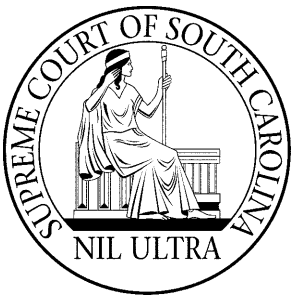

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

August 4, 2003

ADVANCE SHEET NO. 29

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

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PETITIONS - UNITED STATES SUPREME COURT

None

The Supreme Court of South Carolina

James W. Breeden, Jr.,
Employee, Respondent/Petitioner,

v.

TCW, Inc./Tennessee Express,
Employer, and Granite State
Insurance Co., Carrier, Petitioners/Respondents.

ORDER

We deny the Petition for Rehearing but withdraw Opinion Number 25652 filed May 19, 2003, in order to clarify one point. The new opinion removes the language stating "reduced the lien by a factor of .31" and replaces the language with "reduced the lien in the same proportion as the third party settlement bore to the total cognizable damages." Also, in footnote 3, the new opinion removes the language "therefore, the lien was reduced by a factor of .31" and replaces it with "therefore, the amount of the reduced lien was computed by multiplying the original lien by .31."

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

July 28, 2003

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James W. Breeden, Jr.,
Employee, Respondent/Petitioner,

v.

TCW, Inc./Tennessee Express,
Employer, and Granite State
Insurance Co., Carrier, Petitioners/Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Colleton County
Gerald C. Smoak, Circuit Court Judge

Opinion No. 25652
Heard February 4, 2003 - Refiled July 28, 2003

AFFIRMED IN PART; REVERSED IN PART

Stanford E. Lacy, of Columbia, for Petitioners/Respondents.

D. Michael Kelly, of Columbia; Saunders Aldridge, of Savannah; and William B. Harvey, III, of Beaufort, for Respondent/Petitioner.

JUSTICE PLEICONES: Respondent/Petitioner James Breeden ("Breeden") was awarded workers' compensation benefits from petitioners/respondents TCW, Inc./Tennessee Express ("Employer") and Granite State Insurance Company ("Carrier") for injuries he sustained in an automobile accident. Breeden settled his claim against the tortfeasor and notified the Workers' Compensation Commission ("Commission") of the settlement. Breeden then moved the Commission to determine the amount of Carrier's lien and to determine the distribution scheme of any remaining settlement proceeds.

The Commission reduced Carrier's lien and ordered that the remaining settlement proceeds be placed in a trust account to pay future compensation. The Commission further found that "compensation" did not include future medical expenses. The trial court affirmed. The Court of Appeals affirmed in part, reversed in part, and remanded. Breeden v. TCW, Inc./Tennessee Express, 345 S.C. 201, 546 S.E.2d 657 (Ct. App. 2001). Breeden and Carrier each sought writs of certiorari, both of which were granted. We reverse in part, and affirm in part.

FACTS

On December 14, 1993, Breeden was injured when a truck owned by Piggly Wiggly crossed the center line and hit Breeden's truck head on. Breeden filed a workers' compensation claim.

On July 28, 1995, Breeden filed a Form 50[1] alleging he was totally disabled as a result of a traumatic physical brain injury and was awarded lifetime benefits pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2000). There was no appeal from this Order.

During this time, Breeden pursued a third party claim against Piggly Wiggly. Piggly Wiggly had $11 million in liability insurance coverage, and the parties acknowledge liability was clear. Breeden alleged economic losses

[1] A Form 50 is an Employee's Notice of Claim and/or Request for Hearing.

alone that were in excess of $9 million, including future medical expenses, and a range of total cognizable damages[2] from $18 to $25 million. The Commissioner held the total cognizable damages were $13.5 million. No lawsuit was filed, and Breeden's claim was settled for $4.2 million while his wife's loss of consortium claim was settled for $1.8 million. Breeden's attorney explained the claims were settled for such a low amount compared to the amount of insurance available because "[w]e had to. This family was coming apart at the seams."

After settling the third party claim against Piggly Wiggly, Breeden notified the Commission of the settlement and moved to have the Commission determine Carrier's lien and the balance remaining to be paid to Carrier under S.C. Code Ann. § 42-1-560(g) (1985). At the hearing, Breeden took the position that Carrier's lien should be reduced using the equitable reduction provision of S.C. Code Ann. § 42-1-560(f) (1985). Both sides introduced detailed life care plans projecting Breeden's future medical needs.

The Commission held that the probable future expenditures in § 42-1-560(g) were subject to the lien reduction provisions of § 42-1-560(f). The Commission also held that under § 42-1-560, the Carrier's lien "does not include future medical expenses which have not yet been incurred at the time of third party settlement. Rather, the lien includes compensation, both past and future, as defined by S.C. Code Ann. § 42-1-100, and those medical expenses paid, or incurred but not yet paid, at the time of the third party settlement." Finally, the Commission found that a reduction of Carrier's lien was equitable to all parties concerned, and reduced the lien in the same proportion as the third party settlement bore to the total cognizable damages.[3]

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[2] The total cognizable damages are "those damages which are legally recoverable in the type of action in which [a] settlement occurs." Garrett v. Limehouse & Sons, Inc., 293 S.C. 539, 360 S.E.2d 519 (Ct. App. 1987).

[3] The formula in §42-1-560(f) applies if the settlement amount is less than employee's estimated total damages. The formula is: (third party settlement divided by total cognizable damages)lien – carrier's share of attorney's fees and costs = recovery by carrier. In this case, the total cognizable damages

The Court of Appeals agreed that the Carrier's lien should be reduced but held that the Commission misapplied the *Kirkland*[4] factors and the reduction formula and therefore may have ordered an excessive reduction. The Court of Appeals also held that the lien reduction subsection, § 42-1-560(f), applies to future compensation. Finally, it held that future medical expenses are to be considered in calculating the amount of Carrier's lien, and for the purpose of establishing a fund to pay future compensation benefits. The Court of Appeals remanded the case to the Commission to recalculate the value of the lien.

LAW

South Carolina Code Ann. § 42-1-560 is a subrogation statute. The injured employee may bring an action against a third-party tortfeasor in order to recover from the ultimate wrongdoer under § 42-1-560(b). If the employee recovers in that action, whether through a judgment, settlement or otherwise, "the carrier shall have a lien on the proceeds of any recovery…to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier…to the extent the recovery shall be deemed to be for the benefit of the carrier." S.C. Code Ann. § 42-1-560(b). If the employee enters into a settlement for an amount less than the employee's estimated total cognizable damages, then the Commission may reduce the amount of the carrier's lien in the proportion that the settlement bears to the Commission's evaluation of the employee's total cognizable damages at law, if the Commission finds that a reduction is equitable to all parties and serves the interests of justice. § 42-1-560(f). Once the lien and other specified expenses[5] are paid, any balance remaining is placed into a fund which shall be "applied as a credit against future compensation benefits

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were set at $13.5 million, and the settlement was for $4.2 million. 4,200,000/13,500,000=.3111. Therefore, the amount of the reduced lien was computed by multiplying the original lien by .31.

[4] Kirkland v. Allcraft Steel, 329 S.C. 389, 496 S.E.2d 624 (1998).

[5] These expenses include reasonable and necessary expenses, including attorney's fees, incurred in effecting recovery. § 42-1-560(b).

for the same injury or death and shall be distributed as provided in subsection (g)." § 42-1-560(b).

The policy issues surrounding subrogation in a workers' compensation setting include imposing the burden of payment upon the actual wrongdoer, and avoiding double recovery for the injured employee. 12 *Larson's Workers' Compensation Law* §§ 110.01-110.02. The "central objective [of a subrogation statute] is to provide the mechanics that will achieve…the third party paying what it would normally pay if no compensation question were involved; the employer and carrier 'coming out even' by being reimbursed for their compensation expenditure; and the employee getting any excess of the damage recovery over compensation." Id. at §116.02.

Workers' compensation benefits do not include all the various types of damages that may be recovered in a personal injury suit against a third party tortfeasor. See, e.g., Garrett v. Limehouse & Sons, Inc., 293 S.C. 539, 360 S.E.2d 519 (Ct. App. 1987)(The total cognizable damages at law are "damages which are legally recoverable in the type of action in which the settlement occurs.") For example, in a personal injury suit, the "loss compensable in a personal injury action includes such elements as pain and suffering, disfigurement, medical expenses, and lost earning capacity." F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 555 (2d ed. 1997). The workers' compensation claimant's benefits, however, fall into two categories "benefits to the worker for physical injury, and benefits to the dependents in case of death. Benefits for physical injury, in turn, are of two kinds: wage-loss payments based on the concept of disability; and payment of hospital and medical expenses occasioned by any work-connected injury, regardless of wage loss or disability." *Larson's*, supra, § 80.01. Since a personal injury settlement with a third party tortfeasor includes elements that are not included in the workers' compensation benefits, it follows that the carrier's lien should not always be satisfied in full from the settlement proceeds. In Kirkland v. Allcraft Steel, 329 S.C. 389, 496 S.E.2d 624 (1998), this Court set out examples of factors to be considered by the Commission when deciding whether or not it is "equitable to all parties concerned and serve[s] the interests of justice" to reduce the carrier's lien. The four suggested factors included "strength of the claimant's case, likelihood of third party liability, claimant's desire to settle, and whether carrier is

unreasonably refusing to consent to the settlement." Kirkland, supra at 394, 496 S.E.2d at 626.

ISSUES

I. Did the Court of Appeals err in including future medical expenses in Carrier's lien under § 42-1-560(f)?

II. Did the Court of Appeals err in holding that the fund established under §42-1-560(g) is subject to the reduction formula in §42-1-560(f)?

III. Did the Court of Appeals err in its application of the *Kirkland* factors?

ANALYSIS

I. Future Medical Expenses and Carrier's Lien

One of the questions before us is whether the Carrier's lien, which can be discounted by subsection (f), includes medicals that have not yet been incurred, and whether "future compensation benefits" for which a fund is established under subsection (g), includes future medical expenses. We find the Commission properly held that the Carrier's lien includes only those medical expenses paid or accrued but not yet paid at the time of the third party settlement, and does not include future medical expenses. Rather, future medicals are to be included in the fund designated to pay future compensation benefits under subsection (g).

Breeden argues that the definition of compensation in the fund provided for in subsection (g) includes only future economic benefits and not future medicals because that subsection of § 42-1-560 only uses the term compensation.[6] While this argument is facially persuasive, we must decline to read the statute that way. If we were to accept Breeden's argument that 'compensation' includes only that described in § 42-1-100, then there would

[6] The definition of "compensation" under § 42-1-100 is "the money allowance payable to an employee or to his dependents as provided for in this Title and includes funeral benefits provided in this Title."

be no reason for subsection (g) to exist.[7] Under § 42-1-560(b), the Carrier's lien includes "the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier...." (emphasis supplied). Pursuant to the statute the carrier's lien includes the "total amount of *compensation...paid or to be paid*." If we were to construe the language in subsection (b) to include compensation only as set forth in § 42-1-100, then the fund in subsection (g) would be unnecessary, as there would be nothing to put into that fund. This is because all of the compensation, including all future economic damages and medicals, would be folded into the Carrier's lien, leaving nothing for a fund under (g). We hold that the language in § 42-1-560(f) must be read to require the Carrier's lien to include those medical expenses paid, or accrued but not yet paid, at the time of the settlement and does not include medical expenses that have not yet accrued.

After the lien is calculated, and reduced if equitable, "…any balance remaining after payment of necessary expenses and satisfaction of the carrier's lien shall be applied as a credit against future compensation benefits for the same injury or death and shall be distributed as provided in subsection (g) of this section." S.C. Code Ann. § 42-1-560(b). We hold that "future compensation benefits for the same injury or death" includes future medicals in addition to economic compensation. It would be inequitable to allow the employee to recover damages based on future medicals, and then disallow recovery for the Carrier. "The 'compensation' expenditure for which the insurer is entitled to reimbursement includes not only wage benefits but hospital and medical payments as well; this is usually expressly stated, but is the correct result even if the reimbursement provision speaks only of 'compensation' paid…The obvious intention of the legislature in these [subrogation] statutes is to make the insurer whole, not to repay the insurer certain selected and stipulated parts of its compensation costs." *Larson's*, supra, § 117.03. While we reverse the Court of Appeals to the extent that it held future medicals are included in the Carrier's lien we affirm the decision

[7] We must construe a statute to give effect to all of its provisions. Nexsen v. Ward, 96 S.C. 313, 80 S.E. 599 (1914). "[E]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction." Id.

that future medicals are to be included in establishing the amount of the fund under § 42-1-560(g).

II. Application of Lien Reduction to Future Compensation

We disagree with the Court of Appeals that the future compensation fund established pursuant to § 42-1-560(g) is subject to the lien reduction under § 42-1-560(f). Section 42-1-560(f) permits reduction of the Carrier's lien as defined by § 42-1-560(b). Subsection (g) specifically states that "[w]hen there remains a balance of five thousand dollars or more...*after...satisfaction of carrier's lien*...which is applicable as a credit against future compensation benefits for the same injury...the entire balance shall in the first instance be paid to the carrier by the third party." (emphasis supplied). The Carrier's lien is a separate pot of money that is not included in the same pool of money creating the fund under subsection (g). As we held above, future medicals are to be included in the fund under subsection (g), but are not included in the carrier's lien under subsection (f). Because the statute clearly separates the carrier's lien from the fund for future reimbursement, and because there is no provision for the fund under subsection (g) to be reduced under subsection (f), we reverse the Court of Appeals to the extent that it held subsection (g) was subject to the reduction provisions under subsection (f).

III. *Kirkland* Factors

In S.C. Code Ann. § 42-1-560(f), the General Assembly set out the formula for if and how a carrier's lien may be reduced. The Commission determines whether or not it is equitable to both parties and in the interest of justice to reduce the lien using, among other considerations, the four factors suggested in *Kirkland*. The Commission is not required to consider all of the factors, and is free to consider different factors than the ones listed in *Kirkland* if implicated by the facts. The Commission does not need to follow specific *Kirkland* factors in deciding whether or not it is equitable to reduce the carrier's lien, but instead the Commission should look at the policy behind subrogation, and judge whether or not a reduction is warranted on a case-by-case basis. The Commission should be given wide discretion in deciding which factors to consider, and what weight to give each factor. The

factors are to be used only to decide whether to reduce the lien and have no bearing on the *amount* of the reduction. Section 42-1-560(f) sets forth a specific formula[8] that should be followed if the Commission determines that the lien should be reduced.[9]

In this case, the Court of Appeals correctly held that the Commission erred in its application of some of the *Kirkland* factors. The four suggested factors include "strength of the claimant's case, likelihood of third party liability, claimant's desire to settle, and whether carrier is unreasonably refusing to consent to the settlement." Kirkland, supra at 394, 496 S.E.2d at 626. The likelihood of third party liability weighs against reduction of the lien because the employer should not have to shoulder an undue proportion of the liability for claimant's damages if there is clear third party liability. The strength of the claimant's case also weighs against reduction where the claimant has a strong case. The claimant's desire to settle relates to the settlement with the third party, not against the employer or carrier. This third factor weighs in favor of a reduction of the lien in this case because Claimant needed to settle for the benefit of his family. The fourth factor, whether the carrier is unreasonably refusing to consent to a settlement, weighs in favor of the equitable reduction of the lien, if the Carrier is unreasonably refusing to agree to the settlement.

The Commission also considered three additional factors: Carrier's conduct in fulfilling its statutory obligations; whether the Carrier has actual exposure[10]; and, the extent of the Claimant's injuries. The Court of Appeals held that the first two factors should not be considered, and that the third factor could be considered as a subset of the strength of the Claimant's case.

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[8] See supra note 3.

[9] The Court of Appeals incorrectly stated that the *Kirkland* factors should be considered "in deciding whether *or in what amount* to reduce the lien." Breeden, supra, at 208, 546 S.E.2d at 661 (emphasis supplied).

[10] In this case, there was evidence that the claim was re-insured by the Carrier.

We agree with the Court of Appeals that whether the Carrier has actual exposure should not be a factor in determining whether the lien should be reduced. A carrier should not be penalized for protecting its interests by buying re-insurance. However, the Court of Appeals erred in determining that the Commission should not have considered the carrier's conduct in fulfilling its statutory obligations, and the extent of the claimant's injuries. Once again, the Commission should apply only factors implicated by the evidence in the case before it, and apply these on a case-by-case basis.

Both the Commission and the Court of Appeals held that it was equitable to reduce the lien, after application of the *Kirkland* factors. We agree. Because we hold that the *Kirkland* factors only apply to the determination of whether to reduce the lien, and not to the amount by which to reduce it, we reverse the Court of Appeals to the extent that it remanded the case to the Commission to determine the percentage by which the lien should be reduced. However, we uphold the Court of Appeals' decision that a reduction in the Carrier's lien is warranted, and reinstate the Commission's determination that the lien should be reduced by a factor of .31.

CONCLUSION

We hold the *Kirkland* factors are a non-exclusive list, which can be applied to determine whether it is equitable to both parties and in the interests of justice to reduce the lien. Once it is determined that a reduction is appropriate, no decision is needed on the amount of the reduction, rather there is a mechanical application of the statute's formula. We hold that future medicals are not included in the carrier's lien under subsection (f), only those medicals which have already been paid or accrued but not yet paid at the time of the settlement. We also hold that future medicals are to be included in the future compensation fund under subsection (g), which is not subject to the lien reduction under subsection (f).

We reinstate the Commission's calculation of the Carrier's lien to include compensation, paid and accrued but not yet paid, and medical benefits paid, or accrued but not yet paid. We also reinstate the Commission's determination of the factor by which the lien should be

reduced. However, the Commission must recalculate the fund under subsection (g) to include future medical benefits. We remand this case to the Commission for proceedings consistent with this opinion.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mary Louise Sloan, Individually and as Class Representative on Behalf of All Others Similarly Situated, Appellant,

v.

South Carolina Department of Public Safety and Image Data, LLC, Defendants,

of whom Image Data, LLC, is Respondent.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25689
Heard June 25, 2003 - Filed August 4, 2003

AFFIRMED

Carl F. Muller, Wallace K. Lightsey, and John C. Moylan, of Wyche, Burgess, Freeman & Parham, P.A., of Greenville, for appellant.

Joseph E. Major, Kurt M. Rozelsky, and Paul E. Hammack, of Leatherwood, Walker, Todd, & Mann, P.C., of Greenville, for respondent.

PER CURIAM: Appellant Mary Louise Sloan brought this action against the South Carolina Department of Public Safety (DPS) and Respondent Image Data, LLC (Image Data) alleging invasion of privacy by misappropriation of personality and seeking damages, injunctive, and declaratory relief. In separate orders, the trial judge granted summary judgment to DPS and Image Data. Sloan appeals the order granting summary judgment to Image Data.

BACKGROUND

In 1997, the General Assembly passed Act No. 155, 34.15, 1997 S.C. Acts 1445 (the 1997 Act), providing:

> (DPS: Sale of Photos or Digitized Images) The Department of Public Safety may enter into contracts to provide copies of photography, electronically stored information, stored photographs or digitized images. Such items are to be used for the prevention of fraud, including but not limited to, use in mechanisms intended to prevent the fraudulent use of credit cards, debit cards or other forms of financial or voter transactions. The use of such photographs, electronically stored or digitized images obtained by private companies or other entities is limited to the verification of the identity of the holder. Funds derived from the contractual sale of these copies are retained by the Department of Public Safety to defray the costs of providing same.[1]

[1] The following year, the General Assembly passed an identical provision. Act No. 419, § 36.12 , 1998 S.C. Acts 2912.

On January 30, 1998, DPS and Image Data entered a "Data Access Agreement." Under the terms of this agreement, DPS agreed to make available to Image Data the information and photograph appearing on the face of South Carolina drivers' licenses and state-issued personal identification cards. In return, Image Data agreed to pay DPS for the information and photographs. According to the agreement, Image Data intended to incorporate the information into a multi-state or national electronic database to be used for identity verification and fraud prevention purposes. [2]

According to the affidavit of Robert Houvener, Image Data's co-founder, president, and CEO, through its "True I.D." database, Image Data electronically provides an image (i.e. photograph) corresponding to the identification provided by a customer to a merchant at the point of sale. The merchant can use the image to verify the customer's identification.

Between September 1998 and April 1, 1999, Image Data operated a pilot test program of its True I.D. system at fifteen retail establishments in South Carolina. During this seven month period, approximately 2,000 transactions occurred. Sloan's image was not displayed during the pilot program.

DPS terminated its contract with Image Data effective March 22, 1999. DPS agreed to refund payments received from Image Data and requested Image Data purge all South Carolina records from its database, return all computer tapes to DPS, and verify that the deletions occurred.

In 1999, the General Assembly passed Act No. 100, Part II, 1999 S.C. Acts 842 (the 1999 Act), prohibiting DPS from selling or providing a private party with social security numbers, photographs, or signatures taken

[2] At some point, driver's license and personal identification card holders were permitted to "opt out" of the Image Data program. At her deposition, Sloan testified she was aware she could opt out of the program, but did not do so because she thought opting out would be "a real hassle."

for purposes of a driver's license or personal identification card. The legislature specified social security numbers, photographs, signatures, or digitized images from a driver's license or personal identification card are not public records.[3] In the same Act, the General Assembly amended the Freedom of Information Act (FOIA),[4] specifying FOIA does not permit DPS to sell or furnish to a private party social security numbers, photographs, signatures, or other identifying features obtained for the purpose of a driver's license or a personal identification card. Act No. 100, Part II, § 53, 1999 S.C. Acts 990.[5] In addition, it amended FOIA to specify that a private person may not use an electronically-stored version of information obtained from a driver's license record for any purpose. Id.

Sloan filed her original complaint in February 1999 alleging invasion of privacy through the unlawful appropriation of her driver's license information and photograph by DPS and Image Data. She later filed an amended complaint in which she stated DPS disclosed social security numbers to Image Data, that it also disclosed information from personal identification cards in addition to drivers' licenses, and that Image Data intended to use the information not simply to prevent fraud, but to accumulate and to sell information concerning consumers' buying habits.

ISSUE

Does the purchase/sale of information and images contained on drivers' licenses and state issued identification cards, as authorized by the General Assembly, constitute the tort of misappropriation of personality?

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[3] See S.C. Code Ann. § 56-3-545 (Supp. 2002).

[4] S.C. Code Ann. §§ 30-4-10 to -165 (1991 and Supp. 2002).

[5] See S.C. Code Ann. §§ 30-4-160 to -165 (Supp. 2002).

DISCUSSION

"The right to privacy is correctly defined ... as the right to be let alone; the right of a person to be free from unwarranted publicity." Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 458, 7 S.E.2d 169, 171 (1940). In South Carolina, there are three separate and distinct causes of action for invasion of privacy: 1) wrongful appropriation of personality; 2) wrongful publicizing of private affairs; and 3) wrongful intrusion into private affairs. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999). Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity. Snakenberg v. Hartford Cas. Ins. Co., Inc., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989).

The trial judge properly determined Image Data did not misappropriate Sloan's driver's license information and photograph. At the time Image Data and DPS entered the Data Access Agreement, the 1997 Act specifically permitted the purchase/sale arrangement contemplated by the contracting parties. Image Data was entitled to rely in good faith on the 1997 Act as authority to enter into its contract with DPS. See Wyatt v. Cole, 504 U.S. 158, 168, 112 S.Ct. 1827, 1833, 118 L.Ed.2d 504, 515 (1992) (" . . . principles of equality and fairness may suggest, . . . , that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protections from liability. . . ."). Because the 1997 Act authorized the transaction between Image Data and DPS, Image Data did not misappropriate Sloan's driver's license information and photograph. [6]

[6] While not directly addressing the issue of privacy, the United States Supreme Court upheld Congress' authority it enact the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C.A. §§ 2721-2725 (2000) which restricts the sale or release of a driver's personal information. Reno v. Condon, 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000). The DPPA, however, permits motor vehicle departments to disclose personal information

Furthermore, Sloan presented no evidence of the existence of a genuine issue of material fact that Image Data's intended use of the driver's license and identification card information was for other than fraud prevention, the stated purpose of the 1997 Act. While Sloan suggested Image Data acquired the information in order to track and sell consumer buying habits, she failed to offer any material evidence to support her claim.

Finally, we recognize Image Data and DPS exceeded the scope of the 1997 Act by purchasing/selling social security numbers. While the transfer of social security numbers was not authorized by the 1997 Act, the information was erroneously transferred from DPS to Image Data.[7] In light of the fact that the transfer was inadvertent and there is no evidence Image Data used the information, the technical violation of the 1997 Act does not bar Image Data from relying on the 1997 Act.

We conclude Sloan failed to present any genuine issue of material fact supporting her claim for misappropriation of personality. Accordingly, the trial judge properly granted summary judgment to Image Data and the order of the lower court is **AFFIRMED**. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998) (summary

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from driver's records for a number of purposes, one of which is for use by a business to verify the accuracy of personal information submitted to the business and to prevent fraud or pursue legal remedies if the information that the individual submitted to the business is revealed to have been inaccurate. § 2721(b)(3).

[7] At the summary judgment hearing, counsel for DPS stated DPS inadvertently transmitted the social security numbers to Image Data. Counsel for Image Data agreed the Data Access Agreement did not call for release of social security numbers and stated the social security numbers were neither needed nor used by Image Data.

judgment is proper where there is no genuine issue of material fact and moving party is entitled to judgment as a matter of law).[8]

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

[8] Sloan sought to be certified as a class representative of similarly situated plaintiffs. Because of our disposition in this matter, we decline to address the order denying class certification.

The Supreme Court of South Carolina

In the Matter of Maria Reichmanis, Respondent.

O R D E R

Pursuant to the Rule 28(b)(6)(A), of the Rules of Lawyer Disciplinary Enforcement ("RLDE"), we **VACATE** the interim suspension placed on Maria Reichmanis and place her on incapacity inactive status based on the severity of her documented medical condition.

Further, pursuant to Rule 28(b)(6)(C), RLDE, we defer all pending disciplinary matters against Ms. Reichmanis because she has established that she is unable to assist in her own defense. This stay of the proceedings will be in effect until Ms. Reichmanis attempts to change her incapacity inactive status.

IT IS SO ORDERED

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

Pleicones, J., not participating

Columbia, South Carolina

July 25, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Monroe Roger Rudd, II, Appellant.

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 3663
Heard June 10, 2003 – Filed August 4, 2003

REVERSED

Assistant Appellate Defender Robert M. Pachak, of South Carolina Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H.

Richardson, Assistant Attorney General Deborah R. J. Shupe, all of Columbia; and Solicitor Walter M. Bailey, Jr., of Summerville, for Respondent.

HEARN, C.J.: Monroe Roger Rudd, II, was convicted of committing a lewd act on a child. He appeals, arguing the trial court erred in overruling defense counsel's objections to statements made by the solicitor during closing arguments. We reverse.

FACTS

Rudd lived with Mother and her eight-year-old daughter, Victim, for approximately seven years. Mother's job often required her to work the night shift, leaving Rudd to care for Victim. Victim testified that one evening, when Rudd and Victim were alone together, Rudd asked her to rub his head, which she did. Rudd then allegedly pushed her hand down to his chest and to his stomach. She stated: "And he kept pushing . . . my hand to his private part and then I felt it."

Victim also testified that in separate incidents Rudd had her completely disrobe and lie down on the bathroom floor before getting into the shower. She stated that Rudd asked her to spread her legs while he examined her genitals without penetrating her vagina. Victim testified that Rudd's fingernails were painful to her. According to Victim, Rudd told her that he was examining her in an effort to determine whether she had developed an infection. Rudd allegedly performed these examinations approximately twice a week.

Finally, Victim testified that Rudd had showered with her on a prior occasion. She stated that both she and Rudd were naked at the time. She testified that Rudd helped her wash and rinse her hair because she had difficulty rinsing out all of the shampoo.

On March 6, 2001, Victim reported to school officials that Rudd had sexually assaulted her between the months of December 2000 and

January 2001. Mother was called to the school and was present when Victim disclosed the alleged misconduct.

The State charged Rudd with first-degree criminal sexual conduct with a minor as well as committing a lewd act upon a child. At trial, several of the State's witnesses testified that Victim told them identical stories of the circumstances surrounding the alleged assaults. Mother testified that she learned of the assaults from Victim when she arrived at the school where Victim first raised the allegations. Later that day, Victim affirmed her account of the alleged assaults while speaking with Patrolman Hubert Prince of the Dorchester County Sheriff's Office. Detective Thomas Marshall also testified that Victim's reports to him were consistent with her earlier accounts to Patrolman Prince, Mother, and an account appearing in the Low Country Children's Center reports. Victim's grandmother testified Victim told her about the sexual assaults, and it appeared that Victim was consistent in recalling the circumstances surrounding the incidents. Several healthcare professionals also testified that Victim related to them the same specifics of the alleged assaults.

At trial, Rudd testified in his defense. He admitted having washed Victim's hair, but claimed only to have been treating her for head lice. He also testified to examining Victim's genitals after she allegedly injured herself on a bicycle seat. However, Rudd denied ever being nude with Victim in the shower and he denied touching her improperly. Rudd also denied putting Victim's hand on his genitals.

At issue in this case are two separate comments made by the solicitor during her closing argument before the jury. First, the solicitor began her closing argument by stating:

> Ladies and gentlemen of the jury, the defense's argument is what we call the old cotton candy defense. . . . Reminds you of going to the fair when you're a child, you see the cotton candy, it looks nice and sweet and something good. When you get right

> down to it basically it's a lot of sugar spun up with hot air.

Rudd's counsel objected to this comment as improper and as "a scurrilous, at home and personal attack against opposing counsel." The trial court overruled the objection.

At a later point in her closing argument, the solicitor told the jury:

> A child is not sophisticated enough to fool everybody, ladies and gentlemen. The defendant has had many protections before he gets into this court of law to face you jurors. First of all, [Victim] would have to fool Deputy Prince, Lowcountry Children's Center, [and] Detective Marshall, who gets a warrant, has a magistrate sign a warrant. There's a preliminary hearing before a magistrate before its bound over, there's a grand jury that true bills or no bills an indictment before this case is ever brought to you. So certainly a child's story -- a child is not sophisticated enough to fool all these people.

Defense counsel objected, arguing the solicitor had improperly commented on prior procedures. The trial court again overruled counsel's objection.

The jury acquitted Rudd of first-degree criminal sexual conduct with a minor, but convicted him of committing a lewd act upon a child. Rudd was sentenced to a term of twelve years in prison. This appeal follows.

ISSUES

I. Did the trial court err in determining the solicitor's statement, which compared the defense's argument to cotton candy, did not amount to an improper personal attack on defense counsel?

II. Did the trial court err in determining the solicitor's reference to prior procedures did not improperly reference preliminary determinations of fact?

STANDARD OF REVIEW

The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion. State v. Penland, 275 S.C. 537, 539, 273 S.E.2d 765, 766 (1981).

LAW/ANALYSIS

I.

Rudd argues that the solicitor's comparison of Rudd's defense to cotton candy amounted to an improper personal attack on defense counsel. Accordingly, Rudd insists the trial court erred in overruling defense counsel's objection to the statement. We disagree.

A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. Copeland, 321 S.C. at 324, 468 S.E.2d at 624; State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Further, the argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). It is improper for the solicitor to express before the jury his or her personal judgment about opposing counsel. State v. Lunsford, 318 S.C. 241, 246-47, 456 S.E.2d 918, 922 (Ct. App. 1995).

Here, the trial court did not abuse its discretion by overruling Rudd's objection to the solicitor's comparison of Rudd's defense to cotton candy. The solicitor is entitled, within reason, to question the credibility of Rudd's defense. See Lunsford, 318 S.C. at 246, 456 S.E.2d at 922 ("In telling the jury, 'so don't fall for that,' the solicitor was merely telling the

jury that it should not credit defense counsel's argument regarding the absence of fingerprint evidence."). Counsel may fairly point out matters that the jury should not consider. Id. In Rudd's case, the solicitor's comment did not express her personal judgment about defense counsel; rather, her statement merely invited the jury to find Rudd's assertions at trial lacked credibility.

II.

Rudd next contends the solicitor's reference to prior procedures constituted an improper reference to preliminary determinations of fact. We agree.

Our supreme court has repeatedly condemned closing arguments that lessen the jury's sense of responsibility by referencing preliminary determinations of the facts. See, e.g., State v. Thomas, 287 S.C. 411, 412, 339 S.E.2d 129 (1986) (citing Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984)); State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981)). "These statements to the jury are improper because they inject an arbitrary factor into jury deliberations. The danger is that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts. . . ." Thomas, 287 S.C. at 412-13, 339 S.E.2d at 129.

Here, the solicitor told the jury that Rudd "has had many protections before he gets into this court of law to face you jurors." The solicitor then informed the jury that, in addition to numerous others who had examined Victim's allegations, a preliminary hearing was held before a magistrate, and the case had been presented to a grand jury. It is irrelevant that the solicitor's intent may have been to simply emphasize that Victim's story had remained consistent throughout the investigation. A statement of this type could have improperly lessened a juror's sense of responsibility to independently determine the facts of this case by permitting him or her to rely on the opinions of the investigators, the magistrate, and the grand jury. See Thomas, 287 S.C. at 412, 339 S.E.2d at 129 (condemning solicitor's comment that the case had already been examined by a magistrate and a

grand jury, and that a preliminary hearing had been held). Accordingly, we hold the trial court abused its discretion by overruling Rudd's objection to this improper statement.

However, improper comments do not require reversal if they are not prejudicial to the defendant. Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997). On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Copeland, 321 S.C. at 324, 468 S.E.2d at 624-25; State v. Johnson, 293 S.C. 321, 326, 360 S.E.2d 317, 320 (1987). The appropriate determination is whether the solicitor's comment so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Victim alone provided the substantive testimony against Rudd. The State's other witnesses testified only that Victim told them about the assaults and that her account was consistent as to the time and place the events allegedly occurred. Rudd denied sexually assaulting Victim and testified that he only examined her to determine if she was injured in a bicycle accident. The jury's verdict ultimately depended upon whether they believed Victim's story was credible. Under these circumstances, the evidence of Rudd's guilt is not overwhelming; thus, we find the solicitor's comment was unfairly prejudicial to Rudd.[1] As the supreme court has warned: "We caution solicitors that arguments of this kind can rarely be harmless." Thomas, 287 S.C. at 413, 339 S.E.2d at 129.

Moreover, we do not believe the trial court's jury charge cured the error. The trial court instructed the jurors to decide the case according to

[1] The State submits that because the jurors acquitted Rudd of the CSC charge, they could not have been prejudicially affected by the solicitor's comments. We find this argument unpersuasive. It is impossible for this court to determine what effect the solicitor's comment may have had on the minds of the jurors.

the testimony of sworn witnesses and other evidence without regard to any arbitrary factors. However, the trial court made no reference to the solicitor's comment regarding the "many protections" Rudd had received prior to the trial or the prior examinations by the magistrate, the grand jury, and others. The trial court's instruction to the jury was insufficient to cure the solicitor's improper comment. Considering the solicitor's closing argument in the context of the entire record, we cannot say the trial court's error in allowing the solicitor's improper comment was harmless.

CONCLUSION

For the foregoing reasons, Rudd's conviction is

REVERSED.

CONNOR and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Harold Pittman, Respondent,

v.

C. E. Lowther, Appellant.

Appeal From Jasper County
Gerald C. Smoak, Jr., Circuit Court Judge

Opinion No. 3669
Heard March 12, 2003 – Filed August 4, 2003

REVERSED

H. Fred Kuhn, Jr., of Beaufort, for Appellant.

Darrell T. Johnson, Jr., of Hardeeville, for Respondent.

STILWELL, J.: C. E. Lowther appeals the order of the circuit court granting a private prescriptive easement across his land to Harold Pittman. We reverse.

FACTS/PROCEDURAL BACKGROUND

Weldon Wall purchased Good Hope Plantation from Good Hope Corporation. At that time, a very old system of trails and plantation roads traversed the entire tract. One such plantation road was Wellington Road, leading into the plantation from U.S. Highway 278. The entire road system was shown on the plat referenced in the deed. In 1973, Wall subdivided Good Hope into two parcels: Parcel A consisting of 2,340.8 acres and Parcel B containing 661.33 acres. Wall sold Parcel A to Pittman. The plat referenced in this deed did not show Wellington Road or any of the other plantation roads.

Mary Wilcox later purchased Parcel B at a foreclosure sale. Wilcox assigned a portion of her bid on Parcel B to Pittman and in 1975 Pittman purchased 279 acres out of Parcel B. Pittman converted a hunting lodge located on the property into a home. This property was referred to in the testimony as the "house tract." On three sides, the "house tract" was bordered by the 2,340.8 acre parcel already owned by Pittman. The remaining portion of Parcel B, held by Wilcox, abutted the fourth side of the tract. The "house tract" did not abut any public road. Both Parcel A and Wilcox's land abutted U.S. Highway 278.

Since May of 1973, Pittman used Wellington Road to travel from Highway 278 to a trailer on Parcel A. At the time he purchased the "house tract" in 1975, his only access to that property was also Wellington Road.[1]

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[1] The "house tract" deed granted Pittman an express 20-foot access easement to Highway 278. Pittman never used the easement for a driveway to his home. He testified that he had negotiated for the easement for the sole purpose of getting a mowing machine in behind a fence. Five or six big live oak trees stand in the path of the easement and would have to be felled to create a road.

After the 1975 purchase, Pittman continued to use Wellington Road to reach Parcel A and as a driveway to his home on the "house tract." A portion of the road passed over Wilcox's land before it joined U.S. Highway 278.

Wilcox sold her remaining portion of Parcel B consisting of 312.11 acres to Lowther in 1976. About five or six years later, Lowther began to place obstacles in Wellington Road in an effort to close the portion which traversed his property.[2] Pittman either drove around the obstacles or cut or pushed them down to travel the road to Highway 278. This scenario was repeated numerous times.

Pittman stopped using the road for approximately four or five months in 1992 while a mutual friend attempted to mediate the dispute. After the friend told Pittman his settlement attempts were unsuccessful, Pittman promptly pushed up the wires and cables across the road and continued to travel across it to Highway 278. In the early fall of 1997, Lowther requested his attorney write to Mr. Pittman and instruct him to stay off his property and the disputed section of the road. Pittman ignored the letter and destroyed the barriers blocking the road. Lowther called a deputy sheriff out to observe the damage and instruct Pittman to stay off of his land. This litigation ensued.

The original Wellington Road and a separate, newer county road, some 200 feet farther up, run roughly parallel to one another leading off Highway 278 into the old Good Hope land and towards the Lowther and Pittman properties. About 300 feet from Highway 278, the new county road merges into the original Wellington Road and runs for some unknown distance to the edge of a particular lot belonging to Lowther. Lowther dedicated this portion of Wellington Road to the county. A final portion of the original road continues on for another 168 feet running along the edge of Lowther's

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[2] Pittman testified that about four or five years after he bought the "house tract" he built a road from a trailer located on the adjoining Parcel A out to U.S. Highway 278. At some point thereafter he constructed a driveway connecting his home on the "house tract" to that road. This provided an alternate route at about the time the Lowthers began to obstruct Wellington Road.

property until it meets the gate to Pittman's "house tract." It is this last 168 feet of Wellington Road that remains in controversy.[3]

Pittman brought an action to declare an easement by prescription, necessity, or dedication across 168 feet of Wellington Road running through Lowther's land. After a bench trial, the court issued an order granting Pittman a private prescriptive easement over Wellington Road providing access to Highway 278 across Lowther's property.

LAW/ANALYSIS

I. Continuous and Uninterrupted Use

Lowther argues the trial court erred in concluding Pittman established a private prescriptive easement because the evidence does not support a factual finding that Pittman's adverse use was continuous and uninterrupted. Because the trial court reached inconsistent factual findings, it erred in concluding Pittman's use was continuous and uninterrupted during the alleged prescriptive period.[4]

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). The trial court relied upon the following standard set forth in Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420, 423 (Ct. App. 1997) to find that Pittman should be granted a prescriptive easement. "To establish a prescriptive easement, one must show: (1) continued use for 20 years, (2) the

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[3] The Lowthers are developing a subdivision on their property. The disputed portion of Wellington Road runs across 168.83 feet of a lot designated as lot # 12.

[4] Because we hold Pittman did not enjoy continuous and uninterrupted use of the road segment in question, we need not address Lowther's other arguments concerning the existence or extent of the claimed easement.

identity of the thing enjoyed, and (3) use which is adverse or under claim of right. Id. (citing Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993)). Laychur, however, emphasized as to the first prerequisite not only that there must be a continued use for twenty years, there must be "continued and uninterrupted use or enjoyment of the right for a period of 20 years." Laychur, 315 S.C. at 368, 434 S.E.2d at 261 (emphasis added).[5] The uninterrupted requirement is the focal point here.

The trial court's order stated the only interruption in Pittman's use of the challenged portion of Wellington Road was during the failed mediation. However, the court also found Pittman had broken open more than $2,000 worth of barriers costing approximately $200 each "exercising his perceived right to use the road." The barriers the trial court mentioned were erected by Lowther specifically for the purpose of preventing Pittman from utilizing the roadway, and not merely for Lowther's own use or convenience. On direct examination, Mr. Pittman was asked if he had used the road uninterruptedly from the time he bought the tract, and he responded, "Not completely." He stated that five or six years after the Lowthers bought the adjoining property, they started putting obstacles in the way trying to close the road, but that he "pushed them down or went around them . . . ." He also testified the Lowthers later "put up gates and put up cables," but after the attempted mediation failed, he pushed down the wire and cable the Lowthers had erected across the road.

Mitchell Lowther testified regarding efforts made to prevent Pittman from using the road. In addition to setting posts and bolting cables across it, the road was plowed every year and planted with rye a couple of years. Lowther testified he tried to be a good neighbor and, when he found Pittman had driven around a cable or pushed a cable down, he would calmly put the cable back up to try to cause as little problem as possible. Nevertheless, he

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[5] See generally Hartley v. John Wesley United Methodist Church of Johns Island, Op. No. 3642 (S.C. Ct. App. Filed May 27, 2003) (Shearouse Adv. Sh. No. 20 at 19, 22-23), for a discussion as to the discrepancy in the correct standard to apply in determining the existence of an easement by prescription.

eventually reported Pittman's actions to law enforcement and had a deputy come see where Pittman had used his tractor to not only push over posts and cables, but uproot a couple of small trees and scrape the road with his tractor. Pittman stipulated that he had done so.

Lowther's repeated attempts to prevent Pittman from crossing Lowther's land constitute interruptions, however brief, in Pittman's use and enjoyment of that portion of Wellington Road. See 25 Am. Jur. 2d, Easements § 69 (1996) ("Any unambiguous act of the owner of the land which evinces his intention to exclude others from the uninterrupted use of the right claimed breaks its continuity so as to prevent the acquisition of an easement therein by prescription . . . . Though the mere erection of gates by the servient owner for the greater convenience of his operations, and not as a barrier to passage, will not defeat a claim to a prescriptive easement of passage, an easement of way cannot arise by prescription if the owner of the servient estate has habitually broken or interrupted its use at will by the maintenance of gates.") (footnotes omitted). Therefore, the trial court erred in concluding Pittman enjoyed uninterrupted adverse use of the land for the 20-year period necessary to establish an easement by prescription.

II. Easement by Dedication

As an alternate sustaining ground, Pittman urges us to find the existence of an easement by dedication. The record is devoid of evidence to support this contention.

"It is generally held that when the owner of land has it subdivided and platted into lots and streets and sells and conveys the lots with reference to the plat, he thereby dedicates said streets to the use of such lot owners, their successors in title, and the public." Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 118, 145 S.E.2d 922, 924-25 (1965). "Two elements are required to perfect [public] dedication. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Second, there must be acceptance of such property by the public." Laychur, 315 S.C. at 368, 434 S.E.2d at 261. However, as between the original landowner and his grantee, the dedication is complete when the

conveyance is made. Blue Ridge Realty Co., 247 S.C. at 119, 145 S.E.2d at 925.

Pittman does not clearly indicate whether the purported easement by dedication is public or private. However, the distinction is without consequence because there is no evidence any prior landowner intended to dedicate an easement in the use of Wellington Road. Pittman argues the plat referenced in the deed when he purchased the 2,340 acre tract from Wall shows part of Wellington Road, including a part of the 168 feet in dispute. However, as one of Pittman's own witnesses testified, the plat created for that sale does not show Wellington Road. Nor is it shown on the plat referenced in the deed conveying the 279 acre tract to Pittman.

Two plats in the record do show Wellington Road. The first was the one created for and referenced in the conveyance of the entire 3,000 acres from Good Hope Corporation to Wall. This plat shows the entire plantation's road system. However, because the plat was not created as part of a subdivision of the land, the display of the old plantation roads cannot be considered a positive and unmistakable intention to dedicate them to the public. Even though this plat is also referenced in the 2,340 acre deed from Wall to Pittman, the absence of roads on the plat created specifically for that conveyance belies the existence of a dedication of Wellington Road to either the public or Pittman individually.

The second plat that shows Wellington Road was created when Wall was planning to subdivide and sell at auction the land adjoining Pittman's 279 acre tract. The auction was held, but Lowther offered more than the combined individual lot bids and thus purchased the entire tract. The subdivision was never created. Furthermore, although the plat was referenced in the deed conveying the property to Lowther, the deed specifically states the reference was for the purpose of describing the outside boundaries, and was not intended to suggest a subdivision was being transferred. Thus, the existence of this document also falls short of a positive and unmistakable intention to dedicate an easement over Wellington Road.

CONCLUSION

Pittman failed to establish a prescriptive easement in the challenged portion of Wellington Road because his use was not continuous and uninterrupted for the requisite period. Pittman also failed to establish an easement by dedication because the evidence does not demonstrate an express intent by any of the prior landowners to create such. For these reasons, the order on appeal is

REVERSED.

CURETON and HOWARD, JJ., concur.