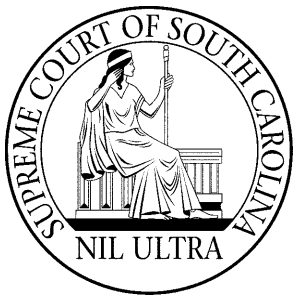

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26

June 23, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Gary White, III, Respondent.

Opinion No. 26482
Heard April 1, 2008 – Refiled June 23, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, of Columbia; for Office of Disciplinary Counsel.

Irby E. Walker, Jr., of Conway; for Respondent.

PER CURIAM: This is an attorney disciplinary matter involving a Complaint against William Gary White, III (Respondent) for his representation of a client in a personal injury case. After a full investigation by the Office of Disciplinary Counsel (ODC), the Commission on Lawyer Conduct filed formal charges against Respondent. After a hearing before the Commission on Lawyer Conduct Panel (Panel), the hearing panel recommended Respondent be sanctioned to a ninety-day definite suspension from the practice of law and be required to pay the costs of the proceedings. Due to the gravity of Respondent's misconduct, we believe a harsher sanction is warranted. After we issued our original opinion suspending Respondent for six months and ordering him to pay the costs of the proceedings,

Disciplinary Counsel petitioned for rehearing. We deny the petition for rehearing, withdraw our original opinion in this matter, and substitute it with this opinion which corrects a single factual statement that Respondent gave testimony to Disciplinary Counsel pursuant to a Notice to Appear and Subpoena rather than appearing as the "sole witness for a hearing conducted by disciplinary counsel before an investigative panel."

FACTS

On October 5, 2004, Client was involved in an automobile accident in which she sustained injuries. Three days later, Client sought to retain Respondent to represent her to recover for her injuries and property damage. During the initial meeting, Client signed a retainer agreement which stated in part, "I authorize my attorney to receive settlement checks on my behalf, endorse my name and deposit same for distribution."

In the latter part of July 2005, Respondent negotiated a settlement with GEICO in the amount of $5,500. In a letter dated August 3, 2005, GEICO submitted a Release to Respondent and referenced a settlement check. According to the letter, the settlement check dated August 3, 2005, had been sent under a separate cover. The letter instructed Respondent to hold all funds in escrow until Respondents' clients had signed and returned the Release to GEICO. The Release and settlement check were to be signed by Client and her husband. Client's husband was not represented by Respondent and had never accompanied his wife to any of her meetings with Respondent. Upon receipt of the check, Respondent endorsed it by signing his name, Client's name, and her husband's name. Respondent deposited the check into his trust account and then disbursed his legal fees from the settlement proceeds and transferred the amount into his operating account.

On August 22, 2005, Client met with Respondent who informed her that the case was closed and there was nothing else that could be done despite Client's complaints that she was still in pain and receiving medical treatment. Client expressed dissatisfaction with the settlement and ceased any further contact with Respondent. In December 2005, Respondent's office contacted Client in a failed attempt to get Client to pick up her settlement check.

In May 2006, Client retained another attorney (Attorney) to represent her in a legal malpractice action against Respondent and to further pursue her personal injury claim. During Attorney's investigation of the personal injury case, she discovered from GEICO that a Release had not been signed. Because Respondent had retained the settlement proceeds, Attorney corresponded in writing with him requesting that he return the proceeds to GEICO in order that she could settle Client's case. In his responses, Respondent claimed that Client had authorized him to settle the case and he was not required to return the funds. Respondent also challenged Attorney's allegation that Client had an additional claim and implied that such a claim would be fraudulent.

Ultimately, Respondent returned the settlement proceeds to GEICO less his fee of $1,879.75. Following the return of the funds, Attorney negotiated a settlement of $15,000 from GEICO less the fees retained by Respondent. Attorney also settled with State Farm, Client's insurance carrier, for $50,000, which represented her underinsured coverage. This settlement took into account the medical bills that Client acquired after she terminated her representation with Respondent, which included a rotator cuff surgery in September 2005 for an injury attributed to the October 2004 automobile accident.

Due to Respondent's conduct, Client filed a Complaint against Respondent with the ODC. On May 25, 2006, ODC notified Respondent regarding the investigation of Client's Complaint. Respondent filed a response to the notice on June 22, 2006. On November 30, 2006, Respondent gave testimony to Disciplinary Counsel pursuant to a Notice to Appear and Subpoena.

Based on its investigation, the investigative panel authorized formal charges against Respondent. The ODC filed formal charges against Respondent on March 22, 2007. In his Response to the charges, Respondent admitted he: (1) had negotiated the settlement on behalf of Client; and (2) endorsed the settlement check with his name and Client's name. Because he believed that Client had authorized him to settle her case, he denied any

misconduct. Although he neither admitted nor denied signing Client's husband's name, he admitted that he deposited the settlement check in his trust account and transferred the amount of his legal fees into his operating account. He further admitted that at the time of the disbursement of the legal fees Client had not signed any type of settlement or disbursement sheet.

At the hearing before the Panel, the following witnesses were presented: Client, Client's husband, Attorney, and another witness (Witness A)[1] who recounted Respondent's actions.

Respondent gave a different account of his representation of Client. Respondent, a sole practitioner, testified he had practiced law for thirty-one years during which time he had handled personal injury cases. In terms of representing Client, Respondent testified he felt Client was "anxious to settle" given she frequently called his office to inquire about a settlement. Because he believed that Client was released from medical treatment on July 8, 2005[2], he pursued a settlement with GEICO in the latter part of July 2005. According to Respondent, Client authorized him to settle her case for $6,000. Respondent claimed he entered into an agreement with GEICO to settle the case after several failed attempts to consult with Client regarding a settlement. He further stated that in all of his years of practice he had never settled a claim without his client's permission.

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[1] Witness A, who worked for Respondent as an administrative assistant during the Client matter, testified she had been present when Respondent returned phone calls to Client. She further testified she spoke with Client several times a week regarding her case. Additionally, she claimed Client had told her that she had been released from her doctor prior to August 2005. However, Witness A stated Client never told her that she wanted to settle her case.

[2] Respondent offered into evidence a message from his office phone log on July 8, 2005, stating that Client was released from the doctor and ready to proceed. Respondent claimed to have Client's medical bills prior to entering into the agreement with GEICO.

Respondent admitted that after receiving the settlement check from GEICO he signed Client's name to the check. Although he could not specifically recall signing Client's husband's name to the check, he testified that if he signed the check it was done without a fraudulent intent. Respondent further admitted he deposited the settlement check in his trust account and transferred the amount of his legal fees into his operating account. Respondent believed this conduct was permissible and not in violation of GEICO's instructions because he received the settlement check prior to receiving GEICO's letter. Respondent further testified he did not believe any of his conduct, while representing Client, was unethical.

On cross-examination, Respondent admitted he sent a medical release to Client's orthopedist on August 22, 2005, in which he requested Client's medical records from August 1, 2005. Respondent was unable to explain why he made this request after he entered into a settlement agreement with GEICO in July 2005. In terms of endorsing the settlement check, Respondent conceded that he was not authorized to sign for Client's husband; however, he claimed he did so because he was concerned about losing the check before it was properly endorsed.

After the hearing, the Panel found Respondent engaged in misconduct in violation of the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1, RPC (Competence); Rule 1.2, RPC (Scope of Representation; Allocation of Authority between Client and Lawyer); Rule 1.4, RPC (Communication); Rule 1.5 (Fees); Rule 1.15, RPC (Safekeeping Client's Property); and Rules 8.4(d) and (e), RPC (Misconduct). The Panel recommended that Respondent be suspended for a period of ninety days and pay the costs of the proceedings.

DISCUSSION

Although Respondent raises eleven exceptions to the Panel's report, we believe Respondent is essentially challenging the Panel's: (1) factual findings; (2) decision regarding the exclusion of certain testimony; and (3) imposition of a ninety-day suspension.

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." In re Thompson, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "Although this Court is not bound by the findings of the Panel and Committee, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of witnesses." In re Marshall, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998). "However, this Court may make its own findings of fact and conclusions of law." Id. Furthermore, a disciplinary violation must be proven by clear and convincing evidence. In re Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006).

I. Factual Findings

In terms of the Panel's factual findings, Respondent contends the Panel erred in: (1) finding that his testimony was not credible; (2) placing emphasis on the fact that he settled the case for less than Client had authorized; (3) finding he violated GEICO's instructions to hold the settlement proceeds in escrow until the Release was signed by Client and her husband; (4) finding he did not have proper authorization from Client to settle her case; (5) finding he failed to present Client with any settlement or disbursement statement; (6) placing emphasis on the fact that he obtained medical releases from Client after the case was settled; and (7) making a statement that Respondent's failure to promptly return the settlement proceeds to GEICO after requested to do so by Attorney caused the Panel "grave concern."

The Panel prefaced its decision with a specific finding that Respondent's testimony was not credible. Because the inferences drawn from testimony in the record depended largely on the credibility of the witnesses, we believe this finding by the Panel is significant in terms of assessing Respondent's exceptions to the Panel's ultimate decision.

Deferring to the Panel on its credibility determination, we find there is evidence to support each of the factual findings challenged by Respondent. First, Client denied ever authorizing Respondent to settle her case for $6,000. Thus, the Panel's emphasis on the fact that Respondent settled Client's claim for less than $6,000 does not establish error on the part of the Panel as argued

by Respondent. Instead, the Panel's finding was merely intended to support its determination as to Respondent's credibility.

Secondly, Respondent admitted that he endorsed the settlement check, deposited it into his trust account, and transferred his legal fees to his operating account. Clearly, Respondent's actions were in direct violation of the instructions by GEICO that Respondent retain the settlement proceeds in his trust account until the parties signed and returned the Release. Even if, as Respondent contends, the settlement check was received prior to the GEICO instruction letter, this would not negate Respondent's misconduct. Once he received the letter, Respondent should have withdrawn his legal fees from the operating account and transferred them back to his trust account. Furthermore, Respondent was aware on August 22, 2005, that Client did not intend to sign the GEICO release. Thus, per GEICO's instruction, Respondent should have returned his legal fees to his trust account until the matter was resolved. As of the date of the Panel hearing on June 27, 2007, Respondent still retained the amount of his legal fees in his operating account.

Thirdly, again deferring to the Panel's credibility determination, there is evidence to support the Panel's finding that Respondent did not have proper authorization to settle Client's case. Respondent's reliance on his retainer agreement to support his decision to settle the case is misplaced. The terms of the retainer agreement only authorized Respondent to receive a settlement check and endorse a client's name if the client agreed to the proposed settlement. Here, Client adamantly denied authorizing Respondent to settle her case.

Fourthly, there is evidence to support the Panel's finding that Client had not signed any settlement or disbursement statement. Respondent admitted that Client never signed a release for the settlement check. Moreover, even at their last meeting on August 22, 2005, Client expressed dissatisfaction with the settlement, did not sign any documents, and ceased all further contact with Respondent.

Fifthly, there is evidence to support the Panel's finding that Respondent sought to obtain medical releases for Client's records after the case was settled. Respondent believes this finding was irrelevant to a determination of misconduct. We believe the Panel's finding was intended to establish that Respondent was not a credible witness. Respondent never adequately explained his decision to seek a medical release to obtain Client's medical records in August 2005 after he had settled the case in July 2005. According to Respondent, he claimed he had in his possession all of Client's medical records at the time he entered into the settlement agreement. Respondent also testified that he informed Client on August 22, 2005, that the case had been settled and nothing could be done regarding any additional medical treatment for her injuries. Thus, the fact that he requested additional medical records after the settlement and this meeting created a discrepancy in Respondent's testimony and would again draw into question his credibility.

Finally, the Panel was justified in expressing concern over the fact that Respondent declined to promptly return the settlement proceeds to GEICO when requested by Attorney. Respondent admitted that Client never signed a settlement release. He also knew of the correspondence between Attorney and GEICO regarding a potential settlement of Client's claim. Therefore, Respondent was aware that Client's personal injury claim with GEICO had not been finalized. Despite this knowledge, Respondent delayed returning the funds to GEICO. Additionally, Respondent never relinquished the amount of his attorney fees even though he failed to procure a final settlement for Client. Respondent's failure to promptly return the entire amount of the settlement proceeds impeded Attorney's progress in pursuing Client's claim with GEICO.

II. Exclusion of Testimony

Respondent contends the Panel erred in ruling that neither he nor his proposed witness (Witness B) could testify regarding problems Respondent encountered with Attorney prior to his representation of Client.

At the start of the hearing, Respondent's counsel indicated that he intended to call Witness B, a former client of Attorney's and a member of

Respondent's office staff who was also his client. According to Respondent's counsel, Witness B was to testify regarding the "bad blood" that existed between Respondent and Attorney prior to the Client matter. Counsel also intended to elicit testimony from Witness B regarding a grievance she had filed against Attorney. Disciplinary counsel objected to the admission of this testimony on the ground it was irrelevant to a determination of Respondent's alleged misconduct. After hearing arguments from counsel, the Panel ruled that Respondent's counsel could not present any testimony regarding a grievance against Attorney and needed to limit the testimony to only the interactions between Attorney and Respondent regarding the Client matter.

Unless provided otherwise in a specific rule, the South Carolina Rules of Evidence for non-jury civil matters and the South Carolina Rules of Civil Procedure apply to lawyer disciplinary proceedings. Rule 413, SCACR; Rule 9, RLDE. We hold the Panel properly limited the proposed testimony on the ground that it was not relevant. See Rule 401, SCRE ("'Relevant' evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). Because the Panel was only considering the formal charges against Respondent, the testimony presented was properly confined to Respondent's representation of Client. Furthermore, given that Attorney was called as a witness, Respondent's counsel was able to attack her credibility and establish any potential bias or prejudice she may have had against Respondent.

III. Ninety-Day Suspension

Finally, Respondent challenges the Panel's recommendation of a ninety-day suspension. He contends the recommendation was not warranted because: (1) his endorsement of Client's husband's name on the GEICO settlement check was "either harmless error, or such an error as should not cause a suspension of his license;" and (2) the evidence did not support the

Panel's findings that he committed several serious breaches of ethical conduct in violation of the Rules of Professional Conduct.

A.

In its report, the Panel concluded that Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1, RPC ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Rule 1.2, RPC ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter."); Rule 1.4, RPC (providing that a lawyer shall keep the client informed and consult with the client regarding means by which client's objectives are to be accomplished); Rule 1.5, RPC (stating that "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination"); Rule 1.15, RPC (providing that a lawyer shall: safeguard client's property; deposit unearned legal fees into client trust account; and render full accounting regarding client's property); Rule 8.4(d), RPC (stating it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); and Rule 8.4(e), RPC (stating it is professional misconduct for a lawyer "engage in conduct that is prejudicial to the administration of justice").

We hold there was clear and convincing evidence that Respondent violated each of the above-listed Rules of Professional Conduct. Deferring to the credibility determination of the Panel, Client testified she never authorized Respondent to settle her case. Yet, Respondent settled Client's claim without her consent and despite the knowledge that she was still receiving medical treatment for her injuries. We find this conduct was in violation of Rule 1.1 (Competence); Rule 1.2 (Scope of Representation;

Allocation of Authority between Client and Lawyer); and Rule 1.4 (Communication). Furthermore, Respondent engaged in fraudulent conduct in violation of Rule 8.4(d) when he signed Client's husband's name to the settlement check without his consent and without an agreement to represent him. In terms of Respondent's handling of the settlement proceeds, Respondent's decision to negotiate the settlement check in violation of GEICO's instructions and to disburse his legal fees to his operating account constitutes a violation of Rule 1.5 (procedure lawyer should follow after conclusion of contingent fee matter) and Rule 1.15 (safekeeping client's property). Finally, Respondent's failure to promptly return the entire amount of the settlement proceeds to GEICO prevented Attorney from expeditiously pursuing Client's personal injury claim; therefore, we find this conduct was in violation of Rule 8.4(e) (conduct which is prejudicial to the administration of justice). Although not listed by the Panel, we also find this conduct violated Rule 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. The lawyer may retain a reasonable nonrefundable retainer.").

B.

With respect to the Panel's recommendation of a ninety-day suspension, there is precedent to establish that this sanction is within the range this Court has imposed in the past where attorneys have engaged in similar misconduct. However, due to Respondent's egregious conduct and the fact that he has been sanctioned by this Court in the past,[3] we find the

[3] See In re White, 328 S.C. 88, 492 S.E.2d 82 (1997) (holding public reprimand was warranted for attorney's improperly retaining client file, ex parte communication with the court, and commingling personal funds with client trust funds).

Panel's recommendation is inadequate and a harsher sanction is warranted. Therefore, we hereby sanction Respondent to a six-month definite suspension and order him to pay the costs of the proceedings. See, e.g., In re Nwangaza, 362 S.C. 208, 608 S.E.2d 132 (2005) (finding public reprimand was warranted, upon submission of agreement, where attorney negotiated personal injury settlement check without client's consent/endorsement; deposited proceeds into trust account; issued a check for client's medical provider and withdrew her contingency fees; and failed to maintain the appropriate balance in her trust account until the dispute over the fees in a domestic matter was resolved); In re Williams, 336 S.C. 578, 521 S.E.2d 497 (1999) (accepting parties' agreement and holding that public reprimand was warranted where attorney: failed to properly safeguard his client's property by neglecting to promptly notify his client of settlement and fraudulently endorsing settlement check; failed to use proper accounting methods; failed to keep his client reasonably informed about status of case; failed to comply with demand for payment; made false statements to the Commission on Lawyer Conduct and other party in suit; and created a false Disbursement Sheet); In re Belding, 356 S.C. 319, 589 S.E.2d 197 (2003) (finding one-year suspension was appropriate sanction where attorney: settled case without first obtaining client's consent; drafted false documents which included names of real lawyers and a judge; failed to inform client regarding status of case; and failed to take steps to protect his client's interest after he attempted to be relieved as counsel following a "charade to conceal his mistakes"); In re Lewis, 344 S.C. 1, 542 S.E.2d 713 (2001) (holding attorney's engaging in improper banking practices, misappropriating client funds, signing clients' names to settlement documents and checks without clients' knowledge or consent, making false statement to disciplinary counsel, and violating financial record keeping warranted disbarment); In re Ring, 320 S.C. 249, 464 S.E.2d 328 (1995) (concluding sanction of disbarment warranted where: attorney settled case without client's authorization; forged client's signature; failed to keep client informed or respond to client's inquiries; misappropriated client funds; terminated representation without taking steps to protect client's interests; issued a bad check; and failed to cooperate in investigation); In re Smith, 310 S.C. 449, 427 S.E.2d 634 (1992) (holding disbarment was appropriate sanction where attorney: entered into settlement without client's consent and negotiated settlement check by forging client's

signature; improperly handled client funds; failed to deliver property to client; failed to notify client of receiving funds in which client had an interest; made false statements to third party and Board; failed to cooperate with investigation; failed to competently and diligently represent clients; and improperly disclosed client confidence).

CONCLUSION

In view of the gravity of Respondent's misconduct, we hereby suspend Respondent from the practice of law for six months. Additionally, we order Respondent to pay costs associated with this proceeding within ninety days of the filing of this opinion. Within fifteen days of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Leroy McGrier #2, Appellant.

Appeal From Greenwood County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26489
Heard February 21, 2008 – Refiled June 23, 2008

REVERSED

Appellate Defender LaNelle C. DuRant, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, and Ernest Charles Grose, Jr., of Greenwood, for Appellant.

John Benjamin Aplin, of SC Department of Probation Parole and Pardon, of Columbia, for Respondent.

JUSTICE BEATTY: In this direct appeal, Leroy McGrier challenges the circuit court's order revoking six months for violating the conditions of the Community Supervision Program ("CSP").

McGrier contends the CSP statute, specifically section 24-21-560(D) of the South Carolina Code, is unconstitutional given a revocation from the CSP resulted in the imposition of a greater sentence than his original sentence without the benefit of the requisite constitutional protections. After we issued our original opinion reversing the decision of the circuit court, the State petitioned for rehearing. We deny the petition for rehearing, withdraw our original opinion, and substitute it with this opinion which corrects non-substantive scrivener's errors.

FACTUAL/PROCEDURAL HISTORY

On November 16, 1999, McGrier pleaded guilty to two counts of distribution of crack cocaine (third offense). The circuit court judge sentenced McGrier to three years imprisonment on each count. The sentences were to be served concurrently.

On May 4, 2002, after serving eighty-five percent of the original term of imprisonment,[1] McGrier was released pursuant to section 24-

[1] Section 24-13-150(A) of the South Carolina Code provides in pertinent part:

> (A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, a prisoner convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed. This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of

21-560[2] of the South Carolina Code to the CSP of the South Carolina Department of Probation, Parole, and Pardon Services (the Department). The ending date of McGrier's participation in the CSP was set for May 3, 2004.

On February 23, 2004, McGrier appeared before Circuit Court Judge Wyatt T. Saunders for a revocation hearing. After finding McGrier willfully violated the terms of the CSP, Judge Saunders revoked the CSP and ordered that McGrier be remanded to the custody of the South Carolina Department of Corrections for a period of four months.[3] After serving this sentence, McGrier was again released to

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> imprisonment imposed, not including any portion of the sentence which has been suspended.

S.C. Code Ann. § 24-13-150(A) (2007) (emphasis added). Distribution of crack cocaine, third offense, has been designated as a "no parole offense." S.C. Code Ann. § 24-13-100 (2007).

[2] Section 24-21-560(A) provides in relevant part:

> (A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, any sentence for a "no parole offense" as defined in Section 24-13-100 must include any term of incarceration and completion of a community supervision program operated by the Department of Probation, Parole, and Pardon Services. No prisoner who is serving a sentence for a "no parole offense" is eligible to participate in a community supervision program until he has served the minimum period of incarceration as set forth in Section 24-13-150.

S.C. Code Ann. § 24-21-560(A) (2007).

[3] Sections 24-21-560(C) and (D) of the South Carolina Code provide in relevant part:

(C) If the department determines that a prisoner has violated a term of the community supervision program and the community supervision should be revoked, a probation agent must initiate a proceeding in General Sessions Court. The proceeding must be initiated pursuant to a warrant or a citation issued by a probation agent setting forth the violations of the community supervision program. The court shall determine whether:

(1) the terms of the community supervision program are fair and reasonable;
(2) the prisoner has complied with the terms of the community supervision program;
(3) the prisoner should continue in the community supervision program under the current terms;
(4) the prisoner should continue in the community supervision program under other terms and conditions as the court considers appropriate;
(5) the prisoner has wilfully violated a term of the community supervision program.

If the court determines that a prisoner has wilfully violated a term or condition of the community supervision program, the court may impose any other terms or conditions considered appropriate and may continue the prisoner on community supervision, or the court may revoke the prisoner's community supervision and impose a sentence of up to one year for violation of the community supervision program. A prisoner who is incarcerated for revocation of the community supervision program is not eligible to earn any type of credits which would reduce the sentence for violation of the community supervision program.

(D) If a prisoner's community supervision is revoked by the court and the court imposes a period of incarceration for the revocation, the prisoner also must complete a

CSP on June 23, 2004, and assigned a supervision ending date of June 22, 2006.

On April 11, 2005, McGrier appeared before Judge Saunders for a CSP revocation hearing. At the conclusion of the hearing, Judge Saunders found McGrier had willfully violated the conditions of the CSP. As a result, Judge Saunders revoked CSP, sentenced McGrier to six months imprisonment, and recommended that McGrier participate in the Alcohol Treatment Unit (ATU) while incarcerated. Upon completion of this sentence, McGrier was again released to the CSP on September 30, 2005. On April 3, 2006, McGrier appeared before Judge Saunders for a CSP violation hearing. Finding that McGrier willfully violated the terms of the CSP, Judge Saunders permitted McGrier's continued participation in the CSP but ordered that he be held in jail until he was accepted into an in-patient substance abuse treatment program.

> community supervision program of up to two years as determined by the department pursuant to subsection (B) when he is released from incarceration.
>
> A prisoner who is sentenced for successive revocations of the community supervision program may be required to serve terms of incarceration for successive revocations, as provided in Section 24-21-560(C), and may be required to serve additional periods of community supervision for successive revocations, as provided in Section 24-21-560(D). The maximum aggregate amount of time the prisoner may be required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original "no parole offense". The original term of incarceration does not include any portion of a suspended sentence.

S.C. Code Ann. § 24-21-560(C), (D) (2007).

On October 30, 2006, McGrier appeared before Circuit Court Judge J. Cordell Maddox, Jr., for violating the terms of the CSP. After finding that McGrier willfully violated the terms and conditions of the CSP, Judge Maddox revoked McGrier's CSP and sentenced him to ninety days imprisonment. As part of the order, Judge Maddox specified that McGrier would not be awarded time-served credit, good-time credit, or work credit. McGrier appealed this order to the Court of Appeals.

On January 27, 2007, McGrier was released from the Department of Corrections to the CSP with a supervision ending date of January 26, 2009. On February 6, 2007, McGrier was served with an arrest warrant in which it was alleged that he violated the terms and conditions of the CSP by failing to: report since his release date of January 27, 2007; report to be placed on an electronic monitoring device; and follow the advice and instructions of his probation agent.

Based on these alleged violations, McGrier appeared before Circuit Court Judge Kenneth G. Goode on April 2, 2007, for a CSP revocation hearing. At the hearing, McGrier, who was represented by counsel, contended he should be released from the CSP because "his [original] sentence has been satisfied by the earlier revocation." In support of this argument, McGrier primarily relied on Justice Pleicones' dissent in State v. Mills, 360 S.C. 621, 602 S.E.2d 750 (2004), to challenge the constitutionality of section 24-21-560(D). Ultimately, Judge Goode rejected this argument and found that McGrier had willfully violated the terms and conditions of the CSP. As a result, Judge Goode revoked McGrier's CSP and sentenced him to a six-month term of imprisonment. McGrier appeals from this order.

DISCUSSION

McGrier asserts the circuit court judge erred in finding section 24-21-560(D) constitutional. Because a revocation under the CSP statute can result in a sentence that exceeds the original sentence, McGrier contends he is entitled to the protections afforded all criminal

defendants. Specifically, he claims his sentence was increased without the benefit of the right to be informed of the charges against him, the right to counsel, and the right to a jury trial. Given that the revocation procedure under the CSP statute does not provide for these rights, McGrier claims the statute is unconstitutional.

In support of this argument, McGrier primarily relies on Justice Pleicones' dissent in State v. Mills, 360 S.C. 621, 602 S.E.2d 750 (2004). In Mills, the defendant pleaded guilty to distribution of crack cocaine, second offense, and was sentenced to six months imprisonment. After serving five months and two days, he entered a CSP which was to continue for two years. After a circuit court judge found the defendant violated the terms of his CSP, the judge revoked the defendant's CSP and sentenced him to five months and seven days pursuant to section 24-21-560(D) of the South Carolina Code. Id. at 622, 602 S.E.2d at 751.

Mills appealed the circuit court's order, arguing that section 24-21-560(D) limited his sentence for revocation to the remaining time left on his original sentence for the substantive crime. Mills claimed that because he had served five months and two days, as well as three weeks on a prior revocation, his revocation sentence should not have exceeded five days. Essentially, Mills averred the circuit court misinterpreted section 24-21-560(D) to permit a revocation sentence that was "almost double" his original sentence. Id. at 623, 602 S.E.2d at 751. According to Mills, his sentence for revocation could only equal the amount of unserved time remaining on his original sentence.

A majority of this Court rejected Mills' assertion on the ground his claim was not supported by the plain reading of section 24-21-560(D). In reaching this conclusion, the Court stated:

> Subsection (C) of § 24-21-560 provides that "the court may revoke the prisoner's community supervision and impose a sentence of up to one year for a violation of the community supervision program." Subsection (D) then provides that for a *successive* revocation, the prisoner may

> be sentenced "as provided in [subsection] (C)" *i.e.*, for up to one year, with the limitation that the total time imposed "for successive revocations" *i.e.*, *all* revocations, cannot exceed the length of time of the prisoner's original sentence. Subsection (D) does not provide, as appellant contends, that the sentence for any successive revocation is limited to the amount of time remaining on the prisoner's original sentence, nor does this statute inevitably result in the "doubling" of a prisoner's sentence.

Id. at 624, 602 S.E.2d at 752. Applying the above-outlined reasoning, the Court affirmed the circuit court judge's sentence of five months and seven days on the ground that Mills had served three weeks on his prior revocation and his time for all revocations could not exceed six months. Id. at 625, 602 S.E.2d at 752.

Justice Pleicones disagreed with the majority's reading of section 24-21-560, stating that "[t]he majority holds that S.C. Code Ann. § 24-21-560 (Supp. 2003) permits an inmate found to have violated the terms of his community supervision (CSP) to serve an additional sentence, up to an amount equal to the period of incarceration imposed as part [of] his original sentence." Id. at 625, 602 S.E.2d at 752. Justice Pleicones explained, "if the revocation judge is truly imposing a new sentence of up to one year, then the protections afforded all criminal defendants, including but not limited to the right to an indictment, counsel, and a jury, must be afforded her." Id. at 625 n.3, 602 S.E.2d at 752 n.3. Although Justice Pleicones agreed with the majority's literal interpretation of the statute, he believed such a reading rendered the statute unconstitutional. Id. at 626, 602 S.E.2d at 752. In his opinion, Justice Pleicones read the statute "as putting an outside limit on incarceration of twice the period imposed by the trial judge. The outside limit on the total amount of time an inmate could be incarcerated and/or required to participate in the CSP program is the length of the original sentence, that is, the term of incarceration plus any period of suspension." Id. at 626, 602 S.E.2d at 753. Based on this analysis, Justice Pleicones found the maximum time Mills "could constitutionally be subjected to incarceration and/or required to participate in the CSP program pursuant to [his original sentence] was

six months." Because the six-month period had expired, Justice Pleicones found the circuit court judge erred in reincarcerating Mills. Id.

At least facially, Mills would require this Court to affirm the circuit court's order in the instant case. Because McGrier has served an aggregate of nineteen months as the result of his CSP revocations, under Mills, the circuit court's order was appropriate given McGrier's additional periods of incarceration have not exceeded his original, thirty-six month sentence. However, we believe this case presents an opportunity for the Court to reconsider its decision in Mills in light of several arguments that were not previously raised. See Mills, 360 S.C. at 624, 602 S.E.2d at 752 (stating "we emphasize that the only issue before us is the construction of this particular statute and not the wisdom of the CSP statutory scheme as a whole").

Although we believe this Court properly employed the rules of statutory construction in deciding Mills, we did not at that time envision the problems that would arise out of a practical application of the decision. Upon further reflection, we believe Mills does not effectuate what the Legislature intended by enacting the CSP. We reach this result cognizant of our duty to ascertain the intent of the Legislature and to give it effect so far as possible within constitutional limitations. Brown v. County of Horry, 308 S.C. 180, 183, 417 S.E.2d 565, 567 (1992) ("It is a settled rule of statutory construction that it is the duty of the court to ascertain the intent of the Legislature and to give it effect so far as possible within constitutional limitations.").

An elementary and cardinal rule of statutory construction is that courts must ascertain and effectuate the actual intent of the Legislature. Horn v. Davis Elec. Constructors, Inc., 307 S.C. 559, 563, 416 S.E.2d 634, 636 (1992); Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); see State v. Ramsey, 311 S.C. 555, 561, 430 S.E.2d 511, 515 (1993) ("In the interpretation of statutes, our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute.").

"This Court has long recognized that legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary." Bailey v. State, 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992). "'It is always to be presumed that the Legislature acted in good faith and within constitutional limits; and this declaration of the Legislature is a conclusive finding of fact and imports a verity upon its face which cannot be impugned by litigants, counsel, or the courts, but is absolutely binding upon all.'" Scroggie v. Scarborough, 162 S.C. 218, 231, 160 S.E. 596, 601 (1931) (quoting State ex rel. Weldon v. Thomason, 221 S.W. 491, 495 (Tenn. 1919)). "Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977).

As we read section 24-21-560(B) in light of Mills, the continuous two-year term in CSP begins anew each time a participant is released into the program after a period of incarceration. See S.C. Code Ann. § 24-21-560(B) (2007) ("A community supervision program operated by the Department of Probation, Parole, and Pardon Services must last no more than two continuous years."). If, as in McGrier's case, there are successive revocations, the two-year period could produce a never-ending cycle of participation in CSP and an incarceration period which would clearly exceed or extend past the originally ordered term of incarceration. See State v. Bennett, 375 S.C. 165, 174 n.6, 650 S.E.2d 490, 495 n.6 (Ct. App. 2007) (discussing the fact that successive CSP revocations resulted in defendant serving seven years, four months, and three days for an original four-year sentence). To read the statute in this manner, as Justice Pleicones' noted in his dissent, would render it unconstitutional in several respects.

Initially, we find a practical application of Mills would violate a defendant's procedural due process rights. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (No person shall be deprived of life, liberty, or property without due process of law.). Here, the imposition of a sentence which exceeds the defendant's original term of incarceration involves a situation where the defendant has not received notice that the

terms of his original sentence would be modified and a greater punishment imposed. See State v. Allen, 370 S.C. 88, 97, 634 S.E.2d 653, 657 (2006) ("'It is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation . . . [W]here the proscribed acts are not criminal, due process mandates that [a probationer or parolee] cannot be subjected to forfeiture of his liberty for those acts unless he is given prior fair warning.'" (quoting U.S. v. Dane, 570 F.2d 840, 843-44 (9th Cir. 1977))); Hord v. Commonwealth, 450 S.W.2d 530, 531-32 (Ky. Ct. App. 1970) ("Due process of law . . . must be followed to insure a valid conviction of [a defendant's] felonious charge. Due process does not contemplate that months or years later his 'trial' may be opened and a greater punishment imposed.").

Although McGrier was on notice by the terms of the statute that the completion of the CSP was a requirement of his originally-imposed sentence,[4] he would not have been aware that his participation in this program could potentially be in perpetuity. See State v. Dawkins, 352 S.C. 162, 167, 573 S.E.2d 783, 785 (2002) (finding defendant's five-year probation sentence was discharged after he successfully completed a community supervision program pursuant to section 24-21-560(E) of the South Carolina Code); State v. Scott, 351 S.C. 584, 590, 571 S.E.2d 700, 703 (2002) (holding, pursuant to section 24-21-560 of the South Carolina Code, defendant was required to participate in CSP and not be placed on probation even though he "maxed out" his active sentence through good-conduct credits given defendant had not served his entire active term of incarceration until he **completed** a CSP). Conceivably,

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[4] Section 24-21-560(E) of the South Carolina Code provides:

> (E) A prisoner who successfully completes a community supervision program pursuant to this section has satisfied his sentence and must be discharged from his sentence.

S.C. Code Ann. § 24-21-560(E) (2007).

had McGrier been aware of the potential sentencing consequences, he may not have decided to plead guilty.

Furthermore, we believe a literal interpretation of the CSP statute, as in Mills, would improperly permit a CSP violation to become a separate and distinct criminal offense from that which a defendant was convicted without the benefit of the requisite Sixth Amendment constitutional protections.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). "These basic rights are applicable to the states through the due process clause of the Fourteenth Amendment." Id. "The Amendment essentially 'constitutionalizes' the right to present a defense in an adversary criminal trial." Id.

It is undisputed that neither McGrier nor other CSP violators have been afforded these protections. To contend, as does the Department, that the Sixth Amendment protections are inapplicable to the revocation of CSP because it does not involve a criminal prosecution would be a matter of semantics that minimizes or essentially ignores the consequences of a revocation. Our United States Supreme Court has repeatedly held that, "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a **jury**, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." Cunningham v. California, 127 S.Ct. 856, 863-64 (2007) (emphasis added). Although McGrier, and other similarly situated defendants, are not in actuality being convicted for a second time, they are being given an additional sentence for violating the terms of CSP. Because CSP is a collateral consequence of a conviction for a "no-parole offense," revocations for successive CSP violations should not extend or exceed the term of incarceration that was originally ordered for the underlying offense. Jackson v. State, 349 S.C. 62, 64, 562 S.E.2d 475, 475 (2002) (holding participation in CSP is a collateral consequence of sentencing).

As illustrated by the foregoing, we believe a practical application of our decision in Mills renders the CSP statute unconstitutional. Moreover, in our view, the purpose of the CSP statute is to continue supervision during the remaining term of the original sentence. Because the CSP program is a more stringent program than traditional probation, we believe the Legislature did not intend for this form of supervision to have the effect of increasing an inmate's original sentence for a "no parole offense." See Dawkins, 352 S.C. at 167, 573 S.E.2d at 785 ("The CSP is a more stringent, closely monitored form of supervision than normal probation. Even considering Part E in the context of the statute as a whole, we believe the legislature intended mandatory participation in the CSP to serve as a more rigorous term of probation for those convicted of no-parole offenses, in lieu of normal probation.").

Therefore, to effectuate the intent of the Legislature and remain within the confines of constitutional limitations, we have decided to change our position regarding an interpretation of the following statutory language:

> The maximum aggregate amount of time the prisoner may be required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original "no parole offense." The original term of incarceration does not include any portion of a suspended sentence.

S.C. Code Ann. § 24-21-560(D) (2007). We now read this language as limiting the total amount of time an inmate could be incarcerated after a CSP revocation to be the length of the remaining balance of the sentence for the "no parole offense." Based on this interpretation, a circuit court may not impose a sentence for a CSP revocation that would result in an inmate being incarcerated for an aggregate period of time that extended beyond the unsuspended portion of the original sentence. Thus, assuming an inmate has served at least eighty-five percent of the unsuspended portion of his original sentence, an inmate whose CSP is revoked is limited to serving an amount of time equal to the remaining fifteen percent balance of this sentence. We believe this

construction preserves the presumed validity and constitutionality of the CSP statute as mandated by our rules of statutory construction. Cf. Thomas v. State, 838 So. 2d 701, 702 (Fla. Dist. Ct. App. 2003) (holding sentence of incarceration that exceeded suspended portion of previously imposed sentence of incarceration, which resulted from violation of community control, was illegal).

Applying our holding to the facts of the instant case, we find the circuit court erred in reincarcerating McGrier given he has served eighty-five percent of the original, three-year term of imprisonment and has served an aggregate of nineteen months as a result of the CSP revocations. Accordingly, the decision of the circuit court is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, Petitioners,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the S. C. House of Representatives, Andre Bauer in his official capacity as President of the S. C. Senate, and The State of South Carolina, Respondents.

IN THE ORIGINAL JURISDICTION

Opinion No. 26506
Heard March 4, 2008 – Filed June 23, 2008

James G. Carpenter, Jennifer J. Miller and Lewis W. Clayton, all of Carpenter Law Firm, of Greenville, for Petitioner.

Bradley S. Wright and Charles F. Reid, both of Columbia, for Respondent Robert W. Harrell, Jr.

Michael R. Hitchcock and Kenneth M. Moffitt, both of Columbia, for Respondent Andre Bauer.

Attorney General Henry D. McMaster and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for Respondent State of South Carolina.

Burnet R. Maybank, III, of Nexsen Pruet, of Columbia, for Amicus Curiae SC Manufacturer's Alliance and Michelin N.A., Inc..

Weston Adams, III, Jeffrey N. Thordahl, and Ashley B. Stratton, all of McAngus Goudelock & Courie, of Columbia, for Amicus Curiae SC Economic Developers' Association.

JUSTICE WALLER: We accepted this matter in our original jurisdiction to address Petitioners' claim that numerous acts passed by the General Assembly in 2007 violate the one subject rule of the South Carolina Constitution, Article III, § 17. We agree.[1]

DISCUSSION

S.C. Const., Art. III, § 17 provides that "[e]very Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." The purpose of Article III, § 17 is (1) to apprise the members of the General Assembly of the contents of an act by reading the title, (2) prevent legislative log-rolling and (3) inform the people of the state of the matters with which the General Assembly concerns itself. Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005). See also Keyserling v. Beasley, 322 S.C. 83, 470 S.E.2d 100 (1996). Article III, § 17 is to be

[1] We decline to address Petitioners' contention that 2007 Act Nos. 130, 136, 142, 143 and 151 constitute special laws in violation of South Carolina Constitution, Article VIII, § 7, and Article III, § 34. Petitioners lack standing to challenge those acts. Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); Blandon v. Coleman, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

liberally construed so as to uphold an Act if practicable. Id.; McCollum v. Snipes, 213 S.C. 254, 49 S.E.2d 12 (1948). Doubtful or close cases are to be resolved in favor of upholding an Act's validity. Alley v. Daniel, 153 S.C. 217, 150 S.E. 691 (1929). Article III, § 17 does not preclude the legislature from dealing with several branches of one general subject in a single act. It is complied with if the title of an act expresses a general subject and the body provides the means to facilitate accomplishment of the general purpose. Keyserling. However, Article III, section 17 requires that "the topics in the body of the act [be] kindred in nature and hav[e] a legitimate and natural association with the subject of the title," and that the title conveys "reasonable notice of the subject matter to the legislature and the public." Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 141, 262 S.E.2d 45, 47 (1980).

a. Act 49

The first Act challenged by Petitioners is 2007 Act No. 49, which establishes the South Carolina Critical Needs Nursing Initiative Act. The title to Act 49, as initially written**,** was as follows:

> A BILL TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 110 TO TITLE 59 SO AS TO ENACT THE "SOUTH CAROLINA CRITICAL NEEDS NURSING INITIATIVE ACT" INCLUDING PROVISIONS ESTABLISHING THE CRITICAL NEEDS NURSING INITIATIVE FUND, TO IMPROVE THE NUMBER OF QUALIFIED NURSES IN THIS STATE BY PROVIDING NURSING FACULTY SALARY ENHANCEMENTS, CREATING NEW FACULTY POSITIONS, PROVIDING FOR ADDITIONAL NURSING STUDENT SCHOLARSHIPS, LOANS, AND GRANTS, ESTABLISHING THE OFFICE FOR HEALTH CARE WORKFORCE RESEARCH TO ANALYZE HEALTH CARE WORKFORCE SUPPLY AND DEMAND, AND PROVIDING FOR THE USE OF SIMULATION TECHNOLOGY AND EQUIPMENT IN THE EDUCATION OF NURSES.

The bill went through three readings with minor changes until May 22, 2007, when its title was amended to add the following provisions:

> TO AMEND SECTION 40-43-83, AS AMENDED, RELATING TO IN STATE FACILITIES DISPENSING DRUGS BEING REQUIRED TO BE PERMITTED BY THE BOARD OF PHARMACY AND BEING REQUIRED TO COMPLY WITH OTHER PROVISIONS, SO AS TO EXEMPT THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL FROM CERTAIN OF THESE REQUIREMENTS; TO AMEND SECTION 40-43-86, AS AMENDED, RELATING TO FACILITY REQUIREMENTS FOR PHARMACIES, INCLUDING THE REQUIREMENT FOR A PHARMACIST IN CHARGE, SO AS TO EXEMPT THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL FROM CERTAIN OF THESE REQUIREMENTS; AND BY ADDING SECTION 44-1-215 SO AS TO PERMIT THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO RETAIN CERTAIN FUNDS DERIVED FROM RADIATION SAFETY REQUIREMENTS.

As a result of these amendments, sections 3 and 4 were added, exempting DHEC from certain pharmacy requirements of S.C. Code Ann. § 40-43-83, and amending § 44-2-115, to allow DHEC to retain certain funds. Respondents and the Attorney General all concede the added provisions violate Article III, § 17. We agree. The add-on provisions do not deal with the South Carolina Critical Needs Nursing Initiative Act such that they are violative of the one-subject provision.

The question remains, however, whether these provisions are severable from the remainder of Act 49, inasmuch as it contains no severability clause. Notwithstanding the lack of a severability clause, we find the surviving sections of the Critical Needs Act may stand alone.

We have previously held:

> The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that the legislature would have passed it independent of that which conflicts with the constitution. When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision.

Sloan v. Wilkins, 362 S.C. at 439, 608 S.E.2d at 584, *citing* Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 649, 528 S.E.2d 647, 654 (1999). Notwithstanding the absence of a severability clause from Act 49, the legislative intent is clear, and the purposes of the Act may be complied with by upholding the Critical Needs Nursing Initiative Act. Accord Keyserling (one-subject clause is complied with if the title of an act expresses a general subject and the body provides the means to facilitate accomplishment of the general purpose). Accordingly, the offending portions of Act 49 are hereby severed.

b. Act No. 83

2007 Act No. 83 establishes the South Carolina Hydrogen Infrastructure Fund (§§ 1-4), and the Energy Freedom and Rural Development Act (§ 10). As initially proposed, Act 83 contained only the Hydrogen Infrastructure Act. It was amended on May 2, 2007, adding §§ 5 through 8 concerning economic impact zone tax credits for qualifying investments, amusement park sales-tax exemptions, creating the Board of Trustees for the SC Research Authority, and creating the South Carolina Venture Capital Authority.[2] Act 83 was again amended on May 30, 2007, adding §§ 9 through 18, which created the Energy Freedom and Rural Development Act (§ 10), and added tax credits for alternative fuel usage. We

[2] Sections 5, 6 and 8 of Act 83 are repeated verbatim as sections 2, 3 and 4, of Act 110, which is discussed below.

find that §§ 5, 6 and 8 of Act 83 do not relate to the main purpose of the act. Accordingly, those provisions are hereby severed.[3]

We find the remaining sections of Act 83 sufficiently related to the goals of promoting hydrogen and alternative energy as to fall within the ambit of the Act. Accord Keyserling v. Beasley, 322 S.C. 83, 470 S.E.2d 100 (1996) (Article III, § 17 does not preclude legislature from dealing with several branches of one general subject in a single act).

c. Act 110

Act 110 is the Research and Development Tax Credit Reform Act. With the exception of Sections 5 and 57, all of the remaining sections of Act 110 have been superseded by Act No. 116.

Respondents concede that Section 5 of the Act was enacted in violation of the one-subject rule; accordingly, it is stricken. The only remaining section of Act 110 which was not superseded by Act 116 is section 57, which provides for methane gas tax credit. We find this section relevant to the stated title of Act 110, the Research and Development Tax Credit Reform Act such that it is not in violation of the one-subject rule.

d. Act 116

Act 116 was initially introduced as H3479 to amend § 12-10-80 relating to Job Development Credits. It was amended throughout the legislative process and now contains some 70 sections.

Petitioners do not point to any specific sections of Act 116 which are violative of the "one-subject rule" but contend, instead, that Act 116 relates to a total of 69 subjects. We find the majority of Act 116 is sufficiently related to the subject of raising revenue to withstand a "one-subject" challenge.

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[3] We note that sections 5 (economic impact zone credit), 6 (amusement park tax exemption), and 8 (Venture Capital Authority) of Act 83 were reenacted in Act 116. Inasmuch as Act 83 has been superseded by Act 116, the issue is moot.

Act 116 contains the following sections:

§ 1- the Jobs Tax Credit, multi-business park
§ 2- the SC Venture Capital Authority
§ 3-Tourism Infrastructure
§4 –Exception
§ 5- Income Tax Credit
§ 6- Corporate license tax
§ 7- Fee in Lieu of Taxes
§ 8- Jobs tax credit
§ 9- Property Tax Exemption
§ 10- Reassessment Postponement
§ 11- Wine Tastings
§ 12- Contested Hearings Open To Public
§ 13- Retail facilities tax credits
§ 14- Definition of “individual”
§ 15- Applicability of federal provisions
§ 16- Pass through trade and business income
§ 17- Deductions from taxable income
§ 18- Jobs Tax Credit
§ 19- Jobs Tax Credit
§ 20- Jobs Tax Credit
§ 21- Historic Rehabilitation Tax Credit
§ 22- Industry Partnership Fund tax credit
§ 23- Solar Installation tax credit
§ 24- Extension for filing return
§ 25- Nonresident seller withholding
§ 26- Nonresident distributee withholding
§ 27- Overpayment of Tax withheld
§ 28- Holding company license fee
§ 29- Exemptions from business license tax
§ 30- Exemptions from sales tax
§ 31- Tax free certificate
§ 32- Credit for tax relief
§ 33- Extension for filing or paying tax

§ 34- Time limits on assessments
§ 35- Penalties for understatement of taxes
§ 36- Disclosure by the department
§ 37- Disclosure by the department
§ 38- Legislative intent
§ 39- Administrative tax process
§ 40- Tax millage increase limits
§ 41- Department determination
§ 42- Powers and duties of department
§ 43- Applicability of federal law
§ 44- Federal laws not adopted
§ 45- Jobs tax credit
§ 46- Small business tax credit
§ 47- Sales tax exemption; construction materials
§ 48- Surety for payment of taxes
§ 49- Disclosure by the department
§ 50- Payment in readily available funds
§ 51- Estimation of tax liability
§ 52- School district reimbursement
§ 53- Tax credit certificates
§ 54- Penalty prohibited
§ 55- Allocation and apportionment of business income
§ 56- Allocation and apportionment of business income
§ 57- Conduct of business in this State
§ 58- Definition of “sales factor”
§ 59- Income from other sources
§ 60- Computation; apportionment; repeal
§ 61- Authority to invest
§ 62- Sales tax exemption; amusement park
§ 63- Economic impact zone credit
§ 64- Property tax exemption; watercraft
§ 65- Subchapter “S” bank shareholders
§ 66- Boats with situs in this State
§ 67- Special source revenue bonds
§ 68- Fund established
§ 69- Severability clause

§ 70- One subject clause
§ 71- Time effective

As is evident, the majority of these sections involve some type of revenue collection and or taxation. Many of the sections amend Title 12 of the S.C. Code, pertaining to taxation. Accordingly, to the extent the various sections of Act 116 are kindred in nature, we find the Act does not violate S.C. Const. Art. III, § 17. Sloan v. Wilkins, (topics in body of an act must be kindred in nature and have a legitimate and natural association).

However, there are two sections of Act 116 which we find unrelated to the subject of revenue raising. In particular, § 11 relating to Wine Tastings, and § 68 which creates the "South Carolina Renewable Energy Infrastructure Development Fund" to provide loans and grants to entities engaged in renewable energy production. We conclude these sections are violative of Article III, § 17 and hereby strike them. The remainder of Act 116 is upheld.

CONCLUSION

Those provisions of the aforementioned acts which violate the one-subject provision of Article III, § 17, are stricken. We uphold the remaining portions of the challenged acts.

TOAL, C.J., MOORE and BEATTY, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in the majority's analysis of the log-rolling problems raised by these legislative acts, but I adhere to my dissenting opinion in Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005), and would hold that the provisions of these acts that violate Art. III, § 17 are not severable. As I stated in Sloan v. Wilkins, severing certain provisions of an act neither prevents nor corrects log-rolling, but rather creates uncertainty and promotes arbitrary enforcement of the one-subject rule.

Accordingly, I would hold that the unconstitutional provisions of the legislative acts are not severable.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Scott B. and Andrea M., Respondents,

v.

Melissa M., Everett H., and Dylan & Grace, Minors Under the Age of Seven (7) Years, Defendants,

of whom Melissa M. is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Wesley L. Brown, Family Court Judge

Opinion No. 26507
Heard May 6, 2008 – Filed June 23, 2008

REVERSED

Richard H. Rhodes, of Burts, Turner, Rhodes and Thompson, of Spartanburg and Joseph K. Maddox, Jr., of Spartanburg, for Petitioner.

James Fletcher Thompson, of Spartanburg, for Respondents.

Susan A. Fretwell, of Fretwell Law Firm, of Spartanburg, for Guardian Ad Litem.

PER CURIAM: Michael Scott B. and Andrea M. (respondents) filed an action in 2004 seeking to terminate Melissa M.'s (petitioner's) parental rights (TPR) and seeking to adopt petitioner's two children. After a final hearing in 2006, the family court terminated petitioner's parental rights and granted respondents' request to adopt the children. Additionally, the family court ordered respondents, the ultimate prevailing party, to pay petitioner's attorney's fees in the amount of $16,000. The parties cross-appealed to the Court of Appeals, and the Court of Appeals affirmed the family court's TPR order but vacated the award of attorney's fees. Scott B. v. Melissa M., Op. No. 2007-UP-109 (S.C. Ct. App. filed March 6, 2007). We granted certiorari solely on the issue of attorney's fees and now reverse.

FACTS

Petitioner is the mother of two minor children, and Respondents are the sister and brother-in-law of petitioner. Petitioner's struggles with depression and drug abuse, leading to several suicide attempts and subsequent hospitalizations, were the basis for TPR.

Shortly after respondents filed the TPR action, the family court appointed an attorney to represent petitioner. In petitioner's Answer and Counterclaim, she requested attorney's fees for the defense of the action.

During the TPR hearing, respondents' counsel stated that he did not object to the payment of petitioner's attorney's fees by a third-party other than respondents. At the conclusion of the TPR hearing, the family court judge granted petitioner's counsel's request to submit an attorney's fee affidavit.

The family court issued its final order in which the family court terminated petitioner's parental rights based on two statutory grounds: S.C. Code Ann. § 20-7-1572 (4), (6) (Supp. 2005). The family court further

determined that TPR was in the children's best interests. The order required respondents to pay $16,000 for petitioner's attorney's fees.

The Court of Appeals vacated the award of attorney's fees to petitioner that were to be paid by respondents, finding that S.C. Code Ann. § 20-7-420 (Supp. 2005) provided the family court with a basis for awarding attorney's fees to a spouse in marital litigation, but it did not apply to private actions for TPR.

ISSUE

Did the Court of Appeals err by vacating the award of attorney's fees?

ANALYSIS

Petitioner argues the Court of Appeals erred in vacating the award of attorney's fees. We agree.

Attorney's fees are not recoverable unless authorized by contract or statute. S.C. Dept. of Soc. Serv. v. Tharp, 312 S.C. 243, 245, 439 S.E.2d 854, 856 (1994).

The Court of Appeals erred by holding that § 20-7-420 does not provide a statutory basis to award attorney's fees in a private action for TPR.[1] Section 20-7-420(4) provides the family court with jurisdiction to hear and determine private actions for TPR. Additionally, § 20-7-420(38) provides that "[s]uit money, including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court." Section 20-7-420(38) grants the family court general jurisdiction to award attorney's fees, and because there is no specific statute precluding attorney's fees in a TPR action instituted by a private party, the family court did not err in awarding attorney's fees. *See* Spartanburg County Dept. of Soc. Serv. v. Little, 309 S.C. 122, 420 S.E.2d 499 (1992) (Section 20-7-

[1] Respondents concede that statutory authority exists to award attorney's fees.

420(38) grants family court general authority to award attorney's fees against parties subject to the court's jurisdiction, but a more specific statute precluding attorney's fees may determine the authority to award fees).

Respondents argue that even if there was statutory authority to award petitioner's attorney's fees, the family court abused its discretion in awarding attorney's fees. We disagree.

The decision to award attorney's fees is a matter within the sound discretion of the trial judge, and the award will not be reversed on appeal absent an abuse of discretion. Marquez v. Caudill, 376 S.C. 229, 656 S.E.2d 737 (2008). The factors used to determine a reasonable attorney's fee are: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. Id. (citing Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991)).

All six Glasscock factors support an award of attorney's fees to petitioner. This was a difficult case in which petitioner strongly fought the termination of her parental rights, and her appointed attorney devoted nearly two years to the case. The trial judge, in his order, commended petitioner's attorney for serving his client's interests well. Furthermore, respondents do not challenge the reasonableness of the amount of fees requested by petitioner's counsel.

Respondents' main objections to the award of attorney's fees are the lack of a beneficial result for the petitioner and their assertion that petitioner has the ability to pay the fees. As to the beneficial result, although petitioner did not ultimately prevail on the TPR action, she was able to procure visitation rights with her children while the TPR/adoption proceedings were pending.[2] Even though petitioner had her parental rights terminated, her

[2] The children had been removed from the home following an emergency hearing held after the filing of the TPR/adoption action.

failure to ultimately prevail, standing alone, does not preclude an award of attorney's fees. Upchurch v. Upchurch, 367 S.C. 16, 624 S.E.2d 643 (2006).

As to petitioner's ability to pay the fees, she was unemployed, being treated for depression, and had just been discharged from the hospital when the action was filed. She had not worked since April 2004, and after being discharged from a mental health facility and subsequently enrolling in a technical college, petitioner did not resume full-time employment until December 2005. The record supports the finding that in light of petitioner's financial difficulties, respondents should be responsible for petitioner's attorney's fees.

Accordingly, a review of the Glasscock factors weighs in favor of awarding petitioner her attorney's fees.

CONCLUSION

The Court of Appeals erred in finding no statutory authority existed under § 20-7-420 to support an award of attorney's fees. Furthermore, the attorney's fees award was proper.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Matthew A. Giannini, Sr., Personal Representative for the Estate of Deborah Jane Giannini, deceased; Tracy Golden and Roderic R. Bradley, Respondents/Appellants,

v.

South Carolina Department of Transportation, Appellant/Respondent.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 26508
Heard November 14, 2007 – Filed June 23, 2008

AFFIRMED

Andrew F. Lindemann, of Davidson, Morrison & Lindemann, Frank B. McMaster and John Gregg McMaster, both of Tompkins & McMaster, all of Columbia, for Appellant-Respondent.

Charles L. Henshaw, Jr., of Furr, Henshaw & Ohanesian, Jeffrey Scott Holcombe, of McDougall & Self, Robert C. Ashley, of Ormand, Ashley & Gibbons, and Sherod H. Eadon, Jr., of Lee, Eadon, Isgett & Popwell, all of Columbia, for Respondents-Appellants.

JUSTICE WALLER: These consolidated appeals arise out of tort claims actions filed by the plaintiffs against the South Carolina Department of Transportation (SCDOT). The jury returned verdicts in favor of the plaintiffs; the trial court reduced the verdicts pursuant to the S.C. Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq. The plaintiffs and SCDOT appeal. We affirm.

FACTS

These cases arise out of an automobile accident which occurred on January 4, 2000, on Interstate 77 (I-77) in Columbia, between the Boyden Arbor overpass and Percival Road. At 3:10 p.m., a Ford Expedition driven by Barry Harp, while heading north on I-77, hydroplaned and crossed the center median into the southbound lanes, striking cars driven by Deborah Giannini, and Tracey Golden. Roderic Bradley was a passenger in the vehicle driven by Golden. Giannini was killed; Golden and Bradley suffered serious bodily injuries.

The plaintiffs filed tort claim actions alleging SCDOT was negligent in failing to install median barriers which could have prevented Harp's vehicle from crossing over into the southbound lane of traffic. SCDOT answered and claimed it was immune from liability under the S.C. Tort Claims Act, S.C. Code Ann. § 15-78-60 (15). The trial court denied SCDOT's motions for directed verdict, and the case proceeded to trial. The jury returned verdicts of $1.5 million dollars to the estate of Giannini, $745,000 to Golden, and $645,000 to Bradley. SCDOT filed motions for judgment notwithstanding the verdict (JNOV) and to reduce the verdicts in accordance with the statutory limitations of liability set forth by the Tort Claims Act. The trial court denied JNOV but reduced the verdicts to $200,000 for each plaintiff. SCDOT and the plaintiffs appeal.

ISSUES

SCDOT Appeal:

1. Did the trial court err in denying SCDOT's motions for directed verdict and JNOV?
2. Did the trial court err in refusing to instruct the jury regarding the non-taxability of their verdict?

Plaintiffs' Appeal:

1. Does the Tort Claims Act's limitation of recovery to $600,000 total per occurrence violate equal protection?
2. Did the General Assembly violate the "one subject" rule of S.C. Const., Art. III, § 17 by "logrolling" or "bobtailing" the reenactment of statutory caps in the 1994 and 1997 Appropriations Acts?

Plaintiff Giannini's Appeal:

1. Did the trial court err in apportioning the $600,000 verdict equally among the three plaintiffs, as opposed to apportioning it in proportion to the verdicts?

1. SCDOT APPEAL - JNOV

SCDOT contends the trial court erred in denying its motions for a directed verdict and JNOV on numerous grounds. It contends a) it did not owe a duty to install a median barrier where the accident occurred, b) it was entitled to design/discretionary immunity, and c) there is no evidence that the absence of a median barrier was the proximate cause of the accident. We disagree. We find these matters were properly submitted to a jury.

Initially, SCDOT asserts that S.C. Code § 15-78-60(15) shields it from liability. Section 15-78-60(15) sets forth exceptions to the state's waiver of

sovereign immunity, stating, in pertinent part, that a governmental entity is not liable for loss resulting from:

> (15) absence, condition or malfunction. . . of any. . . median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. . . . Nothing in this item gives rise to liability arising from a failure of any governmental entity to initially place any of the above signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity. . . . Governmental entities are not liable for the design of highways and other public ways. . . .

SCDOT contends it owed no duty because its actions were the result of the design of the highway, such that it is immune from liability. It cites Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997), in support of its contention. Summer is inapposite. In Summer, we held SCDOT's insertion of wedging to correct bumps in an intersection which was under construction was essentially a claim of defective construction, such that the plaintiff had no claim because SCDOT was entitled to design immunity. The rationale for our holding in Summer was that the intersection was still in the process of being constructed.

Unlike Summer, the plaintiffs here claim that SCDOT failed to take proper measures after notice of an existing hazard. Here, the portion of I-77 where the accident occurred was built in 1995, and there had been several crossover accidents within two miles of this accident in which two people had been killed; the accidents had been publicized by local media. This is not a claim of defective construction but, rather, one of failure to take corrective action subsequent to notice of a defect. This case is more analogous to Wooten v. SCDOT, 333 S.C. 464, 511 S.E.2d 355 (1999).

In Wooten, we affirmed the Court of Appeals' ruling that although SCDOT has design immunity, such immunity does not extend to maintenance issues after the DOT has notice of a hazardous condition. 333 S.C. at 467-

468, 511 S.E.2d at 357. In Wooten, the plaintiffs claimed SCDOT was negligent in failing to provide traffic lights at an intersection which would allow a pedestrian ample time to cross the street. The Court of Appeals held that although DOT initially had design immunity, such immunity was not "perpetual." The Court of Appeals held that once DOT had notice the intersection was hazardous, it was no longer immune from liability. 328 S.C. 36, 492 S.E.2d 55 (Ct. App. 1997). On appeal, this Court affirmed as modified, adopting the trial court's ruling that the immunity provision regarding signs and signals was the more specific one applicable to the case, such that a jury issue was presented as to whether SCDOT was liable. Wooten v. SCDOT, 333 S.C. at 468-469, 511 S.E.2d at 357-358 (1999).

Accordingly, we find the trial[1] court properly denied SCDOT's motions for directed verdict and JNOV on the issue of whether it breached a

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[1] The dissent is "disconcerted" by our lack of discussion of discretionary immunity. It contends SCDOT is entitled to discretionary immunity as a matter of law, because there is evidence in the record that SCDOT took some action after notice of the accidents. Contrary to the dissent's contention, § 15-78-60(15) provides discretionary immunity only for the "failure of any governmental entity to initially place . . . signs, signals, warning devices, guardrails, or median barriers when the failure is the result of a discretionary act of the governmental entity." (Emphasis supplied). The dissent correctly points out that, in exercising this initial discretion as to whether to place median barriers or guard rails, the exercise of such discretion includes the right to be wrong. McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

However, the exercise of this discretion in the design of highways is not absolute. It is subject to the requirement that the "absence, condition, or malfunction [be] corrected by the governmental entity responsible for its maintenance **within a reasonable time after actual or constructive notice**." S.C. Code Ann. § 15-78-60(15). (Emphasis supplied). Wooten, supra. It is undisputed that SCDOT was on notice of fatal highway cross over accidents by 1997. It nonetheless failed to install median barriers until December 2000, some eleven months after the accident in this case.

The dissent points to the fact that diagonal yellow lines were placed in the shoulders of the highway in 1998, thereby evincing an exercise of discretion which entitles SCDOT to immunity as a matter of law. On the contrary, when cross-examined, SCDOT's own expert testified that the reason for installation of these lines was that the shoulder lane was extremely wide, and the lines were placed there to delineate that this was not supposed to be a travel lane for drivers. The lines were "not meant to deal with the situation of a car in the normal travel lane losing control, leaving the roadway, and crossing in and over the median." We find a jury question was presented as to whether SCDOT properly took corrective action after notice of the crossover accidents was properly submitted to the jury. Accord Wooten (whether SCDOT

duty to the Plaintiffs in failing to install median barriers after notice of cross over accidents along that stretch of I-77.

SCDOT also asserts it was entitled to a directed verdict as there was no evidence the absence of a median barrier proximately caused the accident. We disagree.

Plaintiffs presented the deposition testimony of Darcy Sullivan, a highway transportation engineer. Sullivan testified that it was feasible to install three-cable median barriers prior to January 2000, and that such a barrier would have entrapped or redirected the tires of a car hitting it. When asked if he had an opinion to a reasonable degree of engineering certainty whether the collision in this case most probably could have been prevented, he testified, "I think it is highly likely that the crossover would have been prevented. Certainly, the vehicle would have been redirected to some extent. And although there may have been some subsequent crash, it would not have been the crash that occurred. The trajectory of the Harp vehicle would have been modified enough that it simply would not have happened as it did."

This evidence was sufficient to submit the issue to the jury, and any defects in Sullivan's testimony were matters of weight for the jury. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion); State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007)(defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility). JNOV was properly denied on the issue of proximate cause.

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complied with appropriate professional standard was at least a jury issue); Pike v. SC Dep't of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000) (holding burden of persuasion to establish discretionary immunity is on governmental agency, and the standard is inherently factual; SCDOT may not shield itself from liability as a matter of law by merely creating an issue of fact).

2. JURY INSTRUCTION ON TAXABILITY

SCDOT next asserts the trial court committed error in refusing to instruct the jury that any award it gave would not be subject to income taxes, and that it was not to consider taxes in fixing the amount of an award. It cites for this proposition a 1952 Missouri case, Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952). Dempsey is not controlling here.

We find no South Carolina cases suggesting that a jury instruction on income tax consequences is appropriate. On the contrary, such a charge is prohibited by the collateral source rule. See e.g., New Found Baptist Church v. Davis, 257 S.C. 443, 186 S.E.2d 247 (1972); Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969) (tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from a source wholly independent of the wrongdoer); 11 S.C. Juris. Damages § 11 (1992); see 22 Am.Jur.2d Damages §§ 570-90, at 641-56 (1988) (tortfeasor cannot take advantage of payments or services rendered by a collateral source for the plaintiff's benefit, irrespective of whether the source is an insurance company, an employer, a family member, or other source). We find no basis upon which to hold such a charge warranted under S.C. law.[2]

The trial court committed no error in refusing the requested charge. Moreover, we find no conceivable prejudice here, in light of the size of the verdicts and the fact that the verdicts were reduced in accordance with the Tort Claims Act caps.

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[2] SCDOT cites a United State Supreme Court decision upholding such a charge. Norfolk & W. Ry v. Liepelt, 444 U.S. 490 (1980). However, Liepelt involved a wrongful death action brought under Federal Employers' Liability Act in which it was held that evidence to show effect of income taxes on decedent's estimated future earnings was admissible at trial. Here, there was no evidence of potential tax liability adduced at trial, and the trial court advised SCDOT that if the jury asked about it, he would address the taxation issue.

PLAINTIFFS' APPEAL:

1. EQUAL PROTECTION

Plaintiffs Giannini, Golden and Bradley contend the Tort Claims Act's limitation to a $600,000 aggregate verdict violates equal protection. We disagree.

The jury awarded verdicts of $1.5 million (Giannini estate), $745,000 (Golden), and $645,000 (Bradley). The trial court reduced the verdicts to a total of $600,000 pursuant to S.C. Code Ann. § 15-78-120(2), which provides "[e]xcept as provided in Section 15-8-120(a)(4), the total sum recovered hereunder arising out of a single occurrence shall not exceed six hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved."

This Court has previously addressed the individual statutory caps as set forth in S.C. Code Ann. § 15-78-120(a), which provides a limitation on damages to $300,000 because of "loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved." In Wright v. Colleton County, 301 S.C. 282, 291-292, 391 S.E.2d 564, 570 (1990), we upheld the $300,000 cap against an equal protection challenge, stating:

> the limitation bears a reasonable relationship to the legislative objectives as expressed in Section 15-78-20(a) of relieving the government from hardships of unlimited and unqualified liability and preserving the finite assets of governmental entities which are needed for an effective and efficient government. The limitations set forth in the statute rest on a reasonable basis and are not arbitrary in that the legislature has balanced the needs for services and demand for reasonable taxes against the fair reimbursement of injured tort victims. Finally, we find that the damage limitation provisions apply to similar plaintiffs in a similar manner.

We concluded in Wright that there was no equal protection violation because the same monetary cap applies equally to the entire class of plaintiffs. Id.

Plaintiffs assert the class here, tort victims injured by the state, are not treated the same under the statute, because the dollar amount may vary and be limited by the amount of persons injured in an occurrence. We disagree. We find the limitation accords with the stated legislative purpose of preserving finite governmental assets, and treats similar plaintiffs in a similar manner.

As we noted in Foster v. SC Dep't of Transp., 306 S.C. 519, 413 S.E.2d 31 (1992), the fact that a classification results in some inequity does not render it in violation of the Constitution. In Foster, we upheld higher liability limits for physicians and dentists against an equal protection challenge.

We find the Legislature's aggregate limitation on liability is supported by a rational basis such that there is no equal protection violation. Accord Wilson v. Gipson, 753 P.2d 1349 (OK 1998) (several children injured and five killed in explosion of water heater at a public school; court upheld aggregate limitation of $300,000 liability against equal protection challenge, awarding $18,221 to parents of children killed, and remainder to injured children); Lee v. Colorado Department of Health, 718 P.2d 221 (Colo.1986) (legislative decision to limit the public entity's liability to $150,000 for any injury to one person and $400,000 for any injury to two or more persons in a single occurrence withstood equal protection).

2. ONE SUBJECT/BOBTAILING

Giannini, Bradley and Golden next assert the Legislature's re-enactment of the statutory tort claims caps in 1994 and 1997 violate S.C. Const., Art. III § 17 by "logrolling" or "bobtailing" provisions into an appropriations act. We disagree.

S.C. CONST. Art. III, § 17 requires that "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title."

As recently noted by this Court:

> The purpose of Article III, § 17 is (1) to apprise the members of the General Assembly of the contents of an act by reading the title, (2) prevent legislative log-rolling and (3) inform the people of the state of the matters with which the General Assembly concerns itself. . . . Article III, § 17 is to be liberally construed so as to uphold an Act if practicable. Doubtful or close cases are to be resolved in favor of upholding an Act's validity. Article III, § 17 does not preclude the legislature from dealing with several branches of one general subject in a single act. It is complied with if the title of an act expresses a general subject and the body provides the means to facilitate accomplishment of the general purpose. However, Article III, section 17 requires 'the topics in the body of the act [be] kindred in nature and hav[e] a legitimate and natural association with the subject of the title,' and that the title conveys 'reasonable notice of the subject matter to the legislature and the public.'

Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005) (emphasis supplied, internal citations omitted). Plaintiffs assert the reenactments violate the one-subject rule as they do not inherently relate to the raising and spending of tax monies.

We recognized in Town of Hilton Head v. Morris, 324 S.C. 30, 484 S.E.2d 104, 107 (1997) that "a measure enacted as part of a general appropriations act does not violate Article III, § 17, if it reasonably and inherently relates to the raising and spending of tax monies." See also Keyserling v. Beasley, 322 S.C. 83, 470 S.E.2d 100 (1996) (provisions of appropriations act which created negotiating committee to establish new regional radioactive waste disposal compact and which repealed statute adopting prior compact were related to raising and spending of revenues and, thus, complied with one-subject rule); Hercules v. South Carolina Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980) (statute providing for suspension of the statute of limitations on tax assessment if a corporate

taxpayer fails to give the Tax Commission notice of an IRS examination was germane to the General Appropriations Act in which it was contained and thus did not violate the constitutional requirement that every act relate to but one subject).

Here, 1994 Act No. 497, lists in its title that the act is "TO PROVIDE THAT CERTAIN PROVISIONS OF SECTIONS 15-78-100 AND 15-78-120 OF THE 1976 CODE ARE REENACTED AND MADE RETROACTIVE TO APRIL 5, 1988." Further, Part 2, § 107 of the Appropriations Act amends the Uniform Contribution Among Joint Tortfeasors Act to make it inapplicable to government agencies, and reinstates the Tort Claims Caps set forth in § 15-78-120(a)(1). The 1997 Appropriations Act, 1997 Act No. 155, Part II, § 55, similarly reenacts the $500,000 cap set forth in § 15-78-120(a)(2). The statutory reenactments reasonably and inherently relate to the raising and spending of tax monies. Town of Hilton Head v. Morris. Accordingly, reenactment of the caps does not violate Article III, § 17.

GIANNINI'S APPEAL:

1. APPORTIONMENT OF VERDICT

Finally, Giannini asserts the trial court erred in apportioning the verdict equally among the Plaintiffs, rather than apportioning it in accordance with the verdicts awarded to each plaintiff.

As noted, S.C. Code Ann. § 15-78-120(a)(1) limits an individual's recovery against a government agency to $300,000 for a loss arising from a single occurrence. Section 15-78-120(a)(2) further limits the total sum recoverable from a single occurrence to $600,000 regardless of the number of agencies or political subdivisions or claims or actions involved. The trial court determined that, since each of the verdicts exceeded $300,000, each plaintiff's verdict would each be reduced to $200,000.

We find no error in the trial court's apportionment. If the Legislature had intended for the $600,000 aggregate cap to be divided in proportion to the verdicts awarded to each plaintiff, it could have said so. State v. Curtis,

356 S.C. 622, 591 S.E.2d 600 (2004) (if Legislature had intended certain result in a statute it would have said so). Accordingly, the trial court's ruling is affirmed.

AFFIRMED.

MOORE, J., concurs. BEATTY, J., concurring in a separate opinion. PLEICONES, J. dissenting in a separate opinion in which TOAL, C.J., concurs.

JUSTICE BEATTY: I concur in the majority opinion; however, I write separately to address the discretionary immunity issue.[3]

In my view, discretionary immunity viability is equal to that of design immunity, neither is perpetual. See Wooten ex rel. Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 467-68, 511 S.E.2d 355, 357 (1999) (affirming as modified the Court of Appeals' holding that "design immunity is not perpetual. Once the Department of Transportation had notice of a hazardous condition, it was no longer immune from liability").

Section 15-78-60(15) affords SCDOT discretionary immunity in the failure to initially place median barriers. This section provides, in pertinent part, that the governmental entity is not liable for a loss resulting from:

> **(15) absence**, condition, or malfunction **of** any sign, signal, warning device, illumination device, guardrail, or **median barrier unless the absence**, condition, or malfunction **is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice**. Governmental entities are not liable for the removal or destruction of signs, signals, warning devices, guardrails, or median barriers by third parties except on failure of the political subdivision to correct them within a reasonable time after actual or constructive notice. **Nothing in this item gives rise to liability arising from a failure of** any governmental entity to **initially place any** of the above signs, signals, warning devices, guardrails, or **median barriers when the failure is the result of a discretionary act of the governmental entity**.

S.C. Code Ann. § 15-78-60(15) (2005)(emphasis added).

[3] SCDOT moved for a directed verdict and JNOV on the ground that it was entitled to design immunity and for discretionary immunity under section 15-78-60(15).

"Discretionary immunity is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." Wooten ex rel. Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999).

The finite viability of discretionary immunity is evident in the statute itself. The statute uses the temporal word initially indicating that the immunity for the failure to initially place median barriers terminates after notice of a hazardous condition. In other words, SCDOT gets a free pass on the initial claim for damages occurring before SCDOT receives notice of a hazardous condition if it actually exercised discretion in failing to initially place median barriers. After notice, SCDOT is required to remedy the hazardous condition within a reasonable time.

I agree with the dissent that the exercise of discretion includes the right to be wrong but the right to be wrong is not perpetual. The SCDOT exercised discretion not to place median barriers when I-77 was constructed and opened to traffic.[4] SCDOT is entitled to immunity for that decision because it related to the initial placement of median barriers. Subsequent to the initial decision, SCDOT received notice of cross-over accidents and the existence of hazardous conditions. Once SCDOT was put on notice, the first sentence in section 15-78-60(15) required SCDOT to correct the condition within a reasonable time. See Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999) ("While provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit liability, we also must presume in construing a statute that the Legislature did not intend to perform a futile thing.").

Section 15-78-60(15) does not grant discretionary immunity every time SCDOT attempts to correct a hazardous condition.

[4] SCDOT was entitled to both design and discretionary immunity at that time.

In the instant case, it was up to the jury to determine if SCDOT corrected the hazardous condition within a reasonable time as required by section 15-78-60(15).

I would affirm the trial court.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the trial court should have granted SCDOT's motion for directed verdict, and I would not address the other issues raised by the parties.[5]

I am troubled by the majority's analysis of the Tort Claims Act's immunity provisions applicable to SCDOT. First, the majority fails to adequately address SCDOT's claim that it did not owe plaintiffs a duty to install median barriers. The majority instead jumps ahead to the immunity issue under the Tort Claims Act. While it is clear that SCDOT has a duty to plan, construct, maintain, and operate the state's highways,[6] I believe the majority opinion improperly implies that a duty may arise simply because an exception to the State's waiver of sovereign immunity does not exist in the Tort Claims Act. *Cf.* Arthurs ex rel. Est. of Munn v. Aiken County, 346 S.C. 97, 105, 551 S.E.2d 579, 583 (2001) (existence of a duty, as well as other elements of negligence, must be shown before reaching immunities issue under the Tort Claims Act).

Perhaps more disconcerting is the majority opinion's lack of any discussion of discretionary immunity. Discretionary immunity is different from design immunity, and SCDOT argues it is entitled to both. Design

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[5] While there would be no need to address the remaining issues should we find SCDOT should have been granted a directed verdict, I note that I agree with the majority's conclusions on the remaining questions except for the verdict apportionment. I would hold that the trial court erred by not apportioning the $600,000 statutory cap in proportion to the actual verdicts returned by the jury. Additionally, I believe the enrolled bill rule clearly disposes plaintiffs' bobtailing claim. Med. Socy. of S.C. v. Med. U. of S.C., 334 S.C. 270, 278, 513 S.E.2d 352, 356 (1999) (enrolled bill rule provides that an act ratified by the General Assembly, approved by the Governor, and enrolled in the office of the Secretary of State is conclusively presumed to have been properly passed and is not subject to impeachment by evidence outside the act to show it was not passed in compliance with law).

[6] S.C. Code Ann. § 57-1-30 (Supp. 2006); Brashier v. S.C. Dept. of Transp., 327 S.C. 179, 191, 490 S.E.2d 8, 14 (1997), *overruled in part on other grounds*, I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

immunity gives SCDOT absolute immunity for liability arising from the design of highways and public ways. Wooten ex rel. Wooten v. S.C. Dept. of Transp., 333 S.C. 464, 511 S.E.2d 355 (1999); S.C. Code Ann. § 15-78-60(15). However, design immunity is not perpetual, and once the governmental entity receives notice of a hazardous condition, it may no longer invoke design immunity as an absolute shield for liability. Id.[7] Although an entity may lose design immunity, it may still be immune from liability if it exercises discretion when faced with actual or constructive knowledge of a hazardous condition.

In Wooten, this Court explicitly stated that the design immunity provision of § 15-78-60(15) did not control that case; the more specific clause providing discretionary immunity for the initial placement of traffic signals was the applicable immunity provision. Likewise, in this case, the pertinent portion of § 15-78-60(15) is the part that specifically provides discretionary immunity for the initial placement of cable median barriers. The majority appears to acknowledge this correlation, but unlike in Wooten, it does not analyze whether SCDOT's actions after it received notice of the dangerous condition entitle SCDOT to discretionary immunity. I would hold that SCDOT is entitled to discretionary immunity.

Discretionary immunity is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice. Further, the entity must establish, in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue. Strange v. S.C. Dept. of Hwys. & Pub. Transp., 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994). The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense. Niver v. S.C. Dept. of Hwys. & Pub. Transp., 302

[7] *But cf.* Summer v. Carpenter, 328 S.C. 36, 43, 492 S.E.2d 55, 59 (1997) (holding "[e]ven if the Highway Department was on notice the design of the intersection was dangerous, the Highway Department was immune from suit for negligent design."). Summer can be distinguished by the fact that the injury in Summer occurred while the intersection was still under construction, thus preserving design immunity.

S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990). The provisions of the Tort Claims Act that establish limitations on and exemptions to the liability of the State must be liberally construed in favor of limiting the liability of the State. S.C. Code Ann. § 15-78-20(f) (Supp. 2005).

There is no question that SCDOT weighed competing economic and environmental considerations, in addition to following accepted professional standards promulgated by the federal government and the American Assocation of State Highway and Transportation Officials (AASHTO), when it decided not to place median barriers on I-77 when it opened in 1995. After SCDOT received notice in 1997 of several median crossover accidents in the vicinity of the accident in this case, SCDOT added diagonal yellow lines with raised reflectors to the highway shoulders that bordered the median. This was done to reduce crossover accidents by decreasing the possibility that motorists would drift into the median.

Even though the placement of these raised markers significantly decreased the number of accidents within a one-mile radius[8] of this accident site, SCDOT began gathering information in 1999 concerning median widths, accident history, average daily traffic, etc., in order to prioritize and secure funding for installation of median barriers. This project was underway when this accident occurred in January 2000, and the first median cable barriers were installed by December 2000. The record clearly shows that SCDOT constantly weighed its options in an attempt to minimize the possibility of crossover accidents on this stretch of I-77. Simply because there was disagreement between each side's experts as to whether discretion was *properly* exercised does not preclude discretionary immunity for SCDOT. In other words, the exercise of discretion includes the right to be wrong. McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985), *superseded by statute as recognized in* Murphy v. Richland Mem. Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995).

[8] Given the specific locations involved in tracking highway accidents, it is important to note that SCDOT had tracked the accident reports for I-77, and between 1995 and 1999, no median cross-over accidents occurred within 1,500 feet of the site where this accident occurred.

In my opinion, SCDOT was entitled to discretionary immunity because it is undisputed that it exercised discretion in maintaining the area of I-77 where this accident occurred. SCDOT contemplated its alternatives pursuant to the relevant AASHTO regulations and federal standards, and it made a conscious effort to keep this interstate as safe as possible in light of its options. Accordingly, I would reverse.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lisa Snavely, Appellant,

v.

AMISUB of South Carolina, Inc., d/b/a Piedmont Medical Center, Tenet Healthcare Corporation, Tenet South Carolina, Inc., and Eric Eugene Zellner, M.D., Respondents.

Appeal From York County
Paul M. Burch, Circuit Court Judge
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 4413
Submitted May 1, 2008 – Filed June 12, 2008

AFFIRMED

Nekki Shutt and Mary Dameron Milliken, both of Columbia, for Appellant.

William B. Darwin, of Spartanburg, H. Spencer King and Jason M. Imhoff, of Spartanburg, for Respondents.

THOMAS, J.: In this action for breach of patient-physician confidentiality, Lisa Snavely appeals the trial court's grant of Piedmont Medical Center's (Piedmont) motion for summary judgment. We affirm.[1]

FACTS

On January 20, 2003, Carol Brooks, Snavely's sister-in-law, drove Snavely to the emergency room of Piedmont because Snavely was complaining of weakness, jaundice, and abdominal pain.[2] Per Snavely's request, Mrs. Brooks accompanied her to a private examination room. Dr. Zellner, an emergency room physician working at Piedmont, examined Snavely in Mrs. Brooks' presence and questioned Snavely regarding her symptoms. After completing the examination and reviewing Snavely's medical history, Dr. Zellner informed Snavely "she had likely contracted some form of hepatitis." To confirm his diagnosis, Dr. Zellner ordered Snavely undergo "blood work and an ultrasound." Shortly thereafter, Snavely's brother, James Brooks, arrived at Piedmont and joined Snavely in the examination room[3] where Mrs. Brooks informed him of Dr. Zellner's preliminary diagnosis.

After obtaining the results of Snavely's blood tests, Dr. Zellner returned to the examination room and confirmed to Mr. and Mrs. Brooks the diagnosis of hepatitis. Dr. Zellner also indicated he would refer Snavely to a specialist to determine the type of hepatitis she had contracted. The next day,

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] At the time of the incident, Snavely resided with her brother, James Brooks (Mr. Brooks), and his wife, Carol Brooks (Mrs. Brooks).

[3] The record contains no evidence suggesting Dr. Zellner, or anyone else connected with Snavely, disclosed her condition outside the examination room.

the Brookses accompanied Snavely to the office of Dr. Debra Gazzuolo. After completing a physical examination and reviewing Snavely's test results, Dr. Gazzuolo informed Snavely she contracted Hepatitis B. Dr. Gazzuolo provided Snavely information about Hepatitis B, including a pamphlet explaining the nature of the disease and methods to avoid transmitting it to others. Snavely then shared this diagnosis with the Brookses, and allowed them to review the information Dr. Gazzuolo provided. Subsequently, either Mr. or Mrs. Brooks disclosed Snavely's condition to her employer, a local restaurant, and she was fired.[4]

Following her termination, Snavely filed an action against Piedmont and Dr. Zellner for breach of patient-physician confidentiality. Specifically, Snavely alleged Dr. Zellner unlawfully disclosed her medical condition to the Brookses, and Piedmont was responsible for any unlawful act of Dr. Zellner. In response, Piedmont filed a motion for summary judgment asserting Snavely consented to the disclosure of her condition by allowing the Brookses to remain in the examination room at the time Dr. Zellner delivered his diagnosis. At the motion for summary judgment hearing, the trial court ruled in favor of Piedmont finding:

> [Snavely] permitted Mrs. Brooks to remain in the examination room while Dr. Zellner performed his examination, and when he advised [Snavely] of his diagnosis. By allowing her sister-in-law to remain in the room throughout Dr. Zellner's examination, [Snavely] at least tacitly consented to disclosure of her medical conditions to her sister-in-law.
>
> [Snavely] then allowed her brother and sister-in-law to accompany her to Dr. Gazzuolo's office the following day and after seeing the doctor, confirmed to the Brooks her specific diagnosis of Hepatitis B.

[4] It appears there was a falling out between Snavely and the Brookses after which Mrs. Brooks allegedly called Snavely's employer and disclosed Snavely's condition.

> [Snavely] also shared a pamphlet with her brother and sister-in-law that discussed the disease and ways to prevent spreading it. [Snavely] made no attempt to conceal her medical condition; rather, she involved her brother and sister-in-law at each stage. Thus, she cannot complain that any negligence, assuming there was any, of Dr. Zellner caused her injury.

Snavely's Rule 59(e), SCRCP, motion for reconsideration was denied. Shortly thereafter, Dr. Zellner filed a motion to dismiss based upon the trial court's grant of summary judgment in favor of Piedmont. The trial court granted Dr. Zellner's motion, concluding "the issue of negligence was held to be solely that of [Snavely] and no one else. Moreover, medical confidences were waived by consenting to the inclusion of family members in medical examination, diagnosis, and treatment." The trial court further found the collateral estoppel doctrine barred Snavely from litigating her claims against Dr. Zellner. In response to the trial court's order of dismissal, Snavely filed another Rule 59(e) motion, which was denied. This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper where 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; Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 36, 637 S.E.2d 560, 561 (2006). On appeal from a grant of summary judgment, the appellate court applies the same standard governing the trial court. Id. The trial court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003) (quoting Rule 56(c), SCRCP). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Law v. S.C. Department of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "A court considering summary judgment neither makes factual

determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

LAW/ANALYSIS

I. Summary Judgment

Snavely contends the trial court erred in granting Piedmont's motion for summary judgment based upon: (1) Snavely's lack of consent to the disclosure of her medical condition; (2) Piedmont's contributory negligence; (3) the contradicted findings of fact relied upon by the trial court; (4) invasion of privacy; and (5) the doctrine of ostensible agency. We disagree.

A. Snavely's Consent to Disclosure

Snavely contends the trial court erred in granting Piedmont's motion for summary judgment because she did not consent to the disclosure of her medical condition. We disagree.

While South Carolina does not recognize physician-patient testimonial privilege,[5] the law does recognize an action against a physician for the

[5] At common law, neither the patient nor the physician has the privilege to refuse to disclose in court a communication of one to the other, nor does either have a privilege that the communication not be disclosed to a third person. 61 Am.Jur.2d Physicians, Surgeons, and Other Healers §§ 148, 169 (1981). Although several states have statutorily created a "physician-patient testimonial privilege," South Carolina has not enacted a similar statute and does not recognize the physician-patient privilege. See Peagler v. Atlantic Coast Line R.R. Co., 232 S.C. 274, 282-83, 101 S.E.2d 821, 825 (1958) (noting statutes have been enacted in most states making communications between a physician and patient privileged from compulsory disclosure, but there is no such statute in South Carolina). However, the absence of a

disclosure of confidential information, unless the disclosure is compelled by law or consented to by the patient. McCormick v. England, 328 S.C. 627, 635-40, 494 S.E.2d 431, 435-37 (Ct. App. 1997); see also Aakjer v. Spagnoli, 291 S.C. 165, 173, 352 S.E.2d 503, 508 (Ct. App. 1987) ("There is no physician-patient privilege in South Carolina.").

In the present case, Snavely implicitly consented to the disclosure of her medical condition by involving the Brookses at every stage of her medical treatment. By her own admission, Snavely "chose to take [Mrs. Brooks] back" to the examination room and did not ask her to leave during Dr. Zellner's examination. Specifically, Snavely testified as follows:

> Q: Okay. And you chose to take [Mrs. Brooks] back with you?
> A: Yes.
> Q: Okay. That was your decision?
> A: Yes.
> Q: Okay. And you met Dr. Zellner in an examining room?
> A: Yes.
> Q: Okay. And what occurred in the examining room?
> A: [Dr. Zellner] asked me what my symptoms were. I told him. He told me that he was guessing right now with hepatitis, but not sure which one and that he would send me for blood work and an ultrasound.

Subsequently, Snavely permitted the Brookses to accompany her to Dr. Gazzuolo's office where her diagnosis of Hepatitis B was confirmed. Additionally, Snavely shared a pamphlet with the Brookses discussing the disease and preventive treatments. Accordingly, the trial court did not err in

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testimonial privilege barring certain in-court disclosures is not determinative of our issue because this evidentiary privilege is discernible from a duty of confidentiality. As noted by our Supreme Court in S.C. State Board of Medical Examiners v. Hedgepath, 325 S.C. 166, 169, 480 S.E.2d 724, 726 (1997): "The terms 'privilege' and 'confidences' are not synonymous, and a professional's duty to maintain his client's confidences is independent of the issue whether he can be legally compelled to reveal some or all of those confidences, that is, whether those communications are privileged."

granting summary based upon the finding Snavely "at least tacitly consented" to the disclosure of her medical condition.

B. Contributory Negligence

Snavely contends the trial court erred in granting Piedmont's motion for summary judgment by failing to find Piedmont contributorily negligent. We disagree.

In order to establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). "However, under South Carolina's comparative negligence doctrine, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant." Id. at 422, 529 S.E.2d 712-13. Generally, a "comparison of the plaintiff's negligence with that of the defendant is a question of fact for the jury to decide." Id. at 422, 529 S.E.2d 713. In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is the plaintiff's negligence exceeded fifty percent. See Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) ("If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created.").

Here, Snavely fails to prove any negligent act attributable to Dr. Zellner was the proximate cause of the disclosure of her medical condition. Indeed, the record contains no evidence suggesting Dr. Zellner, or anyone else connected with Piedmont, disclosed her condition outside the examination room. Furthermore, Snavely consented to the disclosure of her medical condition by (1) allowing the Brookses to remain in the examination room; (2) involving the Brookses at every stage of her medical treatment; (3) sharing information explaining the disease with the Brookses; and (4) making no attempt to conceal her condition. Consequently, Snavely's negligence in consenting to the disclosure of her medical condition exceeded any negligent

act of Dr. Zellner. Thus, the trial court did not err in granting Piedmont summary judgment based upon the doctrine of comparative negligence.

C. Uncontradicted v. Contradicted Findings of Fact

Snavely alleges the trial court erroneously relied upon contradicted facts in granting Piedmont's motion for summary judgment because the record contains factual discrepancies regarding the disclosure of her medical condition. We disagree.

Mindful of the summary judgment standard of review, we note the record contains many facts which, even when viewed in the light most favorable to Snavely, clearly show Snavely at least tacitly consented to the disclosure of her medical condition. Snavely involved the Brookses at every stage of her medical treatment and made no attempt to conceal her condition. Consequently, any factual discrepancies which might exist as to Piedmont's contributory negligence cannot alter the inescapable conclusion Snavely's negligence exceeded fifty percent. Under South Carolina jurisprudence, where evidence of the plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury. See Hopson, 321 S.C. at 314, 468 S.E.2d at 307. Therefore, we find the trial court did not err in granting summary judgment.

D. Publication

Lastly, Snavely argues the trial court erred in granting Piedmont summary judgment because the publication of her medical condition to the Brookses amounts to an invasion of privacy. We disagree.

> Invasion of privacy consists of the public disclosure of private facts about the plaintiff, and the gravamen of the tort is publicity as opposed to mere publication. The defendant must intentionally reveal facts which are of no legitimate public interest, as there is no right of privacy in

> public matters. In addition, the disclosure must be such as would be highly offensive and likely to cause serious mental injury to a person of ordinary sensibilities.

McCormick, 328 S.C. at 640, 494 S.E.2d at 437-38 (emphasis added).

"Publicity involves disclosure to the public, not just an individual or a small group." Id. at 641, 494 S.E.2d at 438; see also Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 478-80, 514 S.E.2d 126, 131 (1999) (noting the difference between publicity and publication "is one of a communication that reaches, or is sure to reach, the public"). Thus, while a confidential relationship is breached if unauthorized disclosure is made to an individual not a party to the confidence, the right of privacy[6] is not implicated. McCormick, 328 S.C. at 641, 494 S.E.2d at 438.

Based upon the foregoing, we find Snavely cannot sustain her claim against Piedmont for invasion of privacy. Here, the record contains no evidence suggesting Dr. Zellner or anyone else connected with Piedmont disclosed Snavely's condition outside the examination room. Consequently, Snavely cannot satisfy the publicity requirement of her invasion of privacy claim because Snavely cannot prove Piedmont publicized her medical condition to the public at large. Thus, the trial court properly granted Piedmont summary judgment on this ground.

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[6] As noted by our Supreme Court in McCormick:

> Privacy is a right against the public at large. Its doctrinal limits narrowly circumscribe the zone of proscribed conduct in order to prevent hindrance of public expression. In contrast, a right to confidentiality exists against a specific person, who, by virtue of his relationship to the confider, has notice of the duty to preserve the secrecy of clearly identifiable information.

328 S.C. at 641, 494 S.E.2d at 438 (citation omitted).

Because we find Dr. Zellner breached no duty, we decline to address Snavely's remaining argument regarding the ostensible agency doctrine established in Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000). See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

II. Motion to Dismiss

Snavely argues the trial court erred in granting Dr. Zellner's motion to dismiss. Specifically, Snavely argues the trial court erred in finding the collateral estoppel doctrine barred the litigation of her claims against Dr. Zellner. We disagree.

Initially, we note this issue is not properly before us because Snavely failed to serve her motion to alter or amend judgment pursuant to Rules 5(a) and 59(e), SCRCP. According to Rule 59(e), SCRCP, "a motion to alter or amend judgment shall be served no later than 10 days after receipt of written notice of the entry of the order." Rule 5(a), SCRCP, further provides all "written motions . . . shall be served upon each of the parties of record." In the present case, Dr. Zellner was never served with Snavely's motion to alter or amend judgment.[7] Thus, we decline to rule on this issue.

Adverting to the merits, this court set forth the modern rule regarding the application of collateral estoppel in Beall v. Doe, 281 S.C. 363, 370-71, 315 S.E.2d 186, 190-91 (Ct. App. 1984). In addressing the application of collateral estoppel, the Beall court held a party precluded from relitigating an issue with an opposing party is also precluded from relitigating the same issue with a different party unless the precluded party lacked full and fair opportunity to litigate the issue in the first action. Id. While the traditional use of collateral estoppel required mutuality of parties to bar relitigation,

[7] In her attorney affidavit, Snavely's counsel explained the motion to alter and amend judgment was not properly served on Dr. Zellner due to "inadvertence and excusable mistake."

modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues. Id. As noted by this court:

> In the abstract, there is no legitimate reason to permit a defendant who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question, already once decided, simply because he now faces a different plaintiff who for due process reasons could not be adversely bound by the prior judgment. The public interest demands an end to the litigation of the same issue. Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation.

Id. at 370, 315 S.E.2d at 190. Thus, the primary concern of our courts in applying collateral estoppel is not whether the parties satisfy the mutuality requirement, but whether a potentially precluded party had a full and fair opportunity to litigate the issues in a prior action. Id.

In the present case, the record clearly indicates Snavely had a full and fair opportunity to litigate the issues of consent, waiver, and comparative negligence in her claim against Piedmont. Therefore, non-mutual collateral estoppel was correctly applied, and Snavely was properly barred from relitigating these same issues against Dr. Zellner. Accordingly, the trial court did not err in granting Dr. Zellner's motion to dismiss.

CONCLUSION

Based on the foregoing, we find the trial court did not err in granting both Piedmont's motion for summary judgment and Dr. Zellner's motion for dismissal. Accordingly, the decision of the trial court is

AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Macksey Johnson, Employee, Appellant,

v.

Beauty Unlimited Landscape Co., Employer, and Selective Way Insurance Co., Carrier, Respondents.

Appeal From Charleston County
Mikell R. Scarborough, Special Circuit Court Judge

Opinion No. 4414
Submitted June 1, 2008 –Filed June 17, 2008

AFFIRMED

Steven Eric Goldberg, of Charleston, for Appellant.

Benjamin M. Renfrow, of Greenville, for Respondents.

CURETON, A. J.: In this action seeking workers' compensation benefits for a work-related eye injury, Macksey Johnson appeals the circuit court's order affirming an award of benefits for an 8.5% loss of vision. We affirm.[1]

FACTS

On May 31, 2001, a tree limb struck Macksey Johnson's right eye while he was working for Beauty Unlimited Landscaping (Beauty Unlimited). As a result of that injury, Johnson developed a traumatic cataract in that eye. Dr. Karen Ullian, a general ophthalmologist, surgically removed the cataract and implanted an artificial lens. Johnson returned to work in September of 2001. One month later, Dr. Ullian recorded that the intraocular implant had restored Johnson's vision in his right eye to 20/20.

Dr. Ullian testified in March of 2005 Johnson had 20/30 vision in his right eye, but glasses corrected this vision to 20/20. When Johnson complained of seeing "floaters" in February of 2005, Dr. Ullian examined him. She determined the floating visual disruptions were benign and would eventually go away. Dr. Ullian considered the intraocular implant to be a corrective measure comparable to glasses or contact lenses. However, according to Dr. Ullian, the implant is a permanent solution to Johnson's injury. She testified the only maintenance the implant would ever require was an annual eye exam. Dr. Ullian confidently stated, "He will never need an implant replacement[;] that implant is perfect." Moreover, as a result of the implant, Dr. Ullian testified Johnson "ha[d] no disability."

Johnson filed a Form 50 with the Workers' Compensation Commission (Commission) seeking compensation for 100% loss of use of his right eye.[2] The single commissioner found Johnson's eye injury was compensable and ordered Beauty Unlimited to pay all approved medical bills related to

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Johnson subsequently developed a cataract in his left eye, but Dr. Ullian believed it was unrelated to the right-eye injury. Johnson made no claim for his left eye.

treatment for this injury through February 16, 2005, the date Johnson reached maximum medical improvement. However, the single commissioner declined to characterize the intraocular implant as a "corrective lens" and awarded Johnson only an 18.5% permanent partial disability for the loss of vision in his right eye. Both parties appealed.

The appellate panel affirmed the single commissioner with some modifications. The appellate panel reduced the 18.5% loss of vision to 8.5% based upon correction of Johnson's 20/30 vision to 20/20.[3] Furthermore, the appellate panel held the word "use" in the applicable regulation must necessarily indicate a removable corrective appliance like glasses or contact lenses. The circuit court affirmed the appellate panel. This appeal followed.

STANDARD OF REVIEW

In reviewing workers' compensation decisions, the appellate court ascertains "whether the circuit court properly determined whether the appellate panel's findings of fact are supported by substantial evidence in the record and whether the panel's decision is affected by an error of law." Baxter v. Martin Bros., Inc., 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006) (citations omitted); see also S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2007). Generally, "'[c]ourts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ.'" Neal v. Brown, 374 S.C. 641, 649, 649 S.E.2d 164, 168 (Ct. App. 2007), cert. granted May 30, 2008 (quoting S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)).

> If a statute's terms are clear, the court must apply the terms according to their literal meaning. "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit

[3] According to the Snellen Notation table, 20/30 vision corresponds with an 8.5% loss of vision. 25A S.C. Code Ann. Regs. 67-1105 (1990).

> the scope of a statute." While the appellate court usually defers to the [a]ppellate [p]anel's construction of its own regulation, where the [a]ppellate [p]anel's interpretation is contrary to the plain language of the regulation, the court will reject its interpretation.

Id. at 650, 649 S.E.2d at 168 (citing Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002)) (internal citations omitted).

LAW/ANALYSIS

I. Regulation 67-1105

Johnson first argues the circuit court erred in interpreting regulation 67-1105[4] to exclude compensation for the 100% loss of vision in his eye. We disagree.

A disability is an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-1-120 (1985). An employer must pay an injured employee compensation for partial disability. S.C. Code Ann. § 42-9-20 to -30 (1985 & Supp. 2007). The loss of an eye results in a compensable partial disability. S.C. Code Ann. § 42-9-30(18) (Supp. 2007). "Loss of vision is based on reading without the use of corrective lenses." S.C. Code Regs. § 67-1105 (1989).

The circuit court properly determined the appellate panel committed no error of law. Under the Workers' Compensation Act (Act), a work-related injury is compensable above and beyond the cost of treatment to the extent it renders the employee disabled. See §§ 42-9-20 to -30. From this premise it follows that when treatment restores the employee to his pre-injury condition so he no longer requires assistive devices to compensate for his loss, the

[4] 25A S.C. Code Ann. Regs. 67-1105 (1990).

employee is no longer disabled. Only a disabled employee is eligible for additional workers' compensation benefits. In Dr. Ullian's opinion, Johnson was no longer disabled after the implant surgery. However, he did wear glasses to correct the 20/30 vision in his right eye. No other medical testimony was offered. In light of these facts, the appellate panel affirmed an award of disability benefits appropriate to Johnson's 20/30 vision. Consequently, we find the circuit court did not err in affirming the appellate panel's award.

We see no compelling reason to depart from the appellate panel's ruling that the term "corrective lenses" does not include implanted lenses.[5] While we agree with Dr. Ullian that an intraocular implant is corrective in nature, we find it is not a "corrective lens" as contemplated by regulation 67-1105. In affirming the appellate panel, the circuit court reasoned:

> Clearly, there is a distinct difference between a removable glass or plastic lens, which must be replaced or removed periodically, and a complex invasive surgery that permanently restructures and repairs one's vision. An intra-ocular lens implant . . . is an intricate surgery that rebuilds the inner-workings of the eye, whereby the patient is able to permanently recover his or her vision to a degree often greater than that prior to injury.

We find an intraocular implant differs significantly from both glasses and contact lenses in terms of the permanence of the solution and the requirement of future maintenance. With regard to permanence, a person may wear or remove glasses or contact lenses at will. However, an intraocular implant resides wholly within the patient's eye and is inaccessible without surgery.

[5] Both parties to this appeal have surveyed the rather even split on this issue in decisions from other jurisdictions. However, we are not compelled to weigh the decisions of other jurisdictions when we agree with the well-reasoned ruling of the Commission. See Neal v. Brown, 374 S.C. 641, 649, 649 S.E.2d 164, 168 (Ct. App. 2007), cert. granted May 30, 2008.

Furthermore, according to Dr. Ullian, the intraocular implant will last the rest of Johnson's life. In light of these facts, we do not believe Johnson's current "loss of vision" without the use of his implanted lens could be determined without surgically removing his implant. See S.C. Code Regs. § 67-1105 (1989). With regard to future maintenance, common knowledge dictates that both glasses and contact lenses frequently require replacement because they become lost, break, or, more commonly in the case of contact lenses, wear out. Periodic vision examinations and new prescriptions render old glasses and contact lenses obsolete. In addition, as Dr. Ullian observed, contact lenses expose the wearer to the risk of eye infections.

By contrast, Johnson's implant will never need replacement and does not regularly expose his eye to infections. His vision without the use of contact lenses or eyeglasses has been measured at 20/30. He need only wear glasses to perfect his vision, which is already quite good. However, Johnson received an award of workers' compensation benefits for the percentage of his vision the glasses restore. Because we concur with the appellate panel's reasoning in distinguishing an intraocular implant from the "corrective lenses" contemplated in the regulation, we defer to the agency's expertise and ruling in this matter.

II. Interpretation of Regulation

Johnson next argues the circuit court erred in failing to interpret the regulation in the light most favorable to the claimant. We disagree.

"Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault." Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993). On appeal from a decision of the appellate panel, a court must "review the evidence, and state the facts and the reasonable inferences therefrom, in the light most favorable to claimant." Ford v. Allied Chem. Corp., 252 S.C. 561, 564, 167 S.E.2d 564, 565 (1969). "Any reasonable doubts as to construction of the Act should be resolved in favor of coverage." Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992).

The circuit court did not err in affirming the appellate panel. The role of the courts is to evaluate the evidence "in the light most favorable to claimant" to ensure injured employees do not bear the cost of disabilities resulting from work-related hazards. This role does not empower the courts to employ semantics to stretch the Act or its attendant regulations and extend benefits to persons who no longer suffer a disability. See Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989). The Commission found Johnson suffered a work-related disability and ordered his employer to fund his medical treatment. No evidence suggests his employer failed to pay for his treatment. But for a small diminution in vision, the medical treatment he received eliminated the disability. Therefore, we find Johnson has recuperated without bearing the cost of his recovery. Permitting him to recover simultaneously for wholly successful medical treatment and for a 100% disability that no longer exists would create an unreasonable windfall for Johnson. The Act has served its purpose by ensuring coverage for Johnson's "sure, swift recovery" from injury and by providing for his future vision-care needs in accordance with the actual diminution in vision he has experienced. Peay, 313 S.C. at 95, 437 S.E.2d at 65. Accordingly, we see no error.

CONCLUSION

We find no error of law in the appellate panel's decision to exclude an intraocular implant from the term "corrective lenses" in regulation 67-1105. For this reason, the circuit court did not err in affirming the appellate panel's decision. Furthermore, we find the appellate panel committed no error in evaluating the evidence or interpreting the law in this matter, and thus, its decision is supported by substantial evidence. Consequently, the circuit court did not err in affirming the appellate panel's decision. Accordingly, the order of the circuit court in this matter is

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

The Supreme Court of South Carolina
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Columbia, South Carolina 29211