# Judicial Merit Selection Commission



Post Office Box 142
Columbia, South Carolina 29202
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## M E D I A R E L E A S E

July 13, 2010

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629.

**The Commission will not accept applications after <u>Noon on Thursday, August 12, 2010.</u>**

The term of office currently held by the Honorable Paul E. Short, Jr., Judge of the Court of Appeals, Seat 1, will expire June 30, 2011.

The term of office currently held by the Honorable H. Bruce Williams, Judge of the Court of Appeals, Seat 2, will expire June 30, 2011.

A vacancy will exist in the office currently held by the Honorable J. Ernest Kinard, Jr., Judge of the Circuit Court, Fifth Judicial Circuit, Seat 1, upon Judge Kinard's retirement on or before August 31, 2010. The successor will fill the unexpired term of that office, which will expire June 30, 2013.

A vacancy exists in the office formerly held by the Honorable John C. Few, Judge of the Circuit Court, Thirteenth Judicial Circuit, Seat 2, upon his election to the Court of Appeals,

Chief Judge, Seat 5, February 3, 2010. The successor will fill the unexpired term of that office, which will expire June 30, 2012, and the subsequent full term that will expire June 30, 2018.

A vacancy exists in the office formerly held by the Honorable F. P. Segars-Andrews, Judge of the Family Court, Ninth Judicial Circuit, Seat 1. The successor will fill the subsequent full term of that office which will expire June 30, 2016.

The term of office held by the Honorable Patrick R. Watts, Master-in-Equity of Dorchester County, expired June 30, 2010. The successor will fill the subsequent full term of that office, which will expire June 30, 2016.

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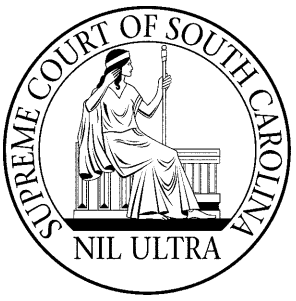


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 28**
**July 19, 2010**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

## CONTENTS

## THE SUPREME COURT OF SOUTH CAROLINA

## PUBLISHED OPINIONS AND ORDERS



## UNPUBLISHED OPINIONS



## PETITIONS – UNITED STATES SUPREME COURT



## EXTENSION TO FILE PETITION FOR REHEARING UNITED STATES SUPREME COURT



## PETITIONS FOR REHEARING

# The South Carolina Court of Appeals

## PUBLISHED OPINIONS



## UNPUBLISHED OPINIONS

2010-UP-364-State v. Travis Washington
(Bamberg, Judge Doyet A. Early, III)

2010-UP-365-State v. James Jones Jordan, III
(Lancaster, Judge James E. Lockemy)

2010-UP-366-Charleston DSS v. Wendy J.
(Charleston, Judge Paul W. Garfinkle)

2010-UP-367-Orlando Martin v. SCDC
(Administrative Law Court, Judge Deborah Durden)

2010-UP-368-State v. Randolph Scott Freeman
(Pickens, Judge D. Garrison Hill)

**PETITIONS FOR REHEARING**

| | |
|---|---|
| 4672-State v. Porter | Denied 07/07/10 |
| 4674-Brown v. James | Pending |
| 4680-State v. Garner | Pending |
| 4685-Wachovia Bank v. Coffey | Pending |
| 4691-State v. C. Brown | Pending |
| 4692-In the matter of Manigo | Pending |
| 4694-Sherlock (London I v. Enterprise) | Pending |
| 4696-State v. Huckabee | Pending |
| 4697-State v. D. Brown | Pending |
| 4698-State v. M. Baker | Pending |
| 4699-Manios v. Nelson Mullins | Pending |
| 4700-Wallace v. Day | Pending |

| | |
|---|---|
| 4702-Peterson, Frank v. Porter, Charles | Pending |
| 2010-UP-276-Ford v. S.Carolina | Pending |
| 2010-UP-298-Graham v. Babb | Pending |
| 2010-UP-300-Motsinger v. Williams | Pending |
| 2010-UP-302-McGauvran v. Dorchester | Pending |
| 2010-UP-303-State v. N. Patrick | Pending |
| 2010-UP-308-State v. W. Jenkins | Pending |
| 2010-UP-314-Clems v. SCDPPPS | Pending |
| 2010-UP-317-State v. C. Lawrimore | Pending |
| 2010-UP-330-Blackwell v. Birket | Pending |
| 2010-UP-331-State v. Rocquemore | Pending |
| 2010-UP-340-Blackwell v. Birket #2 | Pending |
| 2010-UP-343-Birket v. Blackwell | Pending |

**PETITIONS – SOUTH CAROLINA SUPREME COURT**

| | |
|---|---|
| 4367-State v. J. Page | Pending |
| 4370-Spence v. Wingate | Pending |
| 4451-State of South Carolina v. James Dickey | Pending |
| 4474-Stringer v. State Farm | Pending |
| 4476-Bartley, Sandra v. Allendale County | Pending |
| 4480-Christal Moore v. The Barony House | Pending |
| 4491-Payen v. Payne | Pending |
| 4493-Mazloom v. Mazloom | Pending |

| | |
|---|---|
| 4510-State v. Hicks, Hoss | Pending |
| 4518-Loe #1 and #2 v. Mother | Pending |
| 4525-Mead v. Jessex, Inc. | Pending |
| 4526-State v. B. Cope | Pending |
| 4529-State v. J. Tapp | Pending |
| 4541-State v. Singley | Pending |
| 4545-State v. Tennant | Pending |
| 4548-Jones v. Enterprise | Pending |
| 4553-Barron v. Labor Finders | Pending |
| 4554-State v. C. Jackson | Pending |
| 4560-State v. C. Commander | Pending |
| 4561-Trotter v. Trane Coil Facility | Pending |
| 4574-State v. J. Reid | Pending |
| 4575-Santoro v. Schulthess | Pending |
| 4576-Bass v. GOPAL, Inc. | Pending |
| 4578-Cole Vision v. Hobbs | Pending |
| 4585-Spence v. Wingate | Pending |
| 4588-Springs and Davenport v. AAG Inc. | Pending |
| 4592-Weston v. Kim's Dollar Store | Pending |
| 4597-Lexington County Health v. SCDOR | Pending |
| 4598-State v. Rivera and Medero | Pending |

| | |
|---|---|
| 4599-Fredrick v. Wellman | Pending |
| 4600-Divine v. Robbins | Pending |
| 4604-State v. R. Hatcher | Pending |
| 4605-Auto-Owners v. Rhodes | Pending |
| 4606-Foster v. Foster | Pending |
| 4607-Duncan v. Ford Motor | Pending |
| 4609-State v. Holland | Pending |
| 4610-Milliken & Company v. Morin | Pending |
| 4611-Fairchild v. SCDOT/Palmer | Pending |
| 4613-Stewart v. Chas. Cnty. Sch. | Pending |
| 4614-US Bank v. Bell | Pending |
| 4616-Too Tacky v. SCDHEC | Pending |
| 4617-Poch v. Bayshore | Pending |
| 4619-State v. Blackwill-Selim | Pending |
| 4620-State v. K. Odems | Pending |
| 4621-Michael P. v. Greenville Cnty. DSS | Pending |
| 4622-Carolina Renewal v. SCDOT | Pending |
| 4630-Leggett (Smith v. New York Mutual) | Pending |
| 4631-Stringer v. State Farm | Pending |
| 4633-State v. G. Cooper | Pending |
| 4635-State v. C. Liverman | Pending |
| 4639-In the Interest of Walter M. | Pending |

| | |
|---|---|
| 4640-Normandy Corp. v. SCDOT | Pending |
| 4641-State v. F. Evans | Pending |
| 4653-Ward v. Ward | Pending |
| 4654-Sierra Club v. SCDHEC | Pending |
| 4659-Nationwide Mut. V. Rhoden | Pending |
| 4661-SCDOR v. Blue Moon | Pending |
| 4666-Southeast Toyota v. Werner | Pending |
| 4670-SCDC v. B. Cartrette | Pending |
| 4671-SCDC v. Tomlin | Pending |
| 4673-Bailey, James v. SCDPPPS | Pending |
| 2008-UP-126-Massey v. Werner | Pending |
| 2008-UP-285-Biel v. Clark | Pending |
| 2008-UP-668-State v. S. Terry | Pending |
| 2009-UP-148-State v. J. Taylor | Pending |
| 2009-UP-199-State v. Pollard | Pending |
| 2009-UP-204-State v. R. Johnson | Pending |
| 2009-UP-265-State v. H. Williams | Pending |
| 2009-UP-266-State v. McKenzie | Pending |
| 2009-UP-276-State v. Byers | Pending |
| 2009-UP-281-Holland v. SCE&G | Pending |
| 2009-UP-299-Spires v. Baby Spires | Pending |

| | |
|---|---|
| 2009-UP-322-State v. Kromah | Pending |
| 2009-UP-336-Sharp v. State Ports Authority | Pending |
| 2009-UP-337-State v. Pendergrass | Pending |
| 2009-UP-338-Austin v. Sea Crest (1) | Pending |
| 2009-UP-340-State v. D. Wetherall | Pending |
| 2009-UP-359-State v. P. Cleveland | Pending |
| 2009-UP-364-Holmes v. National Service | Pending |
| 2009-UP-385-Lester v. Straker | Pending |
| 2009-UP-396-McPeake Hotels v. Jasper's Porch | Pending |
| 2009-UP-403-SCDOT v. Pratt | Pending |
| 2009-UP-434-State v. Ridel | Pending |
| 2009-UP-437-State v. R. Thomas | Pending |
| 2009-UP-524-Durden v. Durden | Pending |
| 2009-UP-539-State v. McGee | Pending |
| 2009-UP-540-State v. M. Sipes | Pending |
| 2009-UP-564-Hall v. Rodriquez | Pending |
| 2009-UP-585-Duncan v. SCDC | Pending |
| 2009-UP-587-Oliver v. Lexington Cnty. Assessor | Pending |
| 2009-UP-590-Teruel v. Teruel | Pending |
| 2009-UP-594-Hammond v. Gerald | Pending |
| 2009-UP-596-M. Todd v. SCDPPPS | Pending |

| | |
|---|---|
| 2009-UP-603-State v. M. Craig | Pending |
| 2010-UP-080-State v. R. Sims | Pending |
| 2010-UP-090-F. Freeman v. SCDC (4) | Pending |
| 2010-UP-111-Smith v. Metts | Pending |
| 2010-UP-138-State v. B. Johnson | Pending |
| 2010-UP-140-Chisholm v. Chisholm | Pending |
| 2010-UP-141-State v. M. Hudson | Pending |
| 2010-UP-154-State v. J. Giles | Pending |
| 2010-UP-156-Alexander v. Abbeville Cty. Mem. Hos. | Pending |
| 2010-UP-158-Ambruoso v. Lee | Pending |
| 2010-UP-162-State v. T. Washington | Pending |
| 2010-UP-173-F. Edwards v. State | Pending |
| 2010-UP-178-SCDSS v. Doss | Pending |
| 2010-UP-196-Black v. Black | Pending |
| 2010-UP-197-State v. D. Gilliam | Pending |
| 2010-UP-215-Estate v. G. Medlin | Pending |
| 2010-UP-220-State v. G. King | Pending |
| 2010-UP-225-Novak v. Joye, Locklair & Powers | Pending |
| 2010-UP-227-SCDSS v. Faith M. | Pending |
| 2010-UP-234-In Re: Mortgage (DLJ v. Jones, Boyd | Pending |

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

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Eric U. Fowler and Melissa W. (Dawn) Fowler, Respondents,

v.

Sallie Hunter, Gynecologic Oncology Associates, Selective Insurance Company of South Carolina and Insurance Associates, Inc., Defendants,

of whom Selective Insurance Company of South Carolina is, Respondent,

and Insurance Associates, Inc., is, Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

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Opinion No. 26834
Heard May 25, 2010 – Filed July 19, 2010

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**AFFIRMED**

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F. Matlock Elliott and Joshua L. Howard, of Haynsworth Sinkler Boyd, of Greenville, for Petitioner.

Andrew F. Lindemann, of Davidson & Lindemann, of Columbia; Rodney M. Brown, of Younts Alford Brown & Goodson, of Fountain Inn, for Respondents.

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**CHIEF JUSTICE TOAL:** This Court granted a writ of certiorari to review the court of appeal's reversal of the trial court's grant of summary judgment to Insurance Associates, Inc. (Insurance Associates), an insurance agency.

## FACTS/PROCEDURAL BACKGROUND

Respondents Eric and Melissa Fowler (the Fowlers) were severely injured when a vehicle driven by Sallie Hunter (Hunter) collided with their motorcycle. Among the physical harm suffered by the Fowlers was a permanent brain injury to Melissa Fowler. The car driven by Hunter was owned by Hunter's husband's medical practice, Gynecological Oncology Associates (GOA). The Fowlers filed a negligence action against Hunter and GOA.

Three insurance policies were initially thought to provide coverage for the accident. First, GOA had a business automobile insurance policy with a limit of one million dollars issued by Auto-Owners Insurance that insured the car driven by Hunter. Hunter and her husband also had a personal catastrophic liability policy with a limit of two million dollars, which was

issued by Selective Insurance Company (Selective). There are no coverage questions with respect to these two policies.

However, GOA also had a commercial liability policy with a limit of four million dollars issued by Selective, but procured by Insurance Associates. GOA intended that this policy provide automobile coverage, however Selective contended that the commercial liability policy did not provide automobile coverage. In reaction to Selective's contention, the Fowlers filed the instant declaratory judgment action against Hunter, GOA, Selective, and Insurance Associates to determine the amount of available insurance coverage under the commercial liability policy.

Hunter and GOA answered and filed cross-claims against Selective for breach of contract, bad faith, and reformation. Hunter and GOA also asserted a cause of action against Insurance Associates for professional negligence, in which Hunter and GOA alleged Insurance Associates, as the agent for Selective, failed to properly issue the policy with automobile coverage as requested by GOA. They also alleged Selective was liable for the acts and omissions of Insurance Associates because Insurance Associates was acting as the agent for Selective. Selective then filed a cross-claim against Insurance Associates for equitable indemnification.

At GOA's request, Insurance Associates procured the commercial liability policy through Selective's "One and Done" software program. Hunter and GOA alleged Insurance Associates representative, Roy Phillips (Phillips), simply failed to check the appropriate box within the "One and Done" program, which would have provided GOA with the requested automobile coverage under the commercial liability policy. In his deposition, Phillips testified that GOA requested automobile coverage under the policy, but that he inadvertently failed to check the correct box. According to Phillips, there would not have been any additional cost added to the premium had he included automobile coverage as requested. Finally, Phillips testified that Insurance Associates had the authority to issue the policy and bind Selective.

Eventually, all of the parties except for Insurance Associates agreed to settle the motorcycle suit and entered into a global settlement agreement. As part of this agreement, Auto-Owners Insurance agreed to tender to the Fowlers the limits on the Hunter's one million dollar automobile policy. Also, Selective agreed to tender the policy limits on the two million dollar personal catastrophic liability policy. Furthermore, Selective agreed to pay the Fowlers an additional one and a half million dollars within thirty days of the filing date of an order approving the settlement, which was required because of Melissa Fowler's brain injury.

Notably, the Fowlers signed a covenant not to execute against the Hunters[1] and GOA. The Hunters and GOA also assigned to the Fowlers their professional negligence claim against Insurance Associates. Selective and the Fowlers agreed to cooperate in the pursuit of the professional negligence and equitable indemnification actions. Furthermore, they agreed to equally split the costs and potential proceeds realized from these causes of action.

After the trial court approved the settlement, Insurance Associates moved for summary judgment as to the causes of action for professional negligence and equitable indemnity. The trial court granted these motions.

With respect to the professional negligence claim, the trial court found the covenant not to execute entered into by the parties relieved Hunter and GOA from further liability from any and all claims arising from the motorcycle accident. Therefore, the trial court found that the Fowlers, standing in the shoes of Hunter and GOA, could never prove damages with respect to Insurance Associates' alleged failure to procure automobile insurance coverage under the four million dollar commercial liability policy. Thus, the trial court granted the motion for summary judgment.

The trial court granted summary judgment as to Selective's cause of action for equitable indemnification finding that Selective was not harmed by

[1] Dr. Hunter was a party to the settlement despite the fact that he was not named as a defendant in the lawsuit.

Insurance Associate's alleged negligence. The trial court noted Insurance Associates' argument that Selective was actually benefitted by Insurance Associates' failure to procure the desired automobile coverage. Specifically, Insurance Associates argued that had it prepared the policy as requested, Selective would have been unquestionably liable for four million dollars, the total amount of the policy. However, Insurance Associates argued that Selective was able to settle the claim for only one and a half million dollars because of the uncertainties involved. The trial court agreed and concluded it was impossible to determine whether Selective was harmed by Insurance Associates' mistake. Therefore, the trial court ruled there could be no finding of harm and granted summary judgment as to the equitable indemnification claim.

The court of appeals reversed. Insurance Associates filed a petition for a writ of certiorari, which this Court granted.

## ISSUES

Insurance Associates presents the following issues for review:

I. Did the court of appeals err in reversing the trial court's grant of summary judgment as to the claim for professional negligence?

II. Did the court of appeals err in reversing the trial court's grant of summary judgment as to the claim for equitable indemnification?

## STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such

that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.*

## LAW/ANALYSIS

### I. Professional Negligence

Insurance Associates argues that the court of appeals erred in reversing summary judgment as to the Fowlers' claim for professional negligence. We disagree.

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) damages proximately resulting from the breach of duty. *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000).

Insurance Associates argues the court of appeals erred in following other jurisdictions that allow the prosecution of assigned claims such as this because the court of appeals' reasoning disregards the essential element of damages from the tort of negligence. The court of appeals held the trial court's analysis concerning the Fowler's inability to prove damages was technically correct, but was persuaded by the foreign jurisdictions that have addressed the issue and elected to allow such assigned claims to proceed.

Examining several decisions from foreign jurisdictions, the court of appeals found that a majority of other courts have approved similar settlement agreements, provided the risk of collusion is minimized. Citing *Bartholomew v. McCartha*, 255 S.C. 489, 179 S.E.2d 912 (1971), the court of appeals held South Carolina has expressed a willingness to depart from the technicalities of the common law in order to promote reasonable settlements in civil suits. The court further held South Carolina law required the careful

scrutiny of settlement agreements to avoid the potential for complicity or wrongdoing.

We agree with the court of appeals' reliance on the Supreme Judicial Court of Massachusetts's holding in *Campione v. Wilson*, 661 N.E.2d 658 (1996), in which that court found the existence of conflicting approaches to this issue throughout the country reflects a balancing of policy considerations. The Massachusetts court held the primary concern in many cases with the same procedural posture as the instant matter is the risk of collusion when an insured is protected from liability by an agreement not to execute prior to the entry of judgment in the underlying tort action. *Id*. We agree with this holding.

Insurance Associates argues that the parties' settlement in this case was collusive. We disagree. The court of appeals addressed this issue and correctly held there was no evidence of collusion between the parties. For instance, the parties did not stipulate as to the Fowlers' damages in the settlement agreement to reduce the appearance of collusion and the settling parties believed the motorcycle suit would be tried to a conclusion. Additionally, the settlement enabled the Fowlers to obtain the three million dollars available under the two policies in which coverage was not disputed, while litigation against Insurance Associates was not foreclosed.

Because the court of appeals correctly recognized that South Carolina courts favor settlement and determined that there was no collusion involved in the settlement, it reversed the trial court's order granting summary judgment as to the assigned professional negligence claim. The court of appeals' reasoning is sound and we affirm its holding with respect to this issue.

## II. Equitable Indemnification

Insurance Associates argues the court of appeals erred in reversing the trial court's grant of summary judgment as to Selective's claim for equitable indemnification. We disagree.

A plaintiff may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as the result of another's tortious act. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Co.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). A plaintiff asserting an equitable indemnification cause of action may recover damages if he proves: (1) the indemnitor was liable for causing the plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor. *Id*.

Insurance Associates argues the trial court's grant of summary judgment was appropriate because Selective cannot show it has been damaged by Insurance Associate's alleged negligence. Specifically, Insurance Associates asserts that Selective would have been liable for four million dollars had it procured the policy as requested. Thus, because Selective settled for one and a half million dollars, as opposed to the four million dollar liability limit, Insurance Associates argues Selective was benefitted by its negligence.

Insurance Associates' argument lacks merit because it is not clear from the record whether Selective would have issued the automobile coverage at issue, voluntarily exposing itself to liability. In support of its argument that Selective would have unquestionably issued the automobile coverage but for its negligence, Insurance Associates points to a set of guidelines related to the "One and Done" software program. These guidelines, Insurance Associates argues, allowed agents to automatically secure policies if certain criteria were met. It claims these criteria were met.

Nonetheless, Selective claims that the required preconditions for the issuance of automobile coverage were not met and points to its own set of guidelines showing that coverage of the sort at issue here may not be automatically issued unless the underlying policy of automobile insurance was also issued by Selective. The underlying automobile policy in this case was not issued by Selective, but by Auto-Owners. Thus, Selective argues

that it would not have issued the automobile coverage at issue exposing itself to four million dollars of liability, thus the one and a half million dollar paid in settlement are damages directly related to Insurance Associates' negligence.

The court of appeals found the competing sets of guidelines raised a genuine issue of material fact as to damages precluding summary judgment and reversed the trial court's grant. Insurance Associates' additional arguments in support of reversal, such as Selective's alleged failure to mitigate damages, misunderstand the reasoning of the court of appeals and are without merit. We agree with the narrow grounds upon which the court of appeals reversed the trial court's grant of summary judgment on the equitable indemnification claim and, thus, affirm its decision.

## CONCLUSION

For the foregoing reasons, we affirm the court of appeals' reversal of the trial court's grant of summary judgment on the claims for professional negligence and equitable indemnification.

**PLEICONES, BEATTY, JJ., and Acting Justices James E. Moore and John H. Waller, Jr., concur.**

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

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Temporary Services, Inc., on behalf of themselves and all others similarly situated; and Charleston Steel & Metal Company, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

American International Group, Inc.; American Home Assurance Company; Commerce and Industry Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; and American International Underwriters Corporation, Defendants.

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ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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The Honorable Joseph F. Anderson, Jr.,
United States District Judge

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Opinion No. 26835
Heard June 9, 2010 – Filed July 19, 2010

## CERTIFIED

James K. Holmes, of Steinberg Law Firm, of Charleston; Richard A. Harpootlian and Graham Lee Newman, both of Columbia, and Mark D. Chappell, J. Richards McCrae, III, W. Hugh McAngus, Jr., all of Chappell, Smith & Arden, of Columbia, for Plaintiffs

Stephen G. Morrison, Robert H. Brunson, and Jay T. Thompson, all of Nelson Mullins Riley & Scarborough, of Columbia, and Michael B. Carlinsky, Kevin S. Reed, Jennifer J. Barrett, Safia G. Hussain and Lee Katherine Turner, all of Quinn Emanuel Urquhart & Sullivan, of New York, New York, for Defendants.

**CHIEF JUSTICE TOAL:** In this matter, the United States District Court for the District of South Carolina has certified two questions regarding the applicability of the filed rate doctrine to Plaintiffs' claims.

### FACTS/PROCEDURAL BACKGROUND

The underlying lawsuit was filed by Temporary Services, Inc. and Charleston Steel and Metal Company (Plaintiffs) against American International Group, Inc., Commerce and Industry Insurance Company, and American Home Assurance Company (Defendants). Plaintiffs have asserted seven claims of breach of contract against Defendants stemming from workers' compensation insurance policies procured by Plaintiffs from Defendants. Plaintiffs allege that Defendants have committed material breaches of these policies by fraudulently charging excessive premiums.

In determining the rates applicable to insurance policies, carriers utilize a calculation based on a combination of two criteria: a pure loss component (LC) and an expense component, or loss cost multiplier (LCM). The LC is an industry-wide calculation of projected claims as to each specific job description. The LCM is a multiplier applied to the premium rate based on an insurer's specific expenses. The expenses relevant to the LCM include items such as acquisition costs, overhead, taxes, and profit. S.C. Code Ann. § 38-73-1400 (2002). Plaintiffs allege Defendants fraudulently calculated their LCM, which was submitted to the Department of Insurance (DOI) in 2001, in order to charge excessively high premiums.

The questions certified to this Court concern how, if at all, the Filed Rate Doctrine applies to Plaintiffs' claims. The Filed Rate Doctrine was adopted by this Court in the case of *Edge v. State Farm Mutual Insurance Company*, 366 S.C. 511, 623 S.E.2d 387 (2005), and "was originally a federal preemption rule which provided that rates duly adopted by a regulatory agency are not subject to collateral attack in court."

## ISSUES

The United States District Court for the District of South Carolina has certified the following two questions to this Court:

I. Under South Carolina law, were the Defendants' submissions to the DOI in 2001 "filed rates" within the meaning of the Filed Rate Doctrine as adopted by this Court in *Edge*?

II. Does South Carolina recognize an exception to the Filed Rate Doctrine that permits a private plaintiff to avoid the Filed Rate Doctrine by alleging that regulatory approval for the rate was obtained through fraudulent means, or must a private plaintiff seek remedies solely through administrative channels?

## LAW/ANALYSIS

### I. Applicability of Filed Rate Doctrine to Plaintiffs' Claims

Plaintiffs argue the Filed Rate Doctrine does not bar its claims. We agree.

The Filed Rate Doctrine "stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit." *Edge*, 366 S.C. at 517, 623 S.E.2d at 391 (quoting *Amundson & Assocs. Art Studio v. Nat'l Council on Comp. Ins.*, 988 P.2d 1208, 1213 (1999)). The DOI was not vested with the authority to determine the rates applicable to the workers' compensation policies at issue, thus the Filed Rate Doctrine does not bar Plaintiffs' claims in this instance.

A brief examination of the regulatory scheme applicable to workers' compensation policies provides the necessary context to understand the issues before this Court. Generally, the DOI is vested with the authority to regulate the insurance industry. For regulatory purposes, there are three categories of workers' compensation insurance that employers can maintain: self-insurance, assigned risk insurance, and voluntary insurance. The workers' compensation insurance at issue is voluntary insurance.

Each category of workers' compensation insurance is regulated in a different manner by the DOI. An examination of the regulatory scheme applicable to the self-insurance category is irrelevant to our understanding of the issues before the Court. However, an understanding of the regulation of assigned risk insurance and voluntary insurance is necessary to properly contextualize the Federal Court's certified questions.

Generally, those employers participating in the assigned risk program are high-risk insureds that were unable to procure insurance in the open market. In contrast, those employers participating in the voluntary program were able to acquire insurance on the open market. The differences in the

nature of these programs are reflected in their respective regulation. In 1989, the General Assembly established a rating system for the assigned risk insurance and voluntary insurance programs. As briefly explained before, the rates in both programs are calculated by the use of two categories of data: the LC and the LCM.[1] The LC is derived by the National Council of Compensation Insurers (NCCI) and submitted to the DOI for approval. The LCM differs from the LC in that it is not industry wide or calculated by a rating agency but is carrier-specific and calculated using figures for expenses and profits each individual carrier incurs in the market.

Beginning in 1990, the DOI differentiated between the voluntary and assigned risk programs as to how the "expense component," or LCM, would be developed and who would file this information. Section 38-73-1380 provides for the LCM to be "filed with the department and approved by the director or his designee, by each member or subscriber of a rating

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[1] The "pure loss component," which is another term for LC, is comprised of:

> [t]hat portion of the final rate or premium charge applicable to calendar/accident year incurred losses (the sum of paid losses plus loss reserves including incurred but not reported loss reserves) and loss adjustment expense (those expenses directly related to the payment of claims) in this State, trended to include both the past and prospective loss experience.

S.C. Code Ann. § 38-73-1400(1).

The "expense component," which is another term for LCM, is comprised of:

> that portion of the final rate or premium charge applicable to production costs (including commissions and other acquisition expenses), underwriting costs, administrative costs (including the actual costs of taxes, licenses and fees), and profit margin in this State.

S.C. Code Ann. § 38-73-1400(2).

organization independently." The DOI, however, utilized the discretion given to it under section 38-73-1430 to mandate that the rating organization

> file a proposed expense component for the Assigned Risk Plan reflecting the cost of the Assigned Risk Plan only, which, when approved, will be added to the approved pure loss component for the Assigned Risk Plan to become the final rate for the Plan.

Department of Insurance Bulletin No. 1990-05.

Thus, after the inception of the rating system in 1990, workers' compensation insurance rates were to be established uniformly throughout the assigned risk program. In contrast, however, insurers in the voluntary program market relied on rating agencies for the LC used in calculating their rates, but developed and filed their own LCM. The Administrative Law Court recognized this change by stating that "[e]ach carrier determines its own final rates in the voluntary program by combining its own expenses with the loss costs." *NCCI v. SCDOI, et. al.*, 05-ALJ-09-0355-CC (S.C. Admin L. Ct. 2005) (http://www.scalc.net/decisions.aspx?q=4&id=8127#_ftn1) (last visited June 2, 2010). Nonetheless, within its bulletin establishing a two-tiered rating system, the DOI mandated that all insurers filing proposed LCM figures, including those in the voluntary insurance market, "shall include the necessary information required by 'SCID Form No. 2007,' … and all data necessary to support the filing." Department of Insurance Bulletin No. 1990-05. These filings were subject to public hearing.

The deregulation of the voluntary insurance program continued when, in 2000, the General Assembly altered the filing and review requirements for workers' compensation insurers seeking deviations from their previously-approved premiums. The General Assembly introduced the definition of "exempt commercial policies" to the rating scheme in 2000 Act No. 235. Exempt commercial policies were defined as insurance contracts:

> . . . for large commercial insureds where the total combined premiums to be paid for these policies for one insured is greater

> than fifty thousand dollars annually and as may be further provided for in regulation or in bulletins issued by the director. Exempt commercial policies include all property and casualty coverages except for commercial property and insurance related to credit transaction written through financial institutions.

S.C. Code Ann. § 38-1-20(40) (2002). The definition of casualty insurance includes workers' compensation insurance. *Id*. § 38-1-20(9). Thus, workers' compensation insurance policies are exempt commercial policies.

The General Assembly provided that "[e]xempt commercial policies are not subject to prior approval by the [DOI]." Act No. 235, 2000 S.C. Acts 1683, § 8 (codified as S.C. Code Ann. § 38-73-910(G) (2002)). The General Assembly amended the definition of exempt commercial policies by removing the minimum premium requirement, thus making all commercial insured policies exempt from DOI rate approval. S.C. Code Ann. § 38-1-20(4) (Supp. 2008).

The General Assembly's recognition of a class of exempt commercial policies abrogated the DOI's rate-making authority over the policies at issue. Act No. 235 eliminated the subject policies from the public notice requirement by specifically exempting them from the rate-making requirements of Title 38. This exemption eliminated the instant policies from the requirement of public notice given to consumers of a proposed rate increase and the fundamental requirement that "[n]o insurer may make or issue a contract or policy except in accordance with the filings which are in effect for the insurer." *Id*. § 38-73-920.

Furthermore, this Court has recognized that "sellers of exempt commercial policies are not required to file rate schedules and plans with the [DOI]." *Croft v. Old Republic*, 365 S.C. 402, 410, 618 S.E.2d 909, 913 (2005). Finally, the DOI has specifically noted that "no insurer of exempt commercial policies will be required to file any classification, rate, rule, or rating plan." S.C. Code Ann. Regs. § 69-64 (Supp. 2008). As argued by Plaintiffs, the DOI continued to require rating agencies to file LC data with

the DOI for its approval. However, beginning in 2000 with the advent of exempt commercial policies, the DOI was not vested with the authority to regulate LCM.

The filing at issue was made in 2001, a year after exempt commercial policies were no longer subject to rate setting regulation by the DOI. All of policies at issue were for large commercial insureds and carried premiums in excess of $50,000, thus all were exempt commercial policies under both the original and amended versions of the definition of this term. Therefore, because the submission made by Defendants in 2001 did not invoke the regulatory authority of the DOI, the Plaintiffs' claim against Defendants is not barred by the Filed Rate Doctrine.

## II. Exceptions to the Filed Rate Doctrine

Plaintiff argues that, if the Filed Rate Doctrine applies in this instance, their claims ought to fall within an exception to the Doctrine. Because the Filed Rate Doctrine does not apply so as to bar Plaintiffs' claims, we decline to answer the second certified question.

## CONCLUSION

In addressing the issues before us, we make no judgments regarding the merits of Plaintiffs' underlying claims. We answer the questions narrowly, finding that because the workers' compensation policies at issue were exempt commercial policies, Defendants' submissions to the DOI in 2001 did not invoke the regulatory authority of the DOI and the Filed Rate Doctrine does not bar Plaintiffs' claims. Thus, the Court need not address the Federal Court's second certified question.

**BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.**

# The Supreme Court of South Carolina

In the Matter of Michael Davis Moore, Respondent.

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ORDER

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The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Dale Van Slambrook, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Van Slambrook shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the

interests of respondent's clients. Mr. Van Slambrook may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

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

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

Mr. Van Slambrook's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Costa M. Pleicones J.

FOR THE COURT

Columbia, South Carolina

July 16, 2010

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

The State, Respondent,

v.

Santiago Rios, a/k/a
Santiago Pasqual, Appellant.

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Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

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Opinion No. 4710
Heard May 19, 2010 – Filed July 14, 2010

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**AFFIRMED**

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Ricky Keith Harris, of Spartanburg, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

**LOCKEMY, J.:** Santiago Rios appeals his conviction for murder, arguing the trial court erred in (1) denying his request to suppress two statements he made to investigators because he did not knowingly and intelligently waive his Miranda[1] rights and (2) failing to charge the jury on involuntary manslaughter and self-defense. We affirm.

## FACTS

Rios was indicted for murder in Spartanburg County. The State alleged Rios shot and killed his wife, Eliza Hernandez, in their home on November 23, 2006. The night of the shooting, Rios told a responding police officer three black male intruders robbed their home and shot Hernandez. Later that evening, investigators questioned Rios at the Spartanburg County Sheriff's Department (the Department). Initially, Rios maintained that intruders shot Hernandez. However, Rios later changed his story and told investigators he and Hernandez got into an argument that led to a physical confrontation and a struggle between them for the gun. According to Rios, the physical altercation started when he shoved Hernandez after she refused to fix him Thanksgiving dinner. Rios told investigators Hernandez then pulled his hair and the medallion around his neck. Rios stated he followed Hernandez into their bedroom, where she grabbed a gun and pointed it at him. Rios told investigators the two struggled with the gun and it fired. Rios claimed he was defending himself when the gun fired. Tests revealed no gunshot residue on either Rios's or Hernandez's hands, and the gun was never located.

At a pre-trial Jackson v. Denno[2] hearing, defense counsel argued Rios's statements to investigators were not knowingly and intelligently given. Defense counsel asserted Rios, a native of Mexico, did not have the capacity to waive his Miranda rights because his native language was Tarascan, and he was given Miranda warnings in Spanish. According to defense counsel, there is no right to remain silent in Tarascan culture and no translation for the

[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] Jackson v. Denno, 378 U.S. 368 (1964).

terms "court" or "judge." The State noted Rios had lived in the United States for ten years and argued Rios was able to communicate in English and Spanish. After hearing testimony, the trial court found Rios's statements to investigators were freely, voluntarily, and knowingly given. Following trial, a jury found Rios guilty of murder, and he was sentenced to thirty years' imprisonment. This appeal followed.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, this court is bound by the trial court's factual findings unless they are clearly erroneous. Id. "On review, this [c]ourt is limited to determining whether the circuit court abused its discretion." State v. Simmons, 384 S.C. 145, 158, 682 S.E.2d 19, 26 (Ct. App. 2009). "This [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence." Id.

## LAW/ANALYSIS

### I. Miranda Warnings

Rios argues the trial court erred in denying his motion to suppress the statements he made to Sergeant George Balderama and Officer Angel Diaz the night of the shooting. Specifically, Rios maintains he did not knowingly and intelligently waive his Miranda rights. We disagree.

At the Jackson v. Denno hearing, Sergeant Balderama, a Spanish interpreter for the Department, testified he utilized two forms for the purpose of informing Rios of his Miranda rights. First, Sergeant Balderama advised Rios of his Miranda rights in Spanish by reading the rights from a card printed in Spanish. Sergeant Balderama testified Rios acknowledged that he read or understood each right by initialing the card next to each enumerated right. Sergeant Balderama also presented Rios with a pre-interrogation waiver form with his Miranda rights printed in English. According to

Sergeant Balderama, he asked Rios if he understood his Miranda rights, and Rios said "yes."

After Rios was advised of his rights, he provided an oral statement to Sergeant Balderama and Investigator William Gary in Spanish, and Sergeant Balderama transcribed the statement in English. Rios told the investigators Hernandez was shot by masked intruders. Sergeant Balderama testified he read Rios's statement back to him in Spanish and Rios signed the statement. Sergeant Balderama testified he never threatened Rios or coerced him into giving a statement. According to Sergeant Balderama, Rios spoke to him in Spanish and never used another dialect or language. Sergeant Balderama testified he had no trouble communicating with Rios in Spanish and never felt Rios had trouble understanding him. Later that night, Rios gave a second statement to Officer Diaz, another Spanish interpreter for the Department. Rios told Officer Diaz he and Hernandez got into an argument and were struggling over the gun when it fired. Officer Diaz transcribed Rios's statement in English and then read it back to him in Spanish. Rios was given the opportunity to make changes, additions, or deletions to his statement. Officer Diaz also testified he did not have any difficulty communicating with Rios in Spanish.

At the hearing, Rios relied on People v. Jiminez, 863 P.2d 981 (Colo. 1993), to support his argument that his waiver of his Miranda rights was not knowing and intelligent. In Jiminez, the Colorado Supreme Court upheld the lower court's suppression of Jiminez's confession on the grounds that Jiminez's waiver of his Miranda rights was not knowing and intelligent. 863 P.2d at 985. Jiminez functioned at the level of a six year old, had never been to school, and had a very limited vocabulary even in his native language, Kickapoo. Id. at 982. Because a Kickapoo translator was not available, Jiminez selected Spanish for the interrogation. Id. The Colorado Supreme Court affirmed the lower court's suppression of Jiminez's confession on the grounds that his mental disability rendered him incapable of understanding his rights, and not on the grounds that he was culturally unable to understand his rights. Id. at 985. Here, the trial court distinguished the present case from Jiminez and determined Rios's statements were freely, voluntarily, and knowingly given. The trial court noted Rios presented no testimony concerning his mental capacity or ability. Furthermore, the trial court found

the State presented evidence Rios communicated fluently in Spanish and in English while on the job, and noted Rios presented no evidence he had a limited vocabulary in any of the languages he spoke.

On appeal, Rios argues his initials on each of the enumerated rights on the Miranda card may constitute an acknowledgement that he was read the rights, but do not indicate he fully understood his rights and his waiver of those rights. Specifically, Rios asserts language and cultural barriers prevented him from fully understanding his rights. Rios claims he has a limited education and Tarascan does not include words for concepts such as "rights" and "courts." Rios contends the Spanish interpretation of Miranda was insufficient and prevented him from understanding his right to remain silent.

We find the trial court did not abuse its discretion in admitting the statements Rios made to Sergeant Balderama and Officer Diaz. Evidence in the record indicates Rios knowingly and intelligently waived his right to remain silent. See State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) ("The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances."). While Rios argues his understanding of his waiver was limited because of language and cultural barriers, evidence in the record reflects Rios did not have trouble communicating in Spanish or understanding his rights. Sergeant Balderama and Officer Diaz both testified they had no trouble communicating with Rios in Spanish. Furthermore, Sergeant Balderama testified he specifically asked Rios if he understood his Miranda rights and he said "yes." Moreover, Robert Reeder, the trainer and safety director at the Milliken Cotton Blossom plant where Rios worked, testified Rios completed forty hours of training in English and was able to communicate in both English and Spanish. Rios had also lived in the United States for ten years at the time of his arrest. Accordingly, we affirm the trial court's decision to admit Rios's statements.

## II. Jury Charges

Rios also argues the trial court erred in failing to charge the jury on involuntary manslaughter and self-defense. Specifically, Rios contends he

was entitled to an involuntary manslaughter charge because he presented evidence he and Hernandez struggled over the gun. Rios also maintains he was entitled to a self-defense charge based on his statement to investigators that he was defending himself at the time of the shooting. In response, the State contends Rios abandoned his requests to charge involuntary manslaughter and self-defense when he withdrew the requests during the charge conference. We find this issue is not preserved for our review.

During the charge conference, Rios asked the trial court to charge the jury on accident, self-defense, voluntary manslaughter, and involuntary manslaughter. The State asserted Rios was entitled to an accident charge, but not self-defense, voluntary manslaughter, or involuntary manslaughter charges. In response, Rios withdrew his request for a voluntary manslaughter charge. Subsequently, the trial court stated it was inclined to charge voluntary manslaughter, but was not inclined to charge involuntary manslaughter because it involved recklessness. Rios asserted recklessness could have been present, but conceded "I certainly know this Court has more wisdom on the subject than I do." Rios also argued he was entitled to a self-defense charge because he told investigators he was acting in self-defense. The trial court stated that Rios's own characterization of his actions as self-defense was not binding on the court. Thereafter, the trial court noted Rios's statements indicated either intruders were responsible for the shooting or Rios shoved Hernandez first. The trial court also noted Rios presented no evidence Hernandez was the primary aggressor. Rios admitted he could not provide the court with any evidence that he did not push Hernandez first or that he and Hernandez were not involved in mutual combat.

The trial court then stated it did not mind charging accident or voluntary manslaughter, but that it did not "see self-defense in here." At that point, Rios asked for a 30-second break to confer with his co-counsel. Thereafter, Rios asked the trial court to charge voluntary manslaughter, accident, and murder. The trial court agreed to the proposed charges, and neither the State nor Rios objected. Later, after charging the jury, the trial court asked if there were any objections to the charges given. Neither the State nor Rios had any objections.

We find Rios's argument is not properly before us for review because he abandoned his request for jury charges on involuntary manslaughter and self-defense when he acquiesced and asked the trial court to charge voluntary manslaughter, accident, and murder. Therefore, Rios waived appellate review of this issue because an issue conceded in the trial court cannot be argued on appeal. See, e.g., State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005) (appellant waived any argument he had when he acquiesced the next morning and stated he would ask witness if he had administered a polygraph and "leave it at that"); State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding that when an appellant acquiesces to the trial court's limitation of cross-examination, he cannot complain on appeal); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (a party cannot acquiesce to an issue at trial and then complain on appeal).

Rios also failed to make a contemporaneous objection to the jury charges. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (holding a contemporaneous objection must be made to preserve an issue for appellate review). Rios did not object at any point to the trial court's decision not to charge involuntary manslaughter and self-defense. Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, "None." By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal. Thus, we affirm the trial court's decision not to charge the jury on involuntary manslaughter and self-defense.

## CONCLUSION

Accordingly, the decision of the trial court is

**AFFIRMED.**

**KONDUROS and GEATHERS, JJ., concur.**

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

M. Lee Jennings, Appellant,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and BJR International Detective Agency, Inc., Respondents.

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Appeal from Richland County
L. Casey Manning, Circuit Court Judge

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Opinion No. 4711
Heard April 15, 2010 – Filed July 14, 2010

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

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Max N. Pickelsimer and Carrie A. Warner, both of Columbia, for Appellant.

Deborah Harrison Sheffield, Richard Giles Whiting, Gary W. Popwell, Jr. and John K. Koon, all of Columbia, for Respondents.

**GEATHERS, J.:** In this appeal, M. Lee Jennings (Husband) contends that the circuit court erred by granting Respondents' motions for summary judgment as to his cause of action for a violation of the Stored Communications Act, 18 U.S.C. §§ 2701-2712 (2006). Husband also argues that the circuit court erred by denying his motion to amend his complaint to add Thomas Neal (Neal) as a party defendant. We affirm in part, reverse in part, and remand for further proceedings.

## FACTS/PROCEDURAL HISTORY

On June 21, 2006, Husband's wife, Gail Jennings (Wife), discovered a card for flowers in her car. Suspecting the flowers were not for her, Wife questioned Husband, who had recently borrowed her car, about the card. To Wife's dismay, Husband informed Wife that he had bought the flowers for another woman, with whom he had fallen in love. Although Husband refused to tell Wife the woman's full name, he mentioned that he had been corresponding with her via email at his office. That same day, the couple separated.

A few days later, Wife's daughter-in-law, Holly Broome (Broome), visited Wife at her home. Wife, who was extremely upset, told Broome about the separation and the conversation she had had with Husband. The next day, Broome, who had previously worked for Husband, logged onto Husband's Yahoo account from her personal computer by changing Husband's password. Broome proceeded to read emails that had been sent between Husband and his girlfriend. After reading a few of the emails, Broome called Wife, who came over to Broome's home. Broome printed the emails, and she and Wife made copies of them. They then gave one set of the emails to Neal, Wife's divorce attorney, and another set to Brenda Cooke (Cooke), a private investigator from the BJR International Detective Agency, Inc. (BJR) whom Wife had hired.

Broome subsequently logged onto Husband's Yahoo account on five or six additional occasions. Information she obtained about Husband's

girlfriend as a result was communicated to Neal and Cooke. According to Broome, she never accessed any of Husband's unopened emails.

On June 29, 2006, Wife initiated an action in family court for divorce and separate support and maintenance. During the course of that litigation, which is still pending, Husband learned that Broome had accessed emails from his Yahoo account and that copies of those emails had been disseminated to Cooke and BJR.

In February 2007, Husband commenced this action against Wife, Broome, Cooke, and BJR, alleging causes of action for invasion of privacy (publicizing of private affairs and wrongful intrusion), conspiracy to intercept and disseminate private electronic communications, and violation of the South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10 to -145 (Supp. 2009) (HSA). The parties filed cross-motions for summary judgment in May 2007.

In June 2007, Husband filed a motion to amend his complaint, which was granted pursuant to a Consent Order to Amend issued July 13, 2007. Later that July, Husband filed his amended complaint, adding allegations of violations of the following statutes: (i) the South Carolina Computer Crime Act (CCA), S.C. Code Ann. §§ 16-16-10 to -40 (2003 & Supp. 2009); (ii) Title I of the Federal Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2510-2522 (2006); and (iii) Title II of the ECPA, 18 U.S.C. §§ 2701-2712 (2006), which is separately known as the Stored Communications Act (SCA).

In February 2008, Wife and Broome each moved again for summary judgment. Thereafter, Husband filed a motion to amend his complaint a second time. Among other things, Husband sought to add Neal as a party defendant.

A hearing regarding the parties' summary judgment motions and Husband's motion to amend his complaint was held in June 2008. At that hearing, Husband voluntarily withdrew his causes of action arising under the

HSA, the CCA and Title I of the ECPA, as well as his cause of action for conspiracy.

By an order filed September 24, 2008, the circuit court granted Respondents' motions for summary judgment as to Husband's remaining causes of action, and it denied Husband's motion to amend his complaint. With regard to Husband's claim under section 2701 of the SCA, the circuit court held that Husband had failed to allege all of the elements necessary for a cause of action. Additionally, the circuit court found that Husband was not entitled to relief under section 2701 because the emails at issue were not in "electronic storage" as that term is defined in 18 U.S.C. § 2510(17) (2006). Furthermore, the circuit court ruled that, even if the emails were in electronic storage, Husband could not recover against Wife or Cooke because their actions did not constitute a violation of section 2701.

Husband subsequently filed a motion to reconsider, which was denied by the circuit court. This appeal followed.

## ISSUES ON APPEAL

1. Did the circuit court err in granting Respondents' motions for summary judgment on Husband's cause of action for a violation of the SCA on the ground that Husband failed to allege all of the elements necessary to successfully plead a cause of action under 18 U.S.C. § 2701 (2006)?

2. Did the circuit court err in granting Respondents' motions for summary judgment on Husband's cause of action for a violation of the SCA on the ground that the emails were not in "electronic storage" as defined in 18 U.S.C. § 2510(17) (2006)?

3. Did the circuit court err by not allowing Husband to amend his complaint to add Neal as a party defendant?

## STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court under Rule 56(c), SCRCP. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ascertaining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004).

A motion to amend a pleading is normally addressed to the sound discretion of the trial court. Porter Bros., Inc. v. Specialty Welding Co., 286 S.C. 39, 41, 331 S.E.2d 783, 784 (Ct. App. 1985). The trial court's decision will not be overturned "without an abuse of discretion or unless manifest injustice has occurred." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). The discretion afforded to the trial court in granting or denying an amendment "is so broad that it will rarely be disturbed on appeal." Porter Bros., 286 S.C. at 41, 331 S.E.2d at 784.

## DISCUSSION

### I. Did the circuit court err in determining that Husband failed to allege all of the elements of a cause of action under section 2701 of the SCA?

Section 2701(a) of the SCA provides:

> Except as provided in subsection (c) of this section whoever—

> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2701(a) (2006) (emphasis added).

Husband contends that the circuit court erred by determining that he failed to allege all of the elements of a cause of action under Section 2701. We agree.

Here, the circuit court held that the allegations in Appellant's complaint were "fatally incomplete" because Appellant failed to specifically contend that Respondents "obtain[ed], alter[ed], or prevent[ed] authorized access to a wire or electronic communication while it [was] in electronic storage." Because the circuit court's ruling focused upon Appellant's complaint, it appears that the circuit court treated Respondents' motions for summary judgment as motions to dismiss under Rule 12(b)(6), SCRCP.[1] However, the

[1] Rule 12(b)(6), SCRCP, provides that "failure to state facts sufficient to constitute a cause of action" is a defense in a civil action. Here, there is no evidence in the record that any of the Respondents filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. Moreover, even if Respondents had done so, the circuit court's consideration of matters outside of the pleadings would have converted such a motion into a summary judgment motion. See Rule 12(b), SCRCP ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause

requirements for granting summary judgment are obviously different than the requirements for granting a Rule 12(b)(6) motion to dismiss. For instance, in ruling on a Rule 12(b)(6) motion, the court is confined to the complaint. See Berry, 328 S.C. at 441, 492 S.E.2d at 797 ("A Rule 12(b)(6) motion to dismiss for failure to state a cause of action must be resolved by the trial judge based solely on the allegations established in the complaint.") (emphasis added). In contrast, in ruling on a summary judgment motion, "a court must consider everything in the record-pleadings, depositions, interrogatories, admissions on file, affidavits, etc." Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

In the present case, Husband introduced evidence showing that Broome logged onto Husband's Yahoo email account without authorization by changing Husband's password. He also presented evidence that Broome, without Husband's consent, read and printed emails that were stored in Husband's Yahoo email account. Importantly, at least one court has held that comparable proof was sufficient to withstand a summary judgment motion in a section 2701 action. See Fischer v. Mt. Olive Lutheran Church, Inc., 207 F. Supp. 2d 914, 924-26 (W.D. Wis. 2002) (denying summary judgment to defendants in a cause of action for a violation of section 2701 where evidence was presented to show that defendants logged onto plaintiff's Hotmail account without authorization and printed plaintiff's emails). Because the circuit court was ruling on motions for summary judgment, it was required to consider the evidence presented by Husband. Accordingly, we conclude that the circuit court erred by granting summary judgment to Respondents based merely upon the fact that Husband failed to expressly allege in his complaint that Respondents "obtain[ed], alter[ed], or prevent[ed] authorized access to a

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of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); Berry, 328 S.C. at 441-42, 492 S.E.2d at 798 (holding that, by considering matters outside of the pleadings, the trial court converted a Rule 12(b)(6) motion to dismiss into a summary judgment motion).

wire or electronic communication while it [was] in electronic storage." See 18 U.S.C. § 2701(a) (2006).

## II. Did the circuit court err in holding that the emails were not in "electronic storage" as contemplated by 18 U.S.C. § 2510(17)?

By its terms, section 2701(a) applies only to communications that are in "electronic storage." See 18 U.S.C. § 2701(a) (2006). Section 2510(17) defines "electronic storage" as:

> (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
>
> (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

18 U.S.C. § 2510(17) (2006) (emphasis added).[2] In the present case, Husband contends that the emails in question fell within subsection (B) of section 2510(17) and that the circuit court therefore erred by holding that the emails were not in "electronic storage."[3] We agree.

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[2] The definitions set forth in section 2510 have been incorporated into the SCA. See 18 U.S.C. § 2711(1) (2006).

[3] Several courts have held that the application of subsection (A) of section 2510(17) is limited to communications that have not yet been accessed by their intended recipient. See, e.g., In re DoubleClick, Inc. Privacy Litig., 154 F. Supp. 2d 497, 512 (S.D.N.Y. 2001) ("[I]t appears that [section 2510(17)(A)] is specifically targeted at communications temporarily stored by electronic communications services incident to their transmission—for example, when an email service stores a message until the addressee downloads it."); United States v. Weaver, 636 F. Supp. 2d 769, 771 (C.D. Ill.

In its decision, the circuit court held that the emails in question fell outside the scope of section 2510(17)(B) because: (i) they were not stored by an "electronic communication service" (ECS); and (ii) they were not stored "for purposes of backup protection." As discussed below, we find that the circuit court erred in reaching those conclusions.

### A. Were the emails stored by an ECS?

An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15) (2006). In the present case, the circuit court denied recovery to Husband based in part on its finding that "Plaintiff has not asserted or provided evidence from which to conclude he is an 'electronic communication service.'" Although we agree with the circuit court that Husband is not an ECS, the circuit court framed the issue incorrectly. Specifically, the circuit court should have addressed whether Yahoo was an ECS, rather than whether Husband was an ECS. Here, the emails in question were stored on servers operated by Yahoo. Therefore, the emails were stored "by" Yahoo. See Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 901 (9th Cir. 2008) ("By archiving the text messages on its server, Arch Wireless certainly was 'storing' the messages."), rev'd on other grounds sub nom. City of Ontario v. Quon, No. 08-1332, 2010 WL 2400087 (U.S. June 17, 2010). Although any emails stored by Husband on the hard drive of his computer would not be covered by the SCA,[4] in this case, Broome did not

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2009) ("Because the emails here have been opened, they are not in temporary, intermediate storage incidental to electronic transmission."). Here, as noted above, Broome testified that she never accessed any of Husband's unopened emails.

[4] See, e.g., Hilderman v. Enea TekSci, Inc., 551 F. Supp. 2d 1183, 1204-05 (S.D. Cal. 2008) (holding that emails stored by employee on hard drive of company-issued laptop were not in "electronic storage" as contemplated by the SCA); In re DoubleClick, 154 F. Supp. 2d at 511-13 (holding that computer programs known as "cookies" placed by internet advertising

access the emails in question from Husband's hard drive. Instead, she logged directly onto Yahoo's system and retrieved the emails from there. Accordingly, the relevant issue here is whether Yahoo constitutes an ECS.

Turning to that question, we hold that Yahoo is an ECS. Yahoo unquestionably provides its users with the ability to send or receive electronic communications. Any doubt regarding whether Yahoo constitutes an ECS is removed by the SCA's legislative history, which provides that "electronic mail companies are providers of electronic communication services." S. REP. NO. 99-541, at 14 (1986); see also H.R. REP. NO. 99-647, at 63 (1986) ("An 'electronic mail' service . . . would be subject to Section 2701.").[5]

Wife, however, contends that Yahoo was acting as a "remote computing service" (RCS), rather than an ECS, at the time that the emails were accessed. RCS is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2) (2006).[6] The term refers to "the processing or

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corporation on the hard drives of plaintiffs' computers were not in "electronic storage").

[5] Federal courts have looked to legislative history such as House and Senate Reports in interpreting the SCA. See, e.g., Fischer, 207 F. Supp. 2d at 925-26 (citing Senate Report); In re Nat'l Sec. Agency Telecomms. Records Litig., 483 F.Supp.2d 934, 939 (N.D. Cal. 2007) (citing House and Senate Reports). Additionally, in construing federal statutes, the South Carolina Supreme Court has reviewed congressional reports to glean legislative intent. See White v. S.C. Tax Comm'n, 253 S.C. 79, 85-86, 169 S.E.2d 143, 145-46 (1969) ("Clearly demonstrative of the intent and purpose of Congress in enacting what is now Code Section 2056(b)(4) is the following quotation from Senate Report No. 1013 . . . .").

[6] An "electronic communications system" is "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer

storage of data by an off-site third party." Quon, 529 F.3d at 901; see also Orin S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 Geo. Wash. L. Rev. 1208, 1213-14 (2004) (describing customers of RCS as those that "paid to have remote computers store extra files or process large amounts of data").

In the present case, it is questionable whether Yahoo was providing RCS with respect to the emails in question. For instance, in Quon, the Ninth Circuit held that Arch Wireless, a company providing text messaging services to the city of Ontario, was not an RCS and that Arch Wireless therefore violated the SCA when it disclosed to the city the contents of text messages sent by city employees. Quon, 529 F.3d at 900-03.[7] Nonetheless, even if Yahoo was acting as an RCS with respect to the emails at issue, there is no question that Yahoo was also acting as an ECS with regard to those same emails. Husband's account was still active, and Husband retained the ability to send (forward) any of the emails at issue to someone else. Notably, the House Report for the SCA indicates that, in such situations, the communications would still be protected under section 2701. See H.R. REP. NO. 99-647, at 63 (1986) ("[T]o the extent that a remote computing service is provided through an Electric Communication Service, then such service is also protected [under section 2701].").

Because Yahoo was providing ECS with respect to the emails at issue, this case is distinguishable from Flagg v. City of Detroit, 252 F.R.D. 346 (E.D. Mich. 2008), a case relied upon by Respondents. In that case, the court

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facilities or related electronic equipment for the electronic storage of such communications." 18 U.S.C. § 2510(14) (2006).

[7] This holding was not on review in the U.S. Supreme Court's recent City of Ontario decision in which the Court reversed a portion of Quon. See City of Ontario, 2010 WL 2400087, at *7 (noting that "[t]he petition for certiorari filed by Arch Wireless challenging the Ninth Circuit's ruling that Arch Wireless violated the SCA was denied"). Rather, the issue addressed in City of Ontario was whether the city violated the Fourth Amendment by reviewing the text messages. Id. at *4.

addressed whether text messages stored by a non-party service provider on behalf of the city of Detroit were discoverable in a civil action brought against the city. Id. at 347. The city claimed that disclosure of the text messages by the service provider was barred by section 2702(a) of the SCA, which prohibits RCS entities from knowingly divulging communications maintained on their systems and ECS entities from knowingly divulging communications that are in "electronic storage" on their systems. Id. at 349. The court disagreed with the city, finding that the service provider was acting as an RCS with respect to the text messages and that the city, as the "subscriber," could therefore give its consent to the disclosure of the messages under an exception set forth in section 2702(b)(3). Id. at 363.[8] The court gave the following explanation for its conclusion that the service provider was acting as an RCS:

> [T]he ECS/RCS inquiry in this case turns upon the characterization of the service that SkyTel presently provides to the City, pursuant to which the company is being called upon to retrieve text messages from an archive of communications sent and received by City employees in years past using SkyTel text messaging devices. . . . SkyTel is no longer providing, and has long since ceased to provide, a text messaging service to the City of Detroit—the City, by its own admission, discontinued this service in 2004, and the text messaging devices issued by SkyTel are no longer in use. . . . The Court finds, therefore, that the

[8] Section 2702(b)(3) provides: "A provider described in subsection (a) may divulge the contents of a communication . . . with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service." 18 U.S.C. § 2702(b)(3) (2006). Although, in Flagg, the city did not want to give its consent, the court concluded that the city, as a party to the action, was "both able and obligated to give its consent" so that the city could comply with a request for the production of the text messages under Rule 34 of the Federal Rules of Civil Procedure. 252 F.R.D. at 363 (emphasis added).

> archive maintained by SkyTel constitutes "computer storage," and that the company's maintenance of this archive on behalf of the City is a "remote computing service" as defined under the SCA.

Id. at 362-63.

Here, unlike the situation in Flagg, Yahoo was providing email services to Husband at the time the emails at issue were accessed. Accordingly, Flagg is distinguishable from the present case.

### B. Were the emails being stored "for purposes of backup protection"?

As noted above, to fall within section 2510(17)(B), a communication must not only be stored by an ECS, it must also be stored "for purposes of backup protection." In Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2004), the Ninth Circuit addressed whether previously delivered emails held by an internet service provider (ISP) were stored "for purposes of backup protection" as contemplated by section 2510(17)(B). The court concluded that they were, explaining:

> An obvious purpose for storing a message on an ISP's server after delivery is to provide a second copy of the message in the event that the user needs to download it again—if, for example, the message is accidentally erased from the user's own computer. The ISP copy of the message functions as a "backup" for the user. Notably, nothing in the Act requires that the backup protection be for the benefit of the ISP rather than the user. Storage under these circumstances thus literally falls within the statutory definition.

Id. at 1075.

Like the Ninth Circuit, we believe that one of the purposes of storing a backup copy of an email message on an ISP's server after it has been opened is so that the message is available in the event that the user needs to retrieve it again. In the present case, the previously opened emails were stored on Yahoo's servers so that, if necessary, Husband could access them again. Accordingly, we hold that the emails in question were stored "for purposes of backup protection" as contemplated by section 2510(17)(B).

Respondents nonetheless contend that, because Husband has not claimed that he saved the emails anywhere else, the storage of his emails could not have been for the purposes of backup protection. However, courts interpreting section 2701 have issued rulings that would seem to allow Husband's cause of action in this case. See Cardinal Health 414, Inc. v. Adams, 582 F. Supp. 2d 967, 976 (M.D. Tenn. 2008) ("[W]here the facts indisputably present a case of an individual logging onto another's e-mail account without permission and reviewing the material therein, a summary judgment finding of an SCA violation is appropriate."); Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 555 (S.D.N.Y. 2008) ("The majority of courts which have addressed the issue have determined that e-mail stored on an electronic communication service provider's systems after it has been delivered, as opposed to e-mail stored on a personal computer, is a stored communication subject to the SCA."); Fischer, 207 F. Supp. 2d at 925-26 (rejecting argument that emails stored on Hotmail's system were not in "electronic storage").

Furthermore, we do not find Respondents' argument to be convincing. Under Respondents' construction of the SCA, the unauthorized access of a person's emails from an ECS would be unlawful if the person had previously saved his emails somewhere else, but would be perfectly lawful if the person had not done so. However, such an interpretation would lead to strange results. For instance, a person whose emails were stored solely with an ECS would generally suffer greater harm if someone "alter[ed]" or "prevent[ed] authorized access" to his ECS-stored emails than a person who had saved his emails in additional locations. Yet, under Respondents' construction of the

SCA, only the person in the latter position would be protected. We do not believe that this was what Congress intended.

Indeed, the legislative history of the SCA supports the conclusion that Congress intended for the SCA to apply to the conduct Broome engaged in here. For instance, both the House and Senate Reports state that section 2701 "addresses the growing problem of unauthorized persons deliberately gaining access to, and sometimes tampering with, electronic or wire communications that are not intended to be available to the public." H.R. REP. NO. 99-647, at 62 (1986); S. REP. NO. 99-541, at 35 (1986). Additionally, the Senate Report provides the following illustration of what conduct would constitute a violation of section 2701:

> For example, a computer mail facility authorizes a subscriber to access information in their portion of the facilities storage. Accessing the storage of other subscribers without specific authorization to do so would be a violation of [section 2701].

S. REP. NO. 99-541, at 36. Here, Broome has admitted that she accessed and read, without authorization, Husband's emails that were stored on Yahoo's system. The legislative history of the SCA indicates that Congress intended that such conduct would constitute a violation of section 2701.

### C. Does the SCA apply to emails in a "post-transmission" state?

Respondents also argue for affirmance of the circuit court's decision on the ground that the emails in question were not in "electronic storage" as contemplated by section 2510(17) because they were in a "post-transmission" state. In making this argument, Respondents rely upon Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623 (E.D. Pa. 2001), aff'd on other grounds, 352 F.3d 107 (3rd Cir. 2003). In Fraser, the court addressed whether an employer violated the SCA when it accessed emails of its employee that were stored on the employer's server. Id. at 632. The court held that there was no

violation because the emails were in "post-transmission" storage, meaning that they had already been retrieved by the intended recipient. Id. at 636. The court concluded that the SCA "provides protection only for messages while they are in the course of transmission." Id.

However, the district court's decision in Fraser was subsequently appealed to the Third Circuit, which affirmed on different grounds. See Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107 (3rd Cir. 2003). Specifically, the Third Circuit held that the employer's actions fell within the exception set forth in section 2701(c)(1) because the employer administered the email system and thus was acting as the ECS.[9] Id. at 114-15. Importantly, in reaching that result, the Third Circuit expressed skepticism regarding the district court's ruling that the emails were not in electronic storage, stating:

> [A]ccording to the District Court, the e-mail was in a state it described as "post-transmission storage." We agree that Fraser's e-mail was not in temporary, intermediate storage. But to us it seems questionable that the transmissions were not in backup storage—a term that neither the statute nor the legislative history defines. Therefore, while we affirm the District Court, we do so through a different analytical path, assuming without deciding that the e-mail in question was in backup storage.

Id. at 114 (emphasis added).

Moreover, in Theofel, the Ninth Circuit declined to follow the district court's holding in Fraser, reasoning:

[9] Section 2701(c)(1) provides: "Subsection (a) of this section does not apply with respect to conduct authorized . . . by the person or entity providing a wire or electronic communications service." 18 U.S.C. § 2701(c)(1) (2006).

> In contrast to subsection (A), subsection (B) [of section 2510(17)] does not distinguish between intermediate and post-transmission storage. Indeed, Fraser's interpretation renders subsection (B) essentially superfluous, since temporary backup storage pending transmission would already seem to qualify as "temporary, intermediate storage" within the meaning of subsection (A). By its plain terms, subsection (B) applies to backup storage regardless of whether it is intermediate or post-transmission.

Theofel, 359 F.3d at 1075-76 (emphasis added). Similarly, in Quon v. Arch Wireless Operating Co., Inc., 309 F. Supp. 2d 1204 (C.D. Cal. 2004), the court rejected the contention that the SCA did not apply to emails in a "post-transmission" state, explaining: "Part (B) [of section 2510(17)] states that the storage must be 'for the purpose of backup protection.' Backup protection clearly may be needed after transmission." Id. at 1208. For the foregoing reasons, we decline to follow the district court's decision in Fraser.

Respondents further claim that the legislative history of the SCA supports their position. Specifically, they point to a section of the applicable House Report that states that email messages stored by an RCS should "continue to be covered by section 2702(a)(2)" if left on the server after they were accessed by the user. See H.R. REP. NO. 99-647, at 65 (1986). Respondents appear to contend that this passage demonstrates that Congress intended for opened emails to be covered under section 2702(a)(2), as opposed to section 2701. In Theofel, the Ninth Circuit rejected a similar argument, explaining:

> The cited discussion [from the House Report] addresses provisions relating to remote computing services. We do not read it to address whether the electronic storage provisions also apply. The committee's statement that section 2702(a)(2) would "continue" to cover e-mail upon access supports our

> reading. If section 2702(a)(2) applies to e-mail even before access, the committee could not have been identifying an exclusive source of protection, since even the government concedes that unopened e-mail is protected by the electronic storage provisions.

359 F.3d at 1077 (citations omitted).

We agree with the Ninth Circuit's analysis in Theofel. In our view, it would be too much of a stretch to conclude that the above-referenced passage from the House Report demonstrates that Congress did not intend for section 2701 to apply to opened emails.

### D. Did the circuit court err by granting summary judgment to Wife, Cooke, and BJR?

Alternatively, Wife, Cooke and BJR contend that, even if the emails were in "electronic storage," the circuit court's grant of summary judgment as to them should be affirmed because they did not engage in a violation of section 2701. We agree.

In its order granting summary judgment to Respondents, the circuit court held that "regardless of this Court's findings as to whether any violation of 18 USC § 2701 occurred, Plaintiff cannot obtain any relief or recovery against Defendant Jennings or Defendant Cooke, as Defendant Jennings and Defendant Cooke are not persons who potentially engaged in such alleged violation." Because Husband has not specifically challenged that ruling, it is the law of the case and requires affirmance. See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (holding that an unappealed ruling is the law of the case).

Moreover, we conclude that the circuit court's ruling on this issue was not erroneous. As noted above, Husband claims that Respondents violated section 2701. In order to violate section 2701, a person or entity must, among other things, intentionally access without authorization, or

intentionally exceed an authorization to access, a facility through which an electronic communication service is provided. See 18 U.S.C. § 2701(a) (2006). Civil causes of action for violations of the SCA may be brought pursuant to section 2707(a), which provides:

> Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2707(a) (2006) (emphasis added).

Importantly, section 2707 extends civil liability only to "the person or entity . . . which engaged in [the] violation." 18 U.S.C. § 2707(a) (2006); Tucker v. Waddell, 83 F.3d 688, 691 (4th Cir. 1996). Here, there is no evidence that Wife, Cooke, or BJR accessed Husband's email account. Although Wife disclosed some of Husband's emails to Cooke and BJR, who allegedly used the emails to obtain additional information about Husband's affair, the SCA does not punish such conduct. See Cardinal Health, 582 F. Supp. 2d at 976 ("While [the] SCA punishes the act of accessing a 'facility through which an electronic communication service is provided' in an unauthorized manner, the SCA does not punish disclosing and using the information obtained therefrom."). Accordingly, the circuit court did not err by granting summary judgment to Wife, Cooke, and BJR. See Fischer, 207 F. Supp. 2d at 926 (granting summary judgment to defendants who did not access plaintiff's email accounts); Cardinal Health, 582 F. Supp. 2d at 977-79 (same); see also Freeman v. DirecTV, Inc., 457 F.3d 1001 (9th Cir. 2006) (holding that civil liability under section 2707 does not extend to those who aid, abet, or conspire with a person or entity engaging in a violation of section 2702); Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003) (holding that

an ISP was not liable under sections 2511 and 2520 of the ECPA for aiding and abetting defendants who intercepted and disclosed oral communications).

## III. Did the circuit court err by denying Husband's motion to amend his complaint to add Neal as a party defendant?

Finally, Husband contends that the circuit court erred by not allowing him to amend his complaint a second time to add Neal as a party defendant. We disagree.

Rule 15(a), SCRCP, sets forth the standard for granting motions to amend a pleading. It provides in pertinent part:

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

Rule 15(a), SCRCP (emphasis added). Although leave to amend should generally be "freely given," this court has held that it may be denied where the proposed amendment would be futile. See Higgins v. Med. Univ. of S.C., 326 S.C. 592, 604-05, 486 S.E.2d 269, 275 (Ct. App. 1997).

Here, Husband has not alleged that Neal accessed Husband's email account. Therefore, because liability under the SCA extends only to those who actually engaged in a violation of that act, adding Neal as a party defendant would have been futile. Like Wife, Cooke, and BJR, Neal would have been entitled to summary judgment if he had been added as a defendant.

Accordingly, we conclude that the circuit court did not err in refusing to grant Husband leave to amend his complaint to add Neal as a party defendant.

## CONCLUSION

For the foregoing reasons, we affirm the circuit court's grant of summary judgment as to Wife, Cooke, and BJR, as well as the circuit court's denial of Husband's motion to amend his complaint to add Neal as a party defendant. Additionally, we reverse the circuit court's grant of summary judgment as to Broome and remand the case for further proceedings. Accordingly, the circuit's court's decision is

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

**PIEPER, J., and CURETON, A.J., concur.**