# OPINIONS

**OF**

# THE SUPREME COURT

**AND**

# COURT OF APPEALS

**OF**

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 25**
**June 8, 2009**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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

Casey Edwards and Justin Williams, Petitioners,

v.

State of South Carolina and Mark Sanford, in his Official Capacity as Governor of the State of South Carolina, Respondents.

and

South Carolina Association of School Administrators, Petitioner,

v.

The Honorable Mark Sanford, in his official capacity as the Governor of the State of South Carolina, and The Honorable Jim Rex, in his official capacity as the State Superintendent of Education of South Carolina, Respondents.

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**ORIGINAL JURISDICTION**

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Opinion No. 26662
Heard June 3, 2009 – Filed June 4, 2009

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Richard A. Harpootlian and Graham L. Newman, of Richard A. Harpootlian, PA, of Columbia, for Petitioners Edwards and Williams.

Kenneth L. Childs, William F. Halligan, John M. Reagle, and Keith R. Powell, of Childs & Halligan, P.A.; and Frank S. Holleman, III, of Wyche Burgess Freeman & Parham, PA of Greenville, for Petitioner South Carolina Association of School Administrators.

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**CHIEF JUSTICE TOAL, JUSTICE WALLER, JUSTICE BEATTY, AND JUSTICE KITTREDGE:** We accepted these matters concerning the application for State Fiscal Stabilization (SFS) funds under

the American Recovery and Reinvestment Act of 2009 (ARRA)[1] in our original jurisdiction. These two cases are brought as the result of a dispute between the Governor of South Carolina and the General Assembly of South Carolina over whether the State should apply for and accept the SFS portion of the ARRA funds. This Court has no role to play in the policy considerations at issue between the Governor and the General Assembly. Our duty under the South Carolina Constitution and the remand from the United States District Court for the District of South Carolina is to declare the law. Petitioners in the first action (Edwards Action) seek a declaratory judgment that §1607 of the ARRA allows the South Carolina General Assembly to request, accept, and distribute the SFS funds, which the General Assembly included in the 2009-10 General Appropriations Bill (the Budget), and that Governor Sanford must execute the Budget as enacted by the General Assembly.

In the second action (SCASA Action), Petitioner seeks a declaration of the rights, status, and other legal relations between the parties concerning Part III of the Budget; to declare Respondents must take the actions required by Part III of the Budget; and to order equitable relief to cause Respondents to perform the duties under Part III of the Budget. In addition, Petitioner asks the Court to issue a writ of mandamus to compel Governor Sanford to perform the duties required under Part III of the Budget. Finally, Petitioner asks for a declaratory judgment that the State Superintendant of Education has been empowered by the General Assembly to act in the Governor's name to apply for the SFS funds.

## I.

## FACTUAL/PROCEDURAL BACKGROUND

The ARRA, federal economic stimulus legislation, was enacted by Congress to preserve and create jobs and promote economic recovery; assist

[1] The American Recovery and Reinvestment Act of 2009, Pub.L. 111-5 (2009).

those most impacted by the recession; provide investments needed to increase economic efficiency by spurring technological advances in science and health; invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; and stabilize state and local government budgets in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases. ARRA, § 3(a). In the ARRA, as is typical in federal funding legislation, Congress specifies how the federal funds are to be allocated and spent in the respective states.

Section 1607(a) of the ARRA requires the Governor, within forty-five days of the enactment of the ARRA, to certify that: (1) the State will request and use funds provided by the Act; and (2) the funds will be used to create jobs and promote economic development. Because Governor Sanford disapproved of the use of funds as mandated by Congress, he initially indicated he would not make the §1607(a) certification. Yet on the final day for certification, April 3, 2009, Governor Sanford made the §1607(a) certification by letter to the Director of the Office of Management and Budget, including the request "that funds be released to the appropriate state agencies to spend in accordance with guidelines set forth in the ARRA and by federal agencies." In his April 3, 2009 certification letter, Governor Sanford did express "reservations" and noted his intention to pursue his concerns with the "policy makers within the General Assembly of South Carolina."

The South Carolina General Assembly acted on Governor Sanford's §1607(a) certification. On May 13, 2009, the General Assembly appropriated the ARRA funds, including the SFS funds, in the Budget[2]. In Proviso 90.15 of Part IB of the Budget, the General Assembly set forth its intention to "accept all available funds from the State Budget Stabilization Fund contained within the American Recovery and Reinvestment Act of 2009 and to authorize expenditure of such funds as delineated in this act."

[2] H. 3560, 118th Gen. Assem., Reg. Sess. (S.C. 2009).

In Part III, Section 1 of the Budget, the General Assembly requires the Governor and the State Superintendent of Education to take all actions necessary and required by the ARRA and the U.S. Secretary of Education in order to secure the receipt of the funds recognized and authorized for appropriation in the Budget. In accordance with the ARRA guidelines, Part III of the Budget requires the Governor to apply for the phase one State Fiscal Stabilization funds within five days of the effective date of Part III. The Governor is required to apply for the phase two funds within thirty days of those funds becoming available.

In addition, on May 14, 2009, pursuant to §1607(b) of the ARRA, in an apparent response to Governor Sanford's public criticism of the ARRA, the General Assembly adopted a concurrent resolution[3] to accept the ARRA funds should the Governor fail to accept the funds. Section 1607(b) provides: "If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State." Pursuant to §1607(c), entitled "DISTRIBUTION," Congress provides: "After the adoption of a State legislature's concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the State's discretion."

Governor Sanford vetoed provisions of the Budget, including the ARRA funds. The General Assembly voted to override the vetoes on May 21, 2009.

Notwithstanding his §1607(a) certification of the ARRA funds and the presence of a lawfully enacted appropriations act, Governor Sanford has refused to formally apply for the SFS funds. Governor Sanford's refusal to comply with state law is based on what he asserts as contrary and controlling federal law—a claim of absolute discretion under the ARRA, specifically

[3] S. 577, 118th Gen. Assem., Reg. Sess. (S.C. 2009).

§14005. Although Governor Sanford removed these actions to federal court, the matters were remanded to this Court by order dated June 1, 2009.

## II.

## QUESTIONS PRESENTED

(1) Does the General Assembly have the authority under South Carolina law to require Governor Sanford to apply for the SFS funds?

(2) If so, are the provisions of the Budget requiring Governor Sanford to apply for the SFS funds in conflict with the ARRA?

(3) Should this Court grant a writ of mandamus to compel Governor Sanford to apply for the SFS funds?

(4) Does the Superintendent of Education have the authority to apply for the SFS funds in the Governor's name?

## III.

## SOUTH CAROLINA LAW

### Separation of Powers

"In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. CONST. art. I, § 8. One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government to prevent the concentration of power in the hands of too few and provide a system of checks and balances. *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982). Under our system, the legislative department makes the laws, the executive department carries the laws into

effect, and the judicial department interprets and declares the laws. *Id.* at 312, 295 S.E.2d at 636.

The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

The Governor is charged with executing the law. S.C. CONST. art. IV, § 15 ("The Governor shall take care that the laws be faithfully executed."). One of the Governor's duties is to submit a recommended state budget to the General Assembly. S.C. Code Ann. § 11-11-15 (Supp. 2008). The Governor has the ability, after the General Assembly has passed a budget, to veto items or sections contained within the budget. S.C. CONST. art. IV, § 21. However, if any item or section of the bill not approved by the Governor is overridden by two-thirds of each house of the General Assembly, it becomes a part of the law, notwithstanding the objections of the Governor. *Id.* "Once the legislature enacts a law, all that remains is the efficient enforcement and execution of that law." *Knotts v. S.C. Dep't of Natural Resources*, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002). The administration of appropriations is a function of the executive department. *State ex rel. McLeod v. McInnis*, 278

S.C. at 314, 295 S.E.2d at 637. Executive agencies are required to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid. *Layman v. State*, 376 S.C. 434, 450, 658 S.E.2d 320, 328 (2008).

Under the constitution and laws of this State, the General Assembly is the sole entity with the power to appropriate funds, including federal funds. Therefore, the General Assembly has the authority to mandate that the Governor apply for federal funds which it has appropriated. Because the General Assembly has overridden the Governor's vetoes of the provisions of the Budget concerning the SFS funds, those provisions are now law and must be executed by the Governor. Accordingly, under South Carolina law, Governor Sanford is obligated to take the actions required to apply for and accept the SFS funds.

## FEDERAL LAW

### The ARRA

The question then becomes whether our State law is in conflict with the ARRA. Where a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court's duty is to adopt the latter. *Jones v. United States*, 529 U.S. 848, 857 (2000). "Federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement" in the language of the legislation of Congress' intent to alter the usual constitutional balance of state and federal powers. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). In accordance with this rule of statutory construction, we must, if possible, construe the ARRA provisions to avoid any conflict between the ARRA and the General Assembly's mandate that the Governor apply for the SFS funds.

The primary purpose in construing a statute is to ascertain legislative intent. *Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In construing a statute, this Court must give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language should be regarded as conclusive. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Section 1607 of the ARRA provides the methods for a state to certify that it will request ARRA funds and use the funds for the purposes set forth in the Act. Under §1607(a), a certification must be made by the Governor that the State will accept funds provided for in the ARRA and use the funds for their intended purposes. Despite the fact that he expressed reservations about accepting the SFS funds, it is uncontested that Governor Sanford made the certification that the State desired the ARRA funds.

Petitioners in the Edwards Action argue §1607(b) grants the General Assembly the authority to apply for SFS funds if the Governor refuses to do so. In light of the Governor's §1607(a) certification, we need not address the substantive contention in the Edwards Action that the General Assembly's mere compliance with §1607(b) is sufficient to require SFS funding. We nevertheless construe §1607(b), especially when read in conjunction with the distribution language of §1607(c), as evidence of Congressional intent to allow a state legislature a meaningful voice in the decisional process. In short, Congressional intent as expressed in §1607(b) and (c) defeats the Governor's contention that the ARRA unambiguously makes him the sole arbiter of whether South Carolina will accept the SFS funds. At best, when §14005 is considered, we are confronted with a genuinely ambiguous statute. Here, the General Assembly, acting pursuant to §1607(b) and (c), has expressed South Carolina's desire to receive the SFS Funds.

In §14005(a), the ARRA provides, "[t]he Governor of a State desiring to receive an allocation under section 14001 shall submit an application . . . ."

Similarly, §14005(c) provides "[t]he Governor of a State seeking a grant . . . shall . . . submit an application for consideration."

Governor Sanford argues that notwithstanding his §1607(a) certification and the Budget, §14005 grants him the sole discretion to determine whether to apply for the SFS funds. In this regard, Governor Sanford claims the ARRA, as a matter of federal law, trumps state law under the Supremacy Clause of the United States Constitution.[4] The Petitioners, the Attorney General, and Superintendent Rex argue for a construction of the ARRA that does not create a conflict with settled South Carolina separation of powers principles. Accordingly, they contend ARRA in general, and §14005 in particular, does not grant to the Governor exclusive and unfettered discretion to accept or refuse the SFS funds, especially at this stage in the process following certification and the provisions of the Budget.

Governor Sanford is correct in that Congress may impose conditions on states receiving federal funds pursuant to its powers under the Spending Clause.[5] However, limits on this power include the following: the conditions must be stated unambiguously, must bear some relationship to the purpose of the spending, and cannot require states to engage in unconstitutional activities. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

Congress clearly intended to provide funds to any state desiring to receive those funds. Sections 1607(b) and (c) evidence Congress' intent to include the legislatures of the states in that decision. However, there is no clear intent in the ARRA to give the Governor absolute discretion over whether to apply for funds as a condition of the State's receipt of the funds.

The ARRA contains no plain statement of Congress' intention to alter the unquestionable right of a state to constitutionally provide for the establishment and operation of its government. Further, the action of the General Assembly in requiring Governor Sanford to apply for the SFS funds

[4] U.S. CONST. art. VI, cl.2.

[5] U.S. CONST. art. I, § 8 , cl.1.

in no way obstructs the purposes of the ARRA. To the contrary, the action of the General Assembly promotes the purposes of the ARRA.[6]

We accordingly construe the participial phrase "desiring to receive an allocation [or seeking a grant]" in §14005 as modifying the word immediately preceding it—"State"—to avoid any conflict between our State constitutional allocation of power and the ARRA. With this construction, it is the State which must desire to receive the funds and grants, not merely the Governor. The Governor is the officer designated by Congress to perform the ministerial act of submitting the State's application for the funds.

Under South Carolina law, the General Assembly has the sole authority to direct the appropriation of funds and, therefore, is the entity which decides whether the State desires to receive the funds. In its appropriation of the SFS funds in the Budget and its concurrent resolution, the General Assembly has acted on the Governor's §1607(a) certification and expressed the State's desire to receive the funds. At this stage in the process, the Governor certainly has no discretion to make a contradictory decision on behalf of the State.

We hold the Governor must apply for the SFS funds.

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[6] The Governor's position in this matter is much like that of the state of South Dakota in *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985). The Governor wants to change the purpose for which Congress directed the ARRA funds to be used. To that end, he wrote President Obama and requested a waiver from the ARRA's spending purpose so that the SFS funds could be used for state debt reduction. The Office of Management and Budget denied this request on the grounds that such spending would violate the federal act. Similarly, in *Lawrence County*, the United States Supreme Court held that the state of South Dakota could not change the purpose for which federal payment in lieu of taxes funds could be utilized.

## IV.

## REMEDY

The Petitioners in the Edwards Action seek a declaratory judgment that §1607(b) of the ARRA allows the General Assembly to request, accept, and distribute the SFS funds, which the General Assembly included in the Budget, and that Governor Sanford must execute the Budget as enacted by the General Assembly. While we do agree and declare that Governor Sanford must comply with the Budget and promptly submit the ARRA "application" referenced in §14005, we decline to do so as a function of §1607(b) and (c).

SCASA requests this Court to issue a writ of mandamus to compel Governor Sanford to promptly submit the §14005 "application" and take all legal and necessary steps to effectuate the State's receipt of the SFS funds for the purposes as set forth by Congress. We hold a writ of mandamus should issue against the Governor requiring him to follow the law.

The Supreme Court has the power to issue writs of mandamus. S.C. CONST. art. V, § 5; S.C. Code Ann. § 14-3-310 (1976). Mandamus is the highest judicial writ known to the law. *Brackenbrook N. Charleston, LP v. County of Charleston*, 360 S.C. 390, 400, 602 S.E.2d 39, 45 (2004). It is a coercive writ which orders a public official to perform a ministerial duty. *Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 582 (2008); *Ex Parte Littlefield*, 343 S.C. 212, 222, 540 S.E.2d 81, 86 (2000).

For a writ of mandamus to issue, the following must be shown: (1) a duty of the Respondent to perform the act; (2) the ministerial nature of the act; (3) the Petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. *Wilson v. Preston*, 378 S.C. at 354, 662 S.E.2d at 583. A ministerial act or duty is one which a person performs because of a legal mandate which is defined with such precision as to leave nothing to the exercise of discretion. *Id.* at 354, 662 S.E.2d at 583.

A writ of mandamus may issue against a Governor for the performance of a purely ministerial act. *Blalock v. Johnston*, 180 S.C. 40, 44, 185 S.E. 51, 52 (1936) ("[W]hen, in the exercise of some official power neither political nor essentially governmental, the law specially enjoins upon the Governor of the state as a duty the performance of some particular act, under circumstances in which he has no discretion, and his refusal to perform the act deprives a party of his property or of some legal right, mandamus will lie against the Governor to compel the performance of such ministerial act, in the absence of other plain, speedy, or adequate remedy at law."). *See also Fowler v. Beasley*, 322 S.C. 463, 467, 472 S.E.2d 630, 633 (1996) (noting the Supreme Court has jurisdiction to review the ministerial acts of the Governor); *Easler v. Maybank*, 191 S.C. 511, 511, 5 S.E.2d 288, 289 (1939) (noting that the Governor of South Carolina is subject to a writ of mandamus to compel the performance of a purely ministerial duty).

The duty to execute the Budget, as properly enacted by the General Assembly, is a ministerial duty of the Governor. He has no discretion concerning the appropriation of funds. The application for the SFS funds is a simple, definite duty arising under the conditions specified in the ARRA and leaves nothing to Governor Sanford's discretion. It is a ministerial duty. Because the General Assembly, following Governor Sanford's certification and request that the ARRA "funds be released," included the SFS funds in the Budget and by virtue of its concurrent resolution, the clear intent is the State of South Carolina desires the SFS funds, and Governor Sanford must ask for the funds.

While we recognize and respect Governor Sanford's sincerely held beliefs concerning the ARRA, those convictions do not alter the ministerial nature of the legal duty now before him. The decision on a request to mandamus the Governor is an extremely delicate one, which is undertaken with great reluctance and consciousness of its great gravity and importance. *Blalock v. Johnston*, 180 S.C. at 43, 185 S.E. at 52. However, when mandamus is warranted, "the judiciary cannot properly shrink from its duty." *Id.* at 50, 180 S.E. at 55.

We hold under the circumstances presented that a writ of mandamus is warranted and issue a writ of mandamus to compel Governor Sanford to apply for the SFS funds and take all legal and necessary steps to effectuate the State's receipt of the SFS funds for the purposes as set forth by Congress.

Because we hold Governor Sanford is required to apply for the SFS funds and issue a writ of mandamus ordering him to do so, the Court need not reach the question of whether the Superintendent of Education may apply for the funds on behalf of the Governor.

## V.

## CONCLUSION

Our decision today should not be construed as a comment on the policy differences between Governor Sanford and the General Assembly respecting the wisdom or necessity of South Carolina accepting the SFS funds. Under our limited role, the matter is presented to us as one of statutory construction of the ARRA and the application of settled state separation of powers principles. We discharge our duty to honor the rule of law, nothing more.

We issue a writ of mandamus compelling the Governor of South Carolina to comply with the law as set forth above.

**PLEICONES, J., concurring in a separate opinion.**

**JUSTICE PLEICONES, CONCURRING**: As explained below, I would hold that the petitioners in Edwards v. State are entitled to the declaratory relief that they seek, and therefore would not reach the merits of the issues raised in the South Carolina Association of School Administrators case. I do so because I believe that the Edwards case can be resolved without reaching the constitutional issues necessarily involved in the School litigation.

Petitioners Edwards and Williams (petitioners) seek a declaration that respondent Sanford (the Governor) must perform the actions required by the American Recovery and Reinvestment Act of 2009 (ARRA)[7] to apply for the State Fiscal Stabilization (SFS) Funds available under that Act. I would grant the requested relief.

In enacting the ARRA, Congress, exercising its authority pursuant to the spending clause,[8] provided two methods by which a state could express its desire to receive ARRA funds. Section 1607 of the ARRA is entitled "ADDITIONAL FUNDING DISTRIBUTION AND ASSURANCE OF APPROPRIATE USE OF FUNDS." Under § 1607(a), entitled "CERTIFICATION BY GOVERNOR," the ARRA provides "for funds provided to any State or agency thereof, the Governor of the State shall certify that: (1) the State will request and use funds provided by this Act . . . ." In § 1607(b), entitled "ACCEPTANCE BY STATE LEGISLATURE," the act provides "If funds provided . . . in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State." As the legislative history makes clear, § 1607(b) was included in the ARRA in response to suggestions from the Governor that he was averse to accepting federal funds.

Under my reading of the ARRA, either a certification or a concurrent resolution is required in order for ARRA funds to be received by a state. Section 1607 vests the decision to exercise discretion first in the Governor,

[7] Pub. L. 111-5 (Feb. 17, 2009).
[8] U.S. Const. art. I, § 8, cl. 1.

and then, as to any funds which he chooses not to accept, discretion vests in the General Assembly.

The Governor did provide a timely letter[9] expressing his intent to accept ARRA funds, and his desire that the letter serve as his § 1607(a) certification. In this certification letter, however, the Governor stated that he was not applying for the SFS Funds, and expressed his "reservations about accepting these funds."

In response to the Governor's letter indicating that he was certifying but not accepting SFS Funds, the General Assembly exercised the discretion afforded it by § 1607(b) and enacted a concurrent resolution accepting the SFS Funds. Although the Governor argues that such a resolution does not have the force of law in this State, he misapprehends the purpose for which this resolution was passed: to exercise the discretion given the General Assembly under federal law to accept funds which the Governor had declined.

Here, we have a certification from the Governor under § 1607(a) which declines to accept the SFS Funds, followed by a concurrent resolution under § 1607(b) by which the General Assembly exercised its discretionary power to accept the SFS Funds.

The ARRA further requires that in order to receive SFS Funds, "the Governor of a State **desiring** to receive an allocation [of these funds] shall submit an application . . . ." § 14005 (emphasis supplied). While there is some debate as to the proper grammatical construction of this statutory phrase, I conclude that § 14005 was drafted to accommodate the two methods, certification or concurrent resolution, by which a state can demonstrate that it desires SFS Funds. South Carolina has manifested its desire for SFS Funds through the concurrent resolution method provided for in § 1607(b). Once a state has expressed its desire to receive SFS funds

[9] Letter from the Governor to the Director of The Office of Management and Budget dated April 3, 2009.

through § 1607, it is my view that the state's governor is obligated to obtain those funds by complying with the requirements in § 14005.

If a state expresses its desire to receive ARRA funds through a concurrent resolution, § 1607(c) of the ARRA then requires that "funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the State's discretion." Here, through the adoption of the annual appropriations act, the General Assembly has provided for the distribution of the SFS Funds and thus has met the mandate of § 1607(c). In short, South Carolina has fulfilled all the requirements set forth in federal law to demonstrate that it desires SFS Funds.

The Governor contends that the appropriations act offends the South Carolina Constitution's separation of powers clause[10] to the extent it purports to compel him to apply for the SFS Funds. As explained above, I read § 1607 to give the governor of a state or, under certain circumstances, its legislature, the authority to determine whether a state desires ARRA funds. Under my view of the ARRA, the Governor's obligation to complete the SFS Funds application process found in § 14005 arises from the General Assembly's compliance with the provisions of § 1607(b) and (c), and is not based upon the appropriations act itself. The appropriations act is relevant to my analysis only to the extent that it fulfills the requirement of § 1607(c). I perceive no separation of powers issue here.

Petitioners request the Court issue a declaratory judgment that, the General Assembly having fulfilled the requirements of § 1607(b) and (c), the Governor and the executive branch must perform any and all acts necessary for the State to receive SFS Funds from the federal government. I would grant this relief.

[10] S.C. Const. art. I, § 8.

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

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Robert J. Dema, Edward M. Finn, and Joyce E. Gadson, on behalf of themselves and all others similarly situated, Appellants,

v.

Tenet Physician Services-Hilton Head, Inc. and AMISUB (Hilton Head), Inc., collectively d/b/a Hilton Head Regional Medical Center, Respondents.

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

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Opinion No. 26663
Heard March 18, 2009 – Filed June 8, 2009

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**AFFIRMED**

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A. Hoyt Rowell, T. Christopher Tuck, Michael J. Brickman, all of Richardson, Patrick, Westbrook & Brickman, of Mt. Pleasant, Daniel S. Haltiwanger, of Richardson, Patrick, Westbrook & Brickman, of Barnwell, Mark C. Tanenbaum and John P. Algar, both of Charleston, for Appellants.

E. Douglas Pratt-Thomas, of Pratt-Thomas & Walker, of Charleston, William H. Jordan and Samuel R. Rutherford, both of Alston & Bird, of Atlanta, for Respondents.

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**CHIEF JUSTICE TOAL:** Appellants filed suit against Respondents asserting several causes of action stemming from Hilton Head Regional Medical Center's (HHRMC) administration of hundreds of unauthorized therapeutic cardiac catheterizations. The trial court dismissed Appellants' complaint in its entirety. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

Between 1997 and 2000, HHRMC[1] performed over 200 unauthorized therapeutic cardiac catheterizations (TCCs) in violation of State Certification of Need and Health Facility Licensure Act (CON Act), S.C. Code Ann. § 44-7-110, *et seq.* (Supp. 2008). The Department of Health and Environmental Control (DHEC) issued a fine of $100 for each unauthorized procedure for a total of $24,200.

In February 2006, Appellants filed their complaint alleging that they received unauthorized TCCs at HHRMC in 1998 or 1999. Appellants asserted claims for violations of South Carolina Unfair Trade Practices Act (SCUTPA), S.C. Code Ann. § 39-5-10, *et seq.* (Supp. 2008) violations, unjust enrichment, battery, and outrage. The complaint also referenced a federal *qui tam* complaint filed against HHRMC by Dr. Lowman, a doctor formerly employed with Respondents, alleging that HHRMC fraudulently billed Medicare as a result of performing the unauthorized TCCs. Respondents

[1] Respondents Tenet Physician Services-Hilton Head, Inc. and AMISUB (Hilton Head), Inc. own and operate HHRMC.

removed the complaint to federal court pursuant to federal question jurisdiction based on the reference to the Lowman complaint, but the district court remanded the case to state court.

Respondents filed a motion to dismiss, and following a hearing, the trial court dismissed the complaint in its entirety. The trial court found that it lacked subject matter jurisdiction over the case since DHEC was the sole agency empowered with authority to resolve claims regarding violations of the CON Act. The trial court further ruled that even if it had jurisdiction, Appellants could not maintain an unjust enrichment or SCUTPA claim because a private right of action did not exist for violations of the CON Act. The trial court dismissed the SCUTPA claims on the additional grounds that the claims fell under the regulatory exception, the allegations were not capable of repetition, and SCUTPA prohibits class action suits.[2]

We certified the case pursuant to Rule 204(b), SCACR, and Appellants present the following issues[3] for review:

I. Did the trial court err in ruling that it did not have subject matter jurisdiction over the case?

II. Did the trial court err in ruling that the CON Act did not create a private cause of action?

III. Did the trial court err in dismissing the SCUTPA claims?

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[2] The trial court also dismissed the battery and outrage claim, but Appellants have not appealed these rulings.

[3] Appellants also appeal the trial court's ruling regarding recovery of Medicare and Medicaid payments. Specifically, the trial court ruled that Appellants lacked standing to recover Medicare or Medicaid payments, were judicially estopped from seeking such payments, and any such claims were preempted by the federal False Claims Act. We decline to address this issue since Appellants contend that they are not seeking such payments.

IV. Did the trial court err in dismissing Appellant's unjust enrichment claim?

## STANDARD OF REVIEW

Generally, in considering a motion to dismiss, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007). The motion may not be sustained if the facts alleged in the complaint and the inferences that can be drawn therefrom would entitle the plaintiff to relief under any theory. *Id.*

## LAW/ANALYSIS

### I. Subject Matter Jurisdiction

Appellants argue that the trial court erred in ruling that it did not have subject matter jurisdiction to hear the case. We agree.

Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008). South Carolina trial courts are vested with general original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts. S.C. Const. art. V, § 11. In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute. *See Unisys Corp. v. South Carolina Budget and Control Bd. Div. of Gen. Servs. Info. Mgmt. Office*, 346 S.C. 158, 175, 551 S.E.2d 263, 273 (2001) (examining the language of the statute to determine the legislative intent regarding exclusive jurisdiction).

We hold that the trial court erred in ruling it did not have subject matter jurisdiction over this case. Appellants did not file suit seeking a determination from the trial court that HHRMC was acting in violation of the

CON Act. Rather, Appellants' suit involved civil claims arising out HHRMC's violations of the CON Act, which DHEC had already determined HHRMC had committed. While DHEC has exclusive subject matter jurisdiction to determine whether a violation has occurred,[4] it does not have subject matter jurisdiction to hear civil claims for damages resulting from those violations.[5] Therefore, we hold that the trial court's ruling was erroneous.

## II. Private Cause of Action

Appellants argue that the trial court erred in ruling that the CON Act did not create a private cause of action. We disagree.

Where not expressly provided, a private right of action may be created by implication if the legislation was enacted for the special benefit of the private party. *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 28, 416 S.E.2d 641, 645 (1992). If the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party. *Adkins v. South Carolina Dept. of Corr.*, 360 S.C. 413, 419, 602 S.E.2d 51, 54 (2004).

We hold that no private right of action may be implied from the CON Act. The purpose of the Act is:

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[4] *See* S.C. Code Ann. § 44-7-140 (Supp. 2008) (providing that "[DHEC] is designated the sole state agency for control and administration of the granting of Certificates of Need and licensure of health facilities and other activities necessary to be carried out under this article.").

[5] Whether the CON Act creates a private cause of action or whether a party may maintain an independent civil private cause of action seeking damages as a result of CON Act violations, both cases over which a trial court would have subject matter jurisdiction and discussed *infra*, is a distinct issue from whether a healthcare facility violated the CON Act, a case over which DHEC has exclusive subject matter jurisdiction. *See* § 44-7-140.

> to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State.

S.C. Code Ann. § 44-7-120 (Supp. 2008). In our view, this expressly-stated purpose clearly indicates that in enacting the CON Act, the Legislature intended to advance the quality of healthcare provided in this State for all people receiving the care, not for a particular individual. The fact that the Act considers violations a misdemeanor and imposes fines as well as license denial, revocation, or suspension further supports the conclusion that the CON Act does not create a private cause of action by implication. *See Adkins*, 360 S.C. at 419, 602 S.E.2d at 51 (acknowledging that a violation of the Prevailing Wage Statute is considered a misdemeanor and thus finding that nothing in the statute indicated a legislative intent to create civil liability for a violation). In other words, the enforcement mechanism of the CON Act is DHEC's authority to impose sanctions and not civil liability.

For these reasons, we hold that the CON Act does not provide a private cause of action for violations.

## III. SCUTPA

Appellants argue the trial court erred in dismissing their SCUTPA claim. We disagree.

Appellants filed this suit as a class action. Class action suits are representative lawsuits in which a single individual or a small group of individuals represent the interests of a larger group. SCUTPA, however, prohibits a plaintiff from bringing a suit in a representative capacity. *See* §§ 39-5-20 and 140 (providing that that any person who suffers a loss as a result of an unfair act or practice may "bring an action individually, but not in a representative capacity"). Federal courts have recognized that class action suits may not be brought pursuant to SCUTPA. *See Gunnells v. Healthplan*

*Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003) (impliedly affirming the district court's refusal to certify a SCUTPA suit as a class action pursuant to § 39-5-140); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp 2d 702, 727 (D. Md. 2001) (dismissing class action claims under SCUTPA because "[t]hat Act does not permit suits for damages to be maintained as class actions."). Additionally, other jurisdictions with a similar provision in their Unfair Trade Practices Acts have also reached the conclusion that such a claim may not be maintained as a class action suit. *See Danielson v. DBM, Inc.*, No. 1:05-CV-2091-WSD, slip op. at 4 (N.D. Ga. August 11, 2005); *Morris v. Sears, Roebuck and Co.*, 765 So.2d 419, 421 (La. App. 2000) (recognizing that a provision in the Louisiana Unfair Trade Practices Act providing that a plaintiff "may bring an action individually but not in a representative capacity" expressly prohibits a private class action). Accordingly, because SCUTPA claims may not be maintained in a class action law suit, the trial court properly dismissed Appellants' claim.[6]

## IV. Unjust Enrichment

Finally, Appellants argue the trial court erred in dismissing their unjust enrichment claim. We disagree.

[6] Although the trial court properly dismissed the claim pursuant to SCUTPA's prohibition of class action suits, it erroneously dismissed the claim pursuant to the regulatory exception, which provides that SCUTPA does not apply to: "actions or transactions permitted under laws administered by any regulatory body." § 39-5-40. This exception exempts an entity from liability where its actions are lawful or where it "'does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations.'" *Ward v. Dick Dyer & Assocs.*, 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991), quoting *Skinner v. Steele*, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987). This provision lends no support to HHRMC because Appellants alleged HHRMC performed *unauthorized* TCCs.

A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another. Unjust enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff. *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988).

HHRMC argues that *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006) is directly on point and thus precludes Appellants' unjust enrichment claim. In *Hambrick*, the plaintiffs brought several causes of action, including an unjust enrichment claim, against GMAC after GMAC allegedly engaged in the unauthorized practice of law (UPL) in preparing loan documents for the plaintiffs. Citing *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 483, 560 S.E.2d 612, 616 (2002), the court of appeals determined that there was no private right of action for UPL, and therefore, held that the trial court properly dismissed the case.

Appellants, on the other hand, argue that *Hambrick* is not controlling and that *Inoco v. Jensen Constr. Co.*, 622 F.2d 1291 (8th Cir. 1980) is instructive. In *Inoco*, Jensen Construction was the lowest bidder on a small-business construction contract and Inoco was the next lowest bidder. After the contract was awarded to Jensen, Inoco discovered that Jensen falsely certified itself as a "small-business" under the Small Business Act (SBA) regulations and therefore should not have been awarded the bid. Inoco filed an unjust enrichment claim against Jensen. The Eighth Circuit Court of Appeals held that although no private right of action existed under the SBA, the court could look to the SBA to determine whether a party has committed fraud or has been unjustly enriched.

In the instant case, we find that HHRMC was undoubtedly unjustly enriched. HHRMC was not authorized to perform TCCs, but did so and realized a benefit in the form of tremendous revenues and profits from performing these highly lucrative, yet unlawful, procedures. Nonetheless, even if we were to hold that *Hambrick* was not controlling and allow independent actions against a facility that violates the CON Act, just as the

*Inoco* court allowed an independent action for violations of the SBA, Appellants' claim still fails. Whether HHRMC was authorized to perform TCCs was irrelevant to Appellants' need for the procedure, and Appellants would have received the TCCs from another provider had HHRMC not administered them. In other words, Appellants have suffered no injury even if HHRMC has been unjustly enriched. For these reasons, we must affirm the trial court's dismissal of Appellants' unjust enrichment claim.

## CONCLUSION

Our Legislature enacted the CON Act with the purpose of promoting quality healthcare to the citizens of South Carolina, and when healthcare facilities perform unauthorized medical procedures, they act in direct derogation of this purpose. This problem is further exacerbated by inadequate penalties that a defiant facility receives for violating the Act. While DHEC is authorized to issue fines and even though a violation is considered a misdemeanor, such sanctions amount to a mere "slap on the wrist" penalty and provide no meaningful deterrence, especially in light of the lucrative and profitable nature of some medical procedures. In our view, HHRMC's actions are no different than an unauthorized healthcare provider from a foreign country setting up its operations in South Carolina, a scenario which would certainly cause great outrage. Nonetheless, we can find nothing in the CON Act implying a private cause of action and Appellants cannot show that they were injured as a result of HHRMC's actions. Accordingly, we must affirm the trial court's dismissal of Appellants' complaint.

**WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.**

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

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Raymond Bovain, Jr., as Personal Representative of the Estate of Willor Dean Bovain, Appellant,

v.

Canal Insurance, Roy R. Greene d/b/a Rusty Greene Tree Service, and John R. Frazier, Inc., Defendants,

Of Whom Canal Insurance is the Respondent.

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

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Opinion No. 26664
Heard March 5, 2009 – Filed June 8, 2009

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**REVERSED AND REMANDED**

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Carl B. Grant, of Orangeburg; and Richard A. Harpootlian and Graham L. Newman, both of Columbia, for Appellant.

Brian Dumas, of Peake Fowler & Associates, of Columbia, and Robert D. Moseley, Jr., of Smith, Moore, Leatherwood, of Greenville, for Respondent.

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**JUSTICE BEATTY:** Raymond Bovain, Jr. brought this declaratory judgment action as the Personal Representative of the Estate of Willor Dean Bovain, his late wife, after she died in a collision with a logging truck that was insured by Canal Insurance. Bovain asserted the truck driver was a "motor carrier" and sought reformation of the insurance policy to increase its limit of coverage to $750,000 pursuant to 23A S.C. Code Ann. Regs. 38-414 (Supp. 2008) (requiring heightened insurance coverage for "motor carriers"). Canal Insurance opposed the request and sought a declaration that the $40,000 of combined limits coverage carried on the truck was sufficient under South Carolina law. Both parties moved for summary judgment.[1] The circuit court granted summary judgment to Canal Insurance, finding the truck driver was not a "motor carrier" under state law and was not subject to the insurance requirement of Regulation 38-414. Bovain appeals. We reverse and remand for entry of summary judgment in favor of Bovain.

## FACTS

On September 9, 2004, Bovain's wife died after she collided with a logging truck driven by Roy R. Greene. Greene was pulling onto Interstate 26 from the side of the road when Bovain's wife struck him from behind. Her car burst into flames and she died at the scene.

Greene, who does business as Rusty Greene Tree Service, is in the business of hauling cut trees to various pulpwood and paper companies. At the time of the accident, Greene was picking up logs from a worksite beside Interstate 26 and planned to take them to a paper mill in Eastover, South Carolina. Greene had insurance coverage on the logging truck with Canal Insurance in a combined single liability limit of $40,000. The truck was a

[1] The remaining defendants are not parties to this appeal, so all references are solely to Canal Insurance.

ten-wheeler weighing approximately 26,000 pounds that Greene had purchased used. It had an attachment on the front for moving logs.

On November 4, 2005, Bovain filed this declaratory judgment action against Canal Insurance asserting Greene was a "motor carrier" and seeking to reform the insurance policy to increase the coverage to $750,000 pursuant to 23A S.C. Code Ann. Regs. 38-414. Under Regulation 38-414, which is applicable to "motor carriers," trucks weighing 10,000 or more pounds (GVWR)[2] that carry non-hazardous material must be insured under a policy carrying at least $750,000 of coverage. Bovain argued Greene was a motor carrier and thus was subject to the increased level of coverage required by Regulation 38-414.

Canal Insurance asserted Greene transported his own property and thus was not a motor carrier. Canal Insurance further argued that, even if Greene was a motor carrier, he was exempt from Regulation 38-414 because he was using his truck to haul cut trees. See S.C. Code Ann. Regs. 38-407(4) (Supp. 2008) (providing an exemption for "[l]umber haulers engaged in transporting lumber and logs from the forest to the shipping points in this State").

The circuit court granted summary judgment to Canal Insurance. Bovain appeals, alleging the circuit court erred (1) in ruling the insurance policy at issue cannot be reformed to increase the limit of coverage to $750,000 pursuant to 23A S.C. Code Ann. Regs. 38-414, (2) in finding Greene was not a "motor carrier" within the purview of Regulation 38-414, and (3) in finding that, even if Greene qualified as a "motor carrier," he fell within the "lumber hauler" exception contained in 23A S.C. Code Ann. Regs. 38-407(4) and thus was exempt from Regulation 38-414's coverage requirement.

## LAW/ANALYSIS

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings,

[2] "GVWR" stands for Gross Vehicle Weight Rating, i.e., the maximum total weight of a vehicle and its cargo.

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Brockbank v. Best Capital Corp., 341 S.C. 372, 378-79, 378, 534 S.E.2d 688, 692 (2000). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP. Id. at 379, 534 S.E.2d at 692.

**(A) Insurance for Motor Carriers Under Regulation 38-414**

Bovain first asserts the circuit court erred in finding Greene was not a "motor carrier" subject to the increased minimum insurance requirements of Regulation 38-414. We agree.

South Carolina law contains both statutes and regulations governing "motor carriers." At issue in this case is Regulation 38-414, which provides for heightened insurance requirements for certain "motor carriers" for hire as part of a group of Economic Regulations.

Specifically, Regulation 38-414 provides that "[i]nsurance policies and surety bonds for bodily injury and property damage will have limits of liability not less than" $750,000 per incident for trucks weighing 10,0000 or more pounds GVWR that carry non-hazardous freight. 23A S.C. Code Ann. Regs. 38-414 (Supp. 2008). This regulation applies "to any person . . . or corporation which is . . . engaged as a motor carrier for hire within the State of South Carolina" unless they are otherwise exempted. 23A S.C. Code Ann. Regs. 38-401 (Supp. 2008).

A "carrier," in the legal sense, refers to one who undertakes to transport persons or property from place to place. Huckabee Transp. Corp. v. W. Assurance Co., 238 S.C. 565, 121 S.E.2d 105 (1961); Windham v. Pace, 192

S.C. 271, 6 S.E.2d 270 (1939). The term "motor carrier" includes "both a common carrier by motor vehicle and a contract carrier by motor vehicle." 23A S.C. Code Ann. Regs. 38-402(8) (Supp. 2008).

Statutory law also controls motor carriers. Section 58-23-20 provides: "No corporation or person . . . may operate a motor vehicle for the transportation of persons or property for compensation on an improved public highway in this State" without complying with the applicable statutory provisions and the regulations and authority of the Public Service Commission. S.C. Code Ann. § 58-23-20 (Supp. 2008) (emphasis added).

"The term 'motor vehicle carrier' [as used in the portion of the Code concerning the regulation of motor vehicles for compensation] means every corporation or person . . . owning, controlling, operating or managing any motor propelled vehicle . . . used in the business of transporting persons or property for compensation over any improved public highway in this State[.]" S.C. Code Ann. § 58-23-10(4) (1977) (emphasis added).

The phrase "for compensation" as used in section 58-23-20 "means a return in money or property for transportation of persons or property by motor vehicle over public highways, whether paid, received or realized, and shall specifically include any profit realized on the delivered price of cargo where title or ownership is temporarily vested during transit in the carrier as a subterfuge for the purpose of avoiding regulation under this chapter." S.C. Code Ann. § 58-23-30 (1977).

In the case before us, the circuit court found Greene was a private carrier, not a motor carrier, so he was not subject to the insurance requirements in Regulation 38-414. The circuit court found "Greene is not a motor carrier for hire because he does not transport the property of others for compensation." The circuit court stated: "Greene cuts trees, picks up trees that have been cut and abandoned to him by other tree services, and hauls and sells those trees to pulpwood and paper companies. When he sells the trees, he receives their market value, not a fee for handling them as cargo. Greene is transporting and selling his own property and is not subject to regulation as a motor carrier for hire."

The circuit court stated because Greene is a private carrier, "he is not required to carry a certificate of authority issued by the Public Service Commission (PSC) . . . . Instead, as a private carrier, Greene is governed by the general South Carolina Financial Responsibility Act, which, at the time of the collision, only required him to maintain minimum liability limits of $15,000/$30,000/$10,000 or, in this case, combined single limits of $40,000," citing S.C. Code Ann. § 38-77-140. The circuit court concluded that reformation of the policy issued by Canal Insurance to provide the minimum coverage for a motor carrier of $750,000 was not appropriate as "Greene complied with the law as it applies to private carriers."

On appeal, Bovain contends the circuit court erred in finding that Greene is not a motor carrier subject to the increased limits of coverage in Regulation 38-414. Bovain asserts the temporary transfer of ownership of the logs to Greene may not be used to avoid application of the limits of coverage in Regulation 38-414.

Canal Insurance, in contrast, maintains Greene is not compensated for transporting the wood; rather, Greene owns the trees and takes them to the mills of his choice. Canal Insurance asserts "[t]he fact that Greene is paid by a timber broker [John Frazier] for providing logs to various mills and pulpwood producers does not contradict the fact that he is selling the wood as his own property . . . ."

During his deposition testimony, Greene testified that, on the date of the accident with Bovain's wife, he had responded to a call from a tree cutting service that was removing trees under a contract with the highway department near Interstate 26. Greene testified that he was asked to pick up the wood, which he was told "was on I-26 in between the Lexington hospital and no. 1 exit going toward Charleston." Greene had loaded his truck with cut wood on the side of Interstate 26 and then was pulling onto Interstate 26 to take it to a mill in Eastover when the collision occurred.

Greene stated he had worked with John Frazier for approximately ten years. Greene testified that he picks up wood at various locations for himself,

but stated, "I just sell it through Frazier. That's how I get rid of it." Greene does not charge anything for picking up the wood because he plans to sell it. Greene conceded that when he took the lumber to the mills, he would not be paid at that time. Instead, Frazier would pay him based on the amount of wood procured. Greene acknowledged that Frazier "tells me where I can go with it." Greene stated he did not talk directly to the mills, but did so only "[t]hrough Frazier."

Greene stated he was under Frazier's workers' compensation coverage. In addition, Frazier loaned him money to purchase his logging trucks, including the one that was involved in this accident. Greene stated he purchased the insurance policy with a combined single limit of $40,000 as that was the absolute minimum level he could acquire based on the truck's weight.[3]

John Frazier, a self-identified broker and timber dealer, testified in his deposition that Greene would take the wood to the mill, which would then issue a ticket, and Greene would bring the ticket to him. Frazier would then take out a percentage of the amount for "handling" and give Greene the remainder.

Frazier acknowledged that when Greene brought logs to a mill, the sale price would be credited to his [Frazier's] account, and Greene would bring him the ticket. Frazier stated he has contracts with the paper companies and they pay him, not Greene. Frazier frequently gave "advances" to Greene, and usually kept about ten to twenty percent of the proceeds for being the "middle man" and then gave Greene the remainder. Frazier stated he usually paid Greene and others, including loggers (those he subcontracted with to cut the wood) and vendors, every Friday. Frazier stated Greene procured virtually all of the wood on his own. When asked why Greene did not just sell the wood himself, i.e., why did he need him [Frazier], Frazier conceded: "He doesn't." However, Frazier explained that the mills like to work with people they know, and he had a reputable company with sixty years of experience in the business so they liked doing business with him.

[3] In his affidavit, Greene stated he explained the nature of his business to his insurance agent and requested the minimum liability limits allowed by law.

We find the evidence in the record indicates that Greene sold the logs in the name of John Frazier for at least ten years, that the mills paid John Frazier, not Greene, and that Frazier directed him as to which mills to sell to. Under these circumstances, Frazier is the true seller, and Greene is merely transporting the logs for the convenience of Frazier.

The fact that Greene temporarily held title to the logs does not preclude the finding that he was being paid to transport materials. See S.C. Code Ann. § 58-23-30 (1977) (The phrase "for compensation" as used in section 58-23-20 "means a return in money or property for transportation of persons or property by motor vehicle over public highways, whether paid, received or realized, and shall specifically include any profit realized on the delivered price of cargo where title or ownership is temporarily vested during transit in the carrier as a subterfuge for the purpose of avoiding regulation under this chapter.").

Since Greene knew when he was picking up the logs that he would promptly sell them in the name of John Frazier, Greene was merely holding title temporarily until he took the logs to the mill. Thus, we conclude Greene was transporting the wood for Frazier and hold that he qualifies as a motor carrier under South Carolina law. See 13 Am. Jur. 2d Carriers § 5 (2000) ("The nature of a carrier is determined by its method of operation. Thus, it has been said that a carrier's status is determined by what it does rather than by what it says it does." (footnote omitted)).

**(B) Exemption for Lumber Haulers in Regulation 38-407(4)**

Bovain next argues the circuit court erred in determining that, "[e]ven assuming . . . Greene is a 'motor vehicle carrier' for hire, Greene would be exempt from the insurance requirements in Title 58 and under the regulations because he is a lumber hauler." [R 7] Bovain asserts Canal Insurance failed to establish that the lumber hauler exemption was applicable here. We agree.

Regulation 38-407 provides for exemptions from the Economic Regulations for certain motor carriers. In particular, Regulation 38-407(4)

provides an exemption for qualifying "[l]umber haulers engaged in transporting lumber and logs from the forest to the shipping points in this State." 23A S.C. Code Ann. Regs. 38-407(4) (Supp. 2008) (emphasis added). The phrase "from the forest" is not defined in the regulation.

Bovain argued the exemption did not apply because Greene was not transporting logs "from the forest," but was, instead, picking up logs left by a tree cutting operation that was working in an area along Interstate 26. The circuit court found Bovain was "reading the exemption in an overly-restrictive manner" and that "[t]his exemption is a 'farm to market' exemption and applies when an individual hauls an agricultural product from the point of production to the point of sale."

On appeal, Bovain contends the circuit court interpreted this exemption in a manner that is inconsistent with the plain language of the regulation. Bovain asserts Greene was not a hauler engaged in transporting logs "from the forest," and carriers such as Greene who regularly utilize the State's highways to carry on their business are not entitled to the protection of the "farm-to-market" exemption, which was intended to exempt the infrequent transportation of agricultural products to the market, not the almost daily transportation of items for profit as done by Greene.

The burden of proving the entitlement to an exemption is on the party asserting the exemption. See Ga. Cas. & Sur. Co. v. Jernigan, 305 S.E.2d 611, 614 (Ga. Ct. App. 1983) (finding a truck owner and its insurer failed to meet their burden of showing a pulpwood truck came within the terms of an exemption from the general statutory definition of "motor contract carrier" where they did not prove the truck was engaged exclusively in the transportation of agricultural products from the forest to the mill or other place of manufacture). In this case, the burden was on Canal Insurance to prove the exemption was applicable, and there was no burden on Bovain in this regard. See id. (stating there is no burden on the opposing party).

In general, exemptions are an act of legislative grace and, as such, they are to be strictly and reasonably construed. See State v. Life Ins. Co., 254 S.C. 286, 293-94, 175 S.E.2d 203, 206-07 (1970) (noting exemptions are

provided as an act of legislative grace and are to be construed strictly; a party must meet the specified conditions to obtain the benefit conferred by the exemption); see also Village of Lannon v. Wood-Land Contractors, Inc., 672 N.W.2d 275, 278 (Wis. 2003) (applying a "strict but reasonable construction" in interpreting the application of a personal property tax exemption specifically established for logging equipment).

The words used in legislation "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand [their] operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); see Owen Indus. Prods., Inc. v. Sharpe, 274 S.C. 193, 195, 262 S.E.2d 33, 34 (1980) (stating the general rule that a statutory exemption "must be given its plain, ordinary meaning and must be construed strictly against the claimed exemption"); State v. Hood, 49 S.C.L. (15 Rich.) 177, 185 (1868) ("Every exemption must be couched in such plain and unambiguous language as to satisfy the Court beyond doubt that the Legislature intended to create the exemption. Such a right can never arise by mere implication, and all laws granting the exemption are to be most strictly construed." (citation omitted)).

As noted by one treatise, "forest" is synonymous with "woods," and in its commonly understood sense, refers to an extensive area of land covered by trees:

> The term "wood" is often used in the plural, with the same force as in the singular, as indicating a large and thick collection of trees. It is synonymous with "forest," and has been so defined, although the latter term is sometimes said to imply a wood of considerable extent. Both terms are broad enough to include not only the trees but the land on which they stand. When referring to land, the term "woods" means forest lands in their natural state, as distinguished from lands cleared and enclosed for

> cultivation, and "forest" means a tract of land covered with trees, or a tract of woodland with or without enclosed intervals of open and uncultivated ground.

98 C.J.S. Woods and Forests § 1 (2002) (footnotes omitted).

The Supreme Court of Illinois has also found that "[a] forest is defined as a tract of land covered with trees; a wood, usually of considerable extent." Forest Preserve Dist. v. Jirsa, 168 N.E. 690, 691 (Ill. 1929) (alteration in original); see also People v. Long Island R.R. Co., 110 N.Y.S. 512, 512 (N.Y. App. Div. 1908) (stating "[a] forest is defined as being 'a tract of land covered with trees; a wood, usually one of considerable extent; a tract of woodland with or without [e]nclosed intervals of open and uncultivated ground'" (citation omitted)).

We find the definitions above persuasive, and believe that the plain meaning of "forest" is that it commonly refers to an area of land covered with trees, usually of considerable extent. The express language of Regulation 38-407(4) exempts those hauling lumber from a forest as the point of production. We see no reason to deviate from the plain language of the regulation.

Canal Insurance submitted an affidavit from David Findlay, the Administrator of the Motor Carrier Services Division (MCS) of the South Carolina Department of Motor Vehicles, who stated that "MCS interprets this regulation broadly as applying to persons like Greene who haul cut trees to lumber processors. These exemptions are generally referred to as farm-to-market exemptions." (Emphasis added.) Similarly, Findlay stated that MCS interprets a statute governing the transporting of "forest products from the farm to the first market" to be applicable "to lumber haulers that haul cut trees to sell to pulpwood processors regardless of whether the trees are actually obtained from a 'forest.'" (Emphasis added.)

MCS applies the wrong standard of construction as exemptions are to be construed narrowly, not broadly. Further, MCS is not responsible for overseeing the Economic Regulations. Consequently, its interpretation is not determinative.

Because Regulation 38-407 is meant to be a farm-to-market exception, it should apply to areas of usual harvesting, not just small areas where trees can be cut. See generally 17 Words and Phrases Forestation 43 (Supp. 2008) (citing Cascade Floral Prods., Inc. v. Dep't of Labor & Indus., 177 P.3d 124 (Wash. Ct. App. 2006), which found that Washington's farm labor contractor act did not apply to the brush picking industry as it was not "forestation" within the meaning of the act because the statutory definition of "forestation" required cultivation or commercial planting).

A broad interpretation of "forest" as pertaining to any site where trees are cut would eviscerate the language that the exemption applies to those hauling logs "from the forest to the shipping points in this State." We do not believe that is a reasonable and strict construction of all of the pertinent terms of the exemption. The legislature could have easily used broader language and stated that anyone hauling lumber or logs is exempted if that were its intent. Cf. State v. Alls, 330 S.C. 528, 531, 500 S.E.2d 781, 782 (1998) (stating legislative provisions must be read as a whole and sections which are part of the same law should be construed together and each given effect, if it can be done by any reasonable construction). In this case, we conclude Canal Insurance did not meet its burden of establishing that the exemption applied here as there was no evidence that Greene was transporting lumber and logs "from the forest to the shipping points in this State."

Having found Greene qualified as a motor carrier, and that he did not meet the requirements for exemption as a lumber hauler, we hold the policy issued by Canal Insurance should be reformed because it does not conform to the legal requirements for coverage as mandated by Regulation 38-414. See Hamrick v. State Farm Mut. Auto. Ins. Co., 270 S.C. 176, 179, 241 S.E.2d 548, 549 (1978) ("A policy of insurance issued pursuant to statutory law must at a minimum give the protection therein described. It may give more protection but not less, and a policy issued pursuant to the law which gives less protection will be interpreted by the court as supplying the protection which the legislature intended."); Jordan v. Aetna Cas. & Sur. Co., 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975) (stating while parties are generally permitted to contract as they desire, this freedom is not absolute and

insurance coverage required by law may not be omitted because statutory provisions relating to an insurance contract are part of the contract).

Although Canal Insurance argues that reformation is appropriate only for automobile insurance policies issued under the South Carolina Financial Responsibility Act, we find no reason to impose this arbitrary distinction.

Regulation 38-414 provides: "Insurance policies and surety bonds for bodily injury and property damage **will** have limits of liability **not less than**" $750,000 per incident for trucks weighing 10,0000 or more pounds GVWR that carry non-hazardous freight. S.C. Code Ann. Regs. 38-414 (emphasis added). The South Carolina Legislature has mandated a level of coverage for larger vehicles in order to protect the public from the increased dangers inherent with their operation on our state's highways. It would be unreasonable to interpret the language of Regulation 38-414 differently from the mandated coverage under the Financial Responsibility Act, as the potential for catastrophic damage is much greater with these larger vehicles. We find insurance carriers have a duty to issue policies in accordance with the mandated minimum levels of coverage and that reformation of the Canal Insurance policy to provide the mandated minimum level of coverage is appropriate.

## CONCLUSION

Based on the foregoing, we hold Greene is a motor carrier as defined in the South Carolina Code and that the exemption from the Economic Regulations for lumber haulers is not applicable here. We find insurers have a duty to issue insurance in accordance with the mandate of Regulation 38-414 and conclude Bovain is entitled to reformation of the Canal Insurance policy to conform to the $750,000 minimum level of coverage required by Regulation 38-414. Accordingly, we reverse and remand for entry of summary judgment in favor of Bovain.

**REVERSED AND REMANDED.**

**TOAL, C.J., WALLER, J. and Acting Justice James E. Moore, concur. KITTREDGE, J., concurring in part, dissenting in part in a separate opinion.**

**JUSTICE KITTREDGE**: I concur with the majority's holding that Roy R. Greene was, as a matter of law, a motor carrier under South Carolina law on the accident date of September 9, 2004. I respectfully dissent, however, from the legal determination that Greene may not avail himself of the exemption contained in Regulation 38-407(4). 23A S.C. Code Ann. Regs. 38-407(4) (Supp. 2008) (providing an exemption for "[l]umber haulers engaged in transporting lumber and logs from the forest to the shipping points in this State"). I do not believe the applicability or inapplicability of the exemption may be determined on the current record to the exacting summary judgment standard. I would reverse the grant of summary judgment in favor of Greene and remand to the trial court for further consideration of the claimed exemption.

# The Supreme Court of South Carolina

In the Matter of William Grayson Ervin, Respondent.

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ORDER

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On February 15, 2008, respondent was arrested and charged with pointing and presenting a firearm, which is a felony. As a result, the Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rules 16(c) and 17(a), RLDE, Rule 413, SCACR. The petition is granted.

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

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

Columbia, South Carolina
February 21, 2008

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

The State, Respondent,

v.

Charles Q. Jackson, Appellant.

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

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Opinion No. 4554
Heard February 18, 2009 – Filed June 2, 2009
Revised June 3, 2009

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**AFFIRMED IN PART, REVERSED IN PART, and REMANDED**

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Deputy Chief Appellate Defender For Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark

Rapoport, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

**LOCKEMY, J.:** Charles Q. Jackson appeals his conviction and thirty-year sentence for voluntary manslaughter and possession of a weapon during the commission of a crime, arguing the trial court erred in excluding evidence of his knowledge of the decedent's violent history and in refusing to charge the jury on self-defense. We affirm the trial court's exclusion of evidence but reverse its refusal to charge the jury on self-defense.

## FACTS

Jackson lived in a mobile home with his girlfriend and two children. Jackson's home was located adjacent to the mobile home of his sister, Vicki (Sister); her boyfriend, Andrew Felder; and Sister's three young children. Jackson's mother, Dorothy (Mother), lived with Sister and Felder but sometimes stayed the night at Jackson's home. When Mother drank alcohol to the point of intoxication, she became boisterous and unpleasant and, when her children were young, whipped them and beat Jackson with a broom.

On October 27, 2003, Mother drank heavily and began arguing with Felder. After unsuccessfully asking Mother to leave, Sister went to her brother's home and asked him to come and remove Mother from Felder's home. Jackson encountered Mother and Felder in the yard between the homes and invited Mother to his home, where he was cooking dinner for his family. When she refused, Jackson told her his door would be open to her. As Jackson turned back toward his home, Mother began to cry and told him Felder disliked Sister's son and beat Sister. Jackson returned and asked Felder what was going on. Both Felder and Sister denied Mother's statements.

Mother attempted unsuccessfully to re-enter Felder's home. Testimony differed as to what happened next. According to Sister, Mother stumbled as she tried to go up the steps, Felder caught her as she fell, and Mother told him not to touch her. According to Jackson, Felder blocked the door with his

body, argued with Mother, and the two returned to the yard when Jackson intervened on Mother's behalf. Once back in the yard, Mother positioned herself between Jackson and Felder and, still arguing with Felder, shoved him. Felder warned Mother not to touch him again, and Jackson warned Felder not to touch Mother. Shortly thereafter, Felder either shoved or punched Mother, knocking her to the ground.

The record does not indicate which man delivered the first blow, but when Mother fell to the ground, Jackson and Felder began fighting. Felder soon pinned Jackson against Felder's mobile home, pummeling him. According to his testimony, Jackson feared for his life and therefore pulled out his pocketknife and stabbed or cut Felder a total of seventeen times.[1] As Jackson looked on in shock, Felder fell to the ground, bleeding profusely, and died. Jackson ran away and hid, discarding his shirt and the knife, but turned himself in to police two days later.[2]

Jackson was charged with murder and possession of a weapon during a crime. The trial court sustained the State's objections to testimony concerning Felder's boasts about his past crimes and violence. Over Jackson's objections, the trial court refused to charge the jury concerning self-defense. Jackson was convicted of voluntary manslaughter, for which he was sentenced to thirty years' imprisonment, and the weapons charge, for which he was sentenced to a concurrent term of five years' imprisonment. Jackson appealed to this court.

## LAW/ANALYSIS

### I. Exclusion of Evidence

Jackson argues the trial court erred in excluding his testimony about his personal knowledge of Felder's violent history. We disagree.

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[1] Felder sustained eight stab wounds and nine cuts.

[2] Although Jackson identified in which garbage can he threw his shirt and pocketknife, they were not recovered because the garbage was picked up before police checked the can.

The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006).

Generally, the failure to make a proffer of excluded evidence will preclude review on appeal. State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) (holding a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been). Where no proffer of excluded testimony is made, the court is unable to determine whether the appellant was prejudiced by the trial court's refusal to admit the testimony into evidence. TNS Mills, Inc. v. S.C. Dep't. of Revenue, 331 S.C. 611, 628, 503 S.E.2d 471, 480 (1998).

We affirm the trial court's decision to exclude evidence of Jackson's knowledge of Felder's violent history because Jackson failed to preserve this issue by proffering the excluded testimony. Excluded testimony must be proffered to the trial court to preserve the issue of its exclusion for appellate review. See Santiago, 370 S.C. at 163, 634 S.E.2d at 29. Because Jackson made no attempt to proffer this testimony, the issue of its exclusion is not preserved for our review.[3]

[3] The threshold issue is whether Jackson attempted to proffer the evidence, rather than whether his attempt succeeded. The rule regarding proffers has been relaxed where the trial court refuses to allow a proffer and the record clearly demonstrates prejudice, or where the appellate court is able to determine from the record what the testimony was intended to show and that prejudice clearly exists. Jamison v. Ford Motor Co., 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007). In such instances, the appellate court will address the merits if it can be determined what the testimony was intended to show. Rule 103(a)(2), SCRE; State v. Schmidt, 288 S.C. 301, 303, 342

## II. Jury Instruction

Jackson next argues the trial court erred in refusing to charge the jury on self-defense. We agree.

Generally, the trial judge is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). The evidence presented at trial determines the law to be charged to the jury. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). "If there is any evidence of record from which it can be reasonably inferred that an accused justifiably inflicted a wound in self-defense, then the accused is entitled to a charge on the law of self-defense." State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct. App. 2007). When any evidence in the record entitles the accused to a jury charge on self-defense, a trial judge's refusal to give the charge is reversible error. State v. Muller, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984).

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S.E.2d 401, 403 (1986). Here, because Jackson failed to proffer his testimony, we are unable to review it to determine what it was intended to show and if it were admissible under State v. Day, 341 S.C. 410, 419-20, 535 S.E.2d 431, 436 (2000) ("In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm."). Furthermore, even if this court could discern from the record and arguments on appeal what the testimony would have shown, Jackson does not argue, nor does the record indicate, clearly extant prejudice. See Rule 208(b)(1)(D), SCACR; Jinks v. Richland County, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003) (deeming abandoned on appeal an issue not argued in a party's brief); Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005) (placing on Appellant the burden of presenting a sufficient record to allow review).

A self-defense charge is only required when the evidence supports it. State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007). The State then bears the burden of disproving self-defense beyond a reasonable doubt. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002).

> To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

Slater, 373 S.C. at 69-70, 644 S.E.2d at 52. "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). An accused who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary. Id.

We reverse the trial court's decision not to instruct the jury on self-defense because some evidence exists to support a self-defense charge and because the facts in this case are similar to those in a South Carolina Supreme

Court case in which a self-defense charge was found to be proper. See State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). The trial court did not articulate a specific basis for its decision at the time it ruled. However, oral argument on Jackson's request for a jury charge focused on the first and last elements of self-defense. A jury could have found Jackson satisfied those elements and should have had the opportunity to consider self-defense.

A jury could reasonably have found Jackson was not at fault for the fight because no evidence indicated he acted "in violation of law" and in a manner "reasonably calculated to produce the occasion" until after he became embroiled in the fight. See id. The eyewitness testimony supports very different theories of fault. Felder and Mother were already arguing before Jackson attempted to convince Mother to leave the yard with him. Seeing the dangerous level of tension between Mother and Felder, Jackson instructed Felder not to touch Mother. Mother pushed Felder, he shoved her to the ground, and the men began to fight. No testimony indicated whether Jackson or Felder threw the first punch. Under one theory, Jackson could have assaulted Felder, thereby negating his right to argue self-defense. However, under another equally viable theory, Felder, already angry from his interaction with Mother, could have assaulted Jackson when Jackson stepped between Jackson and Mother. Because a jury could reasonably infer from the evidence that Felder assaulted Jackson, a refusal to charge self-defense on the basis of fault would have been reversible error. See State v. Muller, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984).

A jury also could have found Jackson had no other probable means of preventing serious bodily injury or death once the fight began. Unless the incident occurred in the accused's home or business or on the curtilage thereof, the accused generally has a duty to retreat. State v. Wiggins, 330 S.C. 538, 548 n.15, 500 S.E.2d 489, 494 n.15 (1998). This incident occurred on ground between Jackson's and Felder's trailers, with the climax playing out against the outer wall of Felder's trailer. Consequently, Jackson had a duty to retreat if possible. However, testimony indicated at the time Jackson stabbed Felder, Felder was in a superior position to Jackson, had pinned him

against a wall, and was continuing to beat him.[4] There was also testimony that Felder himself had the knife at one point during the fight. Therefore, a jury could reasonably infer from the evidence that at the time he made the decision to stab Felder, Jackson had no other means of extricating himself, and a refusal to charge self-defense on the basis of failure to retreat would have been reversible error. See Muller, 282 S.C. at 10, 316 S.E.2d at 409.

Furthermore, although the issues on appeal differ, the facts of this case are similar to those in State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). There, Taylor witnessed a violent and escalating argument between a man named Kevin and a woman. Id. at 229, 589 S.E.2d at 2. Kevin pushed the woman, and Taylor intervened in an attempt to stop the altercation. Id. Witnesses disagreed about who started the fight between Taylor and Kevin. Id. At the homeowner's insistence, the two men took their fight outside. Id. at 230, 589 S.E.2d at 2. At some point during the outdoor portion of the fight, Taylor took a buck knife from his pocket and stabbed Kevin a total of fifteen times. Id. Kevin died of a stab wound to the heart. Id. The Taylor court considered whether the trial court properly charged the jury on both self-defense and mutual combat. Id. at 231-34, 589 S.E.2d at 3-5. No exception was taken to the charge on self-defense; rather, the supreme court held the mutual combat charge negated the self-defense charge and created unfair prejudice against Taylor.[5] Id. at 235, 589 S.E.2d at 5. The supreme court specifically found the trial court properly charged self-defense. Id.

Here, Jackson intervened as peacemaker in an escalating argument between Mother and Felder. After Felder pushed Mother to the ground, Jackson and Felder began to fight, although no evidence indicates which man threw the first punch. Felder eventually pinned Jackson against the wall of a mobile home, preventing his escape. Fearing Felder would not stop hitting

[4] Both Jackson and Sister, who testified in the State's case-in-chief, attested to these facts.

[5] We do not suggest mutual combat and self-defense are mutually exclusive; rather, in Taylor, there was no evidence that the victim was willing to engage in mutual combat with Taylor.

him, Jackson took from his pocket the pocketknife he used for work. Jackson stabbed Felder eight times, killing him.[6]

Although the supreme court's finding concerning the propriety of charging self-defense in Taylor is dicta, it is nonetheless instructive in the case at bar. In both cases, the accused stepped into a fight in progress with the intent of stopping the violence but instead became a participant and killed the man he fought. However, in Taylor, the accused was not closely related to the woman whose place he took in the fight. In addition, the accused in Taylor may have had an opportunity to retreat at the time the men removed their fight from the house to the yard. If the evidence merited a self-defense charge under those circumstances, it should do so here as well.

The dissent notes that the defense of others was not an issue on appeal but proceeds to analyze that doctrine in part. We do not turn our disposition on that doctrine. We find only that more than one reasonable inference may be drawn as to whether the accused was the aggressor or provoked the assault and that these inferences must be resolved by the jury, not the court. In our view, the testimony cited by the dissent does not demonstrate that the defendant provoked the assault nor does it establish who the aggressor was in this situation. We also respectfully disagree that we may conclude from this record that it was "apparent" why the defense of others was not asserted on appeal. To do so would amount to speculation on our part and it would be inappropriate to resolve this issue on such speculation. Accordingly, we respectfully disagree with our learned colleague and suggest the matter is more appropriately resolved by the jury.

## CONCLUSION

We find Jackson failed to preserve the trial court's exclusion of evidence for appellate review and therefore affirm that decision. However, we find the trial court erred in refusing to charge the jury on self-defense, and

[6] According to the State's forensic pathologist, Felder suffered seventeen knife wounds. Nine were incise wounds, which are surface cuts. Eight were stab wounds, which penetrated deeper into the body.

thus we reverse the conviction for voluntary manslaughter. Because we reverse the voluntary manslaughter conviction, we necessarily must reverse the conviction for the weapon charge. Accordingly, the decision of the trial court is

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**PIEPER, J., concurs and CURETON, A.J., dissents.**

**CURETON, A.J., dissenting:** Because I believe the only reasonable inference that can be drawn from the evidence is that Jackson was not faultless in "bringing on the difficulty" between him and Felder, he was not entitled to a charge on self-defense. I would therefore affirm.

I note initially that although Jackson's principal argument at trial was that he had a right to defend his mother, he has not asserted on appeal that he was entitled to the self-defense charge because he was defending his mother. It is apparent that the reason he has not done so is due to the fact that, as admitted at trial, his mother was the person who started the fight with Felder, thus, bringing on the difficulty.

I believe Jackson's status in reference to his right to a self-defense charge is summed up in his own testimony. In response to his counsel's questions, he responded on direct examination as follows:

> Q. Did you ever say anything to him about pushing your mother?
>
> A. Yes, sir. I told him not to touch her.
>
> Q. Then what happened?
>
> A. Because she was in between us and real close. So, I was like—and I seen the expression on his face

like he was ready to hit her. So, I was like don't touch her.

Q. Then what happened?

A. He hit her and we started fighting.

Q. And were y'all all on the ground when you say he hit her?

A. Yes, sir.

* * *

Q. … How long after your mother was pushed did you and [Felder] begin to fight?

A. Immediately.

* * *

Q. Did you feel the need to protect your mother?

A. Yes, sir, I did.

Q. … Before the fight began why didn't you just run away?

A. Because I was scared. I mean, if I would have ran away, I mean, by her being drunk and him being him that she was going to get it. He was going to jump on her.

Additionally, Jackson's sister, Elizabeth Jackson, testified:

> Q. Going back, could you tell us because I'm not entirely sure, the pushing between your mother and Andrew Felder, can you tell us again from the start how the physical contact [between Mother and Felder] occurred?
>
> A. My mother pushed [Felder] first, and he replied to her not to touch him again. She pushed him again, and he pushed her, and when he hit her, she hit the ground, and my brother came in, and that's how they started fighting.

An accused who "provokes or initiates an assault" cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997). Moreover, one cannot justify a homicide on the ground of necessity in the defense of another when the other person could not have asserted self-defense by reason of having provoked the encounter. 40 Am. Jur. 2d Homicide, § 168 (2008).

I would affirm the trial court's decision not to instruct the jury on self-defense because there is no evidence to support a self-defense charge. It is undisputed that Felder and Mother were already arguing before Jackson attempted to convince Mother to leave Felder's house with him. Aware of the level of tension between Mother and Felder, Jackson virtually dared Felder to touch Mother. After Mother pushed Felder, he shoved her to the ground. Thereafter, according to the uncontradicted testimony of Jackson's sister, Jackson "came in" and the fight began immediately. While the majority states that a reasonable inference from the testimony is that Felder assaulted Jackson and thus was the aggressor, I do not think that is a reasonable inference to be drawn from the evidence. I would hold that, unlike State v. Taylor, where the defendant testified the decedent "threw the first punch," the

only reasonable inference the jury could adduce from the testimony in this case is that Jackson intervened in an ongoing altercation between Mother and Felder to protect his mother who admittedly was at fault in bringing on the difficulty. Because Jackson stepped into the shoes of his mother, he was not entitled to a charge on self-defense.

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

J. Rutledge Young, Jr., Appellant,

v.

South Carolina Department of Health and Environmental Control, Boyce and Carol Miller, Respondents.

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Appeal From The Coastal Zone Management Appellate Panel
John P. Edwards, Special Assigned Chairman

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Opinion No. 4555
Heard February 18, 2009 – Filed June 4, 2009

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**AFFIRMED**

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Stephen L. Brown, Esquire, J. Rutledge Young, Jr., of Charleston, for Appellant.

Carlisle Roberts, Jr., of Columbia, Cotton C. Harness, III, of Mt. Pleasant, Davis A. Whitfield-Cargile and Elizabeth Applegate Dieck, both of Charleston, for Respondents.

**THOMAS, J.:** This is a dock permit appeal. J. Rutledge Young contends the Coastal Zone Management Appellate Panel (CZMAP) erred in accepting and adopting the Administrative Law Judge's findings of fact and conclusions of law. Specifically, Young alleges CZMAP, in upholding the disputed permit, erred in (1) declining to find the Administrative Law Court (ALC) made an error of law in deciding the case under incorrect regulations; (2) declining to find the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) abused its discretion in failing to exercise discretion when issuing the disputed permit; and (3) declining to find OCRM abused its discretion when not considering the cumulative effect of a boatlift included in the permit application. We affirm.

## FACTS AND PROCEDURAL HISTORY

On April 5, 2005, Samuel M. Riddle, III, submitted an application to OCRM to construct a private recreational dock in Church Creek originating from Lot 11-D on Lonnie Taylor Lane in Wadmalaw Island. According to the application, the proposed project was to include a 10-foot by 15-foot four-pile boatlift. Public notice of the permit application was published on April 21, 2005.

On May 3, 2005, Young, who owns property two lots away from Lot 11-D, notified OCRM in writing of his objection to the proposed permit. Among the objections to the permit was Young's complaint that the proposed boatlift would interfere with his view of Church Creek. In support of his position, Young asserted there were only five docks on the Wadmalaw side of Church Creek, none of which had mechanical boatlifts. Young also contended a drive-on floating dock was an available alternative that would cause less interference with his view.

OCRM issued a conditional dock permit on June 10, 2005, and validated the permit on June 15, 2005. The conditional permit noted that "[a] 10' by 15' four-pile boatlift will be located on the downstream side of the

pierhead." Boyce and Carol Miller bought Lot 11-D on June 21, 2005, and were later substituted for Riddle as respondents of record in this case.

The pertinent regulation in effect when the permit was issued gave OCRM the right to consider allowing an applicant to have a boat storage dock in lieu of a boatlift; however, on June 24, 2005, it was amended to give the permit applicant the option of a boatlift or a storage dock.[1]

On June 12, 2006, the ALC held a hearing in the matter. By order dated August 21, 2006, the ALC upheld OCRM's decision to issue the permit for the dock with the boatlift.

On August 30, 2006, Young appealed the ALC decision to CZMAP. CZMAP heard oral arguments in the matter on June 22, 2007, and on August 17, 2007, affirmed the ALC. This appeal followed.

## ISSUES

I. Did CZMAP err in declining to hold the ALC decided this case using regulations that were not in effect when OCRM considered the permit application?

II. Did CZMAP err in declining to hold OCRM abused its discretion in failing to exercise discretion when issuing the disputed permit?

[1] The prior regulation provided in pertinent part that "[b]oat storage docks will be considered on a case-by-case basis and may be permitted in lieu of elevated boatlifts." 23A S.C. Code Ann. Regs. 30-12(A)(2)(q)(viii) (Supp. 2003). Under the 2005 changes, applicants were granted the right "to choose either one boat lift or one boat storage dock with an impact area not to exceed 160 square feet that will not count against the total allowable dock square footage." 23A S.C. Code Ann. Regs. 30-12(A)(2)(c) (Supp. 2005).

III. Did CZMAP err declining to hold OCRM abused its discretion in not considering the cumulative effect of the proposed boatlift as required by its own regulation?

## STANDARD OF REVIEW

"In contested permitting cases, the ALC serves as the finder of fact." Neal v. Brown, 374 S.C. 641, 648, 649 S.E.2d 164, 167 (Ct. App. 2007), cert. granted May 30, 2008. On appeal to CZMAP, the standard of review is whether substantial evidence supports the ALC's findings. Id. "A proceeding before the ALJ is in the nature of a de novo hearing, including the presentation of evidence and testimony, rather than an appellate proceeding." Brownlee v. S.C. Dep't of Health & Env'tl Control, 372 S.C. 119, 125, 641 S.E.2d 45, 48 (Ct. App. 2007), rev'd on other grounds Op. No. 26620 (S.C. Sup. Ct. filed Mar. 30, 2009) (Shearouse Adv. Sh. No. 14 at 11).

Judicial review of CZMAP's decision by this Court is governed by the prior version of section 1-23-380(A)(6) of the South Carolina Code, under which the court "may reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are

> (a) in violation of constitutional or statutory provisions;
> . . .
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion
> . . . ."

S.C. Code Ann. § 1-23-380(a)(6) (2005). "An abuse of discretion occurs when a ruling is based on an error of law or a factual conclusion without evidentiary support." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 300, 641 S.E.2d 903, 907 (2007).

## LAW/ANALYSIS

### I. Applicable Regulations

Young first argues CZMAP should have reversed the order issued by the ALC because the ALC based its decision on regulations that were not in effect when the permit application came before OCRM. We hold this issue was not preserved for appellate review.

A court has a limited scope of review of the final decisions of administrative agencies and cannot ordinarily consider issues that were not raised to and ruled on by the agency from which an appeal is taken. See Kiawah Resort Assocs. v. S.C. Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995) (applying this rule to judicial review by the circuit court of an administrative agency decision). "[E]very ground of appeal ought to be distinctly stated that the Court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." Boyer v. Loftin-Woodard, Inc.., 247 S.C. 167, 170-71, 146 S.E.2d 606, 607 (1966); see also Home Med. Sys. v. S.C. Dep't of Revenue, Op. No. 26638 (S.C. Sup. Ct. filed April 20, 2009) (Shearouse Adv. Sh. No. 17 at 25, 31) (emphasizing that issue preservation is required in administrative appeals and holding "Rule 59(e), SCRCP, motions are permitted in ALC proceedings").

In his brief to CZMAP, Young merely referenced the regulation he now asserts was applicable to this controversy and never specifically asserted error in the ALC's failure to follow the correct version in reaching its decision. Moreover, as he admitted in his brief to this Court, the reference contained a typographical error. Even if, as Young asserted during oral argument, the correct citation to the regulation should have been evident to those familiar with this case, we do not agree with Young that such a passing reference sufficed to bring this issue to the attention of CZMAP. Cf. Al-Shabazz v. State, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000) (concerning a final decision of an administrative law judge in an appeal from the final decision of the Department of Corrections wherein the supreme court stated

"the inmate's petition to the circuit court must distinctly and specifically direct the court's attention to the errors or abuses allegedly committed by the ALC. . . . A mere expression of dissatisfaction with the ruling is not sufficient.").

## II. OCRM's Alleged Failure to Exercise Discretion

Young next asserts the order of the ALC should have been reversed on the ground that OCRM failed to exercise its statutorily required discretion when it approved the dock permit application. Specifically, Young contends OCRM failed to consider (1) the individual merits of the permit application, (2) certain legislative declaration of findings and state policy, and (3) the extent to which the proposed boatlift could affect the value and enjoyment of adjacent owners such as himself.[2] We disagree.

Under section 48-39-150 of the South Carolina Code, OCRM must consider certain criteria in deciding whether to approve or deny a permit. S.C. Code Ann. § 48-39-150 (1987 & Supp. 2006). Section 48-39-150 references the three factors that Young asserts were not given adequate attention by OCRM when it approved the Millers' dock permit; however, based on our view of the record, we hold Young did not meet his burden to show OCRM disregarded the relevant statutory prerequisites when it considered the Millers' application. See Hoffman v. Greenville County, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963) ("The burden of proof is upon the party who by the pleadings has the affirmative on the issue.").

Young maintains OCRM's decision was motivated by the presence of other boatlifts in the vicinity and cites evidence suggesting OCRM personnel operated under the belief that authorization of boatlifts meeting certain size requirements was mandatory, including a handwritten notation in the permitting document indicating the boat lift had to be authorized because its dimensions did not count against the total square footage of the dock. We have found nothing in the record, however, identifying who made this

[2] The ALC determined that although Young's property was not contiguous to the Millers' property, Young was still an adjacent owner.

notation or suggesting that OCRM's decision to allow the boatlift was based solely on the size of the boatlift or the recognition that there were other boatlifts in the area. To the contrary, Curtis Joyner, OCRM's Manager of Critical Area Permitting, testified that in addition to boatlifts, the area in question already had pier heads and floating docks. He further stated the proposed dock was a very reasonably sized dock compared to other docks in the area and fitted within the general character of the area. Although Joyner candidly admitted that he would have been influenced by what boat storage structures were already present in the area, he had in the past modified a permit based on view impact.

Young next complains that, as required by section 48-39-150(A) of the South Carolina Code, OCRM did not base its determination on the policies stated in sections 48-39-20 and 48-39-30.[3] We disagree. Young's argument on this point appears to focus on Joyner's acknowledgement that he never distinguished Wadmalaw Island from other more developed areas when considering the permit application. This admission, however, does not nullify the fact that OCRM, in determining whether or not to allow the proposed dock, considered the presence of comparable structures in the area as well as whether the dock satisfied all statutory and regulatory requirements. Moreover, as Joyner testified, heightened protection for the area would be available through the creation of a special area management plan, zoning, or enactment of appropriate local ordinances.

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[3] In section 48-39-20 of the South Carolina Code, the South Carolina General Assembly enumerated various findings concerning the importance of developing a statewide management program to regulate development in the coastal zone "in light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests." S.C. Code Ann. § 48-39-20(F) (1987 & Supp. 2006). In section 48-39-30, the General Assembly declared "the basic state policy . . . to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State." Id. § 48-39-30(A).

We also reject Young's argument that OCRM failed to consider the extent to which the proposed boatlift could affect the value and enjoyment of adjacent owners such as himself. In support of this argument, Young cites a recent case from the supreme court for the proposition that recreational pursuits conferred standing on the petitioner to challenge a permit issued by OCRM for "beach sand scraping" from a public intertidal beach. See Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 331-33, 649 S.E.2d 31, 34 (2007). In the present case, however, the issue not whether aesthetic concerns and recreational activities are appropriate factors to consider in evaluating the propriety of the proposed boat storage dock but whether the issues Young raised were in fact given adequate attention during the permitting process. We hold OCRM gave sufficient consideration to Young's reasons opposing the boatlift.

Here, Young's interests in view alone are limited under South Carolina law. See Hill v. Beach Co., 279 S.C. 313, 315, 306 S.E.2d 604, 605 (1983) (noting prescriptive rights to ocean views, breezes, light, and air do not exist in South Carolina). Furthermore, there is a regulation minimizing the visual impact of boatlifts by prohibiting their enclosure. See S.C. Code Ann. Regs. 30-12(A)(2)(e)(iii) (Supp. 2005).[4] We therefore agree with DHEC that OCRM gave adequate attention to Young's interests and rights when it balanced the factors for and against the permit.

## III. OCRM's Evaluation of Cumulative Effects

Finally, Young argues OCRM's alleged failure to consider the cumulative effects of the proposed boatlift amounted to a violation of its own administrative regulation. We disagree.

In deciding permit applications, OCRM must be guided by "[t]he extent to which long-range, cumulative effects of the project may result within the

[4] This regulation was still in effect in 2008. See S.C. Code Ann. Regs. 30-12(A)(2)(e)(iii) (Supp. 2008).

context of other possible development and the general character of the area." 23A S.C. Code Ann. Regs. 30-11(C)(1) (Supp. 2003).[5]

To support his assertion that OCRM failed to consider the long-range, cumulative effects of the proposed boatlift within the context of other possible development, Young points to (1) Joyner's testimony that all owners of adjacent and nearby properties would be granted boatlifts if they applied for them; (2) Joyner's acknowledgment that a proliferation of boatlifts in a reasonably small area could alter the visual aspects of the area; (3) evidence that OCRM personnel felt compelled to allow all applications for boatlifts so long as the boatlifts were of proper dimensions; and (4) the absence of any notation or evidence in OCRM's file regarding the cumulative effect of a boatlift in the area. This evidence, however, does not necessarily warrant a finding that inadequate attention was given to the cumulative effects of the proposed boatlift within the context of other possible development and the general character of the area. As noted by the ALC, the area surrounding Young's property is not a "pristine wilderness, unmarked by docks and piers, but is a creek familiar with development, including docks with boatlifts and other boat storage methods." There is no evidence that any negative impact of the proposed boatlift would be any greater than that of other boat storage structures. Given these considerations, we hold that Young has not carried his burden to show OCRM violated Regulation 30-11(C)(1).

## CONCLUSION

For the foregoing reasons, we affirm CZMAP's decision to adopt the ALC's order upholding the issuance of the Millers' dock permit.

**AFFIRMED.**

**HUFF and LOCKEMY, JJ., concur.**

[5] This regulation has not changed since 2003.

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

David Anthony Murphy, Appellant,

v.

Donald Ray Tyndall, and E-Z Credit Auto Sales, Inc., Defendants,

of whom E-Z Credit Auto Sales, Inc. is the, Respondent.

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Appeal From Dillon County
Edward B. Cottingham, Circuit Court Judge

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Opinion No. 4556
Heard March 3, 2009 – Filed June 4, 2009

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**REVERSED**

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H. Lee Herron, of Florence, for Appellant.

D. Michael Freeman, II, and William E. Lawson, both of Myrtle Beach, for Respondent.

**KONDUROS, J:** David Anthony Murphy appeals the circuit court's grant of summary judgment in favor of E-Z Credit Auto Sales, Inc. (E-Z Credit). We reverse.

## FACTS

Murphy and Donald Ray Tyndall were in an automobile and motorcycle accident on July 3, 2006. Tyndall was driving a Mitsubishi Eclipse he had just purchased from E-Z Credit, a used car dealership located a few blocks from the accident scene and owned by Allen Watts.

Tyndall operated a small business called Clear Difference Headlight Restoration, which did headlight restoration for the general public and car dealerships. Tyndall and Watts testified Tyndall had performed headlight restoration services for E-Z Credit on occasions in the past.

Officer Don Juan Lewis testified that at the scene of the accident, Tyndall said: "Well I just left the shop around there, and I was going right here to NAPA to get some parts, and I was going right back to the shop." The record shows Tyndall purchased nuts, washers, and regal blue paint or dye at McKenzies' Parts and Equipment just prior to the accident. The register receipt shows the items were charged to E-Z Credit's account and specifically notes, "Attention: Donnie."

Officer Kenneth O'Neal Smith testified he spoke with Tyndall at the scene to ascertain where he would be later that afternoon. Smith stated Tyndall "said he was going back to work. He had just went to NAPA to pick up some parts." Smith indicated he delivered Tyndall's copy of the accident report to him at E-Z Credit later that afternoon. Tyndall also provided E-Z Credit's phone number as well as his cell phone number for the accident report.

A witness at the scene, Lajarvious Javonta' Buie testified he overheard Tyndall say, "I work for Allen Watts. I was just trying to make it to the car lot." Buie clarified Tyndall said he worked at Alan Watts' shop. Buie also testified Tyndall was wearing dirty clothes like he had been working at the time of the accident.

Murphy sued Tyndall and E-Z Credit alleging Tyndall was acting as an agent or employee for E-Z Credit and was acting within the course and scope of that employment or agency at the time of the collision. E-Z Credit filed a motion for summary judgment contending there was no genuine issue of material fact regarding Tyndall's employment status at the time of the accident.

In support of its summary judgment motion, E-Z Credit presented Tyndall's testimony that he had never been employed by E-Z Credit and he was not doing subcontract work for E-Z Credit the day of the accident. Tyndall further testified he purchased some replacement parts for the Mitsubishi at NAPA and, with Watt's permission as part of their sales transaction, charged the parts to E-Z's account.

E-Z also produced documentation of the sales transaction that was presented to Officer Lewis at the scene approximately thirty-five minutes after the accident occurred.[1] Via affidavit, Watts corroborated Tyndall's testimony regarding Tyndall's dealings with E-Z Credit on the day of the accident, as did two E-Z Credit employees. E-Z Credit also produced invoices and checks regarding E-Z Credit and Tyndall's business relationship in the past.

The circuit court granted summary judgment in E-Z Credit's favor finding "the only reasonable inference to be drawn from the facts in the record is that Tyndall's actions at the time in question were taken for his own independent purposes and not with reference to any service to E-Z."[2] This appeal followed.

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[1] Officer Smith required documentation of the sales transaction at the scene because the vehicle was being operated without a license plate at the time of the accident.

[2] The circuit court's order relies heavily upon Bravis v. Dunbar, 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994), finding Murphy failed to produce more than a mere scintilla of evidence regarding Tyndall's employment status. However, the South Carolina Supreme Court abrogated Bravis in Hancock v. Mid-South Management Co., 381 S.C. 326, 673 S.E.2d 801 (2009).

## STANDARD OF REVIEW

When reviewing the trial court's grant of summary judgment, the appellate court applies the same standard found in Rule 56(c), SCRCP. Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). Summary judgment is proper when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. On summary judgment, the court's task is not to try issues of fact but to determine if genuine issues of material fact exist. Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002). "The problem besetting courts lies in deciding what is or what is not a 'genuine issue as to any material fact.'" Spencer v. Miller, 259 S.C. 453, 456, 192 S.E.2d 863, 864 (1972).

## LAW/ANALYSIS

Murphy contends the circuit court erred in granting summary judgment in favor of E-Z Credit. We agree.

"Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999). "Additionally, even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted." Hill v. York County Sheriff's Dep't, 313 S.C. 303, 305, 437 S.E.2d 179, 180 (Ct. App. 1993). In determining whether a triable issue of fact exists, the evidence and reasonable inferences from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury. Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006). "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." Hill, 313 S.C. at 308, 437

S.E.2d at 182; see also Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (clarifying and reaffirming in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment).

In the instant case, we believe Murphy has set forth at least a mere scintilla of evidence that Tyndall was E-Z Credit's employee or agent or was working on behalf of E-Z Credit at the time of the accident. Viewing the evidence in the light most favorable to Murphy, Tyndall stated at the accident scene he worked for Watts, owner of E-Z Credit. While Tyndall could have meant he performed headlight restoration for E-Z Credit periodically, that is not what he stated. A jury could reasonably draw more than one inference from the statement. Likewise, Tyndall told Officer Smith "he was going back to work." Again, Tyndall may have meant he was returning to work on his newly purchased car, but a jury could reasonably draw an alternative inference from his statement. Furthermore, Tyndall gave E-Z Credit's phone number as a contact number for him, and Murphy testified he had seen Tyndall around E-Z Credit washing cars. Officer Lewis also testified that while on patrol he had seen Tyndall "working [at E-Z Credit] cleaning up cars," although he did not have any direct knowledge of Tyndall's employment status with E-Z Credit.

Additionally, the receipt from NAPA auto parts shows Tyndall bought three items just before the accident: nuts, washers, and blue paint or dye. The record contains no clear testimony that explains how the blue paint would be used in the restoration or repair of Tyndall's silver Mitsubishi.[3] Therefore, a jury could draw the inference Tyndall was purchasing the items for E-Z Credit as part of his employee duties or as part of a special errand on E-Z Credit's behalf. Additionally, two of E-Z Credit's employees testified they

[3] E-Z Credit's attorney stated at one point Tyndall was going to dye the inside door panel of the Mitsubishi. However, the item is frequently referred to in the record as blue spray paint. Josh Watts, son of Allen Watts and an employee in the E-Z Credit shop, testified he repaired the Mitsubishi after the collision and used silver paint for the exterior. He indicated one would not paint the interior of a car but would dye it.

were not aware of E-Z Credit ever allowing customers to purchase parts on the business's NAPA account.

With respect to payment, the record shows Tyndall received a 1099 tax form from E-Z Credit in 2006. The record also shows Tyndall received checks made to him personally on a weekly basis for the period from July 7, 2006 through August 4, 2006. Some of the checks contain "subcontractor" in the memo line, but some contain "advances" in the memo line. A jury could interpret the regularity of the checks and the term "advances" to mean there was more than an infrequent independent contractor relationship between Tyndall and E-Z Credit.

Finally, issues of credibility are generally for a jury's determination. See Anderson v. The Augusta Chronicle, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App. 2003) (stating credibility determinations and the drawing of legitimate inferences from the facts are jury functions). In this case, all the testimony corroborating E-Z Credit's position is from E-Z Credit employees, E-Z Credit's owner, or Tyndall himself. Tyndall has admittedly done work for E-Z Credit through his headlight restoration business, and Tyndall is a tenant in a home owned by Watts. Furthermore, Tyndall is receiving Social Security Disability and would benefit by appearing to have less income. With that in mind, a jury could reasonably infer bias on the part of the witnesses and find their testimonies to be less than credible.

## CONCLUSION

When viewing the facts and all reasonable inferences that can be drawn therefrom in the light most favorable to him, we find Murphy presented at least a mere scintilla of evidence Tyndall was working for E-Z Credit at the time of the accident thereby precluding summary judgment. Accordingly the judgment of the circuit court is

**REVERSED.**

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

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

The State, Respondent,

v.

Bradley Dye, Appellant.

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

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Opinion No. 4557
Heard May 13, 2009 – Filed June 4, 2009

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**AFFIRMED**

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N. Douglas Brannon, of Spartanburg, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., Office of the Attorney General, of Columbia; and Solicitor Harold W Gowdy, III, of Spartanburg, for Respondent.

**GEATHERS, J.:** Bradley Dye (Dye) appeals his conviction for second-degree criminal sexual conduct with a minor. Dye claims the circuit court should have excluded his confession at trial because it was the product of police coercion and the circuit court did not articulate the relevant findings to establish his confession was voluntarily given. We affirm.

## FACTS

On September 8, 2004, Dye's twelve-year-old daughter (Daughter) reported to the police that her father had sexually abused her on several occasions between 2000 and 2003.[1] On that day, Officer Nikki Cantrell (Officer Cantrell) interviewed Daughter, who then gave the police a brief handwritten statement. Soon thereafter, Daughter again met with Officer Cantrell, at which time Daughter recounted her allegations of abuse and signed a statement detailing those allegations.

As a result of Daughter's statements, Officer Cantrell went to Dye's home and asked Dye if he would be willing to come to the police station for an interview. Dye agreed, and on September 30, 2004, Dye met Officer Cantrell at the police station. Officer Cantrell testified that she had not told Dye the purpose or nature of the prospective interview before he came to the police station. Dye arrived at approximately 8 p.m. and followed Officer Cantrell into an interview room.

Prior to questioning Dye, Officer Cantrell read him a pre-interrogation waiver of rights form. Officer Cantrell testified at the Jackson v. Denno[2] hearing that after she read him each right, she would ask him if he understood that right, and when he said he did, he would then initial on that line. After he indicated that he understood all of his rights, she then asked him again whether he understood them, and he responded in the affirmative. Officer Cantrell stated that they read the waiver of rights portion of the form together and that Dye indicated by his signature that he understood he was not being threatened or forced into speaking with the police and was doing so by his own free will. Dye also signed the portion of the waiver form that noted Dye

[1] The name of the minor child has been changed to protect her identity.
[2] Jackson v. Denno, 378 U.S. 368 (1964).

could read and write, had a seventh grade education, and agreed to talk with Officer Cantrell "in reference to [Daughter]." She testified Dye never requested clarification as to the meaning of his rights, and based on her experience, he understood what was taking place. She recalled that Dye was calm and cooperative during this time.

Officer Cantrell began the interview by talking with Dye about his family and his two daughters. Dye initially denied having molested Daughter and claimed his ex-wife was lying about the incidents to harass him. In response, Officer Cantrell informed Dye that Daughter had told some of her friends at school and that one of the friends told his ex-wife, who then reported it to the police. Dye told Officer Cantrell he could not have molested Daughter because he had never spent more than five minutes alone with Daughter, but he then contradicted himself by saying the two of them took fishing trips together. Officer Cantrell pointed out this inconsistency and told Dye there were two types of people who molest children: one type that does it on a frequent basis to numerous victims and a second type that usually does it to one person; but either way, these people could get help to keep them from continuing to hurt children. Officer Cantrell testified that Dye then said, "I'm not saying that I did it, but if I did, what would happen to me?" In response, Officer Cantrell told him that he would be arrested, taken to jail, released if he could post bond, and tried at a later date. Officer Cantrell advised Dye that once he was released, he could seek help if that is what he felt he needed**.**

At this point, Dye confessed to having molested Daughter. Officer Cantrell stated that Dye allowed her to type his confession while he recounted the episodes of abuse to her because he was upset and emotional. When Officer Cantrell asked if there was a reason why he performed all the acts on Daughter but never had her perform an act on him, he started sobbing and shaking and said that his older brother had raped him when he was younger. Officer Cantrell then questioned Dye on whether any abuse occurred with his younger daughter from his current marriage, and Dye said that he had never done anything to her.

Throughout the hour-and-a-half questioning, Officer Cantrell stated she never promised Dye anything, never raised her voice at him, and never

threatened Dye in any way. She also stated only Dye and she were in the interview room during that time. Officer Cantrell denied threatening to remove his younger daughter from his home if Dye did not give her a statement but agreed that his younger daughter was mentioned in reference to his family situation during the interview.

The circuit court found there was no evidence Officer Cantrell threatened to remove Dye's younger daughter if he refused to confess to molesting Daughter. The court ruled that the statement was voluntary on the basis that his confession was given after he was advised of his rights and after Dye stated he understood and wanted to waive those rights. Dye's statements were later admitted into evidence at trial over his objection. A Spartanburg County jury found Dye guilty of second-degree criminal sexual conduct with a minor, and the circuit court sentenced Dye to the maximum penalty of twenty years imprisonment. This appeal followed.

## STANDARD OF REVIEW

In criminal cases, this Court will review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This Court is bound by the circuit court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). On review, the circuit court's conclusions on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). This Court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

## LAW/ANALYSIS

Dye contends that the circuit court erred in admitting his confession into evidence because it was not freely and voluntarily given. Specifically, Dye argues that the circuit court failed to consider the totality of circumstances in its voluntariness determination because the court articulated no specific findings regarding Dye's education, experience, background, or

conduct. Additionally, Dye contends that his confession was not freely and voluntarily given because it was the product of police coercion. We disagree.

To determine the voluntariness of a statement, the circuit court must first conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. State v. Miller, 375 S.C. 370, 379, 652 S.E.2d 444, 448 (Ct. App. 2007). During this hearing, the circuit court must examine the totality of circumstances surrounding the statement and determine whether the State has carried its burden of proving the statement was given voluntarily. Id. at 383, 652 S.E.2d at 450. Our courts have recognized that the appropriate factors to consider in the totality of circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence, and promises of leniency. State v. Parker, 381 S.C. 68, 87, 671 S.E.2d 619, 628-29 (Ct. App. 2008). If the circuit court finds that the statement was given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt. State v. Washington, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988). On appeal, the circuit court's decision as to the voluntariness of the statement will not be reversed unless so erroneous as to demonstrate an abuse of discretion. Miller, 375 S.C. at 378, 652 S.E.2d at 448.

The circuit court considered the totality of circumstances in its voluntariness determination. While the court may not have specifically articulated all relevant factors, the court did find that Dye's statement to the police was knowingly, intelligibly, and voluntarily made. See id. at 382, 652 S.E.2d at 450 ("The trial judge must determine if under the totality of the circumstances a statement was knowingly, intelligibly, and voluntarily made."). Furthermore, a review of the record demonstrates that the State proved by a preponderance of the evidence that Dye's confession was freely and willingly made.

At Officer Cantrell's request, Dye voluntarily came to the police station. Prior to speaking about any allegations of misconduct, Officer Cantrell read Dye his rights, and Dye acknowledged that he understood them

when he initialed his name on the line next to each right.[3] Officer Cantrell testified that she never promised Dye anything in return for making a confession and denied ever threatening or raising her voice at him. Furthermore, Officer Cantrell's statement to Dye that he could get help for his problems if he admitted to the charge was not tantamount to coercion. See State v. Von Dohlen, 322 S.C. 234, 245, 471 S.E.2d 689, 695 (1996) (finding fact that interrogating officer knew and was empathetic to defendant was insufficient to render statement involuntary) (citing to Miller v. Fenton, 796 F.2d 598, 607-11 (3rd Cir.), which upheld the admissibility of a defendant's statement notwithstanding police's friendly approach, lies concerning evidence, and promises to help the defendant get psychiatric care); see also State v. Linnen, 278 S.C. 175, 179, 293 S.E.2d 851, 854 (1982) (holding that even though interrogating officers encouraged defendant to make a statement, their actions were not coercive or threatening).

The circuit court noted that no testimony was presented to show that Officer Cantrell specifically threatened to remove his younger daughter if Dye did not give a confession, and Officer Cantrell adamantly denied even alluding to placing Dye's younger daughter in emergency protective custody if he failed to make a statement. Cf. State v. Corns, 310 S.C. 546, 549, 426 S.E.2d 324, 325 (Ct. App. 1992) (finding defendant's confession involuntary when interrogating officer admitted that he told defendant that defendant's wife could be arrested and that D.S.S. could take his children if he did not

[3] Dye claims his statement was involuntary because he did not know the subject matter of the interrogation prior to signing the waiver of rights form. Even if Dye was unaware that Officer Cantrell would question him about Daughter before he came to the police station, he willingly signed his name after the paragraph that stated: "I waive (give up) my rights as explained above and agree to talk to Officer Cantrell in reference to [Daughter], and any statement that I may make is of my own free will, without fear, threat or promise or favor or reward of any kind." Dye even conceded in his brief and at oral argument that he made a knowing and voluntary waiver of his rights. See State v. Kennedy, 325 S.C. 295, 307, 479 S.E.2d 838, 844 (Ct. App. 1996) aff'd as modified 333 S.C. 426, 510 S.E.2d 714 (1998) (finding that although defendant stated he did not understand why the officers wanted to talk to him, he never indicated he did not understand his Miranda rights).

confess). Because no competing testimony was introduced to contradict Officer Cantrell's statements, the circuit court was free to accept Officer Cantrell's version of events in making its voluntariness determination. See Miller, 375 S.C. at 387, 652 S.E.2d at 453 (finding that in a Jackson v. Denno hearing, the circuit court has the opportunity to listen to the testimony, assess the demeanor and credibility of all witnesses, and weigh the evidence accordingly).

Moreover, the conditions surrounding Dye's confession do not indicate his statements were induced by an oppressive environment. Dye was present at the police station for approximately an hour and a half before signing his confession, which is not excessive under the circumstances. Cf. Von Dohlen, 322 S.C. at 245, 471 S.E.2d at 696 (finding three-hour interrogation did not render statement involuntary based on totality of circumstances surrounding defendant's confession). Officer Cantrell stated Dye's general demeanor was calm and cooperative, except in the instances when he became emotional as he recounted details of prior abuse. In addition, when Dye confessed, he was not in a police-dominated atmosphere as only Officer Cantrell was present in the room. See State v. Kirton, 381 S.C. 7, 39, 671 S.E.2d 107, 123 (Ct. App. 2008) (stating that Miranda rights are meant to protect the privilege against self-incrimination during interrogation of a suspect in a police-dominated atmosphere).

Finally, even though the circuit court did not specifically acknowledge that Dye had only a seventh-grade education, the State presented this evidence to the circuit court by way of the waiver of rights form. Based on Officer Cantrell's testimony regarding Dye's understanding of his rights and willingness to waive them, we find his lack of education did not hinder his ability to comprehend his rights in light of the attendant circumstances. Consequently, we find the totality of circumstances surrounding Dye's confession establishes that the circuit court did not abuse its discretion in finding his statements were voluntarily given and thus admissible at trial.

## CONCLUSION

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

**AFFIRMED.**

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

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

Eliza Frazier and Dorothy Anderson Brailford, Respondents,

v.

Simon Smallseed; George Holmes; Eve Green; Louisa Brown; Earnestine Smalls; Virginia Anderson; Frank Green and Luther A. Green, if living, and if deceased, their heirs at law, next of kin, distributees, devisees and any persons claiming under, by or through them, also, Jane A. Hannah and Donald Hannah; Colden R. Battey, and all other persons unknown claiming by, under or through them as heirs, distributees, devisees, and any and all persons unknown having, or claiming to have, any right, title, estate, interest in or lien upon the real property described in the Amended Complaint,

being designated collectively as John Doe, including all persons unknown, all minors, persons in the Armed Forces, persons non compos mentis, and any and all other persons under any disability who might have a claim to have any right, title, interest in or lien upon the real property described in the Amended Complaint, designated as Mary Roe, Defendants,

Of Whom Colden R. Battey is Respondent,

Jane A. Hannah and Donald G. Hannah are Appellants,

and

Matthew McAlheany, Intervenor, is Respondent.

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Appeal From Beaufort County
Curtis L. Coltrane, Special Circuit Court Judge

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Opinion No. 4558
Heard March 17, 2009 – Filed June 4, 2009

**AFFIRMED IN PART AND REVERSED IN PART**

Alysoun M. Eversole, of Beaufort and Stephen L. Brown, William L. Howard, and Russell G. Hines, all of Charleston, for Appellants.

Colden Battey and Louis O. Dore, both of Beaufort and Robert V. Mathison, of Hilton Head Island, for Respondents.

**PER CURIAM:** In this civil case, we must determine whether the trial court erred in concluding Donald and Jane Hanna (collectively the Hannas) did not own certain property located in Beaufort County by adverse possession and whether Eliza Frazier and Dorothy Anderson Brailford have a right to an easement in certain property located in the same county. We affirm in part and reverse in part.

## FACTS

The case involves around a parcel of land located in Beaufort County on Corn Island.[1] Specifically, the property at issue lies within Section 29, Township One, Range One East. The individual lots within Section 29 are numbered sequentially. The numbering begins in the upper right corner as Lot 1 and continues, reading right to left until Lot 8 is reached in the upper left corner of the grid. The next row of lots is to the south starting with Lot 9 immediately below Lot 8 on the left side of the grid and continuing left to right until Lot 16 is reached on the right side of the grid immediately below Lot 1. The particular parcel of land in question in this case is Lot 9.

[1] Corn Island is also known as James Island.

Eve Green, whose descendants are Frazier and Brailford, purchased eight acres of land on Corn Island from George Holmes in 1881. By 1889, Green had increased her holdings on Corn Island from eight acres to twenty-two acres. In 1954, Beaufort County began to keep tax records by district, map, and parcel numbers. In this same year, the property record card for Green's twenty-two acre parcel was designated as Parcel 1 on Map 12 in the name of "Heirs of Eve Green" (the Heirs). Parcel 1 on Map 12 included Lots 9, 23, 24, and 26 in Section 29. Lot 24 is directly below Lot 9, while Lot 23 abuts Lot 24 on the east, and Lot 26 is immediately to the south of Lot 23. Green or her heirs paid taxes on the twenty-two-acres until 1997. In June 1997, the Heirs sold Lot 26 and a small portion of Lot 23 to Broadus Thompson and his wife, Patricia Thompson (collectively the Thompsons).

At trial, the Hannas argued they had been in open, notorious, hostile, continuous, and exclusive possession of Lot 9 for a period in excess of ten years and asked the trial court to award title to the property by reason of adverse possession under color of title. Frazier and Brailford argued they were entitled to an easement over Cassena Road and Cassena Island Drive, which had been constructed by the Hannas and crossed the Hannas' property. Matthew McAlhaney sought to intervene because he had a contract to purchase Lot 9, among other property, from Frazier and Brailford.

The trial court allowed McAlhaney to intervene. The trial court concluded the Hannas did not own Lot 9 by adverse possession. The trial court also found Frazier and Brailford were entitled to an easement by prescription over Cassena Road and Cassena Island Drive. The trial court also denied the Hannas' post-trial motions. This appeal followed.

## LAW/ANALYSIS

### I. Adverse Possession

Initially, the Hannas argue the trial court erred in holding they did not own Lot 9 by virtue of adverse possession under color of title. We disagree.

While an action to quiet title usually rests in equity, an action to determine title to real property is an action at law. Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998). Likewise, an adverse possession claim is an action at law. Miller v. Leaird, 307 S.C. 56, 61, 413 S.E.2d 841, 843 (1992). In an action at law tried by a judge without a jury, the appellate court will correct any error of law, but it must affirm the trial court's factual findings unless no evidence reasonably supports those findings. Eldridge, 331 S.C. at 416, 503 S.E.2d at 200; see Knight v. Hilton, 224 S.C. 452, 456, 79 S.E.2d 871, 873 (1954) (holding whether deceased spouse of claimant had held title to land involved by adverse possession was a legal issue and conclusion of the trial court was binding upon an appellate court if any evidence reasonably tended to sustain it).

In order to acquire title by adverse possession, the claimant must show the possession to "be actual, open, notorious, hostile, continuous and exclusive for the whole statutory period. It may be stated as a general rule that claimant's possession must be such as to indicate his exclusive ownership of the property." Gregg v. Moore, 226 S.C. 366, 370, 85 S.E.2d 279, 281 (1954). Color of title, as employed in this case, is relevant to adverse possession in that color of title may be used to show possession of an entire tract of property even though the claimant adversely possesses only a small portion of the entire tract. Johnson v. Pritchard, 302 S.C. 437, 446, 305 S.E.2d 191, 196 (Ct. App. 1990). The South Carolina Supreme Court has described color of title as follows:

> Color of title means any semblance of title by which the extent of a man's possession can be ascertained. It is anything which shows the extent of occupant's claim. The object of color of title is not to pass title. In that case it would be title, not color of title. The only office of color of title is to define the extent of the claim and to extend the possession beyond the actual occupancy to the whole property described in the paper. Hence, when one enters upon land, under color of title, his actual possession of a portion of the

> property will be constructively extended to the boundaries defined by his color of title.

Mullins v. Winchester, 237 S.C. 487, 492, 118 S.E.2d 61, 63 (1961) (internal quotations and citations omitted).

The Hannas pursued their claim of adverse possession under color of title. To support that theory, the Hannas argued that in 1951 a deed from Joseph Holmes to H.B. Attaway, Sr.,[2] J.M. Attaway, and H.B. Attaway conveyed forty-seven acres of property. According to the Hannas, this conveyance included a twenty-acre parcel that they believe contained Lot 9. A careful review of the record reveals the Hannas' belief the 1951 deed included Lot 9 is misplaced.

The 1951 deed for the forty-seven acres consisted of twenty-seven acres from the estate of Caesar Holmes and twenty acres from the estate of Sam Holmes. These two parcels were in turn comprised of Lots 17, 18, 19, 20, and 32. Nowhere is Lot 9 included in the 1951 deed. There was no color of title conferring any ownership interest in Lot 9 to the Hannas. The Hannas' claim of occupying Lot 9 under color of title is without evidentiary support. As such, in order to prevail under a theory of adverse possession the Hannas must show their possession of Lot 9 to "be actual, open, notorious, hostile, continuous and exclusive for the whole statutory period." See Gregg, 226 S.C. at 370, 85 S.E.2d at 281.

If a claimant asserts title by adverse possession and his or her occupancy is not under color of title, the claimant must show either fencing or other improvements covering most of the subject land or some other continuous use and exercise of dominion. King v. Hawkins, 282 S.C. 508, 511, 319 S.E.2d 361, 362 (1984).

In the present case, the record reveals the Hannas never fenced the property, made improvements to it, or exercised dominion over it. Peter Brown, who stated he was intimately aware of the property on Corn Island,

[2] H.B. Attaway, Sr., is Jane Hanna's father.

testified that Lot 9 had never been farmed or fenced. Louise Calvary, who testified she was an heir of Green, stated she came to Beaufort County to pay taxes on the property between 1996 and 2004. Calvary testified that during these visits she would inspect the property, and when asked whether it was fenced, she replied it was not. Additionally, Calvary testified that Don Hanna was timbering the property but when asked to stop, he complied. Although this testimony may seem self-serving, Jane Hanna's testimony confirmed Calvary's account.

Jane Hanna was asked, "The only purpose that you ever used Lot 9 was for recreational?" She replied, "Yes." Jane Hanna was also asked, "You have never fenced [Lot 9]?," to which she replied, "Never fenced it." Based on the foregoing, evidence reasonably supports the trial court's findings. See Knight, 224 S.C. at 456, 79 S.E.2d at 873 (holding whether deceased spouse of claimant held title to land involved by adverse possession was a legal issue and conclusion of trial court was binding upon an appellate court if any evidence reasonably tended to sustain it).

**II. Easement**

The Hannas next argue the trial court improperly concluded Frazier and Brailford were entitled to an easement by prescription over Cassena Road and Cassena Island Drive. We agree.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). "However, the determination of the extent of a grant of an easement is an action in equity." Id. As such, this court may take its own view of the evidence on the latter issue. Id.

The only public road leading to Corn Island is Coosaw River Drive. Prior to 1994, the only means of accessing property on Corn Island from Coosaw River Drive was by a road (Old Road) that crossed the properties of

the Hannas, Colden Battey,[3] and the Heirs. The Old Road ran along the southern boundary of the Hannas' and Battey's property and crossed onto the property of the Heirs. The location where the Old Road crossed the Heirs' property was sold to the Thompsons. Based on these facts, the trial court concluded the Heirs possessed a prescriptive easement over the Old Road.

In addition to finding this easement, the trial court relocated the easement to a new road constructed by the Hannas. In 1994, Don Hanna cleared a new road that crossed the Hannas' and Battey's property. This new road is called Cassena Road from the point it intersects the public road, Coosaw River Drive. Cassena Road splits at a point north of the boundary between the Hannas property and property owned by the Thompsons. The section of Cassena Road that goes north onto the Hannas property is called Cassena Island Drive, while the section that heads south onto the Thompsons property is called Cassena Road. After Cassena Road was built, the Old Road fell into disuse and became obstructed by debris and trash. As a result, the Thompsons, Battey, and the Hannas employed Cassena Road and Cassena Island Drive to access their property.

To establish a private right of way by prescription, one must show "(1) the continued and uninterrupted use or enjoyment of the right for the full period of twenty years, (2) the identity of the thing enjoyed, and (3) the use or enjoyment was adverse or under claim of right." Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 150, 584 S.E.2d 386, 388 (Ct. App. 2003).

With respect to the first element, no evidence showed the Heirs used the Old Road for the required twenty years. Battey testified he did not specifically know if the Heirs had ever used the Old Road. Jane Hanna testified that she never saw the Heirs use the Old Road. Additionally, the trial court could not point to any specific occurrences in which the Heirs ever used the Old Road. The trial court's conclusion that the Heirs owned an easement by prescription over the Old Road was error because no evidence in

[3] Battey owns property on Corn Island.

the record showed the Heirs ever, much less for twenty years, employed the Old Road to access their property.

The trial court also stated, "[T]he Hannahs [sic] are estopped to deny that the easement of Frazier and Brailford moved when Donald G. Hannah [sic] relocated the road. The 'old road' had been in place and had been used by all owners on Corn Island for a period sufficient to establish the easement by prescription, at the time Donald G. Hannah [sic] made his decision to move the road . . . ." Even if we assume, without deciding, the trial court properly employed estoppel in this case, the necessary elements of estoppel are not met.

> The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; [and] (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.

S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993) (internal citations omitted).

The first element requires the Hannas' conduct to amount to a false representation or concealment of material facts or at least, which is calculated to convey the impression the facts are otherwise than and inconsistent with those that the Hannas subsequently attempted to assert. This element was not met because the Hannas did not make any representations, nor did their

conduct amount to a false representation or concealment of facts, with respect to the Heirs using the Old Road. Jane Hanna testified she never saw the Heirs use the Old Road. Additionally, the trial court could not point to any specific occurrences in which the Heirs had ever used the Old Road. As the Heirs presented no direct evidence they ever employed the Old Road, the Hannas could not have made any representations to the Heirs. As such, the trial court committed reversible error in concluding Frazier and Brailford were entitled to an easement by prescription over Cassena Road and Cassena Island Drive.

## CONCLUSION

Accordingly, the trial court's decision is

**AFFIRMED IN PART AND REVERSED IN PART.**

**HUFF, WILLIAMS, and KONDUROS, JJ., concur.**