The Supreme Court of South Carolina

In the Matter of
Cotton Harness, III, Respondent.

ORDER

The Commission on Lawyer Conduct has filed a petition asking for the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Leslie Riley, 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. Ms. Riley shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Riley 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 Leslie Riley, 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 Leslie Riley, 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 Ms. Riley's office.

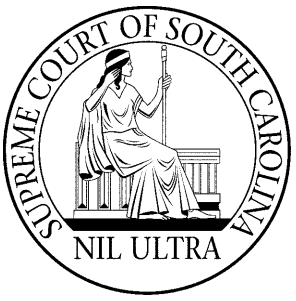
This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

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

Columbia, South Carolina

April 14, 2010



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
April 19, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, Individually and for the Benefit of All Car Buyers Who Paid "Administrative Fees" as Described below to Defendants — Respondents,

v.

Century BMW a/k/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc., a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments LP a/k/a Hendrick Honda; Overland, Inc., d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments; and Toyota of Greenville, Inc. et. al. — Defendants

of whom Century BMW a/k/a Sonic Automotive is the — Appellant.

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

Opinion No. 26805
Heard January 20, 2010 – Filed April 19, 2010

AFFIRMED IN RESULT

Dennis M. Black and Ryan L. VanGrack, of Williams & Connolly, of Washington, Steven W. Hamm, C. Jo Anne Wessinger-Hill, David A. Anderson, and Jocelyn T. Newman, all of Richardson, Plowden & Robinson, of Columbia, for Appellant.

A. Camden Lewis and Brady R. Thomas, both of Lewis & Babcock, of Columbia, Gedney M. Howe, III, of Charleston, Michael Eugene Spears, of Spartanburg, and Richard A. Harpootlian, of Columbia, for Respondents.

JUSTICE KITTREDGE: This case concerns the enforceability of an arbitration agreement. Respondents Christine and Michael Watts entered into a contract with Appellant Century BMW (Century) for the purchase of a car. The transaction included the execution of an arbitration agreement. Subsequently, the Wattses filed a class action suit against Century alleging the dealership had charged illegal administrative fees. Century moved to compel arbitration. The trial court found the arbitration agreement was unconscionable and unenforceable and denied the motion to compel. Century appealed, and we granted certification pursuant to Rule 204, SCACR.

We hold the arbitration agreement, although an adhesion contract, is not unconscionable. Yet the arbitration provision prohibiting class actions is

against public policy, which would ordinarily be severed pursuant to the agreement's severance clause. Century has insisted, however, that if the class action prohibition provision is unenforceable, it will abandon the balance of its rights under the arbitration agreement and consent to the action proceeding in the trial court. Although the arbitration agreement is otherwise enforceable, in accordance with Century's request, we affirm in result the trial court's order denying the motion to compel arbitration.

I.

In 2005, Michael Watts began looking for a car to purchase for his daughter, Christine Watts, as a graduation present. He negotiated with Century for the sale of a 2004 BMW Z4 convertible. Michael gave Century a bottom line price of $32,000, which Century initially rejected, but ultimately accepted. On the day of sale, Century presented a packet of documents Michael and Christine were to sign. Within the packet was a document titled "**ARBITRATION AGREEMENT**." The arbitration agreement provided that any dispute between the parties would be subject to arbitration[1] and that the agreement was governed by the Federal Arbitration Act (FAA). The agreement further provided that the parties were waiving their right to bring or participate in a class action suit.

The Wattses brought a class action suit against Century and numerous other car dealerships in South Carolina, alleging the dealers charged an illegal administrative fee in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act"). S.C. Code Ann. § 56-15-10 *et. seq*. (2005). Century filed a motion to compel arbitration pursuant to the terms of the agreement. Relying heavily on *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), the trial court found the arbitration agreement was unconscionable because there was an absence of a meaningful choice and the agreement contained oppressive and one-sided terms. Accordingly, the trial court found the arbitration agreement was unenforceable and denied Century's motion to compel.

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[1] The Wattses have never contended that this dispute is not within the scope of the arbitration agreement.

II.
A.
Arbitration

The question of arbitrability of a claim is an issue for the courts. *Partain v. Upstate Automotive Group*, Op. No. 26768 (S.C. Sup. Ct. filed February 8, 2010) (Shearouse Adv. Sh. No. 6 at 28). The determination of whether a claim is subject to arbitration is subject to de novo review, but a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.*

At the outset, we recognize that there is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). At the same time, general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause governed by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996)). To this end, if a court as a matter of law finds any clause of a contract involving the sale of goods to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

B.
Adhesion Contract

The Wattses and Century dispute whether this contract is an adhesion contract. Century argues the transaction was thoroughly negotiated and the sale was not conditioned upon the Wattses agreeing to sign the arbitration agreement. The Wattses, on the other hand, argue there is evidence to support the trial court's finding that this was an adhesion contract, including

the fact that this was a standard form contract. It appears that one customer (and certainly no more than a few customers) out of approximately six thousand failed to sign the arbitration agreement.

We agree with the trial court that this is an adhesion contract. This was a contract on a standard form, presented on a take-it-or-leave-it basis. The Wattses did not contribute to the drafting of the contract or possess the bargaining power to negotiate the terms of the contract.[2] *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, although this Court has approached adhesion contracts between a consumer and automobile retailer with "considerable skepticism," adhesion contracts are not per se unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669. Finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902.

C.
Unconscionability

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson v.* 373 S.C. at 25, 644 S.E.2d at 668.

1. Absence of Meaningful Choice

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *Id.* at 25, 644 S.E.2d at 669. In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties'

[2] Although the Wattses negotiated the *price of the car*, they did not have the power to negotiate the *terms of the contract.*

bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.*

We are firmly convinced and find the Wattses had a meaningful choice in signing the contract. We recognize that this was a contract for the sale of a vehicle Christine Watts planned to use as her primary means of transportation, "which is critically important in modern day society." *Id.* at 27, 644 S.E.2d at 670. We also recognize that there was an inherent disparity in bargaining power between the parties, as this was a transaction between a consumer and a commercial entity.[3] However, the arbitration agreement is a separate, one-page document which both Michael and Christine Watts signed. It is clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font. The important terms and provisions of the agreement appear in the body of the contract and again in capital letters just above the signature line.

The Wattses both admitted they did not read the arbitration agreement, and their deposition testimony confirmed the failure to read the documents was solely attributed to them and not to Century's actions. Our jurisprudence forbids us to allow the Wattses to invalidate the enforceability of the arbitration agreement by claiming they did not read it. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981)) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it.").

This arbitration agreement and the actions of Century surrounding the transaction are markedly different from the actual agreement as well as surrounding circumstances in *Simpson*. The *Simpson* arbitration agreement

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[3] Contrary to Century's assertion, we find no significance in the fact that this was a luxury vehicle or that Christine Watts was "highly-educated." These factors do not change the "consumer/business nature" of the transaction.

was inconspicuously buried in the sales contract, on the opposite page from the customer's signature, in paragraph "10" of sixteen other paragraphs. Additionally, the *Simpson* customer alleged the contract was "hastily" presented for her signature.

The significant features that impacted the unconscionability determination in *Simpson* are not present here. We hold the Wattses had a meaningful choice in making the decision to enter into this contract with Century.

2. Oppressive One-Sided Terms

First, we will address the provisions in the arbitration agreement, save for the provision prohibiting a customer from bringing a class action suit against Century.

Under the agreement, all claims must be brought within the applicable statute of limitations, the arbitrator shall be an attorney or retired judge, and each party is responsible for his or her own attorney's fees. Additional terms include: no arbitration is required if the claim is brought in small claims court; the arbitration shall be conducted, at the customer's option, in the federal district in which the customer resides or in which the vehicle was purchased; the arbitrator shall apply governing local, state or federal laws and award damages or other relief allowed by such governing laws; if the customer initiates a claim, Century will pay the portion of the filing fee which exceeds the court filing fee; if Century initiates the claim, it will pay the entire filing fee; Century will pay up to $1,500 of the arbitrator's fees; and parties shall equally share fees in excess of $1,500.

In our view, these terms are neither oppressive nor one-sided. Moreover, nothing in the agreement prevents the arbitrator from awarding punitive damages or double or treble compensatory damages, nor does the agreement limit any available statutory remedies. Several provisions favor the customer, such as allowing the customer a choice of venue and Century's obligation to pay certain fees. Moreover, both the customer and Century are

subject to the same terms in the arbitration agreement, thus there is no lack of mutuality of remedy. *See Simpson*, 373 S.C. at 32, 644 S.E.2d at 672 (adhering to previous holdings in that lack of mutuality of remedy will not invalidate an arbitration agreement, but finding the provision dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies was one-sided and oppressive).

These terms stand in sharp contrast to the terms present in *Simpson*. In *Simpson,* the arbitration provision required the customer to waive her right to mandatory statutory remedies, including the right to punitive damages and double and treble compensatory damages. There was a lack of mutuality of remedies, as the customer was forced to arbitrate all claims she may have had against the dealer, while the dealer reserved its right to judicial remedies in certain circumstances. Further, the scope of the arbitration agreement in *Simpson* was so broad it included non-arbitratable disputes.[4]

3. Ban on Class Actions

Finding the terms in the arbitration agreement not to be oppressive or one-sided, we next turn to the provision banning class action suits. This provision provides: "By entering into this Agreement the Parties are waiving their right to…bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." The Wattses argue this provision is unenforceable because it is oppressive in that it takes away statutory rights, and it is one-sided in that Century would not bring a class action suit against its customers. While we agree with the Wattses that the

[4] The Court found the scope of the arbitration agreement was broad enough to implicate claims arising under the Magnuson-Moss Warranty Act (MMWA), a federal statute that governs warranties on consumer products. The Court noted that federal regulations state that informal dispute resolution procedures set forth in written warranties under the MMWA are not to be legally binding on any person. 16 C.F.R. § 703.5(j) (2006). Accordingly, the Court held "the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of public policy." *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673.

provision is unenforceable, we hold the ban on class actions is unenforceable on public policy grounds.

The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Section 56-15-110(2). The Dealers Act further provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable. We note that courts across the country are split over whether an arbitration agreement may include a waiver of the right to bring a class action suit. *See Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007) (highlighting the split in authority with a list of nationwide cases finding class action waivers enforceable and unenforceable). We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. *See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

4. *Severance*

Finding this provision unenforceable would normally not end the inquiry on the enforceability of the remainder of the contract, as courts will attempt to sever an illegal provision in an otherwise valid contract and enforce the remaining terms.[5] The parties' arbitration agreement provides that "[i]f any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable."

Nevertheless, counsel for Century unambiguously stated at oral argument that Century did not wish to invoke the severance clause and sever the provision banning class actions from the remainder of the agreement. Century unequivocally expressed its intent for the arbitration agreement to stand or fall as a whole. Obviously, the Wattses seek to avoid the arbitration agreement and proceed in court. We will not provide a remedy that neither party seeks. We treat the issue of severability as abandoned. Therefore, we decline to enforce the arbitration agreement and affirm in result the trial court's denial of Century's motion to compel arbitration.

III.

We hold, except for the provision prohibiting customers from bringing class actions, the arbitration agreement is not unconscionable, for the Wattses had a meaningful choice in entering this agreement and the agreement does not contain oppressive or one-sided terms. The arbitration agreement is enforceable except for the ban on class actions, which, under ordinary circumstances, would be severed. However, Century has abandoned its right

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[5] A severable contract is one in its nature and purpose susceptible of division and apportionment, with an emphasis on discerning the parties' intent. *Columbia Architectural Group, Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980). Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002).

to severance and seeks to litigate this matter in court if the ban on class actions is unenforceable. Accordingly, we affirm in result the trial court's order denying the motion to compel arbitration.

AFFIRMED IN RESULT.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In The Interest of M.B.H., A Minor Under The Age of Seventeen, Appellant.

Appeal from Berkeley County
Wayne M. Creech, Family Court Judge

Opinion No. 26806
Heard February 17, 2010 – Filed April 19, 2010

AFFIRMED

Donald Bruce Clark, of Charleston and Jessie J. Glenn, of N. Charleston, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General William M. Blitch, Jr., of Columbia, for Respondent.

CHIEF JUSTICE TOAL: M.B.H. (Appellant), a minor, pled guilty to two counts of assault and battery of a high and aggravated nature (ABHAN). The family court ordered him committed to the Department of Juvenile Justice (DJJ) suspended upon probation, and required him to register as a sex offender. Appellant appealed the requirement that he register as a sex offender. We certified the appeal pursuant to Rule 204(b), SCACR and affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 2007, four juvenile petitions were filed against Appellant, alleging lewd acts with a minor, assault with intent to commit sexual battery, and sexual battery. At issue were several instances of sexual contact Appellant, who was fourteen years old at the time of the incidents, had with both a ten year old boy and a twelve year old boy.[1] Appellant admitted delinquency to two amended charges of ABHAN, and all other charges were dismissed.

At the hearing when Appellant admitted to the two charges of ABHAN, the solicitor recommended to the judge that Appellant undergo an inpatient evaluation and be placed on the private sex offender registry.[2] The judge agreed that an inpatient evaluation was warranted, but retained jurisdiction to render a final disposition regarding the registry after Appellant completed the inpatient evaluation and the report was available to the parties and the court.

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[1] Appellant was friends with the two boys. On two separate occasions, Appellant entered a bathroom stall with one of the boys and attempted to get the boy to touch Appellant's penis. Twice, Appellant showed the younger boys pornographic videos while he openly masturbated in the same room. After one such incident, Appellant performed oral sex on the older of the two boys. During the second incident, Appellant pushed the older boy onto a bed and unsuccessfully tried to have anal sex with him.

[2] Information on the private registry is not available to the general public, but only to certain individuals, organizations, and businesses. *See* S.C. Code Ann. § 23-3-490(D)(2) (2007).

The inpatient sex offender evaluation was ordered to determine his risk of re-offending and what treatment measures were necessary.

After the evaluation, Appellant appeared for the dispositional hearing. After hearing arguments from both the solicitor and Appellant's counsel, and statements from concerned individuals, Appellant was committed to DJJ, suspended on probation. As a condition of his probation, he was ordered to undergo inpatient sexual offender treatment at the Coastal Evaluation Center (the Center), as recommended in the Center's psychosocial evaluation report. Additionally, the judge ordered Appellant to be placed on the private sex offender registry.

At the hearing and in his order denying Appellant's motion to alter or amend the order of probation, the judge enumerated the issues identified in the Center's report that constitute good cause for requiring Appellant to register, including: multiple offenses; multiple younger, same-sex victims; a sense of victimization; denial of harm to others; borderline intellectual functioning; and the Center's recommendation that Appellant receive inpatient sexual offender treatment.

STANDARD OF REVIEW

A trial judge has broad discretion in sentencing within statutory limits. *Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant. *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. *State v. Rice*, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007).

LAW/ANALYSIS

Appellant argues that the judge improperly ordered him to register as a sex offender because the evidence failed to support a finding of good cause. We disagree.

As Appellant notes, good cause is not defined in the statute, nor has it been defined previously by this Court. Appellant urges that without a given definition the judge could not have articulated properly a basis for placing Appellant on the registry. However, we hold that a finding of good cause in this context means only that the judge must consider the facts and circumstances of the case to make the determination of whether or not the evidence indicates a risk to reoffend sexually. Such a determination is a matter of the judge's discretion.

At the dispositional hearing, the solicitor introduced the Center's evaluation report to support the request for Appellant to be placed on the private sex offender registry. The judge relied on the professional findings and recommendations in that report in concluding good cause existed for placing Appellant on the registry. The record is clear that the judge considered all the facts and circumstances of this case, both aggravating and mitigating, in determining that there is a risk of sexual reoffense. Such a determination is supported by the evidence in the record.

Accordingly, we hold the judge did not abuse his discretion in ordering Appellant to be placed on the private sex offender registry.

CONCLUSION

For the foregoing reasons, we affirm the family court's requirement that Appellant be placed on the registry.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Timothy L. Webb, Appellant,

v.

Janice Rush Sowell, f/k/a
Janice Rush Webb, Defendant
and Timothy Loren Webb, Jr.,
Third Party Defendant,
Of whom Janice Rush Sowell
and Timothy Loren Webb, Jr.
are Respondents.

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

Opinion No. 26807
Heard January 7, 2009 – Filed April 19, 2010

REVERSED

Joe Wayne Underwood, of Moses, Koon & Brackett, and Regina Hollins Lewis, of Gaffney Lewis & Edwards, both of Columbia, for Appellant.

Stephen R. Smoak, of Savage, Royall & Sheheen, of Camden, for Respondents.

JUSTICE PLEICONES: This is a direct appeal from the family court's order requiring appellant, Timothy L. Webb (Father), to contribute to college expenses for his son, respondent Timothy Loren Webb, Jr. (Son). Because we find that Risinger v. Risinger, 273 S.C. 36, 253 S.E.2d 652 (1979) was wrongly decided and that S.C. Code Ann. § 63-3-530(A)(17)[1], as interpreted, is unconstitutional, we reverse.

FACTS

Father and respondent Janice Rush Sowell (Mother) divorced in 1994. Father and Mother had two children born of the marriage; Son is the older of the two children. Son turned 18 on April 13, 2005, and started college in the fall of that same year. In April 2006, Father brought an action to reduce child support based on Son's emancipation. Mother counterclaimed for college expenses for Son who eventually joined the legal action as a third party defendant. Mother and Father agreed to reduce Father's child support obligation to reflect only support for their daughter, but the case proceeded to trial on Mother's counterclaim regarding Son's college expenses.

Mother's counterclaim was heard in January 2007, during Son's fourth semester. At the outset of the hearing, Father moved to dismiss Mother's counterclaim based on the Equal Protection clause of the federal and state constitutions. In an order denying Father's motion, the family court observed:

> While the Court has reviewed the motion with some interest and follows the logic proposed by the Plaintiff, the Court is bound by the case of Risinger v. Risinger and its progeny and therefore determines that until there is further ruling by either the Court of Appeals or the Supreme Court, it is appropriate in this instance to require the Plaintiff to contribute to the support of his son's

[1] This statute was previously codified at § 20-7-420(17).

college education. Therefore, the Plaintiff's motion to dismiss on the constitutional grounds is denied.

The family court required Son to apply for "all grants, scholarships and loans" as well as "earn as much money as he can during the summer months and holidays to defray his expenses." Further, the family court specifically found that Son "has the obligation to carry as much of the burden as he can." The family court found that thereafter, Mother and Father would equally divide all reasonable college expenses, to include tuition, books, room, board, spending money, meals, supplies, fees, health insurance, transportation, and any other incidental expenses. This appeal followed.

ISSUE

Does the family court's order obligating Father to contribute to Son's college expenses violate the Equal Protection Clause?

DISCUSSION

Father argues that this Court's interpretation in Risinger of the statute now found at S.C. Code Ann. § 63-3-530(A)(17) violates equal protection. We agree, and find no rational basis for a rule that permits a family court to order a parent subject to a child support order to contribute to an emancipated child's post-secondary education.

S.C. Code Ann. § 63-3-530 provides, in relevant part:

(A) The family court has exclusive jurisdiction:
. . .
(17) To make all orders for support run until further order of the court, except that orders for child support run until the child is eighteen years of age or until the child is married or becomes self-supporting, as determined by the court, whichever occurs first; or without further order, past the age of eighteen years if the child is enrolled and still attending high school, not to exceed

> high school graduation or the end of the school year after the child reaches nineteen years of age, whichever is later; or in accordance with a preexisting agreement or order to provide for child support past the age of eighteen years; or in the discretion of the court, to provide for child support past age eighteen where there are physical or mental disabilities of the child or other exceptional circumstances that warrant the continuation of child support beyond age eighteen for as long as the physical or mental disabilities or exceptional circumstances continue.

S.C. Code Ann. § 63-3-530 (2007).

The statute provides that child support orders terminate when the child reaches age 18, marries, or becomes self-supporting.[2] However, a court may order the continuation of support beyond age 18 for certain "exceptional circumstances." In Risinger, this Court held that a desire to attend college may constitute such "exceptional circumstances." The Court explained as follows:

> The need for education is the most likely additional "exceptional circumstance" which might justify continued financial support. Children over 18 with a physical or mental disability, and children over 18 in need of further education, have much in common. In each case, the child's ability to earn is either diminished or entirely lacking. In each case, most parents feel an obligation to help, and do help the child.

Risinger, 273 S.C. at 38, 253 S.E.2d at 653.

As the above passage makes clear, the Risinger Court focused on the interests of the child. The instant case, however, requires us to examine the rights of the parents. Because the statute only allows for the *continuation* of

[2] Of course, this portion of the statute and the Risinger case do not address situations in which a parent seeks to enforce an agreement regarding post-secondary education expenses.

support beyond the age of 18, the effect of the Risinger decision is that a court may order a parent subject to a support order at the time his or her child reaches age 18 to pay college expenses. However, the statute grants the court no such power over a parent not subject to such an order,[3] nor is there any common law duty on parents to pay for an adult child's post-secondary education.[4]

The Equal Protection clauses of both the federal and state constitutions provide that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. To satisfy the Equal Protection Clause, a legislative classification must bear a reasonable relation to the legislative purpose sought to be achieved, the members of the class must be treated alike under similar circumstances, and the classification must rest on some rational basis. See German Evangelical Lutheran Church of Charleston v. City of Charleston, 352 S.C. 600, 608, 576 S.E.2d 150, 154 (2003).

We view the appropriate class as those parents subject to a child support order at the time of the child's emancipation and can discern no rational basis for the varied treatment of the class as compared to those parents who are not subject to such an order.[5] We therefore find that the

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[3] We disagree with the Chief Justice's interpretation of S.C. Code Ann. § 63-3-530(A)(17). Though statutes are presumed constitutional and, if possible, will be construed to render them valid, we cannot ignore the plain reading of the statute. See State v. Mills, 360 S.C. 621, 624, 602 S.E.2d 750, 752 (2004) (despite rule of construction, "when the terms of the statute are clear and unambiguous, we are constrained to give them their literal meaning."). The portion of the statute cited by the Chief Justice's dissent plainly allows only for the "*continuation* of child support beyond age eighteen . . . ." S.C. Code Ann. § 63-3-530(A)(17) (emphasis added).

[4] We confine our opinion to post-secondary education only.

[5] Though Appellant does not raise this specific classification, we note that this Court is asked, on appeal, to reconsider the validity of Risinger. Having found that this Court's prior interpretation of the statute created an unconstitutional classification, we feel bound to remedy the error. See Am.

statute, as interpreted by Risinger, fails the rational basis test and thus, does not meet the constitutional requirements of Equal Protection.[6]

CONCLUSION

We find that S.C. Code Ann. § 63-3-530(A)(17), as interpreted in Risinger, violates the Equal Protection Clause. We therefore reverse the trial court's denial of Father's motion to dismiss.

REVERSED.

WALLER and BEATTY, JJ., concur. TOAL, C.J., dissenting in a separate opinion. KITTREDGE, J., dissenting in a separate opinion.

Petroleum Inst. v. South Carolina Dep't of Revenue, 382 S.C. 572, 580, 677 S.E.2d 16, 20 (2009) (duty of this Court to determine if statute exceeds the bounds of the constitution).

[6] Because we find that S.C. Code Ann. § 63-3-530(A)(17), as interpreted by Risinger, violates Equal Protection, we need not decide the remaining issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not discuss remaining issues when disposition of prior issue is dispositive).

CHIEF JUSTICE TOAL: I respectfully dissent. Appellant argues that S.C. Code Ann. § 63-3-530(A)(17), as interpreted by *Risinger v. Risinger*, 273 S.C. 36, 253 S.E.2d 652 (1979), violates the equal protection clauses of the United States and South Carolina constitutions. I disagree.

"In reviewing a statute challenged on equal protection grounds, great deference is given to the classification created, and it will be sustained if supported by any reasonable hypothesis and not plainly arbitrary." *Mitchell v. Owens*, 304 S.C. 23, 24-25, 402 S.E.2d 888, 889 (1991), *citing Samson v. Greenville Hosp. Sys.*, 295 S.C. 359, 368 S.E.2d 665 (1988). Furthermore, a statute enacted pursuant to legislative power is presumptively constitutional. *Nichols v. S.C. Research Auth.*, 290 S.C. 415, 351 S.E.2d 155 (1986). Finally, this Court has consistently held it will not construe a statute to do that which is unconstitutional. *See Ward v. State*, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000), *citing Mitchell v. Owens*, 304 S.C. 23, 402 S.E.2d 888 (1991) (holding that statutes are presumed to be constitutional and will be construed so as to render them valid).

As a threshold matter, I must address the classification relied upon by the majority because it is not one before the Court. The majority holds that S.C. Code Ann. § 63-3-530(A)(17), as interpreted by *Risinger*, violates the equal protection clauses of the United States and South Carolina constitutions, finding that there is no rational basis for what it perceives to be the government's disparate treatment of parents subject to support orders prior to a child's emancipation and parents not subject to support orders prior to a child's emancipation. Appellant did not raise this argument,[7] but rather asserted that section 63-3-530(A)(17) violates equal protection because it treats divorced and non-divorced parents differently. Thus, in my view, the majority erroneously relies upon an argument not before the Court.

Nonetheless, assuming Appellant raised the classification relied upon by the majority, section 63-3-530(A)(17) does not treat such classes disparately. Section 63-3-530(A)(17) grants the family court jurisdiction to

[7] Appellant never raised this argument below, in brief, or at oral argument.

order continuation of a support order entered prior to a child's emancipation, but the jurisdiction granted to the family court is not confined to such situations. Section 63-3-530(A)(17) also grants jurisdiction to award support for post-secondary education "in the discretion of the court." That is, the court may order a parent to provide support to cover the expenses of exceptional circumstances encountered by an emancipated child, such as post-secondary education, whether or not there was a support order in effect prior to the child's emancipation.[8]

Turning to the classification actually raised by Appellant, I do not agree that section 63-3-530(A)(17) treats divorced parents and non-divorced parents differently. Section 63-3-530(A)(17) does not apply only to divorced parents.[9] As this Court has noted in a case that dealt with support for an

[8] The majority ignores this reading of section 63-3-530(A)(17) as well as precedent requiring it, where possible, to construe statutes in a constitutional manner. *See Ward*, 343 S.C. at 19, 538 S.E.2d at 247 (holding this Court will not construe a statute to do that which is unconstitutional).

[9] In relevant part, the statute at issue provides as follows:

> The family court has exclusive jurisdiction: …
>
> (17) To make all orders for support run until further order of the court, except that orders for child support run until the child is eighteen years of age or until the child is married or becomes self-supporting, as determined by the court, whichever occurs first; or without further order, past the age of eighteen years if the child is enrolled and still attending high school, not to exceed high school graduation or the end of the school year after the child reaches nineteen years of age, whichever is later; or *in accordance with a preexisting agreement or order to provide for child support past the age of eighteen years; or in the discretion of the court, to provide for child support past age eighteen where there are physical or mental disabilities of the child or other exceptional circumstances that warrant the continuation of child*

unemancipated disabled adult child, this statutory section "treats divorced parents the same as all other parents." *Riggs v. Riggs*, 353 S.C. 230, 236, 578 S.E.2d 3, 6 (2003). In *Riggs*, we therefore found no merit to the husband's equal protection argument. Accordingly, pursuant to *Riggs*, there can be no equal protection violation in the instant case because no such legislative classification is made by the applicable clause of section 63-3-530(A)(17).

For these reasons, I would hold that the family court's order should be affirmed.

> *support beyond age eighteen for as long as the physical or mental disabilities or exceptional circumstances continue.*

(emphasis added).

JUSTICE KITTREDGE: I join Chief Justice Toal in dissent in rejecting the equal protection challenge to section 63-3-530(A)(17) of the South Carolina Code (Supp. 2008). I write separately because my view of the equal protection challenge and *Riggs v. Riggs*, 353 S.C. 230, 578 S.E.2d 3 (2003) differs from that of the Chief Justice. Because I would affirm the family court, I would address Appellant's remaining issue. I believe legislative intent concerning a parent's potential obligation to financially contribute to his or her child's college education includes a limitation to the cost of a South Carolina publicly supported college or university. I would, therefore, remand to the family court to determine if Appellant's contribution should be modified.

I.

I join the Chief Justice in result as to the constitutionality of section 63-3-530(A)(17) (Supp. 2008) (the successor statute to section 20-7-420(A)(17) of the South Carolina Code (Supp. 2007)) insofar as it reflects legislative intent to authorize the family court to order parents to contribute to their child's college educational expenses under the *Risinger*[10] framework. *Risinger*'s construction of legislative intent has stood the test of time, as the Legislature has amended many subsections of this jurisdictional statute through the intervening thirty years, but the "exceptional circumstances" language in subsection (A)(17) remains largely unchanged.

As Chief Justice Toal notes, the majority has ignored our issue preservation rules and redefined the class in a manner not presented "below, in brief, or at oral argument." (Toal, C.J., dissent at n. 1). The majority so acknowledges in footnote 5, "[t]hough Appellant does not raise this specific classification, we note that this Court is asked, on appeal, to reconsider the validity of *Risinger*."

From a policy standpoint, the decision of the majority may be easily understood. A legislative policy of treating children of separated, divorced,

[10] *Risinger v. Risinger*, 273 S.C. 36, 39, 253 S.E.2d 652, 653-54 (1979).

or unmarried parents differently than children of married parents for purposes of requiring parental financial support to attend college is most assuredly a debatable proposition. Because no suspect classification is involved, however, the standard of review is deferential. Against an equal protection challenge implicating no suspect classification, a court must sustain the legislation if it is reasonably related to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on some rational relationship. *German Evangelical Lutheran Church of Charleston v. City of Charleston*, 352 S.C. 600, 608, 576 S.E.2d 150, 154 (2003); *see also In re Marriage of Vrban*, 293 N.W.2d 198, 201 (Iowa 1980) (applying the rational relationship test as neither a suspect class nor a fundamental right are implicated); *In re Marriage of Kohring*, 999 S.W.2d 228, 232-33 (Mo. 1999) (finding no equal protection violation because there was no involvement of a suspect class, no infringement of a fundamental right, and the existence of a rational relationship to legitimate state interest); *Childers v. Childers*, 575 P.2d 201, 209 (Wash. 1978) (applying rational relationship test).

Although the policy rationale underlying section 63-3-530(A)(17) is subject to debate, I believe the statute survives an equal protection challenge. I thus vote to affirm the family court and uphold the statute on the basis that it satisfies the rational basis test. Having rejected the equal protection argument, I return to this Court's construction in *Risinger* of the "exceptional circumstances" statutory language. In this regard, I am especially mindful of the more than three decades that the Legislature has left the statutory interpretation of *Risinger* in place. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736 (1977) (recognizing that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). I would defer to the Legislature, and if the Legislature, as a policy matter, wants to overrule *Risinger's* statutory construction, they are certainly free to do so.

II.

I respectfully disagree with Chief Justice Toal's view, as extrapolated from *Riggs v. Riggs*, 353 S.C. 230, 578 S.E.2d 3 (2003), that the Legislature intended to authorize the family court to order parents of intact families to contribute to the college educational expenses of their children. I do not read *Riggs* that broadly. *Riggs* dealt with a disabled adult child and targeted statutory language authorizing the family court to order "child support past age eighteen where there are physical or mental disabilities." *Id.* at 234, 578 S.E.2d at 5 (quoting from S.C. Code § 20-7-420(A)(17), the predecessor to § 63-3-530(A)(17)). The Court relied initially on "a common law duty of parental support for a child who has reached majority but is so physically or mentally disabled as to be unable to support herself." *Id*. at 234-35, 578 S.E.2d at 5. *Riggs* observed that "[w]here the disability prevents the child from becoming emancipated, the presumption of emancipation upon reaching majority is inapplicable." *Id*. at 235, 578 S.E.2d at 5.

The Court in *Riggs* next construed the language of section 20-7-420(A)(17) which authorized the family court to order "child support past age eighteen where there are physical or mental disabilities." *Id*. at 234-35, 578 S.E.2d at 5. *Riggs* found the statutory provision "to be consistent with this common law duty and h[e]ld the family court is vested with jurisdiction to order child support for an unemancipated disabled adult child." *Id*. at 235, 578 S.E.2d at 5.

The issue of an unemancipated disabled adult child, with its common law underpinnings, is a far cry from a non-disabled adult child who wants to attend college. Imposing a duty of support in the former situation (through the common law and statutorily) is easily understandable. In the absence of a clear expression of legislative intent, I would not venture beyond *Risinger*. Accordingly, I would hold that legislative approval for the family court ordering a parent to contribute to his or her adult child's college educational expenses is limited to children of separated, divorced, or unmarried parents.

III.

Because I reject Appellant's constitutional challenge and vote to affirm the family court, I would address Appellant's contention concerning the scope of his financial obligation. My assessment of legislative intent is that a parent's contribution should be determined and limited based on the cost of a South Carolina publicly supported college or university. Respondent suggests it is unfair to limit a child's selection to a South Carolina publicly supported college or university. I agree with Respondent on that point, but I view the issue differently. The issue, as I see it, is to what degree the Legislature has authorized the family court to compel the contribution of a parent to an adult child's college education. Given that *Risinger* discerned legislative intent from the "exceptional circumstances" provision, I find it incongruous that the Legislature would place no reasonable limitation on a parent's contribution.

The *Risinger* framework entails a host of limitations as a function of legislative intent, including consideration of the adult child's ability to work to defray college expenses, exhaustion of scholarships, availability of student loans, and the parent's ability to contribute. Regardless of a parent's wealth, the *Risinger* factors will apply in all cases. As I construe legislative intent, it matters not that a parent can easily afford the most expensive college education. Parents will often allow an adult child to attend the college of his or her choice, but that is a voluntary decision free from governmental interference.[11] I do not believe the Legislature has authorized the family court to accept an adult child's college selection without regard to the costs. I believe a limitation to a South Carolina publicly supported college or university is in accord with legislative intent as set forth in *Risinger*.

[11] A different situation is presented where parents, through a court approved separation agreement, agree to voluntarily provide support at a certain level to an adult child's college education expenses.

IV.

I respectfully dissent. I would affirm the order of the family court requiring Appellant, pursuant to section 63-3-530(A)(17), to contribute to the son's college educational expenses. But I would limit Appellant's contribution to what his pro rata assessment would have been at a South Carolina publicly supported college or university. Accordingly, I would remand to the family court to determine if Appellant's contribution should be modified.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Willie L. Jones, Personal Representative of the Estate of Chad Jones, Petitioner,

v.

Leon Lott, Linn Pitts, Gilbert Gallegos and Clark Frady, Individually and in their official capacities with the Richland County Sheriff's Department, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Roger M. Young, Circuit Court Judge

Opinion No. 26808
Heard March 3, 2010 – Filed April 19, 2010

AFFIRMED

Hemphill P. Pride, II, of Columbia, for Petitioner.

William H. Davidson, II, Andrew F. Lindemann, and Robert D. Garfield, all of Davidson & Lindemann, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: In this case, the Court granted Willie L. Jones's (Petitioner) request for a writ of certiorari to review the court of appeals' decision in *Jones v. Lott*, 379 S.C. 285, 665 S.E.2d 642 (Ct. App. 2008) affirming the trial court's grant of a directed verdict in favor of Leon Lott (Respondent).

FACTS/PROCEDURAL HISTORY

Linn Pitts (Pitts) and Gilbert Gallegos (Gallegos), members of Richland County Sheriff's Department, attempted to pull over Chad Jones (Jones) because Jones committed a traffic violation. When the officers checked the tags on the vehicle, they were alerted it was stolen. Jones refused to stop so the officers pursued him. Eventually, Jones wrecked into an air conditioning unit at the Waverly Street apartments. Jones fled the scene on foot and dropped a .22 caliber revolver. The officers found Jones in the laundry room of a nearby house where, after a brief struggle, he was apprehended. The officers found a clear plastic container they believed contained crack cocaine.[1] The officers handcuffed Jones and placed him in the rear of Pitts's police cruiser while they began preparing the requisite paperwork accompanying the arrest.

Jones was arrested for ten criminal and traffic offenses.[2] At the time of his arrest, Jones gave officers a false name. However, a Columbia Police

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[1] Police later determined the white powder was washing detergent.

[2] These included: failure to use a turn signal; leaving the scene of an accident; failure to stop for blue lights and siren; driving without a driver's license; possession of a stolen vehicle; possession with intent to distribute crack cocaine; unlawful carrying of a pistol; possession of a pistol under the age of

Department officer on the scene correctly identified Jones. A check revealed Jones had outstanding warrants for attempted burglary, assault with intent to kill, and assault and battery with intent to kill.

While the officers were preparing their paperwork, Pitts and Gallegos noticed Jones fidgeting in the backseat of the cruiser. A third officer, Clark Frady (Frady), who had arrived with a transport van, assisted Gallegos in removing Jones from the cruiser and conducting a pat down search. The officers again secured Jones in the backseat of the cruiser with his hands handcuffed behind his back and his seatbelt fastened. Initially, the officers left the cruiser windows open, but closed them because Jones continued to yell out to passersby. Because it was a warm day, Pitts left the engine running so the air conditioning could operate, and opened the interior Plexiglas window to let the air reach Jones.

Thereafter, Jones maneuvered his handcuffed hands to the front of his body, squeezed through the open Plexiglas window into the driver's seat, and locked the doors. The officers noticed Jones in the front seat when they heard the sound of him turning the key to the already running cruiser. The officers yelled for Jones to stop and unlock the doors. Gallegos unsuccessfully attempted to break the front driver's side window with his baton. Gallegos then ran to his own cruiser, anticipating another pursuit, while Pitts tried to unlock the passenger side door with his key.

Jones placed the cruiser in reverse, backed up, and stopped. Both Pitts and Frady positioned themselves in front of the cruiser and shouted at Jones to stop the vehicle and turn off the engine. Jones placed the cruiser in drive, slumped in the driver's seat, accelerated, and cut left toward Pitts. Pitts moved out of the way and fired a shot into the rear hubcap. Jones then turned the cruiser and drove directly at Frady, who fired twice into the vehicle. One of Frady's shots struck Jones in the back of the head, killing him.

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twenty-one; resisting arrest; and possession with intent to distribute crack cocaine within a half mile of school.

Jones's estate brought a wrongful death and survival action against Respondent, Pitts, Gallegos, and Frady, individually and in their official capacities with the Richland County Sheriff's Department based on allegations of negligence and civil conspiracy. The circuit court granted a motion for summary judgment to the defendants below, but allowed the case to proceed against Respondent in his official capacity as to the gross negligence claim. The circuit court ultimately granted Respondent's motion for a directed verdict at the close of Petitioner's case on the following grounds: (1) the deputies did not owe a duty to Jones to secure him in the back of the cruiser in a manner that made it impossible to escape; (2) any negligence on the deputies' part in securing Jones in the cruiser was outweighed as a matter of law under our comparative negligence standard by Jones's actions in his escape attempt; (3) the use of deadly force by the deputies in that situation was objectively reasonable as a matter of law; and (4) the Sheriff's Department was entitled to immunity under S.C. Code Ann. § 15-78-60(6) (2005) for the method of providing police protection.

On appeal to the court of appeals, Petitioner argued the circuit court erred in granting Respondent's motion for a directed verdict on the following grounds: (1) the deputies had no duty to Jones with respect to the manner in which they confined and secured him upon taking him into custody; (2) the use of deadly force by the deputies was objectively reasonable as a matter of law; and (3) Jones's attempted escape outweighed any negligence on the part of the deputies in failing to secure him. The court of appeals affirmed the circuit court on two grounds: (1) because Petitioner failed to appeal the circuit court's grant of a directed verdict on the issue of Respondent's immunity under section 15-78-60(6), the circuit court's ruling on that issue became the law of the case and warranted affirmance under the two issue rule, and (2) section 15-78-60(21) provided an additional sustaining ground upon which to affirm the circuit court.[3]

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[3] Section 15-78-60 states:

> The governmental entity is not liable for a loss resulting from:
> . . .

ISSUES

I. Did the court of appeals err in finding that the lower court's ruling under section 15-78-60(6) was not raised as an issue for appeal?

II. Did the court of appeals err in finding that Respondent was entitled to immunity under section 15-78-60(21) as an additional sustaining ground?

STANDARD OF REVIEW

When considering a directed verdict motion, the trial court is required to view the evidence and the inferences that can be drawn from that evidence in the light most favorable to the nonmoving party. *Hinkle v. National Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003) (citation omitted). This Court will reverse the trial court's rulings on these motions only where there is no evidence to support the rulings or where the rulings are controlled by an error of law. *Id.* (citation omitted).

> (6) civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection;
> . . .
> (21) the decision to or implementation of release, discharge, parole, or furlough of any persons in the custody of any governmental entity, including but not limited to a prisoner, inmate, juvenile, patient, or client or the escape of these persons;

LAW/ANALYSIS

A. S.C. Code Ann. § 15-78-60

Petitioner argues this Court should reverse the decision of the court of appeals and find that Respondent was not entitled to a directed verdict on the basis of either section 15-78-60(6) or section 15-78-60(21).[4] We disagree.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (citations omitted). The statement of each issue on appeal shall be concise and direct, and broad general statements of issues may be disregarded by this Court. Rule 208(b)(1)(B), SCACR. "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." *Id.* "Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Forest Dunes Assocs. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990) (citation omitted).

Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. *See Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996); *see also First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"). This Court has explained that the two issue rule is applicable in situations not involving a jury:

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of

[4] The two issues outlined above can be addressed simultaneously because Petitioner asserts a gross negligence standard applies to both.

> general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420 n.1, 472 S.E.2d 253, 255 n.1 (1996).

A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* at 420, 526 S.E.2d at 723; *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

"Immunity is an affirmative defense which must be pleaded and can be waived." *Rayfield v. S.C. Dep't of Corrs.*, 297 S.C. 95, 105, 374 S.E.2d 910, 916 (Ct. App. 1988). "When a governmental entity asserts multiple exceptions to the waiver of immunity and at least one of the exceptions contains a gross negligent standard, we must interpolate the gross negligence standard into the other exceptions." *Proctor v. Dep't of Health and Envtl. Control*, 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct. App. 2006). However, this Court has held that "the better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception." *Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 397, 520 S.E.2d 142, 154 (1999).

Petitioner argues he appealed the trial court's grant of a directed verdict on the issue of Respondent's immunity under section 15-78-60(6) because the argument was subsumed in the central issue of the case, which addresses the trial judge's ruling that the officers were not negligent or grossly negligent. Petitioner contends that in issue two of his appellate brief to the court of appeals he argued that where multiple exceptions to the waiver of immunity are invoked and at least one of those exceptions contains a gross negligence standard, the courts must interpolate the gross negligence standard into the other exceptions. Specifically, Petitioner argues the gross negligence standard of section 15-78-60(25) applies to all claims of immunity raised by Respondent, including sections 15-78-60(6) and (21).

Petitioner's second issue on appeal to the court of appeals states, "Did the trial court err in finding the use of deadly force by the Richland County deputies was objectively reasonable, as a matter of law, and that the officers were not negligent, as a matter of law?" There was no mention of section 15-78-60(6) or Tort Claims Act immunity. Moreover, the second issue does not reference a "gross negligence" standard. This left the court of appeals to "grope in the dark" to ascertain the precise point at issue. The issue raised by Petitioner was not concise and direct, but rather a broad general statement that ought to be disregarded by this Court. Hence, because Petitioner failed to preserve the issue for review, it became the law of the case under the two issue rule. Therefore, the court of appeals was correct in holding Respondent was entitled to immunity under section 15-78-60(6).

Petitioner's contention that section 15-78-60(25)'s gross negligence standard should be interpolated into the other pleaded exceptions is misplaced. Respondent never raised an affirmative defense that contained a gross negligence standard. Thus, under this Court's holding in *Steinke,* the gross negligence standard is not interpolated into either section 15-78-60(6) or (21). Also, Respondent raised section 15-78-60(21) as an additional ground in his directed verdict motion. Petitioner's central objection to section 15-78-60(21) is that the gross negligence standard applies to that section. However, as noted above the gross negligence standard does not apply because Respondent did not plead a section containing a gross negligence

standard. Thus, the court of appeals correctly held that section 15-78-60(21) was an additional sustaining ground.

B. *Edwards*

Petitioner also contends this Court's recent decision in *Edwards v. Lexington County Sheriff's Dep't*, __ S.C. __, 688 S.E.2d 125 (2010) supports the proposition that the officers owed a duty of care to Jones by virtue of a special relationship they had with Jones. In *Edwards*, this Court held the Lexington County Sheriff's Department (Lexington) owed Teresa Edwards (Edwards) a duty of care because Lexington created a situation in which it was foreseeable that Allen Baker (Baker) would harm Edwards. *Edwards*, __ S.C. at __, 688 S.E.2d at 130. In that case, Lexington was well aware of Baker's unrelenting violent tendencies toward Edwards.[5] *Id.* Moreover, this Court stressed that our holding in *Edwards* resulted from the unique facts of that case. *Id.*

The present case is simply inapposite to our holding in *Edwards*. Jones was trying to escape the custody of a governmental entity. Jones's attempted escape places this case squarely within one of the exceptions in section 15-78-60. Section 15-78-60(21) provides a governmental entity is not liable for a loss resulting from "the decision to or implementation of release, discharge, parole, or furlough of any persons in the custody of any governmental entity . . . or the escape of these persons." Hence, even if all of Petitioner's issues were preserved for review, the deputies would still be immune from suit pursuant to section 15-78-60(21) because Jones was trying to escape.

[5] Edwards had called the sheriff's office to report Baker's harassment on numerous occasions, and Lexington arranged for Edwards to stay in a hotel after one of the incidents. *Edwards*, __ S.C. at __, 688 S.E.2d at 130. Lexington arranged the bond revocation hearing at the magistrate's office with no security present. *Id*. Despite Lexington's awareness that Edwards feared Baker and was reluctant to attend the bond revocation, Lexington strongly encouraged Edwards's presence. *Id.*

CONCLUSION

Because Petitioner failed to appeal the circuit court's holding that Respondent was entitled to immunity under section 15-78-60(6), that finding became the law of the case under the two issue rule. Also, the court of appeals correctly held that section 15-78-60(21) provided an additional sustaining ground to the circuit court's findings. Lastly, even if all of Petitioner's issues were preserved for review, the deputies would still be immune from suit pursuant to section 15-78-60(21). Hence, for the aforementioned reasons, the decision of the court of appeals is affirmed.

BEATTY, KITTREDGE, JJ., and Acting Justice Steven H. John, concur. PLEICONES, J., concurring in result.

The Supreme Court of South Carolina

In the Matter of Michael E. Atwater, Respondent.

ORDER

Respondent was suspended on October 12, 2009, for a period of six months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

April 19, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sharon Brown,

Appellant,

v.

William B. James,
Superintendent for Cherokee
County School District,

Respondent.

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

Opinion No. 4674
Heard October 13, 2009 – Filed April 12, 2010

REVERSED AND REMANDED

Fletcher Smith, Jr., of Greenville, for Appellant.

M. Jane Turner, David Duff, and Kiosha A. Hammond, all of Columbia, for Respondent.

GEATHERS, J.: Sharon Brown (Brown) appeals the circuit court's decision granting District Superintendent William B. James' (James) motion for summary judgment regarding her action against him for violating her rights under the South Carolina Teacher Employment and Dismissal Act (Employment and Dismissal Act).[1] Brown asserts that (1) the circuit court abused its discretion when concluding she had not exhausted her administrative remedies; (2) the circuit court misinterpreted the Employment and Dismissal Act; (3) she had a legal right to appeal directly to the circuit court because the Board of Trustees (Board) had already reached a final decision regarding the nonrenewal of her contract; and (4) the circuit court abused its discretion when concluding that her motion to amend her complaint to add parties was moot. We reverse and remand.

FACTS

Brown was a teacher, assigned to Limestone Central Elementary School (Limestone) in Cherokee County, South Carolina, for the 2006-2007 school year. Brown had been a teacher at Limestone for eight years before she filed this action. On April 10, 2007, Brown was called to the Cherokee County School District (District) office to meet with Mr. William A. Jones (Jones), Chief Administrative Officer/Director of Personnel for the District. Jones and Brown discussed an "improvement letter" Brown had received from Limestone's Principal, Sharon Jefferies, and the fact that Brown had filed a sexual harassment complaint with the Equal Employment Opportunity Commission against Jefferies.[2] Brown informed Jones that she had planned to file the sexual harassment complaint even before she received the

[1] S.C. Code Ann. § 59-25-410 to -530 (2004).

[2] The record does not explain what an improvement letter is, but it can be inferred that it is a letter outlining a plan to improve the teacher's performance. See S.C. Code Ann. § 59-25-440 (2004).

improvement letter.[3] Jones told Brown she could either go back to work or take Family Medical Leave due to the "hostile/threatening" work environment. Brown chose to take the leave because Jones told her she would be paid until the end of her contract year, which was July 2007. Jones then informed Brown that he was going to recommend that her teaching contract not be renewed and advised her to resign.

Subsequently, Brown received a letter dated April 12, 2007, from District Superintendent James, stating that at the school principal's recommendation, her contract for the upcoming year would not be renewed. Brown retained attorney Theo W. Mitchell (Attorney Mitchell), and within fifteen days of the April 12, 2007 notice, she submitted a written request for an opportunity to be heard under the Employment and Dismissal Act. The Board received Brown's request on April 27, 2007. However, on April 24, 2007, James recommended to the Board that Brown's teaching contract not be renewed, and the Board voted to terminate Brown's contract that same day. The Board did not inform Brown of its decision.

Even though the Board had already made its final determination regarding Brown's contract, the Board asked Attorney Mitchell if Brown would waive the fifteen-day requirement for scheduling the hearing to give it an opportunity to discuss the matter. Brown agreed to the waiver. The Board then notified Attorney Mitchell that it wanted to depose Brown before the hearing.

Subsequently, Attorney Mitchell informed the Board that Brown would not be available for a deposition prior to a hearing. Thereafter, on two separate occasions, the Board informed Attorney Mitchell that if it did not receive a response from either Brown or him regarding the scheduling of a deposition, it would consider Brown's noncooperation as a voluntary withdrawal of her request for a hearing, and the case would be closed. Brown did not participate in a deposition. On November 27, 2007, an attorney for the Board sent Attorney Mitchell a letter stating, "As I have had no contact from you since September 25, 2007, the District now considers the

[3] Brown's initial pro se complaint and her sworn affidavit make reference to her EEOC complaint, which she filed based on sexual harassment, racial discrimination, and retaliation.

request [for a hearing] to be withdrawn and the matter closed." The Board did not schedule or give notice of a hearing. Consequently, on November 29, 2007, Brown filed an action in the circuit court against James for violation of the Employment and Dismissal Act.

PROCEDURAL HISTORY

Brown filed her initial complaint in circuit court because she believed her due process rights were violated under the Employment and Dismissal Act in that her contract was not renewed and she was never afforded an opportunity to be heard. Specifically, in her complaint against James, Brown alleged breach of contract, fraud, breach of contract accompanied by a fraudulent act, "negligence and/or negligent misrepresentation," breach of duty of good faith and fair dealing, and intentional infliction of emotional distress. Brown asserts the Board made a final decision regarding her employment before she was afforded an opportunity to be heard as required by the Employment and Dismissal Act. Brown also asserts that she could not comply with the Employment and Dismissal Act's thirty-day appeal process regarding the Board's final determination as she did not have knowledge of the Board's final determination until eleven months after the decision was made.[4] James did not file a formal answer that addressed any of the issues Brown raised in her complaint. Instead, on January 18, 2008, fifty days after the complaint was filed and served, James filed a motion to dismiss under Rule 12(b)(6), SCRCP, or in the alternative, a motion for summary judgment under Rule 56, SCRCP.

On February 13, 2008, Brown filed a motion to add the Board as a defendant. On March 7, 2008, James renewed his motion, stating only that Brown had not exhausted her administrative remedies. During February and March 2008, Brown filed a request for production of documents and requests to admit. During March and April, James answered the requests. After Brown received the responses to the request for production, she sought to amend her complaint to add the Board's attorneys as defendants predicated on

[4] The Board never sent Brown a formal notification of its final decision regarding her termination. She became aware of the *date* of the final decision through the Board's discovery responses to the case before the circuit court.

their knowledge of and involvement in what she perceived to be a fraudulent act.

On April 28, 2008, the circuit court heard Brown's motion to amend and James' motion to dismiss. On May 5, 2008, the circuit court issued an order granting James' motion to dismiss,[5] concluding that Brown had not exhausted her administrative remedies. The court also concluded that based on the dismissal, Brown's motion to amend was rendered moot. On May 12, 2008, Brown filed a motion for reconsideration, which included a request that if the dismissal was granted, that it be dismissed without prejudice. On June 20, 2008, the circuit court issued an order denying Brown's motion. This appeal followed.

ISSUE ON APPEAL

The issue presented in this case is whether the circuit court erred in granting James' motion for summary judgment because it concluded that Brown failed to exhaust her administrative remedies.

[5] James filed a motion to dismiss the complaint pursuant to Rule 12(b)(6), SCRCP, or, in the alternative, a motion for summary judgment pursuant to Rule 56, SCRCP. Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. Id. In the order granting the dismissal, the circuit court considered "the record in this case, the applicable law, and the argument of counsel and Brown." In doing so, it effectively treated James' Rule 12(b)(6) motion to dismiss as a Rule 56 motion for summary judgment as it based its ruling on allegations and information set forth outside the complaint. Gilbert v. Miller, 356 S.C. 25, 27, 586 S.E.2d 861, 862-63 (Ct. App. 2003); Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999).

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, an appellate court applies the same standard of review as the trial court under Rule 56, SCRCP. Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Knox v. Greenville Hosp. Sys., 362 S.C. 566, 569-70, 608 S.E.2d 459, 461 (Ct. App. 2005); B & B Liquors, Inc. v. O'Neal, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).[6]

LAW/ANALYSIS

I. Exhaustion of Administrative Remedies

Brown argues the circuit court erred in concluding that her claims were not properly before the court due to her failure to exhaust her exclusive statutory remedy under the Employment and Dismissal Act. We agree.

The District Board of Trustees is considered an "agency" as defined in the Administrative Procedures Act (APA). See S.C. Code Ann. § 1-23-310(2) (2005 & Supp. 2009) ("'Agency' means each state board, commission, department, or officer, other than the legislature, the courts, or the Administrative Law Court, authorized by law to determine contested cases.").

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[6] The standard of review in determining whether the Board properly exercised its discretion under section 59-19-90 of the South Carolina Code (2004 & Supp. 2009) is "whether the action measures up to any fair test of reason, and that a clear abuse of discretion is required to justify judicial interference." Redmond v. Lexington County Sch. Dist. No. Four, 314 S.C. 431, 435-36, 445 S.E.2d 441, 444 (1994). This Court does not address the Board's discretion regarding its authority to terminate a teacher, only the process in which it carried out the decision.

Under the APA, Brown was required to exhaust her administrative remedies before seeking judicial review. Section 1-23-380 of the South Carolina Code (2005 & Supp. 2009) specifically states, "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1."

The general rule is that administrative remedies must be exhausted absent circumstances excusing application of the general rule. Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). However, one does not have to exhaust administrative remedies when it would be futile to do so. Ward v. State, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000); Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 39, 535 S.E.2d 642, 645 (2000). "Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse." Garris v. Governing Bd. of S.C. Reinsurance Facility, 319 S.C. 388, 390, 461 S.E.2d 819, 831 (1995); Hyde, 314 S.C. at 208, 442 S.E.2d at 582-83; Stanton v. Town of Pawley's Island, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992). "An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

"The requirement of exhaustion of administrative remedies [in relation to] a court's authority to hear a case involving an agency, where a plaintiff has not asked the agency for relief, is often confused." Adamson v. Richland County Sch. Dist. One, 332 S.C. 121, 125, 503 S.E.2d 752, 754 (Ct. App. 1998). The doctrine of exhaustion of administrative remedies is generally considered a rule of "policy, convenience and discretion, rather than one of law, and is not jurisdictional." Vaught v. Waites, 300 S.C. 201, 205, 387 S.E.2d 91, 93 (Ct. App. 1989) (citing Andrews Bearing Corp. v. Brady, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973)); see also Ex parte Allstate Ins. Co., 248 S.C. 550, 567, 151 S.E.2d 849, 855 (1966). While exhaustion is an "inflexible" rule in some jurisdictions, in South Carolina it "is discretionary in nature." Andrews, 261 S.C. at 536, 201 S.E.2d at 243.

In this case, Brown received notice that her teaching contract was recommended for nonrenewal.[7] In order to fully exhaust her administrative remedies, Brown was required to request a hearing before the Board within the time frame prescribed by the Employment and Dismissal Act. Section 59-25-420 of the South Carolina Code (2004) states, "Any teacher, receiving a notice that he will not be reemployed for the ensuing year, shall have the same notice and opportunity for a hearing provided in subsequent sections for teachers dismissed for cause during the school year."

In order to secure her opportunity for a hearing, Brown was required to make a written request to the Board within fifteen days of the notice of nonrenewal pursuant to S.C. Code Ann. § 59-25-460 (2004). Here, there is no dispute that Brown timely requested a hearing after receiving the Board's April 12, 2007 notice. The analysis of this matter is convoluted for two primary reasons: 1) The Board officially voted to terminate Brown's contract on April 24, 2007 (unbeknownst to Brown) prior to affording her the opportunity for a hearing, all the while operating under the guise of proceeding to the administration of a fair and meaningful hearing, and 2) The Board dismissed her appeal on November 27, 2007, because she refused to submit to a deposition. We will address each of these issues in turn.

Finality of an Agency Action

The minutes of the April 24, 2007, Board meeting show a final decision regarding the termination of Brown's contract was made even before her fifteen-day period to request a hearing had expired.[8] On appeal, James admits a final determination regarding Brown's contract was made on April 24, 2007, but argues that the Board accepted the recommendation "subject to

[7] However, the notice did not inform Brown of the cause for the nonrenewal of her contract, as required by section 59-25-420 and section 59-25-460.

[8] The minutes of the April 24, 2007 Cherokee County School District No. 1, Board of Trustees, Board Meeting are replete with distinct categories that address personnel recommendations; however, the reference to the nonrenewal of Brown's contract is titled "Terminations."

the Act's procedural protections, particularly [Brown's] right to a Board hearing." Yet, there is no language in the Employment and Dismissal Act that states a *final* decision of the Board is *subject to* a teacher's right to a hearing. Brown asserts that the April 24, 2007 vote by the Board constituted a final agency action. We agree.

Our Supreme Court has expounded upon the exhaustion of administrative remedies with regard to an agency's final decision. In S.C. Baptist Hosp. v. S.C. Dep't of Health & Envtl. Control, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987), the Court held:

> An agency decision which does not decide the merits of a contested case . . . is not a final agency decision subject to judicial review . . . It would be premature for a court to decide the merits of a dispute when the agency responsible for making the decision has not yet had an opportunity to decide the merits of the case.

In that case, the Court did not find judicial review of an interlocutory decision to be appropriate. Id. Conversely, judicial review would have been appropriate if an evidentiary hearing was conducted and a final decision regarding the merits of the case was made. Id.[9] Additionally, in Canteen v. McLeod Reg'l Med. Ctr., 384 S.C. 617, 624, 682 S.E.2d 504, 507 (Ct. App.

[9] In Darby v. Cisneros, 509 U.S. 137, 144 (1993), the United States Supreme Court held that "the finality requirement is concerned with whether the initial agency decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . ." Additionally, in Idaho Watersheds Project v. Hahn, 307 F.3d 815, 825-28 (9th Cir. 2002), the Ninth Circuit held that under certain circumstances, an agency's initial decision can be considered final for exhaustion purposes. Specifically, when an agency has completed the process for reaching an initial decision and when that decision has immediate legal effects on the petitioner, the initial decision will be considered a final decision, even though the initial decision-maker may reconsider its decision or the initial decision is subject to review within the agency.

2009), the Appellate Panel of the Workers' Compensation Commission reversed the findings of the single commissioner regarding a brain injury and remanded the case for a determination of permanency to body parts other than the claimant's brain. The claimant immediately sought judicial review and the employer filed a motion to dismiss, arguing the Appellant Panel's decision was interlocutory because it had remanded the case for further proceedings. However, this Court held, "because the appellate panel ruled on [the only issue before it], there was a final agency decision on the merits in this case and [the claimant] exhausted all of her administrative remedies." Id.

In the case at hand, whether or not to terminate Brown was the only issue to be determined regarding her contract, and when the Board unanimously voted to terminate Brown, it reached a final agency decision on the merits. Section 59-25-480 of the South Carolina Code (2004) specifically states, "The decision of the district board of trustees shall be final, unless within thirty days thereafter an appeal is made to the court of common pleas of any county in which the major portion of such district lies."

Further, when the Board voted to accept James' recommendation for the nonrenewal of Brown's teaching contract prior to conducting a hearing, its decision had an immediate effect on Brown's legal rights. Section 59-25-460 and section 59-25-470 of the South Carolina Code (2004) make it expressly clear that *before* the Board makes a final decision regarding the acceptance or rejection of a recommendation for nonrenewal of a teacher's contract, the teacher must be afforded the opportunity to be heard. The observance of the procedural requirements of the Employment and Dismissal Act is mandatory and not a matter of discretion.

James concedes that Brown requested a hearing before the Board but argues that Brown did not *pursue* her request and as such, failed to exhaust her administrative remedies. He further states, "[A] board's decision concerning nonrenewal becomes final only after the teacher has had the opportunity to present testimony and evidence to the board in support of his [or] her case and the board acts to uphold or vacate its earlier nonrenewal decision." Here, James inaccurately interprets the procedure outlined in section 59-25-470.

The Employment and Dismissal Act requires the Board to afford the adversely affected teacher a hearing based on the notice of dismissal that was recommended by the superintendent. After the hearing is completed, the Board is required to either affirm or withdraw the notice and *that* action will translate into its final decision. See S.C. Code Ann. § 59-25-470 (2004); see also Adamson, 332 S.C. at 128, 503 S.E.2d at 756 (explaining the Board is free to reject the superintendent's recommendation, and until then, there is no final board action). Further, contrary to James' argument, the Board never scheduled a hearing or sent Brown notice of the date, time, and place of a hearing as statutorily required, thus depriving Brown of the opportunity to be heard. The fact that an administrative hearing was not conducted below rests with the Board's failure to follow procedure as prescribed in the Employment and Dismissal Act, and not in any failure of Brown to exhaust her administrative remedies.

Exceptions to the Requirement of Exhaustion

Brown asserts that even if she failed to exhaust her administrative remedies before the Board, exhaustion was not required because the facts of her case satisfied one of the exceptions to the exhaustion requirement.

South Carolina, like most jurisdictions, recognizes exceptions to the exhaustion of administrative remedies requirement. The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule. Andrews, 261 S.C. at 536, 201 S.E.2d at 243; Allstate, 248 S.C. at 567, 151 S.E.2d at 855. The legislature will not require a futile act; therefore, a commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act. Moore v. Sumter County Council, 300 S.C. 270, 273, 387 S.E.2d 455, 458; Ward v. State, 343 S.C. at 19, 538 S.E.2d at 247; Video Gaming Consultants, 342 S.C. at 39, 535 S.E.2d at 645. "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" Law v. S.C. Dep't of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (citing Thetford Properties IV Ltd. P'ship v. U.S. Dep't of Hous. & Urban Dev., 907 F.2d 445, 450 (4th Cir. 1990)). Another exception to the

exhaustion requirement is recognized when an agency has acted outside of its authority. See Responsible Econ. Dev. v. S.C. Dep't of Health & Envtl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007).

Brown argues she was not required to request a hearing after a final determination had already been made regarding the nonrenewal of her teaching contract; rather, she asserts that she was within her legal right to appeal directly to the circuit court. Essentially, Brown argues a hearing conducted after the fact would be an action in futility. We agree.

Article 1, section 22, of the South Carolina State Constitution states:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review.

Further, section 59-25-470 states that after the hearing has taken place and the Board has had the opportunity to determine "whether the evidence showed good and just cause for the notice of suspension or dismissal," or in this case, nonrenewal of Brown's teaching contract, the Board "shall render its decision accordingly, either affirming or withdrawing the notice of suspension or dismissal." In his brief, James cites this section of the code and admits "recommendations, when adverse to a teacher, are subject to the Act's procedural protections, particularly the right to a Board hearing pursuant to § 59-25-470."

Plainly, the procedure is set in place to afford the teacher a meaningful review of the evidence *prior* to the Board making a final determination, as a review of the evidence after the fact would be futile. "The elementary and cardinal rule of statutory construction is that the Court ascertain and effectuate the actual intent of the legislature." Horn v. Davis Elec. Constructors, Inc., 307 S.C. 559, 563, 416 S.E.2d 634, 636 (1992). Where, as here, the terms are clear and unambiguous, "the Court must apply them according to [their] literal meaning." Anders v. S.C. Parole & Cmty. Corr. Bd., 279 S.C. 206, 209, 305 S.E.2d 229, 230 (1983).

Our research has not revealed any specific South Carolina case law addressing (or offering instruction on) whether a teacher must participate in a hearing after the Board has made a final determination regarding the nonrenewal of her contract. However, courts in other jurisdictions have analyzed issues similar to the case at bar. Specifically, the Indiana Court of Appeals has held:

> [T]he notice by the school corporation to the tenure teachers was not sufficient, as it did not comply with the statutory requirements for the dismissal of a tenure teacher and such failure to comply with the statutory requirements did not require a tenure teacher to go forth with the burden of requesting a hearing for cause.

Joyce v. Hanover Cmty. School Corp., 276 N.E.2d 549, 564 (Ind. Ct. App. 1971) (finding that the school board's action was arbitrary and capricious as it pertained to tenure teachers), *overruled on other grounds by* Myers v. Greater Clark County Sch. Corp., 464 N.E.2d 1323 (Ind. Ct. App. 1984); see also Tippecanoe Valley School Corp. v. Leachman, 261 N.E.2d 880, 887 (Ind. Ct. App. 1970) (holding that "evidence . . . was sufficient to sustain an implied finding by the trial court that the procedure provided by the contract for the removal of the plaintiff from his position as teacher was not followed and that failure to follow it was a gross abuse of discretion").

The statutes interpreted in the Pennsylvania case of In re Swink, 200 A. 200 (1938), are very similar to South Carolina law in that they afford a teacher who has been notified that her contract has been recommended for nonrenewal an opportunity to present her case to the Board before a final decision has been made.[10] In that case, the Pennsylvania Superior Court held the Board of School Directors failed to comply with the statutory requirements and reversed the Board's actions, stating that the observance of the prescribed procedure "is not a matter of discretion." Id. at 203. The court

[10] See 24 P.S. § 1121 (1937) and note, and §§ 1126, 1161, 1201, and 1202 (1937).

further held, "[T]he purpose of the procedure prescribed by the act for the dismissal of a teacher . . . is to prevent arbitrary action by the board, *to afford a fair hearing* to the teacher . . . *before dismissal*, and *to provide for full, impartial, and unbiased consideration by the board of the testimony produced*." Id. (emphasis added).

Similarly, the North Dakota Supreme Court has held that in order for a teacher to benefit from a hearing, she must be allowed to present her case at a hearing that is based on a *contemplated* recommendation for nonrenewal rather than the premature acceptance of the recommendation. Henley v. Fingal Pub. Sch. Dist. #54, 219 N.W.2d 106, 110 (N.D. 1974). Furthermore, the Supreme Court of Connecticut has explained:

> Notice before termination and notice after termination are not two sides of the same coin. Once the board has committed itself by its action to a particular result it may be too late in the day to suggest a change of direction; at that stage the urge to proceed along its committed course is compelling. But before the die is cast it is still possible for persuasion to affect the result.

Petrovich v. New Canaan Bd. of Educ., 457 A.2d 315, 318 (Conn. 1983).

Analogous to the cases cited above, in the present case, a hearing after the fact would have likely proven futile. Section 59-25-420 and section 59-25-430 of the South Carolina Code (2004) provide for a hearing prior to a final decision of the Board to avoid futility and allow for a meaningful and fair administrative hearing. In addition, because of the hostile environment that caused Brown to take Family Medical Leave in conjunction with the filing of her sexual harassment claim, it is likely the Board would have maintained its position of approving Brown's termination. Section 1-23-380 of the South Carolina Code (2005 & Supp. 2009) states in part, "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." It further states, "A preliminary, procedural, or intermediate agency action or ruling is

immediately reviewable if review of the final agency decision would not provide an adequate remedy." Id., see also Jean Hoefer Toal, et al., Appellate Practice in South Carolina 49 (2d ed. 2002).

Brown did all that was required of her under the Employment and Dismissal Act; thus, she exhausted her administrative remedies. Consequently, as a matter of law, Brown was entitled to have her case proceed before the circuit court, and the granting of James' motion for summary judgment was improper.

Procedures for Compelling Participation in a Deposition

Brown argues the circuit court incorrectly concluded that because she did not participate in a deposition as requested by the Board, she essentially abandoned her right to a hearing and the Board was justified in dismissing her case. We agree.

James argues Brown was required to participate in a deposition prior to a hearing and uses section 59-25-490 of the South Carolina Code (2004) to support his position. Section 59-25-490, in pertinent part, states, "Any party to such proceedings *may* cause to be taken the depositions of witnesses . . . ." (emphasis added).

However, the Employment and Dismissal Act does not authorize the Board to dismiss actions for lack of participation in a deposition. Instead, it outlines the procedure the Board should have taken. Specifically, the pertinent portion of section 59-25-490 states:

> Such depositions shall be taken *in accordance with and subject to the same provisions, conditions and restrictions as apply to the taking of like depositions in civil actions at law in the court of common pleas; and the same rules with respect to the giving of notice to the opposite party*, the taking and transcribing of testimony, the transmission and certification thereof and matters of practice relating thereto shall apply.

(emphasis added).

Here, when the Board did not receive any responses from Brown or her attorney regarding her participation in the requested deposition, it should have served Brown with a subpoena in an effort to compel her attendance at a deposition pursuant to section 59-25-500 of the South Carolina Code (2004). Moreover, the Board could have moved before the circuit court to enforce such a subpoena under section 59-25-520.

The record does not indicate, nor was it asserted at oral argument, that the Board issued a subpoena or that one was served on Brown in an effort to compel her attendance at the requested deposition. Further, the record does not indicate that Brown was ever served with notice of the deposition or notice of a hearing before the Board. Section 59-25-520 of the Employment and Dismissal Act does not vest the Board with authority to dismiss Brown's request for a hearing based on her nonparticipation in a deposition; rather, it prescribes procedural mechanisms including seeking sanctions from the circuit court to compel participation in a deposition. However, the Board did not avail itself of this; instead, it presupposed to dismiss her case, which is not sanctioned under South Carolina law.

II. Dismissal of the Motion to Amend

Brown argues the circuit court abused its discretion when it dismissed her motion to amend her complaint to add parties on the grounds that her motion was moot in light of the fact that the court granted James' motion for summary judgment. We agree.

Rule 15(a), SCRCP, states in part, "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(c), SCRCP, further states, "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading."

"It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232, 599 S.E.2d 462, 465 (Ct. App. 2004). "Courts have wide latitude in amending pleadings and '[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal.'" Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 792 (Ct. App. 1997). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." Id.

Here, Brown attempted to add the Board's attorneys as defendants based on responses she received from discovery requests. Brown asserts the alleged improper conduct of the attorneys arose out of the same transaction or occurrence set forth in her original pleading. Because the circuit court erred in concluding that Brown had not exhausted her administrative remedies and in granting James' motion for summary judgment, Brown's motion to amend her complaint should have been considered in the proper light that she had in fact exhausted her administrative remedies. Accordingly, the circuit court erred in failing to consider the motion under this circumstance. We, however, do not address the merits of her motion to amend her complaint.

III. Automatic Renewal of Contract

Brown contends that because the Board did not recommend the nonrenewal of her contract before the April 15th deadline, her termination was illegal and her contract was automatically renewed. James argues the Board complied with the Employment and Dismissal Act's April 15th deadline as prescribed in section 59-25-410 of the South Carolina Code (2004) in that Brown received a letter on April 12, 2007, informing her of the intention to recommend nonrenewal of her contract.

Brown did not raise the issue of automatic renewal to the circuit court; thus, this issue is not preserved for our review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 592 S.E.2d 543, 546 (2000). Even if Brown had raised the issue below, if the circuit court did not rule on the issue and Brown

did not file a motion to alter or amend the judgment, the issue is not properly preserved for appellate review. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 708 (2007) (stating that in order to be preserved for appellate review, an issue must have been raised to and ruled upon by the trial court); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that if a party raises an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review).

CONCLUSION

The wording of the South Carolina Teacher Employment and Dismissal Act is unambiguous regarding procedure, and the record fails to show the Board complied with its requirements. As a result, the circuit court erred in concluding Brown did not exhaust her administrative remedies. The circuit court also erred in misinterpreting the Employment and Dismissal Act, as Brown was not required to request a hearing of the school district's Board of Trustees after a final decision had been made regarding the nonrenewal of her contract; and, as a matter of law, Brown was entitled to appeal directly to the circuit court. Accordingly, the circuit court erred when it granted James' motion for summary judgment and when it concluded that Brown's motion to amend her complaint to add parties was moot.

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

REVERSED AND REMANDED.

SHORT and WILLIAMS, JJ., concur.