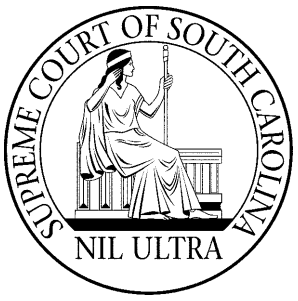


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 19**

**May 8, 2007**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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# The Supreme Court of South Carolina

RE: Appeals from Administrative Decisions

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O R D E R

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By order dated January 31, 2007 (copy attached), this Court adopted amendments to the South Carolina Appellate Court Rules relating to appeals from administrative decisions, and these amendments were submitted to the General Assembly pursuant to Art. V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, these amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
May 3, 2007

# The Supreme Court of South Carolina

RE: Appeals from Administrative Decisions

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ORDER

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On August 15, 2006, this Court promulgated amendments to the South Carolina Appellate Court Rules in response to the passage of Act No. 387 of 2006. In doing so, this Court indicated that this was being done on an emergency basis until this Court can submit amendments to the General Assembly as required by Article V, §4A, of the South Carolina Constitution.

Pursuant to Article V, §4A, of the South Carolina Constitution, the attached amendments to the South Carolina Appellate Court Rules shall be submitted to the General Assembly. In the event these amendments are rejected by the General Assembly, the rules and forms amended by the order of August 15, 2006, shall revert to the language in effect prior to August 15, 2006.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
January 31, 2007

## AMENDMENTS TO THE SOUTH CAROLINA APPELLATE COURT RULES

(1) Rule 201, SCACR, is amended to read:

### RULE 201
### RIGHT TO APPEAL

**(a) Judgments, Orders and Decisions Subject to Appeal.** Appeal may be taken, as provided by law, from any final judgment, appealable order or decision. The procedure for petitioning for a writ of certiorari to review final judgments in post-conviction relief cases is provided by Rule 227. Further, the review of decisions of the State Board of Canvassers in election cases shall be by petition for a writ of certiorari under S.C. Code Ann. §§ 7-17-250 and 7-17-270.

**(b) Who May Appeal.** Only a party aggrieved by an order, judgment, sentence or decision may appeal.

(2) Rule 202, SCACR, is amended to read:

### RULE 202
### DESIGNATION OF PARTIES AND DEFINITIONS

**(a) Designation of Parties.** The party appealing shall be known as the appellant and the adverse party as the respondent.

**(b) Definitions.** For the purpose of Part II of the South Carolina Appellate Court Rules, the following definitions shall apply:

(1) Lower Court: the circuit court (including masters-in-equity), family court or probate court from which the appeal is taken.

(2) Administrative Tribunal: the administrative law court or agency from which the appeal is taken.

(3) Rule 203, SCACR, is amended to read:

## RULE 203
## NOTICE OF APPEAL

**(a) Notice.** A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 233.

**(b) Time for Service.**

**(1) Appeals From the Court of Common Pleas.** A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

**(2) Appeals From the Court of General Sessions.** After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed. In all other cases, a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment. When a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion. In those cases in which the State is allowed to appeal a pre-trial order or ruling, the notice of appeal must be served within ten (10) days of receiving actual notice of the ruling or order; provided, however, that the notice of appeal must be served before the jury is sworn or, if tried without a jury, before the State begins the presentation of its case in chief.

**(3) Appeals From the Family Court.** A notice of appeal in a domestic relations action shall be served in the same manner as provided by

Rule 203(b)(1). A notice of appeal in a juvenile action shall be served in the same manner as provided by Rule 203(b)(2).

**(4) Appeals From Masters and Special Referees**. The notice of appeal from an order or judgment issued by a master or special referee shall be served in the same manner as provided by Rule 203(b)(1).

**(5) Appeals From Probate Court.** When a direct appeal is authorized by S. C. Code Ann. §62-1-308 (g), the notice of appeal shall be served in the same manner as provided by Rule 203(b)(1).

**(6) Appeals From Administrative Tribunals.** When a statute allows a decision of the administrative law court or agency (administrative tribunal) to be appealed directly to the Supreme Court or the Court of Appeals, the notice of appeal shall be served on the agency, the administrative law court (if it has been involved in the case) and all parties of record within thirty (30) days after receipt of the decision. If a timely petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from receipt of the decision granting or denying that motion. If a decision indicates that a more full and complete decision is to follow, a party need not appeal until receipt of the more complete decision.

**(c) Cross-Appeals.** A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties, or in the case of an appeal from the administrative tribunal, by serving a notice of appeal on the agency, the administrative law court (if it has been involved in the case) and all parties of record, within five (5) days after receipt of appellant's notice of appeal, or within the time prescribed by Rule 203(b), whichever period last expires.

**(d) Filing.**

**(1) Appeals from the Circuit Court, Family Court and Probate Court.**

**(A) Where to File.** The notice of appeal shall be filed with the clerk of the lower court and with the Clerk of the Supreme Court in the following cases:

**(i)** Any final judgment from the circuit court which includes a sentence of death;

**(ii)** Any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is one of the constitutionality of the law or ordinance; provided, however, in any case where the Supreme Court finds that the constitutional issue raised is not a significant one, the Supreme Court may transfer the case to the Court of Appeals.

**(iii)** Any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the State, its agencies, political subdivisions, public service districts, counties, and municipalities, or any other indebtedness now or hereafter authorized by Article X of the Constitution of this State.

**(iv)** Any final judgment from the circuit court pertaining to elections and election procedure.

**(v)** Any order limiting an investigation by a State Grand Jury under S.C. Code Ann. § 14-7-1630.

**(vi)** Any order of the family court relating to an abortion by a minor under S.C. Code Ann. § 44-41-33.

In all other cases, the notice of appeal shall be filed with the clerk of the lower court and the Clerk of the Court of Appeals.

**(B) When and What to File.** The notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served. The notice filed with the appellate court shall be accompanied by the following:

**(i)** Proof of service showing that the notice has been served on all respondents;

**(ii)** A copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing; and

**(iii)** A filing fee as set by order of the Supreme Court;[1] this fee is not required for criminal appeals or appeals by the State of South Carolina or its departments or agencies.

**(C) Form and Content.** The notice of appeal shall be substantially in the form designated in the Appendix to these Rules. It shall contain the following information:

**(i)** The name of the court, judge, and county from which the appeal is taken.

**(ii)** The docket number of the case in the lower court.

**(iii)** The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken, or, if a cross-appeal, when the respondent received appellant's notice of appeal.

**(iv)** The name of the party taking the appeal.

**(v)** The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

[1] By order dated April 17, 1990, this filing fee was set at one hundred ($100.00) dollars.

**(2) Appeals from Administrative Tribunals.**

**(A) Where to File.** Appeals from a decision of the Public Service Commission setting public utility rates pursuant to Title 58 of the South Carolina Code of Laws shall be filed with the clerk of the Supreme Court. Unless otherwise required by statute, all other appeals from administrative tribunals shall be filed with the clerk of the Court of Appeals.

**(B) When and What to File.** The notice of appeal shall be filed with the clerk of the appellate court within the time required to serve the notice of appeal under Rule 203(b)(6). The notice filed with the appellate court shall be accompanied by the following:

**(i)** Proof of service showing that the notice has been served on the agency, the administrative law court (if it has been involved in the case), and all parties of record;

**(ii)** A copy of the decision(s) to be challenged on appeal; and

**(iii)** A filing fee as set by order of the Supreme Court;[2] this fee is not required for criminal appeals or appeals by the State of South Carolina or its departments or agencies.

**(3) Effect of Failure to Timely File.** If the notice of appeal is not timely filed or the filing fee is not paid in full, the appeal shall be dismissed, and shall not be reinstated except as provided by Rule 231.

**(e) Form and Content.** The notice of appeal shall be substantially in the form designated in the Appendix to these Rules.

**(1) Appeals from the Circuit Court, Family Court and Probate Court.** In appeals from lower courts, the notice of appeal shall contain the following information:

[2] By order dated April 17, 1990, this filing fee was set at one hundred ($100.00) dollars.

**(A)** The name of the court, judge, and county from which the appeal is taken.

**(B)** The docket number of the case in the lower court.

**(C)** The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken, or, if a cross-appeal, when the respondent received appellant's notice of appeal.

**(D)** The name of the party taking the appeal.

**(E)** The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

**(2) Appeals from Administrative Tribunals.** In appeals from administrative tribunals, the notice of appeal shall contain the following information:

**(A)** The name of the agency and the name of the administrative law judge (if applicable).

**(B)** The docket number of the case before the administrative law court, or if the appeal is from an agency, the docket number before the agency.

**(C)** The date of the decision from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received the decision from which the appeal is taken, or, if a cross-appeal, when the respondent received appellant's notice of appeal.

**(D)** The name of the party taking the appeal.

**(E)** The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

(4) Rule 205, SCACR, is amended to read:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 225. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

(5) Rule 207, SCACR, is amended to read:

**RULE 207**
**TRANSCRIPT OF PROCEEDING**

**(a) Appeals From a Lower Court.**

**(1) Ordering the Transcript.** Where a transcript of the proceeding must be prepared by the court reporter, appellant shall, within the time provided for ordering the transcript, make satisfactory arrangements (including agreement regarding payment for the transcript), in writing with the court reporter for furnishing the transcript. In appeals from the court of common pleas, masters in equity, special referees or the family court in domestic actions, the transcript must be ordered within ten (10) days after the date of service of the notice of appeal. In appeals from the court of general sessions or the family court in juvenile actions, the transcript must be ordered within thirty (30) days of the date of service of the notice of appeal. Appellant shall contemporaneously furnish all counsel of record, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter. Unless the parties otherwise agree in writing, appellant must order a transcript of the entire proceedings below. If a party to the appeal unjustifiably refuses to agree to order less than the entire transcript, appellant may move to be awarded costs for having unnecessary portions transcribed; this motion must be made no later than the time the final briefs are due under Rule 211.

**(2) Delivery of Transcript.** The court reporter shall transcribe and deliver the transcript to appellant no later than sixty (60) days after the date of the request. Records shall be transcribed by the court reporter in the order in which the requests for transcripts are made.

**(3) Extension for Court Reporter.** If a court reporter anticipates continuous engagement in the performance of other official duties which make it impossible to prepare a transcript in compliance with this Rule, the reporter shall promptly notify the Office of Court Administration in writing of the fact, setting forth the caption of the case involved, the length of time required to complete the transcript, and the nature and probable duration of the conflicting official duties. The Office of Court Administration may grant an extension of up to ninety (90) days. An extension in excess of ninety (90) days shall not be allowed except by order of the Chief Justice.

**(4) Notice of Extension.** Upon the granting of any extension of time for delivery of the transcript, the Office of Court Administration shall notify all parties and the clerk of the appellate court.

**(5) Failure to Receive Transcript.** If appellant has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, appellant shall notify the Office of Court Administration, the clerk of the appellate court, and the court reporter in writing.

**(6) Failure to Comply.** The willful failure of a court reporter to comply with the provisions of this Rule shall constitute contempt of court enforceable by order of the Supreme Court.

**(b) Appeals From an Administrative Tribunal.**

**(1) Ordering the Transcript.** Within ten (10) days after the date of service of the notice of appeal, appellant shall, in writing, make satisfactory arrangements with the administrative law court or the agency (administrative tribunal) to obtain a transcript of the proceeding before that body. Appellant shall contemporaneously furnish all counsel of record, and the clerk of the appellate court with copies of all correspondence with the administrative

tribunal. Unless the parties otherwise agree in writing, appellant must order a transcript of the entire proceedings before the administrative tribunal. If a party to the appeal unjustifiably refuses to agree to order less than the entire transcript, appellant may move to be awarded costs for having unnecessary portions transcribed; this motion must be made no later than the time the final briefs are due under Rule 211. The administrative tribunal may establish reasonable rates for providing the transcript or a copy thereof.

**(2) Delivery of Transcript.** The administrative tribunal shall insure that the transcript is delivered to the appellant within (60) days after the date of the request.

**(3) Extension.** If the administrative tribunal cannot deliver the transcript in the time specified, it shall promptly seek an extension from the appellate court. The request for an extension shall be in writing and shall comply with Rule 224, SCACR.

**(4) Failure to Receive Transcript.** If appellant has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, appellant shall notify the clerk of the appellate court, and the administrative tribunal in writing.

**(c) Duty of Appellant.** The transcript received from the court reporter or the administrative tribunal must be retained by appellant during the entire appeal and for a period of at least one (1) year after the remittitur (See Rule 221) is sent to the lower court or administrative tribunal.

(6) Rule 208(b)(1)(C), SCACR, is amended to read:

**(C) Statement of the Case.** The statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain, as a minimum, the following information: the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court, jury, master, or administrative tribunal; the date(s) of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of the service of the notice of appeal; the date of and

description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal; and any changes made in the parties by death, substitution, or otherwise. Any matters stated or alleged in appellant's statement shall be binding on appellant.

(7) Rule 210(c), SCACR, is amended to read

**(c) Content.** The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 238. The Record shall not, however, include matter which was not presented to the lower court or tribunal. Matter contained in the Record on Appeal shall be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcript, charges, exhibits and other materials or documents, and a certificate by appellant. Each page of the Record on Appeal shall be numbered consecutively beginning with the index. Where a portion of a page of the trial transcript, or a page of an exhibit or document, is to be included in the Record on Appeal, the entire page shall be included. When a portion of an order, judgment, decision or pleading is to be included in the Record on Appeal, the entire order, judgment, decision or pleading shall be included in the Record, to include the caption and signature(s); provided, however, that the portion of a pleading showing verification or service shall not be included unless relevant to the appeal. If the original court reporter's numbering has been deleted, the Record on Appeal shall contain ellipses or other notation indicating when pages of the court reporter's transcript have been omitted.

(8) Rule 210(e), SCACR, is amended to read:

**(e) Index.** Every Record on Appeal shall contain an index to the principal matters therein to include orders, judgments, decisions, pleadings, pretrial matters, opening statements, testimony, motions, closing arguments, jury charges, post-trial motions and exhibits. For witness testimony, the index shall show the pages on which direct, cross, redirect and recross examination begins.

(9) Rule 212(a), SCACR, is amended to read:

**(a) By the Court.** The appellate court may require copies of all or any part of the transcript of proceedings or other matter which was before the lower court or administrative tribunal to be sent up for its inspection and consideration. It may likewise require a report of the trial or hearing or of any matter relative thereto, to be made by the trial judge or administrative tribunal. These matters shall become part of the Record on Appeal.

(10) Rule 214, SCACR, is amended to read:

**RULE 214**
**CONSOLIDATION**

Where there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order the appeal to be consolidated.

(11) Rule 220(c), SCACR, is amended to read:

**(c) Affirmance on Any Ground Appearing in Record.** The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

(12) Rule 221(b), SCACR, is amended to read:

**(b) Remittitur.** The remittitur shall contain a copy of the judgment of the appellate court, shall be sealed with the seal and signed by the clerk of the court, and unless otherwise ordered by the court shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court. Where a petition for rehearing has been denied, the Court of Appeals shall not send the remittitur to the lower court or administrative tribunal until the time to petition for a writ of certiorari under Rule 226(c) has expired. If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been

denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the remittitur.

(13) Rule 225, SCACR, is amended to read:

**RULE 225**
**STAY AND SUPERSEDEAS IN CIVIL ACTIONS**

**(a) General Rule.** As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

**(b) Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:

**(1)** Money judgments as provided in S.C. Code Ann. §18-9-130.

**(2)** Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. §18-9-150.

**(3)** Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. §18-9-160.

**(4)** Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. §18-9-170.

**(5)** Judgments directing the sale of perishable property as provided in S.C. Code Ann. §18-9-220.

**(6)** Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. §20-7-2220.

**(7)** Worker's compensation awards as provided in S.C. Code Ann. §42-17-60.

**(8)** An appeal from an order granting an injunction or temporary restraining order.

**(9)** Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. §20-7-420(2).

**(10)** Ejectment orders as provided in S.C. Code Ann. §27-37-130 and S.C. Code Ann. §27-40-800.

**(11)** Appeals from administrative tribunals as provided in S.C. Code Ann. §1-23-380(A)(2) and §1-23-600(G)(5).

**(c) Supersedeas or Lifting of Automatic Stay.**

**(1)** After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule. In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal and, where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, to revive the terms of the prior order or decision.

**(2)** In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

**(3)** The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not

limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

**(4)** If an order is issued pursuant to Rule 225(c)(1), the terms of that order continue in effect during the pendency of the appeal unless modified or revoked by the lower court, the administrative tribunal or the appellate court or judge or justice of the appellate court which issued it, or by a superior court. The granting of any relief pursuant to this Rule shall not be construed to affect the validity of the judgment, order, decree, decision and any liens until the judgment, order, decree or decision is reversed or modified by the appellate court.

**(d) Procedure for Obtaining Lift of Stay or Supersedeas.**

**(1)** Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

**(2)** After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending or an individual judge or justice for review of this order. The individual judge or justice may grant or deny the relief on a temporary basis, and refer the matter to the full appellate court to hear and determine the matter, or he or she may issue a final order. Upon the issuance of a final order by an individual judge or justice, an aggrieved party may petition the full appellate court for review of that decision.

**(3)** A person seeking an order lifting an automatic stay or granting a writ of supersedeas must file a written petition verified by the client. The petition shall be captioned the same as the appeal. In addition to the petition

and verification, the moving party must contemporaneously file a certified copy of the order, judgment, decree or decision of the lower court or administrative tribunal and a copy of the notice of appeal with its proof of service.

**(4)** The petition shall contain:

**(A)** the factual background necessary for an understanding of the petition. If the facts are subject to dispute, the petition shall be supported by affidavits or other sworn statements;

**(B)** the grounds for the petition, and legal arguments with supporting points and authority;

**(C)** a showing that an application for this relief was made to the lower court or administrative tribunal, and was unjustifiably denied or that the relief granted failed to afford the relief which the petitioner requested. A certified copy of the lower court's or administrative tribunal's ruling must be included. If no application was made to the lower court or administrative tribunal, then the petition shall state the extraordinary circumstances which made it impracticable to make such an application.

**(5)** The petition and accompanying documents shall be served on the opposing party(ies). Upon application to the full appellate court, one original and six copies, and a certificate of service shall be filed with the clerk of the appellate court. If the relief is sought from an individual judge or justice, the original and two copies must be filed with the judge or justice. The individual judge or justice shall forward the original documents, including a copy of any order issued by the judge or justice in the matter, to the clerk of the appellate court as soon as possible.

**(6)** A supersedeas or order lifting the automatic stay may be issued ex parte only where exigent circumstances require that action be taken before there is time for a hearing. An ex parte order shall issue only if:

**(A)** it clearly appears from specific facts shown by affidavits or included in the verified petition that immediate and irreparable injury, loss or damage will result before the opposing party can respond; and

**(B)** the moving party's attorney certifies in writing, as an officer of the court, the efforts which have been made to give notice, or the reasons supporting the claim that notice should not be required.

**(7)** Any party aggrieved by the decision of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision.

(14) Rule 231(a), SCACR, is amended to read:

**(a) Involuntary Dismissal and Reinstatement.** Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. The clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing being excluded).

(15) Rule 232(b), SCACR, is amended to read:

**(b) Vacation of Prior Opinions, Orders or Judgments.** As part of their agreement, parties may request vacation of previously rendered opinions, orders, decisions and judgments. However, an appellate court retains the authority to deny any request for vacation. If an agreement which includes a request for vacation is rejected, the parties are free, if they so choose, to resubmit their agreement absent the request for vacation.

(16) Rule 238(a), SCACR, is amended to read:

**(a) Captions.** All documents filed in the appellate court shall be headed by a caption. Except as provided below for appeals from administrative tribunals, the caption shall contain the name of the appellate court where the document is to be

filed (i.e., Supreme Court or Court of Appeals); if the matter involves review of a lower court decision, the name of the county and judge from which the appeal is taken including the title of the judge (e.g., Circuit Court Judge, Family Court Judge, Master-in-Equity, Probate Judge, Special Referee, Special Circuit Court Judge); the title of the case (the party commencing the action in the lower court shall always appear first in the title regardless of whom is appellant or petitioner); the title of the document (e.g., RECORD ON APPEAL; APPENDIX; BRIEF OF APPELLANT; PETITION FOR WRIT OF CERTIORARI; MOTION TO DISMISS); and the name, address and phone number of the counsel submitting the document, or in the case of a Record on Appeal or Appendix, the names, addresses and phone numbers of all counsel in the case. The caption should be substantially in the form shown by this example:

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Howard S. Barnes, Circuit Court Judge

Paul L. Doe, . . . . . .Appellant (or Respondent),

v.

Mary M. Roe, . . . . . .Respondent (or Appellant).

RECORD ON APPEAL

John T. Smith, Esquire
P.O. Box 123
Columbia, SC 29000
(803) 000-0000
Attorney for Appellant

Wanda D. Jones, Esquire
P.O. Box 456
Columbia, SC 29000
(803) 000-0000
Attorney for Respondent

In appeals from administrative tribunals, the caption shall contain the name of the appellate court where the document is to be filed (i.e., Supreme Court or Court of Appeals); the name of the tribunal from which the appeal is taken (e.g., Administrative Law Court, Public Service Commission, etc.); the name of the administrative law judge (if applicable); the title of the case (the title shall remain the same as the title before the tribunal regardless of whom is the appellant); the title of the document (e.g., RECORD ON APPEAL; BRIEF OF APPELLANT; MOTION TO DISMISS); and the name, address and phone number of the counsel submitting the document, or in the case of a Record on Appeal, the names, addresses and phone numbers of all counsel in the case. The caption should be substantially in the form shown by this example:

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

_____

APPEAL FROM THE ADMINISTRATIVE LAW COURT [OR NAME OF AGENCY]

George E. Brown, Administrative Law Judge

_____

Case No. 05-ALJ-00-0000-CC

_____

South Carolina Department of Revenue, Respondent,

v.

Jane C. Roe, Appellant.

_____

BRIEF OF APPELLANT

_____

John E. Smith
Post Office Box 123
Greenville, South Carolina 29000
(864) 000-0000
Attorney for Appellant

(17) Forms 6-19 of Appendix C to Part II are renumbered as Forms 7-20 and the attached is added as Form 6.

**FORM 6**
**NOTICE OF APPEAL FROM ADMINISTRATIVE TRIBUNAL**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

_____

APPEAL FROM THE ADMINISTRATIVE LAW COURT [OR NAME OF AGENCY]

George E. Brown, Administrative Law Judge

_____

Case No. 05-ALJ-00-0000-CC

_____

South Carolina
Department of Revenue, Respondent,

v.

Jane C. Roe,

Appellant.

_____

NOTICE OF APPEAL

_____

Jane C. Roe appeals the decision of the Honorable George E. Brown dated September 1, 2006. Appellant received a copy of this decision on September 3, 2006.

September 15, 2006

s/ John E. Smith
John E. Smith
Post Office Box 123
Greenville, South Carolina 29000
(864) 000-0000
Attorney for Appellant

Other Counsel of Record:
Mary P. Jones
Post Office Box 456
Greenville, South Carolina 29000
Attorney for Respondent
(864) 000-0000

# The Supreme Court of South Carolina

RE: Amendments to the South Carolina Court-Annexed ADR Rules

O R D E R

By order dated January 31, 2007 (copy attached), this Court adopted amendments to the South Carolina Court-Annexed ADR Rules and these amendments were submitted to the General Assembly pursuant to Art. V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, these amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
May 3, 2007

# The Supreme Court of South Carolina

RE: Amendments to the South Carolina Court-Annexed ADR Rules

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ORDER

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Pursuant to Article V, §4 of the South Carolina Constitution, the attached amendments are made to the South Carolina Court-Annexed ADR Rules. These rule amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
January 31, 2007

## AMENDMENTS TO THE SOUTH CAROLINA COURT-ANNEXED ADR RULES

1. Rule 3(b) of the South Carolina Court-Annexed ADR Rules is amended by deleting the word "and" at the end of subsection (7), renumbering subsection (8) as subsection (9) and adding the following:

> (8) family court cases initiated by the South Carolina Department of Social Services; and

2. The phrase "conflict of interest" is substituted for the word "conflict" in the third and fourth sentences of Rule 4(c) of the South Carolina Court-Annexed ADR Rules.

3. The phrase "conflict of interest" is substituted for the word "conflict" in the first and second sentence of 4(d)(3) of the South Carolina Court-Annexed ADR Rules.

4. Rule 5(e) of the South Carolina Court-Annexed ADR Rules is amended to read:

> **(e) Motion to Defer or Exempt from ADR.** A party may file a motion to defer an ADR conference or exempt a case from ADR for case specific reasons. For good cause, the Chief Judge for Administrative Purposes of the circuit may grant the motion. For example, it may be appropriate to defer an ADR conference or completely exempt a case from the requirement of ADR where a party is unable to participate due to incarceration or mental or physical condition.

5. The second paragraph of Rule 7(f) of the South Carolina Court-Annexed ADR Rules is amended to read:

> In pre-suit medical malpractice mediations required by S.C. Code § 15-79-125, the Clerk of Court shall serve notice of entry of the Proof of ADR by first class mail upon all attorneys and unrepresented parties. The 60-day period in which to file a summons and complaint in

accordance with S.C. Code § 15-79-125 (E)(1) shall commence upon receipt of written notice of entry of the Proof of ADR from the Clerk of Court.

6. Rule 17(e) of the South Carolina Court-Annexed ADR Rules is amended to read:

> **(e) Processing complaints of misconduct by neutrals.** Persons alleging that a neutral has engaged in misconduct may file a complaint with the Board of Arbitrator and Mediator Certification. Misconduct includes any conduct or other circumstances that would warrant decertification or discipline under Rule 17(c) or (d). Complaints of misconduct shall be investigated by the Board and, upon a finding of probable cause, forwarded to the Commission on Alternate Dispute Resolution for a hearing before a Hearing Panel consisting of three (3) members of the Commission. Subject to the requirements of Rule 422(d), SCACR, the Commission shall promulgate regulations governing the processing of these complaints.

# The Supreme Court of South Carolina

RE: Amendments to the South Carolina Appellate Court Rules

---

O R D E R

---

By order dated January 31, 2007 (copy attached), this Court adopted amendments to the South Carolina Appellate Court Rules, and these amendments were submitted to the General Assembly pursuant to Art. V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, these amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
May 3, 2007

# The Supreme Court of South Carolina

RE: Amendments to the South Carolina Appellate Court Rules

---

ORDER

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Pursuant to Article V, §4 of the South Carolina Constitution, the South Carolina Appellate Court Rules are amended as shown in the attached. These rule amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
January 31, 2007

# AMENDMENTS TO THE SOUTH CAROLINA APPELLATE COURT RULES

1. Rule 224(j), SCACR, is amended to read:

**(j) Authority of an Individual Judge or Justice.** Except where these rules require the concurrence of two or more members of an appellate court, an individual judge or justice may grant or deny any motion or petition on behalf of the court. Any review of an order issued by an individual judge or justice shall be by petition for rehearing.

2. Rule 226(c) – (f), SCACR, is amended to read:

**(c) Time for Petitioning and Filing Fee.** A decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals. A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals. An original and six (6) copies of the petition shall be filed with the Supreme Court. The copies filed with the Supreme Court shall be accompanied by the filing fee set by order of the Supreme Court.[1] No filing fee shall be required in criminal cases or petitions filed by the State of South Carolina or its agencies or departments.

**(d) Content of Petition.** The petition for writ of certiorari shall contain the following:

**(1)** Certification by counsel for petitioner that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.

**(2)** The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. Only

[1] By order dated April 17, 1990, this filing fee was set at one hundred ($100.00) dollars.

those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein.

**(3)** A concise statement of the case, containing the facts material to the consideration of the questions presented.

**(4)** A direct and concise argument in support of the petition. The argument on each question shall include citation of authority and specific reference to pertinent portions of the Record on Appeal. Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition. The total length of a petition shall not exceed twenty-five (25) pages.

**(e) Appendix.** At the same time the petition is filed, the petitioner shall also file two (2) copies of the Appendix with the Clerk of the Supreme Court. The Appendix shall include the following:

**(1)** A copy of the Record on Appeal and brief(s), or in post-conviction relief matters, a copy of the Appendix, petition for writ of certiorari, return, reply and any briefs filed under Rule 227 SCACR.

**(2)** If the matter was dismissed by the Court of Appeals for procedural or other reasons, the Appendix shall include any documents relevant to the dismissal including any motion to dismiss and any return or reply that may have been filed.

**(3)** A copy of the decision of the Court of Appeals on which certiorari is sought.

**(4)** A copy of the petition for rehearing or reinstatement filed in the Court of Appeals and the Court's ruling on that petition.

If the Appendix contains any of the documents specified in (2) above, a copy of the Appendix must be served on the opposing counsel and proof of service of the Appendix must be filed when the petition for writ of certiorari is filed.

**(f) Return to Petition.** Within thirty (30) days after service of the petition, respondent shall serve a copy of his return on opposing counsel, and shall file with the Clerk of the Supreme Court one original and six (6) copies of his return and proof of service showing that the return has been served. The return shall include an argument on each question and may include a counter-statement of the case and of the questions presented for review. The total length of a return shall not exceed twenty-five (25) pages. If review is being sought regarding a post-conviction relief case, the respondent need not file a return unless requested by the Supreme Court.

3. The phrase "three (3) copies" is replaced with the phrase "a copy" everywhere it appears in Rules 210(a), 211(a), 226(i), and 227(j), SCACR.

# The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Civil Procedure

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O R D E R

---

By order dated January 31, 2007 (copy attached), this Court adopted amendments to the South Carolina Rules of Civil Procedure and these amendments were submitted to the General Assembly pursuant to Art. V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, these amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
May 3, 2007

# The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Civil Procedure

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ORDER

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Pursuant to Article V, §4 of the South Carolina Constitution, the attached amendments are made to the South Carolina Rules of Civil Procedure. These rule amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
January 31, 2007

## AMENDMENTS TO THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE

1. The last sentence of Rule 40(b), SCRCP, is amended to read: "Notwithstanding the foregoing, no action may be called for trial until 180 days after service of the last pleading which adds a new party to the action, unless all parties consent in writing."

2. The following note is added to Rule 40(b), SCRCP:

Note to 2007 Amendment:

The last sentence of Rule 40(b) establishes a minimum period of time following the joinder of a new party during which the action may not be called for trial without the consent of all parties. The 2007 amendment extends this period from 120 days to 180 days, and measures this period from the date the newly joined party is served with process, rather than the filing date of the pleading adding the new party. As before, the 180 day exclusion may be waived with the consent of all parties.

3. The last sentence of Rule 71.1(g), SCRCP, is amended to replace the phrase "Office of Appellate Defense" with the phrase "Division of Appellate Defense of the Office of Indigent Defense."

4. The following note is added to Rule 71.1, SCRCP:

Note to 2007 Amendment:

In 2005, the Office of Appellate Defense became a division of the Office of Indigent Defense. This amendment reflects this organizational change.

# The Supreme Court of South Carolina

In the Matter of Richard M. Campbell, Jr., Respondent.

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ORDER

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Respondent was suspended on April 23, 2007, for a period of fifty-nine (59) days, retroactive to January 26, 2007. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

BY s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

May 7, 2007

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

---

Carol C. Shaw, Charles W. Shaw, III, J. Roth Snowden and Delia S. Snowden, Respondents,

v.

Christopher M. Coleman, Appellant.

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Appeal From Marion County
J. Michael Baxley, Circuit Court Judge

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Opinion No. 4241
Submitted December 1, 2006 – Filed April 30, 2007

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**AFFIRMED AS MODIFIED**

---

Laura Catherine Tesh, of Columbia, Lourie A. Salley, III, of Lexington, for Appellant.

Edgar Lloyd Willcox, II, of Florence, for Respondents.

**BEATTY, J.:** Christopher Coleman appeals a permanent injunction preventing him from discharging firearms on his property or immediate surroundings, firing air rifles or pellet guns toward Carol and Charles Shaw's

and Roth and Delia Snowden's property or person, and yelling or otherwise provoking the Shaws or the Snowdens. We affirm as modified.[1]

## FACTS

Coleman lives between the Shaws' and the Snowdens' property on a stretch of land mainly composed of woods and swamp. The properties stretch across Holly Road in Marion, South Carolina. The Snowdens moved to their property in 1959. Coleman bought his one-acre property in 1990. The Shaws purchased their land in 1992.

After numerous problems with Coleman beginning in August of 2002, including harassing behavior and his firing of weapons on and off his property, the Shaws and the Snowdens brought a nuisance action seeking a permanent injunction[2] of Coleman's use of firearms, damages for Coleman's alleged violation of section 31-18-30 of the South Carolina Code (2007),[3] damages for alleged conversion, and damages and a permanent injunction for alleged trespass.[4] Ultimately, the court's ruling was limited to the question of whether a permanent injunction should be issued.

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[1] This case was originally scheduled for oral argument. Because the parties agreed to submit this case on the record and briefs, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] The trial court granted a temporary injunction by order dated August 17, 2004.

[3] As will be more fully discussed, section 31-18-30 of the South Carolina Code is one of the statutory provisions comprising the "South Carolina Shooting Range Protection Act of 2000." S.C. Code Ann. §§ 31-18-10 to -60 (2007).

[4] In a pre-trial ruling, the court denied the Shaws' and the Snowdens' motion to amend their complaint to include the conversion claim. At the conclusion of the Shaws' and Snowdens' case, the court also directed a verdict in favor of Coleman as to the trespass claim.

As a threshold matter, the trial court had to determine whether Coleman had a shooting range on his property because Coleman attempted to use section 31-18-30 of the South Carolina Shooting Range Protection Act (the Act) as a defense. In reaching this decision, the trial court heard two days of testimony and visited the property with the parties.

Terry and Violette Thompson purchased ten acres from the Snowdens in August of 2002. Coleman had previously expressed an interest in purchasing this land, but the offer was rejected. Prior to the sale, the Snowdens did not have any problems with Coleman. Ms. Shaw testified that before the sale she heard four or five shots on Coleman's land over two to three months. According to Patricia Rowell, who also lives near Holly Road, Coleman fired guns occasionally prior to August of 2002, and after August of 2002, Coleman's shooting was continuous. When the Thompsons bought the property, the frequency of Coleman's shooting greatly escalated. The Thompsons sold their property back to the Snowdens in October of 2003 due to Coleman's continued shooting.

Ms. Shaw testified that Coleman planned to run the Thompsons off the property because he wanted to purchase it. Mr. Shaw concurred with his wife when he testified that Coleman did not want anyone living on the property the Thompsons purchased, and that he planned to run the Thompsons off of their land. Additionally, Mason Draper, a neighbor, discussed the Thompsons with Coleman. According to Draper, Coleman stated that he would keep shooting until the Thompsons moved.

Other nearby property owners experienced similar treatment by Coleman when they sold a portion of their property to a party other than Coleman. The Stackhouses testified that Coleman appeared at their residence screaming that they could not sell their property. In addition, following Frank Shaw's purchase of land near Coleman's property, Coleman followed Shaw and filmed him with a video camera.

There was also testimony that Coleman did not limit his shooting to his property, but instead, targeted specific individuals. Both Mr. Shaw and Mr.

Snowden testified that Coleman fired bullets over their heads. Additionally, Mr. Snowden watched Coleman fire his rifle over the Thompsons' property. Ms. Thompson also saw Coleman firing over a public road and over her head and her son's head. Thomas Nolan witnessed Coleman crouched down near the Shaws' property while wearing a side-arm holster.

In addition to Coleman's shooting, witnesses also described Coleman's harassing and threatening behavior. Mr. Shaw stated that Coleman took pictures of him. Mr. Thompson testified that while he was driving on a dirt road, Coleman appeared and drove erratically behind him while waving a gun. Coleman also repeatedly fired an air cannon on his land.

During this contentious time, Travis Rowell delivered thirty tons of dirt to Coleman's property in December of 2002. Rowell deposited the dirt on a small mound with targets, which was already present prior to the delivery. Additionally, Coleman installed slats on his chain link fence in response to noise complaints.

In presenting his case, Coleman testified that he wanted to become a shooting instructor and met Charles Shortsleeve, an instructor, in 2003. Coleman claimed he taught as many as fifty people about guns. He further testified that he first obtained a business license for the Sports Shooting Club on his property in 1992, and the license is still effective. Coleman acknowledged the license was for "gun smithing activities."

On behalf of Coleman, several people testified regarding firearms being shot on Coleman's property. Ray Williams testified he fired guns on Coleman's property from 1997 to 2001. Between 1990 and 1993, Vicky Bostic observed Coleman shooting at his backstop a few times. Stacey Jordan fired guns on Coleman's property as early as 1993. Brian Polston remembered firing guns on Coleman's property as early as 1997.

Robert Butler, who was involved in drafting several amendments to the Act, stated he saw distance markers and a backstop between ten and twelve feet on Coleman's property the morning of his testimony. Butler believed that Coleman's property met the requirements of the Act.

After the hearing, the trial court issued an order on May 9, 2005. The court held under section 31-18-20 that Coleman's property was not a shooting range because "the primary use of [Coleman's] property is as a residence for Mr. Coleman, and the use of weaponry is a collateral use incident to his residence at the property." Based on this analysis, the court held that Coleman "may not avail himself of the protections of the South Carolina Shooting Range Act," and found that the Act did not apply to Coleman's property. As a result of these findings, the court permanently enjoined Coleman from discharging firearms on his property or the surrounding property, from discharging air rifles or pellet guns toward the Shaws' or Snowdens' property or person, and from screaming obscenities at the Shaws or the Snowdens or otherwise provoking the Shaws or the Snowdens. This appeal followed.

## STANDARD OF REVIEW

"Actions for injunctive relief are equitable in nature." Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). "In an action in equity tried by the judge without a reference, we have jurisdiction to find facts in accordance with our own view of the preponderance of the evidence." LeFurgy v. Long Cove Club Owners Ass'n, 313 S.C. 555, 557, 443 S.E.2d 577, 578 (Ct. App. 1994). However, this scope of review does not require us to disregard the findings of the trial court that saw and heard the witnesses and was in a better position to judge their credibility. Blanks v. Rawson, 296 S.C. 110, 114, 370 S.E.2d 890, 893 (Ct. App. 1988).

## DISCUSSION

### I. Shooting Range Protection Act

Coleman argues the trial court erred in granting the permanent injunction because section 31-18-30 of the Act protects his shooting range from this nuisance action. We disagree.

Relying on the provisions of the Act, the trial court found that Coleman's property, which was his residence, was not a shooting range given that firing firearms was not the "usual, regular, and primary activity occurring in the area." S.C. Code Ann. § 31-18-20(1)(b) (2007). Coleman asserts the trial court "erred as a matter of law in interpreting the statute to per se exclude Coleman's property because he lives there."

Because the disposition of this case turns on the interpretation of the Act, we must rely upon the rules governing statutory construction. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature." Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). "Where the terms of the statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation." Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002). An issue regarding statutory interpretation is a question of law. S.C. Uninsured Employer's Fund v. House, 360 S.C. 468, 470, 602 S.E.2d 81, 82 (Ct. App. 2004).

Section 31-18-20 defines a shooting range as follows:

(1) "shooting range" or "range" means an area that is:

> (a) designated, utilized, and operated by a person for the firing of firearms; where
> (b) the firing of firearms is the usual, regular, and primary activity occurring in the area; and where

> (c) the improvements, size, geography, and vegetation of the area are such that a projectile discharged from a firearm at a target would not reasonably be expected to escape its boundaries by virtue of the trajectory of the projectile, or by virtue of a backstop, berm, bullet trap, impact barrier, or similar device designed to prevent the escape of such projectiles.
>
> (2) "person" means an individual, partnership, limited liability company, corporation, club, association, governmental entity, or other legal entity.
> (3) "substantial change in use" or "substantial change in the use" means that the current primary use of the range no longer represents the activity previously engaged in at the range.

S.C. Code Ann. § 31-18-20 (2007).

On Coleman's one-acre property there is his residence as well as an area specifically designated for firing weapons, which includes a backstop or berm. Coleman also offered evidence that he has a valid business license and all the appropriate permits to operate firearms on the property. Additionally, two witnesses, Butler and William Powell, testified Coleman has established a shooting range which complies with the Act. Based on this evidence, we believe Coleman's property constituted a shooting range and fell within the ambit of the statute. Accordingly, we find the trial court erred in excluding Coleman's property from the protection of the Act because the property was his residence and shooting was not the sole activity conducted on the property.

Although the classification of Coleman's property as a shooting range implicates section 31-18-30 of the Act, that section does not necessarily preclude the Shaws and the Snowdens from bringing their nuisance claim or provide Coleman with absolute immunity from the claim. Section 31-18-30 states in pertinent part:

> (A) Except as provided in this subsection, a person may not maintain a nuisance action for noise against a shooting range, or the owners, operators, or users of the range, located in the vicinity of that person's property if the shooting range was established as of the date the person acquired the property. If there is a substantial change in the use of the range after the person acquires the property, the person may maintain a nuisance action if the action is brought within three years from the beginning of the substantial change.
>
> (B) A person who owns property in the vicinity of a shooting range that was established after the person acquired the property may maintain a nuisance action for noise against that shooting range, or the owners, operators, or users of the range, only if the action is brought within five years after establishment of the range or three years after a substantial change in use of the range.

S.C. Code Ann. § 31-18-30 (2007). As evidenced by the terms of the statute, a nuisance claim may be filed against the owner of a shooting range, but it must be filed within specific time limits. We believe the Shaws and the Snowdens filed their claim in compliance with the above-outlined section.

The Shaws purchased their land in 1992, and the Snowdens moved to their property in 1959. Coleman bought his one acre property in 1990. The record indicates people fired guns on Coleman's property for many years. However, the intensity greatly increased in 2002. In addition, Travis Rowell delivered thirty tons of dirt to Coleman's property in December of 2002, which served as a backstop for firing guns. Moreover, Coleman at that time began taking certification classes and attempted to put up signs to make the public aware of the existence of a shooting range. Therefore, we find that while shooting occurred sporadically on Coleman's property, the shooting range was not established until 2002.

The Shaws and the Snowdens filed their initial complaint against Coleman on May 13, 2004. This filing was well within the five years after the establishment of a range allowed under section 31-18-30(B). Therefore, although the trial court misapplied section 31-18-20 regarding the existence of a shooting range on Coleman's property, we find this error is harmless given section 31-18-30(B) does not protect Coleman from the filing of the nuisance action.

Having found the Act is applicable and that the Shaws and the Snowdens properly filed their claim, we must determine whether Coleman's conduct created a nuisance sufficient to warrant a permanent injunction.

In explaining the theoretical underpinnings for the procedure employed in assessing whether a nuisance has been created, our court has stated:

> In resolving issues relating to a private nuisance, we must deal with the conflicting interests of land owners. To establish the line beyond which one's exercise of his property rights becomes a legal infringement upon the property rights of another requires a delicate balancing of the correlative rights of the parties; the right of one generally to make such lawful use of his property as he may desire and the right of the other to be protected in the reasonable enjoyment of his property.

O'Cain v. O'Cain, 322 S.C. 551, 560, 473 S.E.2d 460, 465 (Ct. App. 1996) (citations omitted).

"The traditional concept of a nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or possession of the land." Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001). "[N]uisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property." Id.; see Blanks v. Rawson, 296 S.C. 110, 113, 370 S.E.2d 890, 892 (Ct. App. 1988) ("A nuisance has been defined as 'anything which works hurt, inconvenience, or damages; anything which essentially interferes with

the enjoyment of life or property.'" (quoting Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 253, 125 S.E.2d 628, 632 (1962))). "If a lawful business is operated in an unlawful or unreasonable manner so as to produce material injury or great annoyance to others or unreasonably interferes with the lawful use and enjoyment of the property of others, it will constitute a nuisance." LeFurgy, 313 S.C. at 558, 443 S.E.2d at 579. "Since the degree of annoyance or inconvenience necessary to constitute an actionable nuisance cannot be generally quantified, each case must depend largely on its own facts." Id. at 559, 443 S.E.2d at 579. "The question is not whether the plaintiffs have been annoyed or disturbed by the operation of the business in question, but whether there has been an injury to their legal rights." Id.

Beginning in 2002, Coleman fired guns continuously, over roads, over property, and over individuals. Coleman also caused excessive noise by firing an air cannon on his property. Several of Coleman's neighbors testified they felt threatened by Coleman's actions. Mr. Snowden also stated that Coleman's actions prevented him from selling any area property. Based on this evidence, we hold Coleman's conduct on his shooting range constituted a nuisance that was not based solely on excessive noise. See O'Cain, 322 S.C. at 562, 473 S.E.2d at 466 ("While a business may be a legitimate one and not a nuisance *per se*, it may become a nuisance *per accidens* by . . . the manner in which it is conducted."). Therefore, we find the trial court correctly determined Coleman created a nuisance in that he unreasonably interfered with the Shaws' and the Snowdens' ownership and possession of their property.

We believe our decision is consistent with the intent of the Legislature in establishing the Act. As both parties agree, property owners near shooting ranges will undoubtedly be annoyed by the noise created by the firing of weapons. However, if the conduct on the shooting range becomes such as to be a nuisance, a property owner must have some recourse to abate the nuisance. As we understand the Act, the Legislature clearly intended to protect the investments of shooting range owners by establishing a limitation on when a nuisance claim may be filed against them. See Act No. 260, 2000 S.C. Acts 1924 (providing that enactment of South Carolina Shooting Range Protection Act of 2000 was "to regulate nuisance actions in connection with

the acquisition of property near existing shooting ranges, the establishment of shooting ranges near existing property, and dormant shooting ranges . . . ."). This limitation assures that property owners may not move to an area where a shooting range has been established and then assert a nuisance claim. Instead, by permitting a property owner to file a nuisance claim, within established statutory time limits, the Legislature effectively balanced the competing interests of the shooting range owners and their neighbors. Here, the Shaws and the Snowdens properly filed their legitimate nuisance claim within the governing statute of limitations.

## II. Permanent Injunction

Even if his shooting range does not have absolute immunity from a nuisance action under the Act, Coleman argues a permanent injunction is an extreme remedy, which is not appropriate because the Shaws and the Snowdens have alternative legal remedies available. We disagree.

"The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected." LeFurgy, 313 S.C. at 558, 443 S.E.2d at 578. "In cases where an injunction is sought to abate an alleged private nuisance, the court must deal with the conflicting interests of the landowners by balancing the benefits of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant or deny an injunction as seem most consistent with justice and equity under the circumstances of the case." Id.

In its order, the trial court recognized the serious nature of an injunction and acknowledged the need to balance the parties' conflicting interests and pointed to evidence of Coleman's "confrontational and threatening behavior." We agree with the trial court and find the preponderance of the evidence shows that Coleman's conduct on his shooting range constitutes a private nuisance and should be enjoined.

The Shaws and the Snowdens testified Coleman willfully fired a rifle towards his neighbors and over their land. There was also testimony that Coleman created excessive noise through the use of an air canon. Based on Coleman's actions, several of the neighbors testified that they felt threatened. Mr. Snowden also testified that Coleman's actions prevented him from selling any area property. Therefore, we agree with the trial court that "Mr. Coleman unreasonably interfered with their ownership and possession of their land." Although we recognize, as did the trial court, the injunction will inconvenience Coleman by preventing him from maintaining his shooting range and being an instructor, the safety benefits to the Shaws and the Snowdens outweigh the inconvenience suffered by Coleman. See Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc., 624 N.W.2d 796, 804 (Minn. Ct. App. 2001) (affirming trial court's decision to issue a permanent injunction and finding that gun club's conduct at shooting range created a nuisance where neighbors were apprehensive about going outside on their property during times of shooting, went indoors to avoid the noise, experienced bullets or shotgun pellets passing over their heads, and saw "signs of indiscriminate shooting on the club property"); see also F.S. Tinio, Annotation, Gun Club, or Shooting Gallery or Range, as Nuisance, 26 A.L.R.3d 661 (1969 & Supp. 2007) ("The remedy generally availed of by persons who have been injured or have suffered damages on account of the maintenance of shooting galleries, gun clubs, or shooting ranges, is injunction. The grant or denial of this remedy depends on the relevant surrounding circumstances and the evidence presented by the plaintiff.").

Additionally, Coleman suggests the Shaws and the Snowdens have legal actions available to them, and thus, a permanent injunction as an equitable remedy was not appropriate. Coleman is correct that equity is reserved for situations where there is no adequate remedy at law. See Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) ("Equitable relief is generally available only where there is no adequate remedy at law."). The Shaws and the Snowdens, however, are seeking an injunction to prevent Coleman's dangerous behavior, which cannot be adequately accomplished by an award of damages.

In their amended complaint, the Shaws and the Snowdens sought an injunction to prevent the "continuous discharging of firearms and threatening of plaintiffs" in addition to actions for damages for alleged trespass, conversion, and violation of section 31-18-30. Mr. Snowden saw Coleman firing onto people's property and over individuals' heads. Coleman also fired over Ms. Thompson's and her son's head. Because the desired action is to prevent Coleman's dangerous activity, an injunction is appropriate in this case. Therefore, we affirm the trial court's decision to grant a permanent injunction. See O'Cain, 322 S.C. at 561, 473 S.E.2d at 466 ("A lawful business should not be enjoined on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or overly sensitive person, but on the other hand, no one, whatever his circumstances or condition may be, should be compelled to leave his home or live in mental discomfort, although caused by a lawful and useful business carried on his vicinity.").

In reaching our decision, we have considered the cases from other jurisdictions which were submitted by Coleman. Upon review, we find these cases are factually distinguishable, particularly those that discuss excessive noise as the sole basis to bar nuisance actions against shooting ranges. Moreover, we are unable to glean a general rule from these cases for which to resolve the very fact-specific determination of whether to issue a permanent injunction based on a nuisance claim. Balancing the benefits of an injunction to the Shaws and the Snowdens against the inconvenience and damage to Coleman, we hold the trial court correctly granted the injunction.

## CONCLUSION

We find the trial court erred in concluding that Coleman did not own a shooting range solely on the basis that he resided on the property at issue. Because we believe Coleman did own a shooting range beginning in 2002, we hold the Act was applicable. We also hold the Shaws and the Snowdens properly filed and established a claim for nuisance against Coleman. Finally, we affirm the trial court's decision to grant a permanent injunction.

For the reasons stated herein, the trial court's decision is

**AFFIRMED AS MODIFIED.**

**HEARN, C.J. and SHORT, JJ., concur.**

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

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The State, Respondent,

v.

Timothy Terreal Kinard, Appellant.

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Appeal From Saluda County
William P. Keesley, Circuit Court Judge

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Opinion No. 4242
Heard April 3, 2007 – Filed May 7, 2007

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**AFFIRMED**

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Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Shawn L. Reeves, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

**SHORT, J.:** Timothy Terreal Kinard appeals his conviction for assault and battery with intent to kill (ABIK). Kinard alleges the trial court erred in refusing to charge the jury on the general intent required to convict for ABIK. We affirm.

## FACTS

On March 13, 2000, Kinard and his brother, Reginald Davis, entered the home of seventy-six-year-old Hubert Bryan. Kinard claimed he and Davis entered the house through an unlocked door and found Bryan present at his home, but Bryan contended he discovered Davis in his home after he had unlocked the door and entered. Bryan suspected the men entered the home through a window they had pried open. It is undisputed that Bryan drew a handgun and confronted Davis while Kinard remained out of sight. Bryan demanded Davis leave and Davis complied. After Davis left, Kinard came running out of the kitchen, struck Bryan in the head with an iron, and left the home. Bryan sustained an injury to his head which required thirteen stitches, and when he returned from the hospital, he noticed $2,500.00 missing from his home. Kinard and Davis fled to New York, but were later arrested and returned to South Carolina.

A Saluda County grand jury indicted Kinard for first degree burglary and assault and battery with intent to kill (ABIK). At trial, the jury convicted Kinard of both charges, and the trial court sentenced him to twenty years imprisonment for burglary and fifteen years imprisonment for ABIK to be served concurrently.[1] Kinard appeals.[2]

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[1] Kinard does not appeal his conviction for first degree burglary.

[2] Pursuant to Anders v. California, 386 U.S. 738 (1967), Kinard's appellate counsel filed a brief along with a petition to be relieved, stating his examination of the record indicated the appeal was without merit. Kinard filed a separate pro se response. Following our Anders review, this court ordered the parties to brief the following issue:

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). Generally, the trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). A charge to the jury is correct if it contains the correct definition of the law when read as a whole. Id. at 665, 594 S.E.2d at 472-73.

## LAW/ANALYSIS

Kinard contends the trial court erred in refusing to charge the jury on the general intent required to convict for ABIK. We disagree.

ABIK is defined as an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied. State v. Wilds, 355 S.C. 269, 275, 584 S.E.2d 138, 141 (Ct. App. 2003). Murder is the killing of a person with malice aforethought, either express or implied. Id. With the exception of the death of the victim, each and every element of murder must be proven beyond a reasonable doubt in order for a jury to convict a defendant of ABIK. Id.

"Malice aforethought" is defined as "the requisite mental state for common-law murder" and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. Black's Law Dictionary 969 (7th ed. 1999). These four possibilities are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the

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Whether the circuit court judge erred in not charging the jury on general intent for assault and battery with intent to kill?

This issue is now our sole appellate consideration.

value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule).[3] Id. "General intent" is defined as "the state of mind required for the commission of certain common law crimes not requiring specific intent" and it "usually takes the form of recklessness . . . or negligence." Black's Law Dictionary 813 (7th ed. 1999).

Clearly, the above definitions illustrate that malice aforethought encompasses both the specific and general intent to commit murder. As ABIK encompasses each of the required elements of murder except for the death of the victim, it is axiomatic that malice aforethought be the mental state required to commit ABIK. Further, the South Carolina Supreme Court has stated "the required mental state for ABIK, like murder, is malice aforethought." State v. Fennell, 340 S.C. 266, 275, 531 S.E.2d 512, 517 (2000).

In this matter the trial court instructed the jury thusly:

> Assault and battery with intent to kill has 4 elements. It's an unlawful act of violent injury to the person of another accompanied with malice aforethought. …Malice is an essential element of assault and battery with intent to kill. The malice must be aforethought. Thought of just before and at the time the blow was struck. …
>
> So what do we mean by malice? Malice imports wickedness, and it excludes any just cause or legal excuse. Malice springs from depravity, from a depraved spirit, from a heart devoid of social duty and fatally bent on mischief. It does not necessarily import ill will towards the specific person who is

[3] We note the South Carolina Supreme Court has found the Black's Law Dictionary definition of "malice aforethought" does not vary in a meaningful way from a proper jury instruction. State v. Harris, 340 S.C. 59, 64, 530 S.E.2d 626, 628 (2000).

> injured, but rather it signifies a general malignancy towards and recklessness for the life and safety of another or a condition of the mind that shows a heart devoid of social duty and fatally bent on mischief. There has to be a combination between this evil intent existing aforethought, just before and at the commission of the battery, and the act producing the battery. . . .
>
> Now obviously, folks, malice is a state of mind. The State has to prove to you that the element of malice existed by either direct evidence or circumstantial evidence or a combination of both.

In its charge, the court went on to explain that the jury could infer malice from the use of a deadly weapon and explained the difference between ABIK and assault and battery of a high and aggravated nature (ABHAN). The court summed up the instructions and noted ABHAN, unlike ABIK, did not require malice aforethought.

At trial, defense counsel relied on State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996), in objecting to this instruction. In Foust, the Supreme Court noted numerous prior cases which required intent to kill accompanied with malice in order to convict for ABIK. Id. at 15, 479 S.E.2d at 51. The Court acknowledged the requirement of "some" intent, but clearly stated a specific intent to kill was not necessary. Id. The court held "it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this state," and "accordingly, . . . in charging juries the law of ABIK, South Carolina trial judges should give a standard 'intent' charge . . . ." Id. at 15-16, 479 S.E.2d at 51-52. Defense counsel interpreted this holding to require a specific instruction regarding general intent to kill. Defense counsel argued you could not convict someone of ABIK if you had malice but not intent to kill or if you had intent to kill without malice. However, when counsel was asked the difference between a general intent to kill and malice aforethought, he replied "I don't know."

While we are mindful of previous opinions from the appellate courts of this state which have treated intent to kill and malice as separate requirements, we, much like both parties and the trial judge below, fail to discern any significant difference between general intent to kill and malice aforethought as they pertain to ABIK. Since the definition of malice aforethought encompasses general intent to kill, we find it difficult to reconcile a manner in which one could find malice aforethought and yet not find general intent to kill. Further, we read the Foust opinion as the elimination of this artificial distinction. In stating that some general intent such as that heretofore applied in murder cases in this state was sufficient to prove ABIK, the Foust court was establishing malice aforethought as the necessary general intent. Since malice aforethought undoubtedly has been established as the intent required in murder cases, we necessarily arrive at the above conclusion. Moreover, our state Supreme Court reaffirmed malice aforethought as the required mental state for ABIK in an opinion decided four years subsequent to Foust. Fennell, 340 S.C. at 275, 531 S.E.2d at 517. Accordingly, we find the trial court's jury instruction, which properly charged the jury regarding malice aforethought, to be without error. The jury was given a proper "intent" charge.

## CONCLUSION

We find no error in the trial court's jury instruction. Based on the foregoing, Kinard's conviction is

**AFFIRMED.**

**KITTREDGE, J., concurs.**

**ANDERSON, J., concurs in result only.**

**ANDERSON, J.: (concurring in result only)** Because I disagree with the reasoning and analysis of the majority, but vote to affirm the learned circuit judge, I concur in result only.

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

Dan F. Williamson and Dan F. Williamson and Company, Appellants,

v.

Alfred C. Middleton, Respondent.

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Appeal from Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

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Opinion No. 4243
Heard November 8, 2006 – Filed May 7, 2007

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**AFFIRMED**

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Desa A. Ballard, of W. Columbia, for Appellants.

James C. Parham, Patricia S. Revenhorst, and Wallace K. Lightsey, for Respondents.

**HEARN, C.J.:** Dan F. Williamson and Dan F. Williamson and Company (collectively, "Williamson") appeal from the trial judge's award of

attorneys' fees to Alfred C. Middleton. Williamson argues that Middleton is not entitled to attorneys' fees, or in the alternative, that the criteria for awarding attorneys' fees were not met in this case. We affirm.[1]

## FACTS

Prior to this litigation, Middleton worked for a number of years as a commissioned salesman for Williamson. When Middleton quit working for Williamson, he was due a commission for having sold pallets to one of Williamson's customers. Middleton and Williamson disagreed as to the amount of commission due to Middleton, and Williamson never paid Middleton any commission, even though it eventually admitted owing him $906.62.

Middleton left his employment with Williamson to work for Peninsula Plastics, Inc., one of Williamson's pallet suppliers. While at his new job, Middleton continued to seek the commission Williamson owed him to no avail, and in the spring of 2001, he hired Mr. James C. Parham, a partner with the Wyche Burgess law firm. Middleton and Parham were personal friends who had met years before when Middleton owned a sporting goods store that Parham frequently visited.

On behalf of Middleton, Parham wrote to Williamson inquiring about the commission due. When he received no response, Parham spoke with Williamson's attorney, Bill Jordan, informing him that a complaint had already been drafted and that Middleton was ready to sue to recover the unpaid commission. Jordan requested that Middleton refrain from acting on

[1] In a split decision, a three-judge panel from this court reversed the award. See Williamson v. Middleton, Op. No. 4135 (S.C. Ct. App. filed July 10, 2006) (Shearouse Adv. Sh. No. 27 at 47). We granted *en banc* review, which has again resulted in a divided court. Five panel members vote to affirm the award, and four panel members vote to reverse it. This division results in an affirmance of the trial judge's award of attorneys' fees. See S.C. Code Ann. § 14-8-90 (Supp. 2006) (requiring a concurrence of six of the judges when reversing the judgment below).

the drafted complaint until Jordan could speak with his client. Parham agreed, and two days later, Jordan filed a complaint on behalf of Williamson against Middleton, alleging causes of action for fraud, constructive fraud, breach of fiduciary duty, and violation of the South Carolina Unfair Trade Practices Act. Middleton filed an answer, denying the allegations and counterclaiming for commissions owed and sanctions under the South Carolina Frivolous Proceedings Act. Middleton also requested attorneys' fees. Upon the initiation of litigation, Patricia Ravenhorst, an associate with the Wyche Burgess firm, assisted Parham in representing Middleton.

While preparing for trial, Middleton had an extraordinarily difficult time collecting responses to its requests for discovery. In Middleton's first set of interrogatories for Williamson, Middleton asked that Williamson "state with particularity the facts alleged by [Williamson] to form the basis of the first, second, third, fourth, fifth, and sixth causes of action." Williamson provided no alleged facts and instead responded with a mere promise to "supplement[] after further discovery and investigation." A verbatim response was provided to Middleton's request for a statement of all damages sustained by Williamson. After receiving these unhelpful responses, Middleton's attorneys initiated several phone conversations and wrote a number of letters imploring Williamson to respond to their requests.

While Middleton waited for discovery responses during the ensuing months, Williamson filed a motion in October of 2001 seeking to amend its pleadings to add Peninsula Plastics and Middleton's supervisor at Peninsula Plastics as defendants and to add three more causes of action. When the hearing on Williamson's motion was just days away, it finally supplemented its responses to Middleton's discovery requests. On November 17, 2001, Judge Henry Floyd denied Williamson's motion to amend, finding it was not well founded, was not required by justice, and would be prejudicial to Middleton. Less than one month later, Williamson filed a separate lawsuit against Middleton; this suit also named Peninsula Plastics and Middleton's supervisor as parties and included the very causes of action Williamson attempted to append to the initial complaint against Middleton. Only after Middleton moved to dismiss this new lawsuit and sought attorneys' fees did Williamson voluntarily dismiss this second complaint.

In addition to Williamson's race to the courthouse to be the first to file, its uncooperativeness when responding to discovery, and its attempt to circumvent Judge Floyd's order, Williamson also cancelled depositions and mediation several times. In at least one instance, the cancellation was communicated so late that Middleton and both of his attorneys were already at the mediator's office when Williamson's attorney called to cancel. Approximately one month prior to trial, Williamson's attorney moved to be relieved as counsel, and Williamson hired its current counsel.

Of Williamson's claims against Middleton, only its cause of action for breach of fiduciary duty went to the jury. The jury returned a verdict in favor of Middleton on that cause of action, and it also found in favor of Middleton on his counterclaim for unpaid commissions, awarding him $906.62 in actual damages.

The trial judge, Judge Pyle, found Middleton was entitled to attorneys' fees, but he asked the parties to attempt to determine the amount of attorneys' fees amongst themselves. In the event the parties could not agree to an amount, Judge Pyle explained he would set the amount for them. The parties could not come to a consensus on the amount of attorneys' fees, and Middleton petitioned the court for assistance. A hearing was held before Judge Miller, who awarded Middleton $35,000 in attorneys' fees. On appeal, our court reversed this award of attorneys' fees, finding Judge Pyle retained exclusive jurisdiction over the matter. We therefore reversed Judge Miller's award and remanded the issue of attorneys' fees for Judge Pyle's consideration. See Williamson v. Middleton, 2005-UP-011 (S.C. Ct. App. filed January 11, 2005).

At the hearing before Judge Pyle, Williamson argued Middleton was not entitled to attorneys' fees because he was not the prevailing party; the bill Middleton's counsel presented documenting over $100,000 worth of work listed hours spent on claims other than the unpaid commissions claim for which attorneys' fees are allowed; and the amount of fees Middleton's counsel requested, $35,000, far exceeded the $906.62 verdict. Williamson also argued Middleton did not actually incur any fees because when Parham

was deposed, he admitted there was no written fee agreement between him and Middleton.

Judge Pyle found Middleton was entitled to attorneys' fees because he prevailed in his action against Williamson for unpaid commissions pursuant to section 39-65-20 of the South Carolina Code. Judge Pyle found that in light of "the detailed time statements, the affidavits of Middleton's counsel, and a review of the supporting memorandum and notebook of exhibits presented by Middleton's counsel, . . . the time and labor were reasonable, not duplicative and were required of Middleton's counsel in asserting his claim and overcoming the obstructions presented by [Williamson]." Judge Pyle also pointed out that although the detailed statements submitted by Middleton's counsel showed $106,992 in attorneys' fees, Middleton requested only a fraction of that amount. With regard to contingency of compensation, Judge Pyle acknowledged that Middleton and his attorney had not entered into a formal, written fee agreement, but they relied instead "on their long-standing personal relationship and mutual agreement to determine an appropriate fee for services at the conclusion of this matter." Judge Pyle found such an agreement did not preclude attorneys' fees. Finally, the judge noted that the fees were reasonable despite a verdict of only $906.62 because Williamson forced Middleton to file his counterclaim even though Williamson admitted he owed this amount at trial. Judge Pyle explained:

> Failure to award Middleton reasonable attorneys' fees and costs incurred in this matter would encourage employers to discourage and obstruct legitimate claims by employees. . . . Employers, such as [Williamson], with significant financial resources should not be permitted to systematically obstruct an employee's efforts to recover unpaid commissions or other wages however small the sum might be. Such a result would be especially egregious in the present case considering the fact that [Williamson] admit[s] owing Middleton these unpaid commissions before and during the

> course of this extended litigation, but consistently refused to pay him anything.

Accordingly, Judge Pyle awarded Middleton $35,000 in attorneys' fees. Williamson filed a Rule 59(e), SCRCP, motion, which was denied. This appeal followed.

## STANDARD OF REVIEW

The parties disagree as to the standard of review. During oral argument, Williamson urged us to apply either an equitable standard of review pursuant to Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997), or an abuse of discretion standard of review pursuant to Russell v. Wachovia, 370 S.C. 5, 633 S.E.2d 722 (2006).[2] In either event, Williamson argued we should not review the trial judge's decision under an "any evidence" standard. Middleton agrees that an abuse of discretion standard should be applied, but that under such standard, an appellate court will affirm the trial judge so long as there is any competent evidence supporting the judge's decision.

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[2] The Hanahan case to which Williamson cites sets forth an equitable standard of review when attorney's fees are awarded as a sanction for filing a frivolous proceeding. Under the Frivolous Proceedings Act, a judge, sitting without a jury, determines whether the party against whom attorney's fees are sought initiated litigation in bad faith or with no reasonable cause. This is an equitable determination, and therefore, an equitable standard of review is used when considering the trial judge's award of fees. See Brown v. State Farm Mutual Ins. Co., 275 S.C. 276, 269 S.E.2d 769 (1980). Unlike a fee awarded as a sanction under the Frivolous Proceedings Act, the attorney's fee awarded to Middleton was based on the jury's award of commissions pursuant to section 39-56-20 of the South Carolina Code (Supp. 2006). A party who violates section 39-56-20 is liable for "attorney's fees actually and reasonably incurred by the sales representative in the action . . . ." S.C. Code Ann. § 39-56-30 (Supp. 2006). Thus, the award of attorney's fees was based upon the jury's finding for Middleton and was not an equitable determination by the trial judge.

We find the law well settled that the review of attorney's fees awarded pursuant to statute is governed by an abuse of discretion standard. See, e.g., Blumberg v. Nealco, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (finding that a trial judge's decision to award attorney's fees will not be reversed on appeal absent an abuse of discretion); Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990) (holding that when attorney's fees are awarded pursuant to section 15-77-300 of the South Carolina Code, the appellate court reviews the award under an abuse of discretion standard); Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 358 S.C. 647, 649-52, 595 S.E.2d 890, 891 (Ct. App. 2004) ("On appeal, the trial court's decision regarding attorney's fees under S.C. Code Ann. § 15-77-300 (Supp. 2003) will not be disturbed absent an abuse of discretion."). The law is equally clear that an appellate court will not reverse an award unless it is based on an error of law or is without *any evidentiary support*. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) ("An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support."); Baron Data Sys. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 296 (1989) ("Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence."); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("An abuse of discretion occurs when the judge's ruling is based upon an error of law or when based upon factual conclusion, is without evidentiary support."). Accordingly, we will affirm the trial judge's award of $35,000 in attorneys' fees if any competent evidence exists to support the award.

## LAW/ANALYSIS

Williamson first argues Middleton is not entitled to attorneys' fees because he does not meet the requirements of section 39-65-30 of the South Carolina Code. Specifically, Williamson points out that this statute only applies to sales representatives who seek to recover commissions on "wholesale" sales, and the sale Middleton seeks commissions from was made to the ultimate consumer. We find this issue is not preserved for our review.

Initially, we note that Williamson's arguments to Judge Pyle on this issue are not reflected in the record on appeal. Williamson did not advance this argument at the hearing before Judge Pyle, and although Williamson's counsel refers to a memorandum she filed in opposition to Middleton's request for attorneys' fees, that memorandum was not included in the record on appeal. See Taylor v. Taylor, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review."). We acknowledge, however, that Judge Pyle addressed the argument in his order awarding attorneys' fees, suggesting the argument was set forth in Williamson's memorandum. In the order, Judge Pyle found Williamson's argument that Middleton was not entitled to attorneys' fees and costs pursuant to section 39-65-30 came too late because during trial, Williamson never objected to the jury instructions referencing section 39-65-30, nor did Williamson challenge Judge Pyle's initial ruling that Middleton was entitled to attorneys' fees. Williamson did not seek a reconsideration of these findings by Judge Pyle in its Rule 59(e) motion.

In its brief to our court, Williamson argues that "[e]ven though the jury returned a verdict . . . that awarded Middleton $906.62 for unpaid commissions, this recovery was sought on alternate grounds, both pursuant to § 39-56-30 and § 41-10-10." In so arguing, Williamson implies the jury's award was based on a statute other than section 39-56-30. Williamson further contends that its argument on this issue is timely because "the request for attorney fees is predicated on entirely different factors than was the request for commissions." From the record before us, there is no indication this specific argument was ever made to the trial judge, either prior to the order awarding attorneys' fees or in Williamson's motion for reconsideration. Thus, the issue is not preserved for review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); State v. Nelson, 331 S.C. 1, 5 n.6, 501 S.E.2d 716, 718 n.6 (1998) ("[T]he ultimate goal behind preservation of error rules is to insure (sic) that an issue raised on appeal has first been addressed to and ruled on by the trial court.").

Next, Williamson argues Middleton did not actually incur any attorneys' fees. We disagree.

The jury awarded Middleton unpaid commission pursuant to section 39-65-20 of the South Carolina Code. When an employer violates that code section, the employer is liable for "attorney's fees actually and reasonably incurred by the sales representative in the action and court costs." Williamson argues Middleton never incurred attorneys' fees because he had no obligation to pay Parham. In support of its argument, Williamson focuses on Parham's deposition testimony in which he stated:

> [W]e don't have a fee agreement with Mr. Middleton. We talked about this with Mr. Middleton to begin with and we decided that we would try to help him collect the monies due him and at the end of the case, we would talk about a fee. So we don't have a fee agreement with him. But some day, he might pay us a fee. Right now, he has no obligation at this point if there is no agreement. He might feel a moral obligation. And when we talk at the end of the case, he will have the final say.

Williamson argues this statement indicates Middleton had neither a fee agreement with nor an obligation to his attorneys, and accordingly, the holding of Hopkins v. Hopkins, 343 S.C. 301, 540 S.E.2d 454 (2000), precludes attorneys' fees from being awarded.

In Hopkins, the supreme court upheld the family court's determination that Husband was not entitled to attorney's fees when he was represented at trial by his new wife, an attorney. In so holding, the supreme court not only pointed out there was no fee agreement between Husband and his wife/attorney, but the Hopkins court also stressed there was no "indication or testimony that [Husband's] wife/attorney intends to collect the fees from [Husband]." Id. at 307, 540 S.E.2d at 457.

Unlike Hopkins, there is evidence in this record to indicate Middleton's attorneys intended to collect their fee from Middleton. While Parham's testimony, excerpted above, could be interpreted to mean Middleton would never be required to pay a fee, it also indicates that "at the end of the case, [Middleton and his attorneys] would talk about a fee." Judge Pyle adopted this latter interpretation, finding that although there was no "formal, written fee agreement in this matter," Middleton and his counsel "have relied on their long-standing personal relationship and mutual agreement to determine an appropriate fee for services at the conclusion of this matter." Additionally, Parham testified he was *hired* by Middleton in the Spring of 2001, and since that time, diligent records were kept detailing the amount of time spent on the case. Furthermore, while Parham described Middleton as his "good friend," such a relationship is not akin to the matrimonial bond found in Hopkins from which gratuitous representation would be expected. It would be even less reasonable to believe Ravenhorst, Middleton's second-chair attorney who had no prior relationship with Middleton, would have volunteered her time without an expectation of being paid.

Although we recognize there was no formal fee agreement between Middleton and his attorneys, the lack of such an agreement does not preclude an attorney from collecting fees. See Singleton v. Collins, 251 S.C. 208, 210-11, 161 S.E.2d 246, 247 (1968) ("An attorney has a right to be paid for professional services rendered, and where there is no express contract, the law will imply one."). Although the Singleton case is procedurally different from the case at hand, its determination regarding attorney's fees is instructive. In Singleton, an attorney filed an action to collect fees after rendering services to a client in a domestic relations action. Despite the lack of a formal contract, the trial court implied a contract and determined the amount of attorney's fees owed. Our supreme court upheld the trial court's decision, noting: "Whether the services were rendered, and their value, are matters of fact to be decided . . . by the court below, and no appeal lies therefrom if the findings of fact are supported by any competent evidence." Id. at 211, 161 S.E.2d at 247.

Although Singleton involves the collection of attorney's fees from a client rather than an opposing party, it illustrates that the lack of a formal

agreement is not fatal to an attorney's claim for fees. Here, the trial judge was not precluded from awarding attorneys' fees simply because Middleton and his attorneys lacked a written agreement. Rather, so long as there was evidence Middleton's attorneys intended to collect a fee, the trial judge had discretion to award the fee. Not only did Judge Pyle find there was such evidence, but Judge Miller, whose ruling was reversed for lack of subject matter jurisdiction, found an informal agreement existed as well. Because there is competent evidence in the record to support the findings of these two outstanding trial judges, we find no abuse in discretion.

In addition to its argument that Middleton did not incur attorneys' fees, Williamson also argues Middleton failed to prove the other elements necessary to recover fees. We disagree.

When awarding attorney's fees, the trial court must consider the following six factors: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. Baron Data Sys, Inc., v. Loter, 297 S.C. at 384-85, 377 S.E.2d at 297. "Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by *any* competent evidence." Id. at 384, 377 S.E.2d at 296 (emphasis added). Here, Judge Pyle made specific findings on each of the six elements, and there is evidence in the record supporting those findings.

Finally, Williamson argues that even if Middleton was entitled to attorneys' fees, the amount of attorneys' fees awarded was unreasonable in light of the meager verdict Middleton received. However, "there is no requirement that attorney's fees be less than or comparable to a party's monetary judgment." Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998). Furthermore, although a $35,000 attorneys' fee may initially seem high for a cause of action for unpaid commissions, especially when the action resulted in a $906.62 verdict, under the peculiar circumstances of this case, there was evidence in the record supporting the trial judge's finding that $35,000 was a reasonable amount to award.

First and foremost, it is important to note that Middleton's attorney did not institute this lawsuit. Rather, in the best tradition of the profession, he attempted to settle this matter with Williamson, and at the specific request of opposing counsel, Middleton delayed bringing suit. However, within a matter of days, Williamson filed suit against Middleton, asserting four causes of action which were ultimately determined to be meritless. In order to litigate his cause of action for unpaid commissions, Middleton had to defend himself against Williamson's claim against him for breach of fiduciary duty, which is an affirmative defense for unpaid commissions. Additionally, Middleton submitted affidavits demonstrating how Williamson employed dilatory tactics prior to the trial of this case, such as persuading Middleton to forebear from filing its complaint so that it could be the first to file, cancelling depositions on the afternoon before or the morning of their scheduled time, and submitting incomplete responses to Middleton's requests for discovery. Moreover, Judge Pyle, who awarded $35,000 in attorneys' fees, had been the trial judge in this matter, and he was acutely aware of the challenges faced by Middleton's attorneys. Considering the detailed bills submitted by Middleton's attorneys and the difficulties they faced in trying their case, we find competent evidence supports the trial judge's award of $35,000 in attorneys' fees.

## CONCLUSION

Based on our limited standard of review and the unusual circumstances of this case, we find no error in the trial judge's award of $35,000 in attorneys' fees to Middleton. Accordingly, the order of the trial judge is

**AFFIRMED.**

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

**ANDERSON, BEATTY, SHORT, JJ., and CURETON, A.J., each dissent in separate opinions.**

**ANDERSON, J., dissenting in a separate opinion:** I disagree with the majority's reasoning and analysis and **VOTE** to **REVERSE** the award of fees.

## FACTUAL/PROCEDURAL BACKGROUND

For several years, Middleton worked for Williamson as a commissioned salesman. When Middleton quit working for Williamson, he was due a commission for having sold yarn pallets to one of Williamson's customers. Middleton and Williamson disagreed as to the amount of commission due, and Williamson never paid Middleton any commission, even though it acknowledged owing him $906.62.

After leaving his employment with Williamson, Middleton began working for Peninsula Plastics, Inc., one of Williamson's pallet suppliers. Middleton continued to seek the commission Williamson owed him, and sought assistance from his present attorney. Middleton and his counsel are personal friends, and counsel previously had represented Middleton in less-complicated matters without charge. Middleton's attorney agreed to help with the claim for commission, and the two were to discuss a fee at the end of the case.

Williamson initially was represented by Jordan & Clardy, LLC. Middleton's attorneys informed Williamson that they had a complaint drafted and were ready to sue in order to recover the unpaid commission. Williamson's attorney requested that Middleton refrain from acting on the drafted complaint until he could speak with his client. Middleton agreed, and two days later, Williamson filed a complaint against Middleton, alleging causes of action for fraud, constructive fraud, breach of fiduciary duty, and violation of the South Carolina Unfair Trade Practices Act. Middleton filed an answer, denying the allegations and counterclaiming for commissions owed and sanctions under the South Carolina Frivolous Proceedings Act. Approximately one month prior to trial, Williamson hired its current counsel.

Of Williamson's claims against Middleton, only the cause of action for breach of fiduciary duty went to the jury. The jury returned a verdict in favor of Middleton on that cause of action and found in favor of Middleton on his counterclaim for unpaid commission, awarding him $906.62 in actual damages.

The trial judge, Judge Pyle, ruled Middleton was entitled to attorney's fees, but asked the parties to attempt to determine the amount of attorney's fees themselves. In the event they could not agree to an amount, Judge Pyle explained he would set the amount for them. The parties could not come to a consensus on the amount of attorney's fees, and Middleton petitioned the court for assistance. Judge Miller awarded Middleton $35,000 in attorney's fees. In an unpublished opinion, Williamson v. Middleton, 2005-UP-011 (S.C. Ct. App. filed January 11, 2005), this Court found that Judge Pyle had retained exclusive jurisdiction over the matter. We therefore reversed Judge Miller's award and remanded the issue of attorney's fees for Judge Pyle's consideration.

At the hearing before Judge Pyle, Williamson argued Middleton was not entitled to attorney's fees because (1) he was not the prevailing party; (2) the bill Middleton's counsel presented documenting over $100,000 worth of work listed hours spent on claims other than the unpaid commission claim for which attorney's fees are allowed; and (3) the amount of fees Middleton's counsel requested, $35,000, far exceeded the $906.62 verdict. Williamson further maintained Middleton did not incur any fees because when Middleton's counsel was deposed, he admitted there was no fee agreement between him and Middleton.

Judge Pyle acknowledged that Middleton and his attorney had not entered into a formal, written fee agreement, but relied instead "on their long-standing personal relationship and mutual agreement to determine an appropriate fee for services at the conclusion of this matter." The judge found such an agreement did not preclude attorney's fees. Accordingly, Judge Pyle awarded Middleton $35,000 in attorney's fees. Williamson filed a Rule 59(e), SCRCP, motion, which was denied.

## STANDARD OF REVIEW

There must be sufficient evidence in the record to support each of the six factors analyzed for an award of attorney's fees. See Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998). "On appeal, absent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact." Blumberg v. Nealco, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993).

The interpretation of a statute is not a finding of fact. Thompson v. Ford Motor Co., 200 S.C. 393, 21 S.E.2d 34 (1942). "The issue of interpretation of a statute is a question of law for the court." Jeter v. S.C. Dep't of Transp., Op. No. 26168 (S.C. Sup. Ct. filed June 19, 2006) (Shearouse Adv. Sh. No. 23 at 43) (citing Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995); see also Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005) ("The determination of legislative intent is a matter of law.") (citations omitted); Eldridge v. City of Greenwood, 331 S.C. 398, 417, 503 S.E.2d 191, 200 (Ct. App. 1998) ("[T]he interpretation of a statute is a matter of law."). See, e.g., Carolina Power & Light Co. v. Town of Pageland, 321 S.C. 538, 471 S.E.2d 137 (1996); Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996); Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996).

## LAW/ANALYSIS

### I. SECTION 39-65-30 OF THE SOUTH CAROLINA CODE

Williamson first argues Middleton is not entitled to attorney's fees because he does not meet the requirements of section 39-65-30 of the South Carolina Code (Supp. 2005). Specifically, Williamson points out that this statute only applies to sales representatives who seek to recover commissions on "wholesale" sales, and the commission awarded to Middleton was from a

sale made to the ultimate consumer. I find this issue is not preserved for our review.

Initially, I note that the arguments Williamson made to Judge Pyle on this issue are not reflected in the record on appeal. Williamson did not advance this argument at the hearing before Judge Pyle, and although Williamson's counsel refers to a memorandum she filed in opposition to Middleton's request for attorney's fees, that memorandum was not included in the record on appeal. See Taylor v. Taylor, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review."). I acknowledge, however, that Judge Pyle addressed the argument in his order awarding attorney's fees, suggesting the argument was set forth in Williamson's memorandum. In the order, Judge Pyle found Williamson's argument that Middleton was not entitled to attorney's fees and costs pursuant to section 39-65-30 came too late because during trial, Williamson never objected to the jury instructions referencing section 39-65-30, nor did Williamson challenge Judge Pyle's initial ruling that Middleton was entitled to attorney's fees.

In its brief to our court, Williamson argues that "[e]ven though the jury returned a verdict . . . that awarded Middleton $906.62 for unpaid commissions, this recovery was sought on alternate grounds, both pursuant to § 39-65-30 and § 41-10-10." In so arguing, Williamson implies the jury's award was based on a statute other than section 39-65-30. Williamson further contends that its argument on this issue is timely because "the request for attorney fees is predicated on entirely different factors than was the request for commissions." From the record before this court, there is no indication this specific argument was ever made to the trial court, either prior to the order awarding attorney's fees or in Williamson's motion for reconsideration. Thus, the issue is not preserved for review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); see also Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) ("'Imposing this preservation requirement on the

appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'") (quoting I'On, L.L.C v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)); Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

Next, Williamson argues Middleton failed to prove the elements necessary to recover fees. I agree.

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (citing Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 383 377 S.E.2d 296, 297 (1989); Hegler v. Gulf Ins. Co., 270 S.C. 548, 548, 243 S.E.2d 443, 444 (1978)); accord Seabrook Island Property Owners' Ass'n v. Berger, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct. App. 2005). "In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees." Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001) (citing Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997); American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 175, 467 S.E.2d 439, 442 (1996); Blumberg, 310 S.C. at 493, 427 S.E.2d at 660; Baron Data, 297 S.C. at 383, 377 S.E.2d at 297; Dowaliby v. Chambless, 344 S.C. 558, 560, 544 S.E.2d 646, 647 (Ct. App. 2001); Harvey v. South Carolina Dep't of Corrections, 338 S.C. 500, 510, 527 S.E.2d 765, 770 (Ct. App. 2000); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 160, 503 S.E.2d 483, 489 (Ct. App. 1998); Prevatte v. Asbury Arms, 302 S.C. 413, 415, 396 S.E.2d 642, 643 (Ct. App. 1990)).

Section 39-65-30 provides:

> A principal who fails to comply with the provisions of Section 39-65-20 is liable to the sales representative in a civil action for:

> (1) all amounts due the sales representative plus punitive damages in an amount not to exceed three times the amount of commissions due the sales representative; and
>
> (2) attorney's fees actually and reasonably incurred by the sales representative in the action and court costs.

S.C. Code Ann. § 39-65-30 (Supp. 2005). The jury awarded Middleton the unpaid commission pursuant to section 39-65-20.

When awarding attorney's fees, the trial court must consider the following six factors: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. Baron Data, 297 S.C. at 384-85, 377 S.E.2d at 297. When awarding attorney's fees, "there is no requirement that [the fees] be less than or comparable to a party's monetary judgment." Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998).

Here, Middleton incurred no attorney's fees because no fee agreement existed between Middleton and his attorney. In his deposition, Middleton's lead counsel stated:

> **[W]e don't have a fee agreement with Mr. Middleton.** We talked about this with Mr. Middleton to begin with and we decided that we would try to help him collect the monies due him and at the end of the case, we would talk about a fee. **So we don't have a fee agreement with him.** But some day, he might pay us a fee. **Right now, he has no obligation at this point if there is no agreement.** He might feel a moral obligation. And when we talk at the end of the case, he will have the final say.

(Emphasis added.)

Counsel's testimony admits there was no fee agreement with Middleton. Consequently, there is no obligation to pay, and no fees have been incurred.

Hopkins v. Hopkins, 343 S.C. 301, 540 S.E.2d 454 (2000), involved Father's action to recover overpayment of child support and attorney's fees. The court found Father was entitled to reimbursement of child support overpayments but held he could not recover attorney's fees because his current wife represented him and they did not have a fee agreement. The court began its analysis by noting that Calhoun v. Calhoun, 339 S.C. 96, 100, 529 S.E.2d 14, 17 (2000), held a pro se litigant could not recover attorney's fees because "a pro se litigant, whether an attorney or layperson, does not become 'liable for or subject to fees charged by an attorney.'" 343 S.C. at 306, 540 S.E.2d at 457. The Hopkins court declared:

> [H]ere, we find no evidence Father actually became "liable for or subject to" attorneys' fees for his attorney/wife's service. There is no contract or fee agreement in the record, nor is there any indication or testimony that Father's wife/attorney has attempted or intends to collect the fees from Father. Accordingly, Father did not prove that he became liable for the fees, such that the family court properly denied Father's request.

343 S.C. at 307, 540 S.E.2d at 457.

The rationale of Hopkins is equally applicable in the instant case. Both Calhoun and Hopkins focused on the litigants' lack of liability for attorney's fees. Here, Middleton's counsel admits Middleton "has no obligation at this point if there is no agreement." There is no agreement; therefore, Middleton owes no obligation to pay, and no fees were incurred. Under these facts the trial judge erred in awarding attorney's fees. I DO NOT HOLD OR RULE THAT A FORMAL FEE AGREEMENT INTER SESE CLIENT-ATTORNEY IS NECESSARY AS A PREDICATE FOR AN AWARD OF ATTORNEY'S FEES IN SOUTH CAROLINA. I DO, HOWEVER, HOLD THAT THE SERVICES RENDERED BY THE ATTORNEY MUST HAVE

BEEN RENDERED UNDER CIRCUMSTANCES WHEREBY THE PARTIES UNDERSTOOD THAT THE CLIENT WAS REQUIRED TO PAY THE ATTORNEY FOR THE SERVICES RENDERED, ALBEIT, THE AMOUNT WAS NOT AGREED UPON AND A REASONABLE FEE NECESSARILY MUST BE IMPLIED. THAT WAS NOT THE SITUATION IN THIS CASE. THE CONTROLLING STATUTE IN THIS CASE MANDATES THAT AN ATTORNEY FEE BE ACTUALLY INCURRED BEFORE THE COURT IS ENTITLED TO AWARD ATTORNEY'S FEES.

## II. REASONABLENESS OF ATTORNEY'S FEES

Assumptively concluding that an award for an attorney's fee in this case should be given, I address the reasonableness of the attorney's fee awarded.

### A. Initial Analysis by the Trial Court: Determining Whether Attorney's Fees Should Be Awarded

When presented with a request for attorney's fees, the trial court must first determine whether such an award is warranted. In making this determination, the following factors should be considered:

(1) each party's respective ability to pay his/her own attorney's fee;
(2) beneficial results obtained by the requesting party's attorney;
(3) the parties' respective financial conditions; and
(4) effect of the attorney's fee on each party's standard of living.

Lanier v. Lanier, 364 S.C. 211, 220, 612 S.E.2d 456, 461 (Ct. App. 2005); Lacke v. Lacke, 362 S.C. 302, 317, 608 S.E.2d 147, 155 (Ct. App. 2005); Doe v. Doe, 324 S.C. 492, 505, 478 S.E.2d 854, 861 (Ct. App. 1996); E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992); Glasscock v. Glasscock, 304 S.C. 158, 160, 403 S.E.2d 313, 315 (1991).

## B. Where Statute or Contract Permits Award of "Reasonable" Attorney's Fees: Six Factors for Consideration by Trial Courts Regarding the Amount of Attorney's Fees Awarded

### 1. What Constitutes a "Reasonable" Attorney's Fee: Six Factors

When determining what constitutes a "reasonable" attorney's fee, the trial court must consider the following six factors: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Seabrook Island Prop. Owners' Ass'n v. Berger, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005); Lanier, 364 S.C. at 220, 612 S.E.2d at 461; Rowell v. Whisnant, 360 S.C. 181, 185, 600 S.E.2d 96, 99 (Ct. App. 2004); Gordon v. Drews, 358 S.C. 598, 613, 595 S.E.2d 864, 872 (Ct. App. 2004); Burton v. York County Sheriff's Dep't, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004); Vick v. South Carolina Dep't of Transp., 347 S.C. 470, 484, 556 S.E.2d 693, 700 (Ct. App. 2001); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998); Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998); Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997); Prevatte v. Asbury Arms, 302 S.C. 413, 416, 396 S.E.2d 642, 644 (Ct. App. 1990); Dedes v. Strickland, 307 S.C. 155, 160, 414 S.E.2d 134, 137 (1992); Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989).

### 2. No One Factor is Controlling

Consideration should be given by the trial court to all six factors; none of the factors is controlling. Taylor v. Medenica, 331 S.C. at 580, 503 S.E.2d at 461; Baron Data Sys., 297 S.C. at 384, 377 S.E.2d at 297.

### 3. Explanation of Factors/Examples of Application of Facts to Six Factors

- **Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 384-85, 377 S.E.2d 296, 297-98 (1989):**

> In awarding reasonable attorney's fees, there are six factors to be considered. See, e.g., Wood v. Wood, 269 S.C. 600, 239 S.E.2d 315 (1977); Bentrim v. Bentrim, 282 S.C. 333, 318 S.E.2d 131 (Ct. App. 1984). Consideration should be given to all six criteria in establishing reasonable attorney's fees; none of these six factors is controlling. Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974).
>
> In making its determination, the trial court articulated each of the six factors.
>
> (1) The Nature, Extent and Difficulty of the Legal Services Rendered.
>
> Upon its evaluation of the nature, extent and difficulty of the legal services, the trial court determined that Baron had to expend considerably more time and effort on the case because the defendants had transformed a simple collection action into complex litigation.
>
> (2) The Time and Labor Necessarily Devoted to the Case.
>
> The trial court concluded that "a review of the statements and affidavits of Baron's trial attorney indicate clearly that the time and labor spent were reasonable and not duplicative." The respondents did not dispute this conclusion.
>
> (3) The Professional Standing of Counsel.
>
> The circuit court's determination that Baron's trial attorney is an experienced, skilled attorney, of high professional standing in the community was based upon a careful review of the affidavits of Baron's expert and its trial attorney, which included

the attorney's resume. Respondents did not contest the trial court's determination.

(4) The Contingency of Compensation.

Not applicable since this was not a contingency case.

(5) The Fee Customarily Charged in the Locality for Similar Legal Services.

Based upon a review of the attorney's resume, affidavits and its familiarity with attorney fees customarily charged in this legal community, the trial court found that the rate of $100 per hour was appropriate.

(6) The Beneficial Results Obtained.

The trial court decided that the total benefits obtained by Baron include a sizeable judgment ($16,151) and the avoidance of nearly half a million dollars in liability on the counterclaims. The Court of Appeals concluded that Baron sought over $70,000 and recovered only $16,151, thus the beneficial result was not significant.

. . . .

I conclude that the trial court properly applied the relevant factors and that its order is supported by the record.

- **Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991):**

[W]e clarify the six factors cited by this Court in determining a reasonable attorney's fee include:

(1) the nature, extent, and difficulty of the case;

(2) the time necessarily devoted to the case;
(3) professional standing of counsel;
(4) contingency of compensation;
(5) beneficial results obtained;
(6) customary legal fees for similar services.

Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989). While "contingency of compensation" is an appropriate factor considered in awarding attorney's fees, the contingency to be considered is whether the party on whose behalf the services were rendered will be able to pay the attorney's fee if an award is not made. Further, the factor "beneficial results obtained" merely aids in determining whether an award is appropriate when considering whether the services of a lawyer facilitated a favorable result. Neither of these factors endorses use of a percentage fee. . . . .

Further, we hold that a fee award must be based upon a reasonable hourly fee. Applying the above six factors to determine an appropriate fee award, the reasonableness of the hourly rate shall be determined according to: (1) the professional standing of counsel; and (2) the customary legal fees for similar services. The reasonableness of the number of hours billed shall be determined according to: (1) the nature, extent, and difficulty of the case; and (2) the time necessarily devoted to the case.[FN1]

> [FN1] As discussed above, the remaining factors, "contingency of compensation" and "beneficial results obtained" are to be considered in determining whether an award should be made. In making this determination, the abilities of the parties to pay, their respective financial conditions, and the effect of the attorney's fees on each party's standard of living are also to be considered. Mitchell v. Mitchell, 283 S.C. 87, 320 S.E.2d 706 (1984).

Applying these factors here, we find the total hourly fee of $51,998.75 reasonable and affirm the award of attorney's fees in this amount.

- **<u>Taylor v. Medenica</u>, 331 S.C. 575, 580-81, 503 S.E.2d 458, 461-62 (1998):**

> The trial court considered each of the above factors in setting the attorney's fee award. The trial judge based his award on the affidavits submitted by Mrs. Taylor's three attorneys and the affidavit of an attorney who did not participate in this matter but attested the hourly rates and hours submitted were appropriate. The trial judge noted he had presided over a number of the discovery motions in this case, all of the pretrial motions, and the two and one-half week trial. The court determined the amount of time estimated by Mrs. Taylor's attorneys, approximately 1500 hours, was appropriate, if not conservative. The court recognized all of Mrs. Taylor's attorneys were experienced and capable trial attorneys and agreed the hourly rates for each were appropriate. The court noted the attorneys had accepted this case on a contingency fee basis and opined it thought UTPA actions were one of the most difficult types of cases to try. The trial court recognized the beneficial results obtained by the attorneys, both in terms of the $108,726 recovered under the UTPA by Mrs. Taylor from CIBL and in terms of the public benefit in deterring CIBL from similar conduct.
>
> In addition, the trial court took judicial notice that CIBL vigorously contested Mrs. Taylor's claims it had violated the UTPA, thereby requiring Mrs. Taylor to present witnesses in response. Mrs. Taylor's experts testified CIBL's laboratory tests were excessive, "absolutely bizarre," and the results were questionable. One expert testified he believed the tests were conducted for the purpose of generating income. One witness testified there was no medical reason for any of the tests. Another witness testified the tests were painful to Mrs. Taylor yet medically worthless.

We have reviewed the affidavits submitted by counsel and agree they are somewhat deficient. One affidavit includes approximately 78 hours of time for work performed prior to the filing of Mrs. Taylor's second amended complaint. Moreover, the affidavits do not specifically state the time spent on the UTPA claim against CIBL.

In spite of these deficiencies, we conclude there is evidence which supports the approximately 1500 hours of time spent by Mrs. Taylor's attorneys on this matter. The affidavits note the time spent by other attorneys and some legal professionals was not submitted for reimbursement. The judge who presided over the majority of this matter stated the submitted time was, in his view, conservative. Furthermore, time spent is but one factor to consider in setting a reasonable attorney's fee. Baron Data Systems, Inc. v. Loter, supra.

With regard to the issue of estimates, two of the three affidavits state the attorneys did not keep records of the time spent on this case. Nonetheless, the accompanying time sheets do list specific services rendered and the time spent performing each service. We conclude the affidavits and accompanying time sheets fairly reflect the time spent by the attorneys on this matter.

Finally, there is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment. This Court has approved an award of attorney's fees where the fee substantially exceeded the actual recovery. Baron Data Systems, Inc. v. Loter.

We conclude the trial judge properly considered all six factors in determining the appropriate attorney's fee and find his decision awarding $500,000 in attorney's fees and $24,068 in costs is supported by the record. Jackson v. Speed, supra. (Footnotes omitted).

### C. Court is Required to make Findings of Fact for Each of the Six Factors

"When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor set forth in Collins v. Collins, [239 S.C. 170, 122 S.E.2d 1 (1961)]." Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993).

"On appeal, absent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact." Id. This proposition has been interpreted by our courts to mean that an award for attorney's fees will not be reversed due to a lack of findings in the order when the record supports the judge's determination. See Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) ("[A]n award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor."); McMaster v. Strickland, 322 S.C. 451, 455, 472 S.E.2d 623, 626 (1996) (affirming special referee's award of attorney's fees notwithstanding his failure to make specific findings about each of the six Blumberg factors because the record contained ample support for each of the six factors).

Encapsulating the facts of this case and the law, I conclude that the amount of the award of the attorney's fee is **NOT** supported by the evidentiary record. Further, the amount of the award is unreasonable and unjustified. In reviewing the Baron Data factors and juxtaposing the evidentiary record to the law extant, I come to the ineluctable conclusion that the amount of the award of attorney's fees far exceeds any notion of reasonableness.

## CONCLUSION

I hold that in South Carolina under section 39-65-30 of the South Carolina Code an attorney's fee must be actually incurred before the court can award an attorney's fee. Additionally, I determine that the amount of the award of the attorney's fee in the case sub judice is unreasonable under the

facts and law. Accordingly, I **VOTE** to **REVERSE** the award of fees because no attorney's fee was incurred in this case. Alternatively, even if an award of an attorney's fee is appropriate under the statute, I **VOTE** to **REMAND** for further consideration as to a reasonable amount.

**BEATTY, J., dissenting in a separate opinion:** I respectfully dissent. Rule 219 SCACR states that en banc consideration is not favored and ordinarily will not be granted except: (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions; or (2) when the proceeding involves a question of exceptional importance. The case sub judice does not adhere to either exception. Therefore, I dissent.

**SHORT, J., (dissenting in a separate opinion):** I respectfully dissent. I join in Judge Anderson's dissent in finding no attorney fee agreement existed between Middleton and his attorney. However, having found the absence of a fee agreement, I do not find it necessary to address the reasonableness of the attorney's fee in this matter.

**CURETON, A.J.: (Dissenting in separate opinion):** I too agree with Judge Anderson's dissent to the extent it finds no attorney fee agreement was ever entered into between Middleton and his attorney. I also agree with Judge Short that having concluded there was no fee agreement, there is no need to address the reasonableness of the attorney fee award.