The Supreme Court of South Carolina

RE: Lawyers Suspended by the South Carolina Bar

The South Carolina Bar has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(1), SCACR, since February 1, 2008. This list is being published pursuant to Rule 419(d)(1), SCACR. If these lawyers are not reinstated by the South Carolina Bar by April 1, 2008, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e)(1), SCACR.

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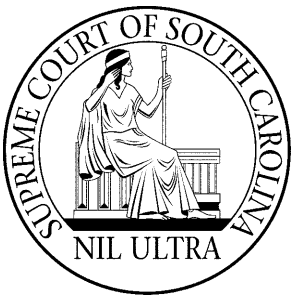

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11

March 17, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Inlet Harbour, a South Carolina General Partnership, Respondent,

v.

The South Carolina Department of Parks, Recreation and Tourism, Appellant,

v.

Inlet Harbour Property Owners Association, Inc., Respondent.

Appeal from Georgetown County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26459
Heard February 7, 2008 – Filed March 17, 2008

AFFIRMED

Mark Andrew Nappier, of Joye, Nappier & Risher, of Murrells Inlet, James B. Richardson, Jr., of Columbia, and Ezizze Davis Foxworth, of Loris, for Appellant.

Dominic A. Starr, of Nelson Mullins Riley & Scarborough, of Myrtle Beach, for Respondents.

CHIEF JUSTICE TOAL: This appeal arises out of a dispute involving road access to oceanfront property in Murrells Inlet, South Carolina. The crux of this matter is the scope of an easement over a private road implied in a deed from Respondent Inlet Harbour, a South Carolina general partnership, to the South Carolina Department of Parks, Recreation and Tourism. The trial court held that the implied easement was limited in scope and the Department of Parks, Recreation and Tourism appealed. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The circumstances giving rise to this case are best explained by way of historical narrative. In the early 1970's, a group of investors formed the Inlet Harbour general partnership and acquired a large tract of land on the peninsula forming the northern border of the entrance to the coastal waterway known as Murrells Inlet. The partnership made this acquisition for the purpose of developing this area into a residential subdivision.

At the time the partnership purchased this land, it was aware that the United States Army Corps of Engineers was preparing a substantial engineering project to solve navigability problems in the Murrells Inlet waterway. This project, referred to as the "Murrells Inlet Navigability Project," called for the construction of jetties at the north and south entrances to the inlet and for routine dredging of the inlet. The project was to be funded with both state and federal resources, and the South Carolina Department of Parks, Recreation and Tourism ("the Department") was charged with acquiring the land necessary for the project. The Department was to acquire the necessary property and transfer that property to the Corps of Engineers.

The land at issue in this case was acquired for the construction and maintenance of the jetty at the inlet's north entrance. Inlet Harbour sold a

first parcel of land to the Department in March 1976. This rather large tract (approximately 4.2 acres) was located very near the end of the peninsula. The tract bordered the ocean on the east and undeveloped property on the west and south. Undeveloped residential lots bordered the tract on the north, and Inlet Harbour Drive – the yet-to-be-developed thoroughfare through the development – abutted portions of the tract's north and west borders. In addition to describing the property by metes and bounds, the deed to the Department referenced a plat recorded roughly two weeks earlier. This plat showed the 4.2-acre tract, the adjacent undeveloped lots, and the future site of Inlet Harbour Drive. The deed to the Department additionally contained an express easement to use Inlet Harbour Drive to access the property "for the sole purpose of constructing and maintaining the north sand dike and jetty for the Murrells Inlet, South Carolina, Navigation Project."

Some time after this transfer, the Corps of Engineers directed the Department to acquire a second tract of land from Inlet Harbour. The Corps required this second purchase in the event that it proved necessary to construct a "deflector dike" to maintain the project. The Department believed this second acquisition to be unnecessary, but nevertheless acquired this smaller tract of approximately 3.56 acres located immediately to the south of the Department's larger tract. The parties completed this transaction in July 1977. Like the initial land sale, this deed described the conveyed property by reference to a plat. Unlike the initial sale, however, this deed did not contain any easement over or reference to Inlet Harbour Drive. After this second transaction, the Department owned contiguous tracts which comprised the south and southeast corners of the north Murrells Inlet peninsula.

The Department transferred the 4.2-acre tract of property to the Corps of Engineers roughly one month after acquiring the 3.56-acre tract. Because the Department felt that the acquisition of the second tract was unnecessary, the Department leased the 3.56-acre tract to the Corps instead of transferring title to the Corps. Although the transfer of the 4.2-acre tract had the effect of cutting the 3.56-acre tract off from road access, it appears that the Corps and the Department continued to access the 3.56-acre tract, albeit very infrequently, by using Inlet Harbour Drive and then traversing the 4.2-acre tract. The Department's lease with the Corps expired in the mid-1990's, and

the Corps determined that it would not need to construct a deflector dike in order to maintain the Navigability Project. The Department then began investigating the subdivision and sale of the 3.56-acre tract, and this litigation followed.

The Inlet Harbour partnership initiated this declaratory judgment action against the Department requesting that the court declare the scope of the Department's right to use Inlet Harbour Drive to access the 3.56-acre tract. The Department asserted the creation of an express easement and an easement implied by necessity as counterclaims, and the Department sought to add Respondent Inlet Harbour Property Owners Association as a third-party defendant.[1] Although the property owners association answered that it had assigned all of its rights in this litigation to the partnership, there appears to be no continuing dispute involving the property owners association's inclusion as a party in this case.

The trial court entered a grant of partial summary judgment to the Department. Relying on the authority of *Blue Ridge Realty Company v. Williamson*, 247 S.C. 112, 145 S.E.2d 922 (1965), the trial court held that the Department had an easement for ingress and egress over Inlet Harbour Drive which arose out of the reference in the Department's deed to a plat depicting subdivided lots and streets. Although the trial court held that there was no doubt as to the existence of this easement, the court held that there was a genuine issue of material fact as to whether the scope of the Department's easement was unrestricted or was restricted to purposes relating to the Murrells Inlet Navigability Project. The parties proceeded to trial, and at the conclusion of the trial, the court held that the Department's easement over Inlet Harbour Drive was limited to environmental purposes associated with maintaining the navigability of Murrells Inlet. The Department appealed.

[1] In the interim period between the Department's transfer of the 4.2-acre tract to the Corps and the expiration of the lease, the Inlet Harbour partnership transferred ownership of Inlet Harbour Drive to the Inlet Harbour Property Owners Association.

This Court certified the appeal from the court of appeals pursuant to Rule 204(b), SCACR. The Department raises the following issue for review:

> Did the trial court err in holding that the Department's easement to use Inlet Harbour Drive is limited to environmental purposes associated with maintaining the navigability of Murrells Inlet?

STANDARD OF REVIEW

The determination of the existence of an easement is a question of fact in a law action, *Jowers v. Hornsby*, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987), and this Court reviews factual issues relating to the existence of an easement under a highly deferential standard. *See Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976) (providing that questions of fact in a law action are generally reviewed under the "any evidence" standard).

Apart from the issue of an easement's creation, however, the determination of the scope of an easement is an action in equity. *Tupper v. Dorchester County*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Townes*, 266 S.C. at 86, 221 S.E.2d at 775.

LAW/ANALYSIS

The Department argues that the trial court erred in holding that the Department's easement over Inlet Harbour Drive is limited to environmental purposes associated with maintaining the navigability of Murrells Inlet. We disagree.

An easement is a right of use over another's property. BLACK'S LAW DICTIONARY 457 (5th ed. 1979). Easements can arise by both express creation and by implication. Implied easements are based upon the theory that whenever one conveys property, he intends to convey whatever is necessary for the property's use and enjoyment. 17A Am. Jur. *Easements* §

37 (1957). The purpose of an implied easement is to give effect to the intentions of the parties to a transaction, and because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself, implied easements are not favored. *Id*.; *see also* 28A C.J.S. *Easements* § 61 (1996).

The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement. 25 Am. Jur. 2d *Easements and Licenses* § 19 (2004); 28A C.J.S. § 62. Courts have, over time, developed various presumptions regarding the creation of implied easements in certain circumstances. One such presumption arises when an owner subdivides his land and has the land platted into lots and streets. This Court has recognized the general rule that when an owner conveys subdivided lots and references the plat in the deed, the owner grants the lot owners an easement over the streets appearing in the plat. *See, e.g., Blue Ridge Realty Co.*, 247 S.C. at 118, 145 S.E.2d at 924-25.[2]

In the instant case, the Department argues that the scope of their easement over Inlet Harbour Drive, implied by the *Blue Ridge* rule, should extend to using Inlet Harbour Drive for residential purposes. The Department first argues that because the rule enunciated in *Blue Ridge* commonly arises when a landowner has platted land into a residential subdivision, the rule presumptively creates an easement to use the platted roads for residential purposes. The Department further argues that the circumstances surrounding this transaction demonstrate that the parties did not intend that the 3.56-acre tract be forever limited to environmental

[2] Other examples of these presumptions are easements implied where the grantor used one portion of property to serve another prior to severance (easements implied by prior use), and easements implied where an easement is necessary to allow a grantee to have meaningful access to his land (easements implied by necessity). *See Boyd v. Bell South Tel. Tel. Co., Inc.*, 369 S.C. 410, 633 S.E.2d 136 (2006) (extensively discussing implied easements).

purposes associated with maintaining the navigability of Murrells Inlet. In our view, both arguments miss the mark.

As a starting point, we note that the intentions of the parties to the transaction are the overriding focus when examining implied easements. *McAllister v. Smiley*, 301 S.C. 10, 16, 389 S.E.2d 857, 862 (1990) (Toal, J. dissenting); 28A C.J.S. §§ 82, 149; 17A Am. Jur. §§ 40, 116; 25 Am. Jur. 2d § 19. Thus, the Department over-reads *Blue Ridge* considerably in suggesting that the case stands for the proposition that an easement created by reference to a plat is presumptively an easement of a particular scope. The rule applied in *Blue Ridge* is nothing more than a presumption that when a grantor conveys property with reference to a plat showing streets or other ways of passage, the grantor intends to allow the grantee the use of the delineated streets and ways of passage. *McAllister*, 301 S.C. at 11-12, 389 S.E.2d at 858. The case *Cason v. Gibson*, 217 S.C. 500, 61 S.E.2d 58 (1950), explained the policy underlying this presumption in terms of estoppel. In that case, this Court explained that when a grantor conveys land abutting a street, he is estopped from denying the street's existence and the right of the grantee to its use. *Id.* at 507, 61 S.E.2d at 61. This approach is reasonable, and it is also reasonable that when an owner conveys property that has been subdivided for residential purposes, the grantor presumably intends for grantees to have access to the abutting subdivision streets for normal residential purposes. But the property at issue here is not subdivided residential property and abuts no road. This demonstrates the problems that might occur if we were to apply a rigid presumption based solely upon particular geography or land division. Our guidepost must be what the parties intended, and the best evidence of the parties' intentions are the facts and circumstances surrounding the conveyance. *See McAllister*, 301 S.C. 12, 389 S.E.2d at 858-59; 28A C.J.S. §§ 82, 149; 25 Am. Jur. 2d §§ 19, 21. Thus, to the extent the Department urges this Court to ignore everything except the deed's reference to a residential subdivision plat, this argument fails to remain true to the principles underlying implied easements.

Our analysis accordingly turns to an examination of the facts and circumstances surrounding the sale of the 3.56-acre tract. The Department argues that the partnership foresaw the likelihood that the 3.56-acre tract

could one day be developed for residential purposes and that this is evidenced by the fact that both the 4.2-acre and the 3.56-acre tracts were carved out of an end of the peninsula labeled "reserved for future development" on one of the partnership's maps. The Department further argues that this evidence is supported by the testimony of a principal of the partnership providing that the partnership would have developed this land for residential purposes if it had not sold the land to the Department. According to the Department, this evidence supports the proposition that the partnership intended for this tract to be used both for purposes associated with maintaining the navigability of Murrells Inlet and for residential purposes.

We believe the trial court wisely discounted these arguments. Relying on testimony and evidence in the record, the court below took the view that the Inlet Harbour partnership purchased the land it sought to develop with the express understanding that portions of the land on the peninsula would need to be conveyed to the government for the specific purpose of the Murrells Inlet Navigability Project. This view was supported by testimony from the partnership that it engaged in several discussions with the state and federal entities involved and that the partnership designed the residential subdivision and Inlet Harbour Drive around the land that the project would demand. A principal of the partnership further testified that the designation of the areas acquired by the Department as "reserved for future development" specifically meant that the land was reserved for sale to the Corps of Engineers for the project.

A clarifying point is instructive. A great deal of the evidence surrounding this transaction does not focus directly on the issue of access to these tracts of land, but pertains instead to how the parties intended for this land to be used. Addressing the question of how this land may be used, the Department focuses on the lack of any restrictive covenants in the deed to the 3.56-acre tract and argues that it should not be prohibited from developing the property where the deed contains no restriction prohibiting such development. But the absence of restrictions in the Department's deed is not terribly relevant, and it is at this point that we must recognize an important distinction regarding what is and what is not at issue in this appeal. The question presented in this case is the scope of the Department's right to

access the 3.56-acre tract through a specific route, not a limitation of the Department's right to use that tract. The Department unquestionably has the same right to make use of its land as does any landowner. The concepts of deed warranties and restrictive covenants are thus largely irrelevant in this case.

This does not mean, however, that we should disregard the evidence of how the parties intended these tracts to be used as irrelevant to the issue of how the parties intended to treat access to these tracts. We do not think that the subjects can be completely separated. If the partnership designed its subdivision around the land that it knew the government would require and intended for this land to only be used for purposes related to the Murrells Inlet Navigability Project, that supports the proposition that the partnership intended for Inlet Harbour Drive to provide only a limited right of access to these tracts. Stated differently, the fact that the partnership contemplated a specific and limited use of this property is evidence that the partnership contemplated a specific and limited use of Inlet Harbour Drive to access the property. That this limited right of access would be the only right of access over Inlet Harbour Drive is further supported by the fact that the partnership initially attempted to insert a clause in the deed to the 4.2-acre tract that would have caused ownership of the tract to revert to the partnership if the property ceased to be used for the jetty project. The Department advised that a reverter would not comply with its responsibility under the project to acquire full title, and the parties thus crafted the express but limited easement found in the deed to the 4.2-acre tract.

The Department does not point us to any evidence demonstrating that the parties contemplated a broader use of Inlet Harbour Drive or intended for this land to one day be used for purposes unrelated to the Murrells Inlet Navigability Project. Indeed, the Department did not even offer testimony that it contemplated residential development of the 3.56-acre tract at the time of purchase. While we can say that the Department is correct in that its failure to secure utility easements or an easement across the 4.2-acre tract does not conclusively prove that later development was not contemplated at the time the partnership sold the 3.56-acre tract to the Department, the acquisition of such easements would make the Department's claim

considerably stronger.[3] The Department could have similarly bolstered its case through bargaining expressly for an unrestricted easement over Inlet Harbour Drive at the time it purchased the 3.56-acre tract from the partnership. Having not done so, the Court is left to discern how the parties intended to treat access to this property. Under these circumstances, we cannot say that the trial court erred in considering the failure to bargain for express utility and access easements in an effort to ascertain the parties' intentions.

The Department's strongest argument for reversal is one based largely on equity. The argument goes that because Inlet Harbour subdivision is a residential subdivision, there is no additional servitude imposed on Inlet Harbour Drive by allowing the Department to use the road for residential purposes. The Department bolsters this argument with the assertion that due to the property's oceanfront location, the property's value will be quite large if road access is granted and quite small if road access is denied. The Department argues that the fact that it leased the land to the Corps of Engineers instead of selling the land evidences the Department's intention to sell the property if it was not needed for the project.

But the equities in this case do not cut solely in the Department's favor. Absent an easement or a license, a landowner generally enjoys no right to use the land of another. Implied easements ask the court to take a deed between grantor and grantee which is silent regarding any grant or reservation of a right to cross one party's land to access the other's and imply what the parties must have meant to include in the deed but did not. In this case, this Court is charged with determining what the partnership and the Department meant to include in the deed regarding the Department's ability to use Inlet Harbour Drive to access the 3.56-acre tract. We find that there is simply very little support for the proposition that the circumstances surrounding this transaction evidence any intent by the parties that an easement over Inlet Harbour Drive extend beyond uses relating to the Murrells Inlet Navigability Project. The trial court viewed the evidence and determined that the parties

[3] The Department eventually acquired an easement across the 4.2-acre tract, but that acquisition did not occur until 1996.

intended for the limited access appearing in the deed to the 4.2-acre tract to serve both parcels, and we agree with the trial court's determination.

Two final points are instructive. First, although the Department's argument about retaining the 3.56-acre tract instead of transferring the tract to the Corps of Engineers is arguably evidence that the Department contemplated someday selling the 3.56-acre property at the time it conveyed the 4.2-acre tract to the Corps, there is no evidence that Inlet Harbour partnership participated in this decision or was even aware of it. Similarly, the Department's argument based on having paid fair market value for the 3.56-acre tract is unpersuasive. The Department paid fair market value for the 4.2-acre tract despite the grant of a limited easement to access that tract, and the record contains testimony that the Department was statutorily required to purchase these tracts for fair market value.

In sum, we hold that the trial court properly concluded that the parties to this transaction did not intend for this land to be accessed by Inlet Harbour Drive for purposes unrelated to the Murrells Inlet Navigability Project. Accordingly, we affirm the trial court's decision that the Department of Parks, Recreation and Tourism's easement over Inlet Harbour Drive is limited to environmental purposes associated with maintaining the navigability of Murrells Inlet.[4]

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision.

MOORE, WALLER, JJ., and Acting Justice James W. Johnson, Jr., concur. PLEICONES, J., dissenting in a separate opinion.

[4] We note that access to the property over navigable water has not been addressed at any point in this case. We therefore assume that the property is accessible over navigable water. *See* 25 Am. Jur. 2d § 38 (providing that an easement by necessity will generally not be implied where property is accessible by navigable water); 28A C.J.S. § 98 (same).

JUSTICE PLEICONES: I respectfully dissent, and would hold the circuit court erred in limiting the scope of the Department of Parks, Recreation and Tourism's (PRT's) easement over Inlet Harbour Drive.

The circuit court's finding of an implied easement has not been appealed and is therefore the law of the case. E.g. Dreher v. Dreher, 370 S.C. 75, 634 S.E.2d 646 (2006). The sole issue is whether the court erred in limiting the PRT's road easement as it relates to the second tract it purchased from respondent to "environmental purposes associated with maintaining the navigability of Murrells Inlet." The majority and I agree on the applicable legal principles, but I draw a different conclusion about the parties' intentions after examining the facts and circumstances surrounding the conveyance of the 3.56 acre tract.

In 1976, PRT bought a 4.2 acre tract from respondent at the behest of the Army Corps of Engineers. This 1976 deed contained an express easement limiting PRT's right to ingress and egress over Inlet Harbour Drive to "the sole purpose of constructing and maintaining the north sand dike and jetty for the Murrells Inlet, South Carolina, Navigation Project." More than a year later, PRT purchased the 3.56 tract at the insistence of the Corps. Among the facts and circumstances surrounding this second transaction was PRT's belief, ultimately vindicated, that this tract would not be necessary for the Corps' Murrells Inlet project. Accordingly, there was a need to preserve this tract's commercial viability. Even more critically in my opinion, the 1977 deed to the 3.56 acres contains no express easement, much less one limiting PRT's access to Inlet Harbour Drive, as had the March 1976 deed to the 4.2 acre tract. As I view the facts and circumstances surrounding the second conveyance, I can draw only one conclusion: that the parties did not intend any restriction upon the scope of PRT's Inlet Harbour Drive easement as it relates to the 3.56 acre tract.

Accordingly, I would reverse.

The Supreme Court of South Carolina

Nancy S. Layman, David M. Fitzgerald,Vicki K. Zelenko, Wyman M. Looney, Nancy Ahrens, James Haynes, and Janice Franklin, on behalf of themselves and all others similarly situated, Respondents/Appellants,

v.

The State of South Carolina and The South Carolina Retirement System, Appellants/Respondents.

ORDER

On January 28, 2008, this Court issued an opinion affirming the circuit judge's award of statutory attorneys' fees for counsel who successfully litigated the claims of a class of TERI participants (Respondents/Appellants in the instant action) against the State and the South Carolina Retirement System.[1] *Layman v. The State of South Carolina and The South Carolina Retirement System*, Op. No. 26427 (S.C. Sup. Ct. filed January 28, 2008)

[1] This Court's opinion in the underlying litigation is found in *Layman v. The State of South Carolina and The South Carolina Retirement System*, 368 S.C. 631, 630 S.E.2d 265 (2006) [hereinafter *Layman I*].

(Shearouse Adv. Sh. No. 4 at 50) [hereinafter *Layman II*]. Beginning with a lodestar calculation based on the timesheets in the record before this Court and on counsel's hourly rates, this Court enhanced the lodestar figure with a multiplier to reflect the exceptional circumstances of the case, and modified the circuit judge's calculation of attorneys' fees to award counsel for the TERI plaintiffs $445,226.60. *Id.* at 73.

Counsel for the TERI plaintiffs filed a petition for rehearing, and in their return, the State and the Retirement System moved for leave to supplement the record. We deny the motions of both parties and issue this order modifying the award of attorneys' fees to reflect the additional fees and costs incurred by counsel for the TERI plaintiffs in litigating the issue of attorneys' fees. In doing so, we note that counsel for the TERI plaintiffs did not set forth these additional fees and costs in the record before this Court in *Layman II* even though counsel were presumably aware that the State's and the Retirement System's theory of the case was that under the relevant statute, attorneys' fees were to be awarded based solely on counsel's hourly rate and time expended. While the matter could be remanded at this juncture for a calculation of attorneys' fees in accordance with the methodology

outlined in *Layman II*, in the interest of fairness and in ending this litigation without further accrual of fees by either side, we modify our original award of attorneys' fees to include this additional time expended by counsel.

The revised award of attorneys' fees is itemized as follows:

	Total Hours Expended	Net Hours Expended	Hourly Rate	Totals
Court's original lodestar calculation (hours expended before June 1, 2006)				
Lewis & Babcock				
A. Camden Lewis	139.5	135.3	$600.00	$81,180.00
Keith M. Babcock	224.8	218.0	$350.00	$76,300.00
Ariail E. King	109.7	106.4	$225.00	$23,940.00
Peter D. Protopapas	14.6	14.1	$250.00	$3,525.00
William A. McKinnon	262.1	254.2	$225.00	$57,195.00
Brady R. Thomas	25.2	24.4	$200.00	$4,880.00
Paralegals	271.3	263.1	$80.00	$21,048.00
Law Clerks	144.2	139.8	$70.00	$9,786.00
R. A. Harpootlian, P.A.				
Richard A. Harpootlian	97.5	94.5	$500.00	$47,250.00
David Scott	96.8	93.8	$250.00	$23,450.00
Heather Herron	44.6	43.2	$80.00	$3,456.00
Holli Langenburg	5.1	4.9	$80.00	$392.00
			Subtotal	**$352,402.00**
Additional hours expended (after June 1, 2006)[2]				
Lewis & Babcock				

[2] Itemized post-June 1 costs and fees incurred by counsel for TERI plaintiffs were set forth in affidavits included in the petition for rehearing.

A. Camden Lewis	267.8	N/A[3]	$600.00	$160,680.00
Keith M. Babcock	211.3	N/A	$350.00	$73,955.00
Mary G. Lewis	4.4	N/A	$350.00	$1,540.00
Ariail E. King	522.7	N/A	$225.00	$117,607.50
Peter D. Protopapas	.80	N/A	$250.00	$200.00
William A. McKinnon	3.4	N/A	$225.00	$765.00
Brady R. Thomas	5.5	N/A	$200.00	$1,100.00
Paralegals	288.3	N/A	$80.00	$23,064.00
Law Clerks	120.3	N/A	$70.00	$8,421.00
R. A. Harpootlian, P.A.				
Richard A. Harpootlian	143.4	N/A	$500.00	$71,700.00
Graham Newman	29.8	N/A	$250.00	$7,450.00
Heather Herron	55.0	N/A	$80.00	$4,400.00
Holli Langenburg	2.7	N/A	$80.00	$216.00
			Subtotal	**$471,098.50**
		TOTAL LODESTAR		**$823,500.50**
Lodestar enhancement				
Lodestar base calculation				$823,500.50
Multiplier				x 1.25
			Subtotal	**$1,029,375.63**

[3] As described in *Layman II*, attorneys' fees in this matter are not being awarded for the litigation of the Working Retirees' claims in *Layman I*. Accordingly, in calculating a reasonable fee, this Court reduced the number of total hours submitted for each attorney and staff member by 3% (shown as "Net Hours Expended") to account for time devoted solely to the claims of the Working Retirees in the underlying litigation. *See Layman II* at 70. Because the additional time expended by counsel after June 1, 2006 logically reflects only those hours spent on the litigation of attorneys' fees with respect to the TERI plaintiffs, there is no need for a similar reduction in our calculation today.

Add expenses incurred	+ $4,724.10
Add additional expenses incurred after June 1, 2006	+$41,602.01
TOTAL ENHANCED LODESTAR	**$1,075,701.74**

Accordingly, we modify our previous award of attorneys' fees in *Layman II*, and assess reasonable attorneys' fees in the amount of $1,075,701.74 against the State and the Retirement System.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ Donald W. Beatty J.

s/ E. C. Burnett, III A. J.

s/ Thomas W. Cooper, Jr. A. J.

Columbia, South Carolina

March 10, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Floree Hooper, as Personal Representative of the Estate of Albert L. Clinton, Deceased, Appellant,

v.

Ebenezer Senior Services and Rehabilitation Center, Respondent.

Appeal From York County
S. Jackson Kimball, Special Circuit Court Judge and Master-in-Equity

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Opinion No. 4350
Heard March 4, 2008 – Filed March 10, 2008

AFFIRMED

John S. Nichols, of Columbia and Robert V. Phillips, of Rock Hill, for Appellant.

R. Gerald Chambers and R. Hawthorne Barrett, both of Columbia, for Respondent.

ANDERSON, J.: In this action for wrongful death and negligence under the survival statute, Floree Hooper appeals the trial court's grant of summary judgment to Ebenezer Senior Services and Rehabilitation Center (Ebenezer) based on the statute of limitations. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In February 2003, Albert Clinton became a resident of Ebenezer, a nursing home facility. Two months later, Clinton was taken to a hospital and remained there until his death on May 15, 2003. Hooper, as Personal Representative of Clinton's Estate, filed an action against Ebenezer on February 6, 2006, for negligence under the survival statute and wrongful death.

When Hooper's attorney (Counsel) received the filed pleadings from the clerk of court, he called Ebenezer's telephone number. A receptionist answered, "Agape Rehabilitation." Counsel inquired about Ebenezer Senior Services and was told the business had been sold and was now Agape Rehabilitation (Agape). A telephone search revealed Agape had the same street address as Ebenezer. Counsel drove to the location, and signage identified the facility as "Agape Rehabilitation of Rock Hill."

Counsel searched the South Carolina Secretary of State's website and found a current listing for Ebenezer as a domestic entity in good standing listing a registered agent: "Jack G. Hendrix, Jr., 1415 Richland Street, Columbia, SC." Counsel forwarded the pleadings to the Richland County Sheriff's office for service upon Hendrix, but service was not accomplished because he "moved to an unknown address on Assembly St."

Counsel hired an investigator to locate Hendrix. The investigator discovered an address in Pelion, and Counsel again sent the pleadings to the Richland County Sheriff's Department for service. The Richland County Sheriff's Department returned the pleadings because the address was in Lexington County. Counsel transmitted the pleadings to the Lexington County Sheriff's Department for service, and the Sheriff's office responded with an affidavit stating the department was unable to serve the pleadings

because "per neighbor [Hendrix] left his wife a year ago and unknown where he lived now."

Having exhausted his options of service by sheriff, Counsel hired an investigator to take the papers to Agape. The investigator served the pleadings upon Janet Inkelaar, the administrator of Agape Rehabilitation, on June 15, 2006, at the facility. Inkelaar indicated she was authorized to accept service on Ebenezer's behalf. By Hooper's calculation, service was completed 129 days after the filing of the summons and complaint.

Ebenezer moved the circuit court to dismiss the action, asserting it was not commenced in a timely fashion pursuant to Rule 3, SCRCP, and section 15-3-530 of the South Carolina Code, the three year statute of limitations. Hooper argued: (1) the statute of limitations should be equitably tolled; (2) the 120-day period under Rule 3(a), SCRCP, should not begin to run until the end of the limitations period; (3) Ebenezer should be estopped from asserting the statute of limitations due to its own unlawful actions; and (4) under Rule 86, SCRCP, the former version of Rule 3, SCRCP, should apply to permit service within a reasonable time after filing following delivery to the sheriff.

The Master in Equity, sitting as a Special Circuit Judge, ruled the action was not timely commenced because it was not served within 120 days of filing. Hooper sought reconsideration of the court's order, and a hearing was scheduled. Hooper then served notice of appeal from the dismissal, and the hearing on reconsideration was not held.

ISSUES

1. Did the 120 day period for service under Rule 3(a), SCRCP, commence when the action was filed or when the limitations period expired?

2. Did the circuit court properly refuse to equitably toll the statute of limitations?

3. Is it unjust and inequitable to permit Ebenezer to assert the statute of limitations as a defense?

4. Should the circuit court have applied the former Rule 3(a), pursuant to Rule 86, SCRCP, and determined that service was timely when completed within a reasonable time after delivery to the sheriff?

STANDARD OF REVIEW

Summary judgment is defined by Rule 12(c), SCRCP:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Id.

When reviewing a grant of summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006); Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007); Bennett v. Investors Title Ins. Co. 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006); see Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); Medical Univ. of S.C. v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Hackworth v. Greenville County, 371 S.C. 99, 102, 637 S.E.2d 320, 322 (Ct. App. 2006); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005).

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)); Moore v. Weinberg, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007); Mulherin-Howell v. Cobb, 362 S.C. 588, 596-97, 608 S.E.2d 587, 592 (Ct. App. 2005). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).

LAW/ANALYSIS

I. Timely Service under Rule 3(a)

Hooper maintains the trial court erred in granting Ebenezer summary judgment, arguing under Rule 3(a), SCRCP, the 120 days for service did not commence until the date the limitations period expired, as opposed to the filing date. We disagree.

Rule 3(a), SCRCP, provides:

> A civil action is commenced when the summons and complaint are filed with the clerk of court if:
>
> (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or
>
> (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Id.

The rule is consistent with section 15-3-20 of the South Carolina Code:

> (A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.
>
> (B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

Id.

This Court explained the importance of statutes of limitation in Blyth v. Marcus, 322 S.C. 150, 470 S.E.2d 389 (Ct. App. 1996):

> A statute of limitations reduces the interval between the accrual and commencement of a right of action to a fixed period, thereby putting to rest claims after the passage of time. This procedural device operates as a defense to limit the remedy available from an existing cause of action. Unless an action is commenced before expiration of the limitations period, the plaintiff's claim is normally barred.

Id. at 152, 470 S.E.2d at 390 (citations omitted).

The purpose of statutes of limitation is to ensure litigation is "brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation." City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct. App. 2004) (quoting Webb v. Greenwood County, 299 S.C. 267, 276, 92 S.E.2d 688, 691 (1956)). "[S]tatutes are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they

believe is a settled state of public affairs." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413-14 (2000).

> Statutes of limitation . . . protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitation encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999), aff'd, 341 S.C. 320, 534 S.E.2d 672 (2000).

> Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (internal citations and quotations omitted).

> The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to

> promote and achieve finality in litigation. Significantly, [s]tatutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims. Moreover, limitations periods discourage plaintiffs from sitting on their rights. Statutes of limitations are, indeed, fundamental to our judicial system.

Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (Ct. App. 2005) (alterations in original) (internal citations and quotations omitted).

The statute of limitations period for wrongful death and negligence actions is three years. S.C. Code Ann. § 15-3-530(5), (6) (2005) ("Within three years: (5) an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and those provided for in Section 15-3-545; (6) an action under Sections 15-51-10 to 15-51-60 for death by wrongful act, the period to begin to run upon the death of the person on account of whose death the action is brought"); S.C. Code Ann. § 15-3-20(A) (2005) ("Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute."). The statute of limitations on a negligence claim accrues at the time of the negligence or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). This standard is known as the discovery rule. Id. "The statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (citations omitted).

"Under Rule 3(a), SCRCP, a civil action is commenced by the filing and service of a summons and complaint." Louden v. Moragne, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997). "Service of the summons brings the defendant within the court's jurisdiction and gives the court the

power to render a personal judgment against the person served." Id. (citing James F. Flanagan, South Carolina Civil Procedure 7 (2d ed. 1996)). If the defendant is "not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing." Rule 3(a)(2), SCRCP; see also S.C. Code Ann. § 15-3-20(B) (2005) ("A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.").

If a statute's terms are clear, the court must apply the terms according to their literal meaning. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002). "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." Id. Section 15-3-20 and Rule 3 pellucidly state if the defendant is not served within the limitations period, service must occur within 120 days after the pleadings are filed.

Hooper does not dispute Ebenezer was served after the limitations period expired and 129 days after she filed the complaint. As evidenced by the transpicuous language in both Rule 3 and section 15-3-20, service must be completed within 120 days of the filing of the complaint if service is not completed during the limitations period. Hooper did not commence the action within the statutory period. The trial court did not err in granting Ebenezer summary judgment based on the statute of limitations.

II. Equitable Tolling/Statute of Limitations

Hooper avers the statute of limitations should be tolled. South Carolina has rarely applied the doctrine of equitable tolling to halt the running of the statute of limitations. Equitable tolling is reserved for extraordinary circumstances. This case does not present such exceptional facts.

In Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989), our Supreme Court determined the statute of limitations is tolled for a workers' compensation claim during a reliance period in "which an employee is induced by the employer to believe his claim is compensable and will be

taken care of without the employee filing a claim." Id. at 129, 382 S.E.2d at 908. The Court announced:

> We believe the rule . . . which tolls the statute of limitations during the reliance period is the better rule. The fact finder in these types of cases must necessarily determine that a reliance period existed and that the claim is otherwise compensable. To hold that claims must be filed within a reasonable time following the end of the reliance period would add yet another layer of fact finding resulting in greater uncertainty as to which claims are compensable. This uncertainty would inevitably result in an increase in litigation associated with such claims.

Id. at 129-130, 382 S.E.2d at 909.

Tiralango v. Balfry, 335 S.C. 359, 517 S.E.2d 430 (1999), addressed tolling the statute of limitations with respect to non-resident motorists. Tiralango, a New York resident, and Balfry, a Quebec resident, were involved in an auto accident in Myrtle Beach on April 5, 1992. Balfry's address was recorded on the police report the day of the accident, but Tiralango did not request and receive a copy of the report for approximately one month. Tiralango filed a summons and complaint against Balfry on March 21, 1995, and served Balfry on April 11, 1995. The action was filed before the running of the three year statute of limitations, but Balfry was not served within three years. (The former Rule 3, SCRCP, did not include the provision allowing for service within 120 days of the filing of the summons and complaint and required service within the statute of limitations.) The South Carolina Supreme Court granted certiorari to review whether the statute of limitations should be tolled while the defendant's address is unknown to the plaintiff.

The Court inculcated:

> Resolution of this issue turns upon construction of the phrase "known to the plaintiff" in Meyer. If

> construed as a requirement of actual, subjective knowledge, then the statute is tolled for the period during which Tiralango did not "know" Balfry's address. If construed as an objective knowledge requirement, i.e., "could have/should have known," then the statute is not tolled as Balfry's address was at all times available. We find the latter construction more consistent with our opinion in Meyer, and with the reasoning in other jurisdictions.
>
> In Meyer, we addressed the rationale for holding the statute is not tolled when the defendant is amenable to service, stating, "[t]o construe the tolling statute in the manner urged by the plaintiff (i.e., as being tolled until the plaintiff decides to serve the defendant) would allow suits to be postponed indefinitely, for no good purpose, and to be brought in some cases at the virtually unlimited pleasure of the plaintiff." 330 S.C. at 183, 498 S.E.2d at 639. In the present case, were we to apply an actual knowledge requirement, Tiralango would have been free to wait six months or one year (or longer) to obtain the report and the statute would nonetheless be tolled, notwithstanding the address was at all times available to him. Such a result is patently inconsistent with our holding in Meyer and, accordingly, we decline to so hold.

Id., 335 S.C. at 362, 517 S.E.2d at 432 (footnote omitted).

The doctrine of equitable tolling is articulated with exactitude:

> The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available

> only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.
>
> Equitable tolling has been deemed available where—
>
> — extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
>
> — the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
>
> — the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.
>
> It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

51 Am. Jur. 2d Limitation of Actions § 174 (2007).

The Supreme Court of Alaska distinguished the concepts of equitable tolling and equitable estoppel:

> Federal precedent permits equitable estoppel or equitable circumstances to extend the three-year limitations period. Many federal cases seem to merge these two doctrines. For example, Seattle Audubon Society v. Robertson [931 F.2d 590 (9th Cir. 1991), rev'd on other grounds, 503 U.S. 429 (1992)] stated that equitable tolling may be applied when plaintiffs are "prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant." But it is only equitable estoppel that requires wrongful conduct on the part of the defendant, i.e., fraud or misrepresentation. The federal equitable tolling doctrine, on the other hand, does not require any conduct by the defendant.

Abbott v. State, 979 P.2d 994, 997-998 (Alaska 1999) (footnotes omitted).

The United States Supreme Court elucidated:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (footnotes and citations omitted). The Court annunciated: "But the principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect." Id.

Courts often apply equitable tolling when a plaintiff has timely pursued his rights through an administrative body or where a plaintiff was enjoined or otherwise legally prohibited from bringing his claims in a timely manner.

> Arizona courts have recognized and applied the equitable tolling doctrine. See Hosogai v. Kadota, 145 Ariz. 227, 229, 700 P.2d 1327, 1329 (1985) (applying doctrine when second wrongful death claim untimely filed after successful verdict on first claim overturned on appeal due to defective service of process); Kosman [v. State], 199 Ariz. 184, ¶¶ 6, 10, 16 P.3d at 213 (applying doctrine where plaintiff prisoner failed to timely file notice of claim against state because he first pursued claim through prison's administrative grievance procedure); Kyles v. Contractors/Eng'rs Supply, Inc., 190 Ariz. 403, 404, 406, 949 P.2d 63, 64, 66 (App.1997) (applying doctrine when right-to-sue letter from Arizona Attorney General's office contained incorrect date by which plaintiff was required to sue on his claim).

McCloud v. State, Ariz. Dep't of Pub. Safety, 170 P.3d 691, 696 (Ariz. Ct. App. 2007).

The Supreme Court of California enunciated:

> Equitable tolling is a judge-made doctrine which operates independently of the literal wording of the Code of Civil Procedure to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness. This court has applied equitable tolling in carefully considered situations to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice.

Lantzy v. Centex Homes, 73 P.3d 517, 523 (Cal. 2003) (quotations and citations omitted).

The Delaware Supreme Court examined the application of equitable tolling where defendants were subject to substituted service:

> In any event, whatever the precise argument made may be, we think that the Delaware statute of limitations on actions for personal injuries runs continuously without interruption when there is available to the plaintiff throughout the period an acceptable means of bringing the defendant into court. Therefore, the answer to the first question posed is that there has been no tolling of the statute of limitations since these defendants, at all times, were subject to substituted service.

Hurwitch v. Adams, 155 A.2d 591,594 (Del. 1959).

The Florida court observed, as an equitable remedy, the prejudice to the defendant must be considered before application:

> The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitations period. See Bailey v. Glover, 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 (1874). The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which "'focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.'" Cocke v. Merrill Lynch & Co., 817 F.2d 1559, 1561 (11th Cir.1987)

> (quoting Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir.1981)). Contrary to the analysis of the majority below, equitable tolling, unlike estoppel, does not require active deception or employer misconduct, but focuses rather on the employee with a reasonably prudent regard for his rights.

Machules v. Dep't of Admin., 523 So.2d 1132, 1133-1134 (Fla. 1988) (footnotes omitted).

Maryland case law disfavors tolling the statute of limitations:

> We have long maintained a rule of strict construction concerning the tolling of the statute of limitations. Absent legislative creation of an exception to the statute of limitations, we will not allow any implied and equitable exception to be engrafted upon it.

Hecht v. Resolution Trust Corp., 635 A.2d 394, 399 (Md. 1994) (quotations and citations omitted).

> Arguably, appellees were on notice of Walko's claim once the motion to intervene was filed. As we have indicated, however, Walko's approach to this case was hardly one of vigilance. The statute of limitations reflects a legislative judgment of what is deemed an adequate period of time in which "a person of ordinary diligence" should bring his action. Ferrucci v. Jack, 255 Md. 523, 526, 258 A.2d 414 (1969); McMahan v. Dorchester Fert. Co., 184 Md. at 159, 40 A.2d 313. The unexplained delay in bringing a timely action here hardly bespeaks the "ordinary diligence" required of one seeking to toll the statute of limitations. Cromwell v. Ripley, 11 Md.App. at 182, 273 A.2d 218. In a very real sense, Walko has slept on its rights, Johnson v. Railway Express Agency, 421 U.S. 454, 466, 95 S.Ct. 1716, 44

> L.Ed.2d 295 (1975), and cannot be heard to complain now for its own tarriance. See Braxton v. Virginia Folding Box Co., 72 F.R.D. at 126-27 (Before limitations had run, plaintiffs successfully intervened in pending civil rights action, but later voluntarily withdrew motion and commenced independent action seeking same relief after statutory period had expired; court held that limitations had not been tolled by timely and successful intervention, thus barring plaintiffs' independent action.).

Walko Corp. v. Burger Chef Sys., Inc., 378 A.2d 1100, 1104 (Md. 1977).

The Court of Appeals of Michigan explicated that the plaintiff must exercise due diligence in order to invoke equitable tolling:

> In view of the strong policy considerations favoring statutes of limitation, we hold that plaintiff's reliance upon a misdated court order did not constitute due diligence sufficient to toll the running of the statutory period of limitation. Defendant Pukoff should not be denied the protections afforded by the statute on so casual a basis. We hold that a minimum standard of due diligence in the case at bar would have included an investigation by plaintiff of the primary source of records of liquor licensees as of the date of the accident. A plaintiff's right to obtain information as to the identity of liquor licensees from the Michigan Liquor Control Commission is provided by the Michigan Freedom of Information Act. . . .

Ray v. Taft, 336 N.W.2d 469, 473 (Mich. Ct. App. 1983).

Mississippi courts require earnest efforts by plaintiffs seeking tolling:

> The parties do not provide nor can we find any instance where "excusable neglect" has tolled or

> otherwise stayed a statute of limitations. That today's decision works to preclude McKinley's and Dixon's representatives' day in court is of no consequence. Watters v. Stripling, 675 So.2d 1242, 1244 (Miss.1996) (citing Traina v. United States, 911 F.2d 1155 (5th Cir. 1990)). There is nothing in the record to indicate that the representatives' failure to file was anything other than a result of their own inactions or omissions.

City of Tupelo v. Martin, 747 So.2d 822, 829 (Miss. 1999).

The Supreme Court of New Mexico opined:

> Equitable tolling is a nonstatutory tolling theory which suspends a limitations period. See Gathman-Matotan Architects and Planners, Inc. v. State Dep't of Fin. & Admin., 109 N.M. 492, 494, 787 P.2d 411, 413 (1990). Equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control. Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir.1984). However, where a plaintiff fails to receive notice of the right to sue through his or her own fault, equitable tolling does not apply. See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.").

Ocana v. American Furniture Co., 91 P.3d 58, 66 (N.M. 2004).

The North Dakota Supreme Court determined a plaintiff's failure to timely serve the defendants did not warrant equitable tolling:

> Even if we were to adopt the equitable tolling doctrine in this case, Riemers' failure to commence

> his action against the defendants within the statute of limitations was not the result of his timely pursuit of one of several other available legal remedies which may have tolled the statute of limitations. Rather, as in Reid, 2000 ND 108, ¶ 16, 611 N.W.2d 187, Riemers' failure to commence his action within the statute of limitations resulted from his failure to effectuate timely service of process on the defendants. We therefore conclude the equitable tolling doctrine would not apply to Riemers' claims.

Riemers v. Omdahl, 687 N.W.2d 445, 454 (N.D. 2004).

Hooper's equitable tolling argument relies on an unpublished order of the United States District Court in Snyder v. Roberts, No. 0:04-22910-CMC-BM, 2006 WL 22181 (D.S.C. 2006). We are not bound by that court's interpretation of South Carolina law. Santee River Cypress Lumber Co. v. Query, 168 S.C. 112, 117, 167 S.E. 22, 24 (1932) ("We are not bound by the construction placed upon the Statute by any Federal Court, and the Federal Courts should adopt and follow our construction."). In Snyder, the plaintiff filed a pro se action arising out of an automobile accident. Under the federal procedure, which differs from South Carolina procedure, the court issues the summons and complaint. When a pro se complaint is filed in district court, it is forwarded to a staff attorney who makes a recommendation to a Magistrate Judge. Snyder, 2006 WL 22181 at *1. The Magistrate Judge decides whether a summons should issue or whether to recommend dismissal of some or all claims. Id. In Snyder, there was some delay because one plaintiff did not submit an original signature on a document, but that defect was cured. The summonses were ultimately issued 101 days after the action was filed. Plaintiffs effected service 31 days later; service occurred 132 days after the action was filed. Id. at *2.

"The order authorizing issuance of the summonses advised Plaintiffs service was required to be accomplished within 120 days of filing of the complaint. . . . The order made no reference to the corresponding state court rules which govern when actions are 'commenced' for statute of limitations

purposes." Id. The court analyzed the situation where the state rule did not contemplate delays by the court that arose under the federal procedure:

> This court is, therefore, faced with a state court rule and statute which suggest no leeway in the requirement for service within 120 days but which do not envision court imposed delays in issuance of the summons such as are required or authorized in federal court. The state court rule (and corresponding statute) do not, in any case, appear to anticipate court imposed delay of service which leaves plaintiffs with only the most minimal time (19 or fewer days in the present case) within which to serve the complaint before expiration of the 120 day period allowed under S.C.R. Civ. P. 3(a)(2). The situation is further complicated in the case at bar because the order which was forwarded to Plaintiffs with the summonses referred only to the federal service requirements and, in doing so, suggested the time could be extended for "good cause." See Dkt No. 5 (advising Plaintiffs the 120 day service requirement of Fed.R.Civ.P. 4(m) could only be extended upon a showing of good cause).

Id. at *5 (footnote omitted).

The court explained:

> [t]hat trial courts have the inherent authority to extend the time for service under the state court's commencement rules where the delay in service is the result of the court's delay in authorizing service and where such delay is so substantial as to significantly impair the plaintiff's ability to effect timely service.

Id. at *5.

Hooper did not ask the court to allow service by publication pursuant to section 15-9-710 of the South Carolina Code. Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 428-429, 535 S.E.2d 128,130 (2000) ("An order for service by publication may be issued pursuant to [the code] when an affidavit, satisfactory to the issuing officer, is made stating that the defendant, a resident of the state, cannot, after the exercise of due diligence, be found, and that a cause of action exists against him."); Montgomery v. Mullins, 325 S.C. 500, 505, 480 S.E.2d 467, 470 (Ct. App. 1997) ("Service of process by publication is authorized . . . where the defendant is a resident of this state, but after a diligent search cannot be found in this state.").

In the instant case, the court did not create the delay in service. Hooper failed to diligently investigate the relationship between Ebenezer and Agape soon after filing to see if personal service could be accomplished at the facility. After determining the registered agent was not at the address provided in Columbia, Hooper did not seek leave from the court to effect service by publication.

The present litigation does not rise to the level necessary for the application of the salutary and salubrious doctrine of equitable tolling. Concomitantly, we refuse to actualize the doctrine of equitable tolling to the relevant statute of limitations in this case.

III. Equitable Estoppel

Hooper contends Ebenezer should be estopped from asserting the statute of limitations as a defense due to its failure to maintain current information for a registered agent with the Secretary of State. Her asseveration fails because the elements of estoppel are not fulfilled.

The Supreme Judicial Court of Maine differentiated the concepts of equitable tolling and equitable estoppel in Dasha v. Maine Medical Center, 665 A.2d 993 (Me. 1995).

> The doctrine of equitable estoppel is distinct from the doctrine of equitable tolling. In cases of equitable

> estoppel, the statute of limitations has expired and the defendant asserts the running of the statute of limitations as a defense. The defendant, however, is estopped from benefitting from the statute of limitations as a defense because the defendant has acted in such a way as to cause the claimant to forego filing a timely cause of action. See Vacuum Sys., Inc. v. Bridge Constr. Co., 632 A.2d 442, 444 (Me.1993); Hanusek v. Southern Me. Medical Ctr., 584 A.2d 634, 637 (Me.1990). In contrast, in cases involving the doctrine of equitable tolling, the defendant does not have the statute of limitations as a valid defense because it has not yet run. Rather, the statute of limitations is tolled when strict application of the statute of limitations would be inequitable. Lambert v. United States, 44 F.3d 296, 298 (5th Cir.1995).

Id. at 996 n.2.

This Court previously expounded upon equitable estoppel in Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), overruled on other grounds, Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995).

> In a proper case, the doctrine of equitable estoppel may prevent resort to the statute of limitations. Servomation Corporation v. Hickory Construction Co., 70 N.C.App. 309, 318 S.E.2d 904 (1984), remanded, 312 N.C. 794, 325 S.E.2d 632 (1985); City of Bedford v. James Leffel & Co., 558 F.2d 216 (4th Cir.1977); 51 Am.Jur.2d Limitation of Actions § 431 at 900 (1970); see Clements v. Greenville County, 246 S.C. 20, 142 S.E.2d 212 (1965). A defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay

> that otherwise would give operation to the statute has been induced by the defendant's conduct. 53 C.J.S. Limitations of Actions § 25 at 962-64 (1948).

Dillon County School Dist. No. Two, 286 S.C. at 218, 332 S.E.2d at 561.

Our Supreme Court defined the essential elements of equitable estoppel:

> Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287 n. 2 (2000). Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. Mayes v. Paxton, 313 S.C. 109, 437 S.E.2d 66 (1993). "Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 15, 532 S.E.2d 876, 878 (2000).

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001).

> Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct. Such inducement may consist of an express representation that the claim will be

> settled without litigation or conduct that suggests a lawsuit is not necessary. The defendant's conduct may also involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue.

Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 136-137, 526 S.E.2d 218, 220 (2000) (quotations and citations omitted).

We previously illuminated the application of estoppel when a party portrays the claim will be settled:

> Similarly, in situations involving settlements in civil cases, one will be equitably estopped to defend with the statute of limitations by either (a) expressly representing that the claim will be settled without litigation, or (b) conduct which suggests that a lawsuit is not necessary. See, e.g. Black v. Lexington Sch. Dist. No. Two, 327 S.C. 55, 488 S.E.2d 327 (1997) (citing and discussing various other cases on this issue). In Strong v. University of South Carolina School of Medicine, 316 S.C. 189, 447 S.E.2d 850 (1994), the court discussed the fraudulent concealment defense to the statute of limitations, which flows from the duty to disclose inherent in the relationship between physicians and patients.
>
> Finally, the general doctrine of equitable estoppel has been applied to affect the running of the statute of limitations in other situations besides those of unconsummated settlement. Equitable estoppel operates to deny a party "the right to plead or prove an otherwise important fact." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994).

Maher v. Tietex Corp., 331 S.C. 371, 380-381, 500 S.E.2d 204, 209 (Ct. App. 1998).

The South Carolina Supreme Court upheld a trial court's refusal of an equitable estoppel contention where the plaintiff had not proved the delay was due to the defendant's conduct:

> In Vines [v. Self Memorial Hospital], 314 S.C. 305, 443 S.E.2d 909, which was brought under the Tort Claims Act, the defendant claimed the statute of limitations as a bar, and the plaintiff argued the defendant was equitably estopped from asserting the statute. The plaintiff based her equitable estoppel argument on the fact the defendant's employees assisted her in completing certain claim forms. She argued that this assistance "caused her to believe she had done all that she needed to do." Vines, 314 S.C. at 308, 443 S.E.2d at 911. The trial court rejected this argument and granted the defendant's motion for summary judgment based on the statute of limitations. On appeal, this Court affirmed, finding there was no showing that the plaintiff had delayed filing suit in reliance on the defendant hospital's conduct. Id.

Black v. Lexington School Dist. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997).

In the case at bar, Hooper was not delayed from filing her action, but she advances Ebenezer's failure to maintain a registered agent's current address hindered service. No evidence suggests Ebenezer's omission in updating the Secretary of State was intended to defraud or conceal facts from Hooper. Ebenezer had no knowledge Hooper would rely on the information to attempt service. When questioned by Hooper's investigator, Inkelaar freely admitted she was authorized to accept service for Ebenezer.

Ebenezer did not engage in conduct warranting estoppel to preclude the assertion of the statute of limitations as a defense. The trial court correctly rejected Hooper's estoppel argument.

IV. Rule 86 to Resurrect Former Procedure

Hooper posits because of Rule 86, SCRCP, the trial court erred in failing to apply the previous version of Rule 3, SCRCP, instead of the current rule. We disagree.

Rule 86(a) of the South Carolina Rules of Civil Procedure states:

> These rules shall take effect on July 1, 1985. They govern all proceedings in civil actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Id.

The former "Rule 3(b), SCRCP, tolls the statute of limitations once a plaintiff files his summons and complaint and delivers the pleadings to the sheriff of the county where the defendant was known to last reside for service upon the defendant, provided actual service occurs within a reasonable time thereafter." Montgomery v. Mullins, 325 S.C. at 504, 480 S.E.2d at 469 (citing Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994)).

In 2002, the legislature amended S.C. Code Ann. § 15-3-20 to add: "(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing." Id. Rule 3, SCRCP, was revised to conform it to the amended statute. The revised rule took effect April 27, 2004.

Rule 86, SCRCP, only applies to cases pending when the new rule takes effect. In the case sub judice, the rule changed almost two years before Hooper filed the complaint on February 8, 2006. This case was not pending when the rules changed, and Rule 86 does not apply. The trial court did not err in failing to apply the former version of Rule 3 in lieu of the current version.

CONCLUSION

We hold Hooper did not commence her action within the statute of limitations due to the fact she served Ebenezer after the running of the statute and outside 120 days of filing. We rule the doctrine of equitable tolling is inapposite because nothing prevented Hooper from timely filing her suit, and there were no extraordinary circumstances or encumbrances to hinder timely service by a diligent plaintiff. We conclude Ebenezer's failure to update its registered agent's information with the Secretary of State did not rise to false representation or concealment to warrant estoppel. Current Rule 3, SCRCP, is controlling rather than a former version.

Accordingly, the order of the circuit court is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of Anthony Valentine, Respondent,

v.

The State of South Carolina, Appellant.

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

Opinion No. 4351
Heard September 11, 2007 – Filed March 10, 2008

REVERSED and REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R.J. Shupe, Assistant Attorney General Brandy A. Duncan, all of Columbia, for Appellant.

Appellate Defender Aileen P. Clare and Appellate Defender LaNelle C. DuRant, both of Columbia, for Respondent.

PER CURIAM: The State appeals the circuit court's determination that there was no probable cause to believe Anthony Valentine was a sexually violent predator. We reverse and remand.

FACTS

In October of 2003, Anthony Valentine sexually assaulted his daughter's friend by grabbing and squeezing her breasts and buttocks. When the victim, who was fourteen years old, notified police, Valentine's step-daughter also accused him of fondling her breasts and vaginal area on multiple occasions when she was between the ages of twelve and fourteen.[1] On February 26, 2004, Valentine pled guilty to one count of lewd act on a minor under the age of sixteen in response to the allegations made by his daughter's friend. On the same day, Valentine also pled guilty to one count of assault and battery of a high and aggravated nature ("ABHAN") in response to the allegations made by his step-daughter. Valentine was sentenced to fifteen years' incarceration, suspended upon the service of five years' confinement and five years' probation for the lewd act conviction, and a concurrent sentence of ten years suspended to five years' confinement and five years' probation for the ABHAN conviction.

While incarcerated, Valentine was convicted of possession of marijuana and cocaine with intent to distribute. Prior to Valentine's release from the South Carolina Department of Corrections, the Multi-Disciplinary Team reviewed his case and determined there was probable cause to believe Valentine was a sexually violent predator as defined by the Sexually Violent Predator Act ("Act").[2] The Prosecutor's Review Committee ratified the determination made by the Multi-Disciplinary Team, and accordingly, the State filed a petition seeking Valentine's civil commitment to the South

[1] In addition to the accusations made by the friend and the step-daughter, Valentine's daughter also accused him of fondling her; however, Valentine denied the charges, and the State did not pursue them.

[2] S.C. Code §§ 44-48-10 to 44-48-70 (Supp. 2006).

Carolina Department of Mental Health for long term control, care, and treatment as a sexually violent predator.

On February 2, 2006, the Honorable Deadra L. Jefferson found the State's petition set forth sufficient facts to establish probable cause to believe Valentine met the statutory criteria for confinement. Thereafter, a probable cause hearing was held on March 10, 2006, before the Honorable R. Markley Dennis. The only issue before the court was whether the State could demonstrate probable cause in showing that Valentine was a sexually violent predator. In order to make such a showing, the State argued that Valentine suffered from the mental abnormality of pedophilia. In support of this argument, the State submitted evidence to the court concerning several risk factors suggesting Valentine's propensity to re-offend in future acts of sexual violence. The risk factors included: (1) multiple victims, (2) the victims were between the ages of thirteen to fifteen, (3) prior non-sexual convictions,[3] (4) Valentine's "four sentencing dates which are criminal in nature," (5) a victim he was not related to, (6) his length of sexual offending was between one and six years, (7) he victimized two or more age groups, (8) a pattern of substantial substance abuse, and (9) one major discipline report while incarcerated.

Judge Dennis found the State produced insufficient evidence to demonstrate Valentine was a sexually violent predator as defined by the Act. In so finding, he relied on the State's reduction of one lewd act charge to an ABHAN charge, the availability of treatment during Valentine's probationary sentence, the absence of a psychological exam, and the fairly lenient sentence Valentine received. This appeal followed.

STANDARD OF REVIEW

"[O]n review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding." In re Care & Treatment of Beaver, 372 S.C. 272, 278, 642 S.E.2d 578, 582 (2007).

[3] Although Valentine has no prior convictions for sexual offenses, he has a prior record for public drunkenness and possession of marijuana.

LAW/ANALYSIS

The State asserts the hearing judge based his conclusion on impermissible speculation. We agree.

I. SEXUALLY VIOLENT PREDATOR ACT

Sections 44-48-10 to 44-48-170 of the South Carolina Code of Laws (Supp. 2006), provide for the involuntary civil commitment of sexually violent predators who are "mentally abnormal and extremely dangerous." S.C. Code Ann. § 44-48-20 (Supp. 2006). The Act is not intended to be punitive in nature, nor is it intended to stigmatize the mentally ill community. Id. "[T]he purpose of the requirements in the SVP Act is to ensure that these involuntary commitment procedures are only used to control a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be indefinite terms." In re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003).

The Act defines a "sexually violent predator" as a person who: "(a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30 (1) (Supp. 2006). When a person has been imprisoned for one or more of the sexually violent offenses identified in section 44-48-30, the Act requires the agency with jurisdiction over that person to notify the Attorney General and a multidisciplinary team designed to evaluate the particular offender prior to his release. See S.C. Code § 44-48-40(A) (Supp. 2006).

The multidisciplinary team reviews relevant records to determine if probable cause exists that the offender satisfies the definition of a sexually violent predator under the Act. S.C. Code Ann. § 44-48-50 (Supp. 2006). These records may include, but are not limited to, the person's criminal offense record, any relevant medical and psychological records, treatment records, victim's impact statement, and any disciplinary or other records

formulated during confinement or supervision. Id. If the multidisciplinary team determines probable cause exists that the person meets the statutory definition, the team forwards its assessment and all relevant records to a prosecutor's review committee. Id.

The prosecutor's review committee then undertakes its assessment of whether probable cause exists to believe the individual is a sexually violent predator. S.C. Code Ann. § 44-48-60 (Supp. 2006). In addition to the records and reports from the multidisciplinary team, the committee must consider any information provided by the circuit solicitor who originally prosecuted the person. Id.

If the prosecutor's review committee finds probable cause, the Attorney General files a petition with the court in the jurisdiction where the person committed the offense. S.C. Code Ann. § 44-48-70 (Supp. 2006). A probable cause hearing is then held to determine whether sufficient evidence exists that would lead a reasonable person to believe the person named in the Attorney General's petition is a sexually violent predator. S.C. Code Ann. § 44-48-80 (Supp. 2006). At the hearing, the law instructs the court to: (1) verify the detainee's identity; (2) receive evidence and hear arguments from the detainee and the Attorney General; and (3) determine whether probable cause exists to believe the detainee is a sexually violent predator. Id. The detainee is guaranteed: (1) to be represented by counsel; (2) to present evidence on his own behalf; (3) to cross-examine witnesses who testify against him; and (4) to view and copy all petitions and reports in the court file. S.C. Code Ann. § 44-48-80(B) (Supp. 2006).

It is important to emphasize that a finding of probable cause at the probable cause hearing does not finally decide the question of whether the detainee is a sexually violent predator. Beaver, 372 S.C. at 275, 642 S.E.2d at 580 n.2 (citing S.C. Code Ann. §§ 44-48-80 through 90 (Supp. 2006)). On finding probable cause, the detainee is transferred to an appropriate secure facility for an evaluation as to whether he, in fact, suffers from a mental abnormality or personality disorder that meets the statutory criteria for commitment under the Act. Id. After the evaluation, a trial is held to determine whether the person is a sexually violent predator. Id. This trial is

before a judge, unless the detainee or Attorney General requests a jury trial. Id. The State must prove the person is a sexually violent predator beyond a reasonable doubt. Harvey, 355 S.C. at 60, 584 S.E.2d at 896; see also S.C. Code Ann. § 44-48-100 (Supp. 2006).

II. PROBABLE CAUSE STANDARD

"Probable cause is a flexible, common-sense standard. The very term itself does not import absolute certainty. Probable cause may be found somewhere between suspicion and sufficient evidence to convict." Care and Treatment of Brown v. State, 372, S.C. 611, 619-20, 643 S.E.2d 118, 122 (Ct. App. 2007) (internal quotations and citations omitted).

Sufficient probable cause exists to find that a sex offender meets the definition of a sexually violent predator, as defined by the Act, if the offender has been convicted of a sexually violent offense, i.e., lewd act upon a minor. Beaver, 372 S.C. at 277, 642 S.E.2d at 581. For the purposes of the Act, "[c]onvicted of a sexually violent offense" means a person has:

> (a) pled guilty to, pled nolo contendere to, or been convicted of a sexually violent offense;
> (b) been adjudicated delinquent as a result of the commission of a sexually violent offense;
> (c) been charged but determined to be incompetent to stand trial for a sexually violent offense;
> (d) been found not guilty by reason of insanity of a sexually violent offense; or
> (e) been found guilty but mentally ill of a sexually violent offense.

S.C. Code Ann. § 44-48-30 (Supp. 2006).

Probable cause to believe someone to be a sexually violent predator requires that the evidence presented would lead a reasonable person to believe and conscientiously entertain suspicion that the person meets the definition of a sexually violent predator. Brown, 372, S.C. at 620, 643 S.E.2d at 122. Probable cause to believe someone to be a sexually violent predator

does not demand a showing that such a belief be correct or more likely true than false. Id. at 620, 643 S.E.2d at 123.

III. THE CIRCUIT COURT'S ANALYSIS

As noted earlier, a two-pronged test exists under the Act to guide the court in making that determination. A person is a sexually violent predator if he (1) "has been convicted of a sexually violent offense"; and (2) "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code § 44-48-30(1) (Supp. 2006). Pursuant to the Act, committing a lewd act upon a child under the age of sixteen is a sexually violent offense. S.C. Code § 44-48-30(2)(k) (Supp. 2006).

Here, the first prong of the statutory requirement defining a "sexually violent predator" was satisfied when Valentine pled guilty to "lewd act upon a minor under the age of sixteen," an offense enumerated under section 48-44-30 as a "sexually violent offense." Therefore, the hearing judge's determination regarding probable cause hinged upon the second prong: whether Valentine suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. As referenced above, our supreme court recently addressed this second prong in Beaver, a case we find to be substantially similar to the one at hand. [4]

In Beaver, the supreme court held the circuit court judge erred as a matter of law when he found Beaver was not a sexually violent predator based on the following factors: the non-violent nature of Beaver's fondling convictions, the fact that a longer sentence could have been imposed upon Beaver, and the State's lack of mental health evidence at the probable cause hearing. Beaver, 372 S.C. at 276-78 n.3, 642 S.E.2d at 580-82. In regard to the hearing judge's characterization of fondling as a non-violent crime, the

[4] We note this decision was not rendered prior to the circuit judge's ruling in the instant case.

Beaver court stated that although the charge of committing a lewd act upon a minor is considered non-violent for criminal purposes, "the Legislature has deemed it appropriate to consider that charge violent for the purposes of the SVP Act." Id. at 277, 642 S.E.2d at 581. In addition, the Beaver court found the hearing judge committed legal error when he commented on the duration of Beaver's sentence. Id. at 276 n.3, 642 S.E.2d at 581. Furthermore, the supreme court acknowledged the State should not be penalized for its failure to produce any mental health information at the probable cause hearing because probable cause must be found by the hearing judge before such evidence can be obtained. Id. at 278, 642 S.E.2d at 582.

As in Beaver, we find the hearing judge in this case erred by relying on a myriad of factors wholly outside the scope of the sexually violent predator determination as outlined by the Act. First, the hearing judge relied on the State's offer of a plea agreement to Valentine, reducing one charge of lewd act on a minor to ABHAN. The hearing judge remarked, ". . . if the State entertained and accepted a plea to ABHAN, that tells me something about the strength of that case and [its] belief in the allegations of the victim. So you can offer it, but it doesn't really help from my viewpoint."[5] The State may offer or accept a plea agreement from a person charged with a crime for a variety of reasons ranging from a lack of evidence, to the realization that testifying at trial will be a traumatic experience for the victim. We find no inherent connection between the reasons the State had for entering into a plea agreement and the evaluation of whether Valentine suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of

[5] Although the hearing judge's written order stated Valentine's probation restrictions would adequately protect the public, and that the State failed to present sufficient evidence Valentine suffered from any mental abnormality or personal disorder, his comments from the bench indicating he considered additional criteria in his determination were improper under Beaver. We acknowledge that when there is a conflict between a judge's oral ruling and the subsequent written order, the latter controls. Parag v. Baby Boy Lovin, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct. App. 1998). Here, however, as was apparently the case in Beaver, the hearing judge's comments from the bench were consistent with his written order.

sexual violence if not confined in a secure facility for long-term control, care, and treatment.

Second, the hearing judge relied on the five years of probation Valentine faced following his release from jail as a factor in denying the State's motion, stating "I would agree with you that he needs [treatment], if he didn't have probation." It is clear the hearing judge thought probation provided adequate safeguards against Valentine's propensity to re-offend on the basis of his mental abnormality of pedophilia. By creating the Act, our legislature has made it clear that the safeguards probation offers to protect society are inadequate for sexually violent predators. Therefore, if indeed the hearing judge found that Valentine needed treatment, he should have issued an order finding probable cause that Valentine was a sexually violent predator. See Brown, 372 S.C. at 622, 643 S.E.2d at 124 (stating the hearing judge erred by finding no probable cause even after acknowledging Brown needed treatment based on his prior convictions for voyeurism). Rather than focusing on the safeguards offered by probation, the court's analysis should have been directed to whether Valentine suffers from a mental abnormality or personality disorder which makes him likely to engage in acts of sexual violence if not confined.

The hearing judge relied on the absence of a psychological exam as evidence demonstrating the State did not meet its burden of proof. The State correctly pointed out that it was unable to present a psychological examination until it demonstrated probable cause that Valentine was a sexually violent predator. Nonetheless, the judge opined that the State should amend the statute. The ability or inability of the State to have the Act amended is in no way relevant to the inquiry of whether the State has demonstrated that Valentine is a sexually violent predator.

Finally, the hearing judge considered Valentine's original sentence as a factor in determining whether he was a sexually violent predator, stating "[T]he presiding judge heard this, too . . . and he said this guy's not that big a risk; the risk factors aren't that severe." Further, he remarked, "[A] judge who has the ability to put him in jail for fifteen years, he puts him in jail for five . . . which is significant to me." While the sentencing judge undoubtedly

considered a number of factors in imposing the sentence upon Valentine, we must assume the sentencing judge was concerned only with criminally punishing Valentine for his past crimes. However, the civil nature of confinement under the Act presents quite a different analysis. Under the Act, the hearing judge is asked to evaluate whether probable cause exists to label the prisoner a sexually violent predator. The fundamental disconnect between the criminal nature of punishment, with which the sentencing judge was entirely concerned, and the civil nature of confinement, upon which a sexually violent predator determination is based, renders the duration of punishment irrelevant.

The hearing judge was limited to an analysis based on probable cause under the Act. Instead of engaging in such an analysis, the hearing judge reached his decision on the basis of the plea agreement, availability of probation, absence of a psychological exam, and the sentence imposed. Pursuant to Beaver and the language of the Act itself, these factors were not relevant in determining whether Valentine suffered from a mental abnormality that made him likely to engage in an act of sexual violence.

Moreover, three separate probable cause determinations preceded Valentine's probable cause hearing. The initial inquiry was made by the statutorily required multidisciplinary team, composed of "(1) a representative from the Department of Corrections; (2) a representative from the Department of Probation, Parole and Pardon Services; (3) a representative from the Department of Mental Health who is a trained, qualified mental health clinician with expertise in treating sexually violent offenders; (4) a retired judge appointed by the Chief Justice who is eligible for continued judicial service pursuant to Section 2-19-100; and (5) an attorney with substantial experience in the practice of criminal defense law to be appointed by the Chief Justice to serve a term of one year." S.C. Code Ann. § 44-48-50 (Supp. 2006). The prosecutor's committee reviewed the multidisciplinary team's report and made the second probable cause finding. That committee must include, but is not limited to, a member of the staff of the Attorney General, an elected circuit solicitor, and a victim's representative. S.C. Code Ann. § 44-48-60 (Supp. 2006). Finally, the preliminary probable cause determination by the circuit judge in Charleston County found the Attorney

General's petition set forth sufficient facts to establish probable cause to believe Valentine meets the statutory criteria for civil commitment.

Considering the scope of the Act and the standard for determining probable cause, we are convinced the record does not reasonably support the hearing judge's finding that the State failed to meet its burden of demonstrating probable cause in this case.

CONCLUSION

Based on the foregoing, we reverse the circuit court's order and hold that the State demonstrated probable cause under the Act.

REVERSED and REMANDED.

HEARN, C.J., and ANDERSON, and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Corrections, Appellant,

v.

Bennie Mitchell, Respondent.

Appeal From Administrative Law Court
John Geathers, Administrative Law Judge

Opinion No. 4352
Submitted January 1, 2008 – Filed March 10, 2008

REVERSED

Michael Truesdale, of Columbia, for Appellant.

Bennie Mitchell, of Columbia, *Pro Se*, for Respondent.

HEARN, C.J.: The South Carolina Department of Corrections (Department) appeals the Administrative Law Court's (ALC) order requiring it to provide an inmate with new shoes. We reverse.

FACTS

Bennie Mitchell is an inmate who suffers from pain related to a spinal cord injury. It is not clear from the record, but at some point while incarcerated, Mitchell was sent outside the prison to visit a neurologist for pain in his legs. In the subsequent report, the neurologist recommended Mitchell acquire "better shoes for walking" that might alleviate his pain. Thereafter, Mitchell submitted Step 1 and Step 2 Inmate Grievance Forms requesting the Department provide for him "medically recommended support shoes." The Department denied both requests, and Mitchell appealed to the ALC. The ALC, having received no brief or record from the Department, reversed the Department's decision to deny Mitchell's grievance.

The Department responded with a motion to reopen the appeal in November of 2006, which the ALC denied.[1] In December of 2007, Mitchell filed a motion for contempt, and the court ordered the Department to purchase him shoes within twenty days. After receiving a pair of leather, high top tennis shoes, Mitchell filed a second motion for contempt. A second order was issued, requiring the Department to contact Mitchell's neurologist and obtain the written shoe specifications necessary to satisfy his previous recommendation. This appeal followed.

STANDARD OF REVIEW

Section 1-23-610 of the South Carolina Code (Supp. 2006) sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency. "The review of the administrative law judge's order must be confined to the record." Id. The court of appeals may reverse or modify the decision only if substantive rights of the appellant [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence

[1] We note the Department did not appeal the ALC's denial of its motion to reopen the appeal.

on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law. Id.

LAW/ANALYSIS

The Department first argues that the ALC should have dismissed Mitchell's appeal for lack of subject matter jurisdiction in accordance with Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000); Sullivan v. SCDC, 355 S.C. 437, 586 S.E.2d 124 (2003); Slezak v. SCDC, 361 S.C. 327, 605 S.E.2d 506 (2004); and Skipper v. SCDC, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006). We disagree.

Our supreme court recently offered clarification of Al-Shabazz and its progeny as to the ALC's subject matter jurisdiction in Furtick v. South Carolina Department of Corrections, 374 S.C. 334, 649 S.E.2d 35 (2007). In Furtick, the court reiterated Al-Shabazz's holding that "the ALC has subject matter jurisdiction over an inmate's appeal when the claim sufficiently 'implicates a state-created liberty interest.'" Furtick, 374 S.C. at 339, 649 S.E.2d at 38. The court further quoted its clarification of jurisdiction in Slezak, stating "the ALC has jurisdiction over **all** inmate grievance appeals that have been properly filed; the ALC however, is not required to hold a hearing in every matter." Id. at 340, 649 S.E.2d at 38 (emphasis in original).

We reject the Department's contention that the ALC should have dismissed the appeal because it believes Mitchell's shoe request does not fall within a protected right. Furtick holds that when an inmate's grievance to an ALC does not implicate a state-created liberty or property interest, the ALC **may** summarily dismiss the appeal at its discretion. (emphasis added). Thus, the ALC clearly had subject matter jurisdiction to hear Mitchell's appeal. Although the ALC could have addressed whether Mitchell's claim implicated a liberty or property interest, and thus could have summarily dismissed the case if it determined Mitchell's claim did not, the ALC chose not to, and heard the appeal. Under Furtick, this was in the ALC's discretion.

The Department next maintains the ALC improperly reversed the parties' burden of proof on appeal. We agree.

The Administrative Procedures Act establishes the standard of review an ALC must apply when reviewing an agency's decision:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380 (A)(6) (2005).

In its order, the ALC explains its rationale in reversing the Department by concluding "this court cannot find that the Department's decision to deny the Appellant's grievance was the result of a good-faith exercise of the Department's administrative responsibilities and not arbitrary or capricious in nature." Under the statute stated above, there is no good faith component that is required for decisions of the Department.

Moreover, when appealing an agency's decision, the burden rests squarely on the appellant to prove that substantive rights were prejudiced based on one of six statutory criteria listed above. "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." Pressley v. Lancaster County, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001). "The burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

The ALC order is devoid of any finding of evidence adduced by Mitchell warranting the ALC's reversal of the Department. Undeniably, Mitchell's request for medically recommended support shoes implicates no state-created liberty interest. Therefore, the ALC's decision must be based on the evidence in the record. We can find no evidence indicating the Department's decision was either clearly erroneous, or arbitrary, capricious, or characterized by an abuse of discretion. Furthermore, Mitchell appears to have received what the neurologist initially recommended, i.e., "better shoes for walking." Instead, the ALC's order appears to be based on the Department's failure to file a substantive brief.

Finally, the Department contends the ALC erred in not reopening the case pursuant to the Administrative Law Judge Division's Rules of Procedure, and that the ALC exceeded its authority by reversing the decision of the Department. Because we find the determination of the issue above to be dispositive in the appeal before us, we need not review Mitchell's remaining contentions. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

The ALC erred in improperly reversing the burden of proof and the Department's decision on appeal. The ALC's order is therefore

REVERSED.[2]

KITTREDGE, J., and THOMAS, J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary Ann Turner, Appellant,

v.

South Carolina Department of Health and Environmental Control and State Accident Fund, Respondents.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4353
Submitted January 1, 2008 – Filed March 10, 2008

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Ronald A. Hightower, of Lexington, for Appellant.

Clarke W. McCants, of Aiken, and Cynthia B. Polk, of Columbia, for Respondents.

HEARN, C.J.: Mary Ann Turner appeals the circuit court's order affirming the South Carolina Workers' Compensation Commission (Appellate Panel). Turner contends the circuit court erred in finding substantial evidence existed for the Appellate Panel to hold she sustained a thirty percent permanent partial disability to her back and had reached maximum medical improvement. Turner also maintains the circuit court erred in failing to find she is entitled to have her doctor designated as the authorized treating medical provider and in failing to find she is entitled to an award for travel reimbursement. We affirm in part, reverse in part, and remand as follows.

FACTS/ PROCEDURAL HISTORY

Turner fell and injured her back on November 16, 1999, while exiting the South Carolina Department of Health and Environmental Control (DHEC) building for a fire drill. Following the accident, DHEC provided medical treatment and paid temporary total compensation to Turner. Thereafter, a hearing was held before a single commissioner. At the hearing, Turner asserted she had injuries to her neck, arms, and legs as a result of the accident. Turner also sought payment of additional temporary total compensation. The commissioner found Turner had reached maximum medical improvement from her injury on October 10, 2001, and that she was not entitled to additional medical care. The commissioner also found Turner was entitled to a finding of thirty percent permanent partial disability to her lower back, and that Turner had not sustained any additional injuries.

Turner then sought Appellate Panel review. Following a hearing, the Appellate Panel affirmed the single commissioner, adding, however, that Turner was entitled to additional medical care. Following Turner's request for judicial review of the Appellate Panel's decision, the circuit court determined the Panel's findings of fact were insufficient and incomplete, and remanded the matter to the Panel to enter additional factual findings.

Pursuant to the circuit court's order, the Appellate Panel issued a new decision and order, again finding Turner sustained a thirty percent permanent partial disability to her lower back and had reached maximum medical improvement. The Panel also found Turner was entitled to ongoing medical treatment; however, it then ruled that Respondents should be responsible for all causally related and authorized medical treatment to the Claimant's lower back *until the date of maximum medical improvement*. Turner appealed the Panel's decision to the circuit court a second time. After the subsequent hearing, the circuit court affirmed the Appellate Panel in full, finding that the factual findings and conclusions of law were supported by substantial evidence contained in the record.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of a decision of an administrative agency. Clark v. Aiken County of Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). Section 1-23-380(a)(5) of the South Carolina Code (Supp. 2006) establishes the substantial evidence rule as the standard of review. Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law, but may only reverse or modify an agency's findings of fact if they are clearly erroneous. The court reviewing the agency's decision should not substitute its own findings of fact for those of the agency nor should the court substitute its judgment for that of the agency as to the weight of the evidence. Tobey v. L & P Constr. Co., 296 S.C. 122, 125, 370 S.E. 2d 897, 899 (Ct. App. 1988).

LAW/ANALYSIS

I.

Turner first asserts the circuit court erred in finding the Appellate Panel set forth adequate findings of fact and conclusions of law to support its decision in this case. We disagree.

The Appellate Panel's findings must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence. Parsons v. Georgetown Steel, 318 S.C. 63, 66, 456 S.E.2d 366, 368 (1995). In this case, the Appellate Panel amended its original decision and order to include more specific findings of fact. In its amended order, the Appellate Panel makes reference to specific medical reports establishing the course of treatment for Turner, the various diagnoses made as part of her care and treatment, the dates on which various providers found her to have reached maximum medical improvement, and their opinions regarding the degree of permanent physical impairment sustained by Turner as a result of the injury. Moreover, the Appellate Panel makes specific reference to those portions of the testimony presented to the single commissioner which support the findings and conclusions regarding the reasons she left her work and the extent of permanent disability. Therefore, we find the circuit court did not err in concluding that the Appellate Panel's findings were sufficiently detailed.

II.

Turner also asserts the circuit court erred in concluding that the decision of the Appellate Panel is supported by substantial evidence. We disagree.

Turner was evaluated by Dr. W. David Redmond who found she sustained a lumbar strain and aggravation of a pre-existing degenerative arthritic condition and sustained seven percent impairment to her lower back. Dr. Donald Johnson stated Turner suffered from degenerative lumbar disc disease and from a cervical strain. He also stated that Turner had reached medical maximum improvement and suffered ten percent impairment to her back and five percent impairment to her neck. Moreover, Dr. Guy Heyl, to whom Turner was referred by her attorney, opined that her neck and upper extremity problems were not related to her fall down the stairs, and that she had sustained a fourteen percent impairment to her back. Finally, Turner was seen by Dr. Jeffrey Rueben in November of 2001, who stated he did not recommend any additional treatment.

The record, therefore, is replete with evidence sufficient to satisfy the Appellate Panel's findings. "Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the [Appellate Panel] reached." Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Lee v. Harborside Café, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002) (quoting Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). Accordingly, we find the circuit court did not err.

III.

Turner next asserts she is entitled to an award of ongoing and future medical treatment pursuant to Dodge v. Bruccoli, Clark, Layman, Inc. et al., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). DHEC concedes this issue in its brief; therefore Turner is entitled to that award.

IV.

Turner also contends Southern Neurological Institute should have been designated as the authorized treating medical provider, and DHEC should be required to pay all medical expenses associated therewith.

Turner argues she is entitled to have her doctors declared the authorized physicians, and that defendants are required to pay for such medical costs. This proposition is inconsistent with S.C. Code Ann. § 42-15-60 (Supp. 2007) and § 42-9-10 (1985), which establish the rights of the employer and the employee with regard to payment for treatments, and ultimately gives great deference to the Appellate Panel. This statute does not give a unilateral right to claimants to select their treating physician, and such an unencumbered right undermines the authority of the commission, as prescribed by the legislature.

Accordingly, we find there is substantial evidence to support the Appellate Panel's decision not to declare Turner's doctors the authorized physicians in this case.

V.

Finally, Turner contends she is entitled to reimbursement for travel expenses. Turner relies on Section 67-1601 of the South Carolina Code of Regulations (1976), which is titled "Expenses Incurred in Receiving Medical Treatment, Reimbursement." It states the following:

> A. The expenses incurred for travel to receive medical attention which shall be reimbursed to the claimant are:
>
> (1) Mileage to and from a place of medical attention which is more than five miles away from home in accordance with the amount allowed state employees for mileage; and
>
> (2) Actual cost of expenses incurred in using public transportation; and
>
> (3) Actual cost of reasonable overnight lodging and subsistence.
>
> B. The claimant shall receive reimbursement from the employer's representative.

Turner appears to be entitled to reimbursement from DHEC's representative under this statute. Moreover, DHEC does not address this issue in its brief. See First Union Nat'l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the

appellant's position is correct), reversed on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997). However, since it is not clear from the record the amount of money Turner is seeking for travel reimbursement, we remand this case to the circuit court for the purpose of entering an appropriate order remanding the case to the Appellate Panel for a hearing solely on the issue of travel reimbursement.

CONCLUSION

Based on the foregoing reasons, we conclude there is substantial evidence to affirm the circuit court's findings; however, we modify the order to the extent Turner is entitled to ongoing and future medical treatments, and remand the issue of travel reimbursement. The decision of the circuit court is accordingly

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

KITTREDGE, J., and THOMAS, J., concur.