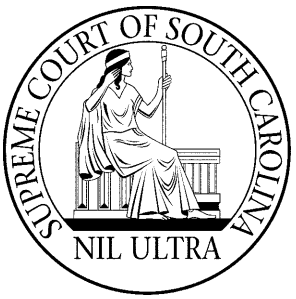

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
June 26, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Jefferson McMillian, III, Respondent.

Appellate Case No. 2013-000936

Opinion No. 27274
Submitted May 28, 2013 – Filed June 26, 2013

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, SC, for Office of Disciplinary Counsel.

William Jefferson McMillian, III, of Goose Creek, SC, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent and have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of any period of definite suspension not to exceed three (3) years. He requests that the suspension be imposed retroactively to February 22, 2013, the date of his interim suspension. *In the Matter of McMillian,* (S.C. Sup. Ct. Order dated February 22, 2013) (Shearouse Adv. Sh. No. 10 at 79). Respondent further agrees to complete the Legal Ethics and Practice Program Ethics School within one (1) year of reinstatement. We accept the Agreement and definitely suspend respondent from the practice of law in this state for three (3) years, retroactive to the date of his interim suspension. Further, respondent shall complete the Legal

Ethics and Practice Program Ethics School within one (1) year of reinstatement. The facts, as set forth in the Agreement, are as follows.

Facts

On March 11, 2013, respondent pled guilty to one (1) count of breach of trust with fraudulent intent, $2,000.00 or less. The conviction arises from respondent's use of his power of attorney to pay personal obligations from his father's checking account. The guilty plea resulted in a fine in the amount of $2,130.00 and court costs, which has been paid.

Law

Respondent admits that by his conduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a) (4) (it shall be ground for discipline for lawyer to be convicted of a crime of moral turpitude or a serious crime).

Conclusion

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law in this state for three (3) years, retroactive to the date of his interim suspension. In addition, respondent shall complete the Legal Ethics and Practice Program Ethics School within one (1) year of reinstatement. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Alice D. Potter, Respondent.

Appellate Case No. 2013-000962

Opinion No. 27275
Submitted May 23, 2013 – Filed June 26, 2013

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Mark Weston Hardee, of The Hardee Law Firm, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or definite suspension not to exceed twelve (12) months. In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of a sanction and to complete the Legal Ethics and Practice Program Ethics School within six (6) months of the imposition of a sanction. Finally, respondent agrees to continue treatment for depression for two (2) years following the imposition of a sanction and to provide quarterly reports of her treatment from her treatment professional(s) to the Commission for the two (2) year period. We accept the Agreement and suspend respondent from the practice of law in this state

for twelve (12) months. In addition, we impose all of the conditions stated above. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

In July 2009, Complainant A retained respondent to pursue a divorce and custody matter against his wife. Complainant A paid the costs of the action and paid respondent $200.00 a month toward the $1,500.00 fee. The fee was fully paid in early 2010.

In May 2010, respondent filed a Summons and Complaint and served the documents on the wife. Complainant A's name was misspelled on most of the documents filed with the Court. Respondent admits she did not correct the misspelling.

A hearing was scheduled for July 27, 2010, but was delayed so that the wife could attend. The hearing was then held on July 29, 2010. Respondent prepared a settlement agreement at Complainant A's direction. Pursuant to the agreement, Complainant A was to receive sole custody of his two children. The Agreement was initialed and signed by both parties and notarized on July 29, 2010. The Agreement was filed with the Court on July 30, 2010.

An Order and Decree of Divorce, prepared by respondent, was not filed until November 1, 2010. Respondent admits she was not diligent in preparing the order. In the order, respondent wrote "[u]nder the terms of the Agreement, Plaintiff and Defendant will share joint custody of the children…" This was contrary to the Agreement itself which clearly stated Complainant A was to receive sole custody of the children. Respondent represents she has now corrected the order to reflect that Complainant A has custody of the children with reasonable visitation by the children's mother.

In early 2011, Complainant A attempted to obtain a hard copy of the Order and Decree of Divorce from respondent. Respondent did not return Complainant A's calls and never mailed a hard copy of the Order to Complainant A. Respondent admits she did not respond to Complainant A's calls and did not send him a hard copy of the Order even though he had requested the Order on several occasions.

Respondent represents she had previously emailed Complainant A a copy of the final Order.

Matter II

Respondent was retained in July 2008 to represent Complainant B in a domestic matter. Respondent failed to keep Complainant B reasonably informed about the status of his case and failed to promptly comply with the client's request for information.

On September 26, 2011, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting a response. Respondent did not respond to the *Treacy* letter or to the Notice of Investigation. Respondent did make an appearance before Disciplinary Counsel and answered questions on the record and under oath.

Matter III

In August 2010, Complainant C retained respondent for a domestic matter. Respondent failed to keep Complainant C reasonably informed about the status of his case and failed to promptly comply with the client's requests for information. Respondent failed to respond to Complainant C's emails, certified mail, and numerous telephone calls for several weeks at a time.

Respondent failed to inform Complainant C of a scheduled pre-trial conference in October 2011. Complainant C learned of the pre-trial conference from the opposing party in the domestic action.

On October 19, 2011, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy, id.*, again requesting a response. Respondent did not respond to the *Treacy* letter or to the Notice of Investigation. Respondent did make an appearance before Disciplinary Counsel and answered questions on the record and under oath.

Matter IV

In March 2011, respondent was retained to represent Complainant D in a domestic matter. Respondent failed to notify the Court or opposing counsel of her representation and failed to file an answer to the Summons and Complaint. As a result Complainant D was served with a "Request for and Notice of Default Hearing and Final Hearing." Complainant D retained new counsel and requested a refund of unearned fees from respondent. Respondent failed to return the unearned fees to Complainant D.

On January 9, 2012, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, again requesting a response. Respondent did not respond to the *Treacy* letter or to the Notice of Investigation.

Matter V

In October 2011, respondent was retained to represent Complainant E in a domestic matter. Respondent failed to keep Complainant E reasonably informed about the status of her case and failed to promptly comply with Complainant E's requests for information. Respondent represents that the matter has now been resolved.

On February 28, 2012, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, again requesting a response. Respondent did not respond to the *Treacy* letter or to the Notice of Investigation.

Matter VI

Complainant F retained respondent to represent her in a custody action. Respondent failed to keep Complainant F reasonably informed about the status of her case and failed to promptly comply with Complainant F's requests for information. Respondent failed to respond to Complainant F's emails and numerous telephone calls.

On March 6, 2012, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen days. Respondent's response was received on June 27, 2012, approximately ninety-eight (98) days past the due date for the response. Respondent represents Complainant F is now being represented by new counsel.

Matter VII

Respondent was retained in August 2010 to represent Complainant G in a domestic matter. Respondent failed to keep Complainant G reasonably informed about the status of her case and failed to promptly comply with Complainant G's requests for information.

On May 2, 2012, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, again requesting a response. After retaining counsel, respondent's response was received by Disciplinary Counsel on July 2, 2012, approximately forty-six (46) days past the due date for the response.

Matter VIII

In March 2010, Complainant H retained respondent for representation in a domestic action. Respondent was paid $3,000 for the representation. Respondent failed to keep Complainant H reasonably informed about the status of her case and failed to promptly comply with the client's requests for information. Respondent failed to respond to her client's telephone calls, text messages, voicemails, and emails. Respondent also failed to diligently represent Complainant H in the domestic action. Complainant H terminated respondent's service by letter dated April 16, 2012, and requested a refund of $2,000 in unearned fees. Respondent refunded the requested amount and provided a letter of apology on or about July 1, 2012.

Matter IX

Respondent ordered deposition transcripts from a court reporting agency on August 30, 2011. Respondent failed to timely pay for the transcripts in spite of

numerous re-billings and letters over a one year period. The amount billed for the transcripts was $ 61.75.

On September 6, 2012, respondent was mailed a Notice of Investigation requesting a response within fifteen days. When no response was received, Disciplinary Counsel attempted to serve respondent with a letter pursuant to *In the Matter of Treacy*, *id*. The *Treacy* letter was returned to the Office of Disciplinary Counsel marked "unclaimed" by the United States Postal Service.

Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.2 (lawyer shall abide by client's decisions concerning the objectives of representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about the status of the matter and promptly comply with reasonable requests for information); Rule 1.15(d) (lawyer shall safekeep client funds and promptly remit to third party funds to which party is entitled); Rule 1.16 (upon termination of representation, lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as refunding any advance payment of fee or expense that has not been earned or incurred); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.1(b) (lawyer shall not knowingly fail to respond to a lawful demand for information from disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits she has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a) (1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We hereby accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law in this state for twelve (12) months.[1] Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission and, within six (6) months of the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School and provide proof of completion of the program to the Commission. For the next two (2) years, respondent shall continue to receive treatment for depression and provide quarterly reports addressing her treatment and prognosis from her treatment professional(s) to the Commission for the two (2) year period. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY KITTREDGE and HEARN, JJ., concur.

[1] In imposing this sanction, the Court is mindful of respondent's disciplinary history which includes an admonition in 2002 and letters of caution in 2007 and 1999. The letters of caution involved client neglect, conduct which is relevant to the misconduct in the current proceeding.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Thomas Ross, Appellant,

v.

Waccamaw Community Hospital, Dr. Webster N. Jones, III, and Dr. David R. Anderson, Defendants,

Of whom, Dr. Webster N. Jones, III, and Dr. David R. Anderson are, Respondents.

Appellate Case No. 2010-155046

Appeal from Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27276
Heard February 21, 2013 – Filed June 26, 2013

REVERSED AND REMANDED

Karl S. Brehmer and L. Darby Plexico, III, both of Brown & Brehmer, of Columbia, for Appellant.

John B. McCutcheon, Jr., and Lisa A. Thomas, both of Thompson & Henry, PA, of Conway, and Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, and Darren K. Sanders, of Buyck and Sanders Law Firm, LLC, of Mt. Pleasant, for Respondents.

JUSTICE KITTREDGE: Section 15-79-125 of the South Carolina Code requires a pre-suit mediation process for medical malpractice claims. The statute further requires that the pre-suit mediation conference be completed within a 120-day period, which may be extended for an additional 60-day period. This appeal presents the question of whether the failure to complete the mediation conference in a timely manner divests the trial court of subject matter jurisdiction and requires dismissal. We hold that the failure to complete the mediation conference in a timely manner does not divest the trial court of subject matter jurisdiction and dismissal is not mandated. We reverse the contrary decision of the trial court and remand for the pre-suit mediation process to be completed.

I.

A.

Section 15-79-125 and the pre-suit mediation conference

As part of the Tort Reform Act of 2005 Relating to Medical Malpractice,[1] the Legislature enacted section 15-79-125 of the South Carolina Code, which requires a medical malpractice plaintiff to file and serve a Notice of Intent to File Suit (Notice of Intent) before the plaintiff may initiate a civil action. S.C. Code Ann. § 15-79-125(A) (Supp. 2012). The Notice of Intent must contain a statement of the facts upon which the plaintiff's claim is based, be accompanied by an affidavit of an expert witness identifying at least one negligent act or omission claimed to exist, and include the standard interrogatories required by the South Carolina Rules of Civil Procedure (SCRCP). *Id*. Filing the Notice of Intent tolls the statute of limitations. *Id*. at § 15-79-125(C).

Following service of the Notice of Intent, the parties are required to participate in a mediation conference. Specifically, subsection (C) provides:

> Within ninety days and *no later than one hundred twenty days* from the service of the Notice of Intent to File Suit, the parties *shall* participate in a mediation conference *unless an extension for no more*

[1] 2005 Act No. 32, § 5, eff. July 1, 2005.

> *than sixty days is granted by the court based upon a finding of good cause*.

Id. § 15-79-125(C) (emphasis added).

Subsection (C) is silent as to the consequences of failing to timely comply with the mediation conference. Subsection (C) does, however, provide that the South Carolina Alternative Dispute Resolution Rules (SCADRR or alternative dispute resolution rules) govern the mediation process, unless the alternative dispute resolution rules are inconsistent with the statute. *Id*. § 15-79-125(C). Regarding enforcement, subsection (D) explicitly recognizes the circuit court's authority to ensure parties comply with the statutory pre-suit mediation requirements. *Id*. §15-79-125(D). Only if the matter cannot be resolved through mediation may a plaintiff thereafter initiate a civil action by filing a summons and complaint. *Id*. §15-79-125(E).

B.

Appellant's allegations of medical malpractice and section 15-79-125

On two separate occasions Appellant John Thomas Ross reported to Waccamaw Community Hospital[2] with severe abdominal pain and was seen by Respondents, Dr. Webster N. Jones and Dr. David R. Anderson. It is alleged that Appellant had a bowel obstruction. Although a CT scan was performed each visit, neither Dr. Jones nor Dr. Anderson recommended that Appellant undergo a follow-up colonoscopy, and each time Appellant's colon condition was allegedly misdiagnosed. Appellant believed Respondents' failure to recommend a colonoscopy and properly diagnose his bowel obstruction amounted to professional negligence. Appellant served a Notice of Intent upon Respondents on November 25, 2008. Therefore, the section 15-79-125 mediation time period of 120 days expired on March 25, 2009.

The parties initially scheduled mediation for March 12, 2009. Due to a subsequent scheduling conflict, however, Appellant's counsel requested that mediation be postponed one week until March 18, 2009—which was within the 120-day period.

[2] Waccamaw Community Hospital is not a party to this appeal.

However, Appellant's counsel was thereafter required to appear for trial of another case on March 18, 2009, and the mediation conference was rescheduled once again, this time for May 20, 2009—outside the 120-day time period.[3] The mediation conference was rescheduled for May 20 with the consent of all involved. None of the parties sought an extension from the circuit court to enlarge the statutory time period, and all parties proceeded as though the mediation would occur, even after the 120-day deadline lapsed.[4]

Nevertheless, six days before mediation was scheduled to take place, Respondents refused to participate, claiming the mediation conference was untimely under section 15-79-125(C) because Appellant failed to seek a sixty-day extension from the circuit court. Specifically, Respondents contended section 15-79-125 is a jurisdictional statute and that, absent a sixty-day extension granted for good cause, a Notice of Intent automatically expires if mediation is not conducted within 120 days of its filing, and the circuit court no longer has jurisdiction to entertain the matter.

Wishing to proceed with the rescheduled conference, Appellant filed a motion to compel the mediation. Appellant contended that nothing in section 15-79-125 deprived the circuit court of jurisdiction if the mediation conference fails to take place within 120 days and that such a reading of the statute would be contrary to the Legislature's intent. Appellant further pointed to subsection (D), which specifically recognizes the circuit court's jurisdiction to enforce the mandatory mediation requirement.[5] Moreover, and also with regard to legislative intent, Appellant cited to the SCADRR, which grant the court wide latitude in enforcing alternative dispute resolution requirements.

Thereafter, Respondents moved to dismiss Appellant's Notice of Intent pursuant to Rule 12(b)(1), SCRCP, reiterating their argument that section 15-79-125 prohibits

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[3] Although this date was outside the 120-day period, it was within the sixty-day extension period available under 15-79-125(C).

[4] For example, defense counsel pursued a subpoena for Appellant's medical records from the Department of Veterans Affairs on April 16, 2009—three weeks past the 120-day deadline.

[5] Section 15-79-125(D) states "[t]he circuit court has jurisdiction to enforce the provisions of this section."

mediation beyond the 120-day deadline and the parties' failure to mediate within the 120-day deadline deprived the circuit court of jurisdiction to enforce the provisions of that statute. Respondents concluded that the trial court was required to dismiss the Notice of Intent. The trial court accepted Respondents' argument in its entirety, granting Respondents' motion to dismiss and denying Appellant's motion to compel the scheduled mediation. In addition, the trial court dismissed not only the Notice of Intent, but also purported to dismiss the underlying medical malpractice action, which had not yet been filed. This appeal followed.

II.

Analysis

Appellant argues the circuit court erred by granting Respondents' motions to dismiss. We agree and hold that the circuit court retained jurisdiction after the expiration of the 120-day mediation period. We further hold that under the facts presented and the motions before the circuit court, the court should have granted Appellant's motion to compel mediation.

"'Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). "It is well-established that 'the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.'" *Id*. (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id*. "It is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that we look beyond the statute's plain language." *Id*. at 536, 725 S.E.2d at 695-96 (citing *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011)).

Further, "statutes in derogation of the common law are to be strictly construed." *Id*. at 536, 725 S.E.2d at 696 (citing *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011)). "Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" *Id*. (quoting *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)). "Statutes subject to this rule include those which 'limit a claimant's

right to bring suit.'" *Id.* (quoting 82 C.J.S. *Statutes* § 535).

Although section 15-79-125(C) provides that the mediation conference should occur within 120 days, the statute is silent as to the consequences of the parties' failure to do so within the prescribed timeframe. Significantly, the General Assembly expressly identified the SCADRR as the governing procedural rules, which favor pretrial dispute resolution in lieu of litigation. *See*, *e.g.*, Rule 1, SCADRR ("These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply."). It is clear that the Legislature enacted section 15-79-125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims.

To accept the view advanced by Respondents would lead to an absurd statutory construction. Specifically, Respondents would have this Court construe section 15-79-125 as a trap for plaintiffs with potentially meritorious claims. Given the pressures of practicing law for even the moderately busy practitioner, completion of the mediation conference in a timely manner will not always be achievable. Respondents' interpretation is ripe for mischief, as defendants could easily thwart timely completion of the mediation conference, and then seek dismissal of the Notice of Intent and reinstatement of the statute of limitations. A mandated penalty of dismissal, as urged by Respondents, for lack of subject matter jurisdiction is fundamentally at odds with the language and purpose of section 15-79-125.

We conclude the time period set forth in section 15-79-125 was not intended to place limitations on the circuit court's subject matter jurisdiction. Indeed, the plain language of subsection (D) refutes such an interpretation, as it unambiguously acknowledges the circuit court's jurisdiction to enforce that section's provisions without limitation. Thus, we hold that failing to comply with the 120-day statutory time period is a non-jurisdictional procedural defect. *C.f. Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93-94, 668 S.E.2d 795, 796 (2008) (noting that the failure to comply with procedural time limits does not affect the circuit court's power to hear and determine cases of the general class to which the proceedings in question belong). We further find that the circuit court retains discretion to permit the mediation process to continue beyond the 120-day time period and may consider principles of estoppel and waiver to excuse noncompliance. *See Mende v.*

Conway Hosp., Inc., 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (finding where both parties agreed to delay trial temporarily and resume proceedings at a later date, the circumstances involved and the defendant's conduct indicated the defendant waived any objection based on the expiration of the statute of limitations).

This is not to say the 120-day time period is meaningless. Indeed, it demonstrates the Legislature's desire that pre-suit mediation takes place expeditiously. And the failure to comply with the 120-day time period could result in dismissal (as the SCADRR provide), but as a function of the court's discretion based on the facts and circumstances, and not as a mandated one-size-fits-all result.[6]

To claim that the statutory time period is a jurisdictional issue is something altogether different, for the Legislature would have used more exacting language had it intended the expiration of the stated time period to forever divest the circuit court of jurisdiction. We find persuasive the opinion of the Supreme Court of Wisconsin, which addressed this very issue.

When presented with a similar situation involving the failure to conduct a pre-suit mediation session within a 90-day statutory time period in a medical malpractice dispute, the Supreme Court of Wisconsin rejected the very argument advanced by Respondents. *Schulz v. Nienhuis*, 448 N.W.2d 655 (Wis. 1989). In *Schulz*, as in this case, mediation was rescheduled at the request of plaintiff's counsel twice due to scheduling conflicts. *Id*. at 656-57. Subsequently, plaintiff's counsel requested that the mediation be rescheduled, but defendants refused to participate, arguing that if no mediation session is held within the statutory period, a claimant loses the right to proceed to trial. *Id*. at 657.

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[6] Rule 10(b), SCADRR, provides:

> If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP.

The Wisconsin Supreme Court rejected that argument, reasoning:

> If the legislature intended the result the defendants urge, it could have expressly stated that a claimant's failure to participate in a mediation session within the statutory mediation period results in dismissal. It did not do so. In the absence of express language, we are unwilling to read the harsh penalty of dismissal of the lawsuit into the mediation statute. The tenor of modern law is to avoid dismissal of cases on technical grounds and to allow adjudication on the merits.
>
> Moreover, strong practical reasons militate against reading the mediation statute as requiring dismissal of the lawsuit if a claimant does not participate in a mediation session within the statutory mediation period. A multitude of events could cause a mediation session to be delayed beyond the statutory period: illness or weather; fixing a date convenient for all parties; the need to appoint different mediators. The defendants' interpretation of [the mediation statute] would mean that a claimant, regardless of fault, would lose all legal redress because the mediation session did not occur within the 90-day period. This interpretation contradicts the legislature's expressed intent of providing an informal, inexpensive, and expedient mediation system.

Schulz, 448 N.W.2d at 658-59 (citations omitted). Accordingly, the Wisconsin Supreme Court reversed the lower court's dismissal of the action and remanded the matter for further proceedings. *Id*. at 659.

We find the reasoning of the *Schulz* court is consistent with this Court's decision in *Grier v. AMISUB of S.C.*, in which we declined to "judicially engraft extra requirements to [section 15-79-125]" that were not plainly included "under the guise of judicial interpretation." 397 S.C at 540, 725 S.E.2d at 698. Although, the "additional requirements" urged in *Grier* were claimed to further legislative intent, the same cannot be said here. Indeed, construing section 15-79-125 to require dismissal if the 120-day mediation period is not met would undermine the Legislature's manifest intent and South Carolina's strong public policy favoring alternative dispute resolution. As noted, given the legislatively designed interrelationship between section 15-79-125 and the SCADRR, we find that judicially engrafting a dismissal mandate into section 15-79-125 would lead to an

absurd result not intended by the Legislature.

III.

In sum, the decision of the trial court was controlled by an error of law, for nothing in section 15-79-125 deprives the circuit court of jurisdiction or mandates dismissal if the parties fail to mediate within the 120-day time period. Rather, the trial court retains jurisdiction to permit the mediation process to continue beyond the 120-day time period, and situations of noncompliance are to be resolved through application of the relevant provisions of the SCADRR. In this case, there is no basis justifying dismissal. Therefore, the circuit court erred in granting Respondents' motions to dismiss and in failing to compel mediation. We reverse and remand the matter to the circuit court for the pre-suit mediation process to be completed.

REVERSED AND REMANDED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kriti Ripley, LLC and Ashley River Properties II, LLC,
Appellants,

v.

Emerald Investments, LLC and Stuart Longman,
Respondents.

Appellate Case No. 2011-201949

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27277
Heard May 1, 2013 – Filed June 26, 2013

REVERSED

William C. Cleveland, of Womble, Carlyle, Sandridge, and Rice, LLP, of Charleston, for Appellants.

Richard S. Rosen, Daniel F. Blanchard, III, and James A. Bruorton, IV, all of Rosen, Rosen, & Hagood, LLC, of Charleston, for Respondents.

JUSTICE HEARN: This case is the culmination of a long and tortured dispute between two members of a limited liability company (LLC) and presents us with the novel issue of foreclosure on a member's interest under the South

Carolina Uniform Limited Liability Company Act.[1] Kriti Ripley, LLC and Emerald Investments, LLC formed Ashley River Properties II, LLC (Ashley River II) for the purpose of developing a parcel of property. Emerald made in-kind contributions for its share in Ashley River II, and Kriti contributed $1.25 million. Immediately, Emerald and its sole member, Stuart Longman (collectively, Respondents), diverted and misappropriated those funds. Upon learning of Emerald and Longman's wrongdoing, Kriti and Ashley River II (collectively, Appellants) procured a judgment against Emerald and Longman, and Emerald was stripped of its voting rights in and management of Ashley River II. Since that time, Emerald and Longman have refused to pay any amount towards the judgment and instead have engaged in a pattern of abusive litigation. Attempting to collect on the judgment, Kriti and Ashley River II obtained a charging order against Emerald's interest and later moved to foreclose on that interest. The circuit court denied the motion for foreclosure, and this appeal followed.

We hold the circuit court committed several errors of law in denying the motion to foreclose. Generally, we find the court improperly considered unavailable remedies as weighing against foreclosure and incorrectly characterized the seriousness of foreclosure. Furthermore, the court failed to consider the relevant factor of the likelihood of satisfaction of the judgment through distributions. Accordingly, we reverse and remand for foreclosure on and the sale of Emerald's interest in Ashley River II.

FACTUAL/PROCEDURAL BACKGROUND

Emerald, a Connecticut LLC managed by Longman, undertook to develop condominiums and a marina on a piece of property in Charleston. The project experienced financial difficulties in 2003, and Emerald turned to Kriti as an outside investor. Kriti is a Delaware LLC of which Davidson Williams is the managing member. Emerald and Kriti entered into an operating agreement under which Emerald became a 70% member and Kriti became a 30% member in Ashley River II. Kriti contributed $1.25 million in capital for its interest, and Emerald contributed the property and permits, together valued at $2.5 million.

The operating agreement states that any dispute arising thereunder is subject to arbitration pursuant to the South Carolina Uniform Arbitration Act.[2] It also

[1] S.C. Code Ann. §§ 33-44-101–1208 (2006).
[2] S.C. Code Ann. §§ 15-48-10–240 (2005 & Supp. 2012).

provides that any dispute must be submitted to arbitration in New York and that the courts of the state of New York have "sole and exclusive jurisdiction." The agreement prohibits the commingling of Ashley River II's funds with other funds and provides that the LLC cannot make any expenditure outside the approved budget attached to the agreement or future budgets approved by the members. Emerald can default under the agreement by taking specified actions, and the remedies Kriti may elect to exercise when Emerald defaults are the forfeiture of Emerald's voting rights, the termination of the project development agreement, and the purchase of Emerald's membership interest for the price of its unreturned capital contribution. Dissolution is provided only upon the occurrence of one of several specified events. Finally, the agreement provides that distributions are to be made by a vote of the members and prohibits distributions if they would cause the LLC to not be able to pay its debts or cause its debts to be greater than its assets.

Immediately upon formation of the LLC, Emerald and Longman diverted Kriti's capital contribution to Longman and other entities controlled by Longman, caused Ashley River II to make payments not on approved budgets, and commingled the contribution with other funds unrelated to Ashley River II. One of the wrongful diversions caused Ashley River II to incur an $84,000 penalty due to a delay in paying a vendor. Additionally, Emerald and Longman failed to disclose to Kriti contracts for the purchase of condominium units and marina slips and the bankruptcy of an entity owned by Longman that was involved in the development.

Emerald continued to manage Ashley River II until January 14, 2005, when Kriti, having discovered Emerald and Longman's wrongful conduct, terminated the development agreement and alleged default under the operating agreement. At that point, Kriti took control of Ashley River II. On March 23, 2005, Kriti and Ashley River II brought an arbitration action in New York (the 2005 Arbitration). They contended Emerald defaulted under the operating agreement and sought damages, forfeiture of Emerald's voting rights, forfeiture of Emerald's interest in the LLC, and alternatively, an order permitting Kriti to buy Emerald's interest for its outstanding capital contributions.

Around the same time, Kriti issued a capital call and informed Emerald that to satisfy the capital call, Emerald would first have to pay Ashley River II the funds at issue in the 2005 Arbitration. Emerald refused to provide the requested capital, and Kriti purportedly reduced Emerald's membership interest to 21.3% according to a formula provided in the operating agreement.

Emerald then counterclaimed in the 2005 Arbitration seeking dissolution of Ashley River II on the grounds Kriti engaged in oppressive conduct towards Emerald, including an improper capital call, frustration of a loan extension, encouragement of litigation against Ashley River II, and improperly refusing an offer to purchase the subject property.

On October 31, 2005, the New York arbitration panel issued an award finding Emerald wrongfully diverted, commingled, and mishandled Ashley River II's funds and failed to disclose material information. As a result, the panel found Emerald had forfeited all voting rights in Ashley River II, the development agreement was validly terminated, Kriti and Ashley River II were entitled to an award of $706,225 consisting of indemnification, legal fees, and arbitrator fees,[3] and Kriti had the option to purchase Emerald's interest in Ashley River II by paying Emerald $2.5 million—the amount of its unreturned capital contributions—within 120 days of the award.[4] The panel concluded that forfeiture of Emerald's membership interest in Ashley River II was not an available remedy because Emerald had probable cause to challenge the capital call.[5] However, the arbitrators did not make any factual findings as to the propriety of the capital call, instead limiting their findings to the probable cause of challenging the capital call. Finally, the panel denied Emerald's counterclaim for dissolution.

Emerald and Longman filed suit in the Charleston County Court of Common Pleas seeking to set aside the 2005 Arbitration award and dissolve Ashley River II

[3] Specifically, the panel found Kriti and Ashley River II were entitled to $400,000 in indemnification from Emerald and Longman for claims made against Ashley River II by third-party vendors, $251,000 for legal fees and disbursements, and $55,225 for administrative and arbitrator fees.

[4] Kriti later attempted to exercise the option to purchase Emerald's interest but was rebuffed, litigation ensued in New York, and the attempt to purchase ultimately failed.

[5] The operating agreement provides that "In the event that [Emerald] shall contest any of the foregoing remedies and shall not prevail, then the Emerald Member shall forfeit all of its Membership Shares in the Company, and the Membership Shares in the Company shall be reallocated between or among the remaining Members on a pro-rata basis . . . ."

(the 2005 Dissolution Suit).[6] As the basis for their claims, the plaintiffs asserted Kriti engaged in the oppressive conduct of making the 2005 capital call, obstructing a loan closing, encouraging litigation against Ashley River II, and declining an offer to purchase the subject property. Kriti and Ashley River II moved to dismiss, and the motion was granted in part and denied in part. The claims to vacate or modify the arbitration award were dismissed on the ground the court lacked jurisdiction because those claims must be brought in New York. The court also dismissed the claim for judicial dissolution, finding that issue had already been decided in the 2005 Arbitration.[7]

Kriti and Ashley River II filed suit in New York (the 2006 Confirmation Suit) for confirmation of the 2005 Arbitration award and an order directing Emerald to transfer its membership interest in Ashley River II to Kriti pursuant to its buyout option under the 2005 Arbitration award. Two days later, Emerald filed suit against Kriti in New York requesting a declaration that Kriti failed to make a proper tender for Emerald's interest in Ashley River II, that Kriti's right to make a tender for Emerald's interest had lapsed, and that Emerald continued to hold a 70% interest in Ashley River II (the 2006 Declaratory Judgment Suit).

In the 2006 Confirmation Suit, the New York court issued an order confirming the arbitration award. The court also denied without prejudice Kriti's request to compel Emerald to transfer its membership interest. On April 29, 2008, Kriti and Ashley River II registered the judgment in the Charleston County Court of Common Pleas. They then brought the instant action for a lien based on that judgment (the Lien Suit). On October 17, 2008, Kriti and Ashley River II perfected a lien on Emerald's distributional interest in Ashley River II through a charging order.

On January 30, 2009, Emerald filed suit in the Charleston County Court of Common Pleas for a determination of its interest in and the dissolution of Ashley River II (the 2009 Dissolution Suit). Specifically, Emerald sought a declaration that it still owned 70% of Ashley River II and dissolution on the ground Kriti had engaged in oppressive conduct. Emerald subsequently filed a demand for arbitration in New York (the 2010 Arbitration), seeking a declaration that Emerald

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[6] A third plaintiff was Ashley River Properties I, LLC, an entity controlled by Longman that was involved in the development.

[7] The sole remaining claim was Ashley River I's claim for a declaration of its rights under the operating agreement.

owned 70% of Ashley River II and that Kriti breached the operating agreement, breached its fiduciary duty, and engaged in waste. As a remedy, Emerald sought the expulsion of Kriti from Ashley River II and damages, or alternatively, the reinstatement of Emerald's voting rights. As a result and by consent order, the 2009 Dissolution Suit was stayed pending resolution of the arbitration.[8]

A New York arbitration panel issued an award in the 2010 Arbitration finding Emerald had a 70% interest in Ashley River II because "the capital call was defective on its face" in "imposing conditions on the application of Emerald's capital contribution which were contrary to the terms of the operating agreement" and, thus, the capital call was "ineffective to trigger a dilution of Emerald's membership interests." However, the panel did not find that the capital call was unnecessary or made with an intent to dilute Emerald's interest. Other than finding the capital call defective, the panel rejected all of Emerald's claims. It found there was no basis to dissociate or dissolve Ashley River II under the operating agreement, Kriti had neither violated the operating agreement nor engaged in corporate waste, and all of Kriti's actions were within its business judgment. It noted that Emerald's claims and evidence were "at best, the observations of Stuart Longman who believed that he could develop the property better."

On February 1, 2011, Kriti and Ashley River II filed the motion at issue here, seeking to foreclose on Emerald's interest in Ashley River II. Attached in support of the motion were Williams' affidavit and as exhibits thereto, the financial statements for Ashley River II for 2008, 2009, and 2010. Shortly thereafter, a second affidavit by Williams was filed with exhibits consisting of the 2010 Arbitration award, a letter from Kriti's counsel to Emerald's counsel offering to confirm the 2010 Arbitration award by consent, a judgment entered by a New York court against Longman on July 10, 1996, and a complaint filed in a Connecticut court against Longman on September 30, 2010.

Williams' first affidavit recounted the procedural history of the case and stated that Kriti and Ashley River II had not recovered anything on their judgment and that it was unlikely Ashley River II would make distributions in the foreseeable future. The financial statements attached showed that from 2008 to

[8] The consent order also dismissed with prejudice the claim for a declaratory judgment as to Emerald's interest based on the parties' agreement to arbitrate that claim. Additionally, the consent order provided that the resulting award in the 2010 Arbitration would be admissible and binding in the 2009 Dissolution Suit.

2010, the members' equity decreased each year—from $1,777,586 in 2008 to $1,219,570 in 2009 and to $1,061,470 in 2010. Additionally, each year the company suffered a loss—$899,498 in 2008, $588,016 in 2009, and $157,432 in 2010. Ashley River II has remained a going concern primarily because of loans Kriti and its affiliated entities have made to the company.

In his second affidavit, Williams recounted the 2010 Arbitration award and informed the court of an outstanding judgment against Longman in New York, an attempt by the judgment creditor to collect on that judgment in Connecticut, and three other suits pending against Emerald or Longman in Connecticut. The appended judgment from New York was entered against Longman personally in 1996 for $1,261,546.88 in actual damages and interest and $2,702,500 in punitive damages for fraud in a real estate transaction. Longman had secretly obtained a mortgage in the name of a corporation, concealed the mortgage from the other shareholder, and used the mortgage proceeds for his own purposes. The 2010 judgment creditor filed suit against Longman, Emerald, and other entities associated with Longman in Connecticut seeking to recover on the 2010 judgment. As of the filing of the Connecticut complaint, the judgment creditor had yet to collect any amount towards the judgment, now totaling $9,017,392.30.

In response to the motion to foreclose, Longman filed his own affidavit with exhibits including Ashley River II's operating agreement, the project development agreement, the 2005 Arbitration award, the 2010 Arbitration award, an appraisal of the underlying property, three offers to purchase the property, and a promissory note executed by Ashley River II in 2006 in favor of Bank of America in exchange for a $9 million loan. In his affidavit, Longman noted that in the 2009 Dissolution Suit Emerald sought dissolution based on "Kriti's persistent mismanagement" of Ashley River II and continues to seek dissolution on that ground. The affidavit also asserted that the financial statements presented by Williams undervalue Ashley River II's real estate holdings, and asserted based on an appended appraisal that the "as is" value for the underlying property is $17.25 million. Longman also stated that Kriti mismanaged Ashley River II by turning down offers to purchase the underlying property, by not selling marina slips as "dockominiums," and by overly indebting the company through the Bank of America loan.

The appraisal submitted by Longman was prepared on behalf of Bank of America as Ashley River II's lender and valued the vacant land "as is" as of September 25, 2009, at $7,720,000. The marina was valued at $9,530,000 if sold as "dockominium" units and $2,340,000 if leased as wet slips.

The first offer to purchase the property was an offer of $14.5 million made by Centex Destination Properties in 2005. However, that offer was for both the property owned by Ashley River II and adjacent property owned by an entity controlled by Longman but in which Kriti had no interest. Kriti declining the offer was raised by Emerald as a ground for relief in the 2010 Arbitration. There, Kriti asserted that it attempted to proceed with the Centex offer, but Emerald refused to agree to place the proceeds in escrow pending a decision in the 2005 Arbitration, and Kriti and Emerald could not agree on an allocation of the proceeds between Ashley River II and the adjacent property owner. The arbitrators found Kriti had not engaged in mismanagement or waste in relation to the offer, but rather properly exercised its business judgment.

Longman also presented a 2007 offer by East Coast Horizons, LLC of $20 million for the property. However, again in the 2010 Arbitration, this issue was raised, Kriti explained that it attempted to accept the offer but the purchaser would not accept the proposed contract, and the arbitrators found there was no mismanagement or waste.

Finally, Longman presented a 2008 offer by Lucorp of $20 million for the property. Again, this issue was raised in the 2010 Arbitration, Kriti explained that Lucorp offered deceptive information and lacked proper references, and the arbitrators found Kriti had not engaged in mismanagement or waste.

A hearing was held on the motions pending in both the Lien Suit and the 2009 Dissolution Suit, and the circuit court entered a brief order denying Kriti's motion to foreclose. The order was devoid of factual findings and contained only the following legal analysis:

> The Uniform Limited Liability Company Act (LLC Act) grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009). In addition to allowing an order of forced dissolution, the statute empowers a court to grant other relief, including ordering the purchase of the shares of any shareholder, either by the corporation or by other shareholders. *See Hendley v. Lee*, 676 F. Supp. 1317 (D.S.C. 1987). Because it is a drastic remedy, foreclosure on a member's distributional interest is discretionary with the Court, not mandatory. *See* S.C. Code Ann. § 33-44-504(b) ("The

court may order a foreclosure lien on a distributional interest subject to the charging order.["])

South Carolina Courts have a long standing [sic] judicial policy to avoid forfeitures. *See National Fire Insurance Company of Hartford v. Brown & Martin Company, Inc.*, 726 F. Supp. 1036 (D.S.C. 1989) (citing *Elliot v. Snyder*, 246 S.C. 186, 143 S.E.2d 374 (1965) ("Forfeitures are not favored in law and Courts will seize upon even slight evidence to prevent one.")). *See also South Carolina Tax Commission v. Metropolitan Life Insurance Company*, 266 S.C. 34, 221 S.E.2d 522 (1975) ("both in law and equity forfeitures are abhorred.").

In the present case, foreclosure may not be the appropriate remedy. The previously issued charging order is sufficient to protect the judgment creditors' interests and the debtor has presented evidence that the debt could be satisfied without the necessity of a forced sale of its distributional interest. The Plaintiff's Motion to Foreclose Judgment Lien is denied.

This appeal followed.[9]

ISSUES PRESENTED

I. Is the denial of the motion for foreclosure appealable?

II. Did the circuit court err in denying the motion to foreclose?

LAW/ANALYSIS

I. APPEALABILITY

Respondents argue the denial of a motion to foreclose on a charging order lien is not immediately appealable and this appeal should therefore be dismissed. We disagree.

[9] Subsequently, Kriti had the 2010 Arbitration award confirmed by a New York court. Also, a bench trial was held in the 2009 Dissolution Suit and the circuit court found "no evidence forming a sufficient basis for dissolution" and denied Emerald's request for dissolution.

Generally, only final judgments are appealable, unless a statute provides an exception. *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). Section 18-9-10 of the South Carolina Code (2012) provides that "an appeal may be taken to the Supreme Court or the court of appeals in the cases mentioned in Sections 14-3-320 and 14-3-330." In turn, Section 14-3-330 of the South Carolina Code (1976) provides in pertinent part:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> > (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by the original process or removed there from any inferior court or jurisdiction, and final judgments in such action . . .
> >
> > (2) An order affecting a substantial right in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action . . .
> >
> > (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment . . .

While section 14-3-330 states it applies to "law cases," we have recognized it as applicable in equity cases as well. *See Ex parte Wilson*, 367 S.C. 7, 12 n.2, 625 S.E.2d 205, 207 n.2 (2005).

The denial of Kriti's motion for foreclosure, while it also likely satisfies other subsections of section 14-3-330, was unquestionably a final judgment. A final judgment is an order that "'dispose[s] of the cause, . . . reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined.'" *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41–42, 21 S.E.2d 209, 212 (1942) (quoting 2 Am. Jur. 860 § 22). Here, the only relief requested or available in the action was the issuance of a charging order and foreclosure upon the lien.

Once foreclosure was denied, the action was over and nothing was left to be done. Therefore, as a final judgment, the order is immediately appealable.

II. FORECLOSURE

Appellants argue the circuit court erred in denying its motion for foreclosure by considering other remedies under the LLC Act, construing foreclosure as a drastic remedy, and characterizing foreclosure as a forfeiture. Appellants further contend the court erred in denying foreclosure on the facts of this case. We agree.

Appellants obtained a charging order and sought to foreclose under Section 33-44-504 of the South Carolina Code (2006) which provides:

> (a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order.
>
> (b) A charging order constitutes a lien on the judgment debtor's distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. A purchaser at the foreclosure sale has the rights of a transferee.
>
> . . .
>
> (e) This section provides the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor's distributional interest in a limited liability company.

Foreclosure being an equitable claim, the decision to grant or deny foreclosure under section 33-44-504(b) is equitable. *See Wilder Corp. v. Wilke*, 324 S.C. 570, 576, 479 S.E.2d 510, 513 (Ct. App. 1996) ("Actions for foreclosure or the cancellation of instruments are actions in equity."), *aff'd* 330 S.C. 71, 497 S.E.2d 731 (1998). Accordingly, an appellate court reviewing a decision to grant or deny foreclosure under section 33-44-504(b) may find facts in accordance with

its own view of the preponderance of the evidence. *See Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

A. Consideration of Other Remedies under the LLC Act

Appellants first contend the circuit court erred by considering other provisions of the LLC Act as providing alternative remedies weighing against foreclosure on the charging order. The court broadly stated that other remedies existed under the LLC Act and specifically mentioned forced dissolution or the compelled purchase of the shares of any shareholder. Those considerations constituted an error of law because the other provisions of the LLC Act were not available remedies, and thus, were irrelevant. Appellants confirmed their judgment, obtained a charging order, and sought foreclosure not as members of an LLC, but as judgment creditors. Their status as judgment creditors did not give them the legal right to seek dissolution or other relief under the LLC Act. Moreover, even considering their status as an LLC and a member of the LLC, respectively, the fact that they were judgment creditors did not give them a right to any remedies under the LLC Act, other than those provided in section 33-44-504. As that section provides, it is the "exclusive remedy" for a judgment creditor seeking to satisfy a judgment through the debtor's interest in an LLC. In short, there were no other available remedies, and the circuit court's conclusion that the availability of other remedies weighed against ordering foreclosure was an error of law.

B. Foreclosure as a Drastic Remedy

Appellants also contend the court committed an error of law when it considered foreclosure to be a "drastic remedy." We agree.

Foreclosure is certainly a more drastic remedy than simply charging a member's distributional interest in an LLC. *See 91st St. Joint Venture v. Goldstein*, 691 A.2d 272, 283 (Md. Ct. Spec. App. 1997) (stating that foreclosure on a charging order is a "more drastic method" of recovering on a debt than a charging order). However, generally, foreclosure is not a drastic remedy. It is a remedy commonly used around the country when a charging order on a debtor's interest in an entity alone will not result in payment of a judgment. *See, e.g.*, *Nigri v. Lotz*, 453 S.E.2d 780 (Ga. Ct. App. 1995); *Fed. Deposit Ins. Corp. v. Birchwood*

Builders, Inc., 573 A.2d 182 (N.J. Super. Ct. App. Div. 1990).[10] It is also a remedy routinely used in this state for the satisfaction of debts. Moreover, the statute provides no indication that foreclosure is "drastic" or only to be used in extreme circumstances. A judgment creditor has a right to collect on his judgment, and characterizing the remedy of foreclosure as drastic wrongly implies that in order to foreclose on a charging order a debtor must make some showing beyond the simple necessity of foreclosure.

C. Foreclosure as Forfeiture

Appellants further contend the circuit court erred as a matter of law when it considered foreclosure to be a form of forfeiture and thus, disfavored. Again, we agree.

We have defined a forfeiture as "that which is lost, or the right to which is alienated, by a crime, offense, neglect of duty, or breach of contract," and went on to make clear that forfeiture is a "penalty." *Tate v. LeMaster*, 231 S.C. 429, 442, 99 S.E.2d 39, 46 (1957). Similarly, Black's Law Dictionary defines a forfeiture as: "1. The divestiture of property without compensation. 2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty. . . . 3. Something (esp. money or property) lost or confiscated by this process, a penalty." Black's Law Dictionary 677 (8th ed. 1999).

Foreclosure is not a penalty, but rather is simply the ultimate remedy for collection of a debt owed. Foreclosure on an LLC member's interest does not divest the member of the interest without compensation or cause him to lose his interest. The member simply has a debt that must be paid. Furthermore, the member can avoid the foreclosure by paying the judgment.

D. Denial of Foreclosure

Finally, setting aside the circuit court's errors of law, appellants assert the circuit court erred in denying foreclosure. We agree.

As an equitable matter, the decision whether to grant foreclosure under section 33-44-504 requires consideration of the totality of the circumstances in

[10] These cases deal with charging orders against partnership interests under the Uniform Limited Partnership Act and Uniform Partnership Law, rather than LLC interests. However, that distinction is immaterial here.

each individual case. *See, e.g.*, *Carroll v. Page*, 264 S.C. 345, 349, 215 S.E.2d 203, 205 (1975) (holding that in "an action in equity . . . 'the equities of both sides are to be considered, and each case must be decided on its own particular facts.'" (quoting 30 C.J.S. *Equity* § 89)). However, the primary, and usually determinative, factor for a circuit court to consider is whether the judgment will be paid within a reasonable amount of time through distributions. *See Nigri*, 453 S.E.2d at 783 ("[T]he further step of ordering a sale may be considered appropriate where it is apparent that distributions under the charging order will not pay the judgment debt within a reasonable period of time."); *Birchwood Builders*, 573 A.2d at 185 ("If the court is convinced the creditor's claim will not be satisfied in a reasonably expedient manner by diverting the debtor's income from the partnership to satisfy the debt, then sale should be ordered."). In short, if a judgment will not be paid through distributions in the reasonably foreseeable future, then foreclosure usually should be ordered.

Here, the circuit court failed to make any findings as to whether the judgment would be satisfied in the foreseeable future through distributions, and therefore, erred in denying foreclosure. Moreover, had the circuit court considered whether the judgment would be satisfied through distributions, it could only have found that distributions would not be made in the foreseeable future. At the time the motion to foreclose was denied, the charging order had been in existence for two years and eight months and had yielded no funds towards satisfaction of the judgment. The *only* evidence presented as to Ashley River II's financial health were the financial statements for 2008, 2009, and 2010.[11] Those statements showed the equity in the company was shrinking each year as the liabilities steadily grew. The company only remains able to pay its debts due to loans made by Kriti and affiliated entities. In that situation and without a capital infusion, distributions not only would not be expected, they would not be permissible under the operating agreement. Furthermore, Kriti can hardly be expected to make a capital contribution when Emerald continues to impede the company's business at every turn. Finally, we find no evidence that Kriti has managed the company so as to avoid making distributions.

[11] While Longman presented evidence—the Bank of America appraisals—challenging the property values contained in those financial statements, the appraisals are irrelevant to whether the company was losing money and unable to make distributions.

Rather than considering the availability of distributions, the circuit court found the "charging order is sufficient to protect the judgment creditors' interests and the debtor has presented evidence that the debt could be satisfied without the necessity of a forced sale of its distributional interest." This seems to indicate the court believed the judgment could be paid through the sale of the property and resulting distributions or through dissolution. However, in part for reasons already stated, those considerations are improper. Kriti and Ashley River II bear no obligation to forego what they believe to be a potentially profitable business venture in order to aid Emerald and Longman in paying their debt. If Kriti and Ashley River II believe the development of the property can still be made to turn a profit, they are free to pursue that goal.

While Emerald and Longman have protested for years, not only in this litigation but also in collateral litigation, that Kriti has acted inequitably and this weighs against ordering foreclosure, we find the opposite to be true. Emerald and Longman have attempted to game the system in order to avoid any consequences for their wrongful acts while at the same time trying to make a profit at Kriti and Ashley River II's expense. On the other hand, throughout the events underlying this case, Kriti has repeatedly been found to have acted appropriately. Most notably, in the 2010 Arbitration, Emerald and Longman presented all of the allegations of wrongful conduct by Kriti that they present here, and the arbitrators denied their claims finding that Kriti had consistently acted within its business judgment. Again, in Emerald and Longman's most recent attempt, the 2009 Dissolution Suit, the court found that Kriti had not engaged in any misconduct. Additionally, Kriti tried to give Emerald a way out of Ashley River II without the loss of any of its capital contribution by offering to purchase Emerald's interest pursuant to the 2005 Arbitration award, but Emerald refused. Also, it bears repeating that Emerald and Longman find themselves in this position because of their wrongful acts. In conclusion, contrary to Emerald and Longman's assertions, to the extent the parties' conduct is relevant to the decision whether to grant foreclosure, we find it weighs against Emerald and Longman.

CONCLUSION

For those reasons, we hold the circuit court erred in denying the motion for foreclosure. Accordingly, we reverse and remand for the foreclosure on and sale of Emerald's interest in Ashley River II through the normal foreclosure process and without further delay.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J, concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cathy C. Bone, Respondent,

v.

U.S. Food Service and Indemnity Insurance Company of North America, Petitioners.

Appellate Case No. 2010-171946

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27278
Heard November 13, 2012 – Filed June 26, 2013

AFFIRMED

Carmelo Barone Sammataro and Michael E. Chase, both of Turner, Padget, Graham & Laney, of Columbia, for Petitioners.

John S. Nichols and Blake Alexander Hewitt, both of Bluestein, Nichols, Thompson & Delgado, of Columbia, for Respondent.

Grady Larry Beard and Nicolas Lee Haigler, both of Sowell, Gray, Stepp & Lafitte, of Columbia; and Kirsten Leslie Barr, of Trask & Howell, of Mount Pleasant, for Amicus Curiae.

JUSTICE BEATTY: This is a workers' compensation case concerning the appealability of a circuit court order of remand. The employee, Cathy Bone ("Bone") filed a claim for an injury she alleged arose out of and in the course of her employment on June 26, 2007. The employer, U.S. Food Service, and its carrier, Indemnity Insurance Co. of North America (collectively, "Petitioners"), disputed the claim. The single commissioner and an Appellate Panel of the South Carolina Workers' Compensation Commission issued orders denying the claim. Under the procedure then in place, Bone appealed to the circuit court, which concluded the injury was compensable and remanded the matter to the Commission for further proceedings.[1]

Petitioners appealed the circuit court's order, and the Court of Appeals dismissed the appeal on the basis the order was not a "final judgment" and thus not immediately appealable because further proceedings were ordered before the administrative agency. *Bone v. U.S. Food Service*, S.C. Ct. App. Order dated June 30, 2010. This Court granted Petitioners' petition for a writ of certiorari to review the decision of the Court of Appeals, and we affirmed. *Bone v. U.S. Food Service*, 399 S.C. 566, 733 S.E.2d 200 (2012).

We subsequently granted a petition for rehearing filed by Petitioners, and we additionally granted the following two motions: (1) Bone's motion to argue against precedent, and (2) the motion of the South Carolina Defense Trial Attorneys' Association to accept its Amicus Curiae Brief in support of Petitioners. After considering the record in this matter, as well as the briefs and arguments, we adhere to our original decision to affirm.

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[1] This case arose under prior law that required an appeal from the Commission to be made first to the circuit court. Such appeals are now directed to the Court of Appeals for all injuries occurring on or after July 1, 2007. S.C. Code Ann. § 42-17-60 (Supp. 2012); *Pee Dee Reg'l Transp. v. S.C. Second Injury Fund*, 375 S.C. 60, 650 S.E.2d 464 (2007).

I. FACTS

Cathy C. Bone filed a workers' compensation claim form (Form 50) dated August 7, 2007 alleging that she injured her back on Tuesday, June 26, 2007 while employed with U.S. Food Service. Her job consisted of power washing and cleaning the insides of truck trailers that transported food. Bone alleged that she hurt her back when she lifted two pallets inside a trailer to clean underneath them.

According to Bone, she did not report the incident immediately as she needed to continue working and believed she would be okay, but she thereafter developed increasing pain. On her way to work on Tuesday, July 3, 2007, Bone's vehicle developed a flat tire, and she called in to advise her office of this fact. Shortly after she arrived at work on July 3, Bone orally reported to one of her supervisors, Richard Thompson, that she had suffered an injury while working on June 26.

Petitioners (the employer and carrier) denied Bone's claim, disputing that she had injured her back on June 26 and asserting the injury had occurred, instead, when her tire was changed on July 3.

At the hearing in this matter, Bone testified that she did not physically change the tire herself; rather, she had pulled off the road and a gentleman in the parking lot of a nearby business had changed the tire for her. In contrast, Bone's supervisor, Thompson, testified that Bone was crying as she reported her injury on July 3 (which Bone conceded, explaining she was in a lot of pain). In addition, he recalled that Bone had told him that "she had to change her tire on her truck," which he interpreted to mean that she had personally changed the tire, and Bone never stated anyone had changed it for her. Bone disagreed with this interpretation as well as with the exact wording of her statement to Thompson. The supervisor did not dispute the fact that Bone had reported that her back injury occurred on June 26 as a result of lifting the pallets in the trailer.

The single commissioner found Bone failed to meet her burden of showing that she had sustained an injury by accident arising out of and in the course of her employment. The Appellate Panel of the Commission upheld the single commissioner's findings and conclusions in full.

The circuit court reversed. The circuit court stated, "The Commission denied the claim finding Claimant did not suffer an on the job injury, ostensibly finding Claimant injured her back while changing her tire on July 3. However, a review of the records shows no evidence to support this finding."

The circuit court noted Petitioners "do[] not contest the existence or the degree of [Bone's] injury" and that "[t]he sole issue is when [her] injury occurred." The circuit court stated Bone gave consistent statements to Petitioners and to physicians that her injury occurred on June 26 and "there is absolutely no evidence in the record, let alone substantial evidence, that Claimant injured her back while changing a tire on the way to work on July 3, 2007." The circuit court noted Petitioners had argued that the supervisor's testimony that Bone reported having a flat tire on her way to work and having to change it, which the supervisor interpreted to mean she did it herself, together with the single commissioner's finding that Bone was not credible, supported the decision below. However, the circuit court stated the finding regarding credibility "goes only to the weight afforded [Bone's] testimony and in no way establishes [that her] injury occurred on July 3."

The circuit court concluded:

> The evidence of record shows Claimant sustained a compensable injury. There is absolutely no evidence to the contrary. When the evidence is susceptible of only one inference, then [the] question is one of law for the Court. As such, as a matter of law, the Decision and Order of the Workers' Compensation Commission is hereby REVERSED and REMANDED to the Commission for proceedings consistent with this Order.

Petitioners appealed to the Court of Appeals. Bone moved to dismiss the appeal on the ground the circuit court's order was not immediately appealable. The Court of Appeals agreed and dismissed the appeal, finding the order remanding the matter to the Commission for further proceedings did not constitute a "final judgment" and thus was not immediately appealable, citing, *inter alia*, *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 52, 446 S.E.2d 618, 618 (1994) (stating our courts "have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable") and *Charlotte-Mecklenburg Hospital Authority v. South Carolina*

Department of Health & Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010) (explaining that the general appealability statute, S.C. Code Ann. § 14-3-330(1) (1976), allowing appeals of intermediate orders "involving the merits," did not apply to appeals involving administrative agencies, which were governed by a different statutory scheme). *Bone v. U.S. Food Service*, S.C. Ct. App. Order dated June 30, 2010.

This Court granted Petitioners' petition for a writ of certiorari to review the determination of the Court of Appeals and affirmed. *Bone v. U.S. Food Service*, 399 S.C. 566, 733 S.E.2d 200 (2012). The Court subsequently granted Petitioners' petition for rehearing as well as Bone's motion to argue against precedent and the motion of the South Carolina Defense Trial Attorneys' Association to accept its Amicus Curiae Brief in support of Petitioners.

II. LAW/ANALYSIS

The Administrative Procedures Act (APA) was enacted in 1977 and "purports to provide uniform procedures before State Boards and Commissions for judicial review after the exhaustion of administrative remedies." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). The APA establishes the standard for judicial review of decisions of the Commission. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010); *Lark*, 276 S.C. at 135, 276 S.E.2d at 306; *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003).

Under section 1-23-380(A) of the APA, "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case[2] is entitled to judicial review . . . ." S.C. Code Ann. § 1-23-380(A) (Supp. 2007). "An agency decision which does not decide the merits of a contested case . . . is not a final agency decision subject to judicial review . . . ." *S.C. Baptist Hosp. v. S.C. Dep't of Health & Envt'l Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987). "A preliminary, procedural, or intermediate

[2] Section 1-23-380 originally provided for review by the circuit court, but it was amended in 2006 to direct appeals to the Court of Appeals. The workers' compensation statutory amendment making this change (§ 42-17-60) was not enacted until 2007 and applies to injuries on or after July 1, 2007, which is after the date of Bone's accident.

agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. § 1-23-380(A).

In this case, the Commission denied Bone's claim in toto, and all parties agree the Commission's order was a final decision subject to initial appellate review in the circuit court because it disposed of the entirety of Bone's claim. However, the order under review by this court is the Court of Appeals's dismissal of the appeal of the circuit court's order that reversed the Commission and remanded the matter. The circuit court found that the Commission erred as a matter of law. Neither the Commission nor the circuit court addressed the severity of Bone's injury, whether or not she had reached MMI, or if she should be provided medical treatment. No award of any kind was made.

It is patently clear that the order from the circuit court remanding the matter to the Commission is not a final order. However, a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. S.C. Code Ann § 1-23-380(A). Petitioners have an adequate remedy in that they may raise the issue of compensability on appeal of a final award.

Petitioners argue that the lack of an order awarding benefits to Bone is irrelevant. Petitioners posit that the circuit court's conclusion that Bone's injury is compensable as a matter of law is tantamount to a final judgment and is immediately appealable.

Section 1-23-390 of the APA, governing further appellate review, provides: "An aggrieved party may obtain a review of a *final judgment* of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases." S.C. Code Ann. § 1-23-390 (Supp. 2012) (emphasis added).[3] At issue here is the meaning of a "final judgment" under section 1-23-390.

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[3] The phrase "in the manner provided by the South Carolina Appellate Court Rules as in other civil cases" simply refers to following the same procedures for briefing schedules, preparation of records, etc., as in other civil cases, and these rules do not supersede the APA provisions.

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "When a statute's language is plain and unambiguous and conveys a clear and definite meaning, the court has no right to impose another meaning." *Regions Bank v. Strawn*, 399 S.C. 530, 541, 732 S.E.2d 230, 236 (Ct. App. 2012). "When 'the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself.'" *Id.* at 542, 732 S.E.2d at 236 (citation omitted).

On its face, the statute refers to a "final judgment," which is a well-established term of art in the law to which great significance is attached. *See Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942) (holding if a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment); *see also Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010) ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." (citing *Good*)).

The Court of Appeals dismissed Petitioners' appeal of the ruling of the circuit court, which found Bone's claim was compensable and ordered a remand to the Commission for further proceedings in light of this initial determination. The dismissal was based on the fact that there was no "final judgment" as required by section 1-23-390 of the APA. We agree that the order remanding the matter to the Commission for further proceedings before entry of a final award was an intermediate judgment that did not dispose of the entirety of the action leaving nothing else for determination, nor did it terminate the proceedings, as articulated in *Charlotte-Mecklenburg*.

Charlotte-Mecklenburg concerned the interpretation of S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2009), which allows judicial review only from "final decisions" of the ALC. 387 S.C. at 266, 692 S.E.2d at 894. The Court there reasoned that appeals in administrative agency matters are governed solely by the APA, not by the general appealability statute of section 14-3-330(1), which permits review of "[a]ny intermediate judgment" involving the merits. *Id.* The Court stated the concepts applicable in general appeals were not applicable under the

APA, as specialized statutes prevail over more general statutes. *Id.* In doing so, the Court specifically overruled both ALC *and* workers' compensation cases to the extent they applied this concept of "involving the merits" under section 14-3-330. *Id.* (overruling *Canteen v. McLeod Reg'l Med. Ctr.*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) and *Oakwood Landfill, Inc. v. S.C. Dep't of Health & Envt'l Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009)).

We apply this reasoning in concluding that the meaning of a "final judgment" as used in section 1-23-390 is not defined by using the exceptions that are present in the general appealability statute, whether or not the statute is specifically referenced.

In doing so, we also rely upon the long-standing precedent of *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994), which involved an appeal from an order of the circuit court remanding the case to the Commission. This Court dismissed the appeal in *Montjoy* on the basis the circuit court's order was not directly appealable under the "final judgment rule" of the predecessor statute of section 1-23-390, which is substantially the same as the version applicable here. *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618. In *Montjoy*, the Court observed that "we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." *Id.* The Court's order provides in full as follows:

> This appeal is from an order of the circuit court remanding this case to the Workers' Compensation Commission. Respondent moves to dismiss the appeal on the ground the order is interlocutory and not directly appealable. We agree and dismiss the appeal.
>
> S.C. Code Ann. § 1-23-390 (1986) provides:
>
> > An aggrieved party may obtain a review of any final judgment of the circuit court under this article by appeal to the Supreme Court. The appeal shall be taken as in other civil cases.
>
> Accordingly, we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable. *Owens v. Canal*

> *Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984); *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983). To the extent our recent decision in *Blakely v. State Board of Medical Examiners*, 310 S.C. 29, 425 S.E.2d 37 (1993), may be read to allow such an appeal, it is hereby overruled.

Id. at 52-53, 446 S.E.2d at 618.

Petitioners contend *Montjoy* did not specify the circumstances for the remand, so the cases that were string-cited in *Montjoy* are illustrative of the circumstances under which an appeal will lie.[4]

In contrast, we view the Court's failure in *Montjoy* to identify the nature of the remand as indicative that this was not a determinative factor. As we stated in *Charlotte-Mecklenburg*, the general appealability statute allowing appeals from decisions "involving the merits" has no place in the APA, which established a different appellate scheme.

In any event, a review of the record reveals that the underlying circumstances in *Montjoy* support our conclusion. In *Montjoy* the claimant sought workers' compensation benefits for the death of her husband, who she contended

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[4] In *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984), the Court held that a circuit court order remanding a workers' compensation case for the taking of additional testimony on the existence of an employer-employee relationship did not involve the merits of the action and was, therefore, interlocutory and not reviewable by the Supreme Court for lack of finality. Neither section 1-23-390 nor any other provision of the APA was cited, nor the general appealability statute.

In *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983), which was also cited in *Montjoy*, the Court considered an appeal by the employer from an order of the circuit court reversing and remanding the case to the Commission to take additional medical testimony from the claimant. The Court stated that, because the interlocutory order did not involve the merits of the action, it was not reviewable for lack of finality. Again, the Court did not reference section 1-23-390, the APA, or the general appealability statute, but did overrule prior cases that could be construed as authorizing such appeals under the same circumstances. The cases overruled were all cases that predated the APA.

died of lung cancer as a result of exposure to asbestos at his workplace. Prior to any award of benefits, a hearing was held to determine the date of the husband's last exposure and the proper insurance carrier for coverage. The single commissioner determined the date of last asbestos exposure and identified the appropriate insurer. The Commission reversed. On appeal, the circuit court vacated the Commission's order and remanded the matter to the Commission for further action. The circuit court, Judge Jackson V. Gregory presiding, found that the Commission erred by considering evidence outside of the record. The employer and insurer appealed and argued that the remand order affected the merits and a substantial right as the Commission would be allowed to consider evidence from unrelated cases as long as this evidence is included in the record.

It is noteworthy that this Court apparently found that the assertion of the employer and insurer that the circuit court's order "involved the merits and affected a substantial right" was irrelevant. This Court's opinion made no mention of their assertion that the circuit court's order involved the merits and affected a substantial right. This Court simply decided that the matter was remanded to the agency; consequently, it was not immediately appealable.

In their petition for rehearing, Petitioners seek a "case-by-case analysis of finality" rather than "a rigid and formulaic approach that mandates dismissal of any interlocutory appeal . . . ."[5] Petitioners essentially ask that we ignore the clear wording of section 1-23-390, which requires a "final judgment." This Court's jurisprudence is in accord with the definition of a final judgment found in Black's Law Dictionary. It defines a final judgment as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs . . . and enforcement of the judgment." *Black's Law Dictionary* 919 (9th ed. 2009).

Petitioners assert the circuit court's determination that the injury was compensable "constituted a final determination of the rights of the parties and left nothing to be done by the Commission on remand other than execute the judgment." To the contrary, there is no enforceable judgment at this stage as the Commission is tasked with further obligations in determining the extent of Bone's compensation and in setting forth a final award that constitutes an executable

[5] We believe the reference to an "interlocutory appeal" is a tacit recognition that there is a lack of finality.

judgment. An order as to compensability, without addressing the claimant's current medical status and specific benefits to be awarded, is not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment.[6]

Petitioners attempt to distinguish *Charlotte-Mecklenburg* and *Montjoy*, arguing there are cases since *Montjoy* that have applied the "involving the merits" language. However, these are cases arising post-APA that apply a pre-APA appealability analysis of whether the order "involves the merits." For example, many of the cases purporting to allow an appeal involving the merits stem from a reliance on pre-APA cases such as *Chastain v. Spartan Mills*, 228 S.C. 61, 65, 88 S.E.2d 836, 837 (1955).[7] The *Chastain* Court properly found the order in that appeal was interlocutory and not appealable, but it used "affecting the merits" language that was correct at the time, but which did not survive the adoption of the

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[6] *See generally Fisher v. E.I. Du Pont de Nemours*, 282 S.E.2d 543 (N.C. Ct. App. 1981) (stating where the North Carolina Industrial Commission had determined the claimant had suffered a compensable injury by accident, but had not yet determined an award of compensation although it entered an order for costs, the appeal was premature; the court stated since the award of compensation the plaintiff is entitled to receive had not been determined, no final award had been entered for purposes of appellate review); *see also Sign Plex v. Tholl*, 863 So. 2d 1113 (Ala. Civ. App. 2003) (stating a judgment determining only the compensability of an injury, but which contains no provision specifying the amount of compensation, was not a final judgment for purposes of appeal).

[7] *Chastain v. Spartan Mills*, 228 S.C. 61, 65, 88 S.E.2d 836, 837 (1955) (holding the Commission's order reversing an award and remanding the case to the single commissioner to take further testimony was not final and not appealable to the circuit court until the Commission's final determination regarding the single commissioner's award; the Court construed the language in a provision of the Code that states appeals from the Commission to the circuit court "shall be 'under the same terms and conditions as govern appeals in ordinary civil actions'" and stated an appeal to the circuit court will not lie from an interlocutory order of the Commission unless it "affects the merits" (citation omitted)). However, the Court did not cite to any specific provisions for this standard.

APA. Later cases, primarily from the Court of Appeals, as noted by the dissent, continued to repeat this concept, however.

For example, in *King v. Singer Co.*, 276 S.C. 419, 420, 279 S.E.2d 367, 367 (1981), this Court held that a circuit court order reversing a determination of the Industrial Commission that the hearing commissioner erred in failing to submit the case to a medical board was not immediately appealable because it "is a matter not affecting the merits of the cause of action." In so ruling, the Court cited both *Chastain* and S.C. Code Ann. § 14-3-330 (1976) for this standard. *Id.* As noted in *Charlotte-Mecklenburg*, however, any reliance on section 14-3-330 and its concepts is inappropriate in APA matters.

In addition, in *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), the Court of Appeals found the Appellate Panel's order reversing the hearing commissioner's finding of compensable brain damage involved the merits and was, therefore, immediately appealable. In support of this standard of "involving the merits," the Court of Appeals in *Canteen* did not specifically cite to section 14-3-330; however, it did cite a case for this proposition that, in turn, cited *Chastain*. *Id.* at 621, 682 S.E.2d at 505-06 (citing *Green v. City of Columbia*, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993)). *Canteen* was overruled by this Court in our *Charlotte-Mecklenburg* decision.

Petitioners assert the concept of allowing appeals from intermediate judgments involving the merits has always been applied in these cases, and some cases do not appear to specifically rely upon section 14-3-330. Although some cases do not explicitly cite to section 14-3-330, they often fail to cite to any supporting authority for the application of this standard. In addition, we overruled *Canteen* even though it did not specifically reference section 14-3-330, as it relied upon its concepts. We find it would be inconsistent to declare that section 14-3-330's standard of "involving the merits" does not apply to APA cases, while simultaneously allowing the same concept of "involving the merits" to be applied by simply asserting the statute is not being relied upon. Under any name, the end result is the same. To impose a changeable definition of a "final judgment," in the absence of a statutory directive to do so, would create more, rather than less, uncertainty in appellate practice in this area.

Petitioners would have us conflate the statutorily-required appellate procedure for actions governed by the APA with the general appellate procedure

for civil actions. This would create a hybrid appellate process within the APA where immediate appealability is determined not by finality of judgment, but by the agency that issued the challenged order. If the order originates from the Workers' Compensation Commission final judgment is irrelevant; however, if it originates from any other agency, finality of judgment is dispositive. Petitioners' position imposes an unwarranted complication in the appellate process for administrative matters and would serve only to delay the final resolution of cases. Petitioners misapprehend the policy interest at play here. The legislative policy expressed in section 1-23-390 is intended to avoid the undue delay and waste of judicial resources caused by interlocutory appeals.

The dissent and Petitioners repeatedly make reference to Court of Appeals cases that utilized the pre-APA "affecting the merits" language. A case from the Court of Appeals, *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), cites to *Montjoy* and *Montjoy*'s reference to *Owens* and *Hunt*, all cases from this Court. However, these cases are distinguishable. Although the "affecting the merits" language was used, each of those cases was remanded to take additional evidence. Therefore, they were clearly interlocutory and did not affect the merits.

More importantly, the dissent and Petitioners overlook our reference in *Montjoy* to *Blakely v. State Board of Medical Examiners*, 310 S.C. 29, 425 S.E.2d 37 (1993). We specifically said that *Blakely* was overruled to the extent that it may be read to allow an appeal of a circuit court order remanding a case for additional proceedings. *Montjoy*, 316 S.C. at 52-53, 446 S.E.2d at 618. In *Blakely*, the Board of Medical Examiners had issued a final order suspending Blakely, fined him $2,500, and required him to complete additional continuing medical education and pass the Special Purpose Examination. *Blakely*, 310 S.C. at 30, 425 S.E.2d at 38. Blakely appealed to the circuit court, which remanded the case to the Board with instructions. *Id.* at 30-31, 425 S.E.2d at 38. The Board failed to follow the circuit court's instructions and instead issued an amended order. *Id.* Four months later, Blakely moved to compel compliance with the court's first order of remand. *Id.* at 31, 425 S.E.2d at 38. The circuit court granted Blakely's motion to compel and the Board appealed. *Id.* Although this Court denied Blakely's motion to dismiss the appeal[8] we said:

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[8] The motion to compel in *Blakely* was construed as an appeal of the Board's second order. As such it was untimely.

> We also note the Board should have appealed the first order of the circuit court, as it is apparent from the record the Board did not agree with the circuit court's order. Because the orders were *not interlocutory* orders and not timely appealed, the orders became the law of the case.

Id. at 31-32, 425 S.E.2d at 39 (emphasis added).

The circuit court's remand orders in *Blakely* undoubtedly affected the merits of the case. The import of the *Blakely* reference in *Montjoy* is that, contrary to the *Blakely* Court, this Court in *Montjoy* wanted it understood that, although the circuit court orders were not interlocutory, they were not immediately appealable because the circuit court's orders remanded the case to the Board. That being said, *Montjoy* makes it clear that the only relevant question here is whether or not the case has been remanded to the administrative agency. In the current appeal, all parties agree that it was. Therefore, the order of remand is not appealable. *Montjoy*'s reference to *Blakely* also makes it clear that the fact that the circuit court heard the matter in its appellate capacity is irrelevant and does not change the analytical framework.

Petitioners and the South Carolina Defense Trial Attorneys' Association[9] lastly argue it is "unfair" and "inequitable" to allow a claimant to receive benefits while the matter is pending on appeal, since there is no stay of an award applicable here. *See* S.C. Code Ann. § 42-17-60 (Supp. 2012) ("In the case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined in accordance with the provisions of this title."); Rule 241(b)(7), SCACR (stating the general rule that a notice of appeal acts to automatically stay matters decided in the order does not apply to "[w]orkers' compensation awards as provided in S.C. Code Ann. § 42-17-60"). Petitioners' allegation of unfairness is both unfounded and unpersuasive.

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[9] The Association has filed an Amicus Curiae Brief in support of Petitioners.

Petitioners, however, do not address the opposite result, i.e., what happens when a claimant is denied benefits and is made to wait during the pendency of appeals by their employer and the insurance carrier, when the ultimate determination is made that the claimant suffered a compensable injury for which medical care and benefits were wrongfully withheld? The claimant may receive interest after the fact, per S.C. Code Ann. § 42-17-60, but there is no provision for medical support during this time. Claimants and employers are treated the same depending upon who prevails before the Commission. Moreover, there has been no definitive, enforceable award entered in this case. That is the point being made here.

The legislature, in using a well-known term of art such as "final judgment," meant exactly what "final judgment" has always been understood to mean: something that finally disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to execute the judgment, which comports with the definition in *Charlotte-Mecklenburg*.

If the legislature did not then or no longer intends this result, it is free to amend the specific language it chose to use and can allow appeals in other circumstances, including those specified in section 14-3-330. Until there is a definitive statement to the contrary from the legislature, however, it is arguably more equitable not to deny workers their benefits in these circumstances since the legislature clearly intended awards to continue during appeal, per S.C. Code Ann. § 42-17-60, as is also recognized by Rule 241(b)(7), SCACR. Moreover, a "case-by-case" determination, as urged by Petitioners, would frustrate the main goals of both the workers' compensation scheme, which is to streamline the process for providing benefits to injured workers in exchange for the employee's release of the employer from tort liability, and that of the APA, which is to provide clear and uniform procedures in agency cases.

III. CONCLUSION

In agency appeals, the APA is controlling over general provisions that conflict with its terms. In this case, there is a specific statute in the APA that governs appeals in administrative cases, section 1-23-390, and it limits appeals to those from final judgments. Therefore, section 14-3-330, a general appealability statute allowing interlocutory appeals in certain instances, and its concepts are not applicable here. The definition of a "final judgment" used in *Charlotte-*

Mecklenburg, as further detailed in the reference to Black's Law Dictionary incorporated in this opinion, should be the point of reference in any analysis of that term when applying section 1-23-390. Consequently, we affirm the decision of the Court of Appeals, which found the current order remanding the matter to the Commission for further proceedings does not constitute a final judgment as required by section 1-23-390 and, therefore, is not immediately appealable.

AFFIRMED.

TOAL, C.J., concurs. PLEICONES, J., concurring in result only. HEARN, J., dissenting in a separate opinion, in which KITTREDGE, J., concurs.

JUSTICE HEARN: I respectfully dissent. While I agree that Section 1-23-390 is the controlling statute, I do not agree that the circuit court's order resolving the issue of compensability was not a final order from which a further appeal could be taken.

To begin, I agree with the majority that the APA governs appealability in administrative cases, which means the general rules of appealability do not apply. The APA provides appealablilty standards for two different stages of appeals: from the administrative body to the judiciary and further appellate review within the courts. This case involves only the latter, which is controlled by section 1-23-390. I also agree that the heart of this case is what the words "final judgment" in section 1-23-390 mean, but I disagree with the majority's interpretation of that term. In my view, the test which has heretofore been applied to determine whether an appellate decision is a "final judgment" eligible for further review under section 1-23-390 is whether the order finally determines an issue affecting a substantial right on the merits. The circuit court order under review in this case is just such an order.

The first time we expressly interpreted this statute was in *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994). At the time that case was decided, section 1-23-390 read: "An aggrieved party may obtain a review of any final judgment of the circuit court under this article by appeal to the Supreme Court. The appeal shall be taken as in other civil cases." S.C. Code Ann. § 1-23-390 (1986). Under this standard, which is similar to the present version of section 1-23-390, "we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618 (1994).

Because the scope of the remand in *Montjoy* is not apparent from the opinion, it is necessary to examine the two workers' compensation cases relied on therein in order to fully understand the parameters of its holding: *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983), and *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984).[10] In both *Hunt* and *Owens*, the circuit court remanded to the full commission for the taking of additional testimony. We held that neither order was reviewable by this Court because they did not involve the merits of the action and were therefore interlocutory.

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[10] Section 1-23-390 was passed into law in 1977. *See* 1977 Act No. 176, Art. II, § 9. Accordingly, even though they do not cite this statute, *Hunt* and *Owens* were governed by it.

The circuit court order in this case, however, unlike the orders in *Hunt* and *Owens*, resolved the issue of compensability with finality and was clearly appealable, just as the full commission's order, which was also a final decision on compensability, was appealable by Bone in the first instance. Both parties conceded at re-argument that upon remand, the full commission will have no alternative but to make an award to Bone, the circuit court having reached the ultimate issue in the case—whether Bone suffered a compensable injury. Nevertheless, Bone has stunningly succeeded in arguing to the majority that while she was entitled to appeal the full commission's decision to the circuit court, once the circuit court reversed the commission's finding of no compensability, the order was transformed into an unappealable order and the employer is precluded from appealing further until after the remand results in an award to Bone. I cannot accept the premise that by reversing the commission on a factually-driven issue and remanding, an appellate court—in this instance the circuit court—can cut off further review up the appellate chain. If Bone could appeal the full commission's decision against her on the issue of compensability, then surely the employer is entitled to appeal the circuit court's order reversing that finding. In other words, appealability, once established, should not be extinguished by one level of appellate review; appealability should not be a moving target.

I would argue a bright line rule is not only impermissible under the statutory framework and *Charlotte-Mecklenburg*, but also is not necessary. In the years since *Montjoy*, the court of appeals had many opportunities to evaluate appealability under section 1-23-390. In particular, the court of appeals examined the issue at length in *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005). There, Brown, a worker in a cotton mill, developed breathing problems after years of service. *Id.* at 383, 622 S.E.2d at 549. Although he also smoked cigarettes for forty-five years, he claimed the respiratory troubles he developed were caused by his work in the mill. *Id.* at 382, 622 S.E.2d at 548. Despite the evidence to the contrary, the single commissioner concluded Brown's "respiratory disease arose out of and in the course of his employment; said disease was due to hazards of the employment which are excess of hazards normally incident to normal employees." *Id.* at 384, 622 S.E.2d at 550. The full commission affirmed. *Id.* at 385, 622 S.E.2d at 550. The circuit court, however, held Brown's smoking was a contributing cause of his illness, and therefore the mill was entitled to a reduction in the compensation it owed. *Id.* at 386, 622 S.E.2d

at 550. Accordingly, the circuit court remanded for a determination of the size of the reduction. *Id.*

Brown appealed, and the mill argued the order remanding to the commission was not immediately appealable. *Id.* at 386, 622 S.E.2d at 550-51. The court of appeals, citing section 1-23-390, *Montjoy*, *Owens*, and *Hunt*, held that "in determining whether the court's order constitutes a final judgment, we must inquire whether the order finally decides an issue on the merits." *Id.* at 387, 622 S.E.2d at 551. As the court went on to note, "'An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case.'" *Id.* (quoting *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993)). Because the circuit court finally determined that Brown's smoking contributed to his injuries, its order was a final judgment under section 1-23-390 and therefore was appealable. *Id.* at 388, 622 S.E.2d at 551. The fact the circuit court had also remanded the proceedings was of no moment because "the panel would have no choice but to allocate some part of Brown's disability to the non-compensable cause." *Id.* As both parties conceded at re-argument, this is precisely the situation facing the commission upon remand here.

The court of appeals reached the same result in *Mungo v. Rental Uniform Service of Florence, Inc.*, 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009). In that case, the claimant, Mungo, alleged a change in condition that would entitle her to more benefits than she originally was awarded for her injuries. *See id.* at 276, 678 S.E.2d at 828. The single commissioner denied her request because the report she used to show a change in condition was completed prior to the original hearing. *Id.* The full commission affirmed, and Mungo appealed to the circuit court. *Id.* The court reversed, holding the report could be considered and Mungo had demonstrated a change in condition. *Id.* at 276-77, 678 S.E.2d at 828. Accordingly, the court remanded to the commission for a determination of "the precise benefits owed to [Mungo] for her change in condition and for her psychological condition." *Id.* at 277, 678 S.E.2d at 828-29.

The employer sought review before the court of appeals, and the threshold question was whether the circuit court's order was appealable. *Id.* at 277, 678 S.E.2d at 829. Relying in part on *Brown*, the court found it was appealable, stating:

> The circuit court's order mandates an award for change of condition . . . . This ruling is a decision on the merits because it decides with finality whether [Mungo] proved these changes in her condition. Although the circuit court remanded the issue of the precise damages to be awarded to [Mungo], the single commissioner would have no choice but to award some damages to [her]. Accordingly, the circuit court's order constitutes a final decision and is appealable.

Id. at 278, 678 S.E.2d at 829.

The court of appeals also has used this same framework to determine when an order of the circuit court is *not* appealable. For example, in *Foggie v. General Electric Corp.*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), the circuit court held the full commission's finding of permanent total disability rested, at least in part, on evidence which should have been excluded. *Id.* at 387, 656 S.E.2d at 397. The court also found the commission did not make any findings regarding a potential credit to the employer for previous psychological injuries the employee sustained. *Id.* at 387-88, 656 S.E.2d at 397. Consequently, the court remanded with instructions for the commission to review the record without the excluded evidence and determine whether the employee was still permanently and totally disabled, and to make findings regarding the employer's entitlement to the credit. *Id.*

The employee appealed, and the court of appeals held the circuit court had not made a final determination of whether the employee was totally and permanently disabled or whether the employer could receive any credit. *Id.* at 389, 656 S.E.2d at 398. Accordingly, the circuit court's order was not immediately appealable. *Id.*; *see also McCrea v. City of Georgetown*, 384 S.C. 328, 333, 681 S.E.2d 918, 921 (Ct. App. 2009) ("The circuit court's order was not a final judgment and did not involve the merits of the case. The circuit court remanded the case to the Commission so that additional evidence could be entered into the record without determining whether Claimant was disabled or whether Employer was entitled to stop payments. As such, this appeal is interlocutory.").

Accordingly, prior to today, the test consistently applied in this State to determine whether an appellate decision was eligible for further review under section 1-23-390 was whether the order finally determined an issue affecting a substantial right on the merits. Under that framework, there could be little question that employer is entitled to appeal the circuit court's decision that there was no

evidence to support the full commission's conclusion that Bone was not injured on the job because that decision affected a substantial right on the merits—Bone's entitlement to benefits. However, rather than applying this traditional test, the majority holds that *Charlotte-Mecklenburg* rejected the "involving the merits" analysis under the APA and implicitly overruled a long line of cases. While I believe *Charlotte-Mecklenburg* was properly decided, it has no impact on this case.

In *Charlotte-Mecklenburg*, the Administrative Law Court (ALC) partially granted summary judgment and remanded for the Department of Health and Environmental Control to decide whether any party was entitled to a certificate of need.[11] 387 S.C. at 266, 692 S.E.2d at 894. One of the parties appealed the ALC's order, and we dismissed the appeal as interlocutory. *Id.* The controlling statute in *Charlotte-Mecklenburg* was not section 1-23-390. Instead, it was Section 1-23-610 of the South Carolina Code (Supp. 2011), which provides "for judicial review of a final decision of *an administrative law judge*."[12] (emphasis added). We defined a final decision in this context as follows:

> If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.

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[11] In order to obtain permission to construct certain healthcare facilities, the facility must demonstrate the need for the proposed facility. *See* S.C. Code Ann. § 44-7-110, *et seq.* (2002 & Supp. 2011).

[12] The statute governing appeals from the Workers' Compensation Commission is Section 1-23-380 of the South Carolina Code (Supp. 2011), a sister statute of section 1-23-610, which similarly provides that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." I agree with the majority that *Charlotte-Mecklenburg*'s interpretation of section 1-23-610 applies equally to section 1-23-380.

Charlotte-Mecklenburg, 387 S.C. at 267, 692 S.E.2d at 894-95 (internal citations omitted). Because the ALC's order did not finally determine whether any party was entitled to a certificate of need, the order under review was not a final decision and thus not immediately appealable.[13] *Id.* at 267, 692 S.E.2d at 895.

The majority therefore is correct that *Charlotte-Mecklenburg* rejected an "involving the merits" analysis *with respect to administrative and agency decisions*. *See id.* at 266, 692 S.E.2d at 894 ("[A]lthough § 14-3-330 permits appeals from interlocutory orders which involve the merits, that section is inapplicable in cases where a party seeks review of a decision of the ALC because the more specific statute, § 1-23-610, limits review to final decisions of the ALC."). *Charlotte-Mecklenburg* therefore examined a different statute and a different stage in the appellate process for administrative cases. Rather than determining whether an order of the circuit court sitting in an appellate capacity or the court of appeals is ripe for further review up the appellate chain, *Charlotte-Mecklenburg* only concerned whether the *administrative* order itself is final and therefore appealable to the judicial branch in the first instance. It went no further than that, and I believe the majority is in error in stretching it's holding beyond the clearly delineated bounds of the opinion. Indeed, the opinion in *Charlotte-Mecklenburg* was issued without either briefing or oral argument; it was issued solely on the basis of a motion to dismiss and supporting memoranda. It is inconceivable that we could have intended to undo years of appellate precedent, not to mention impact the appealability of orders at an entirely different stage in the proceedings.

Put in the context of this case, *Charlotte-Mecklenburg* governs the appealability of the full commission's decision, not the appealability of the circuit

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[13] In reaching this result, we overruled two cases "to the extent [they] rely on [Section 14-3-330 of the South Carolina Code (1976)] to permit the appeal of interlocutory orders of the ALC or an administrative agency." *Charlotte-Mecklenburg*, 387 S.C. at 266, 692 S.E.2d at 894. The cases were *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) and *Oakwood Landfill, Inc. v. South Carolina Department of Health & Environmental Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009). Both of these cases concerned the initial appeal of an administrative order, not further appellate review of an order of the circuit court. *See Canteen*, 384 S.C. at 624, 682 S.E.2d at 507; *Oakwood*, 381 S.C. at 132, 671 S.E.2d at 653.

court's order reviewing the commission's decision. Because the full commission found Bone's claim was not compensable, it rendered a final judgment and the circuit court could entertain the appeal under *Charlotte-Mecklenburg*. At this point, appealability ceased to be governed by *Charlotte-Mecklenburg* and was then controlled by section 1-23-390. Thus while I believe that *Charlotte-Mecklenburg* is correct, given its procedural posture, I do not believe it has any impact on the case before us.

The majority also suggests its decision will not only further judicial economy but also serve the Workers' Compensation Act's underlying purpose of affording compensation to injured workers. The majority asserts that, as between the two parties, the employer is in a better position to shoulder the payment of benefits during the pendency of an eventual appeal. That position misses the point that the Act is designed to provide benefits to workers *who are injured on the job*, a fact which the employer disputes and which the full commission decided in its favor. No employer should have to pay benefits until the worker establishes before the fact-finder, which is the full commission, that she has sustained a compensable injury. Bone simply has not done that yet, and it cannot be good public policy to require employers to pay benefits without the issue of compensability of the claim being finally adjudicated. The employer is entitled, not only under the law, but also on public policy grounds, to have the circuit court's order on compensability reviewed by the highest court. It is neither good law nor good policy to hold that the appellate chain can be broken when, at the first layer of appellate review, the court reverses the fact-finder and sends the case back for the commission to perform the perfunctory task of setting compensation for the worker.

Moreover, the interests of judicial economy demand a rejection of the majority's view. Taken to its logical conclusion, the majority's position could have cases trapped in a cycle of remands for years. In this case, once the full commission renders a decision on the benefits owing to Bone, the parties will return again to the court of appeals. In doing so, the employer runs the risk that the court of appeals will again remand the case, at which point it will have to start the process all over again. Only after that court issues its "final" order—assuming it finds nothing else warranting a remand—will the employer finally be able to argue to this Court that the full commission correctly held Bone's claim was not compensable back in June of 2008.

Because I believe the issue of compensability was finally decided by the full commission and the circuit court, sitting in an appellate capacity, could not thwart

further appellate review by ordering a remand, I would find the order appealable under section 1-23-390. *See Mungo*, 383 S.C. at 278, 678 S.E.2d at 829 ("Although the circuit court remanded the issue of the precise damages to be awarded to Claimant, the single commissioner would have no choice but to award some damages to Claimant. Accordingly, the circuit court's order constitutes a final decision and is appealable."); *Brown*, 366 S.C. at 387-88, 622 S.E.2d at 551 (holding circuit court's order that apportionment was required was final and appealable even though the court remanded for a determination of the amount of apportionment due). Nothing in *Charlotte-Mecklenburg* impacts this decision; rather, it results from a straight-forward application of section 1-23-390, which permits an appeal from a final decision involving the merits of the substantive issue in this case. I would hold that the court of appeals erred in dismissing the employer's appeal.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lawton Limehouse, Sr., Respondent,

v.

Paul H. Hulsey and The Hulsey Litigation Group, LLC, Petitioners.

Appellate Case No. 2011-196246

and

Lawton Limehouse, Jr., Respondent,

v.

Paul H. Hulsey and The Hulsey Litigation Group, LLC, Appellants.

Appellate Case No. 2010-151573

Appeals From Charleston County
Daniel F. Pieper, Circuit Court Judge
Roger M. Young, Circuit Court Judge

Opinion No. 27279
Heard March 6, 2013 – Filed June 26, 2013

REVERSED, VACATED, AND REMANDED

A. Camden Lewis, Keith M. Babcock, and Ariail Elizabeth King, all of Lewis Babcock & Griffin, LLP, of Columbia; Robert H. Hood and James Bernard Hood, of Hood Law Firm, LLC, of Charleston, Deborah Harrison Sheffield, of Columbia, John K. Weedon, of Hinshaw & Culbertson LLP, of Jacksonville, FL, for Petitioners and Appellants.

Frank M. Cisa, of The Law Firm of Cisa & Dodds, LLP, of Mt. Pleasant, for Respondents.

JUSTICE BEATTY: Lawton Limehouse, Sr. ("Father") and Lawton Limehouse, Jr. ("Son") separately sued Paul Hulsey, an attorney, and Hulsey's law practice (collectively, "Hulsey") for defamation arising out of statements Hulsey made regarding L&L Services, LLC ("L&L"), a staffing agency owned and operated by Father and Son. Hulsey removed the case to federal court based on an underlying RICO action[1] involving the operation of L&L. The federal court remanded the case to state court on the ground it lacked federal question jurisdiction over the issues presented. After the remand, the state court clerk of court entered a default against Hulsey.

Following a damages hearing, a jury awarded Father $2.39 million in actual damages and $5 million in punitive damages. The Court of Appeals affirmed. *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011). While the appeal in Father's case was pending, a damages hearing was held for Son's case. A jury awarded Son $1 million in actual damages and $2.6 million in punitive damages.

This Court granted Hulsey's petition for a writ of certiorari to review the opinion of the Court of Appeals. Subsequently, this Court issued an order certifying the appeal in Son's case pursuant to Rule 204(b), SCACR. Because the dispositive issue in each case is identical, we consolidated the matters for oral

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[1] "RICO" is an acronym for the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C.A. §§ 1961-1968.

argument and for the purpose of this opinion.[2] As will be discussed, we find the state court proceedings are void as the lack of a certified remand order precluded the state court from resuming jurisdiction over the cases. Accordingly, we reverse the decision of the Court of Appeals, vacate the state court proceedings, and remand to the circuit court to recommence the cases from the procedural point at which the state court received a certified remand order from the federal court.

I. Factual/Procedural History

Father and Son owned and operated an employment staffing agency known as L&L Services, LLC, which was located in Charleston County. Between February 11, 2004, and February 24, 2004, *The Post and Courier* published four articles concerning housing raids performed on homes rented by L&L and fines assessed for overcrowding, inadequate heating and plumbing, and running illegal boarding houses. On Sunday, March 21, 2004, *The Post and Courier* published a front page article entitled, "The Hidden Economy, Local company accused of trafficking in illegal immigrant labor." Several of L&L's employees were interviewed and quoted in the article. The employees admitted they were undocumented and accused L&L of selling them false citizenship documents and failing to pay for overtime work.

On April 23, 2004, Hulsey filed a class action lawsuit in federal court on behalf of former employees of L&L, alleging violations of the RICO Act and other state and federal laws (the "RICO case"). Hulsey named Father, Son, and L&L as defendants in the RICO case. In the Complaint, it was alleged that defendants hired undocumented workers and exploited them under the threat of deportation by failing to pay overtime wages, manufacturing and providing false identification and immigration documents and reports, and harboring them in substandard housing.[3]

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[2] *See* Rule 214, SCACR ("Where there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order the appeal to be consolidated.").

[3] The RICO case was never certified as a class action and ultimately settled for $20,000.

On April 24, 2004, *The Post and Courier* printed an article entitled, "Lawsuit Targets Staffing Agency." The article quoted Hulsey as stating:

(1) L&L engaged in a "classic racketeering scheme";
(2) L&L's conduct set "the community back 150 years";
(3) L&L engaged in "a blatant case of indentured servitude"; and
(4) L&L "created a perfect racketeering enterprise, just like Tony Soprano."

Neither Father nor Son was mentioned by name in the article. Evidence was presented that the estimated readership for *The Post & Courier* on April 24, 2004 was 237,952.

On April 19, 2006, Father and Son, separately but with identical pleadings, initiated the current defamation action against Hulsey in state court, alleging the statements in the article were false and damaged their reputation, health, and business. Hulsey's law practice was served with a copy of the Complaint on April 20, 2006, and Hulsey was served individually on April 21, 2006. On May 5, 2006, before Hulsey's Answer was due in state court, Hulsey filed a notice of removal to federal district court. On June 2, 2006, Father and Son filed a motion to remand the cases to state court.

By order dated July 19, 2006, the federal district court remanded the cases to state court on the ground that federal question jurisdiction was not present. The federal court electronically transmitted the order to counsel on July 20, 2006; however, the electronic copy was neither manually embossed nor did it contain an electronic seal. The Charleston County Clerk of Court received an uncertified copy of the remand order on July 21, 2006, which it filed the same day. On July 27, 2006, the clerk mailed notice of the filing to the parties.

On August 21, 2006, Father and Son moved for entry of default in state court on the ground Hulsey failed to timely file an Answer to the Complaint. The Charleston County Clerk of Court entered default on August 21, 2006, and filed it on August 22, 2006. The clerk mailed the Form 4 order to all parties on August 24, 2006, noticing the entry of default. On August 29, 2006, upon receipt of the Form 4 order, Hulsey filed an Answer and a motion to set aside the entry of default pursuant to Rule 55(c), SCRCP. Following a hearing, then Circuit Court Judge Daniel F. Pieper issued a written order denying the motion.

On February 4-6, 2008, Circuit Court Judge Roger M. Young presided over the damages hearing involving Father's case. Because Hulsey was deemed in default, Judge Young limited Hulsey's participation in the hearing to cross-examination and objection to Father's evidence. The jury returned a verdict against Hulsey for $2.39 million in actual damages and $5 million in punitive damages. On February 15, 2008, Hulsey filed several post-trial motions, including a motion to dismiss for lack of subject matter jurisdiction after discovering the Charleston County Clerk of Court had not received a certified copy of the remand order from the federal court. Following a hearing, Judge Young denied Hulsey's post-trial motions. Hulsey appealed to the Court of Appeals.

In a divided opinion, the Court of Appeals affirmed. *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011). In so ruling, the majority held: (1) the circuit court had subject matter jurisdiction over the action upon remand as the mailing of a certified order is a procedural, rather than jurisdictional, requirement; (2) Judge Pieper properly denied Hulsey's motion to set aside the entry of default as Hulsey's explanation for the untimely Answer did not support a finding of good cause; (3) Judge Young properly limited Hulsey's participation in the damages hearing to cross-examination and objection to Father's evidence; (4) Judge Young did not comment on the facts of the case when he responded to a question posed by the jury during deliberations; (5) Judge Young properly submitted to and instructed the jury on the issue of punitive damages; and (6) the award of punitive damages was supported by the evidence. *Id.* at 60-80, 723 S.E.2d at 217-28.

In contrast, the dissent found the circuit court was without jurisdiction over the proceeding as the federal court's failure to mail a certified copy of the remand order precluded jurisdiction from re-vesting in the state court. *Id.* at 81, 723 S.E.2d at 228-32. Alternatively, the dissent believed Judge Pieper erred in ruling on Hulsey's motion to set aside the entry of default in light of this Court's decision in *Sundown Operating Co. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). Because the dissent believed *Sundown* changed the analytical framework for ruling on "good cause," the dissent would have reversed Judge Pieper's order and remanded the case for a determination of whether good cause existed under *Sundown*. *Id.* at 89-94, 723 S.E.2d at 233-35.

This Court granted Hulsey's petition for a writ of certiorari to review the decision of the Court of Appeals.

While the appeal of Father's case was pending before the Court of Appeals, Judge Young presided over a jury trial for damages in Son's case on November 9-13, 2009.[4] Because Hulsey was deemed in default, Judge Young again limited Hulsey's participation in the hearing to cross-examination and objection to Son's evidence. The jury returned a verdict in favor of Son in the amount of $1 million actual damages and $2.6 million in punitive damages. Hulsey appealed to the Court of Appeals.

After granting the writ of certiorari to review the Court of Appeals' decision in *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011), this Court certified the appeal in Son's case pursuant to Rule 204(b), SCACR. We now consider the consolidated matters.

II. Discussion

A. Jurisdiction of the State Court

Hulsey asserts the circuit court was without subject matter jurisdiction over the proceedings as the federal removal statutes require the state court to receive a *certified* order for jurisdiction to be re-vested.

Section 1446(d) of the United States Code provides that after an action has been removed to federal court, "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C.A. § 1446(d) (West 2013). A remand order that is based on lack of subject matter jurisdiction is governed by section 1447(c). Section 1447(c), entitled "Procedure after removal generally," provides in relevant part:

> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . *A certified copy of the order of remand shall be mailed by the clerk to the clerk of*

[4] Hulsey filed a motion to stay the trial of Son's case due to the pending appeal in Father's case. Judge Young, however, denied this motion and set the matter for a damages trial.

> *the State court. The State court may thereupon proceed with such case*.

Id. § 1447(c) (emphasis added).

In ruling on this issue, a majority of the Court of Appeals focused on whether *mailing* was required to divest the federal court of jurisdiction. *Limehouse*, 397 S.C. at 60, 723 S.E.2d at 217. Although the court recognized that "a majority of federal circuits take the position that the finality of the remand and the accompanying loss of federal jurisdiction requires both entry of the order with the federal clerk of court *and* a certified copy being mailed to the state court," it adopted the minority view espoused by the Fourth Circuit Court of Appeals. *Id.* at 60, 723 S.E.2d at 217.

Relying on the reasoning of *In re Lowe*, 102 F.3d 731 (4th Cir. 1996),[5] the majority of the Court of Appeals concluded that mailing of the certified remand

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[5] In *Lowe*, Katherine Lowe sued her employer, "Wal-Mart Stores", and two Wal-Mart managers in North Carolina state court. *Lowe*, 102 F.2d at 732. After Wal-Mart removed the case to federal court, Lowe moved to remand the case to state court based on a lack of diversity jurisdiction. *Id.* at 733. The remand order was entered on the district court docket on August 25, 1995. *Id.* The federal court mailed a copy of the order to the state court. However, the state court's copy of the remand order lacked the blue backing necessary to show the order was certified. *Id.* Wal-Mart moved before the federal court for reconsideration of its remand order. *Id.* Ultimately, the federal court reinstated the case to the federal docket. *Id.* Lowe filed a petition for a writ of mandamus in the Fourth Circuit Court of Appeals asking the court to order the district court to return her case to the state court. *Id.* In analyzing whether the district court had jurisdiction when it reconsidered the remand order, the Fourth Circuit was required to determine the point at which the district court lost jurisdiction over the case. *Id.* at 734. Lowe claimed the district court lost jurisdiction when it entered the remand order. In contrast, Wal-Mart asserted the district court retained jurisdiction until it mailed a certified copy of the remand order to the state court. *Id.* The Fourth Circuit ruled in favor of Lowe. In so ruling, the court found that " '[l]ogic . . . indicates that it should be the action of a court (entering an order of remand) rather than the action of a clerk (mailing a certified copy of the order) that should determine the vesting of jurisdiction.' " *Id.* at 735 (quoting *Van Ryn v. Korean Air Lines*, 640 F. Supp.

order is not a jurisdictional requirement, but instead the federal court lost jurisdiction when the remand order was *entered*. *Limehouse*, 397 S.C. at 61-62, 723 S.E.2d at 217-18.

In analyzing whether jurisdiction re-vested in the state court upon mailing of the remand order to the clerk, the majority noted the state court's jurisdiction is general as it is derived exclusively from our state constitution and not federal law. *Id.* at 62, 723 S.E.2d at 218. The majority proceeded to compare the general jurisdiction of the state court to the limited jurisdiction of the federal court and found the state court's jurisdiction is limited only by the federal court's proper exercise of jurisdiction over a case pursuant to a congressional act, "which according to Fourth Circuit jurisprudence in *Lowe*, ceased upon entry of the remand order." *Id.* at 63, 723 S.E.2d at 218.

Because the majority found jurisdiction transferred to the state court upon entry of the order in federal court, the court believed it was unnecessary to determine whether the federal court had to mail a certified order. *Id.* at 62, 723 S.E.2d at 218. The court, however, found that since the issue of mailing was procedural and not jurisdictional, it was not preserved for appellate review as Hulsey failed to make a timely objection. *Id.* at 65, 723 S.E.2d at 220. Additionally, the court noted that to warrant reversal on procedural grounds, Hulsey was required to show that he was prejudiced by the fact that the Charleston County Clerk of Court did not receive a certified copy of the order. *Id.* at 66, 723 S.E.2d at 220. Because Hulsey received personal notice of the remand order, the majority found that Hulsey failed to demonstrate he was prejudiced by the procedural defect. *Id.* at 67, 723 S.E.2d at 221.

In contrast, the dissent found the plain language of section 1447(c) requires that a certified copy of the remand order be mailed before the state court is re-vested with jurisdiction. *Id.* at 81, 723 S.E.2d at 228. Because a certified copy of the remand order was never mailed to the state court clerk, the dissent concluded

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284, 285 (C.D. Cal. 1985)). The court stated that to "hold otherwise would impermissibly elevate substance over form." *Id.*

Our Court of Appeals also referenced the Fourth Circuit case of *Bryan v. BellSouth Communications, Inc.*, 492 F.3d 231 (4th Cir. 2007), wherein the court stated in a footnote that a remand order based on lack of subject matter jurisdiction is effective when entered. *Id.* at 235 n.1.

the state court had no power to proceed. *Id.* The dissent explained that "[b]ecause the state court acted when federal law prohibited it from doing so, the resulting judgment was void." *Id.* Accordingly, the dissent found the trial court's failure to grant relief from the judgment was error and warranted reversal. *Id.*

In reaching its ultimate conclusion, the dissent rejected the majority's reliance on *Lowe*. *Id.* at 82, 723 S.E.2d at 228-29. The dissent found *Lowe* distinguishable from the instant case as the Fourth Circuit considered the point in time when the federal court's decision to remand becomes unreviewable. *Id.* at 83-84, 723 S.E.2d at 229. The dissent further contended that whether the mailing requirement was procedural or jurisdictional was irrelevant because the prohibition contained in section 1447(c), which provides that a state court cannot proceed until a certified copy of the remand order is mailed to it, cannot be avoided by labeling the mailing requirement procedural. *Id.* at 84, 723 S.E.2d at 230. Additionally, the dissent believed the majority incorrectly relied on the Fourth Circuit's decision in *Bryan* because the remand order in that case was not based on lack of subject matter jurisdiction and, thus, was governed by another clause of section 1447(c). *Id.* at 86-87, 723 S.E.2d at 231.

Although the dissent acknowledged that a plain reading of section 1447(c) creates a brief period of time in which neither the federal court nor the state court has the power to act, i.e., a "jurisdictional hiatus," it concluded that a certified copy of a remand order based on lack of subject matter jurisdiction must be mailed to the state court before the state court can proceed. *Id.* at 88, 723 S.E.2d at 232.

Undoubtedly, there is support for both positions espoused by the Court of Appeals as the federal and state courts are divided on the jurisdictional implications of section 1447(c).[6] *See* 14C Charles A. Wright, Arthur R. Miller,

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[6] In addition to *Lowe*, a few federal and state courts have held that jurisdiction transfers back to the state court upon entry of the order of remand. *See, e.g.*, *Whiddon Farms, Inc. v. Delta & Pine Land Co.*, 103 F. Supp. 2d 1310 (S.D. Ala. 2000); *Van Ryn v. Korean Air Lines*, 640 F. Supp. 284 (C.D. Cal. 1985); *Health for Life Brands, Inc. v. Powley*, 57 P.3d 726 (Ariz. Ct. App. 2002); *Citizens Bank & Trust Co. v. Carr*, 583 So. 2d 864 (La. Ct. App. 1991); *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuqurque*, 889 P.2d 204 (N.M. Ct. App. 1993), *aff'd*, 889 P.2d 185 (N.M. 1994); *Int'l Lottery, Inc. v. Kerouac*, 657 N.E.2d 820 (Ohio Ct. App. 1995).

Edward H. Cooper & Joan E. Steinman, *Federal Practice and Procedure* § 3739 (4th ed. 2013) (discussing section 1447(c) and outlining state and federal court decisions applying this provision). Thus, we are now confronted with definitively deciding when jurisdiction resumes in the state court following the federal court's entry of an order of remand.

In answering this question, it is instructive to consider the concept of jurisdiction in general as well as the jurisdictional distinctions between state and federal courts. The word "jurisdiction" does not in every context connote subject matter jurisdiction, but rather, is "a word of many, too many, meanings." *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 467 (2007) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)).

Jurisdiction is generally defined as "the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." 32A Am. Jur. 2d *Federal Courts* § 581 (2007) (footnotes omitted). Specifically, "[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the

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However, the majority of courts considering this issue have held that the federal court is not divested of jurisdiction until a certified copy of the remand order is mailed to the state court. *See, e.g.*, *Fed. Deposit Ins. Corp. v. Santiago Plaza*, 598 F.2d 634 (1st Cir. 1979); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3d Cir. 1995); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984); *Seedman v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 837 F.2d 413 (9th Cir. 1988); *Yarbrough v. Blake*, 212 F. Supp. 133 (W.D. Ark. 1962); *Cook v. J.C. Penney Co.*, 558 F. Supp. 78 (N.D. Iowa 1983); *Louisiana v. Sprint Commc'ns Co.*, 899 F. Supp. 282 (M.D. La. 1995); *Hubbard v. Combustion Eng'g, Inc.*, 794 F. Supp. 221 (E.D. Mich. 1992); *City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc.* 147 F.R.D. 122 (S.D. Miss. 1993); *Campbell v. Int'l Bus. Machs.*, 912 F. Supp. 116 (D. N.J. 1996); *Rosenberg v. GWV Travel, Inc.*, 480 F. Supp. 95, 97 n.3 (S.D.N.Y. 1979); *McManus v. Glassman's Wynnefield, Inc.*, 710 F. Supp. 1043 (E.D. Pa. 1989); *Blazer Elec. Supply Co. v. Bertrand*, 952 P.2d 857 (Colo. Ct. App. 1998); *State v. Lehman*, 278 N.W.2d 610 (Neb. 1979); *Quaestor Invs., Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999).

particular judgment requested." *Indep. Sch. Dist. No. 1 of Okla. County v. Scott*, 15 P.3d 1244, 1248 (Okla. Civ. App. 2000).

"Although federal and state courts form one system of jurisprudence, federal courts have no general supervisory power over the state courts, and there is nothing a state court can do to affect federal practice and procedure." 21 C.J.S. *Courts* § 274 (Supp. 2013). The United States Supreme Court ("USSC") has explained that "the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876)).

A case filed in state court may be removed to federal court only when the case originally could have been filed in federal court. 28 U.S.C.A. § 1441(a) (West 2013) (authorizing a defendant to remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.").

A federal court has subject matter jurisdiction over primarily two types of cases: (1) those involving "federal question jurisdiction," which "aris[e] under the Constitution, laws, or treaties of the United States"; and (2) those involving "diversity jurisdiction," which include parties who are residents of different states and the amount in controversy exceeds $75,000. 28 U.S.C.A. §§ 1331, 1332 (West 2013).

Removal proceedings impact the jurisdiction of the state court in that removal of a state case to federal court "divests" the state court of jurisdiction. *See* Michael J. Kaplan, Annotation, *Effect, on Jurisdiction of State Court, of 28 U.S.C.A. § 1446(e), Relating to Removal of Civil Case to Federal Court*, 38 A.L.R. Fed. 824 (1978 & Supp. 2013) (analyzing jurisdictional and procedural implications of removal of state court case to federal court).

Although most cases speak in terms of "divesting" the state court of jurisdiction during removal proceedings, we believe the more accurate terminology is a "suspension" of the state court's jurisdiction. Here, the circuit court had subject matter jurisdiction over the defamation claims and acquired personal jurisdiction over the parties upon the filing and service of their pleadings. *See*

Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008) ("Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." (citations omitted)); *Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996) (citing Rule 3(a), SCRCP, and recognizing that circuit court acquires personal jurisdiction over the parties once the action is commenced by the filing and service of the summons and complaint); *Boan v. Jacobs*, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1998) ("The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction).").

Neither of these jurisdictional elements was affected by Hulsey's motion to remove the case to federal court.[7] Instead, the remaining element, i.e., the state court's *power* to render the particular judgment requested, was suspended or held in abeyance until a determination was made as to whether the cases involved a federal question more appropriately decided by the federal court. *See Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1052 (Fed. Cir. 2012) (" 'Power' refers to the court's ability, when it has subject matter jurisdiction, to grant equitable and legal relief to a party.").

Because removal proceedings encroach upon a state court's jurisdiction, removal statutes must be strictly construed and any doubts are to be resolved in favor of state court jurisdiction and remand. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The USSC has explained:

> The removal statute[,] which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941). Furthermore, as the rules of statutory construction dictate, it is also necessary for courts to

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[7] Indeed, if a state court was divested of personal jurisdiction and subject matter jurisdiction following removal proceedings, the parties would have to re-file a lawsuit each time a federal court issued an order remanding the case to state court.

consider the legislative history in order to effectuate the purpose of the statute. *See Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) (stating that where "the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself").

Applying these rules, the California Court of Appeal explained:

> Before 1948, the statute governing remand stated in relevant part, "Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, *such remand shall be immediately carried into execution*, and no appeal . . . from the decision of the district court so remanding such cause shall be allowed." (Judicial Code § 28 (1911), italics added; *see also* 28 U.S.C. § 71 (1940).) In 1948, Congress revised title 28 of the United States Code, and placed the procedures governing remand in section 1447. In doing so, Congress deleted the former provision stating that the "remand shall be immediately carried into execution," replacing it with a command that the district court clerk mail a certified copy of the remand order to the state court clerk, and providing that "[t]he state court may thereupon proceed with [the] case." (§ 1447, as enacted June 25, 1948, ch. 646, 62 Stat. 939.) Although some courts—including the Ninth Circuit—had interpreted even the former provision as requiring a certified copy of the remand order to be filed with the clerk of the state court before jurisdiction was transferred (*see, e.g., Bucy v. Nevada Const. Co.* (9th Cir. 1942) 125 F.2d 213, 217), the new statutory language makes that requirement explicit.

Spanair S.A. v. McDonnell Douglas Corp., 172 Cal. App. 4th 348, 357 (Cal. Ct. App. 2009). Although the California Court of Appeal recognized its interpretation appeared to elevate "form over substance," it emphasized "the history and plain language of section 1447(c), leave no doubt that Congress made the mailing of a certified copy of the remand order the 'determinable jurisdictional event after which the state court can exercise control over the case without fear of further federal interference.' " *Id.* (quoting *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 225 (3d Cir. 1995)). Despite legitimate concerns over the wisdom of this rule, the court declined to "second-guess Congress by rewriting the statute." *Id.*

As evidenced by the language in *Spanair*, Congress purposefully included the mailing of a certified order as a jurisdictional requirement and, thus, the mere entry of an order is not self-executing as to the jurisdiction of the state court. *See Arnold v. Garlock, Inc.*, 278 F.3d 426, 437-38 (5th Cir. 2001) ("A § 1447(c) order of remand is not self-executing . . . This provision creates *legal significance* in the mailing of a certified copy of the remand order in terms of determining the time at which the district court is divested of jurisdiction. On that basis, the federal court is not divested of jurisdiction until the remand order, citing the proper basis under § 1447(c), is certified and mailed by the clerk of the district court." (emphasis added) (citation omitted)).

We believe the reasoning for this inclusion is sound. As explained by the Missouri Court of Appeals:

> Requiring the state to wait to proceed with the case until after a certified remand order has been sent ensures that the federal court has indeed ceased to exercise jurisdiction over the merits of the case. Under the case law of most circuits, federal courts have the power to review, alter, or reverse an erroneous order of remand during the short period between the signing of a remand order and the certification and mailing to the state court. Thus, a rule making clear that jurisdiction to proceed does not immediately revert back to the state court upon the signing of the order allows a civil defendant to retain the right to assert that the order of remand was improvidently entered. Because remands are not appealable, 28 U.S.C. § 1447(d), it makes sense to allow the federal district court an opportunity to correct any error or misunderstanding before the remand order is final. A clear rule avoids confusing litigants about where jurisdiction may lie when one of the parties is attempting to obtain an order setting aside of the order of remand.

State ex rel. Nixon v. Moore, 108 S.W.3d 813, 818 (Mo. Ct. App. 2003) (citation omitted). Furthermore, we do not believe the fear of a brief jurisdictional hiatus between the federal and state court should dictate a result that is clearly contrary to the plain terms of the statute.

Based on the foregoing, we conclude that Judge Young and, in turn, the Court of Appeals erred in finding the state court had jurisdiction to conduct the proceedings as the absence of the certified order precluded jurisdiction from

resuming in the state court. Although this Court often defers to Fourth Circuit decisions interpreting federal law, which in the instant case would be *Lowe*, it is not obligated to do so in view of the lack of uniformity amongst the federal circuits. *See State Bank of Cherry v. CGB Enters.*, 984 N.E.2d 449, 459 (Ill. 2013) ("While we are *bound* only by the United States Supreme Court, if the lower federal courts are uniform on their interpretation of a federal statute, this court, in the interest of preserving unity, will give *considerable weight* to those courts' interpretations of federal law and find them to be highly persuasive. However, if the federal courts are split, we may elect to follow those decisions we believe to be better reasoned." (citation omitted)); *Cash Distrib. Co., v. Neely*, 947 So. 2d 286, 294-95 (Miss. 2007) (declining to follow Fifth Circuit's minority position and stating, "While this Court often defers to Fifth Circuit decisions interpreting federal law, we are under no obligation to do so").

Admittedly, this conclusion appears to elevate form over substance and, in turn, may be viewed as harsh considering the significant verdicts. However, we believe it is legally correct and consistent with this Court's position on other jurisdictional issues, such as the effect of the issuance of a remittitur. *See* Rule 221(b), SCACR ("The remittitur shall contain a copy of the judgment of the appellate court, shall be *sealed with the seal and signed by the clerk of the court*, and unless otherwise ordered by the court shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal." (emphasis added)); *Wise v. S.C. Dep't of Corrs.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) ("When the remittitur has been *properly* sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter." (emphasis added)).

Because the absence of a certified order precluded jurisdiction from resuming in the state court, we hold the state court proceedings conducted after the federal court's entry of the remand order are void. As a result, we reverse the decision of the Court of Appeals, vacate both judgments, and remand the cases to recommence in the state court from the procedural point at which the Charleston County Clerk of Court received a certified copy of the federal court's remand

order.[8] *See Davis v. Davis*, 267 S.C. 508, 229 S.E.2d 847 (1976) (concluding that all orders issued by state court after proceeding was removed to federal court were void); *Peoples Trust & Sav. Bank v. Humphrey*, 451 N.E.2d 1104 (Ind. Ct. App. 1983) (noting that, during the pendency of the removal petition, any proceedings by the state trial court are void until remand by the federal court); 77 C.J.S. *Removal of Cases* § 154 (Supp. 2013) ("Proceedings in the state court after the requirements for removal are met are not merely erroneous, but null and void. No subsequent pleadings can be filed in the state court." (footnotes omitted)).

Although this ruling would be dispositive of both appeals, we believe the bench and bar would benefit from a definitive ruling on certain remaining issues. Specifically, we address: (1) the computation of time for filing responsive pleadings following the state court's receipt of a certified remand order; and (2) the level to which a defendant may participate in a post-default damages hearing.

B. Time for Filing an Answer Following a Properly Filed Remand Order

Here, Father and Son served their Complaints on Hulsey's law firm on April 20, 2006, and on Hulsey individually on April 21, 2006. On May 5, 2006, Hulsey removed the case to federal court. The remand order was dated July 19, 2006, and Hulsey's counsel was given electronic notice of the remand order on July 20, 2006. The Charleston County Clerk of Court filed the uncertified copy of the remand order on July 21, 2006, and mailed notice of the filing on July 27, 2006, pursuant to Rule 77, SCRCP.[9] Father's and Son's motions for entry of default, which were

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[8] On March 5, 2009, the Charleston County Clerk of Court received the certified remand order from the federal district court. Hulsey filed and served his Answer on March 13, 2009.

[9] Rule 77(d), SCRCP, provides in relevant part:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by first class mail upon every party affected thereby who is not in default for failure to appear, and shall make a note in the case file or docket sheet of the mailing. Such mailing shall not be necessary to parties who have already received notice. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party

dated August 9, 2006, were filed on August 21, 2006, and Hulsey was found in default that same day. The entry of default was filed on August 22, 2006.

On August 29, 2006, Hulsey filed an Answer and moved to set aside the entry of default. During the hearing before Judge Pieper, Hulsey stated that he believed he had thirty days from service of notice of the remand order from the Charleston County Clerk of Court to file an Answer to the Complaint in state court. Because the state court noticed him of the remand order, he believed he had an additional five days to Answer. Based on these beliefs, Hulsey claimed his Answer was timely made as it was not due until August 31, 2006. Additionally, Hulsey asserted he had a meritorious defense to the action and that the Limehouses would suffer no prejudice if the entry of default was set aside.

Judge Pieper denied Hulsey's motion to set aside the entry of default. In so ruling, Judge Pieper analyzed the threshold question of when the "30 day time period for the defendants to file an answer began to run and what effect the removal of the case and its subsequent remand had on that time period." Noting that this issue was a matter of first impression in this state, Judge Pieper ruled that any unexpired portion of the thirty-day time period to answer was tolled during the time the case was removed to federal court. Therefore, Hulsey had until August 5, 2006,[10] to file an Answer to the Complaint. Judge Pieper found it unnecessary to decide whether Hulsey was entitled to five additional days for mailing pursuant to Rule 6(e), SCRCP because Hulsey's Answer was filed twenty-four days outside of the tolled time frame. Accordingly, Judge Pieper found the entry of default was proper.[11] He further ruled that "there was no good reason presented by the

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> may in addition serve a notice of entry on any other party in the manner provided in Rule 5 for the service of such papers.

[10] Because Hulsey removed the case fourteen days after he was served, Judge Pieper found Hulsey had sixteen days following the remand order to file his Answer.

[11] In support of his method of time computation, Judge Pieper relied on *Cotton v. Federal Land Bank of Columbia*, 269 S.E.2d 422 (Ga. 1980), and *Dauenhauer v. Superior Court In and For Sonoma County*, 307 P.2d 724 (Cal. Ct. App. 1957), wherein the appellate courts tolled the time for filing during removal.

defendants for their failure to file a timely answer other than attorney confusion about the deadline for when an answer was due." Judge Pieper found "no reasonable basis for defense counsel's assumption that the 30 day time to file answer starts completely anew upon remand from the federal court." Thus, Judge Pieper declined to set aside the entry of default.

The majority of the Court of Appeals affirmed Judge Pieper's decision, finding there was no authority in this state to support Hulsey's position that a removing party is entitled to a fresh thirty days to answer a Complaint upon remand. *Limehouse*, 397 S.C. at 68-69, 723 S.E.2d at 221-22. After reviewing state and federal rules of procedure,[12] the majority declined to adopt a new rule that extended the time for filing beyond the thirty-day limit. *Id.* at 69, 723 S.E.2d at 222.

Although there is authority from other jurisdictions to support Hulsey's claim that the time for filing began anew after the case was properly remanded to state court,[13] we agree with the Court of Appeals and decline to adopt such a rule.

As previously discussed, once the case was removed to federal court, the state court's jurisdiction was suspended or held in abeyance until the case was properly remanded. When the state court resumed jurisdiction, it had a duty "to proceed as though no removal had been attempted." *State v. Columbia Ry., Gas &*

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[12] The majority considered Rule 12(a), SCRCP (stating, "A defendant shall serve his answer within 30 days after the service of the complaint upon him"), and Fed. R. Civ. P. 81(c)(2) (providing a defendant twenty-one days to file an Answer after a civil action is removed from a state court).

[13] *See* Ark. R. Civ. P. 12(a)(3) (West 2013) (providing an adverse party with thirty days from receipt of notice that the remand order was filed in state court to file an Answer); Cal. Code Civ. Proc. § 430.90 (West 2013) (providing thirty days from the state court's receipt of the order of remand to file an Answer); Iowa Code Ann. § 1.441(7) (West 2013) (providing that the time for pleadings shall begin anew after a remand order is filed in the state court); N.C. Gen. Stat. Ann. § 1A-1, Rule 12(a)(2) (West 2013) (providing thirty days to file an Answer from the date a remand order is filed in the state court); Tex. R. Civ. P. 237a (West 2013) (providing fifteen days to file an answer after notice that a remand order was filed in state court).

Elec. Co., 112 S.C. 528, 537, 100 S.E. 355, 357 (1919). Thus, the time for filing an Answer was tolled until the state court resumed jurisdiction.

Notably, other jurisdictions have reached a similar conclusion. *See Lucky Friday Silver-Lead Mines Co. v. Atlas Mining Co.*, 395 P.2d 477, 480 (Idaho 1964) ("While the cause is before the Federal court, the state court has no jurisdiction or authority to receive any pleadings in the cause nor can it issue any orders concerning the cause. . . . Thus the period of time the cause is before the Federal court, cannot be considered in computing the time within which the appellant had to appear and plead to the cause."); *Peoples Trust & Sav. Bank v. Humphrey*, 451 N.E.2d 1104, 1109 (Ind. Ct. App. 1983) (finding removal of action to federal court tolled ten-day time limit to apply for change of venue and stating that "tolling the time period eliminates uncertainty, preserves the status quo, and is easily applied"); *Jatczyszyn v. Marcal Paper Mills, Inc.*, 27 A.3d 213 (N.J. Super. Ct. App. Div. 2011) (concluding that discovery period established by state court rules is tolled during the time a motion to remand is pending before the federal court); *see also Gen. Elec. Credit Corp. v. Smith*, 484 So. 2d 75 (Fla. Dist. Ct. App. 1986) (holding that time for filing appeal was tolled during period when case was removed to federal court); *Hartlein v. Illinois Power Co.*, 601 N.E.2d 720 (Ill. 1992) (finding removal of action to federal court tolled time limit on petition for leave to appeal circuit court's grant of preliminary injunction).

Based on the foregoing, we hold that removal of a state court case to federal court tolls the time period for filing responsive pleadings.

C. Defaulting Defendant's Limited Participation in Damages Hearings

Hulsey contends Judge Young erred in imposing unduly restrictive limitations on evidence presented at the damages hearings. In support of this contention, Hulsey claims this Court's ruling in *Howard v. Holiday, Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978), which limits the defendant's ability to participate in the damages hearing, is no longer applicable as it pre-dates the 1985 adoption of Rule 55. Specifically, Hulsey urges this Court to re-examine *Howard* in light of the language of Rule 55(b)(2), which requires the trial court "to establish the truth of any averment of evidence or to make an investigation of any other matter."[14]

[14] Rule 55(b)(2), SCRCP, provides more fully that, in cases where default has been entered and the plaintiff's damages are not a sum certain, a trial judge may

Prior to and throughout the damages hearings, Hulsey sought to call witnesses and present evidence. In Son's case, Hulsey also sought to engage in discovery so that he could fully prepare for cross-examination. Based on *Howard*, Judge Young limited Hulsey's participation to cross-examination and objection to the plaintiffs' evidence. The Court of Appeals agreed with Judge Young's ruling and specifically declined to "diverge from longstanding rules established by" this Court. *Limehouse*, 397 S.C. at 72-73, 723 S.E.2d at 223-24.

This case presents an opportunity for this Court to re-examine our decision in *Howard* in conjunction with Rule 55(b)(2), SCRCP. As will be more thoroughly discussed, we reaffirm our decision in *Howard* and the procedures adopted therein.

In 1978, under the former statutes governing default proceedings,[15] this Court issued its decision in *Howard*, wherein it assessed three approaches as to how a defaulting defendant could contest the issue of damages. *Howard*, 271 S.C. at 241, 246 S.E.2d at 882. Specifically, this Court noted that it could allow damages to be determined: (1) in an ex parte proceeding, denying the defendant any right to participate; (2) after a full adversary contest, including the right of the defendant to produce evidence in rebuttal or in mitigation; or (3) with defense counsel's participation limited to cross-examination and objection to plaintiff's evidence. *Id.* This Court found the third approach was the proper one and approved it for use in the courts of this state. *Id.*

For the past thirty-five years, our appellate courts have consistently adhered to the decision in *Howard*. *See, e.g., Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998); *Solley v. Navy Fed. Credit Union*, 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012). Although our courts have scrutinized default judgments involving punitive damages in order to prevent harsh results, we have declined to expand a defendant's participation in these hearings beyond what was approved of in *Howard*. *See Lewis v. Congress of Racial Equality and/or*

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schedule a hearing on damages if it would "enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter."

[15] S.C. Code Ann. §§ 15-35-310 & -320 (1976) (repealed 1985).

C.O.R.E., Inc., 275 S.C. 556, 274 S.E.2d 287 (1981) (citing *Howard* and raising the issue of the amount of damages *ex mero motu* where plaintiff obtained a default judgment for $150,000 in actual damages and $100,000 in punitive damages in an unliquidated claim and remanding to trial court for a *de novo* hearing on damages).

However, in an apparent reaction to juries awarding significant verdicts of actual and punitive damages, other jurisdictions have allowed defendants to call witnesses and present evidence. *See* B. Finberg, Annotation, *Defaulting Defendant's Right to Notice and Hearing as to Determination of Amount of Damages*, 15 A.L.R.3d 586, § 5 (1967 & Supp. 2013) (identifying state cases where defaulting defendant had the right to cross-examine plaintiff's witnesses and to introduce affirmative testimony on his own behalf in mitigation of the damages); 46 Am. Jur. 2d *Judgments* § 299 (2006) (citing state cases where courts have approved varying levels of defendant's participation in post-default proceedings); *Payne v. Dewitt*, 995 P.2d 1088, 1094-95 (Okl. 1999) (recognizing defaulting defendant's statutory right to cross-examine witnesses and introduce evidence and stating, "The trial court must leave to a meaningful inquiry the *quantum of actual and punitive damages* without stripping the party in default of basic forensic devices to test the truth of the plaintiff's evidence").[16]

Despite these concerns and the authority from other jurisdictions, we adhere to the procedures adopted in *Howard*. If our courts were to allow a defaulting

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[16] In reaching this conclusion, the court in *Payne* relied on the following authorities: *J&P Constr. Co. v. Valta Constr. Co.*, 452 So. 2d 857 (Ala. 1984); *Dungan v. Superior Court In and For Pinal County*, 512 P.2d 52 (Ariz. Ct. App. 1973); *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 510 S.W.2d 555 (Ark. 1974); *Pittman v. Colbert*, 47 S.E. 948 (Ga. 1904); *Stewart v. Hicks*, 395 N.E.2d 308 (Ind. Ct. App. 1979); *Greer v. Ludwick*, 241 N.E.2d 4 (Ill. App. Ct. 1968); *Howard v. Fountain*, 749 S.W.2d 690 (Ky. Ct. App. 1988); *Bissanti Design/Build Group v. McClay*, 590 N.E.2d 1169 (Mass. App. Ct. 1992); *Lindsey v. Drs. Keenan, Andrews & Allred*, 165 P.2d 804 (Mont. 1946); *Gallegos v. Franklin*, 547 P.2d 1160 (N.M. Ct. App. 1976); *Napolitano v. Branks*, 513 N.Y.S.2d 185 (N.Y. App. Div. 1987); *Bashforth v. Zampini*, 576 A.2d 1197 (R.I. 1990); *Adkisson v. Huffman*, 469 S.W.2d 368 (Tenn. 1971); *Ne. Wholesale Lumber, Inc., v. Leader Lumber, Inc.*, 785 S.W.2d 402 (Tex. Ct. App. 1989); *Synergetics By and Through Lancer Indus., Inc. v. Marathon Ranching Co.*, 701 P.2d 1106 (Utah 1985); *Midwest Developers v. Goma Corp.*, 360 N.W.2d 554 (Wis. Ct. App. 1984).

defendant to fully participate in a post-default hearing, we believe there would be no consequence of default. *See Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability."). Furthermore, unlike Hulsey, we discern no basis in the language of Rule 55(b)(2) that would require us to depart from *Howard*.

Finally, we note there are due process safeguards for cases involving punitive damages. It is well established that the relief granted in a default judgment is limited to that supported by the allegations in the Complaint and the proof submitted at the damages hearing. *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988) ("In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered." (citations omitted)). Moreover, trial judges and appellate courts conduct a review of the award to ensure the verdict is not excessive and is supported by the evidence. *See Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009) (discussing the history of due process limitations on punitive damages awards and identifying guideposts for post-judgment review of punitive damages awards).

Having found that *Howard* still governs post-default proceedings, we hold that Judge Young correctly precluded Hulsey from engaging in discovery and limited his participation to cross-examination and objection to the plaintiff's evidence.

III. Conclusion

Based on the foregoing, we hold the lack of a certified remand order precluded jurisdiction from resuming in the state court. Accordingly, we reverse the decision of the Court of Appeals and vacate the state court proceedings. We remand the cases to recommence from the procedural point at which the Charleston County Clerk of Court received the federal court's certified remand order. Additionally, we find the time for filing responsive pleadings was tolled during the removal proceedings as no subsequent pleadings could be filed in state

court until jurisdiction resumed. Finally, we reaffirm our decision in *Howard* wherein we limited a defendant's participation in a post-default hearing to cross-examination and objection to the plaintiff's evidence as we find this effectuates the purpose of default proceedings and is consistent with Rule 55(b)(2).

REVERSED, VACATED, AND REMANDED.

TOAL, C.J., HEARN, J., and Acting Justice James E. Moore, concur. KITTREDGE, J., concurring in result only.

The Supreme Court of South Carolina

Re: Amendments to Rule 510, South Carolina Appellate Court Rules

Appellate Case No. 2013-001147

ORDER

Rule 510, SCACR, which addresses continuing legal education requirements for magistrates and municipal court judges is hereby amended as set forth in the attachment to this Order.

The amendments are effective July 1, 2013.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

June 25, 2013