The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who were administratively suspended from the practice of law on April 1, 2008, under Rule 419(b)(2), SCACR, and remain suspended as of June 1, 2008. Pursuant to Rule 419(e)(2), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by July 1, 2008.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

June 12, 2008

ATTORNEYS SUSPENDED FOR NON-COMPLIANCE
FOR THE 2007-2008 REPORTING PERIOD
AS OF JUNE 1, 2008

Jeffrey S. Black
32 Delaware Road
Goose Creek, SC 29445
(SUSPENDED BY BAR 2/1/08)

Carole H. Brown
1413 Highway 17 S., #104
Surfside Beach, SC 29575

Piero Bussani
595 S. Federal Hwy., Ste 600
Boca Raton, FL 33432
(SUSPENDED BY BAR 2/1/08)

Kenneth Lee Cleveland
2330 Highland Avenue
Birmingham AL 35205

Veronica H. Cope
The Rose Law Firm, PLLC
1600 Parkwood Circle, SE, Ste 320
Atlanta, GA 30339

Samuel F. Crews III
PO Box 5885
Columbia, SC 29250
(INTERIM SUSPENSION 7/13/05)

John L. Drennan
2557 Ashley Phosphate Rd. Ste A
Charleston, SC 29418
(INTERIM SUSPENSION 12/19/07)

George M. Fisher
Milliken & Company-Legal Dept
920 Milliken Rd (M-495)
Spartanburg, SC 29303
(SUSPENDED BY BAR 2/1/08)

Heather A. Glover
PO Box 37
Horatio, SC 29062
(SUPSENDED BY BAR 2/1/08)

Alice Shaw Heard
1515 Bass Rd., Ste I
Macon, GA 31210
(SUSPENDED BY BAR 2/1/07)

O. Tresslar Hydinger
17 B Franklin Street
Charleston, SC 29401
(SUSPENDED BY BAR 2/1/08)

Kimla C. Johnson
PO Box 142
Nettleton, MS 38858
(SUSPENDED BY BAR 2/1/08)

James R. Jones II
PO Box 5863
Columbia, SC 29250
(INTERIM SUSPENSION 11/27/07)

Michael T. Jordan
PO Box 1107
Beaufort, SC 29901
(INTERIM SUSPENSION 8/8/07)

William O. Key, Jr.
PO Box 15057
Augusta, GA 30919
(SUSPENDED BY BAR 2/1/08)

Melissa A. Malarcher
533 Northhampton Drive
Shreveport, LA 71106

Gena Walling McCray
Howard Green & Moye, LLP
PO Box 10305
Raleigh, NC 27605

Henry E. McFall
McFall Law Firm
800 Dutch Square Blvd
Columbia, SC 29210
(SUSPENDED BY BAR 2/1/08)

Jane M. Moody
10219 Dunbarton Blvd.
Barnwell, SC 29812
(SUSPENDED BY BAR 2/1/08)

Charles N. Pearman
5050 Sunset Blvd
Lexington, SC 29072
(INTERIM SUSPENSION 11/3/06)

Marvin L. Robertson, Jr.
Robertson Law Firm
1002 Anna Knapp Blvd
Mt. Pleasant, SC 29464
(INTERIM SUSPENSION 2/22/08)

Maxwell G. Schardt
471 Hemlock Circle
Atlanta, GA 30316
(SUSPENDED BY BAR 2/1/08)

O. Lee Sturkey
203 S. Main Street
McCormick, SC 29835
(9-MTH SUSPENSION BY
COURT 1/28/08)

William R. Witcraft, Jr.
115-B W. 7th North Street
Summerville, SC 29483
(INTERIM SUSPENSION 3/27/08)

The Supreme Court of South Carolina

In the Matter of
Harriett McBryde Johnson, Deceased.

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Ms. Johnson passed away on June 4, 2008, and requesting appointment of an attorney to protect Ms. Johnson's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

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

account(s), and any other law office account(s) Ms. Johnson maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Ms. Johnson, shall serve as notice to the bank or other financial institution that Susan King Dunn, Esquire, has been duly appointed by this Court.

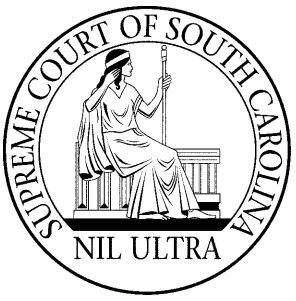
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Susan King Dunn, Esquire, has been duly appointed by this Court and has the authority to receive Ms. Johnson's mail and the authority to direct that Ms. Johnson's mail be delivered to Ms. Dunn's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

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

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

Columbia, South Carolina

June 13, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25

June 16, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2008-UP-288-SCDSS v. Timothy E. and Katine E.
(Aiken, Judge Kellum W. Allen)

2008-UP-289-Mortgage Electronic Registration Systems, Inc. et al. v. Wachovia Bank, National Association
(Richland, Judge Joseph M. Strickland)

PETITIONS FOR REHEARING

4355-Grinnell Corporation v. John Wood	Pending
4369-Mr. T. v. Ms. T.	Pending
4370-Deborah Spence v. Kenneth Wingate	Pending
4372-Sara Robinson v. Est. of Harris (Duggan)	Pending
4373-Amos Partain v. Upstate Automotive	Pending
4374-Thomas Wieters v. Bon-Secours	Pending
4375-RRR, Inc. v. Thomas Toggas	Pending
4376-Wells Fargo v. Turner(R. Freeman)	Pending
4380-Vortex Sports v. Ware (CSMG, Inc.)	Pending
4382-Zurich American v. Tolbert	Pending
4383-Camp v. Camp	Pending
4384-Murrells Inlet Corp. Ward	Pending
4385-Calvin Collins v. Mark Frazier	Pending
4386-State v. R Anderson	Pending
4387-Blanding v. Long Beach	Pending
4388-Horry County v. Parbel	Pending
4389-Ward v. West Oil	Pending

4390-SGM-Moonglo, Inc. v. SCDOR	Pending
4391-State v. Larry Evans	Pending
4392-State v. W. Caldwell	Pending
4394-Platt v. SCDOT (CSX)	Pending
4395-State v. Hercules Mitchell	Pending
43967-Brown v. Brown (2)	Pending
2008-UP-116-Miller v. Ferrellgas	Pending
2008-UP-122-Ex parte: GuideOne	Pending
2008-UP-199-Brayboy v. WorkForce	Pending
2008-UP-204-White's Mill Colony v. Arthur Williams	Pending
2008-UP-205-MBNA America v. Joseph E. Baumie	Pending
2008-UP-214-State v. James Bowers	Pending
2008-UP-218-State v. Larry Gene Martin	Pending
2008-UP-223-State v. Clifton Lyles	Pending
2008-UP-224-Roberson v. White	Pending
2008-UP-226-State v. Gerald Smith	Pending
2008-UP-240-Weston v. Weston	Pending
2008-UP-243-Daryl Carlson v. Poston Packing Co.	Pending
2008-UP-244-Bessie Magaha v. Greenwood Mills	Pending
2008-UP-247-Babb v. Estate of Watson	Pending
2008-UP-248-CCDSS v. Barrs	Pending

2008-UP-251-Pye v. Holmes	Pending
2008-UP-252-Historic Charleston v. City of Charleston	Pending
2008-UP-255-Taylor v. Taylor	Pending
2008-UP-256-State v. Hatcher	Pending
2008-UP-260-Hallmark Marketing v. Zimeri, Inc.	Pending
2008-UP-261-In the matter of McCoy	Pending
2008-UP-271-Hunt v. The State	Pending
2008-UP-277-Holland v. Holland	Pending
2008-UP-278-State v. Grove	Pending
2008-UP-279-Davideit v. Scansource	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4220-Jamison v. Ford Motor	Pending
4233-State v. W. Fairey	Pending
4235-Collins Holding v. DeFibaugh	Pending
4237-State v. Rebecca Lee-Grigg	Pending
4243-Williamson v. Middleton	Pending
4247-State v. Larry Moore	Pending
4251-State v. Braxton Bell	Pending
4256-Shuler v. Tri-County Electric	Pending
4258-Plott v. Justin Ent. et al.	Pending
4259-State v. J. Avery	Pending
4261-State v. J. Edwards	Pending

4262-Town of Iva v. Holley	Pending
4264-Law Firm of Paul L. Erickson v. Boykin	Pending
4267-State v. Terry Davis	Pending
4270-State v. J. Ward	Pending
4271-Mid-South Mngt. v. Sherwood Dev.	Pending
4272-Hilton Head Plantation v. Donald	Pending
4274-Bradley v. Doe	Pending
4275-Neal v. Brown and SCDHEC	Pending
4276-McCrosson v. Tanenbaum	Pending
4277-In the matter of Kenneth J. White	Pending
4279-Linda Mc Co. Inc. v. Shore	Pending
4284-Nash v. Tindall	Pending
4285-State v. Danny Whitten	Pending
4286-R. Brown v. D. Brown	Pending
4289-Floyd v. Morgan	Pending
4291-Robbins v. Walgreens	Pending
4292-SCE&G v. Hartough	Pending
4296-Mikell v. County of Charleston	Pending
4300-State v. Carmen Rice	Pending
4304-State v. Arrowood	Pending
4306-Walton v. Mazda of Rock Hill	Pending

4307-State v. Marshall Miller	Pending
4308-Hutto v. State	Pending
4309-Brazell v. Windsor	Pending
4310-State v. John Boyd Frazier	Pending
4312-State v. Vernon Tumbleston	Pending
4314-McGriff v. Worsley	Pending
4315-Todd v. Joyner	Pending
4316-Lubya Lynch v. Toys “R” Us, Inc	Pending
4319-State v. Anthony Woods (2)	Pending
4325-Dixie Belle v. Redd	Pending
4327-State v. J. Odom	Pending
4328-Jones v. Harold Arnold’s Sentry	Pending
4335-State v. Lawrence Tucker	Pending
4338-Friends of McLeod v. City of Charleston	Pending
4339-Thompson v. Cisson Construction	Pending
4344-Green Tree v. Williams	Pending
4350-Hooper v. Ebenezer Senior Services	Pending
4354-Mellen v. Lane	Pending
2007-UP-125-State v. M. Walker	Pending
2007-UP-151-Lamar Florida v. Li’l Cricket	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-187-Salters v. Palmetto Health	Pending

2007-UP-199-CompTrust AGC v. Whitaker's	Pending
2007-UP-202-L. Young v. E. Lock	Pending
2007-UP-249-J. Tedder v. Dixie Lawn Service	Pending
2007-UP-255-Marvin v. Pritchett	Pending
2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-316-Williams v. Gould	Pending
2007-UP-318-State v. Shawn Wiles	Pending
2007-UP-329-Estate of Watson v. Babb	Pending
2007-UP-341-Auto Owners v. Pittman	Pending
2007-UP-350-Alford v. Tamsberg	Pending
2007-UP-351-Eldridge v. SC Dep't of Transportation	Pending
2007-UP-354-Brunson v. Brunson	Pending
2007-UP-358-Ayers v. Freeman	Pending
2007-UP-364-Alexander Land Co. v. M&M&K	Pending
2007-UP-384-Miller v. Unity Group, Inc.	Pending
2007-UP-460-Dawkins v. Dawkins	Pending
2007-UP-493-Babb v. Noble	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2007-UP-513-Vaughn v. SCDHEC	Pending
2007-UP-528-McSwain v. Little Pee Dee	Pending
2007-UP-530-Garrett v. Lister	Pending

2007-UP-533-R. Harris v. K. Smith	Pending
2007-UP-546-R. Harris v. Penn Warranty	Pending
2007-UP-554-R. Harris v. Penn Warranty (2)	Pending
2007-UP-556-RV Resort & Yacht v. BillyBob's	Pending
2008-UP-048-State v. Edward Cross (#1)	Pending
2008-UP-070-Burriss Elec. v. Office of Occ. Safety	Pending
2008-UP-082-White Hat v. Town of Hilton Head	Pending
2008-UP-084-First Bank v. Wright	Pending
2008-UP-104-State v. Damon Jackson	Pending
2008-UP-126-State v. Werner Enterprises	Pending
2008-UP-131-State v. Jimmy Owens	Pending
2008-UP-132-Campagna v. Flowers	Pending
2008-UP-135-State v. Dominique Donte Moore	Pending
2008-UP-140-Palmetto Bay Club v. Brissie	Pending
2008-UP-141-One Hundred Eighth v. Miller	Pending
2008-UP-144-State v. Ronald Porterfield	Pending
2008-UP-151-Wright v. Hiester Constr.	Pending
2008-UP-273-Bradley v. State	Dismissed 06/05/07

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: George W. Gregory, Jr., Appellant,

IN RE: Annie B. Melton, guardian *ad litem* for Jerry Bittle, a mentally incompetent adult, Plaintiff,

v.

Gerald Malloy, Respondent.

Appeal From Darlington County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 26504
Heard April 2, 2008 – Filed June 16, 2008

AFFIRMED

Lawrence B. Orr, of Orr, Elmore & Ervin, LLC, of Florence, for appellant.

Desa A. Ballard and Stephanie Weissenstein, of Law Offices of Desa Ballard, of West Columbia, for respondent.

JUSTICE MOORE: Annie Melton filed an action against respondent, her former attorney, alleging causes of action for negligence, conversion, breach of contract, breach of contract accompanied by a fraudulent act, and constructive trust. Melton's attorneys were appellant and J. Leeds Barroll. Respondent answered and counterclaimed that the suit was frivolous and in violation of Rule 11, SCRCP, and the South Carolina Frivolous Proceedings Sanction Act, S.C. Code Ann. § 15-36-10, *et seq*. (2005).[1] Melton filed a motion to dismiss the counterclaims. Thereafter, respondent filed a motion for summary judgment as to Melton's causes of action.

After depositions were taken, Melton voluntarily filed a stipulation of dismissal of the complaint with prejudice. Respondent voluntarily dismissed his counterclaims and then filed a motion seeking sanctions against Melton and appellant, but not against Barroll.

After a hearing, the lower court issued an order awarding respondent $27,364.31 against appellant for fees and expenses incurred in defending the Melton suit and in pursuing sanctions. Appellant appeals this award.

FACTS

In May 1999, Jerry Bittle (Bittle) was seriously injured in an automobile accident in which one person died and four additional people were injured. Bittle sustained a brain injury and is now unable to care for himself. After the accident, Bittle's elderly mother, Melton, retained respondent to represent Bittle's interests in seeking recovery for his injuries.

In June 2001, an agreement was reached on how the available insurance coverage would be allocated among the claimants. Bittle was to

---

[1]Section 15-36-10 was rewritten and § 15-36-20 to § 15-36-50 were repealed in 2005. The new § 15-36-10 was effective July 1, 2005, and is applicable to causes of action arising on or after that date. The instant cause of action arose before July 1, 2005; therefore, the previous statutes are applicable in this case.

receive $14,868.97. Within two months, Melton and Bittle went to respondent's office to consummate the settlement. Respondent was not present. Bittle endorsed the settlement check and respondent's secretary explained that Bittle would not receive the endorsed check but he would receive another check later.

Melton called and visited respondent's office several times to determine when the settlement check would be transferred to them; however she was unable to reach him. Melton was aware there was not enough money available from the settlement to pay all of the medical bills; however, she testified she thought respondent had either kept or spent the settlement proceeds.

Melton consulted appellant in January 2004. After the above facts were related to appellant, appellant contacted the insurance agency for the at-fault party and talked with the adjuster who had handled the claim. After obtaining the settlement documents, appellant determined the settlement check was presented for payment on August 24, 2001. Appellant reviewed telephone records that revealed the number of times Melton had called respondent. Appellant also knew that Melton had sought help from a North Carolina attorney; however, seeking that attorney's help did not produce any response from respondent.

Appellant informed Melton she should file a grievance with the Office of Disciplinary Counsel because he felt that if Melton filed a grievance then it might "shake [the money] loose" from respondent. Appellant prepared the letter to disciplinary counsel for Melton and also prepared a subsequent letter. At this point, appellant indicated he was waiting to see what would happen with the grievance and that he was hoping respondent would deliver the money; however, he became concerned that the statute of limitations on any claim concerning the settlement proceeds would run by the end of August 2004.

In June 2004, Melton wrote respondent a letter terminating his services for failure to account for the settlement proceeds. She then entered into a retainer agreement with appellant so that he would pursue claims for

wrongfully holding the settlement funds. Appellant was to take one-third of Melton's recovery, plus any expenses were to come from Melton's portion of her recovery. Appellant associated J. Leeds Barroll as co-counsel in late July 2004.

After Barroll and appellant discussed the facts of the case, Barroll researched causes of action and drafted the complaint. Barroll asked appellant if he thought he should contact respondent but appellant did not think it would "do any good." Because respondent had not responded to Melton's requests for information regarding the funds, Barroll included the conversion action in the complaint. Barroll testified that because the statute of limitations was going to run, he felt they were in a "shoot first, ask questions later" mode. Barroll stated appellant did not initially tell him that he had been on the case since January.

Appellant testified that the basis of the claim for conversion against respondent was that respondent refused to account for the money. Appellant stated he had no knowledge that respondent had actually converted the money.

Leighton Bell, a staff writer with the Cheraw Chronicle, learned of Melton's suit against respondent when the process server personally gave the summons and complaint to him. As a result, he wrote two articles regarding the suit. He stated he spoke to appellant first and that appellant was not surprised by his call and was very helpful with the article. In one article, appellant was quoted as saying: "As an attorney [respondent] should have known he couldn't co-mingle funds," and "If for some reason he couldn't disperse the check he should have put it in a separate fund. Whatever [respondent] did, he shouldn't have kept it in his pocket and collected all the interest on it."

After the action began, respondent immediately transferred the settlement proceeds from his trust account to appellant. Barroll then deposed the Medicaid agent regarding Medicaid's lien on the settlement proceeds. After the deposition, Barroll voluntarily dismissed the case with prejudice a mere seven weeks after filing. Barroll stated that if he had been involved in

the case since January, as appellant had been, he would have had time to interview the Medicaid agent prior to filing a lawsuit. Barroll also acknowledged that once he requested respondent's file and reviewed it, he was able to determine that respondent had been in touch with Medicaid about reducing its lien against the settlement proceeds. Although the contact was minimal, Barroll felt it was a waste of time to proceed with the lawsuit. He indicated there was no evidence that appellant ever asked for respondent's file.

As soon as respondent transferred the money to appellant, Barroll began negotiations with Medicaid and the medical providers to compromise the liens and bills. The Medicaid lien was compromised for $3,469 and the balance of the settlement funds, after subtracting $4,956.32 in attorney fees and $1,045.15 in expenses, was paid to Melton. Melton received $5,398.50.

Respondent filed his motion for sanctions and contended that appellant had no basis for filing a claim, and in particular, the conversion claim. Respondent stated in his affidavit that he was representing Melton and Bittle for free. He stated he discussed with Melton and Bittle how to deal with all of the medical liens and that they agreed that they did not want to jeopardize Bittle's Medicaid eligibility. He requested a waiver of the Medicaid lien but was only able to obtain an agreement for reduction. He stated, even with the reduction, there would be no funds left over for Bittle.

Due to Rule 1.15 of the Rules of Professional Conduct, respondent stated he was obligated to hold the settlement funds until the disputes between the lienholders and his client were resolved, a fact he explained to Bittle and Melton.[2] He informed them he may be able to recover funds for

[2]Rule 1.15(d) provides: "Upon receiving funds . . . in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds . . . that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."

Bittle if he held the funds until the statute of limitations had expired on the medical provider liens. This method would leave only the Medicaid lien to resolve. He then held the funds per their agreement. The C.P.A. who reviewed respondent's account stated the funds never left respondent's trust account until the check was written to appellant.

Appellant testified he did not contact respondent because he thought if respondent would not respond to his clients or the North Carolina attorney, then he would not respond to him. He also felt it was unnecessary to contact respondent because he expected Disciplinary Counsel to take care of it. Appellant stated he did not get respondent's file because he did not think he would learn anything from it.

The trial court granted respondent's motion for summary judgment and found there was no dispute the funds remained in respondent's trust account from the time of the settlement until the funds were disbursed to appellant. The court concluded the cause of action for conversion was frivolous. The court did not issue a judgment against Melton because she had relied on the advice of counsel. The court found appellant had not conducted a reasonable investigation before filing the conversion suit. The court awarded respondent $27,364.31 in attorney fees and costs in defending the action and in pursuing the claim for sanctions.

Standard of Review

Pursuant to the South Carolina Constitution, an appellate court reviews findings of fact in an equity matter taking its own view of the evidence. Father v. South Carolina Dep't of Soc. Servs., 353 S.C. 254, 578 S.E.2d 11 (2003). However, the abuse of discretion standard plays a role in the

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Rule 1.15(e) provides: "When in the course of representation a lawyer is in possession of property in which two or more persons . . . claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."

appellate review of a sanctions award. *Id.* An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. *Id.* For example, where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard. *Id. See also* Runyon v. Wright, 322 S.C. 15, 471 S.E.2d 160 (1996) (the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the lower court).

ISSUES

I. Did the circuit court err by finding the suit against respondent was frivolous because insufficient investigation had been conducted by appellant?

II. Did the circuit court err by awarding attorney fees and expenses which exceeded that provided for in the Frivolous Civil Proceedings Sanctions Act?

DISCUSSION

I

Appellant argues the court erred by finding the suit against respondent was frivolous because he had sufficiently investigated the facts and circumstances related to him and found that there was a basis for the suit.

Under Rule 11(a), SCRCP, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. Runyon v. Wright, 322 S.C. 15, 471 S.E.2d 160 (1996). The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it. *Id.* The sanction may include an order to pay the reasonable costs and attorney fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter

the party or the party's attorney from bringing any future frivolous action or action in bad faith. *Id.* Further, if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith. *Id.* A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed. *Id.*

The South Carolina Frivolous Civil Proceedings Sanction Act provides for liability for attorney fees and costs of frivolous suits. South Carolina Code Ann. § 15-36-10 (2005) provides that any person who takes part in the procurement, initiation, and continuation of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney fees and court costs of the other party if (1) he does so primarily for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based, and (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

Section § 15-36-20 provides:

> Any person who takes part in the procurement, initiation, continuation . . . of civil proceedings must be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 if he reasonably believes in the existence of the facts upon which his claim is based and
>
> (1) reasonably believes that under those facts his claim may be valid under the existing or developing law; or
>
> . . .
>
> (3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or

> defense of a civil cause is not intended to merely harass or injure the other party.

The court correctly found that, had appellant conducted a reasonable investigation, he would have known there was no basis for the conversion action. We find it troubling that appellant was willing to speak with a news reporter and make statements that he would have known to be false if he had conducted any type of meaningful investigation. Without a reasonable basis, appellant relied on his client's statements that she did not know where the settlement money was to make inflammatory statements to the newspaper, *i.e.* accusing respondent of commingling funds and of keeping the settlement money "in his pocket" and collecting all the interest on it.

There was evidence appellant had time to investigate whether respondent had contacted Medicaid and that he could have realized much sooner that respondent was not engaging in any wrongful conduct by holding the settlement money. In fact, the associated attorney, Barroll, had suggested to appellant that he contact respondent, but appellant refused. Had appellant spoken with respondent and relayed Melton's worries over the money, then the suit would have never been filed. Under the particular facts of this case, a simple phone call may have led to an explanation by respondent as to why the money was being held. Such a discussion between the attorneys could have prevented the grievance and suit from being filed against respondent.

We find that while an attorney or a *pro se* litigant does not have a duty to consult with a potential defendant prior to filing suit, before alleging conversion against an attorney for misappropriation of client funds or legal malpractice, a reasonable investigation is necessary.[3]

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[3]The concurrence indicates that we have imposed an additional duty upon an attorney by creating a blanket rule that an attorney is precluded from obtaining a reasonable belief in the merits of a case based solely on information related to him by a client. However, we have not created such a blanket rule. Our conclusion that an attorney must conduct a reasonable investigation beyond what is related to the attorney by his client is limited to

The above facts support the lower court's conclusions that appellant failed to properly investigate the matter prior to filing it, and that the action was frivolous. *See* Father v. South Carolina Dep't of Soc. Servs., *supra* (a party who makes a frivolous claim has committed a more egregious act than one who merely acts without substantial justification). Accordingly, the court did not abuse its discretion by awarding sanctions against appellant. *See id.* (abuse of discretion occurs where decision is controlled by error of law or is based on unsupported factual conclusions).

II

The trial court found appellant had made a frivolous claim and levied a sanction of $27,364.31 in attorney fees and costs in defending the action and in pursuing the claim for sanctions. Appellant argues the court erred by awarding attorney fees and costs that were incurred in pursuing the claim for sanctions. Appellant argues that this portion of the award is not intended by the Frivolous Proceedings Act.

South Carolina Code Ann. § 15-36-50 (2005) of the Frivolous Proceedings Act states that, "[u]pon a finding that a person has violated the provisions of this chapter, the court shall determine the appropriate fees and costs and enter judgment accordingly." Therefore, § 15-36-50 clearly allows respondent to recover the fees and costs that were incurred in seeking sanctions pursuant to the Act. Further, we find the language of S.C. Code Ann. § 15-36-30 (2005), which entitles a person to recover attorney fees and court costs reasonably incurred in litigating the proceedings, also entitles respondent to recover the fees and costs he incurred in seeking sanctions. The language, "reasonably incurred in litigating the proceedings," contemplates the fees and costs that represent the underlying proceedings wherein respondent sought to recover the fees and costs he had to pay to defend the suit against him and the proceedings wherein respondent sought sanctions for the underlying frivolous suit. In conclusion, the trial court

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the situation where a client is alleging conversion against his or her former attorney for misappropriation of client funds or legal malpractice.

appropriately awarded attorney fees and costs to respondent to represent the amount he incurred in seeking the sanctions. Accordingly, the decision of the lower court is

AFFIRMED.

TOAL, C.J., WALLER and BEATTY, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the result reached by the majority but am troubled by the imposition of a new duty forcing an attorney to conduct a "reasonable" investigation so as to comply with § 15-36-20. In my opinion, this new responsibility places upon an attorney an additional requirement not currently required by statute. I would not create a blanket rule that precludes an attorney from obtaining a reasonable belief in the merits of a case based solely on information related to him by a client.

I agree that, based on the facts of this case, appellant filed the action primarily for a purpose other than securing the proper adjudication of the claim upon which the proceedings were based. I would affirm the lower court but see no need to impose additional duties on an attorney beyond that which is required by statute.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

George H. Seago, III, and Real Estate Information Service, Inc., Appellants,

v.

Horry County, Respondent.

Appeal From Horry County
J. Stanton Cross, Jr., Circuit Court Judge

Opinion No. 26505
Heard March 5, 2008 – Filed June 16, 2008

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

Jay Bender and Holly Palmer Beeson, both of Baker, Ravenel and Bender, of Columbia, for Appellants.

Emma Ruth Brittain and Matthew R. Magee, both of Thompson and Henry, of Myrtle Beach, for Respondent.

JUSTICE BEATTY: This case concerns whether further dissemination of public documents obtained pursuant to a Freedom of Information Act (FOIA) request may be restricted where the government entity claims the information is copyright-protected under the federal copyright law. We affirm the circuit court's finding that, while public information must be granted pursuant to FOIA, a public entity may restrict further commercial distribution of the information pursuant to a copyright. However, we reverse and remand for further proceedings on the question regarding the fees charged.

FACTUAL BACKGROUND

George Seago, III, and his company, Real Estate Information Service, Inc., (collectively, Appellants), collect electronic mapping data from various government entities across the state for their website and allow customers, including real estate developers, realtors, mortgage companies, appraisers, attorneys, and others, access to the information from their website for a fee. The fees range from $350 to $3,000 per year, and up to $40,000 per year for one particular subscriber. Subscribers are issued a password to access the website and are prohibited from sharing their passwords with others.

Horry County's geographic information systems (GIS) department developed a digital database to combine several layers of information onto one digital photographic map of the county. The GIS department took over 4,000 orthophoto, or aerial images, of the county and compressed them into a seamless collage in the "Mr. Sid" computer format. The GIS department processed flat file data,[1] including data regarding planimetric layers,[2] parcels, and topography, through a spatial database engine (SDE) to convert the flat file data into lines, points, or images on the photographic map. As

[1] "Flat file" data is a computer file spreadsheet that only contains numbers and information. It is not in the format of a map.

[2] "Planimetric" data includes things such as building footprints, rivers, bodies of water, hydrology, and streets.

information regarding the land in the County is constantly changing, the information in the flat files has to be constantly updated. Thus, there is not one document; a map of a specific region or local has to be "created" by running the requested flat file information through the database to produce the requested map. According to Timothy Oliver, Assistant Director of the GIS department, this process is unique to Horry County and requires creativity and judgment on the part of the GIS department to know how to combine the different flat files to create an integrated, aerial-photographed map that precisely identifies the location of parcels, bodies of water, streets, buildings, hydrology, and topography.

Horry County developed its digital database system at a cost of $7.5 million dollars. Because of the constantly changing information regarding property in the County, it costs nearly $1 million each year to update the information in the flat files. To protect its investment and the integrity of the data from manipulation or alteration by subsequent users, Horry County applied for copyrights for its planimetric layers data and orthophoto Mr. Sid data.[3]

On December 5, 2001, Seago made a FOIA request for a copy of the "Orthophoto Coverage in Mr. Sid format (Countywide)" so he could place the digital photographic map on his website for use by his customers. In January 2002, Lisa Bourcier, Director of Public Information for Horry County, informed Seago that he could obtain a copy of the information for a fee of $100, but he would have to sign a licensing agreement acknowledging Horry County's copyright on the information and restricting any further commercial use without prior written consent. Seago did not object to the fee, but he refused to sign the licensing agreement. Seago did not obtain the requested information.

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[3] The record indicates the copyrighted works were "published" in January 1999 but not registered until February 2003. It appears from the record that the copyrights retroactively applied to the works originally produced in January 1999. In any event, Appellants do not challenge Horry County's ability to obtain a copyright; they challenge the effect of the copyright on their FOIA claim and the lower court's ability to interpret the copyright law.

On August 29, 2002, Seago again made a FOIA request for full-county coverage GIS data for planimetric layers, topographic layers, and parcel layers in ArcInfo Shapefile or ArcInfo export formats. Seago included a check for $125, which he had previously been informed was the charge for the data, and his request specifically noted that he would only sign a licensing agreement if Horry County could show authority to copyright public information. On September 20, 2002, Bourcier returned Seago's check and informed him that Horry County could not process his request at that time because the requested information contained "copyrightable elements," and Horry County had retained copyright attorneys to research and copyright what was appropriate. On October 1, 2002, the Horry County Council held their first reading of a proposed ordinance to require a special fee schedule and a licensing agreement for the distribution of GIS information. Seago continued to receive letters from Bourcier, alternately informing him: (1) that his request could not be processed at that time; (2) that his request was for copyrightable information; (3) that the requested information was not subject to FOIA because the county possessed no document that "provides the complex information you seek" and it would have to be created; and (4) that Horry County was attempting to pass the fee and licensing ordinance. After Seago initiated the underlying lawsuit for a FOIA violation, Bourcier wrote him a letter pointing out Seago's misunderstanding that he was being denied access and stating Seago's FOIA requests would have been granted if only he had signed the licensing agreement.

Appellants' lawsuit sought a declaratory judgment that: Horry County's charges for copies exceeded the actual cost of making copies; the restrictions on the use of the documents by the County was an *ultra vires* act; and there is no FOIA exception for records containing copyrightable elements. Horry County counterclaimed for copyright infringement and later removed the matter to federal court. After the parties argued the case in front of the federal magistrate, the district court adopted the magistrate's recommendation that the case was strictly an application of state FOIA law and dismissed the matter.

In state court, the parties agreed to refer the matter to the master-in-equity, and Horry County later dismissed its counterclaims. In an amended order, the master determined: (1) the requested information constituted a public record subject to disclosure under FOIA because the definition of "public record" is broad enough to include the documentary materials that the flat file records could be exported into; (2) Horry County could copyright its materials, and the copyright protections could be read harmoniously with FOIA, because the right to access public documents is separate and distinct from any right to subsequent distribution; (3) FOIA is satisfied once access is granted to the information; and (4) Horry County could impose a licensing fee in excess of the cost of reproducing the data "where, as under the circumstances of this case, the data is being released for purposes that extend beyond initial access to a public record as allowed by FOIA," and in light of Seago's testimony that he had no objection to the fees being charged to him. This appeal follows.

SCOPE OF REVIEW

"A declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law." Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 280, 580 S.E.2d 163, 165 (Ct. App. 2003) (citing S.C. Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994)). In an action at law tried without a jury, this Court reviews the lower court only to correct errors of law. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). The trial court's factual findings will not be disturbed on appeal unless there is no evidence in the record that would reasonably support the findings. Harkins v. Greenville County, 340 S.C. 606, 621, 533 S.E.2d 886, 893 (2000).

DISCUSSION[4]

I. Restrictions on subsequent use under FOIA

Appellants argue the master erred in finding Horry County could restrict subsequent distribution of public records because: (1) FOIA does not include an exception for disclosure for records containing "copyrightable elements;" and (2) FOIA does not authorize restrictions on subsequent use.

The purpose of FOIA is to protect citizens from secret government activity. Campbell, 354 S.C. at 280, 580 S.E.2d at 166. FOIA allows the public to "learn and report fully the activities of their public officials at a minimum cost or delay" by providing the public access to public documents[5] or meetings. S.C. Code Ann. § 30-4-15 (2007). Pursuant to FOIA, any person has the right to copy public records, unless an exception applies, at a fee "not to exceed the actual cost of searching for or making copies of records." S.C. Code Ann. § 30-4-30(a), (b) (2007). Any government agency attempting to avail itself of an exemption bears the burden of proving the exemption applies. Evening Post Publ'g Co. v. City of North Charleston, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005). The exemptions to FOIA should be narrowly construed to ensure public access to documents. Id.

FOIA grants the public an immutable right to access public records. However, this right of access is viewed differently where commercial use of public information is concerned. FOIA specifically limits the subsequent commercial use of information obtained pursuant to the Act in some situations: (1) public records containing the telephone number, address, and name of handicapped persons may not be disclosed where the information is to be used for person-to-person commercial solicitation of such handicapped

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[4] Appellants raise five issues, including a catch-all issue complaining about all the master's factual findings. For the sake of clarity, we have combined them into three.

[5] Horry County does not challenge the master's finding that the GIS data, no matter what format it was in, constituted a "public record" subject to FOIA.

person; and (2) information contained in a police incident report, or in an employee salary schedule, or the home addresses and phone numbers of employees and officers of public bodies may not be used for commercial solicitation. S.C. Code Ann. § 30-4-40(a)(2) (2007) (providing the government may exempt from disclosure contact information for handicapped persons if it is to be used for commercial solicitation); S.C. Code Ann. § 30-4-50(B) (2007) (prohibiting the use of information in a police report, employee salary schedule, or the home addresses of public body employees and officers for commercial solicitation).

While it is true that copyright-protected data is not listed as an exemption to FOIA disclosure, Horry County does not deny this fact and there is evidence in the record to support the master's finding that Horry County was not attempting to restrict initial access to the material by Appellants. Thus, the question before the Court is whether Horry County may restrict the subsequent commercial distribution of public information pursuant to the copyright law.

In deciding this question, the master relied upon the federal case of County of Suffolk, New York v. First American Real Estate Solutions, 261 F.3d 179 (2d Cir. 2001). In Suffolk, Suffolk County sued First American for copyright infringement for copying and selling Suffolk County's copyrighted tax maps. The Suffolk court found that states and political subdivisions may obtain copyrights, and maps could be copyright-protected to the extent it could be shown that it contained original material, research, and creative compilation. Suffolk, 261 F.3d at 187-88. The court next considered whether the New York Freedom of Information Law (FOIL) abrogated Suffolk County's copyright. Noting that when FOIL was enacted it was recognized that states could possess copyrights, the court found it significant that FOIL was silent as to the effect of requiring disclosure on preexisting copyrights the agency possessed and what may occur after the agency discloses the records. Id. at 189. The court found the extent of the state agency's FOIL obligation is to make its records available for public inspection and copying, stating that it "is one thing to read this provision to permit a member of the public to copy a public record, but it is quite another

to read into it the right of a private entity to distribute commercially what it would otherwise, under copyright law, be unable to distribute." Id.[6]

Because FOIA does not prohibit the copyrighting of some specialized public information, we agree with the Suffolk court's reasoning that the county may obtain copyrights, and maps can be copyright-protected to the extent it can be shown that it contains original material, research, and creative compilation. Suffolk, 261 F.3d at 187-88. The originality and creativity necessary to create and maintain the system is present in this case. Further, the purpose of FOIA is satisfied once the public information is provided. It does not violate FOIA for a public entity to copyright specially-created digital data and to restrict subsequent commercial use as long as the information is provided initially to the requesting person or entity. If an entity is allowed to copyright the specially-created data, it is logical that the governmental entity should be allowed to enact ordinances to restrict further commercial dissemination of the information in order to protect the copyright. See 17 U.S.C.A. § 106 (2005) (providing that copyright holders have the exclusive right to allow certain uses, and thus impose subsequent use restrictions).

However, Appellants point to the Court of Appeals' decision in Campbell v. Marion County Hospital District, 354 S.C. 274, 580 S.E.2d 163

[6] We note there is a similar case from Florida in which the Florida state court distinguished Suffolk and held exactly the opposite. Microdecisions, Inc., v. Skinner, 889 So. 2d 871 (Fla. Dis. Ct. App. 2004). In Microdecisions, a real estate company seeking county GIS tax maps for commercial use brought suit against the county appraiser who refused to provide the public maps without the signing of a licensing agreement. The court noted, "Florida's Constitution and its statutes do not permit public records to be copyrighted unless the legislature specifically states they can be." Microdecisions, Inc., 889 So. 2d at 876. Unlike the case in Microdecisions, while our Legislature and state constitution do not specifically allow counties to copyright, they do not specifically prohibit it, either.

(Ct. App. 2003), to support their argument that FOIA prohibits any subsequent use restriction on public information. In Campbell, the circuit court ruled that Dr. Campbell could get access to the county hospital's records of physician recruitment, physicians' salaries, and purchase prices of practices pursuant to FOIA, but the circuit court ruled such information constituted "trade secrets" such that the court restricted Dr. Campbell from subsequently disclosing the information to third parties. Campbell, 354 S.C. at 278-79, 580 S.E.2d 165. The Court of Appeals reversed the circuit court's protective order, finding the information did not constitute "trade secrets" and that information obtained pursuant to FOIA could not be protected by a restraining order. Id. at 287, 580 S.E.2d at 169. While the Campbell opinion correctly noted that FOIA does not provide for the prohibition on further dissemination of information obtained, the case did not deal with the interplay of federal copyright restrictions and licensing on subsequent commercial dissemination of the information. Thus, Campbell is not applicable to the underlying case.

Accordingly, we agree with the master that FOIA and copyright law can be "read harmoniously" and that the Horry County ordinance allowing the licensing restrictions on further commercial dissemination of the GIS data does not violate FOIA. The ability to copyright specially-created data, as long as the public is given access to the public data, does not frustrate the purpose of FOIA.

II. Jurisdiction to determine copyright claim

Appellants argue the master was without jurisdiction to make any findings of fact regarding copyrights because it is within the exclusive jurisdiction of federal courts.

Federal district courts have original jurisdiction to hear any civil actions "arising under" any Act of Congress relating to copyrights. 28 U.S.C.A. § 1338(a) (1999). The mere fact that a case concerns a copyright does not necessarily mean the case comes within the exclusive jurisdiction of the federal courts. Enhanced Computer Solutions, Inc. v. Rose, 927 F.Supp. 738, 739 (S.D.N.Y. 1996). An action arises under the federal copyright law

where the complaint seeks a remedy specifically granted by the Copyright Act or requires construction of the Act. Merchant v. Levy, 92 F.3d 51, 55 (2d Cir. 1996). "Many disputes over copyright ownership will arise under state law and involve no federal questions." Arthur Young & Co. v. City of Richmond, 895 F.2d 967, 969 (4th Cir. 1990).

In the underlying case, Horry County counterclaimed for copyright infringement, sought damages, and removed the case to federal court. At the argument before the district court magistrate, Appellants asserted they were not challenging Horry County's ability to own a copyright, but they were instead challenging the ability to assert copyright protection to circumvent FOIA. Appellants argued that the case was not a matter of whether a copyright existed, but it was rather a matter of exclusive state law concerning whether Horry County could withhold public information. Appellants later argued that whether Horry County has the authority to obtain a copyright is a question of state law and the extent of such copyright is a federal question. The district court adopted the magistrate's recommendation that the case be remanded to state court because the case did not involve the "validity, scope, or infringement of a copyright claim" and the case related specifically to state law requests pursuant to FOIA.

Despite moving to remand the matter to state court, arguing before the magistrate that they were not challenging the ability of Horry County to obtain a copyright, and failing to appeal the district court's finding that the case did not involve the validity of a copyright, Appellants now argue the master was without jurisdiction to find Horry County had a copyright and was entitled to protect its interests. In light of Appellants' previous concession, the fact that the case concerned matters of interpreting state FOIA law, and the fact that the case did not concern a challenge under the Copyright Act, we find the master had jurisdiction to make a finding that a copyright existed. The Appellant's argument is wholly without merit.

III. Licensing fee

Appellants argue the master erred in finding the licensing fees charged by Horry County did not violate FOIA because: (1) the fees exceed the

actual costs for making copies; and (2) the fees are not charged uniformly for the same records.

FOIA provides that a "public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records," and the fees must be uniform for copies of the same record or document. S.C. Code Ann. § 30-4-30(b) (2007). "The records must be furnished at the lowest possible cost to the person requesting the records." Id. However, the public body may decide not to charge a fee where it determines the waiver of the fee is in the public interest because "furnishing the information can be considered as primarily benefitting the general public." Id.

The Horry County ordinance provides different licensing fees for copying GIS data, depending on the intended use. Timothy Oliver, Assistant Director of Horry County's GIS department, testified before the master that Horry County provides GIS data to certain public entities at no cost, including the U.S. Fish and Wildlife Service, the City of North Myrtle Beach, and Ocean and Coastal Resource Management. Oliver also testified that while the money charged for the record may exceed the actual cost of copying it, the cost is associated with the copyright license use and not the FOIA request. Horry County places the license fees collected in one account for use in maintaining the system and had collected nearly $30,000 from 2003 until the September 2005 hearing. Seago testified at the hearing that he had no objection to the fees charged, tendering checks in the amounts of $100 and $125, and his only complaint was the attempt to restrict subsequent commercial use of the information.

Noting that Seago did not object to the fees being charged to him, the master found the County could impose a licensing fee in excess of actual cost of reproduction "where, as under the circumstances of this case, the data is being released for purposes that extend beyond initial access to a public record as allowed by FOIA."

First, we find no FOIA violation where Horry County waives fees to public entities. The FOIA statute specifically provides that copying fees can be waived where it is in the interest of the public. S.C. Code Ann. § 30-4-

30(b) (2007). Providing these documents for free to public entities that intend to use them for public benefit and not for commercial gain would certainly fit under this category.

The question of whether Horry County can charge "licensing fees" that would exceed the actual copying costs pursuant to a FOIA request is a more difficult question. FOIA requires the actual copying fees be charged at the lowest possible cost to the requesting party. Horry County avers that the county did not charge Appellants for documents requested pursuant to the FOIA, the charge was for the license to commercially distribute the copyrighted data. Appellants argue classifying the fee schedule as a "licensing fee" instead of a copying fee is merely a matter of semantics where the fee is for the production of a public document. Appellants are technically correct that Horry County never provided the documents/data to Appellants in the first place, as is required under FOIA. However, after they tendered the requested fee, Horry County informed Appellants that signing the licensing agreement was a prerequisite to the production of the data. Thus, it is clear that the fee was not for the production of the document; it was for the subsequent commercial distribution of the document.

FOIA limitations on the fee structure for providing copies of public records are applicable only to those copies that are provided in keeping with the spirit of FOIA. FOIA fee provisions do not contemplate subsequent commercial distribution of copyright-protected documents for profit.

FOIA is unambiguous in setting forth the method of determining fees for providing copies contemplated by the Act. This method does not change depending on the status of the requester. However, FOIA does not control fees for subsequent commercial distribution for profit of copyrighted public records.

The undisputed evidence in the record is that the licensing fees charged for the GIS data exceeded actual copying costs. However, no evidence was introduced as to what those actual copying costs would be in non-licensing situations. The fees in this case, while in excess of actual copying costs, do not appear to be exorbitant. Without knowing the actual costs of producing a

copy of the GIS data, we cannot determine whether the fees charged frustrate the intent of FOIA in light of the intended commercial use and Horry County's desire to protect its copyright. Accordingly, we find it is more appropriate to remand the fee question for the determination of what the actual copying costs would be and whether the fees charged were so out of line with the actual copying costs such that the fees would frustrate the intent of FOIA.

CONCLUSION

Horry County is not prohibited from obtaining copyrights on the County's GIS data which was specially-created; Horry County could use its copyright to protect the GIS data from subsequent commercial use without violating FOIA. Although Horry County could use its copyright to protect the GIS data from subsequent commercial distribution for profit, it may not refuse to honor the initial FOIA request. Further, the master had jurisdiction to determine the effect of Horry County's copyright on the FOIA action. The question of whether the fees charged violate FOIA cannot be determined by the record before us because there is no evidence regarding what the actual copying costs would be. Without this information, we cannot determine whether the fees frustrate the purpose of FOIA. We remand the matter to the lower court for a determination of the amount of the fees, whether the fees charged were so out of line with the actual cost as to frustrate FOIA, and whether charging different fees based on the identity of the requester amounted to a violation.

MOORE, Acting Chief Justice, WALLER, J., and Acting Justices E. C. Burnett, III and James R. Barber, concur.

The Supreme Court of South Carolina

In the Matter of Anderson County Magistrate Michael F. Smith, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(a) and Rule 17(b) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

IT IS ORDERED that the petition is granted and respondent is placed on interim suspension. Anderson County is under no obligation to pay respondent his salary during the suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991). Respondent is directed to immediately deliver all books, records, funds, property, and documents relating to his judicial office to the Chief Magistrate of Anderson County. He is enjoined from access to any monies, bank accounts, and records related to his judicial office.

IT IS FURTHER ORDERED that respondent is prohibited from entering the premises of the magistrate court unless escorted by a law enforcement officer after authorization from the Chief Magistrate of Anderson County. Finally, respondent is prohibited from having access to, destroying, or canceling any public records and he is prohibited from access to any judicial databases or case management systems.

This Order, when served on any bank or other financial institution maintaining any judicial accounts of respondent, shall serve as notice to the institution that respondent is enjoined from making withdrawals from the accounts.

II IS SO ORDERED.

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

Columbia, South Carolina

June 11, 2008

The Supreme Court of South Carolina

In the Matter of Howard Hammer, Respondent.

ORDER

The Office of Disciplinary Counsel (ODC) petitions the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, of Rule 413, SCACR. In addition, ODC requests the Court appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

IT IS SO ORDERED.

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

Columbia, South Carolina

June 12, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jesse Houston, **Appellant,**

v.

Deloach & Deloach, **Respondent.**

Appeal from Beaufort County
James E. Lockemy, Circuit Court Judge

Opinion No. 4408
Heard June 3, 2008 – Filed June 10, 2008

AFFIRMED

Darrell Thomas Johnson, Jr. and Warren Paul Johnson, both of Hardeeville, for Appellant.

Allison M. Carter, of Mount Pleasant, for Respondent.

ANDERSON, J.: Jesse Houston appeals the circuit court's order affirming the decision of the appellate panel of the South Carolina Workers'

Compensation Commission which denied him benefits for injuries suffered in a motor vehicle accident. We affirm.

FACTUAL / PROCEDURAL BACKGROUND

On Saturday, August 23, 2003, Jesse Houston (Claimant) was injured in a motor vehicle accident while riding as a passenger in a commercial dump truck owned by his employer, Deloach & Deloach (Employer). Employer denied the claim, arguing that Claimant was outside the scope of his employment at the time of the accident.

Claimant testified that prior to the injury he had been authorized to train a prospective employee named Marlene Gadson (Gadson) to drive a dump truck. Claimant averred he had been training Gadson for approximately two weeks at the time of the accident. Neither party disputed that Gadson was authorized to train with Claimant or that Gadson was training with Claimant on the morning of the accident. Gadson professed that on the day of the accident she had a disagreement with Claimant and ceased her training at approximately 11:00 a.m. She vouched that Claimant was drinking beer the morning of the accident.

After Gadson exited the dump truck, Claimant picked up Leslie Brown (Brown). Brown had never trained to drive a dump truck prior to the date of the accident, but Claimant allowed her to drive the truck while fully loaded with asphalt that same day. Although the dump truck had only two seats in its cab, Claimant and Brown picked up an unauthorized passenger, Kimberly Blake, at some point during the day. Neither Brown nor Blake was employed by Employer. Brown subsequently wrecked the truck, injuring Claimant.

The testimony conflicted over whether Claimant had permission to allow Brown to drive the truck. Claimant contended he first met Brown on Tuesday, August 19, 2003, and on that day Otis Deloach (Deloach), owner of Employer and Claimant's boss, expressly permitted him to train Brown to drive the dump truck. He advanced that this permission was given in the company of Alfred Ervin and Leroy Stevenson, both employees of Employer. Deloach maintained that he did not give Claimant permission to train Brown,

and he never met Brown prior to the August 23, 2003 accident. Brown stated she had not met Claimant prior to the date of the accident. She first heard of Employer the day before the accident.

Alfred Ervin (Ervin) declared he had no knowledge of Deloach giving Claimant permission to train Brown. Ervin substantiated that before he ever drove a loaded dump truck, he trained with an unloaded truck for approximately ten days. Leroy Stevenson asseverated he did not observe Deloach give the Claimant permission to train Brown.

The commissioner issued an order finding Claimant suffered compensable injuries within the course and scope of his employment. An appeal was heard by the appellate panel of the Workers' Compensation Commission. The appellate panel issued a split decision where the majority made the following findings of fact:

> 1. That the Claimant did not have the authority or permission to allow Ms. Brown to drive the Employer's loaded dump truck at the time of the accident.
>
> 2. That skill and training are required to drive a commercial dump truck filled with asphalt.
>
> 3. That the Claimant did not have permission to drink alcoholic beverages during the time period he was performing job duties.
>
> 4. That the Claimant's act in allowing an unauthorized person to drive his Employer's truck constituted an impermissible deviation from his duties, and therefore, the accident did not arise out of the course and scope of his duties.
>
> 5. That the Claimant's injuries to his left lower extremity, right arm, and neck did not occur in the

> course and scope of employment on August 23, 2003, and he is therefore not entitled to benefits under the South Carolina Workers' Compensation Act.

The appellate panel announced its conclusions of law:

> 1. Under S.C. Code Ann. § 42-1-160, the Claimant did not sustain an injury by accident arising out of and in the course of his employment.
>
> 2. That the Claimant's actions deviated outside the course and scope of employment by using a company vehicle in an inappropriate and unauthorized manner. Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971).

The circuit court issued an order affirming the appellate panel's denial of benefits. The circuit court denied Claimant's motion to alter or amend judgment pursuant to Rule 59, SCRCP.

ISSUES

1. Does substantial evidence support the appellate panel's finding that Claimant allowed an unauthorized person to drive the Employer's dump truck which resulted in an impermissible deviation from his duties?

2. Did the circuit court and appellate panel commit an error of law in determining Claimant did not sustain an injury by accident arising out of and in the course of his employment?

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of a decision of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005); Hargrove v. Titan

Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Pursuant to the APA, an appellate court's review is limited to deciding whether the full commission's decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006).

I. Substantial Evidence Standard

The judicial review of the appellate panel's factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002); Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5)(d)(e) (Supp. 2006); see also Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881 (Ct. App. 2006). However, a reviewing court may reverse or modify a decision of the appellate panel if the findings, inferences, conclusions, or decisions of the panel are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006); Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004), aff'd, 369 S.C. 176, 631 S.E.2d 899 (2006).

It is not within the appellate court's province to reverse the appellate panel's factual findings if they are supported by substantial evidence. Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002) (citing Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991)); Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591

(Ct. App. 1999). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 417, 586 S.E.2d 111, 113 (2003); Brown v. Greenwood Mills, Inc., 366 S.C. 379, 392, 622 S.E.2d 546, 554 (Ct. App. 2005); Broughton v. South of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; Smith v. NCCI Inc., 369 S.C. 236, 247, 631 S.E.2d 268, 274 (Ct. App. 2006); DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004).

The appellate panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. Isochem, 365 S.C. at 468, 617 S.E.2d at 376; Frame, 357 S.C. at 528, 593 S.E.2d at 495; Muir, 336 S.C. at 281, 519 S.E.2d at 591. The final determination of witness credibility and the weight assigned to the evidence is reserved to the appellate panel. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Frame, 357 S.C. at 528, 593 S.E.2d at 495. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive. Brown, 366 S.C. at 393, 622 S.E.2d at 554; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681; see also Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the [appellate panel] are conclusive.").

The findings of the appellate panel are presumed correct and will be set aside only if unsupported by substantial evidence. Kenco Group, 366 S.C. at 458, 622 S.E.2d at 581; Frame, 357 S.C. at 528, 593 S.E.2d at 495; Broughton, 336 S.C. at 496, 520 S.E.2d at 637. The appellate court is prohibited from overturning findings of fact of the appellate panel unless there is no reasonable probability the facts could be as related by the witness

upon whose testimony the finding was based. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 611 S.E.2d 297, 301, 363 S.C. 612, 621 (Ct. App. 2005); Hargrove, 360 S.C. at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455-56, 562 S.E.2d at 681. The appellate panel's factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); Muir, 336 S.C. at 282, 519 S.E.2d at 591; Sharpe v. Case Produce Co., 329 S.C. 534, 543, 495 S.E.2d 790, 794 (Ct. App. 1997), rev'd on other grounds, 336 S.C. 154, 519 S.E.2d 102 (1999).

II. Errors of Law

An appellate court may reverse or modify the decision of the appellate panel if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law. S.C. Code Ann. § 1-23-380(A)(5)(d) (Supp. 2006); Porter v. Labor Depot, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007), cert. denied, Dec. 5, 2007; Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005); Pratt v. Morris Roofing, Inc., 353 S.C. 339, 344, 577 S.E.2d 475, 477 (Ct. App. 2003), aff'd as modified, 357 S.C. 619, 594 S.E.2d 272 (2004).

Section 14-3-330 of the South Carolina Code (Supp. 2006) vests the South Carolina Supreme Court with "appellate jurisdiction for correction of errors of law in law cases . . . ." Citing both section 14-3-330 and South Carolina Constitution, article V, section 5, the supreme court has held an appellate court may decide novel questions of law with "no particular deference to the lower court." Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 656 (2006); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). Section 14-8-200(a) of the South Carolina Code (Supp. 2006) provides the Court of Appeals "shall apply the same scope of review that the Supreme Court would apply in a similar case."

An appellate court's review of factual findings in a workers' compensation case is governed and controlled by the substantial evidence rule. However, an appellate court freely and absolutely reviews a trial court's decision concerning an issue of law. See Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (Ct. App. 2005) ("[W]here the Commission's decision is controlled by an error of law, this court's review is plenary."). No passivity or complaisance is owed or given to the ruling of the appellate panel or circuit judge in this context. The highly deferential standards statutorily and universally applied in reviewing issues of fact, such as the "clearly erroneous" and the "manifest error" standards, have no efficacy in regard to an issue of law. "The South Carolina Court of Appeals exercises freedom and independence in deciding an issue of law in a workers' compensation case." Thompson ex rel. Harvey v. Cisson Const. Co., 659 S.E.2d 171 (Ct. App. 2008).

LAW / ANALYSIS

"The South Carolina Workers' Compensation Act requires that, to be compensable, an injury by accident must be one 'arising out of and in the course of employment.'" Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998). See also S.C. Code Ann. § 42-1-160 (Supp. 2007); Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007); Hall v. Desert Aire, Inc., 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007). "Although the requirements are somewhat overlapping, they are not sysonymous and both must exist simultaneously to allow the claimant to recover workers' compensation benefits." Hall, 376 S.C. at 349, 656 S.E.2d at 758.

The question of whether an injury arises out of and is in the course and scope of employment is largely a question of fact for the Workers' Compensation Commission's appellate panel. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 638 (Ct. App. 1999). The claimant has the burden of proving facts that will bring the injury within the workers' compensation law. Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 518, 526 S.E.2d 725, 729 (Ct. App. 2000); accord Clade v.

Champion Laboratories, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998); Sola v. Sunny Slope Farms, 244 S.C. 6, 10, 135 S.E.2d 321, 324 (1964).

I. "Arising Out Of"

The phrase "arising out of" in the Workers' Compensation Act refers to the injury's origin and cause. Osteen, 333 S.C. at 50, 508 S.E.2d at 24; Baggott v. Southern Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998). For an injury to "arise out of" employment, the injury must be proximately caused by the employment. Osteen, 333 S.C. at 50, 508 S.E.2d at 24. See also Fowler v. Abbott Motor Co., 236 S.C. 226, 230, 113 S.E.2d 737, 739 (1960) (accident "arises out of" employment when it arises because of it, as when the employment is a contributing proximate cause). "It must be apparent to the rational mind, considering all the circumstances, that a causal relationship exists between the conditions under which the work is performed and the resulting injury." Hall, 376 S.C. at 350, 656 S.E.2d at 759 (citing Smith v. NCCI, Inc., 369 S.C. 236, 253, 631 S.E.2d 268, 277 (Ct.App.2006); Broughton v. South of the Border, 336 S.C. 488, 497, 520 S.E.2d 634, 638 (Ct.App.1999)). In Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 173 (1965), our supreme court discussed the "arising out of" requirement:

> It (the injury) arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the

> workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Id., 245 S.C. at 269, 140 S.E.2d at 175 (quoting Eargle v. S.C. Elec. & Gas Co., 205 S.C. 423, 429-30, 32 S.E.2d 240, 242-43 (1944); In re Employers' Liability Assur. Corp., 102 N.E. 697, 697 (Mass. 1913)).

II. "In the Course of the Employment"

The phrase "in the course of the employment" refers to the time, place, and circumstances under which the accident occurred. Owings v. Anderson County Sheriff's Dep't, 315 S.C. 297, 433 S.E.2d 869 (1993); Loges v. Mack Trucks, Inc., 308 S.C. 134, 417 S.E.2d 538 (1992); Hall, 376 S.C. at 349, 656 S.E.2d at 758; Gray v. Club Group, Ltd., 339 S.C. 173, 187, 528 S.E.2d 435, 443 (Ct. App. 2000). An injury occurs "in the course of" employment within the meaning of the Workers' Compensation Act when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto. Baggott, 330 S.C. 1, 496 S.E.2d 852; Fowler, 236 S.C. 226, 113 S.E.2d 737; Broughton, 336 S.C. at 498, 520 S.E.2d at 639.

III. Impermissible Deviation

In Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971), an employee was assigned to take several co-workers home after work. "Instead of doing so, he took them on an extensive joy ride. During the course of this jaunt some intoxicants were consumed while stops were made at two houses,

two night clubs and, finally, at a restaurant several miles out Farrow Road at about 5:45 A.M." Id. at 440, 179 S.E.2d at 600. While the employee was driving back to Columbia to take the co-workers home, the vehicle was involved in a fatal accident. Id.

The supreme court articulated:

> The only reasonable inference from the facts which have been stated is that almost immediately upon driving away from his employer's place of business, Dickerson forsook the task assigned to him and embarked upon the pursuit of his own ends. It is abundantly clear that while thus engaged he was not conducting his employer's business within the meaning of the [workers' compensation] statute.

Id. at 441, 179 S.E.2d at 600.

The appellate panel correctly applied Boykin to the facts of this case when concluding "Claimant's actions deviated outside the course and scope of employment by using a company vehicle in an inappropriate and unauthorized manner."

In Brownlee v. Wetterau Food Services, 288 S.C. 82, 339 S.E.2d 694 (Ct. App. 1986), this Court held that an employee who died in an automobile accident while out of town on business was not acting within the scope of and in the course of his employment at the time of death. Brownlee, who worked out of the employer's North Charleston office, was sent to St. Louis, Missouri to attend a training seminar. Id. at 84, 339 S.E.2d at 695. The seminar began each day around 7:00 a.m. and ended at 10:00 p.m. Id. Everyone attending the seminar from out of town roomed at the motel where all of the seminar activities took place. Id.

The accident occurred at 1:55 a.m., apparently when the employee and several other seminar attendees were returning from watching a movie. Id. The movie was an outing planned by Brownlee and other attendees after the

end of the seminar's daily events. Id. Because the accident occurred some distance from the motel and several hours after the last scheduled seminar event had ended, we held: "there is substantial evidence Brownlee died while engaged in an outing that occurred after work, away from the premises of his employer, and at a time when his employer exercised no control over his activities." Id. at 85, 339 S.E.2d at 695.

The present case can be distinguished from Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007). In Hall, the employee and another individual went for a jeep ride after a dinner party where alcohol was consumed. Id. at 345, 656 S.E.2d at 756-57. The employer regularly paid for entertainment, including alcohol, which was common practice for the industry. Id. The evidence indicated that the discussions at the dinner party were strictly related to the employer's business, and the two intended on continuing their business discussions in the jeep. Id. The jeep overturned approximately 300 yards from where the ride started, wounding Hall and killing the driver. Id.

This Court determined:

> Pellucidly, the evidentiary record exuberates that Hall was engaged in ongoing discussions regarding planning for sales activities on behalf of Desert Aire at the time of the accident. The accident occurred within the period of employment, at a place where Hall was reasonably in the performance of his duties and was fulfilling those duties or engaged in activities incidental to that employment. Like the claimants in Beam, Hall was not exercising a personal privilege wholly apart from Desert Aire's interests. Rather, Hall's ongoing business discussion with Brunner was an act, incidental to and recognized as beneficial by Desert Aire in connection with Hall's duties as national sales manager. . . .

> We hold substantial evidence supports the factual finding that Hall's injury arose out of and in the course of employment with Desert Aire, illatively satisfying the legal standard for compensability under section 42-1-160 of the South Carolina Code of Laws.

Id. at 360-61, 656 S.E.2d at 764-65 (citing Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 200 S.E.2d 83, (1973)).

The case sub judice differs from Hall, where Hall was advancing his employer's interests by discussing business on the jeep ride. Although the parties in the present case dispute whether Claimant was authorized to train Brown and allow her to drive the truck, there is substantial evidence to support the appellate panel's finding that Brown was not authorized to drive the truck. By allowing Brown to drive, Claimant deviated from the task he was assigned to do: haul asphalt from a plant to a road construction site. The deviation resulted in an accident that injured him, and thus, Claimant's injuries did not arise out of and in the course of his employment with Deloach & Deloach.

CONCLUSION

The factual findings of the appellate panel are presumed correct and will only be set aside if unsupported by substantial evidence. Rodney v. Michelin Tire Corp., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996). We rule there is substantial evidence to support the factual finding that allowing Brown to drive the dump truck was an impermissible deviation from Claimant's duties. We hold Claimant's injuries did not arise out of and in the course of his employment. We place our imprimatur upon the rulings of law by the appellate panel and the circuit court.

Accordingly, the order of the circuit court is

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State of South Carolina, Appellant,

v.

Reginald Craig Sweat, Respondent.

The State of South Carolina, Appellant,

v.

Arthur Bryant, III, Respondent.

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

Opinion No. 4409
Heard June 3, 2008 – Filed June 10, 2008

AFFIRMED

Charles H. Sheppard and Rachel D. Erwin, both of Blythewood, for Appellant.

Richard L. Pearce, of Aiken, for Respondents.

Danny C. Crowe and R. Hawthorne Barrett, both of Columbia, for Amicus Curiae Municipal Association of South Carolina.

ANDERSON, J.: The State appeals the dismissal of convictions of Reginald Craig Sweat and Arthur Bryant, III, for exceeding the statutory maximum gross vehicle weight. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On February 14, 2006, Reginald Craig Sweat, a sanitation truck driver for the City of Aiken, was stopped and cited by a State Transport Police (hereafter STP) officer for exceeding the allowable gross vehicle weight for the 2005 Sterling Model LT9500, three-axle sanitation truck he was driving. The citation alleges the vehicle weighed 57,100 pounds. The officer claimed the allowable weight was 50,600 pounds, calculated as 46,000 pounds plus a ten percent scale tolerance of 4,600 pounds.

On April 10, 2006, a different STP officer cited Arthur Bryant, III, another driver for the City of Aiken, for driving the same sanitation truck in excess of the allowable gross vehicle weight. On this occasion, the truck weighed 56,900 pounds. The officer noted the allowable weight as 50,600 pounds.

A trial was held before an Aiken County Magistrate. The State and Respondents stipulated to the facts of the case. The drivers made a motion to dismiss both tickets alleging South Carolina Code Section 56-5-4140 permits them to operate the city's sanitation truck at a maximum gross vehicle weight of 66,000 pounds, i.e., a higher gross vehicle weight than the actual vehicle weight shown on the two citations. The magistrate issued two separate orders finding each driver guilty of violating the gross vehicle weight statute. The orders do not contain findings of fact or conclusions of law.

The drivers appealed their convictions to the Court of Common Pleas. The circuit court reversed the magistrate's orders and remanded the cases for entry of a not guilty verdict. The court's order articulates:

> S.C. Code Section 56-5-4140 contains several sections which set forth the weight limits of trucks driving on South Carolina roads that are not in the interstate highway system.
>
> Under Section 56-5-4140(1)(a)(2), the general weight limit provision, the gross weight for vehicles equipped with three axles is 46,000 pounds.
>
> Several exceptions to this general rule for gross vehicle weights exist under this statute, however.
>
> Under Section 56-5-4140(1)(b) trucks with three axles spaced 32 feet in any consecutive group allow the gross vehicle weight to top out at 60,000 pounds.
>
> Another excepted group of trucks appears in Section 56-5-4140(2)(a). Under this provision, trucks designated and constructed for special type work—*and the state* [sic] *has stipulated the City of Aiken garbage truck is such a truck*—are exempted from any axle spacing requirements, are limited to a maximum gross weight of 20,000 pounds per axle *plus scale tolerances*.
>
> Under S.C. Code Section 56-5-4160, scale tolerances are set at ten percent.
>
> Photos introduced to Magistrate Neal and this Court show the garbage truck to have three axles. A review of the tickets issued to Appellants show that the vehicle weights for Sweat's driving to have been 15,500 pounds for axle 1 and 41,600 pounds for axle 2 and 3 in total. When Bryant drove the truck, it weight [sic] in at 15,300 for axle 1; 21,200 for axle 2; and 20,400 for axle 3.

> All of these weights were well within the statutorily-set maximum weight per axle of 22,000 pounds.
>
> The State's position that only the general provision under Section 56-5-4140(1)(a)(2) apply to this truck is misplaced.
>
> To adopt the State's reading of this statute would contravene state law of statutory interpretation. When reviewing a statute, this Court must follow specific provisions over general language in the statute.
>
> In these present cases, applying the specific statutory provisions allow for a garbage truck, as a vehicle constructed for a special type of work, means it can weigh in at up to 22,000 pounds per axle. Both Appellants were well within these limits as appears from the uncontraverted [sic] evidence in this record.

In the order denying the State's motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, the circuit court reiterated and further explained the reasoning of its prior order:

> Respondent has stipulated that the City of Aiken garbage truck driven by these two Appellants is a truck ". . . designed and constructed for special type work . . ." under the provisions of Section 56-5-4140(2)(a), S.C. Code Ann. (2005).
>
> Trucks subject to this exception to the state gross vehicle weight limits are not required to follow the axle spacing requirements of 56-5-4140(b). Furthermore, these specially-built trucks also are allowed a weight of 20,000 pounds per axle, plus a 10% scale tolerance, not to exceed the maximum weight allowed by this section for the appropriate number of axles, irrespective of the spacing distance between axles, plus allowable scale tolerances. See 56-5-4140(2)(a) and table contained in 56-5-4140(1)(b).

In one instance, this truck driven by Sweat, with a single axle under the cab, and a tandem axle under its payload, weighed a total of 57,100 pounds [15,500 for the cab axle plus 41,600 lbs for payload axles]. When driven by Arthur Bryant, III, this truck weighed a total of 56,900 pounds [15,300 cab axle plus 41,600 for payload axles]. In both instances, the truck was well below the statutory maximum gross vehicle weight for a three-axle, specially built truck under 56-5-4140(2)(a):

20,000 lbs for each axle X three axles:	60,000 pounds
PLUS	
Scale tolerances of 10% (56-5-4160(A)): for each axle X three axles	6,000 pounds
TOTAL ALLOWABLE GROSS WEIGHT FOR THIS SPECIALLY-BUILT TRUCK:	66,000 pounds

Section 56-5-4140(2)(a) is the applicable specific statutory exception to the general gross weight limits contained in 56-5-4140(1)(a)(2). Therefore, charging these two drivers with purportedly exceeding allowable gross vehicle weights at readings of 57,100 and 56,900 pounds was improper and their convictions cannot stand.

STANDARD OF REVIEW

The issue of interpretation of a statute is a question of law for the court. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); see also Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007), cert. denied, Oct. 1, 2007; Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

Section 14-3-330 of the South Carolina Code (Supp. 2006) vests the South Carolina Supreme Court with "appellate jurisdiction for correction of errors of law in law cases. . . ." Section 14-8-200(a) of the South Carolina

Code (Supp. 2007) provides the Court of Appeals "shall apply the same scope of review that the Supreme Court would apply in a similar case." Citing both section 14-3-330 and South Carolina Constitution, article V, section 5, the supreme court has held an appellate court may decide novel questions of law with "no particular deference to the lower court." Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 656 (2006); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000); Thompson ex rel. Harvey v. Cisson Const. Co., 659 S.E.2d 171, 179 (Ct. App. 2008).

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. In such cases, the appellate court is not required to defer to the trial court's legal conclusions." Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 242, 597 S.E.2d 165, 167 (Ct. App. 2004) (quotation and citation omitted). When addressing novel question of law, the appellate court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the court's sense of law, justice, and right. Croft v. Old Republic Ins. Co., 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005).

In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000). The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). In Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003), our supreme court stated:

> We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation.

Id. (Citation omitted).

LAW/ANALYSIS

I. Statutory Construction

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002); see also Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT & T Commc'ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582.

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994); Jones v. State Farm Mut. Auto Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 723 (Ct. App. 2005). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); Worsley Cos. v. S.C. Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001); Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739. See also Shealy v. Doe, 370 S.C. 194, 199-200, 634 S.E.2d 45, 48 (Ct. App. 2006).

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the

statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; Brassell, 326 S.C. at 561, 486 S.E.2d at 495; City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 376, 498 S.E.2d 894, 896 (Ct. App. 1998). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002); Adams v. Texfi Indus., 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494.

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. See Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005); see also Georgia-Carolina Bail Bonds, 354 S.C. at 22, 579 S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."). The real purpose and intent of the lawmakers will prevail over the literal import of the words. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. See Liberty Mut. Ins. Co., 363 S.C. at 622, 611 S.E.2d at 302; see also Mid-State Auto Auction v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (stating that in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole).

When interpreting a statute, courts must presume the legislature did not intend to do a futile act. Proctor v. Dep't of Health and Envtl. Control, 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct. App. 2006). The legislature is presumed to intend that its statutes accomplish something. State v. Long, 363

S.C. 360, 364, 610 S.E.2d 809, 812 (2005). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. Statutes § 346). See also Pike v. S.C. Dep't of Transp., 332 S.C. 605, 618, 506 S.E.2d 516, 523 (Ct. App. 1998), aff'd as modified, 343 S.C. 224, 540 S.E.2d 87 (2000).

II. Section 56-5-4140

Section 56-5-4140 addresses the maximum gross weight of vehicles. It states:

> (1)(a) The gross weight of a vehicle or combination of vehicles, operated or moved upon any interstate, highway or section of highway shall not exceed:
>
> (1) Single-unit vehicle with two axles ..... 35,000 lbs.
> (2) Single-unit vehicle with three axles ..... 46,000 lbs.
> (3) Single-unit vehicle with four axles ..... 63,500 lbs.
> Except, on the interstate, vehicles must meet axle spacing requirements and corresponding maximum overall gross weights, not to exceed 63,500 lbs., in accordance with the table in (b) plus tolerances.
> (4) Single unit vehicle with five or more axles ..... 65,000 lbs.
> Except, on the interstate, vehicles must meet axle spacing requirements and corresponding maximum overall gross weights, not to exceed 65,000 lbs., in accordance with the table in (b) plus tolerances.
> (5) Combination of vehicles with three axles ..... 50,000 lbs.
> (6) Combination of vehicles with four axles ..... 65,000 lbs.
> (7) Combination of vehicles with five or more axles ..... 73,280 lbs.
>
> The gross weight imposed upon any highway or section of highway other than the interstate by two or more consecutive

axles in tandem articulated from a common attachment to the vehicle and spaced not less than forty inches nor more than ninety-six inches apart shall not exceed thirty-six thousand pounds, and no one axle of any such group of two or more consecutive axles shall exceed the load permitted for a single axle. The load imposed on the highway by two consecutive axles, individually attached to the vehicle and spaced not less than forty inches nor more than ninety-six inches apart, shall not exceed thirty-six thousand pounds and no one axle of any such group of two consecutive axles shall exceed the load permitted for a single axle.

The ten percent enforcement tolerance specified in Section 56-5-4160 applies to the vehicle weight limits specified in this section except, the gross weight on a single axle operated on the interstate may not exceed 20,000 pounds, including all enforcement tolerances; the gross weight on a tandem axle operated on the interstate may not exceed 35,200 pounds, including all enforcement tolerances; and the overall gross weight for vehicles operated on the interstate may not exceed 75,185 pounds, including all enforcement tolerances except as provided in (b).

(b) Vehicles with an overall maximum gross weight in excess of 75,185 pounds may operate upon any highway or section of highway in the Interstate System up to an overall maximum of 80,000 pounds in accordance with the following:

The weight imposed upon the highway by any group of two or more consecutive axles may not, unless specially permitted by the Department of Public Safety exceed an overall gross weight produced by the application of the following formula:

$$W = 500 (LN/N-1 + 12N + 36)$$

In the formula W equals overall gross weight on any group of two or more consecutive axles to the nearest 500 pounds, L

equals distance in feet between the extreme of any group of two or more consecutive axles, and N equals number of axles in the group under consideration.

As an exception, two consecutive sets of tandem axles may carry a gross load of 68,000 pounds if the overall distance between the first and last axles of the consecutive sets of tandem axles is 36 feet or more. The formula is expressed by the following table:

Distance in feet between the extremes of any group of 2 or more consecutive axles	Maximum load in pounds carried on any group of 2 or more consecutive axles					
	2 axles	3 axles	4 axles	5 axles	6 axles	7 axles
4	35,200					
5	35,200					
6	35,200					
7	35,200					
8 and less	35,200	35,200				
more than 8	38,000	42,000				
9	39,000	42,500				
10	40,000	43,500				
11		44,000				
12		45,000	50,000			
13		45,500	50,500			
14		46,500	51,500			
15		47,500	52,000			
16		48,000	52,500	58,000		
17		48,500	53,500	58,500		
18		49,500	54,000	59,000		
19		50,500	54,500	60,000		
20		51,000	55,500	60,500	66,000	
21		51,500	56,000	61,000	66,500	

22	52,500	56,500	61,500	67,000	
23	53,000	57,500	62,500	68,000	
24	54,000	58,000	63,000	68,500	74,000
25	54,500	58,500	63,500	69,000	74,500
26	55,500	59,500	64,000	69,500	75,000
27	56,000	60,000	65,000	70,000	75,500
28	57,000	60,500	65,500	71,000	76,500
29	57,500	61,500	66,000	71,500	77,000
30	58,500	62,000	66,500	72,000	77,500
31	59,000	62,500	67,500	72,500	78,000
32	60,000	63,500	68,000	73,000	78,500
33		64,000	68,500	74,000	79,000
34		64,500	69,000	74,500	80,000
35		65,500	70,000	75,000	
36		68,000	70,500	75,500	
37		68,000	71,000	76,000	
38		68,000	71,500	77,000	
39		68,000	72,500	77,500	
40		68,500	73,000	78,000	
41		69,500	73,500	78,500	
42		70,000	74,000	79,000	
43		70,500	75,000	80,000	
44		71,500	75,500		
45		72,000	76,000		
46		72,500	76,500		
47		73,500	77,500		
48		74,000	78,000		
49		74,500	78,500		
50		75,500	79,000		
51		76,000	80,000		
52		76,500			
53		77,500			
54		78,000			
55		78,500			
56		79,500			
57		80,000			

(2) Except on the interstate highway system:

(a) Dump trucks, dump trailers, trucks carrying agricultural products, concrete mixing trucks, fuel oil trucks, line trucks, and trucks designated and constructed for special type work or use are not required to conform to the axle spacing requirements of this section. However, the vehicle is limited to a weight of twenty thousand pounds for each axle plus scale tolerances and the maximum gross weight of these vehicles may not exceed the maximum weight allowed by this section for the appropriate number of axles, irrespective of the distance between axles, plus allowable scale tolerances.

(b) Concrete mixing trucks which operate within a fifteen-mile radius of their home base are not required to conform to the requirements of this section. However, these vehicles are limited to a maximum load of the rated capacity of the concrete mixer, the true gross load not to exceed sixty-six thousand pounds. All of these vehicles shall have at least three axles each with brake-equipped wheels.

(c) Well-drilling, boring rigs, and tender trucks are not required to conform to the axle spacing requirements of this section. However, the vehicle is limited to seventy thousand pounds gross vehicle weight and twenty-five thousand pounds for each axle plus scale tolerances.

S.C. Code Ann. § 56-5-4140 (2006).

Section 56-5-4160(A) states, in part: "In determining whether the limits established by Section 56-5-4130 or 56-5-4140 have been exceeded, the scaled weights of the gross weight of vehicles and combinations of vehicles are considered to be not closer than ten percent to the true gross weight, except as otherwise provided in Section 56-5-4140." S.C. Code Ann. § 56-5-4160(A) (Supp. 2007).

The State has conceded that the drivers were operating "trucks designated and constructed for special type work" as defined in subsection (2)(a) of section 56-5-4140. The only remaining question is how to interpret the language of this subsection. It permits special use trucks to weigh 20,000 pounds per axle plus the ten percent scale tolerance. This totals 22,000 pounds per axle or 66,000 total pounds for three-axle vehicles such as the sanitation truck at issue here. This is the only reasonable way to interpret this language.

The State focuses on the second part of subsection (2)(a) and argues it incorporates the general standard of subsection (1)(a). The State's position is incorrect because it would render subsection (2)(a) meaningless. If we accepted the State's interpretation, the maximum allowable weight for a three-axle vehicle would be 46,000 pounds plus scale tolerances totaling 50,600 pounds, regardless of the special use exception found in subsection (2)(a). The State's interpretation strips the special use vehicle exception of any real force or meaning. Under the State's theory, the general rule in (1)(a) would always apply and the exception in (2)(a) would be pointless. The General Assembly obviously intended the exception to have some efficacy, or the legislature would not have enacted it into law.

The circuit court's interpretation properly honors and harmonizes both subsections. Subsection (1)(a) sets the general per-axle standard for vehicles in South Carolina. Subsection (2)(a) provides a different standard for specific types of vehicles when they are not operated on the interstate highway system. Subsection (2)(a) does precisely what an exception is intended to do: it identifies a category to which the general rule does not apply. The court's interpretation recognizes the common interplay between general rules and their statutorily created exceptions.

The State overlooks the fact that subsection (2)(a) carves out an exception that applies only to certain specified types of vehicles, but an understanding of this point is vital to a proper reading of the statute. The State's interpretation raises the question: why have subsection (2)(a) at all if subsection (1)(a) always controls? The answer is that subsection (2)(a) exists to create a different weight allowance for "trucks designated and constructed for special type work." Neither subsection "controls" the other. They work

together to set forth the different standards for regular and special use vehicles. This is the only way to harmonize the two subsections and give effect to both. Under the rules of statutory interpretation, it was proper and indeed necessary for the circuit court to do so.

The State focuses on a perceived inconsistency in the use of the words "this section" in subsection (2)(a). According to the State, the phrase "maximum weight allowed by this section" can only be a reference back to the general standard of subsection (1)(a). We rule that the phrase "this section" refers to section 56-5-4140 as a whole. This includes subsection (1)(b), which presents a formula for increased weight allowances based on the number of axles and the distances between them. The maximum allowable weight for a three-axle vehicle under subsection (1)(b) is 80,000 total pounds. This is the largest allowable weight found anywhere in section 56-5-4140.

When one reads the phrase "this section" in the clause ". . . and the maximum gross weight of these vehicles may not exceed the maximum weight allowed by this section for the appropriate number of axles, irrespective of the distance between axles, plus allowable scale tolerances" in subsection (2)(a) to refer to the entire section of the Code, a clear and consistent meaning emerges. Special use vehicles can exceed the general rule requirements of subsection (1)(a), but the exception in no event allows those vehicles to surpass the maximum figures found in subsection (1)(b). The legislature used the additional clause in subsection (2)(a) simply to clarify this point.

The State's interpretation honors only subsection (1)(a), leaving subsection (2)(a) without any force. In affirming the circuit court's order, we find all three subsections coexist, each serving specific, complementary functions.

Had the legislature intended subsection (2)(a) to be an exception only as to tandem axle vehicles, as the State advances, the General Assembly could have easily included language expressly limiting the nature of the exception contained in subsection (2)(a). The statute is lacking any such verbiage.

It is true that agencies charged with enforcing statutes usually receive deference from the courts as to their interpretation of those laws. Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). Yet where "the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." Id. (citing Brown v. S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002); Richland Co. Sch. Dist. Two v. S.C. Dep't of Educ., 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999)). In this case, the State is not entitled to any deference in its interpretation because the plain language of section 56-5-4140(2)(a) refutes the State's position. The circuit court was not bound to accept the State's interpretation of the statute. This Court is free to read the statute based on its plain language without deference to the State's position.

The circuit court properly interpreted section 56-5-4140 based on the clear wording of the statute. By its express terms, subsection (2)(a) allows special use vehicles like the one involved in these cases to weigh up to 22,000 pounds per axle. This is an intentional exception to the general rule of subsection (1)(a). Subsection (1)(b), and not the general rule, provides the overall maximum weight limitations for special use vehicles. This interpretation honors the plain meaning of the statute, and it gives force and effect to all the subsections. The State's proposed interpretation, which elevates subsection (1)(a) over all others and effectively renders subsection (2)(a) meaningless, flies in the face of the plain language of the statute.

III. Public Policy

The State's claim that the circuit court's interpretation of the statute would allow for grossly overweight vehicles is without merit. According to the State, reading subsection (2)(a) as allowing up to 22,000 pounds per axle would lead to vehicles in excess of 100,000 pounds on South Carolina's roads. The State has not demonstrated that affirming the circuit court will adversely affect the state's roads or public safety. The State's argument overlooks subsection (1)(b). This subsection establishes a maximum total weight for all vehicles, including special use vehicles like the one involved in this case. The special use exception in subsection (2)(a) references and incorporates the statute's overall weight limitations. The maximum total

weight in subsection (1)(b) is 80,000 pounds. With the ten percent scale tolerance, the maximum weight of a vehicle on South Carolina's roads is 88,000 pounds. This puts to rest the State's fears of trucks weighing more than 100,000 pounds on South Carolina's roads. The State is able to cite drivers of vehicles over 88,000 pounds under the circuit court's interpretation of the statute.

To the extent any policy considerations are implicated, they support the circuit court's ruling. The legislature obviously determined there was a legitimate reason to create separate, higher weight allowances for special use vehicles. One purpose for this special category is to permit larger loads in order to limit the trips these vehicles are required to make. The State's interpretation would prevent sanitation trucks from hauling full loads and require them to make more trips to and from the landfill. This would result in increased fuel costs passed on to the taxpayers. The legislature recognized that sanitation trucks and other special use vehicles are designed and built to handle heavier loads safely to reduce the number of trips per truck.

There is nothing in the statute to indicate the legislature intended to place the standard limitations on sanitation trucks and other special use vehicles. The existence of the special use exception suggests the legislature wanted to achieve the opposite result. The circuit court's decision honors that goal.

CONCLUSION

The position articulated by the State in regard to the body of the statute and the exception is quintessential academic statutory colliquefaction. The conflation of the base of the statute and the exception emasculates the separate efficacy intended by the General Assembly in adding the exception.

Accordingly, the order of the circuit court is

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Estate of Beatrice K. Carr by and through Beatrice Sue Bolton, Personal Representative, Appellant,

v.

Circle S Enterprises, Inc. d/b/a Newberry Auto Mart, Respondent.

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

Opinion No. 4410
Heard May 7, 2008 – Filed June 10, 2008

REVERSED

Paul A. James, of N. Charleston and Paula Howker Amick, of Columbia, for Appellant.

Karl S. Brehmer and L. Darby Plexico, III, both of Columbia, for Respondent.

PIEPER, J.: The Estate of Beatrice K. Carr (Estate) appeals the trial court's order granting the motion for directed verdict by Circle S Enterprises, Inc. d/b/a Newberry Auto Mart, (the Dealership). The Estate argues the trial court erred in granting a directed verdict in favor of the Dealership on the following grounds: (1) the motion for a directed verdict was improperly postured; (2) the Estate suffered damages as a result of the Dealership s conduct; and (3) there was sufficient evidence for submission of the various causes of action to the jury. We reverse.

FACTS

In late September 2000, Linda Carr (Linda) was in the market to buy an automobile. Linda, her mother Beatrice Carr (Beatrice), and the rest of her family went to the Dealership to purchase a vehicle for Linda. While negotiating for the purchase of a 1999 Chrysler Sebring convertible with the Dealership's salesman, it was brought to Linda and Beatrice's attention that they would receive a more favorable interest rate on their loan if the vehicle was purchased in Beatrice's name as opposed to Linda's name. Accordingly, Beatrice agreed to allow the vehicle to be purchased under her name and signed a retail installment contract and security agreement with the financing company, Firstar Financial Services (Firstar), for the financing of the vehicle.[1] The amount financed was $15,751.49 and monthly payments on the loan came to $334.09. Each of the first 41 monthly payments included $29.00 to pay for credit life and disability insurance, which Linda testified the Dealership required in order for the sale to be completed in Beatrice's name. The total cost of the proposed insurance coverage came to $1,543.49.

On June 1, 2003, Beatrice, at age eighty-one, passed away. After her mother's death, Linda stopped making the payments on the note under the assumption that the credit life insurance would apply and pay off the note. Upon discovering that the note had not been paid, Linda contacted the Dealership which, after numerous attempts to justify the misapplication of the premiums, eventually informed her that Beatrice had been too old to qualify for the insurance; the Dealership proceeded as if the coverage had never been

[1] Firstar subsequently sold the note to U.S. Bank.

purchased. The Dealership thereafter refunded the insurance premiums plus 6% interest from the date of the sale to the Estate. However, at this point, the note was past due and the vehicle had been repossessed.

The only beneficiaries under Beatrice's last will and testament were Linda's daughter, Deborah S. Carr, and Linda's sister, Beatrice Sue Bolton (Mrs. Bolton). Mrs. Bolton was the personal representative for the Estate. She filed the original inventory and appraisement on February 3, 2005, without mention of the 1999 Sebring as an asset of the Estate, the potential civil claim against the Dealership, or the debt owed to Firstar/US Bank. Mrs. Bolton reopened the Estate in August of 2006, after this claim was filed, to account for the action against the Dealership.

The Estate filed a Summons and Complaint on January 18, 2005, alleging breach of contract, conversion, negligence, violation of the South Carolina Unfair Trade Practices Act (hereinafter SCUTPA), and violations of the Regulation of Manufacturers, Distributors, and Dealers Act (hereinafter Dealers Act). Ultimately, the case was called for trial before a jury on February 5, 2007, in the Newberry County Court of Common Pleas. At the close of all evidence, the trial court granted the Dealership's motion for a directed verdict. The trial judge stated "there's no evidence that the Estate has suffered any loss or has been damaged in any way on the specific causes. . . . I also find there's insufficient evidence to show a violation of the Dealers Act . . . and the same thing with unfair trade practice." This ruling on the record was solemnized by a written form order stating "Court Directed Verdict Against Plaintiff." The Estate thereafter filed and served this notice of appeal on February 26, 2007.

STANDARD OF REVIEW

In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). However, this rule does not authorize submission of

speculative, theoretical, or hypothetical views to the jury. Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006). In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor. Harvey v. Strickland, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002); Proctor at 293, 628 S.E.2d at 503.

The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Law at 434-35, 629 S.E.2d at 648. When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

LAW/ANALYSIS

First, the Estate argues that the trial court erred in directing a verdict since a motion for a directed verdict was not made by the Dealership at the close of the plaintiff's case. We disagree.

The Estate claims that because the Dealership only made a motion to dismiss at the close of the plaintiff's case, it could not subsequently make a motion for a directed verdict at the close of all the evidence. The Estate is mischaracterizing the motions made by the Dealership. At the close of the plaintiff's case, the Dealership did make a motion to dismiss challenging the Estate's existence at the time the suit was filed. However, immediately thereafter, the Dealership asserted its directed verdict motion as to each of the causes of action. The trial court entertained the request as a directed verdict motion, despite not initially being mentioned by name, and denied the request at that point in the trial. At the close of all evidence, the directed verdict motion was revisited. The Dealership appropriately referred to the motion by claiming entitlement to a directed verdict and the trial judge treated the motion as such in his order by directing a verdict against the Estate. Regardless of the form in which the request for relief was framed, the substance of the relief sought is controlling. Standard Federal Sav. and Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991). The

record is clear that throughout the arguments both counsel and the trial judge understood the motion being entertained was a motion for a directed verdict. Counsel for the Dealership at the close of his final argument stated: "we think that we're entitled to a directed verdict on all causes of action for all the reasons stated." Accordingly, the motion was properly before the court and the judge appropriately treated the motion as a directed verdict motion.

In addition, the Estate failed to contemporaneously object to the trial court treating the motion as one for a directed verdict. Therefore, the matter is not preserved for our review. See In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); Lucas v. Rawl Family Ltd. P'ship., 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

As to the remainder of the Estate's allegations, we must consider whether or not the Estate suffered any damage. The trial judge based his ruling primarily on the conclusion that the Estate suffered no damage. We respectfully find the court erred.

We first note that it was error for the trial court to conclude that the Estate suffered no damage at the directed verdict stage of the trial. "The failure to list an item in the inventory of an estate is not determinative of the title." Gibson v. Belcher, 287 S.C. 315, 318, 338 S.E.2d 330, 332 (1985) (citing Griffith Adm'x. v. Miller, 285 Ky. 675, 149 S.W.2d 11 (1941)). Furthermore, the president of the Dealership admitted the existence of a contract between Beatrice and the Dealership. Beatrice bought the vehicle from the Dealership by arranging for financing through Firstar. Beatrice was therefore the legal owner of the vehicle, although Linda made payments on the vehicle. Therefore, under these circumstances, legal title would remain in Beatrice but we recognize Linda may arguably have a legal or equitable claim because of any payments made.

Since Beatrice was the legal owner of the vehicle, her interest passes to her estate upon her demise. "It has long been the law in South Carolina that

upon the testator's death, title to the personal property vests in the executor." Belcher, 287 S.C. at 318, 338 S.E.2d at 332 (citing Lenoir v. Sylvester, 1 Bail. 632, 17 S.C.L. 632 (1830)).[2] Therefore, we find the Estate would have benefitted had the insurance been obtained and the policy paid, thereby preventing the repossession of the vehicle. The loan in Beatrice's name would have been paid off by those proceeds as an obvious benefit to the Estate in its entirety. The Estate's legal title would only be subject to Linda's equitable or legal interest at that point as opposed to also being subject to Firstar/U.S. Bank's security interest.

Moreover, we find that whether the Dealership is liable for any alleged insurance coverage is a question for the jury. If the jury were to find such liability, that coverage would be an asset of the Estate. See Moultis v. Degen, 279 S.C. 1, 7, 301 S.E.2d 554, 558 (1983) (citing In re Miles Estate, 262 N.C. 647, 138 S.E.2d 487 (1964) (holding that an undistributed insurance policy is an asset of the estate)). There is sufficient evidence in the record to support the claim that the Dealership was obtaining insurance for Beatrice. Generally, one who pays insurance premiums is justified in assuming that payment will bring immediate protection. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 357, 415 S.E.2d 393, 395 (1992). In the case at hand, the insurance premium was paid up front through its inclusion in the financing arrangement thereby evidencing an insurance agreement between the parties; however, we also recognize the existence of contrary contractual language yet cannot resolve these conflicts at the directed verdict stage. The terms of the contract included the offer to secure credit life and disability coverage in exchange for the payment of the premium. The premiums were admittedly received and misapplied. While the Dealership argues that it is not an insurance provider and that it was only offering to obtain quotes for Beatrice, it nonetheless accepted and retained payments for insurance coverage it never obtained for an extensive period of time. The acceptance of these payments at a minimum presents a question as to the existence of a contract as well as a question as to the Dealership's liability for said coverage.

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[2] This concept is currently codified in section 62-3-101 which states that a decedent's personal property "devolves, first, to his personal representative." S.C. Code Ann. § 62-3-101 (Supp. 2007).

Having established that the Estate suffered damage, we now turn to the remainder of the Estate's allegations. First, as to the breach of contract claim, there is sufficient evidence as to the existence of a contract and its breach by the Dealership. Further, sufficient evidence exists in the record for a jury to conclude that the Estate, as legal owner of the automobile, was damaged by the breach of that contract. Second, the Dealership admitted to accepting and retaining the insurance premiums for its own benefit, thereby creating at least an inference that the funds were improperly converted, although eventually returned. Third, as to the negligence cause of action, due to the nature of the relationship between the Dealership and Beatrice, the Dealership had a duty to properly utilize the insurance premiums paid to obtain the proper insurance coverage; otherwise, at a minimum, the Dealership should have indicated that coverage was not obtained. Sufficient evidence exists in the record that such duty was breached and that the breach proximately injured the Estate, thereby warranting the submission of the claim to the jury. The mere fact the Dealership subsequently realized its error and refunded the alleged premiums is not dispositive as to whether the Estate's claims may proceed.

Accordingly, we respectfully find the court erred in directing a verdict as to the causes of action for breach of contract, conversion, and negligence.

The Estate next asserts that the court erred in directing a verdict on its cause of action for a violation of the Dealers Act. The Dealers Act declares certain unfair methods of competition and unfair or deceptive acts or practices to be unlawful. S.C. Code Ann. § 56-15-30(a) (2006). It is a violation of the Dealers Act for any manufacturer or motor vehicle dealer "to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." S.C. Code Ann. § 56-15-40(1) (2006).

Our supreme court has defined the term "arbitrary" for purposes of the Dealers Act to include "acts which are unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone." Taylor v. Nix, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992). Furthermore, our supreme court has defined bad faith as:

> The opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

State v. Griffin, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915) (quoting Black's Law Dictionary).

"The Dealers Act defines 'fraud' to include its 'normal legal connotation' as well as 'misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact.'" deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 263-64, 536 S.E.2d 399, 404 (Ct. App. 2000) (quoting S.C. Code Ann. § 56-15-10(m) (1991)).

To be liable under the Dealers Act, the dealer must participate in the wrongful conduct. Jackson v. Speed, 326 S.C. 289, 302, 486 S.E.2d 750, 756 (1997). "An agent for an entity who makes misrepresentations while attempting to sell a motor vehicle qualifies as a dealer who may be held liable under this act." Id. at 302, 486 S.E.2d at 756. The record contains evidence of misrepresentations by the Dealership. Whether intentional or not, the president of the Dealership admitted to unintentionally offering numerous misleading explanations regarding the ultimate disposition of the insurance premiums. These misrepresentations constitute a sufficient basis to submit the violation of the Dealers Act cause of action to the jury. Accordingly, the trial court erred in granting a directed verdict on this cause of action.

Finally, the Estate claims the trial court erred in directing a verdict on its SCUTPA cause of action. To recover in an action under the SCUTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). S.C. Code Ann. § 39-5-10-560 (Supp. 2007). The second element may be satisfied by proof of "facts

demonstrating the potential for repetition of the defendant's actions." Daisy Outdoor Adver. Co., Inc. v. Abbott, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). "Plaintiffs . . . generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence . . . or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." Id. at 496, 473 S.E.2d at 51 (citations omitted).

Sufficient evidence exists in the record for submission of this cause of action to the jury. The first and third elements of the cause of action are sufficiently supported by the evidence for submission to the jury for reasons similar to those as necessary for submission of the Dealers Act claim. The public interest element necessitates additional scrutiny. The Estate, while questioning the president of the Dealership, specifically inquired about the existence of safeguards to ensure that unapplied premiums would be refunded. While the response to the question was unclear, an inference could be made that the Dealership lacked internal protections to prevent the reoccurrence of this conduct in the future. The conduct complained of herein continued for approximately three years without action.[3] Therefore, there is some evidence relating to the potential for public harm which justifies the submission of the SCUTPA claim to the jury. Accordingly, the trial court erred by directing a verdict against the Estate as to the SCUTPA cause of action.

CONCLUSION

For the aforementioned reasons, the order of the trial court directing a verdict against the Estate is hereby

REVERSED.

HEARN, C.J., and CURETON, A.J. concur.

[3] As to SCUTPA, counsel specifically asked whether other customers could have been similarly overcharged. The question was never answered even after an objection to the question was successfully overruled.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William and Elena Tobias, Respondents,

v.

Ruby Rice, Appellant.

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

Opinion No. 4411
Heard March 6, 2008 – Filed June 10, 2008

AFFIRMED

Michael F. Talley, of Greenville, for Appellant.

Adam Fisher, Jr., of Greenville, for Respondent(s).

PIEPER, J.: Ruby Rice (Rice) appeals the circuit court's order denying her motion to alter, amend, or vacate the judgment against her. Rice also appeals the entry of judgment in favor of William and Elena Tobias (William and Elena). We affirm.

FACTS

William and Elena filed the underlying complaint in this case on May 7, 2004. In their complaint, they allege the following four causes of action: (1) breach of contract; (2) conversion; (3) unjust enrichment; and (4) specific performance. The allegations arose from two lease agreements and an alleged oral purchase contract between William and Elena and Rice for a number of residential apartments in two separate apartment buildings in Greenville, S.C., one on Haughty Court and one on Summit Place. The lease agreements were structured such that William and Elena would be responsible for maintaining the apartments, collecting rent, finding tenants, and generally managing the properties in return for below market value rental payments for those properties. These lease agreements allowed William and Elena to sublet the apartments for a greater amount of rent than they were obligated to pay Rice, thereby creating a profit margin. In addition, William and Elena allege that they had an oral option to purchase the above-referenced properties from Rice for a purchase price of $144,000.00 for the Haughty Court property and $288,000.00 for the Summit Place property.

William and Elena further assert that Rice violated her duties under the contracts by unilaterally cancelling the lease agreements and excluding William and Elena from these rental properties once they had successfully subleased each of the individual units to tenants. They claim that in reliance on their option to purchase the buildings, they expended some $68,000.00 in improving the properties. In order to be compensated, William and Elena also seek specific performance on the oral option contract.

In her answer, Rice admits the existence of one of the lease agreements, but specifically denies the existence of any lease agreement on the Summit place property or the existence of any option or purchase agreement on either property. Furthermore, Rice alleges that William and Elena defaulted under the lease provisions and were excluded properly from the properties pursuant to magistrate court procedures.

The procedural history of this case is important since it is the foundation of the motion to vacate and/or set aside the judgment. Following the May 7, 2004, filing of the complaint, Rice hired attorney Rodman Tullis

to represent her. Communication problems existed from the outset of their attorney-client relationship and as a result, both Rice and her counsel filed a separate answer and counterclaim on Rice's behalf on August 3, 2004. However, throughout these proceedings, Mr. Tullis was listed as Rice's attorney of record with the clerk of court.

William and Elena's trial counsel, Randall Hiller, Esquire, indicated to the court that in order to obtain discovery, multiple unsuccessful attempts were made to contact attorney Tullis. As a result, he filed a motion to compel which was granted by the Honorable D. Garrison Hill by order dated April 26, 2005. Judge Hill's order indicates that neither Rice nor her counsel appeared at the motion hearing. Judge Hill further found the record reflected that interrogatories were served and had gone unanswered. He then ordered Rice to respond to discovery requests within thirty (30) days from the date of service of that order, and in the event of noncompliance, Rice's answer and counterclaim would be dismissed with prejudice. Judge Hill, aware of potential communication problems between Rice and her attorney, directed attorney Hiller to serve a copy of his order on both attorney Tullis and Rice individually.

Rice was served with that order in June 2005; since she was unable to get in touch with Mr. Tullis, Rice contacted attorney J. Patricia Anderson, Esquire, who called attorney Hiller's office requesting a thirty day extension to answer the complaint. Attorney Hiller ultimately denied the request pursuant to a facsimile letter advising Anderson that the relevant deadline pertained to discovery responses and that he was unwilling to grant an extension to that deadline. Due to the denial of the extension, Anderson did not become Rice's counsel of record. There was no further communication from Anderson to attorney Hiller, nor from any other attorney representing Rice.

The case then appeared on the Greenville County non-jury docket for the week of November 7, 2005, with a mandatory roster meeting scheduled that same day before the Honorable John C. Few. Attorney Hiller appeared on behalf of William and Elena but no one was present for Rice. The matter was set to be tried the following day.

The trial took place on November 8, 2005, at which time Judge Few was made aware of the inattentive manner in which attorney Tullis had represented his client in these proceedings. However, the trial commenced in Rice's absence. Judgment was entered by order dated November 24, 2005, wherein William and Elena were granted judgment in the amount of $211,700.00 with interest thereon at 8.75% from April, 2004, to the date of the order and at the judgment rate thereafter. Judge Few further ordered Rice to attend a closing for the sale of the two above-referenced properties to William and Elena for a total sales price of $432,000.00, from which William and Elena would be entitled to offset against the purchase price the amount of the judgment obtained.

Rice was served with Judge Few's order on December 1, 2005, and filed a motion to reconsider claiming that her attorney was disbarred and failed to inform her of the commencement of the trial proceedings. She hired Michael Talley to represent her. Attorney Talley filed a motion to vacate and/or set aside the judgment on January 20, 2006. Judge Few entertained Mr. Talley's motion (not the pro se motion) to vacate at a hearing on January 3, 2007, and denied that motion by form order the same day. Rice now appeals the trial court's denial of the motion to vacate and/or set aside the judgment against her.

STANDARD OF REVIEW

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004). An appellate court's standard of review, therefore, is limited to determining whether there was an abuse of discretion. Id. Relief under Rule 60(b)(1), SCRCP, lies within the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. Paul Davis Sys., Inc. v. Deepwater of Hilton Head, LLC, 362 S.C. 220, 225, 607 S.E.2d 358, 360 (Ct. App. 2004). An abuse of discretion arises where the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

ANALYSIS

Rice's first three issues on appeal pertain to issues of notice and depend on whether there was a default judgment damages hearing or a trial. Each of Rice's first three grounds for appeal attempt to place some affirmative duty on William and Elena to give Rice notice of the trial. Pursuant to Rule 55(b), SCRCP, a party seeking a default judgment not involving liquidated damages must provide three days notice to the opposing side; however, this requirement would only be applicable in the case at hand if William and Elena actually sought a default judgment.

A similar situation was dealt with by this court in Goodson v. Am. Bankers Ins. Co. of Fla., 295 S.C. 400, 368 S.E.2d 687 (1988). In the concurrence portion of Judge Cureton's opinion in Goodson, he articulately points out that the defendant was not in default for failing to appear at trial when it had filed an answer, where there had been no application for default, and where default had not been entered by the clerk. Id. at 403, 368 S.E.2d at 690. Recently, this court again relying on similar logic reached the same conclusion. In RRR, Inc. v. Toggas, Op. No. 4375 (S.C. Ct. App. filed April 23, 2008) (Shearouse Adv. Sh. No. 16 at 97), this court held that where the plaintiff did not seek or file for a default judgment but instead proceeded to a judgment on the merits, the notice prescribed in Rule 55(b)(2) is inapplicable.

In the case herein, Rice had answered and filed a counterclaim; no application for default was ever made, and no default was ever entered by the clerk. While Rice argues that Judge Hill's order states that the failure to answer interrogatories will result in her answer and counterclaim being dismissed with prejudice, that order was not automatically effective and there was never a motion made to enforce that order. We cannot assume an order of the type at issue would be automatically effective when the court would only be aware of the failure to comply with the order pursuant to some application by the movant to enforce that order. Absent any such motion to enforce the court's order, compliance is presumed under these circumstances. Accordingly, not only was Rice's answer and counterclaim not dismissed, it was referred to and considered by the judge at trial. Therefore, this court will not treat the trial as a default judgment hearing; as a result, the notice provision in Rule 55(b)(2) is inapplicable.

Despite the fact that Rice's primary argument on appeal is that William and Elena should have provided her notice, we do find the overall situation troubling, especially as it pertains to the adequacy of trial notice given to Rice. As evidenced by the record, Rice's counsel of record, Mr. Tullis, was mailed and faxed notice of the mandatory roster meeting, thereby providing adequate notice of trial. On the other hand, it is undisputed that Mr. Tullis was providing inadequate representation to Rice throughout the circuit court proceedings. Mr. Tullis had some disciplinary history which ultimately culminated in his disbarment in 2007 and included a suspension in 2005 for failure to comply with CLE requirements and failure to pay bar dues.[1]

The general rule is that the neglect of an attorney will be imputed to the client preventing the client from using the attorney's neglect as a ground for relief in a later motion to vacate. Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163-64, 375 S.E.2d 321, 323 (Ct. App. 1988). However, "this is not a hard and fast rule. Rather, it is one that is 'to be applied rationally, with a fair recognition that justice to the litigants is always the polestar."' Brown v. Butler, 347 S.C. 259, 554 S.E.2d 431 (App. Ct. 2001) (quoting 7A C.J.S. Attorney & Client § 181, at 284 (1980)). Furthermore, this general rule is not always applicable when the attorney's neglect rises to the level of willful abandonment. Graham v. Town of Loris, 272 S.C. 442, 452, 248 S.E.2d 594, 599 (1978); see also 7A C.J.S. Attorney & Client § 181, at 285 (1980) (where the conduct of counsel is outrageously in violation of his implicit duty to devote reasonable efforts in representing his client, his acts will not always be imputed to his client).

Notwithstanding, Rice did not move to vacate the judgment based on excusable neglect by arguing that the negligence of her counsel should not be imputed to her due to his willful abandonment of her case, nor does she attempt to raise this ground on appeal. While arguably one could assert that this ground was raised in Rice's pro se motion to reconsider, that motion was never ruled on by the trial court and the issue was never raised on appeal. In order for an issue to be properly presented for appeal, Rice's brief must set

[1] See In the Matter of Rodman C. Tullis, Op. No. 26383 (S.C. Sup. Ct. Oct. 8, 2007) (Shearouse Adv. Sh. No. 36 at 15).

forth the issue in the statement of issues on appeal. See Rule 208(b)(1)(B), SCACR; Silvester v. Spring Valley Country Club, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (Ct. App. 2001). Further, it is error for the appellate court to consider issues not properly raised to it. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating appellant must provide authority and supporting arguments for his issue to be considered raised on appeal). Accordingly, we may not consider this issue.

As to the excusable neglect of Rice, the decision of the trial court is supported by the fact that Rice was on notice of the problems she was facing with her counsel of record in June 2005 at the latest, when she was served with Judge Hill's order. While she attempted to obtain new counsel at one point, she was unsuccessful and made no further attempts despite knowing that the failure to answer the interrogatories would result in the dismissal of her answer and counterclaim with prejudice. For almost six months she never contacted the clerk to ensure that she was served with all relevant notices, never obtained new counsel, nor moved to relieve counsel. We do not find an abuse of the trial judge's discretion in his apparent reliance on the proposition that "a party has a duty to monitor the progress of his case." Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (quoting Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). Rice was aware of her dire legal situation for at least six months, and we find no abuse of discretion in refusing to grant her relief based on her own negligence as opposed to excusable neglect for her attorney's negligence, which has not been raised on appeal.

Rice also asserts the trial court should have set aside its judgment because the grant of specific performance absent a written contract violates the statute of frauds. This issue was not raised at trial and was only raised to the trial judge in the context of a meritorious defense, one of the factors considered by the trial court when ruling on a Rule 60, SCRCP motion. See Hill, 345 S.C. at 309, 547 S.E.2d at 897. Therefore, it is only proper for this court to consider this issue in that context.

A court may relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1), SCRCP. In determining whether a default judgment should be set aside under Rule

60(b)(1), "[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant." N.H. Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)). The alleged violation of the statute of frauds, if true, would amount to a mistake of law, not a mistake of fact. Accordingly, the issue is not persuasive since a party may not generally use Rule 60(b)(1) as a vehicle for relief from a mistake of law. Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001); see also Binkley v. Rabon Creek Watershed Conserv., 348 S.C. 58, 76 n.37 , 558 S.E.2d 902, 911 n.37 (Ct. App. 2001) (Relief from a judgment under Rule 60 is not a substitute for appeal). While we may not agree with the trial judge's rulings on the application of the law at trial, because we find no abuse of discretion by the trial court as to excusable neglect, the mere allegation that the trial judge made a mistake of law on the merits is not properly presented for the first time in a Rule 60 motion and is insufficient by itself as presented to warrant reversal. Since this appeal is postured on grounds solely related to the denial of the Rule 60 motion, as opposed to a direct appeal of the rulings outside of the Rule 60 context, we find no reversible error.[2]

CONCLUSION

For the foregoing reasons, the order of the circuit court is

AFFIRMED.

HEARN, C.J., and CURETON, A.J., concur.

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[2] This case has a somewhat strained procedural history. Rice actually filed a pro se notice of appeal in 2005 with the court of common pleas. However, that notice was not filed with the court of appeals. Therefore, a direct review on the merits of the trial has not been preserved. After Judge Few denied the Rule 60 motion, Rice's counsel filed a timely notice of appeal in January 2007 relating solely to the Rule 60 denial. Accordingly, our review is limited solely to the Rule 60 proceeding.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Christopher Williams, Appellant.

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4412
Heard May 7, 2008 – Filed June 12, 2008

REVERSED AND REMANDED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie M. Thames, all of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

KITTREDGE, J.: Christopher Williams was convicted of two counts of assault of a high and aggravated nature (AHAN), one count of attempted

escape, and two counts of kidnapping. He was sentenced to two concurrent terms of ten years in prison for AHAN, a consecutive term of fifteen years in prison for attempted escape, and two concurrent terms of life in prison without parole for the kidnappings. Williams appeals, contending the trial court committed reversible error by sustaining the State's Batson[1] motion and thereafter mandating that a challenged juror be seated on the new jury. We reverse and remand.

I.

The State's Batson motion began with a challenge to all of Williams' peremptory challenges. Rather than requiring the State to be more specific, the court required Williams to account for all strikes. Williams did so, and the inquiry narrowed to three potential jurors. The court granted the State's Batson motion regarding the three jurors. The court precluded Williams from striking any of the three jurors (Jurors 78, 72 and 116) when the jury was redrawn. Because only Juror 78 was called and served on the jury that convicted Williams, the appeal is limited to Juror 78.

Williams' counsel said he struck Juror 78, a white male, "because his wife is unemployed" and he "usually like[d] to have jurors that consider their spouse somewhat equal and they both work." The State contended the reason was pretextual because Williams' counsel sat Juror 81, also a white male, who is unemployed. Williams' counsel maintained that there is a fundamental difference between a *juror* who is unemployed and a juror whose *spouse* is unemployed. Williams' counsel stated:

> And as far as I struck [Juror 78] because his wife was unemployed, and he said I sat somebody who was unemployed. There's a difference between a juror being unemployed and a juror's wife being unemployed, and that's where I make my difference, Your Honor.

[1] Batson v. Kentucky, 476 U.S. 79 (1986).

The State then turned its argument to, "How is that any different from every juror that's a single juror then?" Williams' counsel reiterated his distinction between jurors who are unemployed and spouses of jurors who are unemployed. Concerning unmarried jurors, defense counsel asserted that "every juror that's single wouldn't be sitting here thinking how much money is my unemployed wife at home spending . . . . There's a big difference between a single juror and a married juror."

Without further discussion, the trial court granted the State's Batson motion, observing that, in connection with Juror 78, "someone similarly situated was seated of a different race." Williams claims the trial court erred in both of its stated reasons. First, according to Williams, the other juror (Juror 81) may not properly be considered "similarly situated," as Williams repeatedly emphasized to the trial court his distinction between an unemployed juror and an employed juror whose spouse is unemployed. Second, the other juror, Juror 81, is white (as is Juror 78) and therefore not of a "different race" from Juror 78. We agree with Williams on both counts, and as a result, we reverse and remand for a new trial.

II.

If a trial court improperly grants the State's Batson motion, but none of the disputed jurors thereafter serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to a particular jury. State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006). Conversely, if one of the jurors is thereafter seated on the jury, then the erroneous Batson ruling has tainted the jury and prejudice is presumed in such cases "because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged." Id. at 114, 631 S.E.2d at 248; see also State v. Short, 327 S.C. 329, 489 S.E.2d 209 (Ct. App. 1997) (finding the remedy for the improper granting of a Batson motion where a disputed juror is seated on the new jury is a new trial).

Even in light of the deference given trial judges in Batson motions, we are persuaded that error has been established in this case. The State, in its

brief, acknowledges that Williams "offered race-neutral reasons for his strikes." We agree that Williams offered a race-neutral reason for striking Juror 78. The State has no good answer for the trial court's clearly erroneous statement that "someone similarly situated [Juror 81] was seated of a different race." The State suggests the trial court really meant to say that the strike "was so fundamentally implausible [as] to not require disparate treatment."

We reject the State's efforts to rescue the trial court's erroneous Batson ruling, and we decline the invitation to recast the trial court's ruling to something it was not. In any event, we do not view as "fundamentally implausible" the idea that counsel may draw a distinction between the employment status of a prospective juror and the employment status of the spouse of a prospective juror.[2] More to the point, employment, or lack of it, is a well-understood and recognized consideration in the exercise of peremptory challenges. State v. Haigler, 334 S.C. 623, 632, 515 S.E.2d 88, 92 (1999) (stating unemployment is a race-neutral reason for a strike); State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (holding place of employment is a race-neutral reason for a strike); see State v. Adams, 322 S.C. 114, 125, 470 S.E.2d 366, 372 (1996) (finding type of employment is a race-neutral reason for a strike). And finally, there is no evidence that someone similarly situated to Juror 78 was seated, i.e., no other juror was seated whose spouse was unemployed.

[2] See State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999) ("Pretext generally will be established by showing that *similarly situated members of another race were seated on the jury*. Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment.") (emphasis added). As noted, Jurors 78 and 81 are both white and they are not "similarly situated," as Juror 81 is unemployed and the *spouse* of Juror 78 is unemployed.

III.

In sum, Williams articulated a race-neutral reason for striking Juror 78, and the State failed to establish that a similarly situated juror was seated. The proper remedy is a new trial.

REVERSED AND REMANDED.

ANDERSON AND HUFF, JJ., concur.