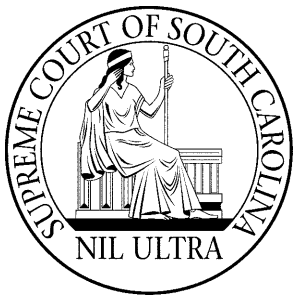


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 14**

**April 7, 2008**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Time Warner Cable Information Services (South Carolina), LLC, Appellant,

v.

Public Service Commission of South Carolina, Farmers Telephone Cooperative, Inc., Fort Mill telephone Co., Home Telephone Co., Inc., PBT Telecom, Inc., St. Stephen Telephone Co., South Carolina Telephone Coalition, and Office of Regulatory Staff,

Of whom

Farmers Telephone Cooperative, Inc., Fort Mill Telephone Co., Home Telephone Co., Inc., PBT Telecom, Inc., St. Stephen Telephone Co., South Carolina Telephone Coalition, and Office of Regulatory Staff are Respondents.

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Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

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Opinion No. 26466
Heard February 20, 2008 – Filed March 31, 2008

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**AFFIRMED**

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Frank R. Ellerbe, III, and Bonnie D. Shealy, both of Robinson, McFadden & Moore, P.C., of Columbia, for appellant.

M. John Bowen, Jr., Margaret M. Fox, Sue-Ann Gerald Shannon, and Robert T. Bockman, all of McNair Law Firm, P.A., of Columbia, for respondents Telephone Companies and South Carolina Telephone Coalition.

Florence P. Belser and Nanette S. Edwards, both of Columbia, for respondent Office of Regulatory Staff.

---

**JUSTICE MOORE:** Appellant Time Warner Cable Information Services (South Carolina), LLC (hereinafter "Time Warner")[1] appeals the denial of its application for an extension of certification into new service areas. We affirm.[2]

---

[1]This company is a limited liability member of the Time Warner, Inc., corporate family.

[2]The Commission declined to rule on Time Warner's "modified application" and we do not address it here.

## FACTS

Time Warner filed an application with the Public Service Commission (Commission) on October 1, 2004, requesting an amended certification for IP Voice Service, or Voice Over Internet Protocol (VoIP), that would provide telephone service using the internet to customers with residential cable subscriptions. Time Warner was providing this service in other areas pursuant to an existing tariff filed May 24, 2004. Respondents, including rural local exchange carriers (hereinafter "Rural LECs"), opposed Time Warner's application. The Commission denied the application based on a failure of proof and the circuit court affirmed.

## ISSUES

1. Did the Commission err in finding a failure of proof?

2. Did the Commission err in ruling that certification is not required to negotiate for interconnect agreements?

3. Did the Commission err in ruling on the basis of the rural exemptions?

## STANDARD OF REVIEW

On appeal, we apply a deferential standard in reviewing decisions by the Commission and will affirm a decision if supported by substantial evidence. Kiawah Prop. Owners Group v. Public Service Comm'n, 357 S.C. 232, 593 S.E.2d 148 (2004). The Commission's findings are presumptively correct, requiring the party challenging an order to show the decision is clearly erroneous in view of the substantial evidence on the record. *Id.*

## DISCUSSION

### 1. Failure of proof

Time Warner contends the Commission's order denying its application based on a failure of proof is arbitrary and capricious since the Commission granted it an expansion of certification in another case based on the same record.

Some procedural background is relevant here. Time Warner was originally certified as a local exchange carrier (LEC) to provide VoIP retail services in May 2004. A certificate was granted subject to a stipulation that Time Warner was seeking to serve customers only in areas where the existing LEC did not have a federal rural exemption.[3] Time Warner subsequently filed an application to expand its services into areas served by an existing LEC, ALLTELL, based on the testimony of its representative, Julie Patterson. ALLTEL did not appear to contest the application and the application was granted by order dated July 27, 2005.

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[3]The rural exemption provides specific treatment for a rural LEC and is found in 47 U.S.C. § 251:

> (f)(1) Exemption for certain rural telephone companies
>
> (A) Exemption
>
> Subsection (c) of this section [imposing certain duties including a duty to interconnect] shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with [other sections].

Time Warner contends it was error to deny the application in the proceeding here because the application in ALLTEL, which was granted, incorporated the same testimony by Patterson given at the hearing on the application here. The record in this proceeding, however, is not limited to Patterson's testimony as it was in the uncontested ALLTEL proceeding. Here, the Rural LECs opposed the application based on testimony by their expert witnesses. These witnesses testified that allowing Time Warner's VoIP service would have an adverse impact on the affordability of rural telephone service. Time Warner's residential cable customers are located in more densely populated areas and the company therefore would not be able to serve the sparsely populated areas. Rural LECs rely on revenue from the more densely populated areas to maintain affordable rates for rural subscribers. With the loss of revenue from competition in densely populated areas, Rural LECs would have to raise rates to rural subscribers who have no access to VoIP.

In light of this testimony, Time Warner's argument that the Commission's order in ALLTEL compels the grant of its application here is without merit. The record in this case supports the Commission's decision since the record includes evidence that the proposed expanded certification will adversely impact the availability of local exchange service. *See* S.C. Code Ann. § 58-9-280(B)(3) (Supp. 2006).

2. Interconnection agreements

Time Warner contends the Commission erred as a matter of law in holding that the company does not need certification as an LEC to obtain interconnect agreements with existing LECs in these areas. The Commission held that Time Warner "may enter into such negotiations without further approval of this Commission."

State law provides for interconnect agreements between certified LECs. Section 58-9-280(C)(1) (Supp. 2006) provides:

> The commission shall determine the requirements applicable to all local telephone service providers necessary to implement this subsection. These requirements shall be consistent with applicable federal law and shall:
>
> (1) provide for the reasonable interconnection of facilities between all certified local telephone service providers upon a bona fide request for interconnection. . . .

(emphasis added).

Here, the Commission ruled only that certification is not required before negotiating for interconnect agreements. This ruling is not inconsistent with state law. Section 58-9-280(C)(1) provides that interconnect agreements may ultimately be approved only if between certified carriers. No approval of interconnect agreements is at issue here. Under the Commission's ruling, Time Warner therefore does not need certification as an LEC at this time for its stated purpose of negotiating interconnect agreements. Since the Commission's order gives Time Warner permission to negotiate for interconnect agreements, there is no relief to be granted on appeal.

3. Waiver of rural exemptions

Time Warner complains the Commission should not have based its ruling on the company's failure to seek a waiver of the Rural LECs' rural exemption under federal law.

The Commission's order notes that Time Warner was not seeking a waiver of the Rural LECs' rural exemption under federal law. This exemption provides that a rural company need not interconnect until a bona fide request is received and the state commission finds it is not economically burdensome, is technically feasible, and otherwise complies with federal law.[4] On rehearing, however, the Commission emphasized that the rural exemptions were not dispositive of any of the

[4]See footnote 3, *supra.*

issues in this proceeding. Time Warner's argument is therefore without merit.

Accordingly, the circuit court's order affirming the denial of Time Warner's application is

**AFFIRMED.**

**TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The Foothills Brewing Concern, Inc., 4MB, Inc., Greenville Wings, Inc., Addy's, Inc., City Tavern, Inc., Greenville 0036, LLC, Euphoria, LLC, WTK, Inc., Drumcliff Abbey, Inc., and Club Management, LLC, Respondents

v.

The City of Greenville, Appellant.

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Appeal From Greenville County
John C. Few, Circuit Court Judge

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Opinion No. 26467
Heard January 9, 2008 – Filed March 31, 2008

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**REVERSED**

---

Ronald W. McKinney, of Greenville, for Appellant.

Randall Scott Hiller, of Greenville, for Respondent.

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**JUSTICE WALLER:** In this direct appeal, the trial court ruled that a municipal ordinance banning smoking in bars and restaurants is preempted by State law and violates the State Constitution. The City of Greenville (the City) appeals from the trial court's order. We reverse.

## FACTS

In 1987, the City was the first municipality in South Carolina to pass an ordinance regulating smoking in public places. The 1987 ordinance applied to such areas as government-owned buildings, theaters, and office buildings. However, the 1987 ordinance exempted bars, and for restaurants, it authorized designated smoking areas.

In 1990, the Legislature enacted the Clean Indoor Air Act of 1990. See S.C. Code Ann. § 44-95-10 *et seq.* (2002). The Clean Indoor Air Act provides that it is "unlawful for a person to smoke or possess lighted smoking material in any form" in various public indoor areas such as: (1) public schools; (2) daycare centers; (3) health care facilities; (4) government buildings; (5) elevators; (6) public transportation vehicles; and (7) public performing art centers. See § 44-95-20.[1] A violation of the Clean Indoor Air Act constitutes a misdemeanor, and upon conviction, the violator "must be fined not less than ten dollars nor more than twenty-five dollars." § 44-95-50.

Because of the reported dangers of second-hand smoke, the City sought to more comprehensively regulate smoking in public places. Therefore, on October 30, 2006, the City enacted Ordinance No. 2006-91 (the Ordinance). In the "Findings and Determinations" section of the Ordinance, the City stated as follows:

[1] Some exceptions are allowed under the Clean Indoor Air Act such as designated smoking areas in employee break areas and private offices. See § 44-95-20. Furthermore, the statute expressly permits certain expansions in the delineated categories; for example, the statute does not prohibit: (1) school districts from providing for a smoke-free campus; or (2) health care facilities from being smoke-free. Id.

> Numerous studies have found that tobacco smoke is a major contributor to indoor air pollution, and that breathing second hand smoke … is a cause of disease in healthy nonsmokers, including heart disease, stroke, respiratory disease, and lung cancer….
>
> The City recognizes that smoke creates a danger to the health and safety of the public at large and that, in order to protect the health and welfare of the public, it is necessary to restrict smoking in the manner provided for in this ordnance.

The Ordinance prohibits smoking in: (1) all enclosed public places, including bars and restaurants; (2) places of employment; and (3) certain outdoor areas, such as stadiums and zoos.

The section of the Ordinance governing violations and penalties states as follows, in pertinent part:

> A. A person who smokes in an area where smoking is prohibited by the provisions of this Ordinance shall be **guilty of an infraction**, punishable by a fine ….
>
> B. A person who owns, manages, operates, or otherwise controls a public place or place of employment and who fails to comply with the provisions of this Ordinance shall be **guilty of an infraction**, punishable by [a fine].
>
> …
>
> D. Violation of this Ordinance is hereby declared to be a **public nuisance**.

(Emphasis added).

Respondents all own and operate restaurants and/or bars in the City. In December 2006, respondents filed a declaratory judgment action contending

the Ordinance was invalid and seeking injunctive relief. The trial court denied respondents' requests for a temporary restraining order and a preliminary injunction. The Ordinance went into effect at noon on January 1, 2007. On March 8, 2007, however, the trial court issued an order declaring the Ordinance was both unconstitutional and preempted by State law. Consequently, the trial court permanently enjoined the City from enforcing the Ordinance.

## ISSUE

Did the trial court err in ruling that the Ordinance is preempted by State law and violates the South Carolina Constitution?

## DISCUSSION

The City argues the Ordinance is not preempted by State law and is consistent with both the Constitution and the general law of the State. We agree.

A two-step process is used to determine whether a local ordinance is valid. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). First, the Court must consider whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid. Id. If, however, the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State. Id.

To preempt an entire field, "an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." Bugsy's, 340 S.C. at 94, 530 S.E.2d at 893 (citing Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990)). Furthermore, "for there to be a conflict between a state statute and a municipal ordinance 'both must contain either express or implied conditions which are inconsistent or irreconcilable with each other…. If either is silent

where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.'" Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. at 553, 397 S.E.2d at 664 (quoting McAbee v. Southern Rwy., Co., 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932)).

In the instant case, the trial court found that a 1996 legislative act – Act 445 – expressly preempts the Ordinance. We find no preemption.

Act 445 accomplished two **separate** objectives: (1) it amended section 44-95-20 of the Clean Indoor Air Act;[2] and (2) it amended and added statutes related to the distribution of tobacco products to minors. See S.C. Code Ann. §§ 16-17-500 thru -504 (2003).

Section 16-17-500 is a criminal statute which makes it a misdemeanor for anyone to sell or give a tobacco product to a minor. Section 3 of Act 445 amended this section by revising the penalties for the offense. Section 2 of Act 445 added sections 16-17-501, 16-17-502, 16-17-503, and 16-17-504 to the Code. Section 16-17-501 provides definitions relating to the distribution of tobacco products; section 16-17-502 makes it unlawful to distribute a tobacco sample to a minor; and section 16-17-503 provides for enforcement and federal reporting.

Section 16-17-504, entitled "Implementation; local laws," provides as follows:

> (A) Sections 16-17-500, 16-17-502, and 16-17-503 must be implemented in an equitable and uniform manner throughout the State and enforced to ensure the eligibility for and receipt of federal funds or grants the State receives or may receive relating to the sections. **Any laws, ordinances, or rules enacted pertaining to tobacco products may not supersede state law or regulation.** Nothing herein shall affect the right of any person

[2] According to the title of Act 445, the amendment to the Clean Indoor Air Act was "to revise the areas in which a person may smoke in public schools and provide that local school boards may make school district facilities smoke free."

> having ownership or otherwise controlling private property to allow or prohibit the use of tobacco products on such property.
>
> (B) Smoking ordinances in effect before the effective date of this act are exempt from the requirements of subsection (A).

§ 16-17-504 (emphasis added).

The trial court found that the second sentence of section 16-17-504(A) (emphasized above) applies not only to the statutory sections regarding the furnishing of tobacco to minors, but also applies to the Clean Indoor Air Act. The trial court therefore determined that this portion of section 16-17-504(A) expressly preempts local ordinances such as the Ordinance passed by the City in 2006. The trial court concluded that by "including the second sentence in section 16-17-504(A), the General Assembly intended to prohibit local government from imposing any restriction on indoor smoking beyond the restrictions contained in the Clean Indoor Air Act."

The City contends that the sections of Act 445 dealing with the distribution of tobacco products to minors were intended to address prerequisites set by the federal government in order to be eligible for certain grant funds. See, e.g., § 16-17-503 (specifically referencing compliance with the federal Public Health Service Act, 42 U.S.C. § 300x-26). Because of the limited focus and purpose of these statutes, the City argues the trial court erred by essentially exporting a portion of section 16-17-504 over to the Clean Indoor Air Act. We agree with the City.

The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. E.g., Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. Denene, 352 S.C. at 212, 574 S.E.2d at198; TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998). Moreover, "[a] statute should not be construed by concentrating on an isolated phrase." South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d

624, 629 (2006). Finally, the Court must presume the Legislature did not intend a futile act, but rather intended its statutes to accomplish something. Denene, supra.

We find the trial court erred when it isolated a phrase from section 16-17-504 and interpreted it in such a way as to accomplish preemption under the Clean Indoor Air Act. See South Carolina State Ports Auth., supra (statute should not be construed by concentrating on an isolated phrase). While sections which are part of the same general statutory law must be construed together and each one given effect, see Denene, supra, this is easily accomplished by looking at the plain language in section 16-17-504 and applying it only to sections 16-17-500, 16-17-502, and 16-17-503. To apply section 16-17-504 more broadly than that would effectively change the meaning of an unambiguous statute, which we refuse to do. See Hodges v. Rainey, 341 S.C. at 85, 533 S.E.2d at 581 ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

In other words, it is patent that the language regarding "ordinances" found in section 16-17-504 is intended to relate specifically to the distribution of "tobacco products" to minors, and not to the regulation of indoor smoking. Hodges v. Rainey, supra (the cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature). Merely because section 16-17-504 was added to the Code in the same piece of legislation which amended the Clean Indoor Air Act does not require that this section's language about local laws be interpreted as part of the Clean Indoor Air Act.

Accordingly, the trial court erred in deciding that Act 445 expressly preempts the Ordinance.

Moreover, we note the Clean Indoor Air Act did not preempt the entire field of indoor smoking. There simply is no **expressly** stated intent in the statute that the State chose to exclusively regulate the subject of indoor smoking. See Bugsy's, 340 S.C. at 94, 530 S.E.2d at 893 (to accomplish

field preemption, "an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way").[3]

Because Act 445 and the Clean Indoor Air Act itself do not preempt the City from legislating in this area, we find the City had the power to enact the Ordinance. Thus, the Ordinance survives step one of the analysis. See Denene, supra; Bugsy's, supra. Next, under step two, we must determine whether the Ordinance is consistent with the Constitution and the general law of the State. Id.

The trial court found the Ordinance violated Article VIII, section 14 of the South Carolina Constitution. Specifically, the trial court stated that because a violation of the Clean Indoor Air Act constitutes a misdemeanor punishable by a fine, and the Ordinance provides for a fine for smoking in areas not prohibited by the State law, the City unconstitutionally "criminalized conduct that is not illegal under State criminal laws governing the same subject." Because we find the Ordinance does not criminalize conduct, we hold it does not run afoul of Article VIII, section 14 of the Constitution.

Although Article VIII deals generally with the creation of local government, Article VIII, section 14 limits certain powers of local governments. See City of North Charleston v. Harper, 306 S.C. 153, 155-56, 410 S.E.2d 569, 570 (1991). Section 14 provides, in pertinent part: "In enacting provisions required or authorized by this article, general law

[3] We are aware that several opinions of the Attorney General have come to a different conclusion, and respondents urge us to adopt the Attorney General's view of this issue. See Op. S.C. Att'y Gen., 2007 WL 1651346 (May 1, 2007); Op. S.C. Att'y Gen., 2006 WL 269614 (Jan. 26, 2006); 1990 Op. S.C. Att'y Gen. 196 (1990). The 1990 opinion reviewed whether the Clean Indoor Air Act preempted localities from further regulating smoking and found that "local political subdivisions would be prohibited, **at least implicitly**, from further regulation of smoking in public indoor places." (emphasis added). Under this Court's law, however, preemption must be explicit, not implicit. Bugsy's, supra. Furthermore, we note this Court is not bound by opinions of the Attorney General. Eargle v. Horry County, 344 S.C. 449, 455, 545 S.E.2d 276, 280 (2001).

provisions applicable to the following matters shall not be set aside: …(5) criminal laws and the penalties and sanctions for the transgression thereof." S.C. Const., art. VIII, § 14.

We have observed that this subsection of the Constitution requires "statewide uniformity" regarding the criminal law of this State, and therefore, "local governments may not **criminalize** conduct that is legal under a statewide criminal law." Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272, 274 (1996) (emphasis added); accord Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) (where the Court held that a municipality cannot criminalize nude dancing when State law does not).

While the Ordinance in this case does make smoking in certain areas "unlawful" where the Clean Indoor Air Act does not, it is our opinion the Ordinance does not criminalize such behavior. Instead, the Ordinance states that a violation constitutes "an infraction." "Infraction" is defined as:

> A breach, violation, or infringement; as of a law, a contract, a right or a duty. A violation of a statute for which the only sentence authorized is a fine and which violation is expressly designated as an infraction.

*Black's Law Dictionary* 537 (6th ed. 1992).

Put simply, the plain language of the Ordinance is non-criminal in nature. This contrasts with the Clean Indoor Air Act's "misdemeanor" language which clearly indicates that a violation of the State law is considered a criminal offense.

Citing Connor v. Town of Hilton Head Island, supra, respondents argue this Court has held that a local ordinance cannot make an activity illegal when it is otherwise legal under State law. They contend that based on this holding, the Ordinance must be struck down. In Connor, we stated that Article VIII, section 14 "prohibit[s] a municipality from proscribing conduct that is not unlawful under State criminal laws governing the same subject." 314 S.C. at 254, 442 S.E.2d at 609. It was clear, however, that the local

ordinance at issue in Connor, which prohibited nude or semi-nude dancing, criminalized such conduct. In support of our holding, we stated as follows: "Since Town has **criminalized** conduct that is not unlawful under relevant State law, we conclude Town exceeded its power in enacting the ordinance in question." Id. at 254, 442 S.E.2d at 610.

In the instant case, however, where the violation of the Ordinance constitutes an infraction or a public nuisance, the conclusion is inescapable that the City does not seek to criminalize any conduct. As such, the Ordinance does not "set aside" the criminal laws of this State. Accordingly, we find trial court erred in finding that the Ordinance violates Article VIII, section 14 of the South Carolina Constitution.

Finally, we hold the Ordinance is consistent with the Constitution and the general law of the State.

South Carolina law provides that each municipality of this State may enact:

> regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it."

S.C. Code Ann. § 5-7-30 (2004). Under the State Constitution, "all laws concerning local government shall be liberally construed in their favor." S.C. Const. art. VIII, § 17. "A municipal ordinance is a legislative enactment and is presumed to be constitutional." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 425, 593 S.E.2d 462, 467 (2004). Furthermore, "[a]s a general rule, 'additional regulation to that of State law does not constitute a conflict therewith.'" Denene, 352 S.C. at 214, 574 S.E.2d at 199 (citation omitted).

The City claims that the Ordinance is a proper exercise of municipal power because it seeks to protect citizens from second-hand smoke. See § 5-7-30 (municipality may enact ordinance which promotes general welfare and preserves health). We agree.

In Denene, this Court found that a local ordinance which prohibited commercial establishments that allow alcohol consumption from operating between the hours of 2 a.m. and 6 a.m. on Mondays through Saturdays did **not** conflict with State law which prohibited the sale of alcohol between twelve o'clock Saturday night and sunrise Monday morning. The Denene Court held that because the local ordinance was "neither inconsistent nor irreconcilable" with the State statute, it was a proper and valid exercise of the city's police power. Denene, 352 S.C. at 215, 574 S.E.2d at 199.

The situation in the instant case is akin to that in Denene. While the State has legislated restrictions on smoking in certain areas, a civil ordinance which adds areas does not in any way conflict with the State law. "Mere differences in detail do not render [statutes] conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand." Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. at 553, 397 S.E.2d at 664 (internal quotes and citation omitted).

Thus, it is our opinion that the Ordinance is consistent with the Constitution and the general law of the State.

## CONCLUSION

For the reasons discussed above, we hold the Ordinance passed by the City is valid and enforceable. Therefore, we reverse the trial court's order.

**REVERSED**.

**TOAL, C.J., MOORE, PLEICONES and BEATTY, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Laura McCann, Respondent,

v.

Jane Doe and John Doe, Appellants.

In Re: Baby McCann.

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Appeal From Beaufort County
Tommy B. Edwards, Family Court Judge

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Opinion No. 26468
Heard December 6, 2007 – Filed April 7, 2008

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**AFFIRMED**

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James Fletcher Thompson, of Spartanburg, for Appellants.

Kenneth L. Tootle, of Beaufort, Scott M. Merrifield, of Quindlen & Merrifield, of Beaufort, for Respondent.

Diane Piazza DeWitt, of Beaufort, for Guardian Ad Litem

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**JUSTICE BEATTY:** In this adoption case, the prospective adoptive parents, John and Jane Doe, appeal the family court's orders: (1) revoking Laura McCann's (the biological mother's) consent for adoption because it was involuntarily entered; and (2) finding the revocation of the consent would be in the best interest of the child and placing the child back with McCann. We note both the Does and McCann love and take excellent care of the child. However, our review of the evidence supports the family court's decision to revoke McCann's consent to adopt and to return the child to McCann.

## FACTUAL/PROCEDURAL BACKGROUND

On the afternoon of Wednesday, July 19, 2006, thirty-year-old McCann drove herself to Hilton Head Regional Medical Center while in labor. At the time, McCann had several emotional stressors in her life, including: (1) her boyfriend had died tragically in a car accident two years prior; (2) her father had died from pancreatic cancer the prior year; (3) the pregnancy was the result of a rape; (4) she hid her pregnancy from her mother, sister, friends, and coworkers because she was ashamed and afraid of their reaction; and (5) she had lost her job during her pregnancy when the restaurant she managed closed down. Although McCann initially informed the hospital staff that she had prenatal care in New York, she later admitted she had not had prenatal care. McCann indicated on the hospital intake forms that she: had a bachelor's degree; worked as a waitress; was of Catholic faith; did not have plans to place the child for adoption; and desired contact with the child. She did not have anyone with her during her delivery and did not want anyone called on her behalf.

McCann delivered a healthy baby girl around 5:00 p.m. that same day. However, McCann did not respond to the child, touch the child, or look at her when the child was placed on McCann's chest. McCann did not want to see the child later in the nursery. Nurse Wendy Yemec thought McCann's flat response to the baby was not normal, and the treating obstetrician ordered a social work consult. McCann was very tearful and remained so for the rest of her hospital stay.

On Thursday, July 20, 2006, McCann had several evaluations. Dr. Ann Gorman, the obstetrician in charge of post-partum care, noted McCann was tearful and learned of McCann's stressors. McCann briefly mentioned adoption to Dr. Gorman.[1] Although she did not diagnose McCann with post-partum depression, Dr. Gorman was concerned that McCann did not have any apparent support system, believed McCann might be at risk for post-partum depression, and ordered a psychiatric consultation with Dr. Srivastava.

That same morning, Judy Hewes[2] performed the social work evaluation on McCann to determine what kind of support system McCann had and what kind of prenatal care McCann had been given. The two discussed the stressors in McCann's life and Hewes provided McCann with names and telephone numbers of adoption agencies per McCann's request. Hewes informed McCann that she had positive experiences with adoption because two of her siblings were adopted.

Hewes' conversation with McCann was interrupted when Dr. Srivastava entered the room to perform a psychological evaluation. The examination was for the sole purpose of determining whether McCann required further hospitalization for psychological issues due to her incessant crying; he did not evaluate McCann for the purpose of determining whether she could knowingly and intelligently consent to the relinquishment of her child for adoption. After speaking with McCann for less than an hour, Dr. Srivastava determined that, although she had significant stressors in her life, she did not have significant depression requiring hospitalization. He recommended follow-up therapy without medication. Dr. Srivastava diagnosed McCann with "significant adjustment disorder," between anxiety

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[1] Although Dr. Gorman's notes reflect McCann was "considering adoption," Dr. Gorman testified McCann personally told her she had decided on adoption because she did not feel at that point in her life that she could handle a baby and McCann seemed at peace with that decision.

[2] There is some debate over Hewes' status as either an intern or unlicensed masters social work student. For purposes of this opinion, we merely refer to Hewes as a social worker.

and depression, with a functioning level, or GAF score of 50, which meant partial insight. Although he noted that a GAF score of below 50 would require hospitalization, he testified that "partial insight" meant fair insight within the normal range and not significantly impaired. He stated the diagnosis of adjustment disorder did not impair judgment. Although McCann did not discuss adoption in detail, she told Dr. Srivastava she was considering adoption, she would "feel ok about it," and she did not have enough resources to care for a baby. Dr. Srivastava testified he did not think social stressors would generally affect decision making, and he had no concerns about McCann's ability to make decisions. Dr. Srivastava did not diagnose McCann with post-partum depression because the illness does not generally manifest until some time after delivery, and he did not see signs of post-partum depression in McCann. According to Dr. Srivastava, McCann was initially tearful during their meeting, she smiled at times, and she was able to engage in the conversation and was not tearful by the end.

In the afternoon on July 20th, McCann referred to a business card given to her along with the list of adoption agency names she requested from Hewes, and she called Helen Duschinski, director of A Child's Future Adoptions, a private adoption agency based in Aiken, South Carolina. McCann testified that she was just exploring options, but Duschinski stated McCann informed her that she had a baby that she wanted to give up for adoption and wanted to know whether there was a family with which the child could be placed. Duschinski agreed to meet with McCann the next morning at the hospital in Hilton Head, and Duschinski contacted the Does about the baby. At some point, Nurse Yemec came in the room and overheard McCann on the phone with Duschinski. Yemec hugged McCann and told her how unselfish and brave she was being in making the adoption decision. McCann requested to see the baby for the first time the evening of July 20th, and the baby stayed in the room with her, for the most part, until discharge the next day. McCann appeared to bond with her baby.

On the morning of Friday, July 21, 2006, Duschinski got lost on her way to the hospital, McCann called her to find out why she was late, and McCann gave Duschinski directions to the hospital. Duschinski testified McCann was clearly resolved in her decision to give the baby up for

adoption, and never verbalized any doubts, citing the fact that she was single and there were societal and financial pressures associated with raising a baby. However, McCann denied having made up her mind about adoption when she called Duschinski, but she did not know whether she had told Duschinski she wanted to put her child up for adoption. McCann believed Duschinski worked with the Department of Social Services and would explain the process. Duschinski filled out paperwork, including medical and family history. One of the documents Duschinski had McCann sign regarded counseling and stated, "I acknowledge that counseling is available to me and has been offered to me. I'm aware that counseling will be made available to me should I request it during this pregnancy or within two weeks after delivery." Duschinski testified McCann was crying and laughing during their meeting, trying to lighten the room with humor. She did not think McCann's emotional reaction was unusual.

At that point, Duschinski left the room and the Does' attorney, Rick Corley, and attorney Hector Esquivel, the separate attorney to present the consent form to McCann, entered the hospital room. Corley left as Esquivel went over the consent for adoption form with McCann and Hewes remained in the room as a witness. McCann believed he was her attorney, although his fees were being paid by the Does. Esquivel testified he went through the consent form line by line, trying to ensure that McCann understood the form and that her consent was voluntary. He stated she did not appear to be in any unusual emotional distress, that she was teary at times, but he believed she was comfortable and resolute. McCann was holding the baby during her meeting with Esquivel.

Esquivel testified he specifically went over the sections regarding the fact that there was no waiting period, that her decision was permanent, and that she had no right to rescission like with financing agreements. At one point he told her the only way to revoke the consent was to go to court and explain the decision was made under duress, but Hewes testified he responded to one of her questions by stating that McCann could go to court to prove she was the better parent in order to "undo it." Esquivel testified that he told her he would leave if she had any doubts, that she could get either legal or other counseling and then decide at a later time whether to proceed

with the adoption, but McCann did not want counseling and seemed to understand the gravity of the situation.

One of the documents Esquivel had McCann sign was a medical power of attorney, which stated, "this limited medical power of attorney shall expire upon the surrender of my parental rights in a court proceeding in accordance with South Carolina law unless I earlier revoke it in writing." Although McCann testified that she did not listen to what Esquivel was saying because she was looking at the baby, she admitted that she was calm when she signed the documents. McCann initialed the consent form next to the section stating there is no revocation period.

After signing the documents, McCann refused additional time with the child and handed the child over to Corley. McCann was discharged that same Friday afternoon, drove herself home, and slept for over a day. Both Nurse Yemec and Hewes were so concerned about McCann's emotional well-being that they separately attempted to call her at her house. On Monday, July 24, 2006, McCann eventually contacted Hewes, who was afraid that McCann might be suicidal. McCann told Hewes that she had contacted the adoption agency because she had changed her mind. Duschinski, however, testified that McCann only contacted her about "some doubts" and never indicated she wanted to revoke her consent.

The adoptive parents filed a petition for adoption on July 26, 2006. McCann filed a Petition for Reversal of Consent on July 27, 2006. An emergency hearing was held on August 16, 2006, and the family court ordered appointment of Diane Dewitt as guardian ad litem for the baby. McCann amended her complaint, and another temporary hearing was held on September 21, 2006. At that point, the family court granted McCann limited, supervised visitation with the baby.

The parties agreed to bifurcate the trial to first deal with the issue of voluntariness of the consent and then to deal with whether revocation of the consent would be in the best interest of the child. On March 1, 2007, the family court issued an order in the first portion of the trial. The family court found that, considering McCann's obvious emotional distress, she could not

have voluntarily given her consent. The court found McCann was in an unusual emotional state during her hospital stay, the guidance she received during her hospital stay was not objective and reflective of a realistic approach to the situation McCann faced, and the confusing wording of the counseling form and medical power of attorney form, coupled with Hewes' question to Esquivel, created the impression that McCann had time to revoke. The court further found that the totality of the circumstances:

> created such pressure or had such influence upon Plaintiff that her signing of the document could not have been done voluntarily and that her signing was obtained under duress or through coercion. I find these circumstances left her with the view that she had no reasonable alternative to signing the Consent and Relinquishment and practically destroyed her free will and caused her to do an act not of her own volition and that her act was not the result of rational judgment on her par.

The court held McCann's grant of consent was not voluntary and ordered that McCann have more visitation with the baby pending the outcome of the second part of the trial regarding what was in the best interest for the child.

After the hearing on the best interest analysis, the family court ordered that it was in the best interest of the child for McCann's consent to be revoked and for the child to be placed with McCann. The Court of Appeals granted the Does' motion for supersedeas, held a hearing, and then issued an order vacating the supersedeas and ordering that the parties share custody of the child on a rotating four-day basis. The case is now presently before this Court after it was certified from the Court of Appeals.

## STANDARD OF REVIEW

In appeals concerning adoption proceedings, like any appeal from family court, this Court may find the facts in accordance with its own view of the preponderance of the evidence. Phillips v. Baker, 284 S.C. 134, 135, 325 S.E.2d 533, 534 (1985) ("An adoption proceeding being a matter in equity

heard by the trial judge alone, this Court's scope of review extends to the finding of facts based on its own view of the preponderance of the evidence."). This broad scope of review does not require the Court to disregard the findings of the family court judge, who saw and heard the witnesses and was in a better position to evaluate their credibility. Ex parte Morris, 367 S.C. 56, 61, 624 S.E.2d 649, 652 (2006); Patel v. Patel, 359 S.C. 515, 523, 599 S.E.2d 114, 118 (2004). "This degree of deference is especially true in cases involving the welfare and best interests of a minor child." Morris, 367 S.C. at 61, 624 S.E.2d at 652.

## I. Voluntariness of Consent

The Does argue the family court erred in finding McCann's consent was involuntary because McCann did not prove duress, coercion, or involuntariness; she only proved she changed her mind.[3] The main question in this case is whether the totality of the circumstances, including emotional stressors from four significant events and McCann's confusion over the significance of the documents she signed, amounts to signing the consent for adoption involuntarily or pursuant to duress or coercion.

Initially, we take this opportunity to comment on the relinquishment law in this state. Several states, including our neighboring states of Georgia and North Carolina, have a time period during which a biological parent can revoke their consent to adopt without having to go to court to prove involuntariness, duress, or coercion. See Ga. Code Ann. § 19-8-9(b) (Supp. 2007) (giving a biological parent a ten-day period within which he or she can withdraw the consent for adoption); N.C. Gen. Stat. § 48-3-706(a) (2005) (stating that a relinquishment of a child may be revoked within a seven-day period after signing). In the case of a newborn, this relinquishment period

[3] The Does raise sixteen sub-issues pointing out facts they allege show McCann failed to meet her burden regarding the involuntary nature of her consent or showing the facts found in the family court's order were not supported by the record. However, each of these issues goes toward the main question regarding voluntariness.

allows a biological parent, usually the birth mother, to contemplate her decision away from the physical and emotional effects of giving birth. After the relinquishment period, the law provides that a biological parent may not revoke her consent unless she proves to the court that it was involuntary or given under duress or pursuant to coercion. See Hicks v. Stargel, 487 S.E.2d 428, 429 (Ga. App. 1997) (holding that there was no reason to revoke the surrendering parents' consent for adoption more than ten days after it was given because there was no evidence of fraud, duress, or incapacity); N.C. Gen. Stat. § 48-3-707(a)(1) (2005) (holding that a relinquishment shall become void if, before entry of the adoption decree, the relinquishing parent establishes by clear and convincing evidence that it was obtained by fraud or duress).

In South Carolina, there is no waiting period before a consent to relinquish a child for adoption becomes effective. Thus, once a parent signs a consent, there is no contemplation time or waiting period during which the consent can be revoked.[4] Withdrawal of the consent is not permitted except by court order after notice and an opportunity to be heard by all parties, and

[4] There are certain statutory requirements for a consent form. For example, a consent or relinquishment form for the purposes of adoption must specify: (1) that the consent acts to forfeit all rights and obligations of the parent to the child; (2) that the consent "must not be withdrawn except by order of the court upon a finding that it is in the best interests of the child;" and (3) that the consent was not voluntary or was obtained through duress or coercion. S.C. Code Ann. § 20-7-1700(A)(6), (7) (Supp. 2007). The consent must be signed in the presence of two witnesses, one of which must be either a family court judge, an attorney who does not represent the prospective adoptive parents, or a person certified to obtain consents through the Department of Social Services. S.C. Code Ann. § 20-7-1705(A)(1) – (3) (Supp. 2007). Each witness must certify that the provisions of the document were discussed with the person giving consent and that the witness believes that the consent was given voluntarily and was not obtained by coercion or duress. S.C. Code Ann. § 20-7-1705(B) (Supp. 2007). Our review of the consent form in the present case shows it met the technical requirements of the statute.

"except when the court finds that the withdrawal is in the best interests of the child and that the consent or relinquishment was not given voluntarily or was obtained under duress or through coercion." S.C. Code Ann. § 20-7-1720 (Supp. 2007). The burden is on the person seeking to revoke the consent to show the consent was obtained involuntarily. See Phillips v. Baker, 284 S.C. 134, 137, 325 S.E.2d 533, 535 (1985) (finding the biological mother failed to establish she executed the consent form under duress).

While an immediately effective consent form may be intended to provide assurances to adoptive parents, it does not reduce the heartbreak from prolonged litigation when a biological parent later changes his or her mind.[5] A reflection period, during which biological parents could closely examine their decision, would assure adoptive parents that the adoption would likely be completed. Although a biological parent could still attempt to revoke consent by proving involuntariness, duress, or coercion, in our view, the likelihood of a challenge to the consent after reflecting during a revocation period would be substantially reduced. However beneficial for both adoptive and biological parents a reflection period may be, it is not the current law in this state, and we must, therefore, apply the law as it currently stands.[6]

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[5] As will be discussed further, we are in no way implying by this commentary that McCann merely changed her mind in the present case.

[6] Although there is no law allowing a waiting period for a parent to consider the enormous decision to give a child up for adoption, it is interesting that the law provides for waiting periods in consumer transactions. See, e.g., S.C. Code Ann. § 37-2-502 (2002) (providing that consumers have three days to change their mind about a home solicitation sale). However, the Legislature enacted a waiting period of sorts for biological parents who wish to use the Department of Social Services for adoption placement. See S.C. Code Ann. § 20-7-2323 (Supp. 2007) ("The Department of Social Services, before it may accept as a client a parent or parents, or prospective parent or parents who wish to relinquish their child for adoption, must first provide them with an informational brochure which outlines the services available from and the procedure used to select adoptive parents by the Department and by the licensed private adoption agencies in this State . . . The Department may not

The more traditional attack on the consent for relinquishment is that it was given under duress or pursuant to coercion. Duress is defined as "'a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition.'" Phillips, 284 S.C. at 137, 325 S.E.2d at 535 (quoting Cherry v. Shelby Mut. Plate Glass & Cas. Co., 191 S.C. 177, 183, 4 S.E.2d 123, 126 (1939)). Duress is viewed with a subjective test, looking at the individual characteristics of the person allegedly influenced, and duress does not occur if the person has a reasonable alternative to succumbing and fails to avail themselves of the alternative. Blejski v. Blejski, 325 S.C. 491, 498, 480 S.E.2d 462, 466 (Ct. App. 1997) (affirming family court's finding that wife's acceptance of settlement agreement was not made under duress where her attorney told her the judge was mad at her and she should accept the agreement or face losing custody of her children; the Court of Appeals found attorney's advice amounted to an opinion and wife had the alternative of taking her chances with a trial).

Certainly, many people suffer tragedies in their personal lives that do not rise to the level of the legal definition of duress. In most instances, suffering tragedies prior to having a baby, without more, would not render involuntary a decision to relinquish the child for adoption. However, duress is only one consideration, and the Court may look to other factors, including the totality of the circumstances, in making the voluntariness determination. See Johnson v. Horry County Dep't of Soc. Servs., 298 S.C. 355, 356, 380 S.E.2d 830, 831 (1989) (considering many factors in affirming the family court's order finding the consent for adoption was entered voluntarily and adoption would be in the best interest of the children where the birth mother: had an eleventh grade education; was able to understand the documents signed; was not under the influence of incapacitating drugs; was not in any

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accept the above persons as clients until a period of forty-eight hours has elapsed from the time they are furnished this brochure . . . ."). Despite giving parents time to consider whether they wish to use a State or private agency for adoption, there is no similar provision giving parents time to reflect on the more important decision of relinquishment.

unusual emotional state; and indicated that her consent was freely given and not the product of duress); see also Burnett v. Burnett, 290 S.C. 28, 30, 347 S.E.2d 908, 909 (Ct. App. 1986) (finding wife entered into domestic settlement agreement voluntarily where there was no evidence that she "was compelled to enter the agreement as a result of being overreached or subjected to any duress, nor is there any evidence that she was not of sound mind or under any unusual stress, other than the stress normally attendant to the breakup of a marriage").

Turning to the present case, conflicting evidence was presented in the portion of the trial regarding voluntariness. McCann cried during her testimony, finding the memories painful, but she believed she was now emotionally, mentally, and psychologically strong. She stated she did not recall the delivery, and her recollection of the events in the hospital was very blurry. She denied telling Dr. Srivastava that she was considering adoption. According to McCann, social worker Judy Hewes only gave her adoption as an option, although Hewes also discussed how her sister handled being a single mom. McCann admitted she told Hewes that she felt the baby might be better off with another family.

McCann testified that she thought she had time to make her final adoption decision because of the language in the counseling form indicating she had two weeks and the language in the medical power of attorney that it would expire after a formal court hearing. McCann admitted that she was calm when she signed the legal documents, that she knew adoption was a permanent legal process, and that she had stated in her deposition that she knew the consent documents had significant legal ramifications, but she stated she felt completely overwhelmed. She testified that she contacted Duschinski on Monday, July 24, 2006, stating she wanted the child back, and she was told by Duschinski that she had ninety days to take legal action. McCann testified that she felt that Hewes, Yemec, and Dushinski misguided her, and she admitted that she felt as though her "raging hormones, lingering pain medication and the unethical treatment of some of the players conspired to lead" her to a poor decision.

McCann also presented the testimony of her treating psychologist, Dr. Bryant Welch, and her treating psychotherapist, Jocelyn Evans. Dr. Welch, who began seeing McCann five weeks after the delivery and reviewed her hospital records, opined that McCann did not voluntarily give her consent for adoption because: (1) women have widely fluctuating emotions postpartum, and the hospital staff all noted McCann's incessant crying; (2) McCann suffered from tremendous stressors, and the cumulative effect impaired her functioning; (3) he believed McCann's GAF score of 50 indicated impaired functioning; and (4) McCann did not get the help she needed from hospital staff, especially Hewes, who was not licensed and only promoted adoption. Welch admitted that Dr. Srivastava did not find McCann had impaired functioning, but argued that the doctor was not evaluating McCann for her ability to sign a consent form.

Jocelyn Evans became McCann's treating psychotherapist some time after McCann filed the underlying action. Evans also testified that McCann was incapable of giving her consent and made her decision "under duress," because of the emotional trauma from the totality of her stressors, she was visibly overwrought, and she was mentally fragile, though not mentally impaired. Evans also noted that she believed a woman should not make her adoption decision within the first forty-eight hours after birth and that Hewes acted unethically in suggesting adoption where McCann had checked "no" to the question of adoption in the hospital intake papers.

Finally, the guardian ad litem, Dewitt, presented her report, stating that McCann was a fit, educated, and mature parent, with support from her mother and sister. Dewitt stated that although she was sure the baby had bonded to some extent with the Does, she was impressed that the child seemed to immediately recognize McCann upon their first visit at eleven weeks. The family court further heard from Dr. Gorman, Judy Hewes, Nurse Yemec, Helen Duschinski, and attorneys Corley and Esquivel.

Giving great deference to the family court's credibility determinations of the conflicting evidence in the present case, we find there is abundant evidence that McCann's emotional stressors and suffering caused impaired functioning. All of the hospital personnel interacting with McCann noted she

was extremely tearful during her stay, and Hewes and Yemec were so concerned about her safety that they contacted her after she left the hospital. Her extreme behavior required a psychological consult to determine solely if McCann could care for herself and be released from the hospital. Dr. Srivastava did not evaluate McCann for her ability to make the adoption decision, and he noted McCann was functioning with only partial insight, as indicated by her GAF score of 50. Despite Dr. Srivastava's deposition testimony that partial insight meant McCann was not significantly impaired, her score was one point away from requiring further hospitalization. Further, the only persons who actually evaluated McCann for her ability to consent to relinquishment, Dr. Welch and Jocelyn Evans, both opined after reviewing all the evidence and records in the case that McCann was incapable of giving her voluntary consent for adoption at the time she was in the hospital.

Further, while McCann was suffering from impaired functioning, she was encouraged by others regarding the adoption decision, she was presented with a counseling form that led her to believe she had a two-week time period in which to consider the adoption decision,[7] the medical power of attorney form created an impression there was a time period before a court terminated her parental rights or before her consent was valid, and the attorney obtaining her signature made a statement that she would have to prove she was the better parent in order to get her child back. Based on the totality of the circumstances in this case, we agree with the family court that McCann proved her consent for relinquishment was involuntary.

[7] As with the consent form, we do not find anything particularly misleading about the counseling or medical power of attorney forms. However, because McCann had impaired functioning in the present case, we give great deference to the family court's determination that McCann's testimony in this regard was credible.

## II. Best Interest

The Does also appeal the finding that it was in the best interest of the child for the consent to be withdrawn and for the child to be awarded to McCann based on the biological connection.

As previously discussed, before a biological parent can withdraw her consent to adoption, the family court must make a determination that withdrawal is in the best interest of the child and that the consent was not voluntarily given or was the product of duress or coercion. S.C. Code Ann. §20-7-1720 (Supp. 2007). "The best interest of the child remains, always, the paramount consideration in every adoption." Dunn v. Dunn, 298 S.C. 365, 367, 380 S.E.2d 836, 837 (1989); Doe v. Roe, 369 S.C. 351, 371, 631 S.E.2d 317, 328 (Ct. App. 2006) (noting that the best interest of the child is the ultimate consideration). The state also recognizes a rebuttable presumption in custody matters that it is the best interest for the child to be placed with a biological parent over a third party. Moore v. Moore, 300 S.C. 75, 78, 386 S.E.2d 456, 458 (1989).[8]

[8] The Does complain the family court erred in using the best interest analysis applied in custody situations, including the preference for the biological parent, because the revocation statute does not indicate a preference for the biological parent over the adoptive parent. The statute does not indicate the best interest analysis to be employed is any different from that used in any other case concerning the welfare of children. While we understand the Does' concern that the presumption in favor of biological parents would devastate any chance an adoptive parent had of enforcing the relinquishment in the face of a challenge, we note the statute requires the biological parent to prove both: (1) the consent was involuntary; and (2) withdrawal was in the best interest of the child. Aside from the situation before us, the burden of proving the involuntariness of the consent for relinquishment is generally difficult. Because a challenge to the consent for relinquishment may only occur prior to an adoption, the dispute concerns a custody determination and the normal best interest analysis in custody disputes should be employed.

After the hearing on the second portion of the trial regarding whether revocation of the consent was in the best interest of the baby, the family court informed the parties on April 21, 2007, that the baby should be placed with McCann. In the written order filed May 4, 2007, the court noted that McCann: had a suitable home; was well-educated and financially stable; had bonded with the child; had strong family support; and demonstrated "natural, instinctive and appropriate parenting skills and great motivation to being the full-time parent, nurturer, and protector of the child." The court also noted that both McCann and the Does were "people of character and integrity who are committed to the well-being of this beautiful child," and that the Does had demonstrated a great capacity for parenting and had a loving, nurturing home. However, the court found that under the facts and circumstances of the case, it would be in the best interest of the child to be raised by McCann, her biological mother, and it ordered the child to be placed with McCann by May 6, 2007.

Both McCann and the Does presented evidence that they have sufficient housing, financial resources, extended support systems, and child care options. McCann and the Does appear to be fit, they all obviously love the baby very much, and, with the exception of the first eleven weeks of her life, the baby has spent much time in both households bonding with the parties and the extended families. However, in light of the involuntariness of McCann's consent for relinquishment, we agree with the family court that it would be in the child's best interest for the consent to be withdrawn. Further, with both sides proving an equal ability to care for the child, we agree with the family court that it would be in the child's best interest for custody to be returned to McCann, the biological parent.

## CONCLUSION

Adoption is a wonderful institution, bringing together parents who want children with children who need loving homes. However, protections need to be in place for both biological and adoptive parents to ensure the decision to give a child for adoption is a thoughtful and certain one and not likely to be challenged in a long, arduous, and emotionally-wrenching legal process as has happened in this case.

Nevertheless, we agree with the family court in the present case that, looking at the totality of the circumstances, McCann proved she was incapable of giving a voluntary consent. It is in the best interest of the child for the consent for relinquishment be revoked and the child to be returned to McCann.

**AFFIRMED.**

**TOAL, C.J., and MOORE, J., concur. PLEICONES, J., concurring in result. WALLER, J., dissenting in a separate opinion.**

**JUSTICE WALLER:** I respectfully dissent. In my opinion, the evidence clearly establishes that the biological mother, Laura McCann, voluntarily signed a relinquishment form which complied with the statutory requirements set out by the Legislature. See S.C. Code Ann. §§ 20-7-1700 & -1705 (Supp. 2007). Because the relinquishment form complied with the statute, and McCann failed to prove duress or coercion, I would hold that the family court erred by revoking McCann's consent to the adoption.

> "Relinquishment" is defined as:
>
> [T]he informed and voluntary release in writing of all parental rights with respect to a child by a parent to a child placing agency or to a person who facilitates the placement of a child for the purpose of adoption and to whom the parent has given the right to consent to the adoption of the child.

S.C. Code Ann. § 20-7-1650(h) (Supp. 2007).[9] Withdrawal of any consent or relinquishment is permitted **only** when the court finds[10] the withdrawal is in the best interests of the child **and** the consent or relinquishment was given involuntarily or was obtained under duress or through coercion. S.C. Code Ann. § 20-7-1720 (Supp. 2007).

The majority concludes that the evidence showed McCann's "emotional stressors and suffering caused impaired functioning," which in turn rendered her relinquishment involuntary. However, an action is involuntary when it is performed under duress, force, or coercion,[11] and the crux of this case really is whether McCann acted while under duress. As

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[9] I focus on the term "relinquishment" because this is "commonly used to refer to a mother's surrender of parental rights to an adoption agency that will place the child with adoptive parents." Elizabeth J. Samuels, *Time To Decide? The Laws Governing Mothers' Consents To The Adoption Of Their Newborn Infants*, 72 Tenn. L. Rev. 509, 511 n.5 (2005).

[10] On appeal from the family court, this Court may find facts based on its own view of the preponderance of the evidence. E.g., Phillips v. Baker, 284 S.C. 134, 325 S.E.2d 533 (1985).

[11] *Black's Law Dictionary* 574 (6th ed. 1991).

noted by the majority opinion, duress is "'a condition of mind produced by improper **external** pressure or influence that practically destroys the free agency of a party and causes [her] to do an act or form a contract not of [her] own volition.'" Phillips v. Baker, 284 S.C. 134, 137, 325 S.E.2d 533, 535 (1985) (emphasis added, citation omitted).

In my opinion, there is no compelling evidence that McCann's "emotional stressors" were anything but internal in nature.[12] Therefore, although I would agree with the family court's conclusion that McCann was in an emotional state, the family court erred in finding her consent was given involuntarily. Circumstances such as temporary depression or emotional distress simply are not sufficient, in and of themselves, to invalidate a consent to adoption. See, e.g., In re J.N., 95 P.3d 414, 419 (Wash. Ct. App. 2004) ("emotional stress alone does not vitiate an otherwise voluntary decision to relinquish parental rights"), review denied, 114 P.3d 1198 (2005); Boatwright v. Walker, 715 S.W.2d 237, 242-43 (Ky. Ct. App. 1986) (consent to adoption will not be revoked based upon emotional distress or temporary depression; a showing of fraud or duress is required); Regenold v. Baby Fold, Inc., 355 N.E.2d 361, 363-65 (Ill. App. Ct. 1976) (where the 19-year-old biological mother was experiencing "a great deal of stress," the court nonetheless reversed the lower court's finding of duress because there was no evidence that her consent to adoption was the product of "third party persuasion, inducement, deception, or domination"), aff'd 369 N.E.2d 858 (1977).

Moreover, to suggest that because others offered support to McCann regarding her adoption decision, this encouragement somehow acted to coerce McCann into signing the relinquishment is a sad commentary, indeed. Support for a parent's choice to place a baby for adoption is something that

[12] I certainly do not contend that any emotions McCann felt were not real, were in any way insignificant, or were her fault. I focus instead on the fact that these emotional pressures clearly were not generated or caused by the people around her, and therefore do not meet the pressures required by the legal definition of duress.

should be promoted, although clearly the decision should never be forced upon a parent.[13]

Furthermore, there is significant evidence which clearly refutes the idea that McCann was in any way coerced to give up her baby for adoption. For example, McCann **herself**: (1) initially raised the issue of adoption to her nurses and postpartum obstetrician; (2) requested information about adoption agencies from the social worker; (3) called the private adoption agency and arranged a meeting with Helen Duschinski for the next day at the hospital; and (4) called Duschinski when she was late arriving and gave her directions to the hospital.

Duschinski eventually arrived with the Does' attorney, Rick Corley, and another attorney, Hector Esquivel. However, only Esquivel and the social worker remained in the hospital room with McCann while Esquivel went over all the forms in detail. McCann thereafter signed various documents.

Of most importance to the instant case is the relinquishment form, which was entitled "CONSENT TO ADOPTION." As previously mentioned, and as conceded by the majority, this form complied with the statutory requirements.[14] See §§ 20-7-1700 & -1705. The purpose of these statutes is "to ensure that birth parents freely and voluntarily consent to

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[13] See In re Comm'r of Soc. Servs., Suffolk County, 529 N.Y.S.2d 883 (N.Y. App. Div. 1988). In this New York case, the appellate court appropriately rejected the birth mother's claim that her consent to adoption had been coerced even though the pregnancy was the result of a rape. Notably, the court found that her husband's encouragement "did not render the circumstances coercive nor did his entreaties impair her ability to exercise her free will." Id. at 884; see also Anonymous v. Anonymous, 530 P.2d 896, 898-99 (Ariz. Ct. App. 1975) (although birth mother's church official advised her in the hospital to "release the baby for adoption," this did not constitute duress).

[14] In addition, although not specifically required by statute, the form expressly stated the following: "I understand that there is no revocation period during which I may withdraw this consent, and that the consent is effective immediately upon my signing the consent."

relinquish their particular child, and do not do so under conditions of duress." Doe v. Clark, 318 S.C. 274, 277, 457 S.E.2d 336, 338 (1995) (Waller, J., dissenting).

The main reason this particular form is so crucial is because, under South Carolina law, there simply is no waiting period before a relinquishment of parental rights becomes effective. It is the Legislature, not this Court, that has made this pronouncement. "'The legal rules on the timing of consents are ultimately a compromise between the interest in protecting biological mothers from making hasty or ill-informed decisions at a time of great physical and emotional stress, and the interest in expediting the adoption process for newborns.'" Elizabeth J. Samuels, *Time To Decide? The Laws Governing Mothers' Consents To The Adoption Of Their Newborn Infants*, 72 Tenn. L. Rev. 509, 541 (2005) (citation omitted).

The Legislature has chosen to safeguard this difficult decision-making process with certain requirements regarding both the "form and content" of a consent or relinquishment form and the process employed at the actual signing of the form. See §§ 20-7-1700 & -1705. There are numerous other states that, unlike South Carolina, provide for various waiting and/or revocation periods.[15] Nonetheless, this Court simply is not empowered "to effect a change in the statutes enacted by the Legislature." State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000).

In other words, although it might seem unwise that under South Carolina law a biological parent does not have even a few days to retract such

[15] An interesting example is Vermont where a biological parent may not even execute a relinquishment until at least 36 hours after the baby is born and then may revoke the relinquishment within 21 days after the relinquishment was executed. See Vt. Stat. Ann. § 2-404(a) (2002); see generally, Cynthia Ellen Szejner, Note, *Intercountry Adoptions: Are The Biological Parents' Rights Protected?*, 5 Wash. U. Global Stud. L. Rev. 211, 214 & n.24 (2006) (where the author notes the "length of time that adoption statutes allow for a birth parent to revoke consent to the adoption varies among the States" and also cites 39 different state statutes, most of which have a time period during which consent may be revoked without a showing of fraud or duress).

an important decision as relinquishing one's rights to her own child, this Court may not "second guess the wisdom or folly of decisions of the Legislature." Id. at 121, 529 S.E.2d 20, 27 (citing Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996)).

The Legislature has set the parameters for adoption. Thus, in order to have her consent to adoption withdrawn, McCann was required to prove her "relinquishment was given involuntarily or was obtained under duress or through coercion." § 20-7-1720. Because it is my opinion McCann did not make such a showing, I would reverse the family court's order revoking McCann's consent to the adoption.

# The Supreme Court of South Carolina

RE: Amendment to Rule 30 of the Rules for Lawyer Disciplinary Enforcement

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ORDER

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Pursuant to Article V, §4 of the South Carolina Constitution, the Rule 30 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413, SCACR, is amended to add the following:

> **(h) Failure to Comply.** A disbarred or suspended lawyer who fails to comply with the requirements of this rule may be held in criminal or civil contempt by the Supreme Court. Further, if a disbarred or suspended lawyer fails to timely surrender the certificate to practice law or to timely file the affidavit as required by sections (f) and (g) of this rule, the time before the disbarred or suspended lawyer is eligible to seek reinstatement under Rules 32 or 33, RLDE, shall not begin to run until the certificate and affidavit are actually received by the Clerk of the Supreme Court.

This amendment shall be effective immediately. It shall apply to lawyers who are disbarred or suspended on or after the date of this order.

Further, for lawyers who are disbarred or suspended before the date of this order and have not surrendered their certificate to practice law or filed the affidavit, they must surrender the certificate and/or file the affidavit

within thirty (30) days of the date of this order. If they fail to do so, the time before they are eligible to seek reinstatement under Rules 32 or 33, RLDE, shall be tolled and shall not begin to run again until their certificate and/or affidavit are actually received by the Clerk of this Court.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

March 25, 2008

# The Supreme Court of South Carolina

In the Matter of William Robert Witcraft, Jr., Respondent.

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ORDER

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The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the suspension.

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

IT IS FURTHER ORDERED that Michael A. Scardato, Esquire, is hereby appointed to 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. Scardato shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Scardato 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.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Michael A. Scardato, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Michael A. Scardato, 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. Scardato's office.

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

s/ James E. Moore J.
FOR THE COURT

Greenwood, South Carolina

March 27, 2008

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Ex Parte:

Brandon Smith, as Personal Representative of the Estate of Tracy Smith, Deceased, Appellant,

v.

Auto-Owners Insurance Company, Respondent,

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In Re:

Lewis Lesesne Scott, Plaintiff,

v.

Wayne K. McGraw, Jr., Defendant.

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Opinion No. 4363
Submitted December 1, 2007 - Filed March 31, 2008
Formerly Unpublished Opinion No. 2008-UP-004
Submitted December 1, 2007 – Filed January 2, 2008
Withdrawn, Subsituted and Refiled March 31, 2008

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Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

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**AFFIRMED**

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Daniel Lawrence Prenner, of Charleston, for Appellant.

Robert Eric Davis, of Spartanburg, for Respondent.

**CURETON, A.J.:** In this action to recover under a policy of underinsured motorist coverage, the Estate of Tracy Smith (the Estate) argues the statutory definition of "insured" does not restrict an insured from having more than one household for purposes of insurance coverage. We affirm.[1]

## FACTS

Ernest and Brenda Smith (collectively the Smiths) purchased land in Spartanburg County and established a residence there (the Spartanburg County home) in the 1970s. Later, the Smiths subdivided some of the acreage and deeded ownership of ten acres to each of their four sons. Ernest retained, in his name alone, ownership of this home and the land immediately surrounding it. In 1989, while still living at the Spartanburg County home, the Smiths purchased a second home in Laurens County (the Laurens County home).

The Smiths lived at the Spartanburg County home, periodically visiting the Laurens County home as their "summer home." When Brenda retired in

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

November of 1999, she moved to the Laurens County home. While he visited his wife in Laurens County on occasion, Ernest continued to work full-time and lived at the Spartanburg County home. Ernest retired in March of 2003 and moved to the Laurens County home with Brenda. However, Ernest continued to work part-time in Spartanburg County after his retirement. Ernest occasionally stayed in the Spartanburg County home when working and kept some personal items and clothing there. Ernest did not have his driver's license updated to reflect his Laurens County address. However, Ernest stated he "considered [his] household after March 2003 to be with [his] wife" at the Laurens County home.

Tracy Smith was the Smiths' 42-year-old son. In May of 2004, Tracy was living in the Spartanburg County home. He would occasionally visit his parents at the Laurens County home, but he did not live there. On May 24, 2004, Tracy was a passenger in an automobile owned and driven by Wayne K. McGraw, Jr. McGraw's vehicle collided with Lewis Lesesne Scott's vehicle, and Tracy was killed in the accident. Tracy had no automobile insurance at the time of his death.

At the time of Tracy's death, Ernest owned and paid taxes on the Spartanburg County home. He did not maintain insurance on that home. The Smiths insured their automobiles through Auto-Owners Insurance Company (Auto-Owners). The automobile insurance policy listed the Laurens County home as the Smiths' residence.

After the accident, Scott sued McGraw. Tracy's son, Brandon Smith, intervened on behalf of the Estate and subsequently joined Auto-Owners as a defendant. Scott and McGraw settled with each other and with the Estate and are not parties to this appeal. The Estate and Auto-Owners submitted the issue of "whether Tracy Smith qualifies as an insured under Ernest and Brenda Smith's underinsured motorist coverage" to the trial court for determination. In an order dated September 28, 2006, the circuit court ruled Tracy Smith was not an insured party under his parents' policy. This appeal followed.

## STANDARD OF REVIEW

The determination of coverage under an insurance policy is an action at law. Nationwide Mut. Ins.Co. v. Prioleau, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004); see also Kizer v. Kinard, 361 S.C. 68, 71, 602 S.E.2d 783, 785 (Ct. App. 2004) (determination of whether underinsured motorist coverage applies is an action at law). In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). We will not disturb the trial court's findings of fact unless those findings are "wholly unsupported by the evidence or controlled by an erroneous conception or application of the law." Gordon v. Colonial Ins. Co. of Cal., 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct. App. 2000).

The determination of resident relative status is a question of fact, and thus, we will not disturb the circuit court's ruling if the record contains any evidence supporting it. Id. at 155, 536 S.E.2d at 378.

## LAW/ANALYSIS

Estate argues the circuit court erred in ruling that Tracy Smith was not an insured resident of his parents' household. We disagree.

In South Carolina, the definition of "insured" includes "relatives" of the named insured and his or her spouse, as long as those relatives are "resident[s] of the same household." S.C. Code Ann. § 38-77-30(7) (2002). In this case, no party disputes that Tracy was a relative of the Smiths. A determination of whether Tracy qualified as an insured under his parents' policy necessarily requires an examination and a comparison of where Tracy and each of the named insureds resided. The circuit court engaged in factfinding concerning Ernest and Tracy's presence at both the Spartanburg County and Laurens County homes and ruled Tracy did not reside in the same household as the Smiths. Therefore, because neither party disputed Tracy lived at the Spartanburg County home, the circuit court's order implicitly ruled that Ernest resided in the Laurens County household.

Section 38-77-30(7) of the South Carolina Code defines "insured" to include both the insured person or persons named in a policy and "while resident of the same household, the spouse of any named insured and relatives of either." No statute provides guidance concerning whether an insured may maintain more than one household simultaneously. Although the courts have contemplated the meaning of "resident relative" on numerous occasions,[2] the issue of whether an insured may reside in multiple households simultaneously is one of first impression. Our task here is limited to determining whether facts in the record supported the circuit court's finding the Smiths and Tracy did not reside in the same household. Consequently, we do not reach the issue of whether an insured may reside in multiple households.

The circuit court found the evidence conclusively established Tracy and his parents resided in two separate households in May 2004. To reach this conclusion, the circuit court necessarily undertook a two-prong analysis. First, the circuit court determined where each of the Smiths resided. The record reflects that in May 2004, Tracy's only residence was the Spartanburg County home. Tracy occasionally visited his parents at the Laurens County home but did not live there. In May 2004, Brenda's only residence was the Laurens County home. In May 2004, Ernest lived at the Laurens County home with Brenda, having moved there from the Spartanburg County home when he retired in March of 2003. However, Brenda testified that Ernest kept clothes, toiletries, and other items at the Spartanburg County home for his personal use when he stayed there following his retirement. Ernest maintained duplicate items at the Laurens County home.

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[2] See, e.g., Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 340, 157 S.E.2d 633, 637 (1967) (asserting nephew who actively participated in uncle's household activities and who did not intend to live elsewhere was a resident relative of uncle); Auto Owners Ins. Co. v. Horne, 356 S.C. 52, 68, 586 S.E.2d 865, 874 (Ct. App. 2003), cert. denied August 4, 2004 (finding child of divorced parents was not a resident relative of her non-custodial parent's household); Auto Owners Ins. Co. v. Langford, 330 S.C. 578, 584, 500 S.E.2d 496, 499 (Ct. App. 1998) (holding grandchild and great-grandchild who occasionally visited named insured were not "insureds").

The conflict in this matter revolves around the time Ernest spent at the Spartanburg County home, the time Ernest resided in the Laurens County home, and his intention with respect to these homes and his son. Because the record supports the assertions that Ernest resided in both homes, the circuit court was required to proceed to the second prong of its analysis.

In the second prong of the analysis, the circuit court applied the Buddin standard of "one, other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently." 250 S.C. at 339, 157 S.E.2d at 636. We note that in 1996, our supreme court adopted a similar but somewhat more stringent approach to determining residency. State Farm Fire & Casualty Co. v. Breazell, 324 S.C. 228, 478 S.E.2d 831 (1996). Under the Waite test enunciated in Breazell, a person resides in a household with another if he or she:

> 1) liv[es] under the same roof; 2) in a close, intimate, and informal relationship, and 3) where the intended duration of the relationship is likely to be substantial, where it is consistent with the informality of the relationship and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their conduct in reliance thereon.

Breazell, 324 S.C. at 231, 478 S.E.2d at 832 (citing A.G. by Waite v. Travelers Ins. Co., 331 N.W.2d 643 (Wis. Ct. App. 1983)).

In applying the Waite test to Ernest's two possible households, we agree with the circuit court that Ernest was a resident of the Laurens County home and was a temporary, transient visitor to the Spartanburg County home. Waite requires residents to "liv[e] under the same roof . . . in a close, intimate, and informal relationship" that anticipates both a substantial length and some durability. Id. Brenda and Ernest lived in the Laurens County home together as husband and wife, thus satisfying the first two factors.

Ernest considered his home to be with Brenda at the Laurens County home. His purpose in leaving that home was to work, and he returned there when not working. Ernest and Brenda's living arrangements in the Laurens County home also satisfied the third factor, that the relationship be lengthy and durable. Using the Laurens County address, Ernest and Brenda purchased homeowners and automobile insurance, filed joint tax returns, received mail, and paid bills. These acts clearly satisfy the final factor, confirming Ernest's residency at the Laurens County home under Waite.

By contrast, Ernest's presence at the Spartanburg County home does not appear to satisfy all of the Waite factors for residency. Ernest and Tracy did indeed live together, at least for part of each week. Ernest's work schedule necessitated his visits to Spartanburg County. Depending upon his employer's needs, he would be in Spartanburg between two and four days per week. With regard to the second Waite factor, Ernest and Tracy appear to have enjoyed a "close, intimate, and informal relationship," given that they were father and son and the record does not indicate that their living arrangement included any restrictions or formal division of household responsibilities. However, this relationship fails to satisfy the third factor. No evidence in the record indicates Ernest and Tracy intended their living arrangement to be substantially long or durable or that they treated their living arrangement as anything but a matter of temporary convenience. Ernest and Tracy did not insure their automobiles together or share the responsibilities of taxes or household bills. Ernest did not insure the Spartanburg County home at all. Although Ernest may have spent up to four nights per week in the Spartanburg County home, it appears he stayed there merely as a matter of convenience and in lieu of renting a hotel room.

Therefore, the circuit court did not err in finding Ernest had only one household in Laurens County that he shared with his wife. His use of the Spartanburg County home did not constitute maintenance of a second household, and Tracy did not qualify as an insured under his parents' automobile insurance coverage.

## CONCLUSION

The circuit court did not err in finding Tracy did not qualify as an insured under his parents' automobile insurance coverage. The record indicates Tracy lived in Spartanburg County and his parents lived in Laurens County. Further, Ernest's occasional visits to the Spartanburg County home did not constitute establishment of a household with Tracy. Therefore, Tracy was not an insured under his parents' policy. Accordingly, the order of the circuit court is

**AFFIRMED.**

**HUFF and PIEPER, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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In the Matter of the Care and Treatment of James P. Ettel, Appellant,

v.

The State of South Carolina, Respondent.

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Appeal From Richland County
L. Casey Manning, Circuit Court Judge

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Opinion No. 4364
Submitted March 3, 2008 – Filed April 1, 2008

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**AFFIRMED**

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Assistant Appellate Defender Lanelle C. Durant, South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R. J. Shupe, and Assistant Attorney General R. Westmoreland Clarkson, all of Columbia, for Respondent.

**WILLIAMS, J.:** James Ettel (Ettel) claims the circuit court erred in permitting an expert to testify at his commitment trial regarding prior sexually-related offenses that did not result in convictions and to a prior murder conviction. Ettel argues the prejudicial nature of this evidence substantially outweighed its probative value. We affirm.

## FACTS

On July 30, 1990, Ettel pled guilty to criminal sexual conduct in the first degree and assault and battery of a high and aggravated nature. Ettel was sentenced to concurrent terms of thirty years and ten years, respectively.

Ettel's conviction stemmed out of a sexual assault in which he bound and gagged the victim, choked and beat her, and then forced the victim to perform oral sex on him after raping her. Ettel had known the victim on a casual basis for two months prior to the attack as he frequented a club where she worked as a bartender. The night of the attack, Ettel told the victim he was too intoxicated to drive home and asked her for a ride to his apartment. Once she entered his apartment, Ettel forced her onto the couch and stated he would cut her into pieces if she did not remain silent. Ettel drove the victim back to his car the next morning after she told him she would not tell the police.

Before Ettel's release from prison for the criminal sexual conduct conviction, the State filed a petition for Ettel's civil commitment pursuant to the Sexually Violent Predator Act[1] (SVP Act). The circuit court found probable cause to believe Ettel was a sexually violent predator and ordered a probable cause hearing. At the hearing, the circuit court ordered Ettel to undergo a psychiatric evaluation, which was performed by Dr. Pamela Crawford, M.D., (Dr. Crawford) a forensic psychiatrist with the Department of Mental Health.

During Dr. Crawford's interview with Ettel, Ettel admitted to three sexual offenses that did not result in convictions. The first offense occurred when Ettel worked at an appliance store in Michigan and grabbed a

[1] S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2007).

customer's breasts and attempted to kiss her. He was charged with assault and intent to commit gross indecency and kidnapping, but he was found not guilty. The second offense pertained to an incident when Ettel kidnapped a hitchhiker in Montana, took her to his house against her will, and tried to grope her breasts. He was charged with sexual misconduct, but the charges were subsequently dropped. The third offense occurred at an animal hospital in Montana when Ettel attempted to sexually assault a woman who worked at the hospital. He was charged with sexual intercourse without consent, but these charges were dropped when he was extradited to South Carolina for the sexual assault on the bartender. Based on Dr. Crawford's evaluation, she concluded Ettel suffered from the mental abnormality of paraphilia, not otherwise specified, and had a history of extreme violence, which made it likely he would engage in acts of sexual violence if not confined for long-term control, care, and treatment under the SVP Act.

Before trial, Ettel's counsel moved to exclude any testimony regarding the sexual offenses that did not result in convictions as well as evidence regarding Ettel's prior murder conviction.[2] Dr. Crawford testified in camera about the evidence supporting her opinion, and the circuit court denied Ettel's motion to exclude the evidence. At trial, Dr. Crawford testified about her conclusions from Ettel's evaluation and discussed the disputed evidence to support her findings. Based on the evidence, the jury found Ettel satisfied the definition of a sexually violent predator, and Ettel was sentenced to long-term commitment under the SVP Act.

## LAW/ANALYSIS

Ettel claims the circuit court committed reversible error when it permitted Dr. Crawford to testify about his previous sexual offenses that did not result in convictions and his previous murder conviction. Ettel claims the

[2] In 1962, Ettel was convicted in Michigan of murdering his girlfriend's mother with a pair of sewing scissors. Dr. Crawford testified the arresting officers told her the mother's shirt was pulled above the mother's head, and Ettel allegedly told the officers he tried to sexually assault the mother before he killed the mother. No incident report was available for Dr. Crawford to substantiate the officers' testimony.

prejudicial effect of the evidence substantially outweighed its probative value. We disagree.

The admission of evidence is within the discretion of the circuit court and will not be reversed absent an abuse of discretion. In re Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003). Generally, all relevant evidence is admissible. Rule 402, SCRE; State v. Pittman, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). Evidence is relevant if it tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE. However, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Rule 403, SCRE.

Under the SVP Act, a sexually violent predator is defined as a person who (a) has been convicted of a sexually violent offense and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. S.C. Code Ann. § 44-48-30(1)(a), (b) (Supp. 2007).

After the State files a petition to request a probable cause hearing, the circuit court must make a probable cause determination as to whether the person is a sexually violent predator. S.C. Code Ann. §§ 44-48-70, -80(A) (Supp. 2007). If the probable cause determination is made, the person must undergo an evaluation by a court-approved expert as to whether the person is a sexually violent predator. S.C. Code Ann. § 44-48-80(D) (Supp. 2007). Experts are allowed to have "reasonable access to the person for the purpose of the examination, as well as access to all *relevant* medical, psychological, *criminal offense*, and disciplinary records and reports." S.C. Code Ann. § 44-48-90 (Supp. 2007) (emphasis added).

These offenses can include both convictions and offenses not resulting in convictions as long as they are relevant to the determination of whether a person is a sexually violent predator. See White v. State, 375 S.C. 1, 9, 649 S.E.2d 172, 176 (Ct. App. 2007) (holding past convictions and prior offenses not resulting in convictions that bear on whether a person is a sexually violent predator are admissible in a SVP case). Because a "person's dangerous propensities are the focus of the SVP Act," consideration of "[p]ast criminal

history is therefore directly relevant to establishing 44-48-30(1)(a)," which in turn bears directly on whether one suffers from a mental abnormality under section 44-48-30(1)(b). In re Corley, 353 S.C. at 206-07, 577 S.E.2d at 453-54.

The circuit court properly admitted Dr. Crawford's testimony regarding Ettel's prior sexual offenses as well as his prior murder conviction. The prior sexual offenses and the murder conviction were relevant because Dr. Crawford relied on them in evaluating Ettel's need for and likelihood of success in treatment as well as his ability to control his behavior in the future. See State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (holding admission of motion did not violate defendant's due process rights because it was relevant in evaluating defendant's need for and probability of success in treatment and was not unfairly prejudicial as it was one of several sources on which the expert based her opinion); see also Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Looking at Ettel's prior sexual offenses established a "pattern of behavior of sexual assaults," and this pattern was significant because as Dr. Crawford stated, "[F]uture behavior [can only be predicted] based on past behavior." Additionally, the murder conviction was relevant due to the crime's level of violence. Dr. Crawford stated, "Whether or not [the murder] was a sexual crime . . . it goes to [Ettel's] propensity to commit further violent crimes." Based on the officers' recollection of the crimes, Dr. Crawford learned "there may have been a sexual motivation in [the] crime," which would aid in her diagnosis.

Further, the possibility of unfair prejudice did not substantially outweigh the probative value of the testimony. Regarding its probative value, Dr. Crawford used the information to develop her "opinion in terms of [Ettel] not being able to control his behavior" and to diagnose Ettel with paraphilia. As for the testimony's possible prejudice, the prior sexual offenses not resulting in convictions as well as the murder conviction were not the only sources of Dr. Crawford's diagnosis. Dr. Crawford testified that even without considering this evidence, her opinion as to whether Ettel had a

mental abnormality or personality disorder would not change. Dr. Crawford stated she additionally relied on, among other sources, Ettel's past criminal sexual conduct conviction, Ettel's statements during her extensive clinical forensic interviews with him, interviews with individuals close to Ettel, administrative records, Ettel's prior psychological evaluation, and his record while in a sex offender treatment program.

Because Dr. Crawford's testimony regarding Ettel's prior sexual offenses not resulting in convictions and previous murder conviction was relevant and the probative value outweighed any prejudicial effect, the circuit court acted within its discretion and properly admitted the testimony. See Gaster, 349 S.C. at 557, 564 S.E.2d at 94 (finding disputed evidence was relevant and its probative value outweighed any prejudicial effect such that circuit court properly admitted the evidence within its discretion).

## CONCLUSION

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

**AFFIRMED.**[3]

**HUFF and KITTREDGE, JJ., concur.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Isiah James, Jr., Appellant,

v.

South Carolina Department of Probation, Parole, and Pardon Services (SCDPPPS), Respondent.

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Appeal From Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

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Opinion No. 4365
Submitted February 1, 2008 – Filed April 1, 2008

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**AFFIRMED**

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Isiah James, Jr., Pro se, for Appellant.

J. Benjamin Aplin, of Columbia, for Respondent.

**HEARN, C.J.:** Isiah James, Jr. appeals the Administrative Law Court's (ALC) dismissal of his appeal for lack of subject matter jurisdiction. We affirm.

## FACTS

On June 18, 1979, James pled guilty to two counts of voluntary manslaughter and armed robbery. The trial judge sentenced him to two, thirty-year consecutive terms of imprisonment for each count of voluntary manslaughter, and a twenty-five-year consecutive term of imprisonment for armed robbery.

James first became eligible for parole in 1988, and the South Carolina Board of Probation, Parole and Pardon Services (Board) rejected his application. Over the years, the Board rejected James' parole several more times. In 2005, James filed a request for the Board to reconsider his most recent parole rejection. In this request for reconsideration, James asserted his due process rights were violated because only five of the seven board members were present for his hearing. The Board denied his request for rehearing, finding "the reasons stated in [James'] request did not affect the decision of the Parole Board." Thereafter, James appealed to the ALC, asserting once more that his due process rights were violated. The ALC dismissed his appeal due to a lack of subject matter jurisdiction. This appeal followed.

## STANDARD OF REVIEW

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

## LAW/ANALYSIS

James argues the ALC erred in dismissing his appeal on the grounds that it lacked subject matter jurisdiction. We agree that the ALC has subject matter jurisdiction over all inmate grievances, but also affirm that James' appeal should have been dismissed.

Our supreme court recently offered clarification of Al-Shabazz v. State[1] and its progeny as to an ALC's subject matter jurisdiction in Furtick v. South Carolina Department of Corrections, 374 S.C. 334, 649 S.E.2d 35 (2007).[2] In Furtick, the court reemphasized its clarification of jurisdiction in Slezak v. South Carolina Dept. of Corrections, stating "the ALC has jurisdiction over **all** inmate grievance appeals that have been properly filed; the ALC however, is not required to hold a hearing in every matter." Id. at 340, 649 S.E.2d at 38 (emphasis in original) (explaining Slezak v. South Carolina Dept. of Corrections, 361 S.C. 327, 605 S.E.2d 506 (2004)). The court continues that the ALC could summarily dismiss any appeal where the inmate's grievance does not implicate a state-created liberty or property interest. Id.

Although the ALC had subject matter jurisdiction to hear James' claim, his appeal does not implicate a state created liberty or property interest and therefore dismissal was appropriate. In determining the existence of a liberty interest, "an inmate has the right of review by the [ALC] after the final decision that he is ineligible for parole, but . . . a parole-eligible inmate does not have the same right of review after the decision denying parole . . . This distinction stems from the fact that parole is a privilege, not a right." Sullivan v. Dep't of Corrections, 355 S.C. 437, 586 S.E.2d 124 n.4 (2003) (emphasis in original). In the case before us, the Board denied James' parole, but did not permanently deny his eligibility; therefore his grievance does not implicate a liberty or property interest.

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[1] Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

[2] We acknowledge that the ALC's Order of Dismissal was filed July 19, 2006, and was therefore decided without the benefit of Furtick v. South Carolina Department of Corrections, 374 S.C. 334, 649 S.E.2d 35 (2007).

Moreover, the inquiry into whether an inmate is entitled to review of a parole board's final decision is based on whether the inmate "has a liberty interest in gaining access to the parole board." Furtick v. S.C. Dep't of Probation, Parole & Pardon Services., 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003). As previously illustrated, James' appeal does not involve any liberty interest, and he consequently has no right to a review of the Board's decision.

James next asserts that because the Parole Board conducted its hearing with only five of the seven members present and voting, it denied him a right to a hearing altogether. We disagree.

James submitted this argument to the ALC on appeal, but the ALC's order did not address the issue in its order. Thereafter, James made no Rule 59(e), SCRCP, motion to alter or amend the proposed order, and under this court's general preservation rules, this argument would not be preserved for our review. See Great Games, Inc. v. South Carolina Dep't of Revenue, 339 S.C. 79, 529 S.E.2d 6 (2000) (stating where a party raises an issue, the trial court fails to rule upon the issue, and the party fails to raise the court's omission by way of a Rule 59 motion, the issue is not ruled upon and, therefore, not preserved on appeal). We note the issue of whether a Rule 59(e) motion is necessary, or even cognizable to an ALC is one that has not been decided in South Carolina. Pursuant to this court's request for certification, this precise issue is now pending before the South Carolina Supreme Court. Assuming without deciding that a Rule 59(e) motion is not necessary to an ALC in order to preserve an issue on appeal, and in the interests of judicial economy, we will address the merits of James' contention.

Chapter 21 of Title 24 of the South Carolina Code (2007) provides the statutory framework for the Board of Probation, Parole, and Pardon Services. However, Chapter 21 does not specify the exact number of board members that must be present for a parole hearing. The chairperson of the Parole Board may direct the board members to meet in three-person panels, and any unanimous vote of a panel is considered a final decision of the board. S.C. Code Ann. § 24-21-30(A) (2007). In order to grant parole of a violent crime

as defined in Section 16-1-60, under which James' guilty pleas to voluntary manslaughter and armed robbery fall, a two-thirds majority vote of the full board is required. S.C. Code Ann. § 24-21-30(B) (2007); See also S.C. Code Ann. § 16-1-60 (2007). Conversely, the statute does not require a certain number of board members to be present in order to deny parole for someone convicted of a violent crime.

"In the absence of any statutory or other controlling provision, the common-law rule that a majority of the whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum." Garris v. Governing Bd. of the State Reinsurance Facility, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998). Here, five members of the Board were present, and each voted to deny James' parole. A unanimous and majority decision was reached by a quorum in this hearing; thus James' contention is without merit.

## CONCLUSION

Although we agree the ALC has subject matter jurisdiction over all inmate grievances, no liberty interest was implicated in this case and James was not entitled to an appeal. Consequently, the ALC did not err in dismissing his case. The ALC's order is accordingly

**AFFIRMED.**[3]

**PIEPER, J., and GOOLSBY, A.J., concur.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Allan S. Terry — Appellant,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, and South Carolina Department of Archives and History — Respondents.

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Appeal From Coastal Zone Management Appellate Panel
Office of Ocean and Coastal Resource Management
South Carolina Department of Health and Environmental Control

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Opinion No. 4366
Submitted March 3, 2008 – Filed April 3, 2008

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**AFFIRMED**

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C. C. Harness, III, of Mt. Pleasant, for Appellant.

Carlisle Roberts, Jr., of Columbia, Evander Whitehead, of Charleston, and

James S. Chandler, Jr., of Pawley's Island, for Respondents.

**HEARN, C.J.:** Allan S. Terry (Landowner) appeals the decision of the Coastal Zone Management Appellate Panel (Appellate Panel) affirming the order of the Administrative Law Court (ALC) which upheld the Office of Ocean and Coastal Resource Management's (OCRM) denial of his application for a recreational dock permit. We affirm.

## FACTS

In June 1991, Tamsburg Properties (Developer) applied to the Coastal Council for a permit to install ten private docks, one community dock, and a community boat ramp within Bakers Landing, a proposed residential subdivision in Dorchester County along the shoreline of the Ashley River.[1] Developer's application to build multiple docks generated controversy among the interested parties, and extensive discussions took place involving OCRM staff, Developer, and public agencies. A public hearing on the application was also held. During this same time, planning was underway to create a Special Area Management Plan (SAMP) to conserve the natural and historic character of the Ashley River corridor, an area that now includes the Bakers Landing subdivision.

On February 6, 1992, Coastal Council's Permitting Committee issued a permit to Developer authorizing installation of eight private docks and one community dock. The Coastal Council conditioned the permit upon Developer's agreement to the following conditions: a community boat ramp would not be built; the community dock would not be used for permanent moorage; pier heads would not be located over wetlands vegetation; and no additional docks or modifications to permitted docks would be allowed within the boundaries of the subdivision. Because there was no appeal of

[1] The South Carolina Coastal Council was subsequently incorporated into OCRM within the Department of Health and Environmental Control (DHEC).

OCRM's issuance of this permit to Developer, it became a final agency decision.

In 1998, Landowner purchased a lot in Bakers Landing that bordered a tributary of the Ashley River.[2] In 2002, he applied for a permit to construct a dock. Based on the pre-existing, special conditions permit OCRM issued to Developer in 1992, OCRM denied Landowner's permit application in a letter dated August 9, 2002, which stated:

> OCRM, in its 1991 review of a multiple dock application made by the developers of Bakers Landing, Tamsberg Properties (91-3D-185-P), conditionally limited the development to 8 private docks and 1 community use dock, to which [D]eveloper agreed. The 1991 general dock permit served as the Dock Master Plan for all docks within the Bakers Landing Development, and consequently must be used as a framework for subsequent permitting decisions. The [Landowner's] application goes against the terms of the [Developer's] permit and is a piecemeal attempt to permit additional docks where OCRM has already acted. Therefore, OCRM staff has determined that this application must be denied.

Landowner requested a contested case hearing before the Administrative Law Court (ALC).[3] The ALC upheld OCRM's denial of the

[2] In documents Landowner filed with his dock permit application, he stated he paid the fair market value of $65,000 for his lot in 1998.

[3] The South Carolina Department of Archives and History intervened in support of OCRM's denial of Landowner's dock permit, contending "the proposed dock would cause undue adverse impacts on the historical and cultural values of the Ashley River Historic District, would be inconsistent with the Ashley River Special Area Management Plan, and thus would violate the Coastal Zone Management Act and the OCRM regulations."

permit application, and Landowner appealed to the Appellate Panel. The Appellate Panel found no error of law and held that substantial evidence in the record supported the ALC's decision. This appeal followed.

## STANDARD OF REVIEW [4]

In administrative law cases, the ALC serves as the fact-finder and is not restricted by the findings of the administrative agency. Dorman v. Dep't of Health & Envtl. Control, 350 S.C. 159, 164, 565 S.E.2d 119, 122 (Ct. App. 2002); S.C. Code Ann. § 1-23-600(A)-(B) (Supp. 2007). An aggrieved party may appeal the ALC's decision to the agency's Appellate Panel; however, the Panel's review is confined to the record and is governed by South Carolina Code section 1-23-610(C). Accordingly, the Appellate Panel can reverse the ALC's decision if it determines the ALC's findings are not supported by substantial evidence contained in the record or are affected by an error of law. Dorman at 165, 565 S.E.2d at 122; see also Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (stating the ALC's findings are supported by substantial evidence if, looking at the record as a whole, there is evidence from which reasonable minds could reach the same conclusion the ALC reached).

After an aggrieved party has exhausted all administrative remedies, the party is entitled to judicial review by the South Carolina Court of Appeals. See S.C. Code Ann. §1-23-380(A) (Supp. 2007). Judicial review is confined to the record and is governed by South Carolina Code section §1-23-380 (A)(5), which provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the

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[4] The procedural posture of this case is unique because the ALC and the Appellate Panel heard Landowner's appeal prior to the passage of 2006 Act No. 387, which was enacted to provide a uniform procedure for hearing contested cases and appeals from administrative agencies. Act 387 became effective on July 1, 2006 and amended the South Carolina Code sections referenced in this opinion. See 2006 Act No. 387.

> evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. [However,] [t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

## LAW/ANALYSIS

### A. 1992 Permit as a Basis for OCRM's Denial

Landowner argues the basis for OCRM's denial of his application for a dock permit was improper. We disagree.

First, Landowner contends OCRM improperly denied his application because regulations controlling Dock Master Plans (DMPs) did not exist when OCRM issued a permit to Developer in 1992. Richard Chinnas, who served as Coastal Council's permitting coordinator in 1992, testified the Council began implementing a comprehensive approach to dock master planning in 1987 under its general permitting authority. At that time, the Coastal Council authorized multiple dock permits, which it characterized as "DMPs," although the process governing DMPs was not formalized until 1993. Chinnas testified the Coastal Council's permitting authority allowed it to issue Developer a permit prohibiting installation of additional docks and

the permit continued to be enforceable, whether it was called a DMP or a general permit.[5]

Our review of the record shows substantial evidence supports the ALC's finding that OCRM properly denied Landowner's permit application based on the special provisions contained in the permit the Coastal Council issued to Developer in 1992.

## B. Evaluation of Permit Application on its Merits

Landowner argues OCRM failed to consider his permit application on its individual merits and contends Developer's permit expired in 1995. We disagree.

OCRM's letter of August 9, 2002 stated the basis for denying Landowner's permit application was the 1992 permit issued to Developer, which was conditioned upon there being no additional docks in the subdivision. OCRM's letter also indicated the statutes and regulations it relied upon in denying Landowner's application.

The ALC's order stated its decision to uphold OCRM's denial of the permit was based on the unique facts of this case, and upon:

> overriding considerations flowing from Regs. 30-11(C)(1) (the need to consider the extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area) and Regs. 30-11(C)(2) (the need to consider the extent to which the overall plans and designs can be submitted together and evaluated as a whole, rather than submitted piecemeal and in a fragmented way which limits comprehensive review).

[5] In our review of the record, we note the Coastal Council's 1991 minutes referred to its consideration of a "dock master plan" for Bakers Landing.

The ALC concluded granting Landowner's permit application was "simply incompatible" with the consideration owed these regulations.

Chinnas testified the Coastal Council issued dock permits containing special conditions when it was possible to review all potential impacts at the time a new development was proposed in order to avoid future "piecemeal" applications. He stated this type of permit "gave us the opportunity to cumulatively review the whole project, essentially lock the project in" when the proposed development was "still a piece of raw land." Chinnas also testified the permit's expiration date governs only the construction period and the conditions remain enforceable until they are amended.

We find substantial evidence in the record supports the ALC's finding that OCRM reviewed Landowner's application on its individual merits, yet within the context of the 1992 permit prohibiting additional docks.

## C. Ashley River SAMP

On appeal to this court, Landowner asks us to consider the specific policies of the Ashley River SAMP.[6] However, OCRM's letter denying Landowner's permit application, the ALC's decision, and the Appellate Panel's ruling each stated the permit's denial was based upon the original dock plan issued to Developer in 1992 and on consideration of the applicable regulations; the orders did not address the SAMP policies. Accordingly, this issue is not preserved for our review. See Brown v. S.C. Dep't. of Health and Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the agency are not preserved for judicial consideration. Likewise, issues not raised to and ruled on by the ALJ are not preserved for appellate consideration.").

[6] On February 14, 1992, this section of the river was designated as being within the SAMP. Chinnas testified the Coastal Council's decision to issue a special conditions permit to Developer was not driven by SAMP and, in fact, had SAMP been the driving factor in its decision, the resulting permit would have granted only one dock.

## D. Subsequent Events

Landowner contends the special conditions contained in OCRM's 1992 permit are "rendered moot by multiple amendments." We disagree.

A review of the record shows OCRM had allowed some minor changes to be made to the nine docks constructed under Developer's 1992 permit; these changes include the addition of safety rails, navigation lights, and benches to the existing docks. Yet, the record also shows OCRM denied several applications to modify existing docks, and some dock owners had modified their docks without seeking a permit.

Chinnas testified the ALC authorized one additional dock under a consent order to resolve confusion related to the placement of a joint dock under the 1992 permit. However, he also stated the ALC's consent order did not constitute a modification to the permit's special condition prohibiting additional docks.

The ALC's order expressly addressed both subsequent modifications to existing docks and the ALC's consent order authorizing one additional dock; however, the ALC dismissed Landowner's argument as unpersuasive:

> I have given consideration to the fact that modifications have occurred to the existing docks and that at least one dock has been added beyond the nine originally authorized. However, the addition of handrails to many docks has resulted from safety concerns and the other modifications have not been extensive. Further, only one new dock added since the original dock plan was issued was a dock which arose due to extenuating circumstances. Even that dock was not allowed until a consent order was executed through the ALC. Thus, there is no evidence of wholesale additions of docks to the subdivision. Accordingly, the denial of

> [Landowner's] dock is not inconsistent with the past practice of OCRM in Bakers Landing.

Chinnas testified Bakers Landing has ten waterfront lots that are currently restricted from building docks by Developer's 1992 permit. The Homeowner's Association stated in a letter to OCRM that if it granted Landowner's application "equity would require that all properties in Bakers Landing that border on the river or marsh should be granted permits upon application."

We agree with the ALC's conclusion that minor modifications to the nine permitted docks and a consent order allowing the addition of one dock during the fifteen years following issuance of Developer's permit is not sufficient to warrant alteration of the conditions OCRM placed on the 1992 permit.

## CONCLUSION

We find the final order of the ALC was unaffected by an error of law and that substantial evidence in the record supports its order upholding OCRM's denial of Landowner's application for a dock permit. Accordingly, the final order of the Appellate Panel is

**AFFIRMED.**[7]

**PIEPER, J., and CURETON, A.J., concur.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Jaleel V. Page, Appellant.

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

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Opinion No. 4367
Heard December 12, 2007 – Filed April 3, 2008

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**AFFIRMED**

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Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor I. McDuffie Stone, III, of Beaufort, for Respondent.

**HEARN, C.J.:** Jaleel V. Page appeals his convictions for conspiracy, attempted armed robbery, and possession of a pistol by a person under the age of 21. Page contends the circuit court erred in allowing the State to introduce evidence that Page's nontestifying co-defendant implicated Page in a statement to police where the statement did not fall into a hearsay objection and Page's counsel did not "open the door" to the admission of the statement. We affirm.

## FACTS

On March 16, 2003, Willie Cunningham was shot and killed near his home in York, South Carolina. Katrina Howard (Girlfriend) testified she had driven Page and Lamont McCollum to York, on the same day, to visit McCollum's friend, Lofton Garvin, who lived in the Hall Street Apartments.[1] Upon arriving in York, Page and McCollum exited the vehicle and gathered with approximately eight individuals in a park near the apartments while Girlfriend remained in the vehicle. Girlfriend testified she overhead the group discussing an argument that had occurred between Lofton and "a gentleman." This discussion continued for some time near Girlfriend's vehicle and also near a large tree and playground located near the park and the apartments. Girlfriend testified she left the apartments for fifteen or twenty minutes, during which time she went to a convenience store for a drink.

During this discussion, both Page and McCollum showed the group, which also included A.J. Williams, another co-defendant, a gun each was carrying. Williams testified the group consisted, among others, of himself, Page, McCollum, and Terrence McKnight, the fourth and final defendant in this case. The group was smoking marijuana and discussing "making a lick," which Williams testified was slang for "coming up on some extra money, doing something to come up with some extra money some way or somehow."

[1] Howard was McCollum's girlfriend and was pregnant with his child at the time of the incident; McCollum is a co-defendant in this case.

Rashad Simpson (Nephew), Cunningham's nephew, lived with Cunningham at the time of his murder in a trailer in or around the Hall Street Apartments. On the same afternoon, Nephew testified he walked to a friend's trailer in the same apartment complex. While en route, Nephew was approached by Page and McCollum, neither of whom he knew. Nephew testified Page and McCollum approached and asked Nephew about where they could buy marijuana. Nephew responded in the negative, and continued to walk to his friend's house, despite Page and McCollum's further attempts to get Nephew to stop. Although he testified he had briefly gone home to get something to eat and thus was not present for this encounter, Williams testified Page and McCollum told him they were "going to make a lick on [Nephew] right then and there but [Nephew] kept on walking."

Williams testified he reunited with Page, McCollum and McKnight after eating lunch. Thereafter, the group, led principally by McCollum and Page, concocted a plan to rob Nephew's trailer while he was away. McCollum indicated that if Williams and McKnight served as lookouts, they "would get a cut of whatever [McCollum and Page took] from [Nephew]'s house." Shortly thereafter, the group of four approached Nephew's trailer. McCollum and Page went directly to the porch, and Williams testified he and McKnight stood off to the side of the trailer.

Before McCollum and Page could go inside, Cunningham came to the door of his trailer. The two asked Cunningham where Nephew was, and then McCollum pulled his gun out and told Cunningham to "get down, get down." Williams testified the group had previously discussed what they would do if someone was in Nephew's trailer when they tried to rob it, and McCollum had told the others he would hold the person hostage while they robbed the trailer. Williams confirmed he and McKnight could see the entire encounter from their vantage point. Williams saw Cunningham reach for the gun, but McCollum "pulled back the gun and came back and shot him two times in the chest." All the while, Williams testified Page was standing "right beside [McCollum] with his hands in his pocket [sic]."

Meanwhile, Girlfriend testified when she returned from the convenience store, she saw McCollum, Page and "the boys that was with

[McCollum]," who she could not identify, already at the porch of Nephew's trailer. An argument ensued, and Girlfriend, who at the time was driving past Nephew's trailer, testified she saw the group "on the porch arguing and tussling or whatever and I saw [Page] pull out a gun and shoot [Cunningham]." Thereafter, both Girlfriend and Williams testified the group scattered in two different directions with McCollum and Page in the direction of Girlfriend's vehicle, while Williams and McKnight ran to Williams' trailer. Girlfriend drove the pair back to York before they went their separate ways. Nephew, who was still at his friend's house, received a phone call that Cunningham had been shot.

None of the four participants came immediately forward to the police. Instead, Williams was first caught on tape some nine months later describing Cunningham's death to a fellow inmate who was wearing a wire, while both were incarcerated on other charges. Williams thereafter gave a full statement to Detective Sara Robbins (Detective). Although Williams initially did not implicate McKnight, through several subsequent statements, Williams implicated himself, McKnight, McCollum and Page in Cunningham's murder.

At the time of his arrest, McKnight gave police an oral statement that was later memorialized in writing, as well as a second written statement implicating McKnight and the other co-defendants. Page made a pre-trial motion to suppress the statements implicating Page if McKnight chose not to testify, but the motion was denied. In the ensuing trial, a redacted version of McKnight's statement, replacing any mention of Page with "another guy" or the "other guy," was admitted into evidence over Page's objection. McKnight was present at the trial, but chose not to testify. McKnight's statements confirm that both McCollum and Page had guns on the day in question, and were interested in robbing Nephew's trailer. McKnight's statement indicated he did not see who shot Cunningham, but Williams told McKnight it was McCollum after the two had run away.

Detective testified at trial that leads were initially hard to come by in the case; however, Williams' statements to a fellow inmate, and later directly to the police "collaborated [sic] other leads that [the police] hadn't been able

to connect." On cross-examination, Page questioned Detective extensively about her investigation and the steps leading to the charges and ultimate arrests of Page, McCollum, and McKnight.[2] Page's cross-examination of Detective attempted to show how the State had very little evidence to link Page to the murder and attempted armed robbery. After Page finished, the State made a motion to admit McKnight's full and complete statement on the basis Page had opened the door to allow the unredacted evidence, because Page had questioned Detective's investigation. The circuit court agreed, and admitted McKnight's unredacted statement.

Thereafter, the jury found Page guilty of conspiracy, attempted armed robbery, and possession of a pistol by a person under the age of 21. Page was found not guilty of murder. This appeal followed.

## STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). In criminal cases, the appellate court sits to review errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). We are bound by the trial court's factual findings unless they are clearly erroneous. Id. at 388, 577 S.E.2d at 500-01.

## LAW/ANALYSIS

Page asserts the circuit court erred in allowing the State to introduce evidence that Page's nontestifying co-defendant implicated Page in a statement to police where the statement did not fall into a hearsay objection and Page's counsel did not "open the door" to the admission of the statement. We find no reversible error and affirm.

[2] Williams, as referenced above, was already in custody, and gave Detective several statements which led to the other defendant's arrests.

"The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). The introduction of a nontestifying co-defendant's statement which implicates a defendant violates a defendant's right to confrontation because no opportunity to cross-examine the co-defendant is presented. Bruton v. United States, 391 U.S. 123 (1968). Because the right to confrontation is so fundamental, limiting instructions are not an adequate substitute. Id.; See also State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) (recognizing that in Bruton, the Supreme Court held that a defendant's rights under the Confrontation Clause of the Sixth Amendment are violated by the admission of a nontestifying co-defendant's confession that inculpates a defendant, even if a cautionary instruction is given).

Redaction has come into play as a tool to allow admission of a co-defendant's confession against the confessor in a joint trial. State v. Holmes, 342 S.C. 113, 119, 536 S.E.2d 671, 674 (2000). The point of redaction is to permit the confession to be used against the nontestifying confessor, while avoiding implicating his co-defendant. Id. The Confrontation Clause is not violated when a defendant's name is redacted but other evidence links the statements application to the defendant, if a proper limiting instruction is given. See Richardson v. Marsh, 481 U.S. 200, 211 (1987) (holding "the Confrontation Clause is not violated by the admission of a nontestifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.").

Here, Page made a pretrial motion to exclude two statements made by his nontestifying co-defendant, McKnight. The court denied the motion and asked the State to prepare a redacted version of each statement in accordance with Bruton and its progeny above. Ultimately, one of McKnight's redacted statements was read into the record during Detective's testimony. After Page's cross-examination of Detective, the State moved to admit McKnight's unredacted statement on the basis that Page had opened the door to this

testimony due to his questions on Detective's investigative techniques and the sufficiency of evidence linked to Page.

It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence. State v. Young, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct. App. 2005) cert. granted, Jan. 2007; See also State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) ("Given that [defendants] maintained that PPS did not allow pornographic materials or links on the website, it is patent that they opened the door to this line of inquiry."); State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (ruling expert could testify that she believed the victim in this case because defendant opened the door by cross-examining expert about other cases in which she did not believe victim); State v. Dunlap, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003) (holding defense counsel's opening statement "opened the door to the introduction of evidence rebutting the contention that [defendant] was merely an addict"); State v. Taylor, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) ("[B]ecause appellant opened the door about his relationship with his wife, the solicitor was entitled to cross-examine him regarding the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction."). Furthermore, an appellant cannot complain of prejudice resulting from admission of evidence to which he or she opened the door. State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 431 (2003).

In the present case, the court found Page attempted to elicit replies from Detective indicating the only evidence she had gathered linking Page to the crime were the contradictory statements and testimony of Williams and Howard, while, in reality, she had also used co-defendant McKnight's statements. This, the court determined, reflected on Detective's credibility as a witness and on the quality of the investigation she undertook that led to Page's arrest. As a result, the court found Page had opened the door during his cross-examination to the extent that Detective's testimony warranted bolstering. Detective was then allowed to testify the "other guy" identified in McKnight's statement was Page, and the court gave a limiting instruction to the jury that it should not consider the evidence against Page, rather only as to the credibility of Detective and her investigation.

Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge. State v. Adcock, 194 S.C. 234, 234, 9 S.E.2d 730, 732 (1940). See also Corbett v. Fleetwood Homes of North Carolina, 213 F.3d 630 (Table), 2000 WL 530325 (C.A.4 (S.C.)) (2000). While we recognize the discretionary authority of the trial judge in this area, we believe he erred in finding that Page's counsel's zealous representation of his client required the admission of this inadmissible evidence in order to rehabilitate Detective's investigative techniques. Nevertheless, we find any error resulting from the admission of the unredacted statement was harmless.

To constitute error, a ruling to admit or exclude evidence must affect a substantial right. Rule 103(a), SCRE; State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). However, error is harmless where it could not reasonably have affected the trial's outcome. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990). In considering whether error is harmless, a case's particular facts must be considered along with various factors including:

> ... the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

State v. Clark, 315 S.C. 478, 482, 445 S.E.2d 633, 635 (1994) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581,

584 (1989). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). A violation of a defendant's Sixth Amendment right to confront a witness is not per se reversible error if the error is harmless beyond a reasonable doubt. State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). In fact, the United States Supreme Court has expressly found that the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case. See Harrington v. California, 395 U.S. 250, 254 (1969); Van Arsdall, 475 U.S. at 682.

Our court also found harmless error in State v. Gillian, where the testimony was "largely cumulative" to testimony from other witnesses and other evidence suggested Gillian was guilty. State v. Gillian, 360 S.C. 433, 457-58, 602 S.E.2d 62, 74-75 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). In Gillian, we stated that "[n]o definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Id., at 454-55, 602 S.E.2d at 73.

Applying the Van Arsdall factors to the case at hand, we note that the sections of McKnight's statement mentioning Page was either cumulative or corroborated by other witnesses. McKnight's statement references Page specifically on four occasions. The first two occasions, McKnight indicates McCollum and Page had "little pocket guns;" McCollum with an "automatic .25 silver with a black handle," and Page "had a small revolver, a .32 or something." As described above, co-defendant Williams had already testified to the guns McCollum and Page were carrying that day. Williams testified McCollum was carrying "a little small .25" and that "it was an automatic." Meanwhile Page carried "a little .32, old rusty looking .32 . . . Revolver." Furthermore, York Police Department detective John Naylis testified four gun shell casings were found at the scene, and in his opinion, each of the casings came from the same gun, and were associated with a .25 automatic pistol. Naylis found significant that a .25 automatic weapon typically eject

its casings, while a revolver typically requires manual unloading of spent gun shell casings.

The third occasion McKnight's statement mentions Page, it places Page at the apartments, and again says "[McCollum] and Page kept playing with their guns, pulling them out and pointing at us playing." Williams' testimony already indicated both McCollum and Page had guns. In addition, the testimony or statements of four people placed Page at the scene. These included: Nephew, Girlfriend, Williams, and Mary Burress, whose statement placing McCollum and Page on her porch at the Hall Street Apartments the day of Cunningham's murder was read into evidence by Detective during her testimony. Finally, McKnight's statement placed Page on Nephew's porch during the commission of the murder. As indicated above, the testimony of both Williams and Girlfriend had already placed Page on the porch, therefore McKnight's statement was merely cumulative to the evidence already on the record.

Moreover, prior to the admission of the unredacted statement, Detective was asked to respond to a question on cross-examination from Page as to whether she corroborated the details of Williams' statements to police. (emphasis added). Detective testified that "[the police] did talk to other people and were unable to corroborate [Williams's statements] until we corroborated it through Terrance McKnight's statement." This testimony was not objected to at the time. A contemporaneous objection is required to preserve issues for direct appellate review. Webb v. CSX Transp., Inc., 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005). As the Supreme Court has stressed on several occasions, the Constitution entitles a criminal defendant to a fair trial, not a perfect one. See United States v. Hasting, 461 U.S. 499, 508-509 (1983); Bruton, 391 U.S. 135.

## CONCLUSION

As a result of the foregoing, we hold that any error allowing the introduction of Page's nontestifying co-defendant's statement implicating Page to the police, where the court determined Page had opened the door to

the admission of the evidence, was harmless beyond a reasonable doubt. The decision of the circuit court is accordingly

**AFFIRMED.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The Estate of Ada B. Nicholson, by Ronald D. Nicholson, Personal Representative, Appellant,

v.

South Carolina Department of Health and Human Services, Respondent.

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Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

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Opinion No. 4368
Submitted March 3, 2008 – Filed April 3, 2008

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**AFFIRMED**

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Robert J. Thomas, Sarah L. Clingman, and Amy M. Lander, of Columbia, for Appellant.

George R. Burnett, South Carolina Department of Health and Human Services, of Columbia, for Respondent.

**WILLIAMS, J.:** Ronald D. Nicholson, as the Personal Representative (the PR) for the Estate of Ada B. Nicholson (Mother), appeals the decision of the Administrative Law Judge (ALJ) affirming the South Carolina Department of Health and Human Services' (the Department) denial of Max Nicholson's (Son) request for an undue hardship waiver under the South Carolina Medicaid program (Medicaid). We affirm.

## FACTS

In April 1996, Mother began receiving services from Community Long Term Care (CLTC), a program provided by Medicaid. CLTC provides services to Medicaid recipients who elect to receive assistance in their homes rather than seek admission to a nursing facility. Mother continued to receive these services until January 1999 when she moved into Easley Nursing Home (the Nursing Home). While in the Nursing Home, Mother's care was paid for by Medicaid. In July 2004, Mother passed away. Mother's estate consisted of a partial interest in her home.

Following Mother's death, the Department determined it had paid $206,616.26 for CLTC and/or nursing home care on Mother's behalf, and subsequently, the Department filed a claim in that amount against Mother's estate. The PR then requested a hardship waiver on behalf of Son, who was incarcerated at the time, claiming Son had lived with Mother for more than two years prior to her entering the Nursing Home, which would preclude the Department from asserting an interest in Mother's home. Son had been incarcerated since October 2002.

The Department denied the PR's request. The Department stated the hardship waiver would not be granted for the following reasons: (1) Son's income exceeded 185% of the federal poverty guidelines; (2) Son was not actually residing in Mother's home at the time the waiver was requested; and (3) Son had not lived in Mother's home in over two and a half years prior to Mother's institutionalization. Pursuant to the provisions of the Appeals and Hearings regulations of the Department, the PR appealed the Department's denial, and a hearing was scheduled.

The Hearing Officer assigned to review the PR's appeal subsequently concurred with the Department's decision to deny the waiver. The Hearing Officer additionally found CLTC services were the functional equivalent of nursing home care. The PR then appealed the Hearing Officer's decision to the Administrative Law Court. Although the ALJ did not rule on the issue of whether CLTC is the functional equivalent of institutionalization, the ALJ did find Son was not "actually residing" in Mother's home when the waiver application was submitted. The ALJ, therefore, upheld the Hearing Officer's denial of Son's hardship waiver. This appeal follows.

## STANDARD OF REVIEW

"Appeals from decisions by the [D]epartment are heard pursuant to the Administrative Procedures Act [(APA)] . . . ." S.C. Code Ann. § 44-6-190 (2002). The APA, therefore, determines the standard of judicial review for cases initially heard by the Department. Todd's Ice Cream, Inc. v. S.C. Employment Sec. Comm'n, 281 S.C. 254, 257, 315 S.E.2d 373, 375 (Ct. App. 1984). "It is well settled that in reviewing a decision by an administrative agency, this Court will not substitute its judgment for that of the agency concerning the weight of the evidence as to questions of fact." Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). "Pursuant to the APA, this [C]ourt may reverse or modify an agency decision which is either affected by error of law or clearly erroneous in view of the reliable, probative, and substantial evidence in the record." S.C. Dep't of Labor, Licensing, & Regulation v. Girgis, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998). The substantial evidence standard is met if a reasonable mind might accept the evidence as adequate to support the agency's conclusion. Kearse, 318 S.C. at 200, 456 S.E.2d at 893.

## LAW/ANALYSIS

The PR argues the ALJ erred in finding Son was not "actually residing" in Mother's home when the hardship application was made. We disagree.

The Department may seek recovery of medical assistance paid under Medicaid from the estate of an individual who, at the age of fifty-five or older, received medical assistance consisting of nursing facility services or home and community-based services. S.C. Code Ann. § 43-7-460(A)(2) (Supp. 2007). The Department must waive recovery, however, upon proof of undue hardship asserted by an heir or devisee of the decedent. S.C. Code Ann. § 43-7-460(C) (Supp. 2007).

An undue hardship exists if the surviving child of the decedent lived in the home of the decedent for at least two years immediately prior to the decedent's institutionalization. Section 43-7-460(C)(1)(d). The child claiming this hardship, however, must have been "*actually residing* in the [decedent's] home at the time the hardship [was] claimed." Section 43-7-460(C)(1) (emphasis added). Another situation allowing for an undue hardship waiver is when the claimant has been living in the decedent's home two years prior to the decedent's death, owns no real property, and earns below a certain income level. Section 43-7-460(C)(2)(a), (c), (d). As in the previous example, however, the claimant must have been "*actually residing* in the [decedent's] home at the time the hardship [was] claimed." Section 43-7-460(C)(2)(b) (emphasis added). The statute fails to define the phrase "actually residing." Consequently, we must turn to the rules of statutory construction to ascertain the phrase's meaning.

The cardinal rule of statutory construction is to determine and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). The best evidence of legislative intent is the text of the statute. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005). If "the terms of the statute are clear, the court must apply those terms according to their literal meaning." City of Columbia v. Am. Civil Liberties Union of S.C., Inc., 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996). If there is any ambiguity in the statute, however, that ambiguity "should be resolved in favor of a just, equitable, and beneficial operation of the law." Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996). Furthermore, "[t]he language [of the statute] must also be read in a sense which harmonizes with its subject matter and accords with its general

purpose." Cox v. BellSouth Telecomm., 356 S.C. 468, 472, 589 S.E.2d 766, 768 (Ct. App. 2003). "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." Lee v. Thermal Eng'g Corp., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303-04 (Ct. App. 2002).

"Reside" has been defined as (1) to dwell permanently or continuously; (2) to have a settled abode for a time; or (3) to have one's residence or domicile. Webster's Third New International Dictionary 1931 (1986). However, in the legal field, the term "reside" has been defined as to "[l]ive, dwell, abide, sojourn, stay, remain, [or] lodge." BLACK'S LAW DICTIONARY 1176 (5th ed. 1979). Additionally, the term "residence" has been defined as "[t]he place where one actually lives, as distinguished from a domicile . . . ." BLACK'S LAW DICTIONARY 1050 (7th ed. 2000). "Domicile" has been defined as "[t]he place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." Id. at 396.

In light of these definitions, "residence" is a somewhat general and fluid term. When read alone, the word "residence" is susceptible to varying interpretations. Phillips v. S.C. Tax Comm'n, 195 S.C. 472, 476, 12 S.E.2d 13, 15 (1940). It may have a restricted or enlarged meaning, and therefore, the precise meaning of the term is dependent upon the explanatory context. Id. at 476-77, 12 S.E.2d at 15-16.

The context in which "actually residing" is used in Section 43-7-460 indicates the phrase has a restricted meaning of physical presence, rather than a broader meaning of domicile. The statute allows for waivers of the State's recovery only in situations when the ramifications would be extremely detrimental to the claimant. See Section 43-7-460(C) (stating the Department must waive recovery if an heir or devisee proves undue hardship will ensue). The requirement that the claimant must actually be living in the decedent's home when the undue hardship waiver is claimed is one way the statute ensures the waivers are permitted in only those limited situations.

This restricted meaning of physical presence is bolstered by the emphasis added by the adverb "actually." This adverb stresses the importance that the claimant must currently be living in the decedent's home when the hardship is claimed. Looking at the language of the statute, it is insufficient to show the decedent's home is the claimant's domicile without proof the home is also the claimant's current residence. This interpretation is in line with previous case law which has recognized that "'residence' is a more elastic and flexible term than domicile or citizenship. A person may have only one domicile, but may have several residences." Cook v. Fed. Ins. Co., 263 S.C. 575, 582, 211 S.E.2d 881, 884 (1975). We also note, while a person's "legal residence" is often determined by his or her domicile, a person's "actual residence" will be determined by his or her "present physical location." 25 Am. Jur. 2d Domicil § 9 (2008). This distinction between actual residence and legal residence has long been recognized. See Phillips, 195 S.C. at 477, 12 S.E.2d at 16 ("But a distinction has long been made between *actual residence and legal residence*.") (emphasis in original).

Finding the phrase "actually residing" requires physical presence in the decedent's home, Son must have been currently living in Mother's home when the hardship waiver application was made. Son was incarcerated at the South Carolina Department of Corrections when the PR requested the undue hardship waiver, and thus, he was not physically present in Mother's home when the hardship waiver application was made. Therefore, Son did not meet the requirements for an undue hardship waiver, and the waiver was properly denied.

## CONCLUSION

For the foregoing reasons, the decision of the ALJ is

**AFFIRMED**.[1]

**HUFF and KITTREDGE, JJ., concur.**

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