The Supreme Court of South Carolina

Re: Reconciliation and Disposition of General Sessions Cases Statewide and Appointment of Committee Members

Appellate Case No. 2013-002484

ORDER

In *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012), this Court ruled that S.C. Code Ann. § 1-7-330 (2005), which vests exclusive control of the criminal docket in the circuit solicitor, violates the separation of powers principle embodied in Article 1, Section 8 of the South Carolina Constitution. Together with its decision in *Langford*, the Court issued administrative orders concerning the disposition and reconciliation of cases in the Court of General Sessions, but subsequently held those orders in abeyance pending further action by the Court. Additionally, the Court directed that a Committee be appointed to propose a plan for the implementation of the changes necessary to docket management in the Court of General Sessions.

Pursuant to the provisions of Article V, §4, of the South Carolina Constitution, and in furtherance of this Court's opinion in *State v. Langford*, the Court has created the General Sessions Docket Committee and appoints the following representatives from the Judiciary, Solicitors, Public Defenders, Private Counsel, and Clerks of Court to the Committee. The Committee is charged with making recommendations to the Court concerning the adoption of a rule or order for the orderly administration of the docket in the Court of General Sessions.

Judges
The Honorable Donald W. Beatty (Chair)
The Honorable Perry M. Buckner
The Honorable Roger L. Couch

The Honorable Deadra L. Jefferson
The Honorable Letitia H. Verdin

Solicitors

Barry Joe Barnette
Kevin Scott Brackett
Ernest Adolphus Finney, III
James Strom Thurmond, Jr.

Public Defenders

Harry Alfred Dest
John I. Mauldin
Orrie E. West

Private Counsel

James Wofford Bannister
Michael Demorris Brown
Carl B. Grant
Joseph M. McCulloch, Jr.
C. Rauch Wise

Clerks of Court

M. Hope Blackley
Beulah G. Roberts
Alma Y. White
Paul B. Wickensimer

Administrative Support

Jason M. Bobertz
Sakoya R. Bryant

Justice Beatty, as the Committee Chair, shall establish a timetable for Committee meetings as soon as practicable.

Additionally, we find it necessary to confirm the inventory of outstanding General Sessions cases and to reconcile any discrepancies that may exist between records maintained by the Solicitors and the Clerks of Court. Therefore,

IT IS ORDERED that each Circuit Solicitor shall reconcile all pending General Sessions cases attributable to each county in the Solicitor's circuit with the records

maintained by the County Clerks of Court using the County Statistics Self-Audit Portal.

Any discrepancies between the Solicitor's records and the Clerk of Court's records shall be reconciled to ensure dispositions are accurately reflected in the Clerk's Case Management System. Cases shown as pending in the Clerk of Court's records may not be ended except by court order or written notification from the Solicitor that the case has been dismissed or *nolle prossed*. The Circuit Solicitor shall provide to the Clerk of Court the name of the Assistant Solicitor and the attorney for the defendant, if any, in each pending case.

The General Sessions records for each county must be reconciled no later than thirty (30) days from the date of this Order. The Solicitors shall notify the Chief Justice through the Director of Court Administration of compliance with this Order and that the record of pending cases is accurate as of the date of reconciliation. The Solicitors shall also notify the Public Defender that the records have been reconciled. Within 15 days of notification from the Solicitor, the Public Defender shall review the list of pending cases provided in the online Court Roster and provide to the Clerk of Court any updated information regarding the name of the defendant's attorney. Within 45 days of the date of this Order, the Clerk of Court shall provide to the Chief Judge for Administrative Purposes a report of all cases pending over 545 days from the date of filing with the Clerk of Court.

Thereafter, Clerks of Court shall conduct monthly self-audits utilizing the County Statistics Self-Audit Portal to ensure that the records transmitted to the South Carolina Judicial Department are accurate. Verification of the monthly self-audit will be submitted to the South Carolina Judicial Department for the Chief Justice's periodic review. Further, it is the ongoing responsibility of the Solicitors and Clerks of Court to reconcile pending General Sessions cases on a quarterly basis.

The Solicitor shall also provide a list of all cases pending for more than 545 days since filing with the Clerk of Court, which the Clerk shall maintain separate and apart from other pending cases. The Solicitor shall provide to the Clerk of Court the following information regarding cases pending for more than 545 days: (1) Indictment number; (2) Defendant's name; (3) Date of Arrest; (4) Assigned Assistant Solicitor; (5) Current Defense Counsel, any Previous Counsel, and Grounds for any Substitution or Change; (6) Date of Indictment (True Bill); (7) Request(s) for Continuances, if any; (8) Results of any Previous Motions or Hearings, if any; (9) whether the defendant is confined or on bond.

Cases which have been pending for more than 545 days since the date of filing with the Clerk of Court shall be promptly set for disposition by the Chief Judge for Administrative Purposes, taking into account the need to balance disposition of these older cases with trials in ongoing matters. The Chief Judge for Administrative Purposes shall consult with the solicitor to determine the best method to achieve prompt resolution of these matters, and may request special terms of court for order by the Chief Justice to resolve these matters.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 7, 2014

The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

S.C. Code Ann. § 34-31-20 (B) (Supp. 2013) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 2, 2014, the first edition after January 1, 2014, listed the prime rate as 3.25%. Therefore, for the period January 15, 2014, through January 14, 2015, the legal rate of interest for judgments and money decrees is 7.25% compounded annually.

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

Columbia, South Carolina
January 3, 2014

The Supreme Court of South Carolina

In the Matter of James C. Dimitri, Petitioner

Appellate Case No.2013-002576

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 9, 1976, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 3, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of James C. Dimitri shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 27, 2013

The Supreme Court of South Carolina

In the Matter of William Burton Pettus, Respondent

Appellate Case No. 2013-002575

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 6, 2008, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court of South Carolina, dated December 2, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of William Burton Pettus shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 27, 2013

The Supreme Court of South Carolina

In the Matter of Douglas R. Wright, Petitioner

Appellate Case No. 2013-002431

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 2001, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated November 13, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Douglas R. Wright shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 27, 2013

The Supreme Court of South Carolina

In the Matter of Coleman M. Legerton, Petitioner

Appellate Case No. 2013-002603

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1992, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 5, 2013, Petitioner submitted her resignation from the South Carolina Bar.

Further, the records in the office of the Clerk show that she has filed an affidavit indicating she cannot locate her certificate of admission and that she has no clients.

We accept Petitioner's resignation. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 27, 2013

The Supreme Court of South Carolina

In the Matter of Stewart Michael Kahn, Petitioner

Appellate Case No. 2013-002592

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1981, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated November 3, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Stewart M. Kahn shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

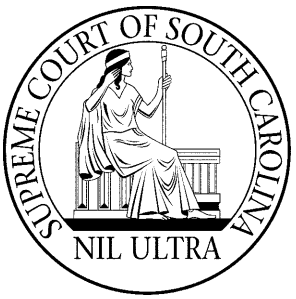
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 27, 2013



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 8, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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2013-UP-189-Thomas J. Torrence v. SCDC	Pending
2013-UP-199-Wheeler Tillman v. Samuel Tillman	Pending
2013-UP-224-Katheryna Mulholland-Mertz v. Corie Crest	Pending
2013-UP-232-Theresa Brown v. Janet Butcher	Pending
2013-UP-236-State v. Timothy E. Young	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-256-Woods v. Breakfield	Pending
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-267-State v. William Sosebee	Pending
2013-UP-272-James Bowers v. State	Pending
2013-UP-279-MRR Sandhills v, Marlboro County	Pending
2013-UP-286-State v. David Tyre	Pending
2013-UP-288-State v. Brittany Johnson	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-294-State v. Jason Thomas Husted	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending

2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-311-Pee Dee Health Care, P.A. v. Thompson	Denied 12/19/13
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-323-In the interest of Brandon M.	Pending
2013-UP-326-State v. Gregory Wright	Pending
2013-UP-327-Roper LLC v. Harris Teeter	Pending
2013-UP-340-Randy Griswold v. Kathryn Griswold	Pending
2013-UP-360-State v. David Jakes	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of C. Kevin Miller, Respondent.

Appellate Case No. 2013-002345

Opinion No. 27342
Submitted December 9, 2013 – Filed January 2, 2014

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

C. Kevin Miller, of Spartanburg, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment. We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to March 7, 2012, the date of his interim suspension. *See In re Miller*, 397 S.C. 7, 723 S.E.2d 211 (2012). The following matters are addressed in the Agreement.

Matter A

Respondent failed to timely respond to an initial inquiry by ODC into this matter.

Matter B

Respondent represented client in a workers' compensation case that was settled in 2006. Client was to receive $91,000 from the settlement, but for personal reasons asked respondent to hold the funds and disburse them as requested. Respondent failed to safeguard the funds, and although he made some disbursements, he did not always make disbursements at the time or in the amount requested. In addition, the majority of the disbursements were made from respondent's operating account rather than his trust account and at a time when the trust account in question had a balance of less than $75.

In 2010, an attorney representing client in another matter learned of the situation with the workers' compensation settlement funds and, along with client, demanded an accounting from respondent. Respondent had not maintained a ledger for the funds and was unable to provide a timely accounting. Eventually, respondent determined he owed client $45,000, and he issued a certified check to client in that amount. After further review of his records, respondent determined he owed client a balance of $4,400, and he issued another certified check to client in that amount. Respondent cannot establish the whereabouts of client's funds during the period they were entrusted to respondent's care.

Finally, respondent did not respond to the notice of investigation in this matter until after receiving a *Treacy* letter,[1] and after being placed on interim suspension, failed to respond to two additional requests for information.

Matter C

In early 2011, respondent closed a refinance transaction for client. Respondent was to submit a payoff of $67,687.06 to client's former lender, but failed to do so. Instead, respondent used the funds for other purposes and took no action when client advised him more than once that client was still receiving bills from his former lender. When the former lender began foreclosure proceedings approximately six months after closing, client filed a complaint with the

[1] *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982).

Commission on Lawyer Conduct. Respondent then paid the outstanding balance with funds he obtained from another source discussed below.

Respondent initially informed ODC his failure to submit the payoff in a timely manner was an error and oversight. After additional inquiry, respondent acknowledged he failed to safeguard the payoff funds, had not been reconciling the trust account into which the funds had been placed, and was not maintaining full and accurate trust account records as required by Rule 417, SCACR.

Matter D

For many years, respondent failed to properly manage the trust account involved in Matters B and C above. Trust account records provided to ODC demonstrated respondent failed to safeguard funds belonging to the clients and failed to comply with Rule 417, SCACR. Moreover, the records were not sufficient to gain a complete understanding of the management of the account. Respondent failed to maintain or produce ledgers for many of his clients. He also issued checks to himself in connection with clients for whom he produced no ledgers. Many disbursements from the trust account could not be linked to corresponding deposits. Some of the ledgers produced were inaccurate, incorrectly reflecting a zero balance when, in reality, disbursements exceeded deposits. At least one ledger reflected a zero balance when there should have been a small amount of funds remaining. Respondent submitted journals that did not capture all account transactions. Respondent did not produce any reconciliation reports for the trust account and admitted he routinely failed to conduct monthly reconciliations. After his initial compliance with a subpoena, respondent twice submitted corrected journals and ledgers to ODC after comparing his records to bank statements.

Respondent also commingled his money with that of his clients and withdrew more money for his own uses than he ever placed into the account. In September 2009, respondent placed $70,000 in personal funds into the trust account. In June 2011, shortly before he submitted the payoff in the refinance matter, respondent placed another $85,000 in personal funds in the account. He explained he did not put the money into his operating account because he wanted to avoid it being taxed as income. However, he also needed to infuse the account with money to make up for his failure to safeguard the funds of the clients in Matters B and C. After making the deposits, respondent used the trust account to pay personal and professional expenses, but did not keep track of the personal funds by ledger or otherwise.

Respondent paid his home mortgage, home utility bills, cell phone bills, credit cards, insurance, shopping bills, personal loans, and other personal expenses from the account. He also paid for business expenses, including online continuing legal education courses, payroll, computer expenses, furniture, and telephone service from his trust account. Before the account was closed in October 2011, respondent placed an additional $6,110 in personal funds into the account to cover NSF items and fees. According to his own admittedly inaccurate records, respondent disbursed at least $175,177 for personal and office expenses, $14,067 more than the $161,110 in personal funds he placed into the account. By spending more than he personally had on deposit, respondent misappropriated client funds.

Respondent also failed to safeguard funds he was holding for the seven children of a widow and her late husband, who was killed in a work-related accident. Although a complaint was not filed, the Lawyers' Fund for Client Protection approved claims that respondent misappropriated $62,956.72 from the children. Respondent did not provide ODC with a ledger for the funds, but did write checks to the children's mother from the account and wrote himself at least one $500 check associated with the family.

Matter E

Due to lack of proper management and recordkeeping, respondent chose to stop using the trust account involved in the matters above. However, because of his improper handling of the account and inadequate recordkeeping, he failed to have sufficient funds in the account to cover outstanding items and seven items, totaling $3,060.36, were paid against insufficient funds. Some of the items were for matters involving clients and some were disbursements for payroll or personal expenses. Respondent deposited $6,110 in personal funds into the account to cover these items, plus fees and any other outstanding items. Ultimately, the bank closed the account and charged off a negative balance of $122.38, but respondent paid the bank for the charged off amount.

Matter F

Respondent failed to respond to the notice of investigation in this matter, providing a response only after receiving a *Treacy* letter. In addition, respondent failed to respond to ODC's written request for additional information until he received a reminder letter. Although it was determined respondent did not commit

misconduct in the matter, he did violate Rule 8.1(b) by failing to timely respond to ODC's inquiries regarding the matter.

Matter G

Respondent opened a new trust account in July 2011. The account had a balance of $337.57 when respondent deposited a $20,000 settlement check for a domestic case. The next day, respondent issued a $500 check to himself that was not associated with the domestic case. He was able to cash the $500 check and the check cleared because of the intervening deposit. However, when the $19,117 check to his domestic client cleared the account, insufficient funds remained to pay the $893 check respondent issued to himself for fees in the domestic case. The bank honored the check and respondent deposited personal funds to correct the account balance.

Matter H

Client hired respondent to help him get an abandoned road reopened so he could have access to his landlocked property. Respondent did not work diligently on client's behalf and did not keep him informed of the status of the matter. The Lawyers' Fund for Client Protection approved payment to client of $905, the entire fee client paid to respondent.

Matter I

The Resolution of Fee Disputes Board issued a $1,450 award against respondent in favor of a former client. Respondent did not pay client pursuant to the award. Respondent does not dispute client is entitled to the money, but states he does not have the funds to pay client at this time. The Lawyers' Fund for Client Protection paid client $1,450.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (requiring lawyer to act with reasonable diligence and promptness in representing a client); Rule 1.4 (requiring lawyer to keep a client reasonably informed about the status of a matter); Rule 1.15(a) (requiring a lawyer to keep client funds separate from the lawyer's own property, to safeguard client property and keep complete records of

funds in such accounts); Rule 1.16(d) (requiring a lawyer to return any unearned fee after termination of representation); Rule 8.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact to a disciplinary authority); Rule 8.1(b) (knowingly fail to respond to a lawful demand for information from a disciplinary authority); and Rule 8.4(d) (providing it is professional misconduct for a lawyer to engage in conduct involving dishonesty, deceit or misrepresentation). Respondent also admits he violated Rule 417, SCACR, which sets forth requirements for financial recordkeeping.

Finally, respondent admits his conduct constitutes grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it is a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (it is a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state retroactive to March 7, 2012, the date of his interim suspension. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Within thirty days of the date of this opinion, respondent shall enter into a payment plan with the Commission on Lawyer Conduct to (1) repay costs incurred by the Commission and ODC and (2) reimburse the Lawyers' Fund for Client Protection for all amounts paid to respondent's former clients. Respondent may not apply for readmission to the South Carolina Bar until he has had a six-year forensic accounting and audit performed of all of this trust accounts by a certified public accountant (CPA), the CPA renders a report giving reasonable assurance that all injured parties have been identified, and respondent has made restitution to all injured parties identified in the report.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Raquel Martinez, Employee, Petitioner,

v.

Spartanburg County, Employer, and S.C. Association of Counties Self-Insurance Fund, Carrier, Respondents.

Appellate Case No. 2011-202268

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 27343
Heard October 15, 2013 – Filed January 8, 2014

VACATED

James K. Holmes and David T. Pearlman, of The Steinberg Law Firm, LLP, of Charleston, and Chadwick D. Pye, of Chadwick D. Pye, LLC, of Spartanburg, for Petitioner.

Richard B. Kale, Jr. and Mitchell K. Byrd, Jr., of Willson Jones Carter & Baxley, P.A., of Greenville, for Respondents.

JUSTICE HEARN: This workers' compensation case comes before us following the court of appeals' reversal of a circuit court order. The circuit court order reversed a decision of the Workers' Compensation Commission and remanded the case for further proceedings. Pursuant to this Court's decision in *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013), we find the circuit court's order was not a final judgment and therefore it was not appealable. Accordingly, we vacate the court of appeals' opinion and remand the case to the Commission.

Raquel Martinez, the claimant, was employed by the County as a master deputy forensic investigator. In that capacity she investigated an accident scene where an infant girl was fatally crushed by a car driven by the child's father, a police officer who formerly worked with Martinez. She later suffered a mental breakdown and filed a workers' compensation claim alleging the breakdown was the result of the investigation. Both the single commissioner and the appellate panel of the Workers' Compensation Commission found Martinez's claim was not compensable because the investigation was not an extraordinary and unusual condition of her employment and because the investigation did not proximately cause her injury. Martinez appealed to the circuit court which reversed and remanded the case for further proceedings before the Commission. Respondents appealed to the court of appeals which reversed the circuit court, finding Martinez's injury noncompensable. *Martinez v. Spartanburg County*, 394 S.C. 224, 715 S.E.2d 339 (Ct. App. 2011).

A party is entitled to judicial review of any final agency decision. *See* S.C. Code Ann. § 1-23-380 (Supp. 2012). Once the initial judicial branch appellate review of an agency decision is complete, further appellate review is governed by Section 1-23-390 of the South Carolina Code (Supp. 2012). That statute permits further appellate review only "of a final judgment of the circuit court or the court of appeals." S.C. Code Ann. § 1-23-390. In *Bone*, this Court construed "final judgment" to mean an order "that finally disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to execute the judgment . . . ." *Bone*, 404 S.C. at 83, 744 S.E.2d at 561.

Here, under *Bone*, the circuit court's order was not a final judgment. It remanded the matter to the Commission for further proceedings, and thus left matters to be determined rather than disposing of the whole subject matter of the

action. Because the order was not appealable, we hereby vacate the court of appeals' opinion and remand the case to the Workers' Compensation Commission.

TOAL, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larius G. Woodson and Maurissa Woodson, Petitioners,

v.

DLI Properties, LLC, Allen Tate Co., Inc., Melia C. Faile and Alan L. Cauthen, Defendants,

of whom Allen Tate Co. and Melia C. Faile, are Respondents.

Appellate Case No. 2011-198286

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 27344
Heard October 16, 2013 – Filed January 8, 2014

AFFIRMED AS MODIFIED

John Martin Foster, of Rock Hill, for Petitioners.

Thomas Lynn Ogburn, III, of Poyner Spruill, LLP, of Charlotte, North Carolina, for Respondents.

CHIEF JUSTICE TOAL: Larius and Maurissa Woodson (Petitioners) appeal the circuit court's decision granting summary judgment in favor of Allen Tate Co. (Allen Tate) and Melia Faile (collectively, Respondents). The court of appeals affirmed. We affirm the court of appeals' decision as modified.

FACTS/PROCEDURAL BACKGROUND

In 2006, DLI Properties, LLC (DLI), hired Allen Tate, a real estate brokerage firm, and Faile, Allen Tate's licensee, to serve as its agents in connection with the sale of certain real property in Lancaster, South Carolina (the property). Petitioners, using Sharon Davis of Davis Integrity Realty, Inc. as their broker, offered to purchase the property.[1]

On August 1, 2006, at Petitioners' request, Faile sent Petitioners a draft form of an "Agreement to Buy and Sell Real Estate" (the offer). Upon receiving the offer, Petitioners made changes to several terms, initialed the changes, signed the offer, and returned it to Faile on August 3, for consideration by DLI. That same day, DLI made material changes to the offer, initialed those changes, signed the offer, and Faile returned it to Petitioners for consideration and approval. At some point later that day, after receiving the offer from Petitioners with initials to only some of DLI's changes, Faile faxed Davis the offer with the signatures and stated in the fax cover sheet that Petitioners needed to initial a few more items to finalize the offer. On Friday, August 4, Petitioner Larius Woodson (Larius) called Faile and explained he forgot to include in the offer a $4,300 limit on the cost of tapping into the existing water and sewer system (tap fee), which was a contingency term of the offer. Faile told Larius she would discuss the tap fee with DLI, but was unsure whether DLI would accept the change.

After Faile discussed the tap fee with a DLI representative, Faile telephoned Larius and left a voice message at 5:00 p.m. on August 4, stating DLI agreed to the change and directing Larius to notate the change, initial it, and deliver the offer to her with a check for the $1,000 earnest money deposit. Petitioners inserted the tap fee term, and initialed that change as well as DLI's changes. On Saturday, August 5, Petitioners delivered the offer to Faile's office with a check for the earnest money. Around 3:00 p.m. that day, Faile picked up the offer and check from her

[1] Although Davis acted as Petitioners' agent, she was absent during relevant portions of the real estate transaction. Therefore, at times, Petitioners communicated directly with Faile.

office and called DLI to finalize the offer; however, because some of DLI's partners were out of town and therefore unable to sign the tap fee change, they agreed to meet on Monday, August 7, to finalize the agreement.

On Sunday, August 6, Alan Cauthen contacted Faile through his real estate agent about making an offer on the property. Faile informed Cauthen's agent that DLI was considering another offer, but DLI had not finalized that offer yet. The agent requested Faile to fax over details about the property. Approximately four hours later, Cauthen's agent indicated Cauthen was very interested in the property and wanted to make a cash offer with an earlier closing date, but Cauthen was concerned with the septic and indicated he wanted an inspection. The inspection occurred on August 8, with Cauthen and his agent present. After the inspection, Cauthen informed Faile he wanted to make an offer, and Faile stated the offer must guarantee an earlier closing date and a $5,000 earnest money deposit.

In the meantime, on Monday, August 7, Faile informed DLI about Cauthen's offer. Faile also asked DLI whether she should inform Petitioners about Cauthen's offer. DLI instructed Faile not to inform Petitioners after Faile told DLI that she was afraid that, if she informed Petitioners about the other offer, DLI could lose both offers.

On Wednesday, August 9, Cauthen delivered a formal written offer to purchase the property. DLI accepted Cauthen's offer, and the parties executed the agreement that afternoon. After the agreement's execution, Faile called Davis and informed her that DLI had accepted another offer, which contained no contingencies and an earlier closing date. Petitioners subsequently filed a lis pendens on the property in the amount of $3,000.

On October 27, 2006, Petitioners commenced the current action against Respondents alleging fraud, negligent misrepresentation, and violations of the South Carolina Unfair Trade Practices Act (the SCUTPA)[2] based on DLI's acceptance of Cauthen's offer and Faile's representation that DLI would accept Petitioner's offer.[3] Petitioners claimed Respondents made misrepresentations concerning the validity and effectiveness of their agreement to purchase the

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[2] S.C. Code Ann. §§ 39-5-10 to -560 (1985 & Supp. 2012).

[3] Petitioners made the claims against Respondents in the alternative to their claims against DLI.

property. Petitioners asserted Respondents had a duty of care to communicate truthful information to Petitioners, and breached that duty by failing to disclose the Cauthen offer and the fact that DLI had not signed Petitioners' offer. Petitioners further alleged Respondents demonstrated a pattern of behavior sufficient to establish a SCUTPA violation.

In his deposition, Larius testified he understood the tap fee's exclusion was a mistake on his part, which he realized on Friday, August 4, and he merely sought to enforce the contract for sale he and DLI originally negotiated. Larius stated he knew DLI planned to sign the tap fee change, but he was unaware that DLI's signature to the tap fee change was necessary to render the agreement valid and enforceable. Larius testified he sought to close on the land and receive reimbursement for expenses, estimated at $3,000, that he incurred between the time Petitioners changed the offer until DLI's rejection of the offer, which was the period between Saturday, August 5, through Wednesday, August 9.[4]

Faile testified that she believed Petitioners and DLI reached an agreement *before* Petitioners requested the inclusion of the tap fee. However, she testified that, prior to this change, she contacted Davis to inform her that the offer still required Petitioners' initials to ensure the validity of the agreement. Faile acknowledged that DLI would have accepted the offer with the tap fee and that she confirmed this with Larius in a voicemail. However, Faile also testified she believed the transaction was not complete until DLI initialed the tap fee change. She further testified that she felt the offer contained enough contingency terms, and that the tap fee would be an easy way for Petitioners to cancel the deal because the actual tap fee cost would likely be more than the $4,300 contingency. Additionally, Faile testified that she was ethically obligated to bring all potential offers, including Cauthen's offer, to DLI after Petitioners delivered their offer to her, because DLI had not yet signed Petitioners' offer containing the tap fee change.

[4] In his deposition, Larius admitted he had no documentation to support the $3,000 claim for damages; instead, he asserted that amount was the value of his time spent on the deal and gas consumed over the course of approximately four days in which he thought the agreement was valid.

On March 26, 2008, Respondents filed a motion for summary judgment.[5] On July 13, 2008, after a hearing on July 7, the circuit court entered an order granting Respondents' motion for summary judgment, stating:

> Based upon the arguments of counsel, and upon consideration of the motion for summary judgment, the pleadings, affidavits, deposition, transcripts, discovery responses and other documents on file and the briefs filed by the parties, the Court determines that there are no genuine issues of material fact, and [Respondents] are entitled to judgment as a matter of law on all claims against them contained in the Complaint, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

Petitioners appealed. The court of appeals affirmed the circuit court, finding Petitioners failed to satisfy their burden of providing a sufficient record. *See Woodson v. DLI Props.*, Op. No. 2011-UP-291 (S.C. Ct. App. filed June 14, 2011). The court of appeals concluded it could not determine whether summary judgment was appropriate because the circuit court's order failed to articulate its reasons for granting summary judgment. *Id.* The court of appeals noted that, ordinarily, under *Bowen v. Lee Process Systems Co.*, 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000), it would vacate the circuit court's grant of summary judgment and remand the case for more specific findings and analysis. *Id.* However, relying in part on Rule 210(h), SCACR,[6] the court of appeals declined to do so "because the trial court

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[5] Respondents argued Faile's deposition was evidence that Faile did not promulgate false or misleading information because at all times that she communicated with Larius, Faile believed she was providing truthful information. Respondents also argued Petitioners could not establish the necessary elements for their SCUTPA claims because there was no evidence Respondents engaged in an unfair or deceptive act in the conduct of trade or commerce. Respondents further contended that Petitioners could not establish the alleged unfair or deceptive acts affected the public interest because Petitioners merely suffered a private harm that was not capable of repetition or threatening to the consumer public. Finally, Respondents argued they were entitled to summary judgment because Petitioners were unable to articulate any actual damages incurred by them.

[6] Rule 210(h), SCACR, provides that "the appellate court will not consider any fact

might have articulated its decision during the summary judgment hearing and [Petitioners] failed to provide a hearing transcript." *Id.* (emphasis added).

ISSUES PRESENTED

I. Whether the court of appeals erred in affirming the circuit court on the basis that Petitioners failed to provide a sufficient record for review.

II. Whether the circuit court erred in granting summary judgment in favor of Respondents.

ANALYSIS

I. Sufficient Record

Petitioners argue that a judgment is effective only when set forth in a written order, and if there is a conflict between a court's oral ruling and written order, the written order controls. Therefore, Petitioners argue, what the circuit court "might" have stated during the hearing is irrelevant to whether the motion for summary judgment should have been granted because such statements would not have been controlling of the outcome. Petitioners further contend, because all memoranda, affidavits, and other evidence presented to the circuit court were included in the Record before the court of appeals, and that evidence is the basis upon which the circuit court made its decision, there is no requirement to include the hearing transcript.[7]

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which does not appear in the Record on Appeal." The court of appeals also relied on *Price v. Pickens County*, 308 S.C. 64, 67, 416 S.E.2d 666, 668 (Ct. App. 1992), which provides, "[t]he burden is on the appellant to provide a sufficient record such that this court can make an intelligent review."

[7] Respondents concede the supporting documents containing the facts and legal arguments on which the circuit court relied upon and identified in the order were included in the Record before the court of appeals. Therefore, Respondents submit, the court of appeals did have sufficient information to permit meaningful appellate review of the merits of Petitioners' arguments.

We agree that the court of appeals erred in affirming the circuit court's grant of summary judgment on the basis that Petitioners failed to provide a sufficient record.

The court of appeals, relying on *Bowen*, stated it would have vacated and remanded the case to the circuit court to articulate its reasons for granting summary judgment if Petitioners had provided a sufficient record. In *Bowen*, the court of appeals vacated the trial judge's grant of summary judgment because the order was a cursory form order. The court remanded for a written order identifying the facts and accompanying legal analysis upon which the judge relied because, based on the record, the court of appeals determined the propriety of the summary judgment was a rather close question. *Bowen*, 342 S.C. at 240–41, 536 S.E.2d at 90–91.[8] We agree it is better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment. However, Rule 52, SCRCP, provides that "[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . . ." Thus, such findings and

[8] We note the court of appeals' application of the *Bowen* standard is somewhat inconsistent. *Compare B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 271, 603 S.E.2d 629, 631–32 (Ct. App. 2004) (vacating a form order granting summary judgment and remanding the case to the trial judge for entry of a written order identifying the facts and legal analysis upon which it relied in granting summary judgment), *and Carey v. Snee Farm Cmty. Found.*, 388 S.C. 229, 230, 232, 694 S.E.2d 244, 245–46 (Ct. App. 2010) (finding the trial judge's reasoning for granting summary judgment was not clear from the record where the trial judge's decision was in a form order without any stated grounds for his decision), *with Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (stating that not all circumstances require a detailed order if the appellate court can determine the basis of the trial judge's ruling from the record on appeal), *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 432, 447–48, 626 S.E.2d 25, 32–34 (Ct. App. 2005) (finding *Bowen* distinguishable because the trial judge's reasoning for denial of post-trial motions could be determined from the record on appeal), *and Inglese v. Beal*, 403 S.C. 290, 307–08, 403 S.E.2d 687, 696 (Ct. App. 2013) (Pieper, J., dissenting) (noting the majority affirmed the trial judge's Form 4 order which simply stated "Defendant [] Beal's motion for summary judgment is granted").

conclusions are not required for appellate review, and, for this reason, we overrule *Bowen* to the extent it is relied upon to vacate and remand orders granting summary judgment. Nevertheless, here, the circuit court's reasoning is clear from the order, as it plainly referenced the evidence the circuit court considered in making its decision. *See Porter*, 372 S.C. at 568, 643 S.E.2d at 100 (stating that "not all situations require a detailed order, and the circuit court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal").

Further, a decision on a motion for summary judgment is based on depositions, interrogatories, affidavits, and other evidentiary material provided by the parties. *See* Rule 56(c), SCRCP; *see also Quail Hill, L.L.C. v. Cnty. of Richland*, 387 S.C. 223, 234, 692 S.E.2d 499, 505 (2010) (stating appellate courts apply the same standard as the trial court under Rule 56(c), SCRCP). Here, Petitioners provided the requisite evidentiary material to the court of appeals. Therefore, we find the court of appeals did have a sufficient record before it to permit meaningful appellate review and make a decision on the merits. *See Quail Hill*, 387 S.C. at 234, 692 S.E.2d at 505; *Hamilton v. Greyhound Lines E.*, 281 S.C. 442, 444, 316 S.E.2d 368, 369 (1984) (stating the appealing party has the burden of providing a sufficient record such that the appellate court can make an intelligent review).[9]

Additionally, what the circuit court "might" have stated during the hearing on the motion for summary judgment is irrelevant, as a written order constitutes a final order and final judgment of the lower court. *See Ford v. State Ethics Comm'n*, 344 S.C. 642, 645–646, 545 S.E.2d 821, 823 (2001) (citing Rule 58, SCRCP) (stating "the written order is the trial judge's final order and as such constitutes the final judgment of the court"); *see also Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; Rule 201(a), SCACR; *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993)) ("An appeal ordinarily may be pursued only after a party has obtained a final judgment."). In the presence of a written order, the court of appeals erred in affirming summary

[9] Moreover, the court of appeals' reliance on Rule 210(h), SCACR, is misplaced. All of the facts were included in the Record on Appeal before the court of appeals; thus, the hearing transcript was not necessary for the purposes of appellate review.

judgment on the basis that Petitioners did not provide the hearing transcript as part of the Record. *See Ford*, 344 S.C. at 645–646, 545 S.E.2d at 823; *see also* Rule 56(c), SCRCP (listing the factual material that is reviewable for purposes of deciding whether to grant a motion for summary judgment).

II. The Merits[10]

In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP. *Quail Hill*, 387 S.C. at 234, 692 S.E.2d at 505. Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Quail Hill*, 387 S.C. at 235, 692 S.E.2d at 505.

Petitioners contend they presented sufficient evidence of fraud to withstand summary judgment. Petitioners, relying on section 40-57-137 of the South Carolina Code, argue Respondents had a duty to disclose Cauthen's offer and the fact that DLI had not yet finalized Petitioners' offer. Petitioners contend this duty arises because they had "the right to expressly repose trust and confidence" in Respondents with regard to the offer to purchase the property. *See* S.C. Code Ann. § 40-57-137 (2011); *Jacobson v. Yaschick*, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967) (stating one of the three distinct classes upon which a duty to disclose arises includes when one party expressly reposes a trust and confidence in the other in a particular transaction, or the circumstances of that transaction or the nature of the parties' dealings imply such a trust and confidence). Petitioners also contend Respondents' actions and inactions constituted unfair trade practices under the SCUTPA. We disagree.[11]

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[10] While remand to the court of appeals is appropriate, in the interest of judicial economy, we address the merits of whether summary judgment in favor of Respondents was proper. *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 599, 576 S.E.2d 146, 149 (2003) (addressing the merits of a claim in the interest of judicial economy despite the respondent being entitled to review by the lower court).

[11] We find Petitioners have abandoned the negligent misrepresentation claim by

In reviewing the circuit court's order and the Record, we find the facts—which are uncontested—and the law support summary judgment in favor of Respondents. *See Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) (citation omitted) (stating the moving party has the initial burden of demonstrating the absence of a genuine issue of material fact; however, with respect to an issue upon which the nonmoving party has the burden of proof, the moving party may discharge his responsibility by pointing out to the trial judge there is an absence of evidence to support the nonmoving party's case); *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006) (stating it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine); *see also* Rule 56(e), SCRCP (stating an adverse party may not rest upon the mere allegations or denials of his pleadings to withstand summary judgment, but must set forth specific facts showing a genuine issue exists for trial).

Petitioners were not clients of Respondents; rather, Petitioners employed Davis to represent them in the transaction, and the circumstances of Petitioners' dealings with Respondents did not imply a "trust and confidence" between the parties giving rise to a duty to disclose another offer. *See* S.C. Code Ann. §§ 40-57-135, -137 (2011) (outlining the duties owed by a real estate brokerage firm and a real estate agent);[12] *Holly Hill Lumber Co. v. McCoy*, 201 S.C. 427, 437, 23 S.E.2d 372, 376 (1942) ("Nondisclosure becomes fraudulent only when it is the duty of the party having knowledge of the facts to uncover them to the other."); *see also Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005) (stating it is a question of law whether a duty exists); *Jacobson*, 249 S.C. at 585, 155 S.E.2d at 605 (providing the three distinct classes upon which a duty to disclose arises). Therefore, the circuit court properly granted summary

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failing to set forth an argument on the issue in their brief. *See* Rule 208(b), SCACR (stating that, for appellate review of an issue to occur, the issue must be set forth in a statement and argument); *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (stating that a party's failure to argue an issue constitutes abandonment of the issue and precludes consideration on appeal).

[12] Specifically, section 40-57-137, in part, provides that a seller's real estate agent owes a duty to present all offers to the seller, even when the property is subject to a contract of sale. S.C. Code Ann. § 40-57-137(C)(2)(b).

judgment in favor of Respondents on the fraud claims. *See* Rule 56(c), SCRCP; *Turner v. Milliman*, 392 S.C. 116, 125, 708 S.E.2d 766, 770 (2011) (citation omitted) (stating a fraud claim requires proof by clear and convincing evidence).

As to Petitioners' unfair trade practices claims, the SCUTPA is not available to redress a private wrong because an unfair or deceptive act that affects only the parties to the transaction is beyond the scope of the SCUTPA. *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 478–480, 351 S.E.2d 347, 349–351 (Ct. App. 1986). Here, the transaction only affected Petitioners, DLI, and Respondents, and therefore, Respondents' actions or inactions are not actionable under the SCUTPA, and Petitioners failed to present any evidence to the contrary. *Id.*; *see also Health Promotion Specialists, L.L.C. v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (citation omitted) (stating to recover in an action under the SCUTPA, "the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)"). Therefore, we find the circuit court properly granted summary judgment in favor of Respondents on the SCUTPA claims as well.

Furthermore, Petitioners' allegation that they suffered $3,000 in actual damages is purely speculative and, therefore, not recoverable, which we find further supports summary judgment in favor of Respondents. Larius admitted in his deposition that he estimated the $3,000 in damages based on the time and gas he spent on the deal between August 5 and 9. He further admitted that he could not substantiate that number because he "had no clue" of the actual amount of hours or gas, and simply stated the amount was the value for one week of his time. *See* S.C. Code Ann. § 39-5-140(a) (1985) (providing the SCUTPA allows for the recovery of actual damages); *Fields v. Yarborough Ford, Inc.*, 307 S.C. 207, 212 n.2, 414 S.E.2d 164, 167 n.2 (1992) (finding the alleged damages speculative where plaintiff admitted he did not actually know if he spent more money on gas as a result of the defendant's deceptive act of nondisclosure that the truck plaintiff purchased had a larger size engine than defendant stated); *Baughman v. AT & T Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991) (citations omitted) ("[I]n order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation."); *see also* Michael G. Sullivan & Douglas S. MacGregor,

Elements of Civil Causes of Action 148 (4th ed. 2009) (citations omitted) ("The plaintiff must show the injury clearly, and the damages must not be excessively speculative.").

CONCLUSION

The court of appeals erred by not addressing the merits of Petitioners' appeal. However, on the merits, we affirm the circuit court's decision granting summary judgment in favor of Respondents. Accordingly, the court of appeals' decision is

AFFIRMED AS MODIFIED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, Jane Doe 1, Jane Doe 2 and Jane Doe 3, Appellants,

v.

The Bishop of Charleston, A Corporation Sole, and The Bishop of The Diocese of Charleston, in His Official Capacity, Respondents.

Appellate Case No. 2011-199886

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27345
Heard April 4, 2013 – Filed January 8, 2014

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED

Gregg E. Meyers, of Jeff Anderson & Associates, P.A., of Charleston, for Appellants.

Albert P. Shahid, Jr., of Shahid Law Office, LLC, of Charleston, for Respondents.

JUSTICE PLEICONES: John Doe, Jane Doe 1, Jane Doe 2 and Jane Doe 3 (appellants) separately sued the Bishop of Charleston, a Corporation Sole, and the

Bishop of the Diocese of Charleston in his official capacity (respondents). The cases were consolidated, and respondents moved to dismiss on the pleadings. The trial court granted the motion.[1] We affirm in part and reverse in part.

FACTS

In 2007, in a suit brought in Dorchester County, respondents entered into a class action settlement agreement (the settlement) to settle the claims of "[a]ll individuals born on or before August 30, 1980 who, as minors, were sexually abused at any time by agents or employees of the Diocese of Charleston" as well as their spouses and parents, except those whose claims had been independently resolved. The settlement provided for the establishment of a fund from which awards would be made to claimants who established their sexual abuse claims by arbitration.

Appellants allege they did not receive notice of the settlement. In 2009, after the claims and opt-out period provided for in the settlement had expired, they brought suit alleging claims of the type covered by the settlement. Three appellants (siblings) allege that, between 1965 and 1971, as children they were sexually abused by a priest assigned to St. William Church in Ward, South Carolina; one appellant is the parent of the allegedly abused children.

ISSUES

1. Did the trial court err when it ruled the terms of the settlement do not waive its res judicata effect?
2. Did the trial court err when it found appellants bound by the settlement?
3. Did the trial court err when it found appellants' claims barred by the statute of limitations?

I. Settlement terms

The trial court held that appellants' claims were identical to those addressed in the class action settlement, that appellants were members of the class, and thus that their claims were barred by principles of res judicata and collateral estoppel. Appellants argue this was error because respondents waived the res judicata effect

[1] Appellants did not appeal the trial court's dismissal of their Unfair Trade Practices Act cause of action.

of the class action as to all future claims by the terms of the settlement. We disagree.

When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal under Rule 12(b)(6) is improper. *Id*. The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id*. at 395, 645 S.E. 2d at 248.

As an initial matter, appellants argue that, for purposes of reviewing the trial court's grant of dismissal under Rule 12(b)(6), this Court must accept as true their allegation that respondents waived a statute of limitations defense as to all putative class members. We disagree.

When reviewing a motion to dismiss[2] for failure to state facts sufficient to constitute a cause of action, the pleadings must be construed liberally, and all well pled facts must be presumed true. *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011). However, the interpretation of a judgment is a question of law for the court. 46 Am. Jur. 2d Judgments § 73. Questions of law are reviewed *de novo*. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Thus, we consider the interpretation of the terms of the underlying court-approved class action settlement *de novo*.

"As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated

[2] The trial court's reliance on transcripts and court orders in the underlying class action did not convert the motion to one for summary judgment. See Rule 12(b), SCRCP; *Mullis v. U.S. Bankruptcy Court for the Dist. of Nevada*, 828 F.2d 1385, 1388 (9th Cir. 1987) (under federal rules, court may consider facts subject to judicial notice, including orders and record in underlying case); *General Time Corp. v. Bulk Materials, Inc., 826 F.Supp*. 471, 473 (M.D. Ga. 1993) (consent order); *Stahl v. U.S. Dept. of Agriculture*, 327 F.3d 697, 700 (8th Cir. 2003) (contract documents).

part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989) (citations and internal quotation marks omitted).

In this case, the language in the settlement-related court orders on which appellants' argument depends arose in the context of discussions about notice to putative class members. The original design of the settlement included a 120-day period after the initial notice of final approval of the settlement for any person to make a claim under it. Notice was to be provided to potential claimants through publication in eleven South Carolina newspapers at least once a week for six weeks and in respondents' own periodical, the Catholic Miscellany, in three consecutive issues.

However, it came to light that respondents had been operating under an Instruction from the Vatican that required them to treat allegations of abuse with great secrecy and that their internal files contained the names of several dozen people about whose possible abuse respondents had already received some notice but who had not previously had any claims resolved. Half were already represented in the class action, and half were not. Of the latter group, all but four were located and notified of the pending class action before the Dorchester court approved the settlement. The Dorchester court remained concerned about these final four people. In its July 30, 2007, order approving the settlement, the Dorchester court stated that

> [t]he Diocese has represented to the Court that 20 individuals who may be class members were identified by it in a search of its files. Sixteen of these were located, and as to the other four, I find, . . . , that reasonable efforts were used to locate those individuals and that their present whereabouts are unknown. The Diocese has further stated that it understands that any person who should have had notice, but did not receive notice for whatever reason, would not be bound by the *res judicata* effect of the settlement. Further, the Diocese has stipulated before me in open Court and on the record that any person who comes forward at a later date and can show that he or she should have received notice but did not could participate in an arbitration process with terms identical to the Settlement and Arbitration Agreement before the Court for approval today.

Appellants argue that the language of the July order both removes the ordinary res judicata effect of a class settlement and requires respondents to honor the terms of the settlement as to any future claimant notwithstanding the expiration of the claims period. While we agree with appellants regarding the import of the language of the July order, the Dorchester court entered another order related to the settlement on August 31, 2007. It clarified, in relevant part, that

> in the Court's [July 30] Order . . . approving the Class settlement, the Court made reference to the existence of individuals who, according to the Diocese, (1) were potential class members; (2) came forward to the Diocese at some time in the past with their allegations of child sexual abuse; (3) never resolved their potential claims; and (4) were entitled to receive *actual notice* of the proposed class settlement pursuant to the agreement of the parties and earlier instructions from this Court (hereinafter referred to as "Actual Notice Class Members"). The [Respondents] have asked the Court to clarify how the settlement process will treat the Actual Notice Class Members. Accordingly, this Order clarifies and, where in conflict, supersedes the Court's Order of July 30, 2007.
>
> Actual Notice Class Members shall have 120 days from receipt of actual notice of the class settlement to present their claims to an Arbitrator in the same manner as provided for in the Settlement and Arbitration Agreement. Actual Notice Class Members who present their claims more than 120 days after they receive actual notice of the settlement shall be barred from participation in the settlement process and shall be treated like any other class member who has failed to timely present a claim to the class settlement fund.

Appellants argue that the August order alters the terms of the settlement only as to Actual Notice Class Members. They contend that, as general class members, they are entitled to be treated under the more generous terms of the July order. We disagree.

The August 2007 order clarifies that the Actual Notice Class Members have 120 days to file claims from the time they receive *actual* notice, rather than being limited to 120 days from the entry of judgment, as the other (constructive notice) class members were limited under the settlement. It also reiterates that any

claimant who fails to present her claim within the 120-day notice period will be "barred from participation in the settlement process . . . like any other class member who had failed to timely present a claim to the class settlement fund." This language unambiguously indicates that the 120-day claims period for general class members established in the original settlement remained in place and any seemingly contrary language in the July order was superseded by the August order.

Thus, the terms of the July order do not permit appellants to avoid its res judicata effect and that respondents did not waive a statute of limitations defense as to future claimants who failed to come forward within the claims period provided in the settlement.

II. Issue preclusion

Appellants argue that the trial court erred when it dismissed their claims on the bases that the settlement is res judicata as to appellants' claims and that appellants' claims are collaterally estopped because they were decided in favor of respondents in another case before the same court. We agree.

Notwithstanding the ordinarily preclusive effect of a concluded class action suit, absent class members are entitled to due process before their claims are subject to the suit's res judicata effect. *See Hospitality Management Associates, Inc. v. Shell Oil Co*., 356 S.C. 644, 660, 591 S.E.2d 611, 619 (2004) (hereinafter *Hospitality*). Specifically, before absent class members can be finally bound by the resolution of the class action suit, they are entitled to a limited review on the issues whether sufficient notice was given to putative class members and whether class members had adequate representation. *Id*.; *see also Richburg v. Baughman*, 290 S.C. 431, 434-35, 351 S.E.2d 164, 166 (1986) (Due process guarantees to persons who never had a chance to present their evidence and arguments on a claim a full and fair opportunity to litigate the relevant issue even when "one or more existing adjudications of the identical issue . . . stand squarely against their position" so long as the litigant was not a party or in privity with a party in the previous suit.).

Appellants allege they were deprived of due process in the settlement because it failed to provide either sufficient notice or adequate representation to absent class members. The trial court disagreed. Regarding adequate notice, it held simply that the issue of notice was litigated in Dorchester County, resulting in a final judgment on the merits. Thus, it failed to engage in even limited collateral review whether appellants received minimal notice to satisfy due process. Nor did the trial court

analyze appellants' allegations of inadequate representation in the settlement proceedings.[3] Such allegations would, if substantiated, entitle Appellants to a hearing on their underlying claims, so that dismissal on the pleadings was improper. *Doe*, *supra*.

The trial court also held appellants are collaterally estopped from litigating their claims because their issues were actually adjudicated in "a ruling from the same court in favor of these same Defendants" despite the fact that ruling involved a different plaintiff. Appellants argue this was error. We agree. Absent a showing appellants were in privity with the plaintiff in the previous proceeding, they are not collaterally estopped from litigating the same issue. *Richburg*, *supra*.

III. Statute of limitations

Appellants argue the trial court erred when it found that, even absent the res judicata effect of the settlement, the statute of limitations bars their underlying claims. We agree.

The trial court determined that appellants' claims are independently barred by the statute of limitations. It determined, and appellants do not dispute, that S.C. Code Ann. § 15-3-535 (2005) applies to these claims.[4] Section 15-3-535 requires actions "be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." The trial court found appellants were put on notice of their cause of action by the acts of sexual abuse and that none of the alleged actions of concealment could have

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[3] We note that *Hospitality* was decided in light of deference due to judgments from other states' courts under the Full Faith and Credit clause of the United States Constitution. Review of the procedures provided in a domestic class action does not implicate that clause and raises no similar constitutional tension with the guarantees the Due Process clause provides to absent class members. We do not reach the question whether plaintiffs seeking to avoid the preclusive effect of a domestic class action are entitled to anything more than the limited collateral review available under *Hospitality*. *See also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 457, 661 S.E.2d 81, 90-91 (2008) (quoting *Hospitality* in analysis of domestic class action question).

[4] Section 15-3-555, providing a six-year statute of limitations for actions arising out of sexual abuse or incest, became effective in 2001, long after the acts of sexual abuse that gave rise to appellants' claims occurred.

concealed such harm from them. It held that although three were minors when those acts occurred and the statute was tolled during their minority, the statute of limitations expired at the latest in 1989.[5] Appellants argue the trial court erred because respondents' negligent supervision of an employee is the tort at issue, not the sexual abuse itself. We agree.

An employer may be liable for negligent supervision when (1) his employee intentionally harms another when he is on the employer's premises, is on premises he is privileged to enter only as employee, or is using the employer's chattel; (2) the employer knows or has reason to know he has the ability to control the employee; and (3) the employer knows or has reason to know of the necessity and opportunity to exercise such control. *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116-17, 420 S.E.2d 495, 496 (1992). This rule has been applied to find an employer liable for negligent supervision when the employee sexually assaulted a minor and the employer had some notice of the employee's prior inappropriate sexual behavior with another minor. *Doe by Doe v. Greenville Hosp. System*, 323 S.C. 33, 40-41, 448 S.E.2d 564, 568 (Ct. App. 1994). The employer's liability is direct, not derivative. *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 331 (2008). Thus, the facts alleged in this case would, if established, make out a claim for this independent cause of action, separate from the sexual abuse itself.

"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 (discovery rule)." *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (internal footnote omitted). Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations. *Strong v. University of South Carolina School of Medicine*, 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994).

Appellants allege respondents engaged in a systematic practice of secrecy and concealment of their knowledge of sexual abuse by employees, including the employee who appellants allege committed the abuse at issue. The employer's knowledge of an employee's dangerousness is an element of the tort of negligent supervision. *See Greenville Hospital System*, *supra*. Thus, appellants' allegations could, if proven, toll the statute of limitations.

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[5] It found the youngest appellant was 21 years old in 1986.

CONCLUSION

We hold the language of the settlement does not waive its res judicata effect as to future claimants, so that appellants are not entitled to treatment as class claimants. However, dismissal on the pleadings was not warranted on the questions whether appellants were deprived of notice or adequate representation in the underlying class settlement and, if so, whether the statute of limitations was tolled on their claim of negligent supervision. Should appellants establish on remand that they were denied due process owing to lack of notice or because of inadequate representation in the class action proceedings, and that the statute of limitations was tolled, they may proceed to further prosecution of their claims. We therefore affirm in part and reverse in part and remand for further proceedings consistent with this opinion.

AFFIRMED in part and **REVERSED** in part and **REMANDED**.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Motor Vehicles,
Respondent,

v.

Phillip Samuel Brown, Petitioner.

Appellate Case No. 2011-194026

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From The Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 27346
Heard February 7, 2013 – Filed January 8, 2014

AFFIRMED

Heath Preston Taylor, of Taylor Law Firm, LLC, of West Columbia, for Petitioner.

Frank L. Valenta, Jr., Linda Annette Grice, and Philip S. Porter, all of South Carolina Department of Motor Vehicles, of Blythewood, for Respondent.

CHIEF JUSTICE TOAL: The South Carolina Department of Motor Vehicles (the Department) suspended Phillip Samuel Brown's (Petitioner) driver's license following his arrest for driving under the influence (DUI).[1] The Hearing Officer for the South Carolina Office of Motor Vehicles Hearings ("OMVH") rescinded the suspension on the ground that the arresting officer failed to present reliable evidence that the breathalyzer test was administered and the sample obtained in accordance with the provisions of section 56-5-2950. Specifically, the OMVH found that the required "simulator test" was not conducted prior to the actual test. The Administrative Law Court (ALC) reversed and reinstated Petitioner's license suspension.

On appeal, the court of appeals affirmed the ALC's order, finding Petitioner's failure to contemporaneously object to the arresting officer's testimony with respect to the functioning of the breathalyzer precluded the review of the issue on appeal. We affirm Petitioner's driver's license suspension.

FACTS/PROCEDURAL BACKGROUND

On July 7, 2008, at approximately 1:46 a.m., Officer Scott Wilson of the Columbia Police Department initiated a traffic stop after observing Petitioner's vehicle traveling on Harden Street without the headlights illuminated. During the stop, Officer Wilson smelled alcohol on Petitioner's breath and observed that Petitioner exhibited bloodshot eyes, slurred speech, and "slow and deliberate movements." As a result, Officer Wilson advised Petitioner of his *Miranda*[2] rights and ordered him to perform four field sobriety tests. After Petitioner "failed" three of the four tests, Officer Wilson arrested Petitioner and transported him to the Columbia Police Department.

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[1] S.C. Code Ann. § 56-5-2930 (2006) (outlining the offense of operating a motor vehicle while under the influence of alcohol or drugs). We note that this code section and related code sections referenced in this opinion were amended in 2008 and again in 2012. Because Petitioner's arrest occurred prior to these amendments, we cite to the code sections in effect at the time of his arrest. There are, however, no substantive changes that would affect the disposition of this case.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

At the police department, Petitioner agreed to submit to a DataMaster breathalyzer test after being read the Advisement of Implied Consent rights[3] and his *Miranda* rights. According to Officer Wilson, Petitioner had a blood alcohol concentration level of 0.17%, more than twice the legal limit of 0.08%. *See* S.C. Code Ann. § 56-5-2933 (2006). As a result, he issued Petitioner a Notice of Suspension pursuant to section 56-5-2951(A) of the South Carolina Code.[4]

Petitioner filed a timely request for an administrative hearing before the OMVH to challenge the license suspension. On August 26, 2008, the Hearing Officer held a hearing on Petitioner's license suspension in accordance with section 56-5-2951 of the South Carolina Code.[5] At the hearing, Officer Wilson testified as

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[3] *See* S.C. Code Ann. § 56-5-2950(a) (2006) ("A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs.").

[4] *See* S.C. Code Ann. § 56-5-2951(A) (2006) ("The Department of Motor Vehicles must suspend the driver's license of . . . a person who drives a motor vehicle and . . . has an alcohol concentration of [0.15%] or more.").

[5] Section 56-5-2951(F) limits the scope of the administrative hearing to whether the person:

> (1) was lawfully arrested or detained;
>
> (2) was advised in writing of the rights enumerated in Section 56-5-2950;
>
> (3) refused to submit to a test pursuant to Section 56-5-2950; or
>
> (4) consented to taking a test pursuant to Section 56-5-2950, and the:

the sole witness for the Department. During his brief testimony, Officer Wilson recounted the arrest and Petitioner's submission to the breathalyzer test, which resulted in the purported "0.17" reading.[6] Officer Wilson attested that he was certified to operate the DataMaster machine and that "[t]he machine was functioning properly at the time" of the test. However, the Department did not offer any documentary evidence concerning the machine's functioning or the actual test results.

It was not until his closing argument that counsel for Petitioner moved to rescind the license suspension on the ground the Department failed to produce evidence that the breathalyzer test was administered in accordance with the procedures set forth in section 56-5-2950, which, in part, requires a simulator test to be performed prior to the actual test to ensure the machine is functioning properly.[7]

> (a) reported alcohol concentration at the time of testing was [0.15%] or more;
>
> (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
>
> **(c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950**; and
>
> (d) the machine was working properly.

S.C. Code Ann. § 56-5-2950(F) (2006) (emphasis added).

[6] Specifically, Officer Wilson testified, without objection, that Petitioner submitted to the breathalyzer test:

> [Petitioner] was placed under arrest at that time. He was taken to the DataMaster room at police headquarters. He was informed of the . . . video recording at the site. He was Mirandized again. He was read his implied consent; mouth was checked; did a time stamp; he was observed for 20 minutes. He did take the test; he blew a .17.

[7] Section 56-5-2950(a) provides, in relevant part:

In response to Petitioner's belated motion, Officer Wilson referenced his testimony that the machine was functioning properly and explained that the machine "does check itself to make sure it . . . meets all the requirements within the simulator," which include the temperatures and the alcohol level. He added that the machine "will not function if it's past its solution change date." Petitioner objected to Officer Wilson offering any new testimony. In turn, the Hearing Officer struck the "last statement regarding it will not function, it will not work properly."

Following the hearing, the Hearing Officer issued an order wherein he rescinded the administrative suspension of Petitioner's license. In so ruling, the Hearing Officer concluded that "[t]he officer must show that he complied with all requirements while administering the breath test and that the machine was functioning properly." Although the Hearing Officer acknowledged Officer Wilson's testimony that the machine was working properly and that the test reported a blood alcohol concentration of 0.17%, he found the Department did not present any documentary evidence supporting Wilson's testimony. Ultimately, the Hearing Officer rescinded the license suspension as the Department failed to present evidence to show that Petitioner registered a 0.15% or greater on the breathalyzer test.

The Department appealed, and the ALC reversed the decision of the Hearing Officer.[8] As a threshold matter, the ALC found the Hearing Officer erred in discounting Officer Wilson's sworn testimony on whether the DataMaster machine was working properly "simply because the testimony was not corroborated by

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> The breath test must be administered by a person trained and certified by the Department of Public Safety, pursuant to SLED policies . . . . **Before the breath test is administered, an [0.08%] simulator test must be performed and the result must reflect a reading between 0.076[%] and 0.084[%]**.

S.C. Code Ann. § 56-5-2950(a) (2006) (emphasis added).

[8] Initially, the ALC held the Hearing Officer erred in finding there was no evidence Petitioner registered 0.15% or greater on the breath test as Officer Wilson testified the test indicated a reading of 0.17%. As noted by the ALC, Petitioner conceded in his brief to the ALC that Officer Wilson testified regarding the 0.17% reading.

other evidence." Because this testimony was not contradicted, the ALC determined the Department carried "its burden of proof."

Although the ALC acknowledged that Officer Wilson did not testify regarding the simulator test provision of section 56-5-2950, the court found Petitioner was statutorily required to raise this issue to the Hearing Officer prior to his closing argument.[9] In reaching this conclusion, the ALC found the Department was not required to present evidence regarding the simulator solution "as part of its prima facie case." Instead, the ALC found that pursuant to section 56-5-2950(e), "the provisions under § 56-5-2950 must not be considered by OMVH hearing officers *unless a party expressly moves for their consideration*." (Emphasis added.) The ALC noted that "even in cases where a violation of the provisions is shown, rescission of the motorist's administrative suspension is not automatic."

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[9] In support of this finding, the ALC cited section 56-5-2950(e), which provides:

> Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer **on motion of either party**. The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence any test[] results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure.

S.C. Code Ann. § 56-5-2950(e) (2006) (emphasis added). In the 2008 amendments, this section was designated as subsection (J) and its final sentence changed to state:

> The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court[,] trial judge[,] or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure.

S.C. Code Ann. § 56-5-2950(J) (2013).

The ALC explained that "test results cannot be excluded simply because an arresting officer failed to testify that a specific provision in § 56-5-2950 was followed, unless the motorist makes a motion during the hearing requesting the OMVH hearing officer to review such provision and the hearing officer determines that law enforcement's failure to comply with the provision materially affected the accuracy or reliability of the test[] results or the fairness of the testing procedure." Applying this reasoning, the ALC concluded that Petitioner, by waiting until his closing argument to raise the issue of compliance with the provisions of section 56-5-2950, deprived the Department of a sufficient opportunity to respond. Ultimately, the ALC found Officer Wilson's failure to testify specifically that he performed the simulator test before administering the breathalyzer test did not require rescission of the license suspension, as Petitioner failed to timely raise the issue.

Petitioner appealed. In an unpublished opinion, the court of appeals summarily affirmed the ALC's reinstatement of Petitioner's license suspension. *S.C. Dep't of Motor Vehicles v. Brown*, No. 2011-UP-130 (S.C. Ct. App. Mar. 29, 2011). In so ruling, the court found Petitioner failed to properly preserve his challenge as to whether the Department presented evidence that law enforcement administered the breath test and obtained the sample in accordance with section 56-5-2950 because he did not contemporaneously object to Officer Wilson's testimony. The court explained that Officer Wilson testified the "machine was working properly in general" and further noted "the test results were admitted without objection."

This Court granted Petitioner's petition for a writ of certiorari to review the decision of the court of appeals.

ISSUE

Whether section 56-5-2950(e) automatically excludes breathalyzer test evidence when the Department does not specifically adduce testimony that law enforcement followed each procedure required by 56-5-2950(a)?

ANALYSIS

As stated, *supra*, section 56-5-2950(e) provides:

> Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer ***on motion of either party***. The failure to follow any of these policies, procedures, and regulations, ***or the provisions of this section***, shall result in the exclusion from evidence any test[] results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure.

S.C. Code Ann. § 56-5-2950(e) (2006) (emphasis added). However, it was not until closing arguments that Petitioner moved to rescind his license suspension, claiming the Department failed to produce evidence that the test was administered in accordance with the procedures set forth in section 56-5-2950(a) due to its failure to perform the simulator test.

We agree with the ALC that, in order for the Hearing Officer to consider the "provisions" of section 56-5-2950, a motion must be made for their consideration. *See* S.C. Code Ann. § 56-5-2950(e) (2006) ("Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer ***on motion of either party***."); S.C Code Ann. § 56-5-2950(J) (2013) (same). Here, no such motion was made by Petitioner until *after* the close of evidence in this case. At its heart, this is a question of the reliability of the Department's evidence that Petitioner blew a 0.17% on the breath test. If no motion is made at the appropriate time—*when the State seeks to introduce that evidence*—then the Petitioner has waived his opportunity to challenge its reliability.

In our opinion, this is the only reading of subsection (e) that gives effect to the language that the failure to follow the provisions of section 56-5-2950 "shall result in the *exclusion from evidence*" of the test results upon a finding that that the failure to follow the provisions "materially affected the accuracy or reliability of

the test results or the fairness of the testing procedure." S.C. Code Ann. § 56-5-2950(e) (2006) (emphasis added); *see also* S.C. Code Ann. § 56-5-2950(J) (2013). Here, the Department was not provided with the opportunity to meaningfully respond to allegations that its tests results were not reliable.[10]

We therefore agree with the ALC's holding that the "test results cannot be excluded simply because an arresting officer failed to testify that a specific provision in § 56-5-2950 was followed, unless the motorist makes a motion during the hearing requesting the OMVH hearing officer to review such provision and the hearing officer determines that law enforcement's failure to comply with the provision materially affected the accuracy or reliability of the test[] results or the fairness of the testing procedure."

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision.

KITTREDGE, J., concurs. PLEICONES, J., concurring in a separate opinion. BEATTY, J., dissenting in a separate opinion in which HEARN, J., concurs.

[10] Regardless, we believe that there was sufficient evidence offered by the Department that the DataMaster machine was in proper working condition, as Officer Wilson testified that the machine "was functioning properly." Moreover, he testified that Petitioner's alcohol concentration registered 0.15% or greater on the breath test. Petitioner failed to contemporaneously object to either the testimony or the reliability of the results offered at trial. Therefore, we find that there is evidence in the record to support a finding that the test results were reliable. *See, e.g.*, *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review.") (citation omitted).

JUSTICE PLEICONES: I concur in the majority's decision to affirm the Court of Appeals. I write separately, however, to emphasize two points. First, it is patent that an objection to the sufficiency of the evidence made in a closing argument comes too late. Moreover, to the extent Petitioner's complaint is that the officer's testimony relating the Data Master results should not have been admitted, Petitioner waived his right to make that argument when he failed to object to the testimony when it was offered. *See State v. Burton*, 356 S.C. 259, 589 S.E.2d 6 (2003). The ALC properly found Petitioner did not preserve his objection to the breathalyzer results. Second, I adhere to my view that on certiorari to the Court of Appeals, we review only that decision for errors of law. *Lewis v. Lewis*, 392 S.C. 381, 707 S.E.2d 650 (2011) (Pleicones, J., dissenting). Here, the Court of Appeals' appellate review of the ALC order was confined to a consideration whether it was arbitrary, otherwise an abuse of discretion, unsupported by substantial evidence, or affected by an error of law. *E.g. South Carolina Dep't of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 675 S.E.2d 756 (Ct. App. 2009). Since the Court of Appeals committed no error of law in its review of the ALC order, I concur in the majority's decision.

JUSTICE BEATTY: I dissent as I believe Petitioner properly preserved a valid challenge to the sufficiency of the Department's case. Furthermore, I believe our standard of review mandates a reversal as there is evidence to support the Hearing Officer's finding that the Department failed to present a *prima facie* case to suspend Petitioner's license under section 56-5-2951. Accordingly, I would reverse the decision of the Court of Appeals and reinstate the Hearing Officer's order rescinding Petitioner's license suspension.

I. Discussion

A. Error Preservation

As an initial matter, I disagree with the majority's decision to affirm the ALC's order on error preservation grounds as Petitioner's challenge to the Department's case was both timely and sufficient.

Throughout these proceedings, Petitioner has consistently challenged the reliability of the breath test results on the ground Officer Wilson failed to present evidence that the test was administered and the sample obtained in accordance with section 56-5-2950. Although the Hearing Officer did not expressly rule on the Department's failure to present evidence as to the simulator solution test, he found the Department failed to satisfy its burden of proof as it did not present evidence that "[Officer Wilson] complied with all requirements while administering the breath test" as mandated by section 56-5-2951. Because the Hearing Officer ruled in favor of Petitioner, he implicitly found the testimony regarding the breath test results was unreliable. Accordingly, the issue was raised to and ruled upon by the Hearing Officer. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). In view of this favorable ruling, it was not necessary for Petitioner to request additional conclusions of law from the Hearing Officer in order to preserve his issues for appellate review. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review."). Furthermore, Petitioner raised this issue as an additional sustaining ground in his brief to the ALC.

Finally, as will be more thoroughly discussed, Petitioner's challenge to the reliability of the test results was timely as he was not objecting to the admissibility

of Officer Wilson's testimony but, rather, whether the Department had met its burden of proof in its case-in-chief. Unlike the majority, I do not believe Petitioner was required to raise any challenge until the Department presented a *prima facie* case to support the license suspension. Thus, I would find the Court of Appeals erred in basing its decision on error preservation grounds as it failed to appreciate Petitioner's fundamental contention. Finding the issue properly preserved, I turn to a review of Petitioner's substantive challenges to the ALC's order.

B. Review of the ALC's Order

"The [OMVH] is authorized to hear contested cases from the Department." *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 144, 705 S.E.2d 425, 429 (2011) (citing S.C. Code Ann. § 1-23-660 (Supp. 2009) and *S.C. Dep't of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 347, 675 S.E.2d 756, 757-58 (Ct. App. 2009)). "Thus, the [OMVH] is an agency under the Administrative Procedures Act (APA)." *Id.* "Accordingly, appeals from [the OMVH] must be taken to the ALC." *Id.*

When reviewing the decision of the ALC, an appellate court's standard of review is governed by section 1-23-610 of the South Carolina Code. S.C. Code Ann. § 1-23-610 (Supp. 2012). Under section 1-23-610(B) of the APA, an appellate court may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the appealed decision if the appellant's substantive rights have suffered prejudice because the decision is: (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. § 1-23-610(B).

Although it is clear the Department has the burden of proof in a license suspension proceeding,[11] the positions of the parties diverge with respect to what the Department must prove to establish a *prima facie* case and when a motorist must challenge the sufficiency of the Department's case. In ruling in favor of the Department, I believe the ALC's decision was controlled by errors of law.

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[11] Notably, section 56-5-2951(F) now states, "The Department of Motor Vehicles and the arresting officer shall have the burden of proof in contested case hearings conducted pursuant to this section." S.C. Code Ann. § 56-5-2951(F) (Supp. 2012).

Initially, I believe the ALC and the majority err in their reliance on section 56-5-2950(e) as that provision applies only when a party is raising a substantive challenge to the policies, procedures, and regulations promulgated by SLED. S.C. Code Ann. § 56-5-2950(e) (2006) ("Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer on motion of either party."). Here, contrary to the findings of the majority, Petitioner made no such challenge. Instead, he was asserting that the breath test results were unreliable because there was no evidence that Officer Wilson complied with the procedures set forth in section 56-5-2950.

Even if a motion was necessary under section 56-5-2950(e) for the Hearing Officer to assess the reliability of the breath test results as advocated by the majority, Petitioner's closing argument was sufficient to implicate this provision as his motion was akin to a directed verdict motion wherein he questioned whether the Department followed the procedures of section 56-5-2950.[12] *See* S.C. Code Ann. § 56-5-2950(e) (2006) ("The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence any test[] results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the test[] results or the fairness of the testing procedure."); *State v. Long*, 363 S.C. 360, 363, 610 S.E.2d 809, 811 (2005) (analyzing section 56-5-2950 and stating, "Part (e) provides for judicial or administrative review of regulations, and for the exclusion of evidence if these regulations are not complied with").

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[12] In contrast, the majority maintains that a motion to exclude the breath test results due to the Department's failure to comply with the statutory requirements of section 56-5-2950 must be made at the precise time the results are offered. Although a contemporaneous objection is generally raised at the time evidence is offered, this is not the situation presented in the instant case. Here, Petitioner was not objecting to Officer Wilson's statement regarding the breath test results. Rather, Petitioner was challenging whether the Department presented sufficient evidence to satisfy the statutory requirements of section 56-5-2950 to sustain the suspension of his license. Thus, similar to a defense motion for a directed verdict, Petitioner could not move to dismiss the Department's case based on the insufficiency of the evidence until the Department rested its case before the Hearing Officer. Accordingly, Petitioner's motion was both timely and procedurally proper.

Having found the sufficiency of the Department's case was proper for the Hearing Officer's determination, I next assess what the Department needed to present to set forth a *prima facie* case under section 56-5-2951 as that section outlines "several statutory prerequisites that must be established before a Hearing Officer suspends a citizen's driver's license following an arrest for DUI." *McCarson*, 391 S.C. at 149, 705 S.E.2d at 431. In doing so, I would note the crucial distinctions between a license suspension hearing and a trial for the underlying DUI charge. As our appellate courts have explained:

> [T]he question before the hearing officer was not whether the state had proved its case, but whether the arresting officer had probable cause to believe [the driver] had committed the offense of driving under the influence. This is *not* a trial in regard to the guilt or innocence of the defendant on a DUI charge. **Rather, the gravamen of the administrative hearing is a determination of the efficacy and applicability of the implied consent law. The query posited to the administrative hearing officer is: did the person violate the implied consent law**.

S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 525, 613 S.E.2d 544, 550 (Ct. App. 2005) (citation omitted) (second emphasis added).

Here, Petitioner's fundamental challenge was to the reliability of the breath test results. In section 56-5-2951(F)(4), the General Assembly has identified, in the conjunctive, four foundational requirements for breath test results. Petitioner claimed the Department failed to offer evidence as to subsection (F)(4)(c), which requires that "tests administered and samples obtained were conducted pursuant to Section 56-5-2950." Specifically, whether a simulator test was performed before Officer Wilson administered the actual test.

As noted by the Hearing Officer, the Department did not introduce the actual test results but relied exclusively on Officer Wilson's scant testimony. In the absence of other evidence, the Hearing Officer rejected the 0.17 reading claimed by Officer Wilson as there was no way to determine the accuracy and reliability of the blood-alcohol analysis. *See State v. Huntley*, 349 S.C. 1, 5, 562 S.E.2d 472, 474 (2002) ("The purpose of a simulator test is to ensure the breathalyzer machine produces an accurate, reliable breath-alcohol reading, and ultimately, an accurate blood-alcohol analysis.").

I would decline to reverse this conclusion as the Hearing Officer is the ultimate fact finder in a license suspension proceeding. *See White v. S.C. Dep't of Highways & Pub. Transp.*, 278 S.C. 603, 606, 299 S.E.2d 852, 853 (1983) (finding that factual determinations in license suspension proceeding was the "work of the administrative hearing officer" and should not be reversed by the circuit court or the appellate court "if there is substantial evidence to support the hearing officer's findings and conclusions").[13]

Without reliable evidence as to the amount of Petitioner's blood alcohol concentration, the Department failed to establish a *prima facie* case under section 56-5-2951 to sustain the license suspension. Accordingly, it was not necessary for Petitioner to rebut the Department's evidence as the burden of production never shifted to Petitioner.[14] *See Lawson v. Dir. of Revenue*, 145 S.W.3d 443, 445-46 (Mo. Ct. App. 2004) (holding that evidence did not support suspension of driver's license and stating, "The Director has the burden to present a *prima facie* case. If that threshold is met, the driver is entitled to present evidence in an attempt to

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[13] In direct contravention of our standard of review, the majority would reverse the findings of the Hearing Officer. Specifically, the majority takes its own view of the evidence and finds that "there was sufficient evidence offered by the Department that the DataMaster machine was in proper working condition." Unlike the majority, I employ our standard of review and conclude that there was substantial evidence to support the Hearing Officer's factual findings and conclusions.

[14] The Department cites this Court's decision in *State v. Parker*, 271 S.C. 159, 245 S.E.2d 904 (1978), for the proposition that Officer Wilson's testimony that "the machine was functioning properly" was sufficient to sustain the license suspension. The Department maintains this uncontroverted testimony constituted *prima facie* evidence the breathalyzer test was administered by a qualified person in a proper manner as required by section 56-5-2950(a). I believe the Department's reliance on *Parker* is misplaced as that case was decided prior to the enactment of the statute at issue and before this Court's decision in *McCarson*. Furthermore, in *Parker*, this Court addressed the proper foundation for the introduction of breath test results in a prosecution for DUI rather than a license suspension. *Parker*, 271 S.C. at 164, 245 S.E.2d at 908; *see also State v. Cuccia*, 353 S.C. 430, 578 S.E.2d 45 (Ct. App. 2003) (holding that revocation of a driver's license following a DUI arrest is a civil sanction and not a criminal penalty for double jeopardy purposes).

rebut the Director's *prima facie* case. While the burden of production shifts to the driver when the Director establishes a *prima facie* case, the burden of persuasion remains with the Director throughout the proceedings" (citation omitted)).

II. Conclusion

In my opinion, the majority and the courts below misconstrue Petitioner's challenge as one involving the admissibility of evidence. Instead, Petitioner was challenging the sufficiency of the Department's evidence rather than the admissibility of the 0.17 reading. Stated another way, Petitioner was arguing the Department failed to present a *prima facie* case as to the statutory prerequisites necessary to suspend his license under section 56-5-2951. Thus, whether Petitioner posited a contemporaneous objection to Officer Wilson's testimony was not determinative.

As to the merits of Petitioner's appeal, I would hold the ALC and, in turn, the Court of Appeals erred in reversing the Hearing Officer's order. In rescinding Petitioner's license suspension, the Hearing Officer determined that the Department failed to present a *prima facie* case to suspend Petitioner's license under section 56-5-2951. Specifically, the Hearing Officer rejected the blood alcohol reading attested to by Officer Wilson as there was no other evidence offered to ensure the accuracy and reliability of this reading. Because the Hearing Officer was the fact finder in this proceeding, I would decline to reverse his conclusion as there is substantial evidence to support his ruling. I emphasize that this decision would have no bearing on the viability of the underlying DUI charge and would not preclude the suspension of Brown's license if he were convicted.

Based on the foregoing, I would reverse the decision of the Court of Appeals and reinstate the Hearing Officer's order rescinding Petitioner's license suspension.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Michael Morris Long, Respondent,

AND

The State, Petitioner,

v.

Paul Gwinn, Respondent.

Appellate Case No. 2013-001519

ON WRIT OF CERTIORARI

Opinion No. 27347
Heard November 6, 2013 – Filed January 8, 2014

CONSTITUTION CONSTRUED

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook and Deputy Solicitor General J. Emory Smith, Jr., all of Columbia, for Petitioner.

S. Jahue Moore, Jr., of Moore Taylor & Thomas, PA of West Columbia, for Respondents.

JUSTICE PLEICONES: These cases ask whether the Attorney General has the authority to prosecute cases in magistrate and municipal court. We hold that the Attorney General, as the chief prosecuting officer for the State of South Carolina, has the authority to prosecute cases in magistrate and municipal courts.

Facts

The Attorney General petitioned this Court to review two municipal courts' rulings addressing whether the Attorney General has the authority to prosecute criminal cases in magistrate and municipal courts.[1] This Court granted the request to consolidate the cases, stayed the lower court proceedings, and issued a writ of certiorari to review this issue.

The first case involves the prosecution of Paul Gwinn. The case was brought in the municipal court of Batesburg-Leesville and involves a Criminal Domestic Violence (CDV) charge under S.C. Code Ann. § 16-25-20(A) (Supp. 2012). When the case was called for trial, Mr. Gwinn made a motion that the Attorney General could not prosecute the case because the municipal court was not a court of record, citing S.C. Const. art. V, § 24 (2009). The municipal court found that the Attorney General could prosecute the case.

The second case involves the prosecution of Michael Morris Long.[2] The case involves a CDV charge in municipal court for the city of West Columbia. Mr. Long moved to disqualify the Attorney General's office from prosecuting the case, arguing that the Attorney General is authorized to prosecute cases only in courts of record. The court granted the motion, ruling that the Attorney General did not have the authority to prosecute the case under art. V, § 24.

We granted certiorari to address whether the Attorney General may prosecute cases in summary courts.

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[1] Magistrate and municipal courts will be referred to collectively as summary courts.

[2] Both Mr. Long and Mr. Gwinn will be referred to collectively as Respondents.

Discussion

The question before this Court is whether the Attorney General may prosecute cases in summary courts without violating art. V, § 24. We hold that art. V, § 24 authorizes the Attorney General to prosecute cases in summary courts.

Respondents contend that the plain language of art. V, § 24 limits the Attorney General's prosecutorial authority to "courts of record," and therefore, he or she is constitutionally prohibited from prosecuting cases in summary courts. We disagree.

Article V, § 24 reads in pertinent part:

> …[T]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record.

When this Court is called to interpret our Constitution, it is guided by the principle that both the citizenry and the General Assembly have worked to create the governing law. *See Miller v. Farr,* 243 S.C. 342, 346, 133 S.E.2d 838, 841 (1963) (noting that the Constitution is construed in light of the intent of its framers and the people who adopted it). The Court will look at the "ordinary and popular meaning of the words used," *Richardson v. Town of Mount Pleasant*, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002), keeping in mind that amendments to our Constitution become effective largely through the legislative process. *Miller,* at 347, 133 S.E.2d at 841. For this reason, the Court applies rules of construction similar to those used to construe statutes. *Fraternal Order of Police v. South Carolina Dept. of Revenue*, 352 S.C. 420, 574 S.E.2d 717 (2002).

Looking to the plain language, art. V, § 24 performs two functions. First, it firmly establishes the Attorney General as the chief prosecuting officer of the State of South Carolina for both criminal and civil proceedings. *See State ex rel. Mcleod v. Snipes*, 266 S.C. 415, 419, 223 S.E.2d 853, 854 (1976) ("While [art. V, § 24] designated the Attorney General as the chief prosecuting officer for the first time. . ."). Second, art. V, § 24 grants the Attorney General the authority to supervise

prosecutions in "courts of record." [3] At issue here is only the Attorney General's ability to serve as a prosecutor, not his authority to supervise prosecutions.

Respondents argue that the use of the phrase "courts of record" demonstrates that the intent behind art. V, § 24 was to prevent the Attorney General from *prosecuting* cases in summary courts. Stated differently, the Respondents argue that absence of any mention of "summary courts" evidences intent that the Attorney General would not have authority in "summary courts."[4] We disagree. The only arguable limitation that the inclusion of "courts of record" in art. V, § 24 places on the Attorney General is in reference to his supervisory authority. The Constitutional Amendment's reference to *supervisory* authority in courts of record

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[3] Magistrate and municipal courts are not courts of record. The General Assembly determines whether a court is a court of record. While the General Assembly has so designated the circuit court, probate court, family court, the court of appeals, and the Supreme Court, it has not so designated summary courts. *See* S.C. Code Ann. § 14-5-10 (1977) ("The circuit courts herein established shall be courts of record"); S.C. Code Ann. § 14-23-1120 (Supp. 2012) ("The court of probate shall be a court of record"); S.C. Code Ann. § 63-3-20(C) (2010) ("The family courts shall be courts of record. . ."); S.C. Code Ann. § 14-8-240 (Supp. 2012) (recognizing the Court of Appeals as a "court of record"); S.C. Code Ann. § 14-3-410 (1977) ("The Supreme Court shall be a court of record. . ."). Additionally, the General Assembly has designated magistrate proceedings "as summary." S.C. Code Ann. § 22-3-730 (2007) ("All proceedings before magistrates shall be summary. . .). Furthermore, the General Assembly has distinguished magistrate and municipal courts from courts of record. S.C. Code Ann. § 17-13-140 (2003) ("Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record…"); S.C. Code Ann. §1-9-70 (2005) (recognizing procedures for emergency interim successors for judges in "courts of record" and "courts not of record").

[4] To the extent that Respondents argue that the General Assembly has limited the Attorney General's authority, the General Assembly may not limit the authority granted to the Attorney General through art. V, § 24. *State v. Thrift,* 312 S.C 282, 440 S.E.2d 341 (1994) (discussing the grant of prosecutorial authority in art. V, § 24, "[t]his power arises from our constitution and cannot be impaired by legislation"). Accordingly, we do not address the statutory arguments raised by Respondents.

in no way describes or limits the Attorney General's authority to *prosecute* a case. *See Segars-Andrews v. Judicial Merit Selection Com'n*, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010) (stating that constitutional provisions will not be construed to impose limitations beyond their clear meaning). Accordingly, we hold that art. V, § 24 does not prevent the Attorney General from prosecuting cases in summary courts.[5]

Furthermore, this Court has always regarded the Attorney General as the State's chief prosecuting officer with broad common law and statutory authority to prosecute any case on behalf of the State. *State ex rel. Mcleod v. Snipes,* 266 S.C. 415, 419, 223 S.E.2d 853, 854 (1976) (recognizing the Attorney General as the chief "prosecuting officer of the state"); *see also See State ex rel. Condon v. Hodges*, 349 S.C. 232, 240, 562 S.E.2d 623, 627 (2002) (recognizing the Attorney General as the "chief law officer of the state"); *State ex rel. Daniel v. Broad River Power Co.,* 157 S.C. 1, 153 S.E. 537 (1929); *State ex rel. Wolfe v. Sanders,* 118 S.C. 498, 110 S.E. 808 (1920).

Finally, we have held that the enactment of art. V, § 24 represented no practical change in the Attorney General's authority, *Snipes,* 266 S.C. at 419, 223 S.E.2d at 854 (1976) ("While this constitutional provision designated the Attorney General as the chief prosecuting officer for the first time, it represented no practical change in the situation of the Attorney General from that which existed prior to the adoption of this provision of the Constitution in 1973"), and this Court acknowledged more than a century ago that the Attorney General may prosecute cases in summary court. *See State v. Nash,* 51 S.C. 319, 28 S.E. 946 (1898) (noting

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[5] Moreover, Respondents' construction would lead to a plainly absurd result. This Court will construe a constitutional amendment in a similar manner as it does a statute. *Fraternal Order of Police, supra.* When construing a statute, this Court will reject a meaning when it would lead to a result so plainly absurd that it could not have possibly have been intended by the General Assembly or would defeat the plain legislative intention. *Kiriakides v. United Artists Commc'ns, Inc.,* 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Respondents' reading of art. V, § 24 places the Attorney General as the chief prosecuting officer for the State but prevents him from prosecuting a CDV merely because the case is in summary court. We find that the framers could not possibly have intended that that the chief prosecuting officer of the State cannot prosecute in summary court but a solicitor or a police officer can.

that the Attorney General may request a jury in magistrate court). In light of this Court's long standing recognition of the broad prosecutorial authority of the Attorney General and the limited practical effect art. V, § 24 had on that authority, we hold that art. V, § 24 does not expressly nor implicitly restrict the Attorney General from prosecuting cases in summary courts, and that as the "chief prosecuting officer" of the State of South Carolina, the Attorney General may prosecute cases in summary courts.

We therefore uphold the ruling of the municipal court of Batesburg-Leesville, reverse the ruling of municipal court for the city of West Columbia, lift the stay of the proceedings, and remand these cases to proceed in accordance with this opinion.

CONSTITUTION CONSTRUED

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Frances S. Hudson, Deceased Employee, by Kenneth L Hudson and Keith B. Hudson, Co-Executors of her Estate, as well as Matthew Deese and/or Andrew Deese, of whom Kenneth L. Hudson and Keith B. Hudson are Petitioners/Respondents,

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company, In Liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, Carrier, Respondents/Petitioners.

Appellate Case No. 2011-194189

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lancaster County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 27348
Heard September 19, 2013 – Filed January 8, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Andrew N. Safran, of Andrew N. Safran, LLC, of Columbia, for Petitioners/Respondents.

E. Ross Huff, Jr. and Shelby H. Kellahan, both of Huff Law Firm, LLC, of Irmo, and Mark D. Cauthen and Temus C. Miles, Jr., both of Mckay, Cauthen, Settana & Stubley, P.A., of Columbia, all for Respondents/ Petitioners.

JUSTICE PLEICONES: This case concerns a workers' compensation lump-sum award to a claimant who passed away while an appeal of her award was pending. This Court granted certiorari to review a Court of Appeals opinion that refused to reach Respondents/Petitioners' argument that the award abated upon the beneficiary's death; granted the entire lump-sum award to beneficiary's dependent grandsons; reversed the grant of interest on the award; and affirmed the reinstatement of a ten-percent penalty. *Hudson v. Lancaster Convalescent Center*, 393 S.C. 1, 709 S.E.2d 65 (Ct. App. 2010). We affirm in part, reverse in part and remand.

FACTS

This case comes to the Court after multiple workers compensation hearings/appeals spanning more than 11 years. In 1997, Frances S. Hudson suffered a leg injury while in the scope of her employment with Lancaster Convalescent Center (Employer) for which it and its insurance carrier Legion accepted liability. Thereafter, in an October 2001 order, a single commissioner found Mrs. Hudson permanently disabled and unable to perform any kind of work due to a combination of injuries arising from her 1997 work related injury.

Afterward, Mrs. Hudson requested, over the objection of Employer and Legion, a lump-sum payment of her disability award. After a hearing, a single commissioner issued an order granting Mrs. Hudson's lump-sum request. Employer and Legion appealed this lump-sum award to the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel). During the pendency of this appeal, Mrs. Hudson passed away from cancer unrelated to her workplace injury. The Appellate Panel affirmed all of the single commissioner's findings of fact and conclusions of law.

Following affirmance of the lump-sum award, Legion and Employer appealed to the circuit court. While this appeal was pending, Legion became insolvent. As a

result, the South Carolina Property and Casualty Insurance Guaranty Association (Guaranty) assumed all rights, duties and obligations of Legion pursuant to S.C. Code Ann. § 38-31- 60 (2001).

Guaranty and Employer appealed to circuit court, arguing that it was error to grant Mrs. Hudson's award in lump-sum, and, that in light of Mrs. Hudson's death, the entire award must abate. The appeal was heard by the Honorable Paul E. Short, who affirmed the Appellate Panel's order in its entirety. Judge Short found that the lump-sum award was proper and supported by substantial evidence. Concerning Employer's and Guaranty's argument that the lump-sum award abated upon Mrs. Hudson's death, Judge Short found the issue was not preserved for review. However, the court went on to find that even if the argument were properly before the court, the award would survive Mrs. Hudson's death.

Guaranty and Employer appealed Judge Short's order to the Court of Appeals but voluntarily withdrew their appeal. As a result, the appeal was dismissed and the remittitur was sent on April 20, 2004.

During the above appeals, Employer and Guaranty stopped making payments after Mrs. Hudson's death. After Employer and Guaranty voluntarily dismissed their appeal to the Court of Appeals, Petitioner/Respondents, Kenneth and Keith Hudson, as executors and sole beneficiaries of their mother's estate (the Estate), initiated this action against Employer and Guaranty, seeking enforcement of the lump-sum award.

A dependency hearing was held to determine entitlement to the lump-sum award.[1] Despite Judge Short's rulings and the voluntary dismissal of their appeal to the Court of Appeals, Employer and Guaranty maintained they were not required to pay the lump-sum award because it abated upon Mrs. Hudson's death. The single commissioner found Judge Short's unappealed 2004 order, which found the abatement argument unpreserved, was the law of the case and could not be challenged or relitigated.

As to potential beneficiaries, the single commissioner found that all four beneficiaries had colorable claims to the lump-sum award, and approved a

[1] At the hearing, the potential beneficiaries' included Kenneth and Keith Hudson, as well as Andrew Dees and Mathew Pope, hereinafter Grandsons. Both Grandsons were found to be dependent, to some extent, upon Mrs. Hudson for support.

settlement that had been entered into between the Estate and Grandsons under S.C. Code Ann. § 42-9-390 (1976). The settlement divided the award fifty-percent to the Estate and fifty-percent to the Grandsons. Additionally, the single commissioner imposed interest on the award and a ten-percent penalty against Guaranty.

Employer and Guaranty appealed to the Appellate Panel, which affirmed all of the single commissioner's factual findings and conclusions of law with the exception of the ten-percent penalty. Specifically, the Appellate Panel noted that Guaranty and Legion "did not pursue a frivolous defense," and therefore concluded that no penalty should be imposed.

Thereafter, the Estate, Employer, and Guaranty cross-appealed to the circuit court. The Honorable Kenneth E. Goode heard the appeal and issued an order affirming the Appellate Panel with the exception of the ten-percent penalty. Judge Goode reinstated the ten-percent penalty finding that S.C. Code Ann. § 42-9-90 (1976) mandated a penalty in this case.

Employer and Guaranty appealed. The Court of Appeals refused to address their argument that the award abated, holding that Judge Short's ruling was the law of the case. Additionally, the Court of Appeals affirmed the circuit court's imposition of the ten-percent penalty, but reversed the imposition of interest on the lump-sum award. It concluded that under S.C. Code Ann. § 38-31-60 (2001), Guaranty was only liable for "covered claims" which do not include claims for interest. Additionally, the Court of Appeals reversed the Judge Goode's ruling upholding the settlement which divided half of the lump-sum award to the Estate and half to the Grandsons.

Thereafter, this Court granted Employer's, Guaranty's, and Estate's petitions for writ of certiorari.

ISSUES

I. Does the law of the case doctrine prevent the Court from reaching the merits of Respondents/Petitioners' argument that the lump-sum award abated upon Mrs. Hudson's death?

II. Does S.C. Code Ann. § 42-9-280 (1976) require that the settlement approved by the Commission be set aside, and the entire lump-sum award

be distributed to Mrs. Hudson's dependent grandsons as her "next of kin dependents?"

III. Is an assessment of interest on this award appropriate?

IV. Is imposition of a ten-percent penalty under S.C. Code Ann. § 42-9-90 (1976) appropriate?

DISCUSSION

I. Abatement

Employer and Guaranty contend that the Court of Appeals erred by not reaching the merits of their abatement argument because Judge Short's ruling should not have been the law of the case. We disagree.

Judge Short's 2004 order found the abatement issue unpreserved because Employer and Guaranty failed to raise it to the Appellate Panel. Employer and Guaranty appealed this order but later withdrew their appeal. Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order. *Judy v. Martin,* 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (holding that Appellant may not seek relief from a prior unappealed order of the circuit court because the ruling has become the law of the case); *In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Watkins v. Hodge,* 232 S.C. 245, 247–48, 101 S.E.2d 657, 658 (1958) (refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal). Accordingly, we affirm the Court of Appeals' holding that Judge Short's ruling that the abatement issue was unpreserved is the law of the case.

II. Distribution

The Court of Appeals found that pursuant to § 42-9-280[2] all of the unpaid balance of the lump-sum award must be paid to Grandsons as her next of kin dependents.

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[2] Section 42-9-280 provides:

> When an employee receives or is entitled to compensation under this Title for an injury covered by

As a result, the Court of Appeals reversed the circuit court order that upheld the Appellate Panel's approval of the settlement between the Estate and Grandsons.[3] The Estate argues this was error. We agree.

Our courts have a long standing policy favoring settlements *See*, *Darden v. Witham*, 258 S.C. 380, 388, 188 S.E.2d 776, 778 (1972) ("The courts favor settlements and agreements amongst litigants"). This Court has recognized, "that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law." *Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987). Given that all potential beneficiaries agreed to the settlement, it was approved pursuant to the procedure in S.C. Code Ann. § 42-9-390, and nothing in § 42-9-280 prevents a potential beneficiary from structuring a settlement as to how their award will be distributed, we agree with the Estate that the Court of Appeals erred in reversing the circuit court order.

Furthermore, the only parties challenging this settlement are Guaranty and Employer, neither of whom were aggrieved in any way by the settlement agreement.[4] Therefore, they could not properly appeal the circuit court order approving the settlement agreement. Rule 201 SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.) The Court of Appeals erred in even addressing this issue much less reversing the circuit court on an issue raised by a non-aggrieved party. *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970) (noting that it is an appellate court's "duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court"). Thus, we reverse the Court of Appeals and reinstate the settlement.[5]

> the second paragraph of § 42-9-10…payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support…

[3] Both Grandsons were represented by Guardians ad Litem who agreed with the Estate that to prevent a financial dispute within the family, the best disposition of this issue was to come to a settlement agreement.

[4] During oral arguments, Guaranty and Employer conceded that they would not be harmed by this settlement.

[5] In light of our disposition of this issue, we need not address the Estate's or Guaranty's arguments regarding the applicability of § 42-9-280 to this lump-sum award. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518

III. Interest

Interest was imposed on the lump-sum award by the Appellate Panel under S.C. Code Ann. § 42-9-240 (1976), which provides:

> …[C]ompensation payable under the terms of an award by the Commission or…a judgment of a court upon an appeal...shall become due seven days from the date…of such a judgment of the court, on which date all compensation due shall be paid, including interest from the original date of the award at the maximum legal rate."

The circuit court upheld the imposition of interest. The Court of Appeals, however, reversed the grant of interest, explaining that Guaranty is only responsible for "covered claims" under S.C. Code Ann. § 38-31-60(b) (Supp. 2009),[6] and S.C. Code Ann. § 38-31-20(8)(h) (Supp. 2009) expressly provides that "covered claim…does not include…(h) any claims of interest." The Estate argues this was error, and we agree.

The Estate contends that while Guaranty's derivative liability for Legion's action is limited to "covered claims", its direct liability for its own misconduct is not. Thus, the imposition of interest is proper due to Guaranty's direct liability arising from its failure to timely pay the lump-sum award.

To address this argument we must examine two issues. First, whether Guaranty may be held directly liable for its own conduct, and second, if Guaranty may be held directly liable, is this liability limited to "covered claims?"

The Estate supports its argument that Guaranty may be held directly liable by citing to the "may sue or be sued" language in S.C. Code Ann. § 38-31-60(j) (1976), which provides:

> [Guaranty] may sue or be sued provided, however, that any action brought directly against the association must be

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S.E.2d 591, 598 (1999) ("In light of our disposition of the case, it is not necessary to address [the] remaining issues").

[6] Section 38-31-60(b) provides in relevant part that the Guaranty Association "…is considered the insurer to the extent of its obligation on the covered claims…"

> brought against the association in the State of South Carolina as a condition precedent to recovery directly against the association.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 (1998) (citations omitted). When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this court has no right to impose another meaning. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 525, 642 S.E.2d 751, 754 (2007).

The "may sue or be sued" language of § 38-31-60(j) is clear indication of the legislature's intent for Guaranty to both enforce its own direct claims, and be held directly liable for its own actions. Thus, we hold that Guaranty may be held directly liable for its own actions.

We note Guaranty contends that even if interest could be imposed, no direct action has been brought against Guaranty; thus, the prerequisite to hold Guaranty directly liable under § 38-31-60(j) has not been satisfied.

We agree that the language, "…provided, however, that any action brought directly against the association must be brought against the association in the State of South Carolina as a condition precedent to recovery directly against the association" of § 38-31-60(j), requires that a direct action be brought against the Guaranty before one can recover directly against it. However, we disagree with the assertion that no direct action has been brought against Guaranty.

After the Court of Appeals ordered the dismissal and remittitur of Employer's and the Guaranty's first round of appeals, a dependency hearing was held. The only parties at the hearing were Employer, Guaranty, the Estate, and the Grandsons. This dependency hearing served multiple purposes. Along with determining dependency, the Estate was seeking to enforce the prior orders requiring that Mrs.

Hudson's lump-sum be paid, as well as sanctions against Employer and Guaranty.[7] Since this is a workers' compensation case, the Commission was the only appropriate forum through which the Estate could attempt to enforce these orders against Guaranty. *Posey v. Proper Mold & Engineering, Inc.*, 378 S.C. 210, 223, 661 S.E.2d 395, 401 (2008) ("The General Assembly has vested the South Carolina Workers' Compensation Commission with exclusive original jurisdiction over employees work-related injuries") (citing *Sabb v. South Carolina State University*, 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002)). At this hearing, Guaranty was present as a result of its own refusal to pay the lump-sum award not through the derivative liability of an insolvent insurer. We hold that this satisfies the direct action prerequisite present in § 42-9-240. Therefore, we must determine if the "covered claims" claims limitation applies to Guaranty's direct liability.

Guaranty is a last resort insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent. *See* § 38-31-60; *South Carolina Property and Cas. Ins. Guar. Ass'n v. Carolinas Roofing and Sheet Metal Contractors Self -Insurance Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994)("[Guaranty's] purpose is to provide some protection to insureds whose insurance companies become insolvent"). Section 38-31-60(b) provides that Guaranty "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent…." When Guaranty steps into the shoes of an insolvent insurer, its liability is derivative of the insolvent insurance company's direct liability to the consumer. The legislature has limited this liability to a "covered claim" which is defined by § 38-31-20(8) as "…an unpaid claim…which arises out of…an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer…covered claim does not include:…(h) any claim for interest."

The legislature has chosen to define a "covered claim" as a claim arising from an insolvent insurer, yet Guaranty asks this Court to read the "covered claims" and its corresponding interest limitation to apply to claims arising from Guaranty's own actions. We decline to do so.

The legislature has provided that Guaranty may be held directly liable for its own actions in § 38-31-60(j), yet there is no such "covered claims" limitation for

[7] The Estate and Grandsons also requested that the lump-sum award be distributed pursuant to their settlement.

Guaranty's direct liability. Nor is there any reference to Guaranty's direct liability in the definition of "covered claims." It is axiomatic that “words in a statute must be construed in context,” and “the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.” *Eagle Container Co., LLC v. County of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895 (2008) (citing *Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991)). Further, statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992).

Reading both the covered claims and direct liability statutes together, § 38-31-20(8), cannot be construed as limiting a claim arising from Guaranty's own action. Thus, we hold that the "covered claim" limitation, applies only in the context of claims deriving from insolvent insurance carrier's policies, and hold that when a claim is brought directly against Guaranty, it will not be limited to "covered claims."

Accordingly, we find that interest may be assessed against Guaranty, when liability results from Guaranty's own actions. In this case, after the first round of appeals were abandoned, liability for this lump-sum award was conclusively established. Guaranty's subsequent failure to timely pay this lump-sum award can only be attributed to its own conduct. Therefore, a claim for interest under § 42-9-240 is appropriate in this case because Guaranty's liability for the accrued interest does not arise from a "covered claim."

Accordingly, we hold that an imposition of interest is appropriate in this case. We note that § 42-9-240 allows for interest to accrue from the date of the original judgment. However, as stated above, interest is only appropriate for Guaranty when associated with direct liability. As a result, the Guaranty will only be responsible for interest from the date that this lump-sum award became final, which under the statute is April 27, 2004, seven days from the date of the order of remittitur from the Court of Appeals.[8] *See* § 42-9-240 ("an award by the Commission or under the terms of a judgment of a court upon an appeal from such an award shall become due seven days from the date of such an award or from the date of such a judgment of the court.") Consequently, we reverse the Court of

[8] The Court of Appeal's order of dismissal and remittitur was issued on April 20, 2004.

Appeal's holding that interest is inappropriate in this case and hold that Guaranty is responsible for interest on this lump-sum award at the "maximum legal rate" accruing from April 27, 2004. We therefore remand the matter to the Commission for calculation of the interest due on the lump-sum award.

IV. Penalty

Finally, Guaranty contends that the Court of Appeals erred in affirming Judge Goode's order construing § 42-9-90 as requiring a mandatory penalty.[9] Guaranty presents two arguments to support its contention: (1) the circuit court exceeded its scope of review by making his own factual findings to impose the penalty; and (2) the circuit court erred in reversing the Appellate Panel because Guaranty was excused from payment due to the uncertainty of who was entitled to this lump-sum award. We disagree on both points.

First, the circuit court did not make any improper factual findings. The circuit court merely applied § 42-9-90 to the Appellate Panel's factual findings and found the statute mandated a penalty in this case.

Second, we agree with the Court of Appeals and the circuit court that the Appellate Panel abused its discretion in declining to impose a penalty.

Section 42-9-90 provides:

> …if any installment of compensation…is not paid within fourteen days after it is due, … there shall be added to such unpaid installment an amount equal to ten per cent thereof, which shall be paid… unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

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[9] The ten-percent penalty was first imposed by the single commissioner at the dependency hearing. On appeal the Appellate Panel reversed, stating that the penalty should not be assessed because the Guaranty Association and Employer "did not pursue a frivolous defense." The penalty was reinstated by Judge Goode, which held that § 42-9-90 mandates the penalty any time compensation is not paid within fourteen days of becoming due, citing *Martin v. Rapid Plumbing* 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006).

Section 42-9-90, permits excusal of this penalty only **after** there is a showing of circumstances beyond the employer's control excusing non-payment. Applying § 42-9-90, the Appellate Panel stated "no penalties should be assessed, as Defendant's did not pursue a frivolous defense." This is the only finding or analysis in the order justifying excusal of the penalty. Under § 42-9-90, a demonstration of a non-frivolous defense does not excuse imposition of this penalty. Only a showing of circumstances beyond Guaranty's control preventing them from timely paying this award would excuse this penalty. From the Appellate Panels finding there is no indication of circumstances beyond Guaranty's control which prevented it from paying. Thus, Appellate Panel abused its discretion in declining to apply this penalty. Therefore, we affirm the Court of Appeal's decision to uphold the circuit court's ruling that the Appellate Panel abused its discretion in removing the ten-percent penalty.[10]

V. Conclusion

We affirm the Court of Appeals' decision that Judge Short's order was the law of the case on the abatement issue. We also affirm the Court of Appeals holding that the ten-percent penalty should be imposed in this case. We reverse the Court of Appeals decision requiring the entire lump-sum award be paid to the Grandsons, and reinstate the Estate's and Grandsons' settlement. We also reverse the Court of Appeals decision to remove the assessment of interest, and hold that Guaranty is responsible for interest running from April 27, 2004. Finally, we remand this case to the Commission to calculate the sums due pursuant to this opinion.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

[10] We note that the ten-percent penalty applies to the original lump sum award. *See*, § 42-9-90.

The Supreme Court of South Carolina

In the Matter of William Franklin Warren, III,
Respondent.

Appellate Case No. 2013-002668
Appellate Case No. 2013-002669

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

We appoint Dan A. Collins, Esquire, to serve as a Special Receiver to exercise all duties as specified under Rule 31, RLDE. Mr. Collins shall assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Collins shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Collins may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Collins'

requests for information and/or documentation and shall fully cooperate with Mr. Collins in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Dan A. Collins, Esquire, has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

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

Mr. Collins' appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

December 18, 2013

The Supreme Court of South Carolina

In the Matter of Walter Bilbro, Jr., Respondent.

Appellate Case No. 2013-002690

ORDER

The Office of Disciplinary Counsel asks this Court to transfer respondent to incapacity inactive status and to appoint a Special Receiver pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

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

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

We appoint Ravi Sanyal, Esquire, to serve as a Special Receiver to exercise all duties as specified under Rule 31, RLDE. Mr. Sanyal shall assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Sanyal shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Sanyal may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Sanyal's requests for information and/or documentation and shall fully cooperate with Mr. Sanyal in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Ravi Sanyal, Esquire, has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

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

Mr. Sanyal's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

December 20, 2013

The Supreme Court of South Carolina

In the Matter of Michael O'Brien Nelson, Petitioner

Appellate Case No. 2013-002656

ORDER

On October 23, 2013, Respondent was suspended from the practice of law for a period of six (6) months, retroactive to June 1, 2013. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

FOR THE COURT

BY: s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina

December 20, 2013

The Supreme Court of South Carolina

In the Matter of Kelly Evans, Petitioner.

Appellate Case No. 2012-212828

ORDER

This matter is before the Court on petitioner's Petition for Rehearing of the Court's September 23, 2013, order denying her Petition for Readmission. After a hearing, the Court grants the Petition for Readmission.

Petitioner shall be sworn-in and readmitted to the South Carolina Bar during the next regularly-scheduled swearing-in ceremony.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ Kaye G. Hearn J.

Because I would deny the rehearing petition and adhere to this Court's original decision to adopt the recommendation of the Committee on Character and Fitness, I respectfully dissent.

s/ John W. Kittredge J.

Columbia, South Carolina

December 23, 2013

The Supreme Court of South Carolina

In the Matter of Richard G. Wern, Respondent.

Appellate Case No. 2013-002314

ORDER

By order dated November 6, 2013, the Court placed respondent on interim suspension and appointed the Receiver, Gretchen B. Gleason, to protect the interests of his clients. In the Matter of Wern, S.C. Sup. Ct. Order dated November 6, 2013 (Shearouse Adv. Sh. No. 48 at 30). By order dated December 6, 2013, the Court determined Catherine F. Juhas, Esquire, a lawyer who practiced with respondent prior to his interim suspension, is capable of and shall be responsible for the representation of respondent's clients, and granted the Commission on Lawyer Conduct's Motion to Terminate the Order of Receivership.

Respondent has filed a Motion for Reconsideration asking the Court to lift his interim suspension. The Court lifts respondent's interim suspension on the following conditions:

(1) Respondent shall have no access to or control over the law firm's trust or operating accounts.

(2) Ms. Juhas shall be responsible for ensuring that all of the requirements of Rule 417 of the South Carolina Appellate Court Rules are complied with in a timely manner. Ms. Juhas shall file a monthly report with the Office of Disciplinary Counsel verifying compliance with the requirements of Rule 417, and stating the results of the required reconciliations. The report for each calendar month shall be provided to the Office of Disciplinary Counsel no later than the fifteenth of the following month. The first report shall be due January 15, 2014. In the event this report is not timely made, respondent will again be placed on interim suspension by this Court.

(3) On request, Ms. Juhas shall promptly provide the Office of Disciplinary Counsel with copies of any financial records relating to the trust or operating accounts.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 23, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Andreal Holland, by his Guardian Ad Litem, Peggy Knox, Appellant,

v.

Morbark, Inc., Precision Husky Corporation, A & K Mulch, LLC, and Watford Industry, Inc., Defendants,

Of Whom Morbark, Inc. is the Respondent.

Appellate Case No. 2011-199928

Appeal From Clarendon County
George C. James, Jr., Circuit Court Judge
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5186
Heard September 10, 2013 – Filed January 2, 2014

AFFIRMED

Donald E. Jonas, of Lexington, for Appellant.

Laura Watkins Jordan and Curtis Lyman Ott, of Gallivan, White & Boyd, PA, of Columbia, for Respondent.

WILLIAMS, J.: In this product liability action, Andreal Holland, by and through his guardian ad litem, Peggy Knox, (collectively, Holland) appeals the circuit

court's denial of his motion to amend his complaint and the circuit court's grant of summary judgment in favor of Morbark, Inc. (Morbark). We affirm.

FACTS/PROCEDURAL HISTORY

On June 1, 2006, Holland was finishing his shift as a saw operator at A&K Mulch, LLC (A&K Mulch), in Alcolu, South Carolina. Holland's responsibilities included cleaning and changing the cutting knives inside a stationary 58-inch Morbark wood chipper machine[1] located outside the mill building. The chipper did not require an operator to cut the wood or oversee its operation. As a result, Holland's contact with the chipper was limited to opening and closing its hood when he cleaned and changed the chipper's knives, typically at midday and at closing.

Prior to closing that day, Holland remotely turned off the power to the chipper and "locked and tagged it out" to begin the fifteen-minute process of stopping the circular disc blades inside the chipper. After a co-worker told him a "tapping" noise was coming from the chipper, he left his work station to determine if anything was wrong with the chipper. Upon investigation, he testified he thought the blade had stopped turning and attempted to find his supervisor to report the issue. When he could not locate his supervisor, Holland returned to the machine, mistakenly determined the blades had stopped turning, and attempted to open the hood access door to the chipper. Holland testified the left pin securing the hood was missing.[2] As Holland attempted to remove the right pin and open the hood, the hood came into contact with the interior rotating fan blades. This contact caused the hood to kick back and violently strike Holland in the head.

Holland was rendered unconscious and suffered a crushed eye socket, a broken nose, a broken jaw, and a traumatic brain injury. After being placed on a ventilator

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[1] In this particular wood chipper, boards were cut from raw timber, and the cutting waste was directed onto an automatic conveyor belt. This belt would feed the waste into the chipper, which would exhaust "chip piles" of mulch.

[2] As originally designed and manufactured in 1996, four horizontal bolts, two vertical bolts, and two pins on either side of the chipper's hood had to be removed to open the hood. However, by the date of the accident in 2006, all of the vertical and horizontal bolts were missing from the hood.

and undergoing extensive surgeries, Holland received rehabilitation services, including physical, occupational, and speech therapy. As a result of this accident, the Social Security Administration determined Holland was permanently disabled.

In March 2009, Holland filed an "Amended Complaint"[3] (complaint) against Morbark, A&K Mulch, Precision Husky, and Watford Industry, Inc.,[4] alleging negligence, strict liability, and breach of implied warranty. Morbark removed the case to federal court, but it was subsequently remanded to state court. The parties later consented to a scheduling order for discovery with trial to begin in February 2011.

Holland first moved to amend and supplement his complaint on July 30, 2010. In his amended complaint, he dismissed all defendants except Morbark. Additionally, he withdrew his negligence cause of action but maintained his products liability claims for strict liability and breach of implied warranty. Morbark consented to the motion, and Holland filed consent stipulations of dismissal for all other defendants.

Holland filed a second motion to amend his complaint on January 13, 2011. In his motion, he requested an amendment "to address various developments in the posture of the case since it was filed and to include additional matters learned during discovery." Holland did not attach a proposed amended complaint to this motion. Morbark then filed a motion for summary judgment on February 23, 2011.

Prior to ruling on Morbark's motion for summary judgment, the circuit court heard Holland's motion to amend. At that hearing, Holland argued his newly amended complaint would allege the wood chipper violated Occupational Safety and Health Administration (OSHA) standards and was defective based on the absence of an effective brake to decrease the shut-off time for the chipper. In support of his

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[3] The initial summons and complaint was not included in the record on appeal; as a result, we reference the March 2009 complaint as the "complaint" and the July 2010 complaint as the "amended complaint."

[4] Morbark manufactured the chipper in February 1996. The chipper was owned by at least two owners before Precision Husky Corporation sold it to A&K Mulch in March 2006. Watford Industry installed the chipper at A&K Mulch.

amendment, Holland presented the deposition testimonies of two experts, Roger Davis[5] and David Clement.[6]

The circuit court denied Holland's second motion to amend on April 15, 2011. The court concluded it had the discretion to amend Holland's complaint pursuant to Rule 15, SCRCP, but Morbark proved it would be prejudiced by such an amendment. In so holding, the circuit court found Holland filed this motion following the expiration of all scheduling order deadlines, the conclusion of all liability depositions, and the transfer of the case to the trial roster. Specifically, the circuit court held,

> [Holland] has long known about the possible relevance of the OSHA standard and the defect theory based on the absence of a brake because his own experts . . . extensively discussed these two topics during their respective depositions . . .
>
> . . .
>
> Granting [Holland]'s motion would cause significant increases in discovery costs, at least some of which could have been avoided if [Holland] had timely moved. At this point, discovery would need to be re-opened to allow [Holland] to identify an expert regarding the brake option and Morbark to retain a rebuttal expert. Moreover, many of the liability depositions would need to be re-taken to delve into the witness' testimony about, among other things, the sale of the chipper without the optional brake,

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[5] Davis, a mechanical and forensic engineer, testified at his deposition regarding the dangers presented by the run down time of the wood chipper after it powered off, the effectiveness of warning and safety mechanisms incorporated into the wood chipper, alternative safety and warning designs, and the requirements of 29 C.F.R. § 1910.212(a)(2), which states, "The guard shall be such that it does not offer an accident hazard in itself."

[6] Clement, a human factors expert, testified regarding the sufficiency of the wood chipper's warnings and instructions as well as operator capabilities, perception, and awareness.

> the costs associated with an optional brake, the operation of the chipper with and without such a brake, and the industry custom or standard regarding a brake.

After ruling on Holland's motion to amend, the circuit court issued an order granting summary judgment in Morbark's favor on June 2, 2011. In its order, the circuit court held Holland's design defect claim failed as a matter of law because (1) the chipper was not in the same condition at the time of the accident as when it left Morbark's hands; (2) Morbark's failure to incorporate additional safety features did not render the wood chipper unreasonably dangerous when no other manufacturer in the industry had incorporated the optional safety device advanced by Holland's expert; and (3) Holland failed to prove a reasonable alternative design as required by *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010). In addition, the circuit court dismissed Holland's failure to warn claim because the chipper contained numerous decals and warnings and was accompanied by the operator's manual when Morbark originally sold it. Moreover, because Holland admitted it was dangerous to open the hood before the chipper had stopped turning, the court concluded Morbark could not be liable for failing to warn Holland of a danger he already recognized.

Holland timely moved to reconsider the denial of his motion to amend his complaint as well as the order granting summary judgment. The circuit court denied Holland's motion for reconsideration. Holland appealed.

ISSUES ON APPEAL

I. Did the circuit court err in denying Holland's motion to amend his complaint?

II. Did the circuit court err in granting Morbark's motion for summary judgment?

LAW/ANALYSIS

I. Motion to Amend

Holland first contends the circuit court erred when it denied his second motion to amend because his proposed amendment did not include any new causes of action; rather, it further specified how the wood chipper was defective. Moreover, Holland claims the circuit court denied his second amendment based in part on its erroneous conclusion that the court had already granted Holland's first motion to amend.

In response, Morbark contends Holland was already aware of expert testimony advancing a violation of OSHA yet Holland chose to advance these allegations after the expiration of all scheduling deadlines and the conclusion of all liability depositions. Morbark argues it would be prejudiced by Holland's decision to advance new theories "at the eleventh hour" because it would require the reopening of discovery at a significant cost to Morbark. We agree with Morbark.

We first address Holland's claim that the circuit court failed to grant his first motion to amend. On July 28, 2010, Holland moved to amend his complaint by dismissing all defendants, except Morbark, and by withdrawing his negligence cause of action. No separate written order was entered granting the amendment and dismissal of the other defendants. However, evidence in the record establishes that the circuit court permitted, and the parties consented to, Holland's amendments. First, the circuit court signed all three consent stipulations of dismissal for Precision Husky, A&K Mulch, and Watford Industry, which were filed on August 23, 2010. All filings and appearances after Holland's first motion only involved Holland and Morbark.[7] Second, the circuit court explicitly held in its April 2011 order denying Holland's second motion to amend that it had already granted Holland's first amendment "at a hearing on October 8, 2010." This finding is supported by the court's roster from that date allotting fifteen minutes of argument for Holland's motion to amend. Last, Holland relied upon his amended complaint in his opposition to Morbark's summary judgment motion. We do not believe Holland would have relied upon it for purposes of defeating summary judgment if he was not convinced the amended complaint was properly before the court. Regardless, after reviewing Holland's brief and both his March 2009 complaint and his July 2010 amended complaint, we find any "additional specifications" advanced in Holland's amended complaint were already alleged in his March 2009 complaint. Thus, all the relevant allegations were properly before the circuit court when it considered Holland's second motion to amend.

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[7] Holland filed two motions to compel on August 4, 2010, and September 7, 2010, which included all defendants in the caption but only sought responses to interrogatories from Morbark. In addition, Holland filed a motion for a protective order on January 13, 2011, which copied only Curtis L. Ott, attorney for Morbark, and Darrell W. Carter, attorney for Morbark's insurance carrier, Axis Insurance Company. Further, Holland's second motion to amend and ensuing motion for reconsideration were only directed to Morbark.

Next, we address whether the circuit court properly denied Holland's second motion to amend.

Rule 15, SCRCP, provides,

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

It is well established that a motion to amend is addressed to the circuit court's sound discretion, and the party opposing the motion has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 313 S.C 98, 102, 431 S.E.2d 587, 590 (1993). Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action. *Ball v. Canadian Am. Exp. Co., Inc.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994).

We find the circuit court properly denied Holland's second motion to amend. First, Holland was in possession of information that would have alerted him to the potential relevance of an OSHA brake defect claim after his own experts, Roger Davis and David Clement, were deposed in August and September 2010.[8] Despite this, Holland only stated in his motion that he wanted to "include additional matters learned during discovery." It was not until the court's hearing on the motion in March 2011 that Holland expounded on this theory.

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[8] As noted by Morbark, it is conceivable that Morbark would have concluded Holland would *not* assert an OSHA brake defect claim based on Holland's experts' testimonies. Davis stated he had no opinion when asked if he thought that the chipper was defectively designed without a brake. Clement, on the other hand, stated that it would be "ungodly expensive" to incorporate a brake in a wood chipper that size. Thus, at the time Holland requested this amendment, he arguably had not retained an expert who could support his OSHA brake defect theory.

We agree Holland was not seeking to add a new cause of action, but the parties had conducted extensive discovery prior to Holland's amendment. We acknowledge the undertaking of additional discovery does not establish per se prejudice. However, the addition of the OSHA brake defect theory would have required, at a minimum, the hiring of rebuttal experts and the taking of additional depositions. In these circumstances, granting this amendment would result in an inevitable delay on the eve of trial. *See Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986) (finding prejudice can result when a proposed amendment is offered shortly before or during trial and raises a new legal theory that would require gathering and analysis of facts not already considered by opposition). Further, the amendment did not occur until over two years after Holland first filed his complaint in 2009. As a result, we find Morbark would have been prejudiced at this stage in the case. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 813 (2013) (finding circuit court properly denied party's motion to add a cause of action for violation of SCUTPA to its complaint because amendment did not occur until three years after filing of complaint and undertaking of extensive discovery, particularly when there were no significant factual developments that warranted the untimely amendment); *Ball*, 314 S.C. at 275, 442 S.E.2d at 622 ("Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.").

Furthermore, even if the circuit court permitted this amendment, Holland could not successfully sue Morbark for any injuries based on an alleged violation of OSHA because OSHA only regulates employers, not manufacturers. *See* 29 U.S.C.A. § 653(4) ("Nothing in this chapter shall be construed . . . to enlarge or diminish or affect . . . the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."); *see also Byrne v. Liquid Asphalt Sys., Inc.*, 238 F.Supp.2d 491, 492 (E.D.N.Y. 2002) (excluding evidence of OSHA standards in a products liability action against a manufacturer on grounds that OSHA standards were established to create and maintain safe working conditions between employers and employees and "were not intended to impose duties upon manufacturers and have no application against manufacturers of products"). As a result, we affirm the circuit court's denial of Holland's motion to amend his complaint.

II. Summary Judgment

Next, Holland claims the circuit court erred in several respects when it granted summary judgment on Holland's claims for design defect and failure to warn. We disagree.

a. Design Defect

We first address Holland's claim that the circuit court erred in relying on *Branham* and its requirement of proving a reasonable alternative design in design defect cases. As the supreme court held in *Branham*, and this court recently reiterated in *Miranda C. v. Nissan Motor Co., Ltd.*, 402 S.C. 577, 741 S.E.2d 34 (Ct. App. 2013), the requirement of proving a reasonable alternative design in a design defect case is mandatory. *See Branham*, 390 S.C. at 225, 701 S.E.2d at 16 (holding that in a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design and will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous); *Miranda C.*, 402 S.C. at 586, 741 S.E.2d at 39 (citing to *Branham* and holding the same). As a result, the circuit court properly considered *Branham* when it found Holland failed to provide evidence of a reasonable alternative design sufficient to withstand summary judgment.[9]

To prove a reasonable alternative design, Holland was required to set forth some evidence of an "alternative design," which necessarily included the "consideration of costs, safety, and functionality associated with the alternative design." *Id*. We find Holland failed in this regard. Holland's own expert, Roger Davis, stated he was unaware of anyone, including himself, in the industry that had performed a feasibility analysis for an alternative design. Davis admitted he had not prepared an actual design for an interlock system, instead stating his design was only

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[9] Although Holland claims the application of *Branham*'s risk-utility analysis should be prospective, this court concluded otherwise in *Miranda C.* *See Miranda C.*, 402 S.C. at 587, 741 S.E.2d at 40 ("Because the supreme court chose to abandon the consumer expectations test for the risk-utility test in design defect cases, we believe *Branham* applies retroactively."). In addition, the supreme court inferred the same in *Branham* when it denied Branham's petition for hearing despite Branham's contention that the risk-utility test should only have prospective application. *Id.*

"conceptual." Because a conceptual design is insufficient to establish a reasonable alternative design, we find Holland's claim for design defect fails as a matter of law. *See Holst v. KCI Konecranes Int'l Corp.*, 390 S.C. 29, 37, 699 S.E.2d 715, 719-20 (Ct. App. 2010) (finding the circuit court properly granted summary judgment when the plaintiff failed to present evidence of a feasible alternative design or that a risk-utility analysis was conducted); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 546, 462 S.E.2d 321, 330 (Ct. App. 1995) (finding the circuit court properly granted a directed verdict and holding the plaintiff must introduce evidence that an alternative design is feasible and cannot rely upon mere conceptual design theories).

Because proof of a reasonable alternative design is necessary to establish whether a product is unreasonably dangerous in a design defect case, we decline to address Holland's remaining claims of error pertaining to his design defect cause of action. *See Branham*, 390 S.C. at 218-19, 701 S.E.2d at 13 (finding a plaintiff must show the design of a product caused it to be "unreasonably dangerous" in order to successfully advance a design defect case and further holding proof of whether a product is "unreasonably dangerous" must be demonstrated by evidence of a reasonable alternative design); *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328 (requiring the plaintiff in any strict products liability case to show: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant); *see also Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

b. Failure to Warn

Holland also contends the circuit court erred in granting summary judgment on his failure to warn claim. We disagree.

All products liability claims share common elements; therefore, Holland's failure to establish a reasonable alternative design in his design defect claim prevents Holland from succeeding on his failure to warn claim as a matter of law. *See Branham*, 390 S.C. at 210, 701 S.E.2d at 8 (holding the failure to establish any one of the three elements in a companion products liability claim is fatal to all related products liability claims); *Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, __, 749 S.E.2d

126, 133 (Ct. App. 2013) (citing to *Branham* and stating all products liability causes of action turn on the question of reasonableness).

Even if the success of Holland's failure to warn claim did not hinge on whether the wood chipper was unreasonably dangerous, we find the circuit court properly granted summary judgment on Holland's failure to warn claim.

"A product bearing a warning that the product is safe for use if the user follows the warning is neither defective nor unreasonably dangerous; therefore, the seller is not liable for any injuries caused by the use of the product if the user ignores the warning." *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 270, 471 S.E.2d 708, 710 (Ct. App. 1996). Further, a seller is not required to warn of dangers that are generally known and recognized. *Id.* at 271, 471 S.E.2d at 710. It follows, then, that a product cannot be deemed either defective or unreasonably dangerous if a danger associated with the product is one that the product's users generally recognize. *Id.*

When the wood chipper left Morbark's hands in 1996, it contained numerous decals and warnings and was accompanied by an operator's manual. Morbark acknowledged these warnings and decals were not present when Holland was injured. Instead, Precision Husky, the company that sold the wood chipper to A&K Mulch, had affixed its own warnings and decal in three separate places on the hood of the chipper. Precision Husky's decal depicted an individual being struck in the head by the hood of the chipper if opened while the disc was turning and stated, "Never operate chipper with missing hood bolts. Never operate chipper without hood lock secured. Never open hood while disc is turning. To confirm disc is stopped, visually check disc shaft or drive wheel." We find these warnings sufficiently highlighted any potential dangers so that the wood chipper would be "safe for use if the user follow[ed] the warning[s]." *Id.* at 270-71, 471 S.E.2d at 710.

Regardless, we find it would be improper to hold Morbark liable for failure to warn. First, Morbark affixed warnings and instructions to the machine when it was manufactured. Further, the warnings at issue were designed by Precision Husky, not Morbark. Additionally, Morbark sold the machine ten years prior to the accident, and three intervening owners had used the machine before Holland was injured. Last, Holland admitted during his deposition that he was aware he could be hit in the head by the hood if he opened the hood prematurely. This admission demonstrates he appreciated the danger associated with the chipper. *Id.* at 271,

471 S.E.2d at 710. ("[A] product cannot be deemed either defective or unreasonably dangerous if a danger associated with the product is one that the product's users generally recognize."). Whether Holland knew the blades were turning when he opened the hood on the day in question is immaterial to his failure to warn claim because Morbark did not have a duty to warn Holland of a danger he already recognized. *See id.* at 271, 471 S.E.2d at 710 (" [A] seller is not required to warn of dangers that are generally known and recognized."). As a result, we affirm the circuit court's decision to grant summary judgment on Holland's failure to warn claim.

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard Avon Green, Appellant.

Appellate Case No. 2011-199866

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 5187
Heard November 14, 2013 – Filed January 2, 2014

AFFIRMED

Appellate Defenders Dayne C. Phillips and Carmen Vaughn Ganjehsani, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

LOCKEMY, J.: Richard Avon Green appeals his conviction of the common law charge of attempted burglary. He contends that because attempted burglary is not a lesser included offense of first degree burglary, the trial court erred in submitting the claim of attempted first degree burglary to the jury after it granted a directed verdict in his favor on the charge of first degree burglary. We affirm.

FACTS

On September 2, 2010, Green was indicted on the charge of first degree burglary. His trial began on September 12, 2011. At the close of the State's case, Green moved for a directed verdict. The State requested that the trial court consider the lesser included offense of attempted burglary. Green argued that the State was "scrambling" to find a charge against him and maintained there was no evidence of an attempt of any kind.

The trial court explained it was convinced "there [was] no evidence in the record upon which the jury could convict [Green] of burglary in the first degree because the evidence [was] simply not there for a showing of entry which is one of the elements of [the] crime of burglary in the first degree." Thus, the trial court granted Green a directed verdict on the charge of first degree burglary but decided to submit the case to the jury on the "lesser included offense of attempted burglary in the first degree." The trial court concluded that in charging the elements of attempted first degree burglary, it would explain to the jury that the offense did not require an entry.

The jury returned a verdict of guilty on the charge of attempted burglary in the first degree. The trial court sentenced Green to twenty years of imprisonment.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

LAW/ANALYSIS

Lesser Included Charge

Green argues that the trial court erred in finding attempted first degree burglary was a lesser included charge of first degree burglary, the charge for which Green was on trial. Because of this alleged error, Green contends the trial court further

erred in instructing the jury on the charge of attempted first degree burglary. We disagree.

"'A trial [court] is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater.'" *State v. Gilliland*, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App. 2012) (alterations in original) (quoting *State v. Drafts*, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986)). "The test for determining whether one offense is a lesser included offense of another 'is whether the greater of the two offenses includes all the elements of the lesser offense. If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater.'" *Id.* (quoting *Hope v. State*, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997)); *see State v. Elliott*, 346 S.C. 603, 606, 552 S.E.2d 727, 728 (2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Green was indicted under section 16-11-311(A) of the South Carolina Code (2003). The pertinent portions of the indictment alleged:

> That Richard Avon Green did in Sumter County on or about May 4, 2010 enter the dwelling of Rita Davis located at [address] without consent and with the intent to commit a crime therein and when, in affecting entry or while in the dwelling or in immediate flight and the entering or remaining occurred in the nighttime, in violation of section 16-11-0311(A), Code of Laws of South Carolina, 1976, as amended.

The State asked the trial court to charge the common law crime of attempted burglary as a lesser included charge, not the statutory crime of entering without breaking. "To prove attempt, the State must prove that the defendant committed an overt act, beyond mere preparation, in furtherance of the intent to commit the crime." *State v. Reid*, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (citing *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001)). "[W]here an attempt crime exists, it is properly considered a lesser included offense of the completed offense, so long as the completed offense is a felony." *State v. Elliott*, 346 S.C. 603, 616, 552 S.E.2d 727, 734 (2001) (Pleicones, J., dissenting) *overruled*

on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (citing *State v. Hiott*, 276 S.C. 72, 276 S.E.2d 163 (1981)).

Notably, in *Hiott*, our supreme court found no logic in the defendant's position that an attempted offense is not a lesser included offense in the completed offense because incompletion of the offense is in itself a separate and distinct element. 276 S.C. at 72, 80, 276 S.E.2d at 168. We also find *State v. Murphy*, 322 S.C. 321, 471 S.E.2d 739 (Ct. App. 1996), to be instructive. In *Murphy*, this court stated that

> [a]ssault is an unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery. Assault differs from assault and battery in that there is no touching of the victim in an assault. Accordingly, [assault of a high and aggravated nature] is a lesser included offense of [assault and battery of a high and aggravated nature], without the completed act of violence.

322 S.C. at 325, 471 S.E.2d at 741 (internal citation omitted).

We find that the trial court was correct in ruling that attempted first degree burglary is a lesser-included charge for the charge of first degree burglary. Similar to the situation in *Murphy*, here, attempted first degree burglary is a lesser included offense of first degree burglary, without the completed act of entering the premises. Thus, we affirm the trial court's decision to instruct the jury on the charge of attempted first degree burglary.

Enlarged Indictment

Green argues that even if attempted burglary is a lesser included charge of first degree burglary, the trial court improperly enlarged the indictment when he charged the jury with attempted burglary. We disagree.

Green cites *Bailey v. State*, 392 S.C. 422, 709 S.E.2d 671 (2011), to support its position.[1] We believe Green's interpretation of our supreme court's ruling in *Bailey* disregards the pertinent explanation of its decision. The court in *Bailey* explained that "'[i]n South Carolina, [i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.'" *Bailey*, 392 S.C. at 433, 709 S.E.2d at 677 (quoting *State v. Gunn*, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (alterations in original). "'A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it is not an element of the offense.'" *Id.* (quoting *Gunn*, 313 S.C. at 136, 437 S.E.2d at 82).

"'[W]hile a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged.'" *Id.* (quoting *Thomason v. State*, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994)**)**. "'A conviction under the latter circumstance violates principles of due process . . . because the State has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant was charged.'" *Id.* at 434, 709 S.E.2d at 677 (quoting *Thomason*, 892 S.W.2d at 11).

"Bailey's indictment only apprised him that he had to 'defend against the allegation that he inflicted the physical injuries resulting in the victim's death.'" *Id.* at 436, 709 S.E.2d at 678. "A careful review of the jury's questions and the ensuing discussion with the judge reveals that the jury focused on the terms of the indictment and recognized the alternative elements in the homicide by child abuse statute, *i.e.*, an 'act' versus an 'omission.'" *Id.* "The foreman of the jury then stated the jury found 'no evidence' that Bailey struck the [v]ictim." "Based on this statement and the reference to the last line of the indictment, it is evident the jury was inquiring as to whether a finding of 'neglect' on the part of Bailey was sufficient for a conviction under the statute." *Id.* "The judge's supplemental instructions, which were confusing and contradictory, resulted in the erroneous directive that the jury could find Bailey guilty of homicide by child abuse if it found an act of 'abuse *or* neglect.'" *Id.* "Such an instruction was in direct

[1] *Bailey* was a PCR appeal. Nevertheless, it involves the issue of whether the trial court improperly enlarged the indictment.

contravention of the specific act alleged in the indictment and, thus, constituted a material variance or a 'constructive amendment' to the indictment." *Id.*

Here, Green alleged the State should have moved to amend the indictment to include any allegation of "attempting to enter" the dwelling. Green argues because the State did not move to do so, the trial court improperly enlarged the indictment. We disagree. Green was apprised of the fact that the State was trying to prove first degree burglary by showing he entered the victim's home. Unlike in *Bailey*, where the trial court allowed for a conviction upon a theory not alleged in the indictment, here, the same theory was used by the State under the attempted burglary and first degree burglary charge. Green was on notice of the charge and its lesser included offenses. Accordingly, we affirm the trial court.

CONCLUSION

For the foregoing reasons, the trial court is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc., Respondents,

v.

Professional Plastering & Stucco, Inc., Maria Arias, and Miquel Rosales, Defendants,

Of whom Professional Plastering & Stucco, Inc. is the Appellant.

Professional Plastering & Stucco, Inc., Appellant,

v.

Maria Arias, Miquel Rosales, and APS Enterprises Unlimited, Inc., Third-Party Plaintiffs,

Of whom APS Unlimited, Inc. is the Respondent.

Appellate Case No. 2011-196386

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5188
Heard October 17, 2013 – Filed January 8, 2014

REVERSED

Jonathan J. Anderson and Danielle Beck Wegener, both of Anderson Reynolds & Stephens, LLC, of Charleston; Everett Augustus Kendall, II, and Christy Elizabeth Mahon, both of Sweeny Wingate & Barrow, PA, of Columbia; for Appellant Professional Plastering & Stucco.

W. Jefferson Leath, Jr., of Leath Bouch & Seekings, LLP, of Charleston; Phillip Ward Segui, Jr., of Segui Law Firm, of Mt. Pleasant; John T. Chakeris, of Chakeris Law Firm, of Charleston; Jesse A. Kirchner and Michael A. Timbes, both of Thurmond Kirchner Timbes & Yelverton, PA, of Charleston; Justin O'Toole Lucey, of Mt. Pleasant; all for Respondents Mark F. and Nan M. Teseniar & Twelve Oaks at Fenwick.

Roy Pearce Maybank, Amanda R. Maybank, and Jason Alan Daigle, all of Maybank Law Firm, LLC, of Charleston, for Respondent APS Enterprises.

LOCKEMY, J.: In this civil appeal arising out of the defective construction of an apartment complex, Professional Plastering & Stucco, Inc. (Professional) appeals the jury's verdict in favor of Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and other similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc. (POA) (collectively referred to as Respondents) on the claims of negligence and breach of warranty of workmanlike service. Professional asserts the trial court committed reversible error by (1) failing to qualify Chris Dawkins as an expert witness, (2) failing to admit Professional's stucco-only estimate, (3) denying Professional's motion for set-off and motion for a new trial nisi remittitur, (4) including the settlement amount received by Respondents on the verdict form and in its jury charge, (5) giving improper jury instructions, and (6) denying Professional's motion for a directed verdict and judgment notwithstanding the verdict (JNOV) on the claim of breach of warranty of workmanlike service.

Professional also appeals the trial court's grant of summary judgment in its cross-claim against APS Unlimited, Inc. (APS). We reverse.

FACTS

Respondents represent the interests of the POA, and, in a representative capacity, the individual homeowners of the units at Twelve Oaks at Fenwick Plantation (Fenwick) on John's Island, South Carolina. Fenwick was originally an apartment complex, but the units were converted to condominiums in 2006. Fenwick contained 216 units within twelve buildings. After discovering various problems in the buildings, Respondents retained Miles Glick, a practicing architect, to investigate the source of the problems. Glick determined there were numerous deficiencies in the overall construction attributable to various contractors and sub-contractors.

The Teseniars filed a civil action alleging design and construction defects resulting in water intrusion in the buildings at Fenwick. The POA filed a separate lawsuit, but the two suits were consolidated on October 10, 2008. While the lawsuit initially involved numerous defendants, all of the defendants, with the exception of Professional, settled with Respondents. Thus, the trial focused solely on the exterior stucco installed by Professional and the resulting damage.

Summit Contractors, Inc. (Summit) operated as the general contractor for Fenwick. Professional was hired as a subcontractor for the original construction project,[1] and it installed about one-quarter million square feet of stucco at Fenwick using a form of stucco called the Magna Wall system. The Magna Wall system is a proprietary stucco system that must be installed pursuant to the manufacturer's instructions. It is a water management system designed to control water that gathers behind the cladding by allowing it to escape before damage occurs, as opposed to a barrier system, which does not allow water behind the cladding. Professional was certified by the manufacturer to install the system.

At trial, Respondents presented Glick who was qualified as an expert in architecture, forensic architecture, and construction. He testified to numerous deficiencies in Professional's work that constituted a violation of building codes, the installation instructions, and industry standards. Glick stated there was

[1] Professional ceased doing business the same year this lawsuit was filed.

improper flashing and lapping, which allowed water to damage the underlying sheathing and studs in the wall. Further, Glick testified there were missing weep screeds, which should have been installed to allow water entering the system to drain from the wall to avoid causing damage.

Donnie King, sole owner of Professional at the time of Fenwick's construction, testified on behalf of the Respondents regarding Professional's stucco application. Respondents also presented Robert Gallagher, who was qualified as an expert in the fields of general contracting and estimating. Gallagher offered opinions about the associated costs of Glick's suggested repairs. Gallagher prepared a $15,748,225.00 estimate that he alleged would remedy 100% of the problems, including the stucco defects. However, because Professional was the sole remaining defendant at trial, Gallagher also prepared a "stucco-only" estimate, which he alleged would equal $8,761,443.00.

In response to the evidence and testimonies presented by Respondents, Professional offered the testimony, via deposition, of Claude McNabb and Tacy McGinty. McNabb was the vice president of the developer of Fenwick when it was constructed, and he stated Professional's stucco application was proper and passed his inspection. McGinty, the general contractor's project manager during Fenwick's construction, testified that Professional's work was properly done in accordance with the contract documents.

Professional presented Christian Dawkins and attempted to qualify him as an expert in construction and engineering, but Respondents objected to his qualification. In addition to contending Dawkins was not qualified to testify as an expert, Respondents also argued his testimony should be excluded based on a discovery violation. After voir dire and a subsequent overnight recess, the trial court ruled against qualifying Dawkins. Dawkins was only allowed to testify to his personal observations during his investigation of Fenwick, and he could not give any opinions.

Professional presented Robert Puschek as an expert in construction and restoration, and he was qualified without objection. Puschek offered testimony regarding the cost to repair the damages at Fenwick. In response to Gallagher's stucco-only estimate, Puschek asserted it would only cost $3,662,587.64 to repair any stucco-related damage. Professional was allowed to display a document that reflected the price comparison between Gallagher's and Puschek's stucco-only cost estimates on

an overhead projector. However, when Professional requested the document be admitted into evidence as Defendant's Exhibit 4, Respondents objected. The trial court sustained Respondents' objection.

The jury found in favor of Respondents on the two causes of action, negligence and breach of warranty of workmanlike service, awarding actual damages in the amount of $7,723,225.00. Following the return of the jury's verdict, Professional made motions for a new trial absolute, set-off, JNOV, and new trial nisi remittitur. Within ten days of the trial, Professional filed written motions, memoranda, and replies in support of its motions. Each motion was denied by the trial court in a Form 4 order filed on June 17, 2011. Professional subsequently filed a motion to alter or amend the judgment, which was also denied by the trial court on July 19, 2011.

During the ongoing lawsuit between Professional and Respondents, Professional filed a cross-claim on April 1, 2010, against its subcontractor, APS, asserting claims for negligence, breach of warranties, breach of contract, and indemnity. Professional had hired APS as a sub-contractor to perform stucco repairs in the breezeways of the buildings during Fenwick's conversion into condominiums. APS was also included as a defendant in Respondents' suit and settled for the amount of $100,000.

APS filed a motion for summary judgment on the basis that Professional was not a licensed stucco installer, and, therefore, Professional could not maintain these claims pursuant to statutory law. The trial court granted APS' motion on May 11, 2011. Professional subsequently filed a Rule 59(e), SCRCP motion to alter or amend the judgment, and the trial court denied it.

Professional now appeals the jury verdict, as well as the trial court's denial of its motions for a new trial, directed verdict, JNOV, set-off, and to alter or amend the judgment in its suit with Respondents. Professional further appeals the order granting APS's motion for summary judgment and the subsequent denial of its Rule 59(e), SCRCP motion.

LAW/ANALYSIS

Qualification of Chris Dawkins

Professional argues the trial court erred in failing to qualify Dawkins as an expert witness. We agree.

"The qualification of a witness as an expert is a matter largely within the trial court's discretion and will not be reversed absent an abuse of that discretion." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008) (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997)). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Id.* at 555, 658 S.E.2d at 85-86 (citing *Gooding*, 326 S.C. at 252, 487 S.E.2d at 598).

Pursuant to Rule 702, SCRE, a person may be qualified as an expert based upon "knowledge, skill, experience, training, or education." Rule 702, SCRE, does not set forth mandatory requirements for the qualification of an expert witness, acknowledging that "there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence." *Fields*, 376 S.C. at 556, 658 S.E.2d at 86.

> Because a specific licensing requirement is potentially inconsistent with the variety of ways a person may gain specialized knowledge, [our supreme court has recognized] that a trial court's decision to refuse to qualify a person as an expert based solely on the failure to meet a licensing requirement arguably impairs the truth-seeking function of courts.

Id.; *see J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 374-75 635 S.E.2d 97, 104 (2006).

"At the same time, however, [the appellate court's] jurisprudence emphasizes the role of the trial court as the gatekeeper in determining both the qualifications of an expert and whether the expert's testimony will assist the trier of fact." *Fields*, 376 S.C. at 556, 658 S.E.2d at 86. While "non-compliance with licensing requirements or with the statutory law in specialized areas should not require, *a fortiori*, a trial court to refuse to qualify a witness as an expert," a trial court can consider it as a factor "when judging a purported expert's qualification." *Id.* When a trial court is "determining a witness's qualification as an expert, [it] should make an inquiry broad in scope." *Id.*

> Specifically, the trial court ought to take into account the factors delineated in the rules of evidence, the statutory law, and any other sources of authority that may be relevant to a purported expert witness's level of skill or knowledge; and the trial court must further determine whether the offered testimony will assist the trier of fact.

Id. "Although lack of licensing and violations of statutory law may often coincide with a lack of specialized skill or knowledge, these attributes are not always bedfellows." *Id.* at 556-57, 658 S.E.2d at 86.

Professional attempted to qualify Dawkins in the field of engineering and construction. Dawkins held a bachelor's degree in civil engineering from North Carolina State University and a master's degree in civil engineering with a construction management specialty from Georgia Tech. He was licensed in Georgia and North Carolina, but he was not licensed in South Carolina. He had nearly thirty years of experience in civil engineering and construction. He asserted his current practice typically involved diagnosing problems with buildings, including stucco issues. Dawkins observed testing for four days at the building site, and a licensed professional engineer did the testing for him. The trial court requested Professional present Dawkins' particular skills and understanding of South Carolina licensure and building codes. Dawkins stated he was familiar with the applicable building code, the International Building Code of 2000, because it was also used in Georgia. He worked in the coastal region of Georgia, and he asserted there was no distinction in his analysis of construction in Georgia versus construction in South Carolina. However, he admitted he was not familiar with any local modification to the International Residential Code of 2000 (IRC).

Respondents opposed his qualification for several reasons, asserting (1) he was an out-of-state professional, (2) he had only been qualified as an expert four times, and only in Georgia, (3) he was not licensed in South Carolina which is a violation of statutory law, (4) he has never designed a building of the type at issue in this case nor has he ever designed a building in South Carolina, (5) he only observed testing in this case and did not conduct any testing of his own, and (6) while he is titled a construction consultant, he has no certification for that designation. The trial court did not qualify Dawkins, stating that it was considering all the information as a whole, "in its entirety," and not relying solely on the fact that he was not licensed in South Carolina.

We find the trial court abused its discretion because it did not delineate any particular reason for its decision to not qualify Dawkins and we believe he held the prerequisite experience needed to testify as an expert under Rule 702, SCRE. *See Wilson v. Rivers*, 357 S.C. 447, 452-53, 593 S.E.2d 603, 605-06 (2004) (finding the trial court erred in not qualifying an expert in the field of biomechanics when he was a medical doctor with a doctorate in human physiology and training in biomechanics and he had been qualified as an expert in the field of biomechanics in other states). Dawkins had a lengthy career in the construction business and explained his extensive educational background. Respondents argue that Dawkins' lack of familiarity with the IRC is a factor to consider in whether he should be qualified; however, Respondents' own expert witness, Glick, stated the IBC was the appropriate code, not the IRC. Thus, Dawkins' familiarity with the IRC or lack thereof should have no bearing upon his qualification as an expert witness. As to Respondents' remaining arguments against Dawkins' qualification, "[a]ny defects in the amount of his education and experience, if any, go to the weight of his testimony and not its admissibility." *Id.* at 453, 593 S.E.2d at 605. We find Dawkins had technical and specialized knowledge that would assist the trier of fact to understand the proximate cause of the water intrusion, and we hold the trial court erred in failing to qualify Dawkins.

Even though we find error in the trial court's decision, Professional must show it was prejudiced by this error to warrant reversal. *See Fields*, 376 S.C. at 557, 658 S.E.2d at 86 (stating that to "warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice"). Respondents allege any testimony given by Dawkins would have been cumulative, and, thus, the exclusion of his testimony was harmless.

Professional proffered Dawkins testimony after the jury returned its verdict. Dawkins gave in-depth testimony regarding the water intrusion, which he claimed was caused by incorrect installation of items surrounding the windows, a duty that was not within the scope of Professional's work. Dawkins explained that North Florida Framing was responsible for the improper installation and stated Professional would never have seen the problems when it completed its work. Moreover, he gave definitive testimony in which he said the water intrusion was not proximately caused by Professional's work.

Professional presented another witness, Robert Puschek, for qualification in the areas of construction and restoration with no objection. Respondents claim even if it was error to not qualify Dawkins as an expert, Puschek's testimony mirrored Dawkins' proffered testimony in many ways, and thus, Dawkins' testimony would have been cumulative and its exclusion was harmless. We disagree. Puschek was prevented from critiquing any of Glick's work as an architect because Respondents successfully argued that Puschek was not qualified as an architectural engineer. Puschek was limited in testifying to the needed repairs of the buildings and the pricing of the repairs. Puschek made an estimate of repair and a proposal, but he did not do a forensic analysis of the buildings. Thus, we do not believe Dawkins testimony would have been cumulative. *Compare Fields*, 376 S.C. at 558, 658 S.E.2d at 87 (finding the plaintiffs' expert's testimony would have been cumulative to their other two experts' testimonies, and further, the trial court ruled the other experts would be permitted to say that they relied on the excluded witness's report in reaching their conclusions). The trial court's decision to qualify Respondents' expert witness who testified to the proximate cause of the water intrusion while declining to qualify Dawkins' created a situation where Professional had no expert witness to rebut Respondents' expert witness's testimony.

Respondents argue that Donnie King gave testimony indicating Professional's fault in causing the water intrusion and that considering King's contradictory testimony, it strained "credibility to suggest the verdict would have been any different had Dawkins been allowed to take the stand and essentially disagree with the admissions of the party who hired him to testify." However, any contradictory testimony from King only further highlights the prejudicial nature of excluding Dawkins' testimony.

For the reasons listed above, we find the failure to qualify Dawkins and the resulting exclusion of his testimony was prejudicial error. Accordingly, we reverse the trial court.

Dawkins Discovery

As an additional sustaining ground for affirming the trial court's decision to exclude Dawkins' testimony, Respondents argue it was an appropriate discovery sanction in response to Professional's failure to produce Dawkins' files, which included field notes. We disagree.

"A trial court's decision on whether or not to impose discovery sanctions is reviewed for abuse of discretion." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011) (citing *Jamison v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E.2d 755, 766 (Ct. App. 2007)). "'In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice.'" *Jamison*, 373 S.C. at 270, 644 S.E.2d at 767 (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)). "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion." *Id.* (citing *Samples*, 329 S.C. at 112, 495 S.E.2d at 216).

This court has held a trial judge is required to consider and evaluate the following factors before imposing the sanction of exclusion of a witness: (1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party. *Jumper v. Hawkins*, 348 S.C. 142, 152, 558 S.E.2d 911, 916 (Ct. App. 2001). "'[T]he sanction of exclusion of a witness should never be lightly invoked.'" *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 592, 586 S.E.2d 572, 574 (2003) (quoting *Jackson v. H & S Oil Co.*, 263 S.C. 407, 411, 211 S.E.2d 223, 225 (1975)).

Professional explained it did not realize it had failed to produce some of the materials until it received an email from Respondents regarding the matter. Professional stated it would avoid using any material that was not produced.

Further, it stated Dawkins was designated as an expert on liability for over a year prior to trial, and, therefore, Respondents had ample time to depose him and determine the subject of his testimony. Finally, Professional asserted it would be severely prejudiced if Dawkins was not allowed to testify. When the trial court adjourned the trial for the day to make its decision, Professional offered to make Dawkins available to Respondents for depositions. One of the Respondents' attorneys accepted the offer and deposed Dawkins. When the trial resumed, the trial court declined to qualify Dawkins but did not mention the discovery violation as a basis for its decision at that time.

We do not think it is proper to sustain the trial court's decision under this ground for the following reasons: (1) Professional stated it would avoid using the materials that were not produced, (2) the trial court did not state its decision to exclude Dawkins' testimony was based on a discovery violation, (3) Professional made Dawkins available for depositions overnight prior to taking the stand, and (4) only one of the Respondents accepted the offer to depose or interview Dawkins. The sanction of excluding a witness's testimony should not be invoked lightly, and we find it was not appropriate here. Accordingly, we adhere to our decision to reverse the trial court's decision to exclude Dawkins' testimony.

Because we reverse based upon Professional's first issue, we need not reach its remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("[A]n appellate court need not address remaining issues when disposition of prior issue is dispositive.").

Summary Judgment in Favor of APS

Professional contends the trial court erred in granting APS's motion for summary judgment. Professional maintains it lawfully operated as an unlicensed subcontractor under Summit's license pursuant to section 40-11-270(C) of the South Carolina Code (2011), and therefore is not barred from bringing an action at law or in equity against APS under section 40-11-370(C) of the South Carolina Code (2011). We agree.

Section 40-11-370(C) states that "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. . . . ."

Section 40-11-30 of the South Carolina Code (2011) provides the licensing requirements for the chapter, and it provides:

> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

A contractor is defined as a general or mechanical contractor regulated under this chapter. S.C. Code Ann. § 40-11-20(4) (2011). A general contractor is an entity that performs or supervises or offers to perform or supervise general construction. § 40-11-20(9).

However, Professional claims it did not need a license pursuant to section 40-11-270(C), which states:

> Licensees may **utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or subclassification; provided, the licensee provides supervision.** The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.

(emphasis added). A subcontractor is an entity who contracts to perform construction services for a prime contractor, which is one who contracts directly with an owner to perform general or mechanical construction, or another subcontractor. § 40-11-20(17), (22).

McGinty, one of Summit's project managers for Fenwick, acknowledged that Summit would provide the materials and supervise the work at the breezeway. Pursuant to section 40-11-270(C), Summit, as the licensee, was permitted to utilize Professional's services even though Professional was unlicensed. Further, Summit was allowed to utilize APS's services even though it was unlicensed. Moreover, we note the pertinent licensing statutes are intended to protect the public interest.

S.C. Code Ann. § 40-1-10(A)-(B) (2011). The purpose of protecting the public interest by denying enforceability does not exist when dealing with claims between contractors. *See Kennoy v. Graves*, 300 S.W.2d 568 (Ky. App. 1957) ("The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability does not exist when persons engaged in the same business or profession are dealing at arm['s] length with each other. In the case before us, appellant was in a position to know, and did know, the qualifications of appellee. No reliance was placed upon the existence of a license, as presumptively would be the case if appellee was dealing with the general public.").

Accordingly, we find Professional was not required to have a license under the applicable statutory chapter, and, thus, section 40-11-370(C) does not preclude Professional from bringing a claim against APS. For these reasons, we reverse the trial court's grant of summary judgment.

CONCLUSION

For the foregoing reasons, we reverse the trial court on the first issue regarding the qualification of Professional's expert witness, Dawkins, and remand this case for a new trial. In regard to the trial court's grant of summary judgment in favor of APS, we also reverse.

REVERSED.

HUFF and GEATHERS, JJ., concur.