The Supreme Court of South Carolina

In the Matter of
John M. Gulledge, Deceased.

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Mr. Gulledge passed away on March 18, 2007, and requesting appointment of an attorney to protect Mr. Gulledge's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Marvin R. Watson, Esquire, is hereby appointed to assume responsibility for Mr. Gulledge's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Gulledge maintained. Mr. Watson shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Gulledge's clients. Mr. Watson may make disbursements from Mr. Gulledge's trust account(s), escrow account(s),

operating account(s), and any other law office account(s) Mr. Gulledge maintained 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 Mr. Gulledge, shall serve as notice to the bank or other financial institution that Marvin R. Watson, 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 Marvin R. Watson, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Gulledge's mail and the authority to direct that Mr. Gulledge's mail be delivered to Mr. Watson's office.

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

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

Columbia, South Carolina

April 25, 2007

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF THOMAS B. HALL, PETITIONER

On October 9, 2006, Petitioner was definitely suspended from the practice of law for nine (9) months. In the Matter of Hall, 370 S.C. 496, 636 S.E.2d 621 (2006). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than June 29, 2007.

Columbia, South Carolina

April 30, 2007

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF JEFFREY T. SPELL, PETITIONER

On March 12, 2007, Petitioner was definitely suspended from the practice of law for twelve months, retroactive to August 24, 2005 . In the Matter of Spell, ___ S.C. ___, 642 S.E.2d 749 (2007). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than July 2, 2007.

Columbia, South Carolina

May 3, 2007

The Supreme Court of South Carolina

RE: Lawyers Suspended by the Commission on Continuing Legal Education and Specialization

The Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(2), SCACR, since April 1, 2007. This list is being published pursuant to Rule 419(d)(2), SCACR. If these lawyers are not reinstated by the Commission by June 1, 2007, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e)(2), SCACR.

Columbia, South Carolina
May 7, 2007

ATTORNEYS SUSPENDED FOR NON-COMPLIANCE
FOR THE 2006-2007 REPORTING PERIOD
AS OF MAY 1, 2007

Brian P. Bilbrey
PO Box 2093
Clarkesville, GA 30523

Jessica R. Boney
PO Box 1060
Union, SC 29379
(INTERIM SUSPENSION BY COURT)

John E. Carbaugh, Jr.
11100 Kings Cavalier Court
Oakton, VA 22124
(SUSPENDED BY BAR 2/1/07)

Michael Dirnbauer
1 North Haven Drive
Greenville, SC 29617

Elton F. Duncan
400 Poydras St., Ste 1200
New Orleans, LA 70130

Blaine T. Edwards
PO Box 17678
Greenville, SC 29606
(INTERIM SUSPENSION BY COURT)

Kristine L. Esgar
2719 Kennedy Street
Columbia, SC 29205
(60-DAY SUSPENSION BY COURT)

Michael S. Fahnestock
134 Heartwood Drive
Lexington, SC 29073

Samantha D. Farlow
PO Box 82
Orangeburg, SC 29116
(INTERIM SUSPENSION BY COURT)

Elizabeth T. Galante
816 Cadiz Street
New Orleans, LA 70115
(SUSPENDED BY BAR 2/1/06)

Glenn Gray
PO Box 2251
Columbia, SC 29202

David H. Hanna
PO Box 5496
Spartanburg, SC 29304
(INTERIM SUSPENSION BY COURT)

Tiffiny B. Hattaway
4459 Northside Parkway, NW, Apt. 368
Atlanta, GA 30237
(SUSPENDED BY BAR 2/1/07)

Lisa Ferguson Hayes
4638 Mabry Parkway
Rock Hill, SC 29732

H. Dewain Herring
460 Alexander Circle
Columbia, SC 29206
(INTERIM SUSPENSION BY COURT)

Hoyt Shay Hooks
5661 W. Mazanita Drive
Glendale, AZ 85302

Michael T. Hursey, Jr.
Hursey Law Firm
PO Box 3678
Myrtle Beach, SC 29578
(INTERIM SUSPENSION BY COURT)

Aaron Christian Low
Stott Hollowell Palmer & Windham, LLP
401 E. Franklin Blvd.
Gastonia, NC 28054

Matthew K. Mahoney
428 Hampton Ridge Court
Richmond, VA 23229

William G. McConnell, Jr.
PO Box 91
Sharon, PA 16146

Marvin W. McGahee
PO Box 8047
Savannah, GA 31412

Joseph P. Mizzell, Jr.
302 Watkins Point Road
Batesburg, SC 29006

Alex J. Newton
4 McKenna Commons Court
Greenville, SC 29615
(INTERIM SUSPENSION BY COURT)

Anthony C. Odom
262 Eastgate Drive
PMB 185
Aiken, SC 29803
(INTERIM SUSPENSION BY COURT)

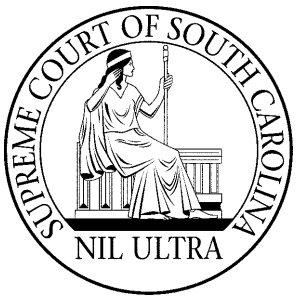
Alan Rosenblum
PO Box 19110
Alexandria, VA 22320

James L. Thorne
The Electric Cooperatives of SC
808 Knox Abbott Drive
Cayce, SC 29033
(SUSPENDED BY BAR 2/1/07)

James F. Wells
PO Box 10646
Rock Hill, SC 29731

Steven Eugene Williford
3674 Express Drive
Shallotte, NC 28470

Harriet E. Wilmeth
PO Box 1139
Hartsville, SC 29551
(INTERIM SUSPENSION BY COURT)



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18

May 7, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RWE NUKEM Corporation,
f/k/a WasteChem Corporation, Respondent,

v.

ENSR Corporation, Appellant.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 26320
Heard April 5, 2007 – Filed April 30, 2007

REVERSED AND REMANDED

Jeffrey S. Patterson, Karl S. Bowers, Jr., and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for Appellant.

Robert E. Stepp, Amy L.B. Hill, and Roland M. Franklin, Jr., all of Sowell Gray Stepp & Laffitte, L.L.C., of Columbia, for Respondent.

JUSTICE BURNETT: ENSR Corporation (Appellant) appeals the circuit court's grant of partial summary judgment in favor of RWE NUKEM Corporation, f/k/a WasteChem Corporation (Respondent). We certified the

appeal from the Court of Appeals pursuant to Rule 204(b), SCACR, and we reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

In the early 1990s, Appellant and Respondent were subsidiaries of American NuKEM Corporation (American NuKEM). In 1995, American NuKEM sold its shares in Respondent to its parent company, RWE NUKEM GmbH.[1] This sale was memorialized in a Stock Purchase Agreement (Stock Agreement), which was signed by representatives of American NuKEM, RWE NUKEM GmbH, Appellant, and Respondent.

As part of the sale, RWE NUKEM GmbH had the option of requiring American NuKEM to direct Appellant to enter into an agreement with Respondent to continue to provide administrative and management services. Although the Administrative and Management Services Agreement (Administrative Agreement), which was attached to the Stock Agreement, was not separately executed by any party, Appellant continued to perform administrative and management services for Respondent following the sale. Between 1995 and 1999, Respondent paid Appellant approximately $1.4 million for its administrative and management services. In July 1999, the relationship between Respondent and Appellant began phasing out and was completely phased out on or about December 31, 1999.

In September 1999 and in February 2000, Respondent requested that Appellant return all of its documents in Appellant's possession. In March 2000, Appellant notified Respondent that some of the records were missing and some were commingled with Appellant's records. Appellant also indicated it was experiencing difficulty in shipping the records in a timely manner. Also in March, Appellant notified Respondent that certain documents were being gathered and would be produced shortly thereafter, but the commingled documents would be produced on an as needed basis due to the prohibitive time and cost. Respondent repeatedly requested documents

[1] RWE NUKEM GmbH is a wholly-owned subsidiary of RWE AG, a publicly-traded German corporation.

from Appellant, and Appellant continually provided Respondent with documents, but Appellant also repeatedly reiterated its position that it would not disaggregate the commingled documents because of the unreasonable cost and time. On January 17, 2003, Respondent again demanded that Appellant produce all of its documents and threatened legal action if the demand was not met by March 31, 2003. On January 28, 2003, Appellant notified Respondent that it would make one final attempt to locate the missing documents, but if Respondent was not satisfied by March 31, 2003, Respondent should take whatever action it deemed appropriate.

Respondent filed this action on September 29, 2003, alleging a breach of contract based on Appellant's failure to provide it with all of its records. Appellant answered and asserted Respondent's claim was barred by the statute of limitations, laches, release, waiver, estoppel, and the statute of frauds. On cross-motions for summary judgment, the circuit court denied Appellant's motion for summary judgment. The circuit court also denied in part Respondent's motion for partial summary judgment as to the existence of a contract; a breach, if any, of the alleged contract; and the validity of the defenses of release, estoppel, and waiver. The circuit court granted in part Respondent's motion for partial summary judgment finding the statute of limitations, laches, and the statute of frauds were not valid defenses in this case.

ISSUES

I. Did the circuit court err in granting partial summary judgment in favor of Respondent based on the statute of limitations?

II. Did the circuit court err in granting partial summary judgment in favor of Respondent based on laches?

STANDARD OF REVIEW

The circuit court may properly grant a motion for summary judgment when "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; Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). "[I]n considering cross motions, the court should draw all inferences against each movant in turn." 73 Am. Jur. 2d Summary Judgment § 43 (2001). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

LAW/ANALYSIS

I. Statute of Limitations

Appellant argues the circuit court erred in granting Respondent's motion for partial summary judgment as to Appellant's statute of limitations defense. We agree.

The circuit court determined the alleged breach, if any, did not occur until March 2003 when Appellant refused to deliver the remaining records within its possession to Respondent. The circuit court held, in the alternative, Appellant's letter dated January 28, 2003, acted as a waiver to any statute of limitations defense prior to March 2003. The circuit court also found the discovery rule did not apply, but even if it did, Appellant would be estopped from claiming the statute of limitations as a defense because of its numerous attempts to comply with Respondent's requests.

A. Date of Breach

Both parties agree the applicable statute of limitations in this action is set forth in S.C. Code Ann. § 15-3-530(1) (2005). An action for breach of contract must be brought within three years from the date it accrues. S.C.

Code Ann. § 15-3-530(1). Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence. State v. McClinton, 369 S.C. 167, 173, 631 S.E.2d 895, 898 (2006) (breach of contract action generally accrues at the time the contract is breached); Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 271, 384 S.E.2d 693, 694 (1989) (discovery rule applies in contract actions), overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995); see also Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (applying the discovery rule to a breach of contract action).

Viewing the evidence in the light most favorable to Appellant, on March 24, 2000 and on June 23, 2000, Appellant advised Respondent that it would not produce all of Respondent's documents because some of the documents were commingled with Appellant's documents and disaggregating them would be too costly and time consuming. On August 21, 2000, Respondent issued a "final demand" to Appellant. On September 14, 2000, Appellant notified Respondent that it did not consider the Administrative Agreement to be a binding contract, but Appellant would continue to supply specific documents if Respondent needed them to respond to a third-party's request for information. On February 22, 2002, Appellant notified Respondent that the latest document review should conclude the ongoing matter and Appellant would supply additional documents only upon Respondent's specific request. In response to a letter written by Respondent on January 17, 2003, Appellant agreed on January 28, 2003, to look for the missing documents and Appellant advised Respondent to take whatever action it deemed necessary if Respondent was not satisfied by March 31, 2003. In light of this series of events and Appellant's repeated unwillingness to disaggregate the commingled documents and provide Respondent with a copy of them, there is a genuine issue of material fact as to when Respondent discovered or should have discovered the breach, if any, through the exercise of reasonable diligence.

B. Waiver

A party can waive a statute of limitations defense. McLendon v. S.C. Dep't of Hwys. & Pub. Transp., 313 S.C. 525, 525-26, 443 S.E.2d 539, 540 (1994). "'Waiver of [the statute of] limitations may be shown by words or conduct. Thus, waiver may result from express agreement, . . . from failure to claim the defense, or by any action or inaction manifestly inconsistent with an intention to insist on the statute.'" Mende v. Conway Hosp., Inc., 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (citing 54 C.J.S. Limitation of Actions § 22 (1987)). Waiver is a question of fact for the finder of fact. Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994).

Respondent specifically argues Appellant's email dated February 22, 2002, is evidence of Appellant's waiver of the statute of limitations. On February 22, Appellant notified Respondent it would ship "four boxes of records which represent our final installment of documents." However, Appellant also advised that certain invoices were commingled with its documents and Appellant refused to send those documents to Respondent, except by Respondent's request for specific documents. Viewing this in the light most favorable to Appellant, this email does not indicate Appellant waived the statute of limitations as a matter of law, but rather indicates there is a factual question regarding waiver.

Moreover, the issue is whether Appellant's willingness to continue to locate documents was an action manifestly inconsistent with an intention to insist upon the statute of limitations. Even though Appellant provided Respondent with a steady flow of documents, Appellant continually notified Respondent that it would not provide all of Respondent's documents and it would produce the commingled documents on an as needed basis only. Appellant complied with Respondent's request on a conditional basis until March 2003, and, this conditional response creates a genuine issue of material fact as to whether Appellant waived the statute of limitations.

C. Estoppel

"[A] defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997) (quotations omitted). The inducement may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. *Id.* Although the issue of whether a defendant is estopped from claiming the statute of limitations is ordinarily a question of fact to be determined by the judge, summary judgment is appropriate where there is no evidence of conduct on the defendant's part warranting estoppel. *Id.* at 61, 62 n.1, 488 S.E.2d at 330, 331 n.1.

Even though Appellant cooperated with Respondent's requests for documents for several years, Appellant also repeatedly objected to disaggregating the commingled documents due to the unreasonable time and cost involved in the task and advised Respondent that it would produce the commingled documents only upon Respondent's request for specific documents. Due to this conditional cooperation by Appellant, a factual question exists regarding whether Appellant induced the delay it now asserts as a defense to Respondent's claim.

II. Laches

Appellant argues the circuit court erred in dismissing its laches defense. We agree.

Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. Chambers of South Carolina, Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner. *Id.* at 421, 434 at 281. The party seeking to establish laches must show (1) delay, (2)

unreasonable delay, and (3) prejudice. Hallums v. Hallums, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988).

The circuit court denied summary judgment as to whether a contract existed and if so, whether the contract had been breached. Because the date of the breach, if any, is unknown, there are factual questions as to whether there was a delay, whether the delay was unreasonable, and whether the delay, if any, prejudiced Appellant. Even if laches is implicated in this case, summary judgment was improperly granted on Appellant's laches defense given these factual questions.

CONCLUSION

Based on the foregoing analysis, we reverse the circuit court's grant of partial summary judgment and remand for further proceedings consistent with this opinion. We need not address Appellant's remaining issue. See Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Elephant, Inc., Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26321
Heard April 4, 2007 – Filed April 30, 2007

AFFIRMED

Randall Scott Hiller, of Greenville, for Appellant.

Harry A. Hancock, of Columbia, for Respondent.

JUSTICE WALLER: This is an appeal from an order of the circuit court, which affirmed the ruling of the Administrative Law Court (ALC), and held that Elephant, Inc., violated S.C. Code Ann. Reg. § 7-200.4, in transferring alcohol to an under-aged confidential informant (CI).[1] Elephant appeals. We affirm.

[1] S.C. Code Reg. 7-200.4, concerning the possession of alcoholic beverages by minors under 21 years old, makes the following a violation of the owner's beverage license:

FACTS

Elephant owns Platinum Plus, a bar in Greenville, SC. On January 21, 2005, South Carolina Law Enforcement (SLED) agents sent an undercover, nineteen-year old confidential informant (CI) into Platinum Plus. Employees of the bar checked the CI's driver's license at the door and noted that he was under twenty-one years of age. They confiscated the CI's driver's license, put wristbands on his wrists, and stamped large X's on the back of his hands. The CI then walked to the bar, ordered, paid for, and was served a Coor's Light beer. Upon observing this, a Platinum Plus employee immediately walked over to the CI and attempted to confiscate the beer. However, the employee was stopped by SLED agents, and the bartender was arrested for serving alcohol to the minor CI. An administrative citation was issued to Elephant, Inc. for violation of Reg. 7-200.4.

The bartender was subsequently charged with transferring beer to a minor under the age of twenty-one and was found not guilty. Elephant, Inc. was issued a $1000.00 fine by the Department of Revenue. On appeal, the ALC reduced the fine to $100.00, finding the fine excessive in light of Elephant's corporate policy attempting to prevent the sale or possession of alcohol by minors. Elephant appeals, contending it is not subject to "prosecution" because the minor CI was never prosecuted for under-age possession.

DISCUSSION

S.C. Code Ann. § 61-4-10 et seq. sets forth general provisions governing beer, ale, porter and wine. Pursuant to S.C. Code Ann. § 61-4-50:

To permit or knowingly allow a person under twenty-one year of age to purchase or possess or consume alcoholic liquors, beer or wine in or on a licensed place of business which holds a license or permit issued by the Department is prohibited and constitutes a violation against the license or permit. Such violation shall be sufficient cause to suspend or revoke the license or permit by the Department.

> It is unlawful for a person to **sell** beer to a person under twenty one years of age. A person who makes a sale in violation of this section must, upon conviction, be fined not less than one hundred dollars nor more than two hundred dollars or imprisoned not less than thirty days nor more than sixty days, or both, in the discretion of the court.

(Emphasis supplied). Under S.C. Code Ann. § 61-4-90:

> It is unlawful for a person to **transfer** or give to a person under the age of twenty one years for the purpose of consumption beer or wine at any place in the State. A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or imprisoned not more than thirty days.

(Emphasis supplied). S.C. Code Ann. § 61-4-100 provides, in pertinent part:

> **If a person is charged with a violation of Section 61-4-50 (the unlawful sale of beer or wine to minors), the minor must also be charged with a violation** of Section 20-7-8920 (unlawful purchase or possession of beer or wine). . . .
> Unless the provisions of this section are complied with, **no person charged with a violation of Section 61-4-50 may be convicted of the offense**.

(Emphasis supplied).

Elephant argues that because the under-aged CI was not prosecuted, it cannot be prosecuted either criminally or administratively. We disagree. Section 61-4-100 requires only that if a person is charged with a violation of § 61-4-**50** (the unlawful sale of beer or wine to minors), the minor must also be charged with a violation of Section 20-7-8920 (unlawful purchase or possession of beer or wine). Noticeably, § 61-4-100 does not require that when a person is charged with the transfer of beer or wine to a minor (under § 61-4-90), that the minor must also be charged with charged with a violation. There is a legitimate basis for the distinction between the two offenses. The sale of beer to minors in violation of § 61-4-50 is punishable

by up to sixty days imprisonment, thereby making it a general sessions offense, whereas a violation of § 61-4-90 carries a maximum thirty day sentence, so as to be a magistrate's court offense. See S.C. Code Ann. § 22-3-330 (Magistrates have jurisdiction over offenses with fines up to five hundred dollars, or imprisonment not exceeding thirty days, or both).

Further, Elephant was not prosecuted under the above statues but was administratively sanctioned pursuant to S.C. Code Reg. 7-200.4,[2] which provides:

> To permit or knowingly allow a person under twenty-one year of age to purchase or possess or consume alcoholic liquors, beer or wine in or on a licensed place of business which holds a license or permit issued by the Department is prohibited and constitutes a violation against the license or permit. Such violation shall be sufficient cause to suspend or revoke the license or permit by the Department.
>
> For a violation of any regulation pertaining to beer or wine, the department may impose a monetary penalty of up to one-thousand dollars upon the holder of a beer or wine license in lieu of suspension or revocation. S.C. Code Ann. § 61-4-250.

Elephant's contention is meritless. Although it is correct that it may not be prosecuted for the sale of alcohol under § 61-4-50 unless the minor is also prosecuted, it cites no authority for the proposition that it may not be administratively sanctioned for violation of a regulation. Administrative sanctions simply are not equivalent to a criminal prosecution. See e.g., State v. Price, 333 S.C. 267, 510 S.E.2d 215 (1998) (administrative suspension of driver's license does not constitute a criminal penalty); State v. Blick, 325 S.C. 636, 481 S.E.2d 452 (Ct. App. 1997) (adoption and execution of policies and practices necessary to preserve internal order and discipline, and to maintain institutional security in the prison are within the province and expertise of correctional officials and do not bar subsequent criminal

[2] Pursuant to S.C. Code Ann. § 61-2-60, the South Carolina Department of Revenue has the authority to promulgate regulations necessary to carry out the duties imposed upon them by law for the proper administration and enforcement of laws pertaining to the distribution of alcohol.

prosecution). We find it is within the Department of Revenue's authority to impose an administrative sanction for the unlawful transfer of alcohol to a minor, without the necessity of the minor being prosecuted.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James W. Henderson, Jr., and
Betty Lee Henderson, Appellants,

v.

Allied Signal, Inc. (Successor to The Bendix Corp.), Aqua-Chem, Inc., (d/b/a Cleaver-Brooks Division), Certain-Teed Corporation, Combustion Engineering, Inc., Daimler Chrysler, Ford Motor Company, Freightliner, General Motors Corporation, International Truck & Engine Corporation (formerly Navistar International Transportation), Kenworth (Paccar), Inc., North American Refractories Company, Peterbilt (Paccar), Inc., Pneumo Abex (Successor to Abex Corp. and American Brake Shoe Company), Rayloc Company, T&N, Ltd., Uniroyal Holding, Inc. (Successor to U.S. Rubber Co.), Of whom Allied Signal, Inc., Daimler Chrysler, Ford Motor Company, General Motors Corporation, North American Refractories Company, Uniroyal Holding, Inc., are, Respondents.

Appeal From Greenville County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26322
Heard March 6, 2007 – Filed April 30, 2007

AFFIRMED

Mona Lisa Wallace, of Wallace and Graham, P.A., of Salisbury, NC, for Appellants.

C. Mitchell Brown and W. Thomas Causby, of Nelson, Mullins, Riley, & Scarborough, LLP, of Columbia; James H. Elliott, Jr., of Pritchard & Elliot, LLC, of Charleston; W. David Conner, James B. Pressley, Jr., and Moffatt G. McDonald, all of Haynsworth, Sinkler, Boyd, P.A., of Greenville; Daniel B. White, of Gallivan, White & Boyd, P.A., of Greenville; and G. Mark Phillips, of Nelson Mullins Riley & Scarborough, of Charleston, for Respondents.

JUSTICE BURNETT: James W. Henderson, Jr., and his wife, Betty Lee, (collectively referred to as Appellants) appeal the order of the trial court granting summary judgment to Allied Signal, Inc., Daimler Chrysler, Ford Motor Company, General Motors Corporation, North American Refractories Company, Pneumo Abex, and Uniroyal Holding, Inc. (Respondents). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellants, North Carolina residents, filed a complaint in 1997 arising out of Mr. Henderson's exposure to asbestos containing products while working as a boilermaker, pipefitter, and sheet metal worker for many years at various industrial sites in South Carolina. Mrs. Henderson's claims arose out of her loss of consortium and enjoyment of life. According to the complaint, Respondents "mined, manufactured, processed, imported, converted, compounded and/or retailed substantial amounts of asbestos and asbestos-related materials" and caused such materials to be placed in the stream of interstate commerce with the result that the materials were sold, distributed and used in South Carolina. Appellants alleged Mr. Henderson "used, worked with, was in the vicinity of, and was exposed to asbestos and asbestos containing products" during the course of his employment and, as a result, contracted mesothelioma and other asbestos-related illnesses. Mr. Henderson was diagnosed in North Carolina.

In a 2001 order, the trial court excluded certain affidavits presented by Appellants for their failure to comply with Rule 33, SCRCP, and dismissed the following defendants from the case pursuant to the Door Closing Statute, S.C. Code Ann. § 15-5-150 (2005), and Rule 12(b)(1), SCRCP: AC&S, Certain-Teed Corporation, Carlisle Corporation, Qualco Products, North American Refractories, Uniroyal, Pnuemo Abex, Kelsey-Hayes, Freightliner, Peterbilt (Paccar), Kenworth (Paccar), International Truck and Engine (formerly Navistar), Daimler Chrysler, General Motors, Ford, Combustion Engineering, Aqua-Chem, and Bird[1]. The trial court found no evidence to support the allegation that Mr. Henderson was exposed to asbestos containing products in South Carolina.

[1] During the course of litigation, numerous defendants filed for bankruptcy and, therefore, are not parties to this action. Also, Pnuemo-Abex reached a settlement agreement with Appellants prior to oral arguments before this Court.

The trial court granted defendants Rayloc and Covil summary judgment on product identification grounds, finding no evidence their products contained asbestos. The trial court also denied the motions of Allied Signal and McCord Corporation, finding genuine issues of material fact existed as to Mr. Henderson's exposure to their asbestos containing products in South Carolina. The trial court denied Appellants' motions for reconsideration.

The case went to trial against Allied, McCord, and Dana with McCord and Dana settling during trial. The jury found for Allied, and Appellants appealed.[2] We certified this case for review from the Court of Appeals pursuant to Rule 204(b), SCACR.

ISSUES

I. Did the trial court err in granting summary judgment based on product exposure?

II. Did the trial court err in limiting the scope of Appellants' evidence solely to mesothelioma?

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997).

[2] Mr. Henderson died shortly after trial, and Ms. Henderson, as personal representative of his estate, proceeded with this appeal.

LAW/ANALYSIS

I. Product Exposure

Appellants argue: (1) the trial court erred in granting summary judgment on product exposure to Uniroyal, Ford, General Motors, Chrysler, Abex, and Rayloc; and (2) a jury question exists as to exposure in relation to Kenworth, Freightliner, Paccar, and International Truck. We disagree.

The Door Closing Statute, S.C. Code Ann. § 15-5-150, provides:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court:
> (1) By any resident of this State for any cause of action; or
> (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

At trial, the Respondents argued Mr. Henderson had no exposure within South Carolina to their asbestos containing products and the trial court lacked subject matter jurisdiction based on the Door Closing Statute and Rule 12(b)(1), SCRCP. Noting Mr. Henderson was admittedly not a resident of South Carolina, the trial court focused on whether the cause of action arose in South Carolina, relying on Murphy v. Owens-Corning Fiberglass Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), *overruled on other grounds by* Farmer v. Monsanto Corp., 353 S.C. 553, 579 S.E.2d 325 (2003) ("Because § 15-5-150 does not involve subject matter jurisdiction but rather determines the capacity of a party to sue, we overrule these cases to the extent they hold otherwise.").

In Murphy, the Court of Appeals held: "In applying the Door Closing Statute, the manifestation of injury through diagnosis, while relevant, is not dispositive in every case for the purpose of determining whether a cause of action shall have arisen in South Carolina."

Murphy, 346 S.C. at 48, 550 S.E.2d at 594-95. Finding the exposure to asbestos originated in South Carolina, the Court of Appeals held plaintiff's claims arose in this State "even though they did not accrue until the mesothelioma was diagnosed." *Id*. at 48, 550 S.E.2d at 594. The Court of Appeals, therefore, found the Door Closing Statute did not bar plaintiff's claims because there was a sufficient connection to South Carolina when the acts which gave rise to the cause of action occurred in this State. *Id*. at 48, 550 S.E.2d at 595. Following the trial court's order in this case, this Court affirmed Murphy and held: "[T]he proper inquiry is whether the foreign corporation's activities that allegedly exposed the victim to the injurious substance, and the exposure itself, occurred within the State. If so, then the legal wrong was committed here." 356 S.C. 592, 598, 590 S.E.2d 479, 482 (2003).

Appellants failed to meet the Murphy test because they failed to show Respondents' products contained asbestos, and they failed to show any actionable exposure in South Carolina. In determining whether exposure is actionable, we adopt the "frequency, regularity, and proximity test" set forth in Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162 (4th Cir. 1986): "To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."

We agree with the trial court that "presence in the vicinity of static asbestos is not exposure to asbestos," and find Appellants failed to present evidence of regular and frequent exposure to asbestos containing products in proximity to where Mr. Henderson worked. Due to the lack of evidence Mr. Henderson was exposed to the Respondents' asbestos containing products in South Carolina, we affirm the trial court's holding.

II. Limited Evidence

Appellants argue the trial court unduly limited their evidence to mesothelioma. We disagree.

Appellants' claim against Allied arises out of Mr. Henderson's experience working with brake products manufactured by Allied and his diagnosis of mesothelioma. Appellants argue the trial court erred in excluding certain evidence concerning other asbestos-related diseases and limiting evidence to cases, reports, and studies showing a link between asbestos exposure and mesothelioma.

The trial court correctly excluded evidence concerning other asebestos-related diseases because such evidence was merely cumulative of evidence actually allowed. See, *e.g.*, Commerce Center of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001) ("Generally, there is no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury.") Appellants were given the opportunity to present evidence concerning asbestos and Mr. Henderson's asbestos-related illness. Because the factual issues of the case were fully aired, the exclusion of cumulative reports and studies did not prejudice Appellants. Furthermore, such evidence was arguably irrelevant under Rule 403, SCRE. See, *e.g.*, State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment.") (internal citations omitted).

CONCLUSION

Applying both Murphy and Lohrman, we find Appellants failed to prove actionable exposure to Respondents' asbestos-containing products. We affirm the decision of the trial court granting summary judgment to Respondents based on the Door Closing statute. We also affirm the decision of the trial court excluding certain affidavits as cumulative.

AFFIRMED.

TOAL, C.J., MOORE, and PLEICONES, JJ., and Acting Justice Edward B. Cottingham, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, individually and as Guardian and next friend for his minor child, James Doe, Petitioners,

v.

Robert Francis Marion, Jr., M.D., Individually, Parkwood Pediatrics Group, Carolina Family Care, Inc., Walton L. Ector, M.D., Individually, William Gamble, M.D., Individually, Malcolm Rhodes, M.D., Individually, William Fred O'Dell, M.D., Individually, Carol Graf, M.D., Individually, Carol Graf, M.D. & Associates, P.A., and Pit Marion, Individually, Of Whom Carol Graf, M.D., and Carol Graf, M.D. & Associates, P.A., are, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 26323
Heard March 20, 2007 – Filed May 7, 2007

AFFIRMED

J. Graham Sturgis, Jr., of Charleston; Gary B. Blasingame and Henry G. Garrard, III, of Blasingame, Burch, Garrard & Ashley, P.C., and Michael O. Crain, of Oliver and Crain, all of Athens, GA, for Petitioners.

Carol B. Ervin and Stephen L. Brown, of Young, Clement, & Rivers, LLP, of Charleston, for Respondents.

JUSTICE BURNETT: John Doe (Petitioner) brought an action on behalf of his minor son, James Doe, to recover damages arising from the sexual abuse of James Doe by Robert Francis Marion, Jr., M.D. Petitioner also alleged Carol Graf, M.D. and Carol Graf, M.D. & Associates (Respondents) were negligent in failing to report to authorities or warn future victims of Dr. Marion's predilection for child molestation. The trial court disagreed and dismissed the case. The Court of Appeals affirmed. Doe v. Marion, 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004). We granted Petitioner's request for a writ of certiorari to review the decision of the Court of Appeals, and we affirm.

FACTUAL/PROCEDURAL BACKGROUND

James Doe was a patient of Parkwood Pediatrics Group (Parkwood) from 1990 to 1998. Dr. Marion was a member of Parkwood until 1985 when he was asked to leave due to complaints of sexual abuse and molestation against him. Dr. Marion established a solo practice and began treating James Doe in 1999 after James Doe's mother transferred him from Parkwood to Dr. Marion. James Doe was allegedly sexually abused by Dr. Marion for a period of several years beginning in 1999.

Dr. Marion received psychiatric treatment from Dr. Graf beginning in 1984 for his predilection for child molestation. Dr. Graf also treated a victim of Dr. Marion who informed Dr. Graf of the molestation. Petitioner alleges Dr. Graf was negligent *per se* in her failure to notify the appropriate authorities of Dr. Marion's child molestation and abuse and in breaching her duty to report suspected sexual abuse of a child pursuant to S.C. Code Ann. § 20-7-510 (Supp. 2002). Petitioner also alleges Dr. Graf was negligent under common law principles for her failure to warn "reasonably foreseeable" future minor patients of Dr. Marion. Finally, Petitioner alleges Carol Graf, M.D. & Associates, P.A., is vicariously liable for Dr. Graf's negligence.

Respondents were dismissed from the initial suit after the trial court granted their motions to dismiss under Rule 12(b)(6), SCRCP. The trial court found: (1) no common law duty to warn existed because there was not a specific threat to a specific individual; and (2) § 20-7-510 did not create a private right of action for failing to report, and if it did, it would only apply to threats to a specific child, not any possible future victims.

The Court of Appeals affirmed the dismissal in Doe v. Marion, 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004). The Court of Appeals found Petitioner failed to allege a specific threat necessary to compel a duty to warn and, therefore, the trial court correctly determined no legal duty existed under the common law. The Court of Appeals also found § 20-7-510 does not create a private cause of action and, consequently, the trial court correctly determined Dr. Graf was not negligent *per se*.

ISSUES

I. Did the Court of Appeals err in finding S.C. Code Ann. § 20-7-510 (Supp. 2002) does not give rise to a private cause of action for negligence *per se*?

II. Did the Court of Appeals err in finding a physician/psychiatrist is not liable under common law negligence principles for failing to report to authorities or warn future victims about the predilection for child molestation of her patient?

STANDARD OF REVIEW

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

LAW/ANALYSIS

I. Negligence *Per Se*

Petitioner argues the Court of Appeals erred in affirming the trial court's dismissal of Petitioner's claims for negligence against Dr. Graf. Specifically, Petitioner contends S.C. Code Ann. § 20-7-510 creates a private cause of action for negligence *per se*. We disagree.

Section 20-7-510 provides, in pertinent part:

> (A) A physician … shall report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child's physical and mental health or welfare has been or may be adversely affected by abuse or neglect.
>
> …
>
> (D) Reports of child abuse or neglect may be made orally by telephone or otherwise to the county department of social services or to a law enforcement agency in the county where the child resides or is found.[1]

Petitioner argues the statute imposes a duty on Dr. Graf to report Dr. Marion's predilection for sexual abuse and/or molestation of children to the appropriate authorities. Petitioner argues the purpose of the Children's Code[2], and specifically of the reporting statute, is to protect children from the type of harm James Doe suffered.

In determining whether a statute creates a private cause of action, the main factor is legislative intent:

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute…. In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision

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[1] Section 20-7-510(A) was amended in 2003 and now reads: "A physician … must report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in section 20-7-490." The amendments do not affect the analysis of Petitioner's argument.

[2] South Carolina Code Ann. §§ 20-7-10 to -9740 (1976 & Supp. 2006).

to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.

Dorman v. Aiken Communications, Inc., 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990) (quoting Whitworth v. Fast Fare Markets of South Carolina, Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)). When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party. Citizens of Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992).

While § 20-7-510 is silent as to civil liability, §§ 20-7-567 & -570 (Supp. 2005)[3] do impose liability for making a false report.

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[3] South Carolina Code Ann. § 20-7-567 states:

(A) It is unlawful to knowingly make a false report of abuse or neglect.
(B) A person who violates subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than ninety days, or both.

South Carolina Code Ann. § 20-7-570 provides:

(A) If the family court determines pursuant to Section 20-7-695 that a person has made a report of suspected child abuse or neglect maliciously or in bad faith or if a person has been found guilty of making a false report pursuant to Section 20-7-567, the department may bring a civil action to recover the costs of the department's investigation and proceedings associated with the investigation, including attorney's fees. The department also is entitled to recover costs and attorney's fees incurred in the civil action authorized by this section. The decision of whether to bring a civil action pursuant to this section is in the sole discretion of the department.
(B) If the family court determines pursuant to Section 20-7-695 that a person has made a false report of suspected child abuse or neglect maliciously or in bad faith or if a person has been found guilty of making a false report pursuant to Section 20-7-567, a person who was

Sections 20-7-567 & -570 indicate the legislature intended to impose civil liability and establish private causes of action in certain instances. The fact that such language is missing from § 20-7-510 indicates the legislative intent was for the reporting statute not to create civil liability. See Byrd v. Irmo High Sch., 321 S.C. 426, 433-34, 468 S.E.2d 861, 865 (1996) (finding when one provision does not include a right that is included in a related provision, legislative intent is that a right will not be implied where it does not exist); State v. Hood, 181 S.C. 488, 188 S.E. 134 (1936) ("It is presumed that the Legislature was familiar with prior legislation, and that if it intended to repeal existing laws it would have expressly done so."). Further, in Rayfield v. South Carolina Department of Corrections, 297 S.C. 95, 374 S.E.2d 910 (1988), this Court stated:

> [W]e are able to derive a test for determining when a duty created by statute will support an action for negligence. In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.

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subject of the false report has a civil cause of action against the person who made the false report and is entitled to recover from the person who made the false report such relief as may be appropriate, including:
(1) actual damages;
(2) punitive damages; and
(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

In determining Dr. Graf had no duty to report, we look to the purpose of the Children's Code and determine the statute in question is concerned with the protection of the public and not with the protection of an individual's private right[4]. Section 20-7-480[5] states the purpose

[4] Other jurisdictions have interpreted similar statutes and reached the same conclusion. For example, the Alabama Supreme Court held:

> The Child Abuse Reporting Act creates a duty owed to the general public, not to specific individuals, and, consequently, it does not create a private cause of action in favor of individuals. Therefore, to the extent that the plaintiffs rely on that statute, they fail to state a cause of action, and the trial court properly dismissed the claims insofar as they were based on the statute.

C.B. v. Bobo, 659 So. 2d 98 (Ala. 1995); see also Arbaugh v. Board of Educ., County of Pendleton, 591 S.E.2d 235 (W. Va. 2003); Cechman v. Travis, 414 S.E.2d 282 (Ga. App. 1991); Fischer v. Metcalf, 543 So. 2d 785 (Fla. Dist. Ct. App. 1989); Borne v. Northwest Allen County Sch. Corp., 532 N.E.2d 1196 (Ind. Ct. App. 1989); but see Ham v. Hospital of Morristown, 917 F.Supp. 531 (E.D. Tenn. 1995); Landeros v. Flood, 551 P.2d 389 (Cal. 1976).

[5] Section 20-7-480 declares:

(B) It is the purpose of this article to:
(1) acknowledge the different intervention needs of families;
(2) establish an effective system of services throughout the State to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate;
(3) ensure permanency on a timely basis for children when removal from their homes is necessary;
(4) establish fair and equitable procedures, compatible with due process of law to intervene in family life with due regard to the safety and welfare of all family members; and
(5) establish an effective system of protection of children from injury and harm while living in public and private residential agencies and institutions meant to serve them.

of the Children's Code and focuses entirely, although not explicitly, on the duties of the Department of Social Services (DSS). See, *e.g.*, S.C. Dep't of Social Servs. v. Pritcher, 329 S.C. 242, 246, 495 S.E.2d 242, 244 (Ct. App. 1997) ("SCDSS has been designated as the state agency primarily responsible for implementing the child welfare scheme for the protection of children in South Carolina.").

Petitioner cites Jensen v. Anderson County Department of Social Services, 304 S.C. 195, 403 S.E.2d 615 (1991), to support his contention § 20-7-510 creates a private cause of action. In Jenson, this Court upheld a private cause of action when a DSS worker failed to properly investigate claims of abuse of a young man. After the young man's brother was beaten to death by his mother's boyfriend, the administratix of the brother's estate brought an action against DSS and the social worker. While public officials are generally not liable for their negligence in public duties, this Court noted an exception exists when a duty is owed to an individual rather than the public, *i.e.*, a "special duty."[6]

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[6] A "special duty" exists when the following six elements are present:
(1) an essential purpose of the statute is to protect against a particular kind of harm;
(2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
(3) the class of persons the statute intends to protect is identifiable before the fact;
(4) the plaintiff is a person within the protected class;
(5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
(6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.
Jensen, 304 S.C. at 200, 403 S.E.2d at 617.

This case is distinguishable from Jenson because there existed no special duty between Dr. Graf and James Doe. Dr. Graf was not a public official. She never had contact with James Doe. In fact, James Doe was not even born when Dr. Graf began treating Dr. Marion in 1984. Therefore, the Court of Appeals did not err in affirming the dismissal of the action and finding § 20-7-510 does not create a private cause of action for negligence *per se*.

II. Common Law Negligence

Petitioner argues the Court of Appeals erred in affirming the trial court's dismissal of Petitioner's claim for common law negligence. Specifically, Petitioner argues Dr. Graf had a duty to warn all future foreseeable victims which arose out of the "special relationship" created in the psychiatrist-patient relationship. We disagree.

In order to prove negligence, a plaintiff must show: (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999) ("The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict."). In Faile v. South Carolina Department of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002), this Court recognized five exceptions to the general rule that there is no general duty to control the conduct of another or to warn a third person or potential victim of danger:

> (1) where the defendant has a special relationship to the victim;
> (2) where the defendant has a special relationship to the injurer;
> (3) where the defendant voluntarily undertakes a duty;
> (4) where the defendant negligently or intentionally creates the risk; and

(5) where a statute imposes a duty on the defendant.

350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002).

The defendant may have a common law duty to warn potential victims under the "special relationship" exception when the defendant "has the ability to monitor, supervise and control an individual's conduct" and when "the individual has made a specific threat of harm directed at a specific individual." Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). In Bishop, this Court relied on "[t]he seminal case on the liability of one treating a mentally afflicted patient for failure to warn or protect third persons threatened by a patient" and stated:

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

Bishop, 331 S.C. at 87, 502 S.E.2d at 82 (quoting Tarasoff v. Regents of Univ. of California, 551 P.2d 334 (1976)). The key is there must be a specific threat made by the patient to harm a readily identifiable third party. *Id*.

Petitioner argues Dr. Graf had a duty to warn James Doe because he was a member of a readily identifiable group of future patients of Dr. Marion. In Gilmer v. Martin, 323 S.C. 154, 157, 473 S.E.2d 812, 814 (Ct. App. 1996), the Court of Appeals rejected a similar argument, holding "it is not simply foreseeability of the victim which gives rise to a person's liability for failure to warn; rather, it is the person's

awareness of a distinct, specific, overt threat of harm which the individual makes towards a particular victim."

Petitioner's claim fails to allege a specific threat against James Doe necessary to create a duty to warn. Therefore, the Court of Appeals did not err in affirming the trial court's dismissal of Petitioner's claims.

CONCLUSION

We affirm the decision of the Court Appeals and find: (1) § 20-7-510 does not create a private right of action for negligence *per se*; and (2) a physician/psychiatrist is not liable under common law negligence principles for failing to report or warn about the predilection for child molestation of her patient in the absence of a specific threat to an identifiable party.

AFFIRMED.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Drew K. Kapur, Respondent.

Opinion No. 26324
Submitted April 10, 2007 – Filed May 7, 2007

PUBLIC REPRIMAND

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

Drew K. Kapur, of Philadelphia, Pennsylvania, pro se.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29, RLDE, Rule 413, SCACR. The facts are set forth below.

Respondent is licensed to practice law in South Carolina and New Jersey. On April 24, 2006, respondent pled guilty in New Jersey to the disorderly persons offense of volunteering false information to a law enforcement officer for the purpose of hindering the apprehension, prosecution, conviction, or punishment of another for an offense.[1] Respondent was sentenced to payment of a fine, along

[1] On October 16, 2005, respondent's son was involved in a single vehicle accident. Respondent told police that he was the driver of the vehicle even though he had not even been present when the

with court costs and penalties. By order dated January 10, 2007, the Supreme Court of New Jersey censured respondent for violation of that court's Rules of Professional Conduct.

Pursuant to Rule 29(b), RLDE, the Clerk provided the Office of Disciplinary Counsel (ODC) and respondent with thirty (30) days in which to inform the Court of any reason why the imposition of identical discipline was not warranted. ODC filed a response stating that a public reprimand is the sanction most similar to a censure under the New Jersey Disciplinary Rules. Accordingly, ODC recommended the Court impose a public reprimand in this matter. Respondent filed a response stating he waived his right to object to the imposition of identical discipline.

After thorough review of the record, we hereby find that respondent's misconduct warrants issuance of a public reprimand. Accordingly, we publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

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accident occurred. On February 1, 2006, respondent informed the prosecutor and law enforcement that his son had been the driver of the vehicle.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dillon County
Magistrate John R. Davis, Respondent.

Opinion No. 26325
Submitted April 17, 2007 - Filed May 7, 2007

DEFINITE SUSPENSION

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

John R. Davis, of Latta, Pro Se.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21of the Rules of Judicial Disciplinary Enforcement, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the issuance of any sanction set forth in Rule 7(b), RJDE, Rule 502, SCACR. We accept the Agreement and suspend respondent from office for six months. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent was contacted at 8:00 p.m. at his residence by an officer of the Dillon County Sheriff's Department and informed that one of the officer's friends had been arrested that afternoon, that bond court had

closed for the day, and that the friend needed to be released so he could attend work the following day. Respondent instructed the officer to bring the necessary bond paperwork to respondent's residence for respondent to review. Later that evening, respondent set a $2,500 personal recognizance bond and the officer's friend was released. The victim was not notified of the bond hearing even though he had requested to be present for the bond hearing.

Respondent was not the magistrate on call that evening, he did not seek permission to conduct the special bond hearing, he failed to ascertain whether there were other inmates awaiting bond hearings, he did not conduct bond hearings for any other inmates awaiting bond hearings, and he failed to inform the Chief Magistrate that a special bond hearing had been conducted.

Law

Respondent acknowledges that his conduct violates the Chief Justice's Administrative Order of November 29, 2000, as well as the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 1(A)(a judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2(A)(a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2(B)(a judge shall not convey or permit others to convey the impression that they are in a special position to influence the judge); Canon 3 (a judge shall perform the duties of judicial office impartially and diligently); Canon 3(B)(2)(a judge shall be faithful to the law and maintain professional competence in it); Canon 3(B)(5)(a judge shall perform judicial duties without bias or prejudice); Canon 3(B)(7)(a judge shall accord to every person who has a legal interest in a proceeding the right to be heard according to law); and Canon 3(B)(8)(a judge shall dispose of all judicial matters promptly, efficiently and fairly). Respondent also concedes that his

misconduct constitutes grounds for discipline under the following provisions of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1)(violation of the Code of Judicial Conduct); Rule 7(a)(4)(persistent failure to perform judicial duties or perform judicial duties in an incompetent or neglectful manner); Rule 7(a)(7)(willful violation of a valid court order issued by a court of this state); and Rule 7(a)(9)(violation of the Judge's Oath of Office contained in Rule 502.1, SCACR).

Respondent indicates that his misconduct in this matter was not intentional and that he will not engage in similar misconduct in the future; however, we note that respondent has a prior disciplinary history of similar misconduct. In the Matter of Davis, 368 S.C. 662, 630 S.E.2d 281 (2006)(respondent publicly reprimanded for conducting two special bond hearings in 2004 and 2005 in violation of the Chief Justice's Administrative Order).

Conclusion

We find respondent's misconduct warrants a suspension from judicial duties. We therefore accept the Agreement for Discipline by Consent and suspend respondent from office for six months.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

W.J. "Joey" Douan, Respondent,

v.

Charleston County Council and Charleston County Election Commission, Defendants,

Of whom Charleston County Council is the, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 26326
Submitted May 1, 2007 – Filed May 7, 2007

REVERSED

Joseph Dawson, III, Bernard E. Ferrara, Jr., and Cantrell M. Frayer, of the Charleston County Attorney's Office, of North Charleston, for Petitioner.

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, of Charleston, for Respondent.

PER CURIAM: Petitioner filed a petition for a writ of certiorari asking this Court to review the Court of Appeals' opinion in Douan v. Charleston County Council, 369 S.C. 271, 631 S.E.2d 544 (Ct. App. 2006). We grant the petition, dispense with further briefing, and reverse the Court of Appeals.

FACTUAL/PROCEDURAL BACKGROUND

Respondent (Douan) brought this action against petitioner Charleston County Council (Council) alleging a proposed ordinance and subsequent referendum violated statutory election law. Following this Court's decision in the related case of Douan v. Charleston County Council, 357 S.C. 601, 594 S.E.2d 261 (2003), the circuit court judge dismissed the pending action as moot and denied Douan's request for attorney's fees. On appeal, the Court of Appeals reversed and remanded, holding Douan's claim for attorney's fees was not moot.

ISSUE

Did the Court of Appeals err in holding Douan's request for attorney's fees was not moot?

DISCUSSION

Council contends the Court of Appeals erred in reversing the circuit court judge's denial of attorney's fees.

S.C. Code Ann. § 15-77-300 (1985) provides:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover

> reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.
>
> . . .

A prevailing party is a party who successfully prosecutes the action by prevailing on the main issue and "in whose favor the decision or verdict is rendered and judgment entered." Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) (citing Buza v. Columbia Lumber Co., 395 P.2d 511 (Alaska 1964)). The key factor in determining whether a party is a prevailing party is the degree of success obtained by the party seeking attorney's fees. Id.

The circuit court judge found the pending action was moot because this Court voided the election results of the 2002 Charleston County Sales and Use Tax Referendum in Douan v. Charleston County Council, supra. Additionally, the circuit court judge ruled that § 15-77-300 does not create a separate cause of action for attorney's fees, but requires a party to be the prevailing party in an action. Accordingly, the circuit court judge denied the request for attorney's fees, finding Douan was not the "prevailing party" in the circuit court action because the action was moot. The Court of Appeals reversed, holding the circuit court judge erred in finding Douan's claim for attorney's fees *was moot*.

We find the Court of Appeals erred in holding the circuit court judge dismissed Douan's request for attorney's fees as moot. The circuit court judge did not dismiss Douan's request as moot, but rather denied Douan's request, finding he was not the prevailing party in the action.

Furthermore, in City of Charleston v. Masi, 362 S.C. 505, 609 S.E.2d 301 (2005), this Court held issues concerning public service district elections were moot due to the Court's intervening decision in Kizer v. Clark, 360 S.C. 86, 600 S.E.2d 529 (2004), and, because the issue was moot, declined to award attorney's fees under § 15-77-300.

Accordingly, the circuit court judge properly found Douan was not the prevailing party in the action below due to this Court's superseding opinion in Douan v. Charleston County Council, supra, which rendered Douan's current claim moot, and denied his request for attorney's fees. We therefore reverse the Court of Appeals' opinion remanding the matter to the circuit court.

REVERSED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Rick Schnellmann and Jennifer Schnellmann, Petitioners,

v.

Nancy Roettger, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26327
Submitted May 1, 2007 – Filed May 7, 2007

AFFIRMED AS MODIFIED

Stephan Victor Futeral, of Futeral Law Firm, LLC, of Mt. Pleasant, for Petitioners.

Max Gerald Mahaffee, of Grimball & Cabaniss, LLC, of Charleston, for Respondent.

PER CURIAM: Petitioners have filed a petition for a writ of certiorari asking this Court to review the Court of Appeals' decision in Schnellmann v. Roettger, 368 S.C. 17, 627 S.E.2d 742 (Ct. App. 2006). We grant the petition only as it pertains to whether the Court of Appeals erred in finding petitioners' reliance on respondent's representation was not justifiable and whether the Court of Appeals applied the correct measure of damages in a fraud case. We dispense with further briefing and affirm as modified the decision of the Court of Appeals.

FACTUAL/PROCEDURAL BACKGROUND

Respondent acted as the real estate agent for the sellers of a home purchased by petitioners. Respondent advertised the property in the Charleston Trident Multiple Listing Service (MLS) as having approximately 3,350 square feet. At the bottom of the MLS listing, it indicated the information stated was "deemed reliable but not guaranteed." The listing also included the following disclaimer: "IF EXACT SQUARE FOOTAGE IS IMPORTANT TO YOU, MEASURE, MEASURE!" Respondent also advertised the property on the website www.realtor.com. This listing, however, did not identify the square footage as approximate or contain the disclaimer language. However, the sales contract granted the purchaser the privilege and responsibility to inspect the home prior to closing, the wording of the clause including specifically the home's square footage. In addition, prior to the closing, petitioners' real estate agent was presented with a summary appraisal revealing that the house was less than 3,350 square feet, but continued with the closing.

An appraisal conducted after petitioners purchased the house revealed it measured only 2,987 square feet.[1] Petitioners sued respondent for fraud, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act (SCUTPA), alleging she misrepresented the square footage of the house in the real estate listing. The trial judge granted summary judgment in favor of respondent on all claims.

[1] A second measurement taken by petitioners' expert revealed the square footage of the house was closer to 3,087 square feet.

The Court of Appeals affirmed the trial judge's grant of summary judgment, finding petitioners' fraud and negligent misrepresentation claims failed because their reliance on respondent's representation was not justified. In addition, the Court of Appeals held these claims, as well as the SCUTPA claim, failed because petitioners had suffered no damages as a result of respondent's representations. Specifically, the Court of Appeals found that, because appraisals of the home conducted at the time of purchase and shortly thereafter reflected its square footage as less than 3,000 square feet and assessed its value in excess of the $478,000 purchase price, petitioners suffered no damages stemming from respondent's alleged misrepresentation.

ISSUE

Did the Court of Appeals apply the incorrect method for calculating damages in a fraud case?

DISCUSSION

Petitioners argue, inter alia, the Court of Appeals erred in finding they were not justified in relying on respondent's representation as to the home's square footage and by applying an incorrect method of calculating damages in a fraud case.[2] Petitioners claim damages for fraud are not measured by calculating the difference between the contract price and the reasonable market value of the property, which was the approach taken by the Court of Appeals. Rather, petitioners contend damages for fraud are determined pursuant to the "benefit of the bargain" rule, or the difference between the value the plaintiff would have received if the facts had been as represented and the value he actually received, plus any consequential losses proximately resulting from the fraud.

To establish a cause of action for fraud, the following elements must be proven by clear, cogent, and convincing evidence: (1) a

[2] We note the Court of Appeals found all of petitioners' claims failed as a result of their failure to prove damages. However, in their argument on the damages issue, petitioners specifically refer to only the Court of Appeals' ruling regarding their fraud claim. Therefore, the Court will address this issue with reference only to the fraud cause of action.

representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980). The failure to prove any element of fraud or misrepresentation is fatal to the claim. Id.

Petitioners correctly argue the Court of Appeals applied the wrong method for determining damages from fraud. It is the well-settled law of this state that the proper method in such a case is the benefit of the bargain approach, according to which the plaintiff is entitled to the difference between the value he would have received if the defendant's representations had been true and the value he actually received, together with any proximately caused consequential or special damages. E.g., Riddle v. Pitts, 283 S.C. 387, 324 S.E.2d 59 (1984); Byrn v. Walker, 275 S.C. 83, 267 S.E.2d 601 (1980); Reid v. Harbison Dev. Corp., 285 S.C. 557, 330 S.E.2d 532 (Ct. App. 1985); Starkey v. Bell, 281 S.C. 308, 315 S.E.2d 153 (Ct. App. 1984).

The Court of Appeals did not undertake a "benefit of the bargain" analysis in determining petitioners' damages, nor did it cite any law for the damages measure it applied. Instead, the Court of Appeals summarily concluded petitioners suffered no damages because, even taking into account the missing square footage, they still paid less than market value for the house. This approach is not in accord with the damage calculation method for fraud utilized by the courts of this state.

However, because we also find the Court of Appeals correctly determined petitioners did not justifiably rely on respondent's representation, we need not decide whether petitioners suffered any damages under the "benefit of the bargain" approach. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining the appellate court need not address remaining issues when disposition of prior issues is dispositive). Accordingly, we affirm as modified the decision of the Court of Appeals upholding the grant of summary judgment in favor of respondent.

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas J. Torrence and William Ray Ward, on behalf of themselves and all others similarly situated and Kimberly Dubose, on behalf of herself and all others similarly situated, Appellants,

v.

South Carolina Department of Corrections and The State of South Carolina, Defendants,

of whom South Carolina Department of Corrections is, Respondent.

Appeal From Richland County
D. Garrison Hill, Circuit Court Judge

Opinion No. 26328
Heard March 6, 2007 – Filed May 7, 2007

AFFIRMED IN RESULT

A. Camden Lewis, and Peter D. Protopapas, of Lewis & Babcock, of Columbia, and Helen T. McFadden, of Kingstree, for Appellants.

Lake E. Summers, of Malone, Thompson & Summers, of Columbia, for Respondent.

ACTING JUSTICE COTTINGHAM: This is a direct appeal from the trial court's dismissal of appellants' declaratory judgment action. We affirm in result.

FACTS

Appellants seek certain declarations of rights under various statutes related to the Prison Industries Program. See S.C. Code Ann. §§ 24-3-40, 24-3-310 thru -430 (2007). Appellants' Second Amended Complaint alleged a class action suit and described the class as follows: "The class consists of all individuals who are beneficiaries of the wages … paid to prisoners participating in the Prison Industries Program." Three specific sub-classes were alleged:

> (1) the "Prisoner Subclass" – Thomas J. Torrence and William Ray Ward represent all prisoners who have participated in the Prison Industries Program at Evans Correctional Institution;
>
> (2) the "Victim Beneficiary Subclass" – Kimberly Dubose, a victim of a felony and recipient of funds from the South Carolina Victims Compensation Fund ("SCVCF"), represents all crime victims who have been awarded funds from the SCVCF and all crime victims receiving restitution paid by prisoners participating in the Prison Industries Program; and
>
> (3) the "Dependent Beneficiary Subclass" – Susan Smith, who has a child whose father is an inmate working in the Prison Industries program at Evans, represents all dependents of prisoners entitled to support payments from funds received through the Prison Industries Program.[1]

[1] We note that the issue of class certification was not ruled upon by the trial court.

Both Torrence and Ward participated in the Prison Industries Wire Harness Assembly facility at Evans for the private sector company Insilco Technologies Group ("Insilco"). The program is federally certified and operates under various state statutes. See e.g., S.C. Code Ann. §§ 24-3-40, 24-3-315 & 24-3-430 (2007). After initially receiving training wages at 25 cents and 75 cents per hour, Torrence and Ward were subsequently paid $5.25 per hour for their work.[2] Appellants allege, however, that Insilco pays respondent, the South Carolina Department of Corrections (the "DOC"), $7.17 per hour for their labor. Appellants' main claim is that the DOC improperly diverts $1.92 from the $7.17 hourly wage received from Insilco and deposits this money into a DOC Surplus Fund. As a result, members of all three subclasses allegedly lose money to which they are entitled under statute. Appellants further claim that the prevailing wage for similar work is $9.84 per hour. Finally, Torrence and Ward claim that they are entitled to immediate access of the portion of their wages which are placed in escrow pursuant to section 24-3-40(A)(5).

Based on the above allegations, appellants sought, *inter alia*, a declaration from the circuit court that the DOC has violated South Carolina law. See §§ 24-3-40 & 24-3-430.

The DOC filed a motion to dismiss the Second Amended Complaint pursuant to Rule 12(b)(6), SCRCP. Finding that the complaint properly stated a declaratory judgment action which involved novel issues, the trial court initially denied the motion in November 2002. However, after this Court issued its opinions in Adkins v. S.C. Dep't of Corrections, 360 S.C. 413, 602 S.E.2d 51 (2004), and Wicker v. S.C. Dep't of Corrections, 360 S.C. 421, 602 S.E.2d 56 (2004), the DOC renewed its motion to dismiss.

The trial court ruled that Adkins and Wicker barred the entire declaratory action and therefore granted the dismissal. The trial court found the circuit court was not the proper forum for members of the Prisoner Subclass to use for an adjudication of their rights. Instead, the trial court noted that, pursuant to Wicker, these members could pursue their claims via

[2] The training period covered their initial 320 hours of employment.

the DOC's inmate grievance procedure. As to the Victim and Dependent Beneficiary Subclasses, the trial court ruled that, pursuant to Adkins, these members likewise had no private right of action. Essentially, the trial court ruled the non-prisoners could rely on the prisoner members' grievance actions.

Appellants moved for reconsideration; after additional briefing on specific issues related to the Victim and Dependent Beneficiary Subclasses, the trial court denied the reconsideration motion. This appeal follows.

ISSUES

1. Did the trial court err in dismissing the declaratory judgment action brought by the three Subclasses regarding their rights under the Prison Industries Statutes?

2. Did the trial court err in dismissing the claim related to the inmates' wages held in escrow?

DISCUSSION

1. Dismissal of Action from Circuit Court

Appellants argue the trial court's determination left the victim and dependent beneficiaries without any avenue of relief. Although we affirm the trial court's dismissal from circuit court of the entire lawsuit, we agree with appellants that the victim and dependent beneficiaries may not be denied some form of process for their claims to percentages of the monies earned by inmates who participate in the Prison Industries Program.

The Legislature specifically authorized inmate labor in private industry via S.C. Code Ann. section 24-3-430. This statute provides that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (2007); see also § 24-3-315 (for a prison industry project, the DOC must determine "that the rates of pay and other conditions of employment are not

less than those paid and provided for work of similar nature in the locality in which the work is performed"). Moreover, section 24-3-430(H) expressly directs that "[t]he earnings of an inmate authorized to work at paid employment pursuant to this section **must be paid directly to the [DOC] and applied as provided under Section 24-3-40**." (Emphasis added).

Section 24-3-40 governs the disposition of prisoner wages and provides in pertinent part:

> (A) Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment … in a prison industry program … shall pay the prisoner's wages directly to the [DOC].
>
> The Director of the Department of Corrections shall deduct the following amounts **from the gross wages** of the prisoner:
>
> (1) If restitution to a particular victim or victims has been ordered by the court, then **twenty percent** must be used to fulfill the restitution obligation. …
>
> (3) **Thirty-five percent** must be used to pay the prisoner's child support obligations pursuant to law, court order, or agreement of the prisoner. These child support monies must be disbursed to the guardian of the child or children or to appropriate clerks of court, in the case of court ordered child support, for application toward payment of child support obligations, whichever is appropriate.…
>
> (4) **Ten percent** must be available to the inmate during his incarceration for the purchase of incidentals. Any monies made available to the inmate for the purchase of incidentals also may be distributed to the person or persons of the inmate's choice.
>
> (5) **Ten percent** must be held in an interest bearing escrow account for the benefit of the prisoner.

> (6) The remaining balance must be used to pay federal and state taxes required by law. Any monies not used to satisfy federal and state taxes must be made available to the inmate for the purchase of incidentals pursuant to subsection (4).

S.C. Code Ann. § 24-3-40 (emphasis added).

This Court addressed the Prison Industries statutes in the companion cases of Adkins and Wicker. In Wicker, the inmate (Wicker) filed an inmate grievance claiming that his training wages violated the prevailing wage provision. See § 24-3-430(D). The Court affirmed the Administrative Law Court's ruling that Wicker was entitled to the prevailing wage of $5.25 per hour during his first 320 hours of employment. In so finding, we acknowledged that while Wicker did not have a private, civil cause of action available to him, he nevertheless had a statutory right to a prevailing wage which had been created by the State. Significantly, we held that a state-created right cannot thereafter be denied "without affording due process of law." Wicker, 360 S.C. at 424, 602 S.E.2d at 57. Thus, Wicker had appropriately utilized the internal DOC grievance procedure to adjudicate his rights.

In Adkins, the inmates filed tort claims in circuit court against the DOC alleging violations of the prevailing wage statutes. The Court affirmed the circuit court's determination that these statutes provided no private right of action for inmates. Noting that "the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general," we decided the statutes were not enacted for the special benefit of inmates. Adkins, 360 S.C. at 418, 602 S.E.2d at 54. Nonetheless, the Adkins Court stated the inmates were not without a remedy because Wicker allowed them an avenue of relief through the inmate grievance system.[3]

[3] More recently, we held in Williams v. S.C. Dep't of Corrections, Op. No. 26274 (S.C. Sup. Ct. filed Feb. 26, 2007), that a class of inmates could not maintain a prison industry program suit against the private industry sponsor who paid the prisoners' wages to the DOC.

Appellants claim that despite the holdings of Adkins and Wicker, the Prisoner Subclass should be able to proceed in circuit court in the posture of a declaratory judgment action. We disagree. The clear rule emerging from the Adkins and Wicker cases is this: inmates working in the Prison Industries Program have a cognizable, state-created interest in having the DOC pay them according to the statutory scheme governing the Program, but they do not have a private right of action; instead, the DOC's internal grievance procedure, with recourse to the Administrative Law Court, is the appropriate way to have a prisoner's wage claim adjudicated. Therefore, the trial court correctly applied Adkins and Wicker to the Prisoner Subclass. To hold otherwise would contravene our precedent on these issues by allowing inmates access to the circuit court merely by styling their cases as declaratory judgment actions.

Likewise, regarding the victim and dependent beneficiaries, Adkins and Wicker apply to bar an action in circuit court. As we stated in Adkins: "the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general." Adkins, 360 S.C. at 418, 602 S.E.2d at 54. Because the statutes are not for the special benefit of the victim and dependent beneficiaries, there is no private right of action. See id.

Nonetheless, the trial court erred in suggesting that these beneficiaries could rely on the prisoners' own inmate grievance claims. We made clear in Wicker that a state-created right cannot be denied "without affording due process of law." Wicker, 360 S.C. at 424, 602 S.E.2d at 57. Since the victim and dependent beneficiaries are directly entitled to a portion of the prisoners' wages earned through the Prison Industries Program, the DOC must afford a process for these beneficiaries to have their claims addressed.

Accordingly, we hereby hold that, like inmates, the victim and dependent beneficiaries shall be able to maintain **their own** claims through the DOC's internal grievance procedure.[4]

[4] We recognize that the DOC will need to implement new regulations to allow these claimants access to the agency's internal grievance system. Furthermore, if appellants prove true their allegation that the DOC removes any of the money

2. Torrence and Ward's Escrowed Wages

Torrence and Ward also argue that they are entitled to a declaration – by the circuit court – of their rights regarding their wages held in escrow. We disagree.

The statute governing the disposition of prisoners' wages provides that the DOC "shall return a prisoner's wages held in escrow … as follows: … A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice." S.C. Code Ann. § 24-3-40(B)(2). According to the Second Amended Complaint, both Torrence and Ward are serving life sentences, and the DOC has informed them they are not entitled to access their escrowed wages until after their death. They claim, however, they are entitled to immediately access these escrowed funds.

For the reasons discussed above, the trial court correctly dismissed pursuant to Adkins and Wicker. Clearly, Torrence and Ward can present this claim via the inmate grievance procedure. See Wicker, supra.

CONCLUSION

In sum, we hold that appellants cannot maintain their action in the circuit court, and therefore, the trial court correctly granted the DOC's motion to dismiss. However, because the victim and dependent beneficiaries need a forum to pursue their own claims, we direct the DOC to afford them due process via the internal grievance system. Wicker, 360 S.C. at 424, 602 S.E.2d at 57 (a state-created right cannot be denied "without affording due process of law").

AFFIRMED IN RESULT.

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remitted by the private industry sponsor and then disburses the percentages listed in section 24-3-40 based on the **lower** rate, the DOC would be in violation of the plain language of the statute which directs it to disburse the money based on the gross wages. See § 24-3-40(A).

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice James W. Johnson, Jr., concur.

The Supreme Court of South Carolina

In the Matter of Robert E. Lee, Petitioner.

ORDER

On October 9, 2006, the Court suspended petitioner for a period of 180 days and required that the Committee on Character and Fitness (CCF) determine whether he had the requisite character and fitness to practice law in this State prior to his reinstatement. In the Matter of Lee, 370 S.C. 501, 636 S.E.2d 625 (2006).

On December 11, 2006, petitioner filed a Petition for Reinstatement and the matter was referred to the CCF. After conducting a hearing on the matter, the CCF submitted a Report and Recommendation in which it concluded that petitioner has the requisite character and fitness to practice law in this State. The Office of Disciplinary Counsel (ODC) has not filed exceptions.

After thorough review and consideration of this matter, the Court grants the Petition for Reinstatement.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Waller, J., not participating

Columbia, South Carolina

May 4, 2007