In deciding whether the trial court properly granted Farm Bureau's motion for dismissal under Rule 12(b)(6), this court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if "facts alleged and inferences reasonably deducible therefrom" entitle the plaintiff to relief under any theory. Id. at 5, 522 S.E.2d at 139 (quoting Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)).

In light of the rules governing pleadings, we find the trial court erred by summarily dismissing all claims under Hopkins without further analysis. Accordingly, we reverse the trial court and remand the causes of action for fraud, negligence, misrepresentation, unfair trade practices, and the intentional infliction of emotional distress.

II.

As to the Gaskins' causes of action for breach of the covenants of good faith and fair dealing and for wrongful adjustment pursuant to South Carolina Code Annotated Section 38-59-20 (1989), we affirm the trial court.

In Tadlock Painting Co. v. Maryland Cas. Co., our Supreme Court held an insured could assert a cause of action for the breach of the implied covenants of good faith and fair dealing against his insurance company. Tadlock Painting, 322 S.C. 398, 473 S.E.2d 52 (1996)(citing Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983)(wherein the Court recognized the existence of a cause of action against an insurance company for bad faith refusal to pay first party benefits due under an insurance contract)). The elements of an action for breach of the covenants of good faith and fair dealing in an insurance contract are as follows:

> 1) *the existence of a mutually binding contract of insurance between plaintiff and defendant*;
> 2) a refusal by an insurer to pay benefits due under the contract;
> 3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing in the contract;
> 4) that causes damage to the insured.

See Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) (emphasis added)(enumerating the elements of a claim for bad faith refusal to pay benefits under an insurance contract).

The Gaskins' complaint did not allege the existence of a contract between the Gaskins and Farm Bureau. Furthermore, South Carolina does not recognize a third party action for the bad faith refusal to pay insurance benefits. Kleckley v. Northwestern Nat'l Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000). But see Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 341 S.E.2d 378 (1986)(applying a narrow exception to this rule for a 'third-party' spouse under the necessaries doctrine). Accordingly, we affirm the trial court's dismissal of this cause of action. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); Rule 220(c), SCACR (an appellate court may affirm the trial court's order for any reason appearing in the record on appeal).

We also affirm the trial court's dismissal of the Gaskins' cause of action alleging wrongful adjustment pursuant to South Carolina Code Annotated Section 38-59-20 (1989)(The South Carolina Claims Practices Act). The Act provides relief for a third party victim of an improper claims practice. S.C. Code Ann. §§ 38-59-10 to -50 (1989 & Supp. 1999); Kleckley at 137, 526 S.E.2d at 221. Section 38-59-20 declares that a third party may pursue *administrative action* before the Chief Insurance Commissioner if an insurer *inter alia* "[k]nowingly

misrepresent[s] to insureds or third-party claimants pertinent facts or policy provisions relating to coverages at issue or providing deceptive or misleading information with respect to coverages." S.C. Code Ann. § 38-59-20(1) (1989).

The Act does not create a private cause of action. See Swinton v. Chubb & Son, Inc., 283 S.C. 11, 320 S.E.2d 495 (Ct. App. 1984)(holding section 38-37-1110, the predecessor statute, recodified by 1987 Act No. 155, § 1 to section 38-59-20, did not allow a private cause of action). A cause of action for wrongful adjustment under section 38-59-20 only entitles the Gaskins to an administrative remedy. Therefore, we affirm the trial court's dismissal of the cause of action for wrongful adjustment. See I'On, 338 S.C. 406, 526 S.E.2d 716 and Rule 220(c), SCACR (an appellate court may affirm the trial court's order for any reason appearing in the record on appeal).

Recusal

The Gaskins also contend the trial judge erred in failing to recuse himself due to his relationship with Farm Bureau and with Brant. This issue is not preserved for review on appeal.

The record indicates the judge disclosed his relationships with Farm Bureau and Timothy Brant. However, the Gaskins did not object or move for the judge to recuse himself.[1] The issue is therefore not preserved for appellate

[1] The court stated:

Okay. Let me – I'm sorry, but let me interrupt you. I apologize.

My home is insured with Farm Bureau, and Farm Bureau has provided insurance as long as I've been out of – well, as long as I have been a licensed driver.

My brother in law works for Farm Bureau in Columbia, and I represented Farm Bureau from time to time when I was practicing law.

Do you have any objection to my hearing this matter?
If you want . . .

Mr. Pagliarini: I have no objection.

The Court: Very well. Do you have any objection to my hearing this?

Mr. Thomas: No, Your Honor.

The Court: Well, excuse me for interrupting you.

review. See Parker v. Shecut, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000) (holding party who failed to move for recusal had not preserved the issue for appellate review).

CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed as to the dismissal of the causes of action for fraud, negligence, misrepresentation, breach of the implied covenants of good faith and fair dealing, and violation of the South Carolina Unfair Trade Practices Act. We affirm the trial court's dismissal of Gaskins' actions for wrongful adjustment and breach of the covenant of good faith and fair dealing. We accordingly remand the case for further proceedings.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

GOOLSBY and CONNOR, JJ., concur.

Mr. Thomas: I did not know you were insured by Farm Bureau until this morning, from Mr. Tim Brant.

The Court: Mr. Brant knows that. I know Mr. Brant very well.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

MacKennon Watson, a Minor, by his Guardian ad Litem, Susan Watson, ... Respondent,

v.

David Chapman, M.D., ... Appellant.

and

Susan Watson and Don Watson, ... Respondents,

v.

David Chapman, M.D., ... Appellant.

Appeal From Florence County
Joseph J. Watson, Circuit Court Judge

Opinion No. 3272
Heard November 8, 2000 - Filed December 18, 2000

AFFIRMED

John B. McCutcheon, Jr., Mary Ruth M. Baxter and Arrigo P. Carotti, all of McCutcheon, McCutcheon & Baxter, of Conway, for appellant.

David W. Goldman, Diane M. Rodriguez and Kristi F. Curtis, all of Bryan, Bahnmuller, Goldman & McElveen, of Sumter, for respondents.

CURETON, J.: In this medical malpractice action, Susan and Don Watson sued Dr. David Chapman for the premature delivery of their son MacKennon and the resulting permanent injury to his lungs. A jury found Dr. Chapman negligent and awarded actual damages in the amount of $106,000 to MacKennon and $100,000 to his parents. Dr. Chapman appeals. We affirm.

FACTS/PROCEDURAL HISTORY

Mrs. Watson sought obstetrical care for her third pregnancy from Baroody, Chapman & Chapman, OB-GYN, in late 1991. Initially, she was examined by Dr. David Chapman, a partner in the practice, on or about December 30, 1991. Dr. Chapman informed Mrs. Watson that her delivery date would be August 11, 1992. Thereafter, Mrs. Watson saw another physician of the practice for her regularly scheduled office visits.[1] During the pregnancy, Mrs. Watson developed gestational diabetes and was referred to another physician who treated the condition with a restricted diet.

Mrs. Watson next encountered Dr. Chapman in the thirty-fourth or thirty-fifth week of her pregnancy during an office visit. At that time, Dr. Chapman scheduled Mrs. Watson for an amniocentesis to be performed on July 15, 1992, with a possible cesarean section to follow on July 16th.[2]

During the July 15th appointment, Dr. Chapman took an ultrasound, but was unable to perform the amniocentesis due to the position of the placenta. Nevertheless, he informed Mrs. Watson that her baby was "big enough" for delivery and that he would perform a cesarean section the next day even though she was not in labor and there were no signs of fetal distress.

Dr. Chapman delivered MacKennon by cesarean section on July 16, 1992. He weighed eight pounds, four ounces at birth. Despite MacKennon's size, his lungs were not fully developed because his mother's gestational diabetes had retarded their normal development. Dr. Chapman had not determined the state of MacKennon's lungs prior to delivery even though a diagnostic test was available to assess fetal lung maturity.

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[1] She saw Dr. John Chapman, who is unrelated to appellant David Chapman.

[2] Mrs. Watson reached the thirty-sixth week of her pregnancy on July 15, 1992.

MacKennon developed Respiratory Distress Syndrome (RDS) within twenty-four hours of birth, for which he was intubated with oxygen and transferred to the Neonatal Intensive Care Unit (NICU) at McLeod Regional Medical Center. MacKennon was discharged from McLeod on August 3, 1992. Although his discharge summary indicated his prognosis was good, MacKennon continued to have breathing difficulties which required further hospital visits and treatment.

On July 13, 1995, the Watsons filed the instant action against Dr. Chapman alleging he was negligent in delivering MacKennon four weeks premature without medical justification and in violation of accepted medical standards. They also asserted that Dr. Chapman "was addicted to the use of drugs and narcotics to the extent that he was not mentally, emotionally or physically able to have provided competent medical care and attention to" Mrs. Watson and MacKennon.

Prior to trial, the circuit court rejected the Watsons' motion to compel discovery of Dr. Chapman's alcohol treatment records because such disclosure would violate federal and state confidentiality statues. However, the trial court also rejected Dr. Chapman's motion in limine to exclude all reference to his alcohol addiction.

LAW/ANALYSIS

I. Admission of Evidence Concerning Alcohol Addiction

Dr. Chapman argues the trial court abused it discretion by admitting irrelevant and unduly prejudicial evidence concerning his alcohol addiction. He also contends federal and state confidentiality statutes prohibit such disclosures. We disagree.

On May 11, 1993, Dr. Chapman entered into a written agreement ("Interim Agreement") with the South Carolina Board of Medical Examiners ("Board") wherein he acknowledged his addiction to alcohol and agreed to treatment and monitoring in exchange for the Board's commitment to continue his licensure on a conditional basis subject to the terms of the agreement. The Interim Agreement further provided "that, pursuant to the South Carolina Freedom of Information Act (S.C. Code Ann. § 30-4-10, et seq. (1986)), this Interim Agreement is a public document." The Interim Agreement was replaced by a private agreement on August 23, 1995.

During discovery, Dr. Chapman revealed he had been treated for alcohol dependency at Fenwick Hall in 1989 and that he had returned to Fenwick for inpatient treatment less than a month after MacKennon's July 16, 1992 delivery. He explained that he "went back to Fenwick at that time [because he had] returned to drinking on the weekends and . . . thought [he] was drinking too much on the weekends." Dr. Chapman also admitted he was drinking during the weekend prior to MacKennon's delivery and that his partners in the OB-GYN practice ousted him from the partnership less than 30 days after the delivery. Dr. Chapman claimed the partners believed he "had ample time for rehabilitative measures and due to certain recent events they felt that it was necessary to sever their partnership with me."

Dr. Chapman filed a motion in limine to exclude the Interim Agreement and his admissions concerning his alcohol dependency because "such evidence is irrelevant to this litigation, more prejudicial than probative, and that admission of such evidence is prohibited by both State law (South Carolina Code Ann. § 44-22-100) and Federal law (42 U.S.C. § 290dd-2) and applicable case law." Specifically, he argued the evidence in question was irrelevant because it did not demonstrate he was impaired at the time he treated Mrs. Watson and would only serve to prejudice him in the eyes of the jury. The trial court denied the motion and admitted the evidence because "[t]he probative value is not substantially outweighed by any prejudicial effect." Dr. Chapman renewed his objection to the evidence at trial and argues on appeal that it was error for the jury to consider it.

The admissibility of evidence lies within the sound discretion of the trial court whose decision will not be overturned on appeal absent a clear abuse of that discretion. Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996); Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994); Carlyle v. Tuomey Hosp., 305 S.C. 187, 407 S.E.2d 630 (1991). In this case, the trial court found that the evidence of Dr. Chapman's alcohol addiction was highly relevant to the Watsons' negligence claims such that its probative value outweighed any prejudicial effect. In so finding, the court did not abuse its discretion.

Relevant evidence is merely evidence which tends to prove or disprove the existence of a material fact. See Rule 401, SCRE (defining relevant evidence 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"). The dictates of Rule 401 are subject to the balancing requirement of Rule 403, SCRE, which requires a court to exclude

relevant evidence upon a showing that its admission would be more prejudicial than probative. See Rule 403, SCRE (excluding relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice).

The fact that a physician may have been an alcoholic while practicing medicine does not, in and of itself, create a separate issue or claim of negligence; however, it is relevant "when that alcoholism translates into conduct falling below the applicable standard of care." Ornelas v. Fry, 727 P.2d 819, 823 (Ariz. Ct. App. 1986). The part, if any, which Dr. Chapman's alcohol dependency played in his decision making process was a highly contested issue in this case and was properly submitted to the jury for a decision. Although Chapman claimed he was not under the influence at the time he decided not to perform the amniocentesis or at the time of the surgical delivery, the Watsons put forth sufficient evidence to the contrary thereby creating a jury question. Accordingly, we agree with the circuit court's conclusion that the evidence was relevant and its probative value was not outweighed by any prejudicial effect.

Dr. Chapman's reliance on federal and state confidentiality statutes as a legal basis for excluding the evidence of his alcohol dependency is misplaced because the evidence complained of is not within the ambit of the statutes.

The federal confidentiality statute provides in pertinent part:

> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C.A. § 290dd-2(a) (Supp. 2000) (emphasis added). Obviously, the Interim Agreement is not a patient diagnostic or treatment record as described by the statute.

Assuming that the Interim Agreement fell within the protection afforded

by the statute, Dr. Chapman relinquished that protection by agreeing to the public disclosure of the agreement. See id. § 290dd-2(b)(1) (creating an exception whereby a patient may consent to public disclosure of his or her record). Furthermore, a court of competent jurisdiction may order the disclosure of a protected record upon a showing that good cause exists to do so. Id. § 290dd-2(B)(2)(c).

Similarly, section 44-22-100(A) of the South Carolina Code protects the confidentiality of certain medical records:

> Certificates, applications, records, and reports made for the purpose of this chapter . . . and directly or indirectly identifying a mentally ill or alcohol and drug abuse patient or former patient or individual whose commitment has been sought must be kept confidential and must not be disclosed . . . .

S.C. Code Ann. § 44-22-100(A) (Supp. 1999).

This statute also protects a *patient's medical records* from unauthorized disclosure, but does not shield a patient from being questioned directly about his condition and any treatments he may have received, subject to the strictures of the rules of evidence. In this case, the circuit court did not order Dr. Chapman to produce medical records, it merely allowed the Watsons to extract testimony from Chapman concerning his alcohol dependency and to rely on a written agreement which, by its own terms, was a part of the public domain pursuant to the South Carolina Freedom of Information Act.

II. Admission of Testimony Concerning Alcohol Addiction

Chapman next argues the circuit court erred by allowing testimony concerning his alcohol addiction because the evidence was irrelevant, unduly prejudicial, and violative of federal and state law. We disagree.

As part of his motion in limine, Dr. Chapman objected to the statements of lay observers who claimed he appeared impaired during and immediately

after the delivery.[3] He argued the statements were refuted by the testimony of at least six other witnesses who were in the operating room at the time of the cesarean section and should be excluded from evidence.

The circuit court ruled in limine that the statements were relevant and not unduly prejudicial:

> [L]ooking at the totality of everything, looking at the fact that this Defendant was treated as an inpatient for an alcohol problem, looking at the fact that by his own admission he was relapsed and drank at least the weekend before the delivery, taking into consideration his conduct, taking into consideration he himself some 27 days after the operation, you know, realized that the – his relap[se] is so serious that it required further inpatient treatment, in looking at the fact that he was terminated by his associates, then I find the evidence is relevant. So I would allow it.

"Making a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." Samples v. Mitchell, 329 S.C. 105, 108, 495 S.E.2d 213, 215 (Ct. App. 1997).

At trial, Mr. Watson and June Collins testified to the substance of their statements, but Dr. Chapman did not renew the objections raised in his motion *in limine.* Accordingly, any objection to their testimony was waived. Further, to the extent Chapman asserts counsel for the Watsons made improper remarks during opening statements or closing arguments concerning his condition, no objection was raised at trial so as to preserve this issue for appeal. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997) (contemporaneous objection must be made to and ruled upon by trial judge to preserve issue for appellate review). In any event, for the reasons discussed in section I, we find the evidence was relevant on the issue of Chapman's alleged negligence and not

[3] Mr. Watson's statement indicated he thought Dr. Chapman appeared impaired because he was enormously "happy" during the delivery and kept asking the operating room staff to remind him to perform a tubal ligation on Mrs. Watson after the delivery was concluded. June Collins, Mrs. Watson's sister-in-law claimed that Dr. Chapman "acted like he [was] on drugs" when she saw him in Mrs. Watson's hospital room one to two days after the delivery. Ms. Collins works with women suffering from alcohol and drug dependency in Georgia.

unduly prejudicial.

III. Scope of Cross-examination of a Defense Expert

Dr. Chapman contends the trial court should not have allowed the Watsons to cross-examine a defense expert concerning the appropriate advice a physician should provide parents prior to a premature birth inasmuch as the Watsons had dropped their claim involving informed consent. We disagree.

Dr. Sandford Estes was called as a defense expert at trial. During cross-examination, counsel for the Watsons asked him "what is the practice in discussions with couples who are the parents of a 36 week fetus that a physician's considering delivering at 36 weeks?" The trial court allowed the question over Dr. Chapman's objection because the testimony was relevant to Chapman's competency and whether his substance abuse affected his ability to provide treatment for Mrs. Watson that did not fall below medically accepted standards. Dr. Estes indicated the usual practice was to discuss the potential problems of a premature birth, including the potential hazard of undeveloped lungs, with the parents prior to the birth.

The scope of cross-examination rests largely in the discretion of the trial court. Cornwell v. Plummer, 265 S.C. 587, 220 S.E.2d 879 (1975). "The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996); see also Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 439 S.E.2d 838 (1994).

We agree with the circuit court's determination that Dr. Estes's testimony was relevant to the central issue of this case. Accordingly, we find the trial court did not abuse its discretion by allowing this question.

IV. Directed Verdict

Dr. Chapman contends the trial court erred by denying his motion for a directed verdict because the only reasonable inference to be drawn from the evidence is that he met the applicable standard of care. We disagree.

Initially, we note that Dr. Chapman did not properly present this argument as a separately enumerated issue as required by the South Carolina Rules of Appellate Procedure. See Rule 208(b)(1)(B), SCACR (requiring every

issue raised to the appellate court to be set forth in the statement of issues on appeal); Rule 208(D), SCACR (requiring an appellate brief to be divided into as many parts as there are issues to be argued). In any event, the contention is without merit.

A directed verdict is warranted where only one reasonable inference can be drawn from the evidence. Adams v. G.J. Creel & Sons, 320 S.C. 274, 465 S.E.2d 84 (1995); Brady Dev. Co. v. Town of Hilton Head Island, 312 S.C. 73, 439 S.E.2d 266 (1993). In deciding a motion for a directed verdict, all inferences must be viewed in the light most favorable to the non-moving party. Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996). In a medical malpractice action, a plaintiff relying on expert testimony must produce evidence that the defendant's negligence most probably caused the injuries alleged. Id.

At trial, the Watsons presented expert testimony which established that MacKennon's delivery was not medically justified, that it fell below the medically accepted standard of care, and was the proximate cause of MacKennon's respiratory difficulties. Additionally, Dr. Chapman's own expert and former medical partner, Dr. John Chapman, admitted it would be violative of the standard of care to elect to deliver a child at 36 weeks gestation without first performing an amniocentesis. Dr. John Chapman also admitted that Dr. Chapman was ousted from their medical practice shortly after MacKennon's birth because of his addiction to alcohol.

We find there was sufficient evidence to present a jury question as to Dr. Chapman's alleged negligence in this case. Accordingly, the circuit court did not err in denying Chapman's motion for a directed verdict.

For the foregoing reasons, the judgment below is

AFFIRMED.

GOOLSBY and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Duke Power Company,

Appellant,

v.

Laurens Electric Cooperative, Inc., The City of Fountain Inn and Marty Seppala,

Defendants.

Of whom Laurens Electric Cooperative, Inc., is,

Respondent.

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

Opinion No. 3273
Heard November 6, 2000 - Filed December 18, 2000

REVERSED & REMANDED

James W. Logan, Jr., of Logan, Jolly & Smith, of Anderson, for appellant.

Wilburn Brewer, Jr., and Richard S. Dukes, Jr., both of Nexsen, Pruet, Jacobs & Pollard, of Columbia; and James E. Bryan, Jr., of Laurens, for respondent.

Amicus Curiae for Carolina Power & Light Company: Len Sullivan Anthony, CP&L Legal Department, of Raleigh, NC; Mark W. Buyck, Jr., and Mark W. Buyck, III, of Florence.

HEARN, C.J.: Duke Power Company (Duke) appeals the grant of summary judgment to Laurens Electric Cooperative, Inc. (Laurens) in Duke's action to enjoin Laurens from serving customers in a newly annexed area of the city of Fountain Inn. Duke argues Laurens lacks the authority under the Rural Electric Cooperative Act[1] (Act) to serve these customers. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Duke brought this action to enjoin Laurens, a rural electric cooperative (co-op), from providing power to a newly annexed area of Fountain Inn known as Country Gardens. Duke, Laurens, and Fountain Inn stipulated to the following facts: Fountain Inn is not a rural area under the Act because its population exceeds 2,500 people; Duke is the principal supplier of electricity to Fountain Inn in terms of both revenue and number of customers; neither Laurens nor Duke served any customers in Country Gardens at the time of annexation; and Fountain Inn adopted an ordinance following annexation granting Laurens an exclusive assignment to serve Country Gardens, part of which was previously assigned to Duke by the South Carolina Public Service Commission.[2]

Both Laurens and Duke moved for summary judgment. The trial court granted summary judgment to Laurens from which Duke appeals.

STANDARD OF REVIEW

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law

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[1]S.C. Code Ann. §§ 33-49-10 to 1330 (1990 & Supp. 1999).

[2] Fountain Inn agreed to the stipulation of facts but did not participate further in the action and did not appear at the hearing.

to those facts." WDW Prop. v. City of Sumter, 342 S.C. 6, 8, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. J.K. Const., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

DISCUSSION

Duke argues the circuit court erred in finding Laurens could lawfully initiate service in a nonrural area absent an applicable exception under section 33-49-250. We agree.

Rural electric cooperatives are creatures of statute and only have such authority as the legislature has given them. See South Carolina Elec. & Gas Co. v. Pub. Serv. Comm'n, 275 S.C. 487, 489, 272 S.E.2d 793, 794 (1980) (recognizing that regulatory bodies as creatures of statute hold only those powers expressly granted by the legislature). The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998)). If a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and courts must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994).

Laurens was created pursuant to the Act's provision granting co-ops the authority to supply energy to rural areas while promoting and extending the use of electricity across the state. S.C. Code Ann. § 33-49-210 (1990). Because Laurens is a co-op, this court must look to the Act to see if Laurens may lawfully initiate service to Country Gardens. "Under S.C. Code Ann. § 33-49-250, a rural cooperative may provide service only in rural areas, i.e., those with a population under 2500." Carolina Power & Light Co. v. Town of Pageland, 321 S.C. 538, 542, 471 S.E.2d 137, 139 (1996). The Act defines a rural area as one "not included within the boundaries of any incorporated or unincorporated city, town, village or borough having a population in excess of twenty-five hundred persons . . . ." S.C. Code Ann. § 33-49-20(1). By stipulation of the parties, Fountain Inn is no longer a rural area for purposes of the Act. Therefore, an exception must apply for Laurens to serve Country Gardens.

The Act provides two exceptions permitting a rural co-op to serve customers within a nonrural area, the annexation exception and the principal

supplier exception. These exceptions provide:

> . . . subject to the provisions of § 58-27-1360, the act of incorporating or annexing into a city or town an area in which the cooperative is serving shall constitute the consent of the governing body of such city or town for the cooperative to continue serving all premises then being served and to serve additional premises within such area until such time as the governing body of the city or town shall direct otherwise and such cooperative is empowered to serve, but it shall not extend service to any premises in any other part of such city or town unless the cooperative was the principal supplier of electricity in such city or town; provided, further, that the right of a cooperative to continue to serve in a city or town in which it was the principal supplier of electricity shall not be affected by the subsequent growth of such city or town beyond a population of two thousand five hundred persons . . . .

S.C. Code Ann. § 33-49-250(1). Both exceptions prevent the ouster of co-ops from areas they have historically served due to population growth or annexation. See City of Abbeville v. Aiken Elec. Coop., Inc., 287 S.C. 361, 369, 338 S.E.2d 831, 835 (1985). These exceptions contemplate the co-op's continued service in an area.

Both Duke and Laurens stipulated that Duke was the principal supplier of electricity to Fountain Inn. Therefore, the principal supplier exception does not apply by the plain language of the statute.

Laurens contends the annexation exception applies here. We disagree. In Pageland, the court held that a co-op may continue serving customers following annexation by a nonrural municipality even where the co-op is not the principal supplier of electricity for that municipality. 321 S.C. at 542-44, 471 S.E.2d at 139-40. The Pageland court found the intent of the legislature in adopting the annexation exception was to permit a co-op to continue serving existing customers once it lawfully entered the area. See also Abbeville, 287 S.C. at 369, 338 S.E.2d at 835. In Pageland, the co-op was allowed to continue serving the annexed area because it was lawfully serving the customers in question before the annexation. Here, this analysis mandates the conclusion

that Laurens may not serve Country Gardens. This does not result in any ouster because Laurens was not serving the area before its annexation.

Although there are no South Carolina cases directly on point, we find the following case instructive. In Farmers' Electric Cooperative, Inc., v. Missouri Department of Corrections, 977 S.W.2d 266 (Mo. 1998), the Missouri Supreme Court addressed whether a rural co-op could lawfully serve a new structure on formerly rural land annexed by a nonrural entity. Missouri law provides an annexation exception similar to section 33-49-250,[3] but the court held the co-op did not fall within this exception because it did not provide service to the structure prior to annexation. We agree with this analysis under our statutory scheme.

Laurens's proposed interpretation of the Act would rob section 33-49-250 of any meaning and render it superfluous.[4] When construing a statute, we

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[3]Mo. Rev. Stat. § 394.080 (1986). The South Carolina and Missouri statutes are nearly identical, both tracking the language of the federal Rural Electrification Act. See 7 U.S.C. §§ 901-18 (1999).

[4]Because we agree with Duke that the issue in this case is whether Laurens may lawfully enter a nonrural area, we do not reach Laurens's contention that Fountain Inn has a constitutional right to choose an electric supplier. We further note that Laurens does not have standing to assert this argument on behalf of the City. Were we to reach this issue, we would find the court addressed and rejected a similar contention in Pageland. There, Pageland contended the trial court's order was contrary to the holding in Berkeley Electric Cooperative, Inc. v. South Carolina Public Service Commission, 304 S.C. 15, 402 S.E.2d 674 (1991). In Berkeley, a co-op challenged the right of the city to designate a private power supplier in a newly annexed area. The court upheld the ordinance based on the municipality's constitutional right to designate its power supplier. Laurens, like Pageland, relies on Berkeley and S.C. Constitution, Article VIII, section 15 for the proposition that a municipality has an unlimited right to choose its electric provider. However, in Berkeley the rights of a co-op to provide that power were not discussed, and Pageland suggests the municipality's right is independent of the powers of a co-op. Pageland, 321 S.C. at 540, 471 S.E.2d at 138 (". . . notwithstanding the supplier may be prohibited from providing service by its status as a rural cooperative."). Further, a municipality may

must presume the legislature did not intend a futile act. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). If rural co-ops may serve any area designated by a municipality, there is no need for section 33-49-250's exceptions. Accordingly, the circuit court's grant of summary judgment to Laurens is hereby reversed and remanded for the entry of an injunction consistent with this opinion.

REVERSED AND REMANDED.

ANDERSON and STILWELL, JJ., concur.

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not enact measures inconsistent with the general laws of the state. S.C. Code Ann. § 5-7-30 (Supp. 1999).