OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29

July 18, 2005

Daniel E. Shearouse, Clerk
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Emma F. Hessenthaler, Petitioner,

v.

Tri-County Sister Help, Inc., Respondent.

On Writ of Certiorari to the Court of Appeals

Appeal from York County
James R. Barber, Circuit Court Judge
On Petition for Second Rehearing

Opinion No. 25650
Heard November 21, 2002 - Filed May 12, 2003
Reheard March 3, 2004 - Refiled October 18, 2004
Reheard February 16, 2005 - Refiled July 18, 2005

AFFIRMED IN RESULT

William Gary White, III, of Columbia, for Petitioner.

Chalmers C. Johnson, of Charleston, for Respondent.

Ashley B. Abel and Lisa Robette Claxton, both of Greenville, for Amicus Curiae.

CHIEF JUSTICE TOAL: Petitioner Emma F. Hessenthaler (Hessenthaler) brought a breach-of-contract action against her former employer, Respondent Tri-County Sister Help, Inc. (the Shelter), alleging she was constructively discharged in violation of a nondiscrimination provision in the Shelter's employee handbook. The jury awarded Hessenthaler $25,000 in damages. The trial court denied the Shelter's motions for a directed verdict and for a judgment notwithstanding the verdict. The court of appeals reversed, finding that the employee handbook did not constitute a contract. *Hessenthaler v. Tri-County Sister Help, Inc.*, Op. No. 2001-UP-325 (S.C. Ct. App. filed June 19, 2001). After granting rehearing for a second time, we withdraw our two prior opinions on this matter and substitute them with this opinion. We affirm in result.

FACTUAL/PROCEDURAL BACKGROUND

In 1984, Hessenthaler began working as a monitor at the Shelter, a place for women and children who are victims of domestic violence. By late 1995, Hessenthaler had advanced to the position of Shelter Director, a position directly below the Executive Director.

That same year, the Shelter hired a new Executive Director, Audrey Harrell (Harrell), an African-American woman. As soon as Harrell was hired, she began firing members of the staff. At one point, she directed Hessenthaler, who is a white woman, to fire certain employees, also white women. Harrell hired two black women and one white woman to replace the fired employees.

According to Hessenthaler, her disputes with Harrell continued and escalated. One day, Hessenthaler told one of the new employees, a black woman, to operate the Shelter hotline. The employee began to scream at Hessenthaler, and another new employee, also a black woman, joined in. Hessenthaler reported the incident to Harrell and planned to file a grievance. But Hessenthaler testified that she was not permitted to file a grievance, and the next day, was told that she would no longer be supervising the two women.

Hessenthaler also testified that on January 1, 1996, someone called her at home to report that the Shelter's twenty-four-hour hotline was not being answered. Hessenthaler called Harrell to report the problem. Harrell demanded that Hessenthaler reveal the name of the person who informed her about the hotline. Hessenthaler refused to answer the question, said she had to go, and hung up the phone. Later, Hessenthaler called a board member to report the hotline situation and the conversation with Harrell.

The next day, Harrell met with Hessenthaler after work for three hours and forty-five minutes. Hessenthaler testified that Harrell told her that she was going to be punished; that she was going to be demoted from Shelter Director; that her office would become a bedroom; that Harrell would "destroy her"; and that hanging up the phone on her was "just like calling [Harrell] the 'n' word." Harrell suspended Hessenthaler for two days for insubordination, failure to assist the Executive Director in an investigation, and failure to follow the proper chain of command. Harrell told Hessenthaler that a board member would contact Hessenthaler to inform her whether or not she could return to work.

While on suspension, Hessenthaler experienced some health problems, including depression. She also had a hysterectomy, and later broke some ribs in a car accident. She periodically sent doctors' notes to the Shelter in support of her leave-of-absence from January to mid-April. The Shelter accepted the notes and did not terminate Hessenthaler.

In February 1996, while Hessenthaler was on leave, Harrell sent Hessenthaler a new employee handbook. Hessenthaler testified that she never read the handbook because she was sick at the time. After some communication by mail,[1] however, Hessenthaler and Harrell finally met at

[1] Among other things, Harrell sent Hessenthaler a job offer, which included the following responsibilities: (1) train Shelter staff and volunteers on Shelter policies and procedures; (2) ensure that these policies and procedures are followed by Shelter residents; (3) provide general facility maintenance and security management; (4) meet with Shelter clients weekly to discuss any problems/concerns regarding the Shelter; (5) recommend Shelter purchases to Assistant Director; (6) facilitate group on Shelter orientation and house rules

the Shelter on May 8. During the meeting, Harrell proceeded to read the employee manual aloud to Hessenthaler.[2] Hessenthaler admitted that the handbook was read to her "cover to cover, page by page, word for word."

The manual contained a disclaimer in bold, all-capitalized letters, on the first page, which provided as follows:

> **THE LANGUAGE USED IN THESE PERSONNEL POLICIES IS NOT INTENDED TO CREATE, NOR SHOULD IT BE INTERPRETED TO CREATE A LEGAL CONTRACT OR AGREEMENT BETWEEN [THE SHELTER] AND ANY OR ALL OF ITS EMPLOYEES. THIS DISCLAIMER TAKES PRECEDENCE OVER ANY STATEMENT IN THESE POLICIES.**[3]

Hessenthaler testified that she did not recall Harrell reading the disclaimer language.

The handbook also contained a nondiscrimination provision, which provided:

> [The Shelter] is an equal opportunity employer. All decisions, including hiring, training, and promotion, are made without regard to race, color, religion, national origin, sex, age, handicap, sexual preference, or any other protected status.

After the handbook was read aloud, Hessenthaler was offered the position as Shelter Manager, which included eleven more requirements than

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with residents; (7) ensure that appropriate codes and standards are met; (8) purchase approved groceries for Shelter; and (9) other duties as assigned.

[2] It is unclear as to why Hessenthaler did not read the handbook herself.

[3] We recognize that the disclaimer, as written here, appears larger than it appears in the actual handbook.

the job offered earlier.[4] Hessenthaler testified that she was told that she needed to get a college degree, and that she would also have to assume the responsibilities of volunteer coordinator. Hessenthaler testified she felt as though it would take eight people to do all of that work.

Hessenthaler left the meeting, telling Harrell that, due to all of the job requirements, she would have to think about whether she would accept the position. Hessenthaler did not return to work by May 13 (her deadline for responding to Harrell's latest job offer) and later discovered that she had been fired.

Hessenthaler brought a breach-of-contract action against the Shelter alleging she was constructively discharged in violation of the nondiscrimination provision in the Shelter's employee handbook. The jury awarded her $25,000 in damages. The Shelter's motions for a directed verdict and for judgment notwithstanding the verdict were denied. The court of appeals reversed, holding that the employee handbook did not constitute a contract, and therefore the trial court erred in denying the Shelter's motions. *Hessenthaler v. Tri-County Sister Help, Inc.*, Op. No. 2001-UP-325 (S.C. Ct. App. filed June 19, 2001).

After granting certiorari, we reversed, holding that the question of whether the handbook created an enforceable contract was properly

[4] The requirements included the following: (1) recruit, train, and motivate volunteers; (2) assess the need for volunteers and coordinate volunteer schedule to ensure twenty-four hour coverage and other related client services; (3) assist public relations coordinator to establish a Speaker's Bureau to promote public awareness and community education on domestic violence; (4) serve as speaker for the Bureau; (5) receive and process all non-monetary donations; (6) maintain appropriate statistics and logs on volunteers and complete required reports; (7) act as PR coordinator in development and distribution of newsletter; (8) assist in fund-raising activities; (9) solicit donations from various groups and organizations; (10) design and coordinate an incentive award program for volunteers; and (11) coordinate mass mailings to churches, social and professional clubs, and organizations in York, Lancaster and Chester Counties.

submitted to the jury. *Hessenthaler v. Tri-County Sister Help, Inc.*, Op. No. 25650 (S.C. Sup. Ct. filed May 12, 2003) (Shearouse Adv. Sh. No. 18 at 50). Rehearing was granted, and following oral argument, we withdrew the initial opinion and substituted it with a new opinion in which we affirmed the court of appeals' decision in result. *Hessenthaler v. Tri-County Sister Help, Inc.*, Op. No. 25650 (S.C. Sup. Ct. filed Oct. 18, 2004) (Shearouse Adv. Sh. No. 40 at 14).

After granting rehearing for a second time, we now consider the following issue for review:

> Did the court of appeals err in holding that the employee handbook did not constitute a contract?

LAW/ANALYSIS

Standard of Review

When ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court must view the evidence and its reasonable inferences in the light most favorable to the party opposing the motions. *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. *Id.* On review, this Court will reverse the trial court's ruling only when there is no evidence to support it. *Id.*

Discussion

Hessenthaler contends that the court of appeals erred in holding that the employee handbook did not constitute a contract. We disagree.

In general, an at-will employee may be terminated at any time for any reason or for no reason, with or without cause. *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 224, 516 S.E.2d 449, 450 (1999). But when an employee's at-will status has been altered by the terms of an employee handbook, an employee, when fired, may bring a cause of action for wrongful

discharge based on breach of contract. *Conner v. City of Forest Acres*, 348 S.C. 454, 463, 560 S.E.2d 606, 610 (2002).

If an employer wishes to issue an employee handbook or manual without being bound by it and with a desire to maintain the at-will employment relationship, the employer must insert a conspicuous disclaimer into the handbook. *Small v. Springs Indus., Inc.*, 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987). This Court has held that a disclaimer appearing in bold, capitalized letters, in a prominent position, is conspicuous.[5] *Marr v. City of Columbia*, 307 S.C. 545, 547, 416 S.E.2d 615, 616 (1992); *cf. Johnson v. First Carolina Fin. Corp.*, 305 S.C. 556, 409 S.E.2d 804 (Ct. App. 1991) (finding disclaimer appearing in all-capitalized letters, in a prominent position, conspicuous).

The issue of whether an employee handbook constitutes a contract should be submitted to the jury when the issue of the contract's existence is questioned and the evidence is either conflicting or is capable of more than one inference. *Small*, 292 S.C. at 483, 357 S.E.2d at 454; *Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct. App. 2000). In most instances, judgment as a matter of law is inappropriate when a handbook contains both a disclaimer and promises. *Fleming v. Borden*, 316 S.C. 452, 464, 450 S.E.2d 589, 596 (1994). But a "'court should intervene to resolve the handbook issue as a matter of law . . . if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.'" *Id.* (quoting Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 Indus. Rel. L. J. 326, 375-76 (1991-92)); *cf. Horton v. Darby Elec. Co.*, 360 S.C. 58, 67-68, 599 S.E.2d 456, 461 (2004) (holding, as a matter of law, that a handbook containing conspicuous disclaimers and a non-mandatory discipline procedure did not alter at-will status).

[5] The General Assembly recently passed legislation requiring disclaimers to be in underlined, capitalized letters, appearing on the first page of the handbook, and signed by the employee. S.C. Code Ann. § 41-1-110 (Supp. 2004).

Mandatory, progressive discipline procedures may constitute enforceable promises. *See, e.g.*, *Conner*, 348 S.C. at 464, 560 S.E.2d at 611 (holding that a handbook containing both disclaimers and a mandatory discipline procedure created a jury issue); *Leahy v. Starflo Corp.*, 314 S.C. 546, 548-49, 431 S.E.2d 567, 568 (1993) (holding that an employer was contractually bound by the mandatory disciplinary procedure). Such procedures typically provide that an employee may be fired only after certain steps are taken. When definite and mandatory, these procedures impose a limitation on the employer's right to terminate an employee at any time, for any reason.

In the present case, the employee handbook has a disclaimer on the front page, in bold, capitalized letters. Because the disclaimer appears on the front page of the handbook, in bold, capitalized letters, we hold that the disclaimer is conspicuous as a matter of law.[6] *Marr*, 307 S.C. at 547, 416 S.E.2d at 616; *Johnson*, 305 S.C. at 560, 409 S.E.2d at 806.

Finding the disclaimer to be conspicuous as a matter of law, we next turn to the question of whether the handbook contains a promise. Hessenthaler contends that the nondiscrimination provision constituted a promise, and that she was fired in violation of that promise. The provision provides:

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[6] Although Hessenthaler may not have appreciated the conspicuousness of the disclaimer because it was read aloud to her, she had actual knowledge of the disclaimer and its contents. She admitted that the handbook was read aloud to her, "cover to cover, page by page, word for word." Her testimony that she does not remember the disclaimer language does not change the fact that it was conspicuous and was read aloud to her. In addition, other sections of the handbook affirmed that employment remained at-will. For example, a section of the handbook, titled "'At-will' Employment," states: "[the Shelter's] policy forbids guaranteed employment for any specified duration for any [Shelter] employee. Exceptions to this policy may occur only with the authorization of the [Shelter's] Board of Directors." There is no evidence in the record that the Board of Directors authorized an exception to this policy.

> [The Shelter] is an equal opportunity employer. All decisions, including hiring, training, and promotion, are made without regard to race, color, religion, national origin, sex, age, handicap, sexual preference, or any other protected status.

We hold that this provision does not constitute a promise altering the at-will employment relationship and giving rise to a breach-of-contract claim. *See McKenzie v. Lunds, Inc.*, 63 F. Supp. 2d 986, 1003 (D. Minn. 1999) (holding that nondiscrimination policy statements in employee handbook are legally insufficient to sustain a breach-of-contract claim; such policies are too indefinite to form a contract between employer and employee); *Cherella v. Phoenix Technologies Ltd.*, 586 N.E.2d 29, 31 (Mass. App. Ct. 1992) (holding that an equal opportunity policy announced in an employee handbook did not establish contractual rights supporting a breach-of-contract claim). Unlike a mandatory, progressive discipline procedure, a general policy statement of nondiscrimination does not create an expectation that employment is guaranteed for any specific duration or that a particular process must be followed before an employee may be fired.[7]

To be enforceable in contract, general policy statements must be definitive in nature, promising specific treatment in specific situations. *See, e.g., Ex parte Amoco Fabrics & Fiber Co.*, 729 So.2d 336, 339 (Ala. 1998)

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[7] The discipline section in the Shelter's handbook did not contain any promises. This section, entitled "Corrective/Disciplinary Action," provides:

> All [Shelter] personnel are required to meet acceptable performance standards and to comply with the policies set forth in this handbook. Failure may result in corrective or disciplinary action, including termination. [The Shelter] reserves the right to terminate an employee at any time when, in the opinion of the Executive Director, a termination is in [the Shelter's] best interests.

Because employees could be fired "at any time" and for any reason that is in the Shelter's "best interests," this section reiterated that employment remained at-will.

("[to] become a binding promise, the language used in the handbook . . . must be specific enough to constitute an actual offer rather than a mere general statement of policy") (internal quotations omitted); *Ross v. Times Mirror, Inc.*, 665 A.2d 580, 584 (Vt. 1995) ("[o]nly those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself will be enforced"); *cf. Bookman v. Shakespeare Co.*, 314 S.C. 146, 148-49, 442 S.E.2d 183, 184 (Ct. App. 1994) (finding that a sexual harassment policy contained a promise to "promptly and carefully" investigate complaints of sexual harassment). The nondiscrimination provision in this case was not specific and did not make any promises regarding disciplinary procedure or termination decisions. Therefore, we hold that the handbook did not contain promises enforceable in contract.

Accordingly, we conclude that the evidence in this case leads to only one inference: the handbook does not constitute a contract. Therefore, the issue of whether the handbook constituted a contract should not have been submitted to the jury. *See Small*, 292 S.C. at 483, 357 S.E.2d at 454 (holding that the issue of whether a contract exists should be submitted to the jury when the existence of the contract is in question and the evidence is either conflicting or admits of more than one inference).

CONCLUSION

Because the Shelter's handbook contained a conspicuous disclaimer, of which Hessenthaler had actual notice, and because the handbook did not contain any promissory language altering the employment at-will relationship, we hold that the handbook did not constitute a contract. Therefore, the Shelter's post-trial motions should have been granted.

Accordingly, the court of appeals' decision is affirmed in result.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bryan Bowman, Claimant,

v.

State Roofing Company, Chesterfield County School District, George Cantlon, Uninsured Employers' Fund, Travelers Insurance Co., AFCO Credit Corporation, and C. Douglas Wilson & Co. Inc.,

Of whom State Roofing Company and Uninsured Employers' Fund are Respondents,

and Travelers Insurance Co. and AFCO Credit Corporation are, Appellants.

Danny Gainey, Claimant,

v.

State Roofing Company, Chesterfield County School District, George Cantlon, Uninsured Employers' Fund, Travelers Insurance Co., AFCO Credit Corporation, and C. Douglas Wilson & Co. Inc.,

Of whom State Roofing Company and Uninsured Employers' Fund are Respondents,

and Travelers Insurance Co. and
AFCO Credit Corporation are, Appellants.

ORDER

Appellants Travelers Insurance Company and AFCO Credit Corporation have petitioned this Court for rehearing in this matter. We deny the petitions but withdraw our former opinion and substitute the attached opinion. The only change is as follows.

The opinion currently states:

> Once Finance Company requested cancellation, it had the right to demand repayment of the unearned premium. The fact that it did not do so in this case does not vitiate the requirements placed on Carrier under the statute.

The underscored language is replaced by the addition of footnote 6 which reads as follows:

> Finance Company's notice of cancellation in fact includes a demand for return of the unearned premium.

IT IS SO ORDERED.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

While I agree with the change made to the opinion and the denial of the petition for rehearing filed by AFCO Credit Corporation, I would grant the petition for rehearing filed by Travelers Insurance Company.

s/Jean H. Toal C.J.

Columbia, South Carolina

July 18, 2005

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bryan Bowman, Claimant,

v.

State Roofing Company, Chesterfield County School District, George Cantlon, Uninsured Employers' Fund, Travelers Insurance Co., AFCO Credit Corporation, and C. Douglas Wilson & Co. Inc.,

Of whom State Roofing Company and Uninsured Employers' Fund are Respondents,

and Travelers Insurance Co. and AFCO Credit Corporation are, Appellants.

Danny Gainey, Claimant,

v.

State Roofing Company, Chesterfield County School District, George Cantlon, Uninsured Employers' Fund, Travelers Insurance Co., AFCO Credit Corporation, and C. Douglas Wilson & Co. Inc.,

Of whom State Roofing Company and Uninsured Employers' Fund are Respondents,

and Travelers Insurance Co. and
AFCO Credit Corporation are, Appellants.

Appeal from Sumter County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 25996
Heard February 2, 2005 - Filed June 6, 2005
Refiled July 18, 2005

AFFIRMED AS MODIFIED

C. Mitchell Brown, Elizabeth Herlong Campbell, and Beth Burke Richardson, of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Erroll Anne Y. Hodges, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for appellant AFCO Credit Corporation.

Byron P. Roberts, of Tally, Roberts & Blue, LLC, of Columbia, for appellant Travelers Insurance Co.
David C. Holler, of Lee, Erter, Wilson, James, Holler & Smith, L.L.C., of Sumter, for respondent Employer Company.

Ajerenal Danley and Matthew C. Robertson, of Danley Law Firm, P.C., of Columbia, for respondent Uninsured Employers' Fund.

JUSTICE MOORE: Claimants Bowman and Gainey commenced these workers' compensation claims alleging on-the-job injuries sustained on

June 3 and September 15, 1998, while working for respondent State Roofing Company (Employer). Employer's workers' compensation insurance carrier, appellant Travelers Insurance Company (Carrier), denied coverage on both claims asserting Employer's policy had been cancelled effective before either claim arose. The two claims came before the single commissioner solely on the issue of coverage. The commissioner found the policy was not effectively cancelled and ordered Carrier to appear and defend the claims on behalf of Employer. The full Commission affirmed, as did the circuit court. We affirm as modified.

FACTS

Employer purchased a workers' compensation insurance policy from Carrier with coverage for one year from November 8, 1997. On November 20, Employer signed a finance agreement with appellant/respondent AFCO Credit Corporation (Finance Company) whereby Finance Company agreed to finance the annual premium of $4,616 for Employer's workers' compensation insurance. In exchange, Employer agreed to repay Finance Company in nine monthly installments. Under this agreement, Finance Company was authorized to cancel the insurance policy if Employer did not comply with the terms of the finance agreement. On December 16, Finance Company paid the entire annual premium to Carrier.

Employer missed its first installment payment to Finance Company which was due January 8, 1998. On January 20, Finance Company mailed Employer a Notice of Intent advising that if the payment and a late charge were not received within ten days, the policy would be cancelled. On February 5, Finance Company issued a Notice of Cancellation (NOC) requesting that Carrier cancel the policy effective February 13. A copy of the NOC was sent to Employer.

Finance Company did not receive Employer's January installment until February 13 when the February installment was already due. Finance Company advised Employer that its account was still delinquent. Employer continued sending payments late and its account was not current until June 1998. On June 24, Finance Company sent to Carrier a Request for Reinstatement. After the June payment, Employer made no more payments

to Finance Company. On July 20, Finance Company sent a second Notice of Intent followed by an NOC on August 6 requesting cancellation effective August 14.

It is undisputed that Carrier never refunded any unearned premium to either Finance Company or Employer.

ISSUES

1. Does the capitulation agreement signed by Employer resolve the issue of coverage?

2. Does noncompliance with statutory requirements render the cancellation ineffective?

DISCUSSION

1. Capitulation agreement

Appellants (Carrier and Finance Company) contend the Workers' Compensation Commission has no jurisdiction because Employer signed a capitulation agreement acknowledging non-compliance with workers' compensation insurance requirements from March 1998 to February 1999. This agreement was negotiated by the Commission's Director of Coverage and Compliance after the Commission received from Carrier a notice that Employer's coverage had been cancelled. The validity of the cancellation was not investigated for purposes of this agreement, however, and Employer remained adamant that it had coverage. According to testimony by the Director of Coverage and Compliance, the point of the agreement was an admission that Employer was unable to demonstrate compliance. After signing the agreement, Employer paid a fine for non-compliance with workers' compensation insurance requirements.

The agreement in question specifically states: "It is understood and agreed by signing this Agreement [Employer] does not make any admissions or waive any claims or causes of action [Employer] may have against any third party, insurance company, agent or broker." Under the limited terms of

this agreement, the commissioner properly found Employer did not waive its claim that Carrier's cancellation of the policy was invalid.

2. Cancellation of the policy

The cancellation of insurance by Finance Company is governed by S.C. Code Ann. § 38-39-90 (2002)[1] which provides:

> **§ 38-39-90. Cancellation of insurance contracts by premium service company.**
>
> (a) When a premium service agreement contains a power of attorney enabling the company to cancel any insurance contract listed in the agreement, the insurance contract may not be canceled by the premium service company unless the cancellation is effectuated in accordance with this section.
>
> (b) The premium service company shall deliver the insured at least ten days' written notice of its intent to cancel the insurance contract unless the default is cured within the ten-day period.
>
> (c) Not less than five days after the expiration of the notice, the premium service company may thereafter request in the name of the insured cancellation of the insurance contract by delivering to the insurer a notice of cancellation. The insurance contract must be canceled as if the notice of cancellation had been submitted by the insured himself, but without requiring the return of the insurance contract. The premium service company shall also deliver a notice of cancellation to the insured at his last address as set forth in its records by the date the notice of cancellation is delivered to the insurer. It is sufficient to give notice either by delivering it to the person or by depositing it in the United States mail, postage prepaid, addressed to the last

[1]This section was subsequently amended.

address of the person. Notice delivered in accordance with the provisions of this statute shall be sufficient proof of delivery.

(d) All statutory, regulatory, and contractual restrictions providing that the insurance contract may not be canceled unless notice is given to a governmental agency, mortgagee, or other third party apply where cancellation is effected under this section. The insurer shall give the prescribed notice in behalf of itself or the insured to any governmental agency, mortgagee, or other third party by the second business day after the day it receives the notice of cancellation from the premium service company and shall determine the effective date of cancellation taking into consideration the number of days' notice required to complete the cancellation.

(e) Whenever an insurance contract is canceled, the insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company which financed the premium for the account of the insured. The gross unearned premiums due on personal lines insurance contracts financed by premium service companies must be computed on a pro rata basis.

(f) If the crediting of return premiums to the account of the insured results in a surplus over the amount due from the insured, the premium service company shall promptly refund the excess to the insured or the agent of record. No refund is required if it amounts to less than three dollars.

(g) Cancellations of insurance contracts by premium service companies must be effected exclusively by the forms, method, and timing set forth in this chapter.

(emphasis added).

The commissioner ruled that Carrier's cancellation was invalid under this section because (1) the notices of cancellation sent by Finance Company

to Carrier requesting cancellation did not properly give ten days' notice to Employer; and (2) Carrier failed to refund unearned premiums with notice to Employer. Appellants contend this was error.

a. Notices of Cancellation

The commissioner ruled that the both the February 5 and August 6 Notices of Cancellation (NOC) failed to give the required ten days' notice to Employer before cancellation.

The NOC mailed on February 5 indicated a cancellation date of February 13, less than ten days from the date of the NOC's mailing.[2] The commissioner also applied Regulation 69-10(22) and ruled that the ten-day notice period does not begin to run until the second business day following receipt of the NOC by Carrier; therefore cancellation could not have been effective until February 18. The commissioner concluded Finance Company's February 5 request for cancellation was therefore invalid. Similarly, the August 6 NOC indicated a cancellation date of August 14, less than ten days from the date of mailing. Again applying Regulation 69-10(19), the commissioner concluded cancellation could not be effective until August 19 and therefore the August 6 NOC was invalid.

Appellants contend the commissioner incorrectly calculated the ten-day period required by § 38-39-90. We agree.

The timeline under § 38-39-90 indicates the premium service company must first deliver[3] to the insured a Notice of Intent indicating its intent to cancel the insurance policy in ten days. § 38-39-90(b). Five days after this ten-day period expires, the premium service company may deliver an NOC to the insurance carrier requesting that the policy be cancelled. The premium service company must also send to the insured on the same date a copy of the NOC. § 38-39-90(c).

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[2]Under § 38-39-90(c), the date of delivery is the date of mailing.

[3]As noted above, the date of delivery is the date of mailing under § 38-39-90(c).

Under this statute, the ten-day notice to the insured is calculated from the date of mailing of the Notice of Intent, not the date of mailing the NOC as found by the commissioner. Cancellation may therefore be effected a total of fifteen days from the mailing of the Notice of Intent. *See* Hiott v. Guar. Nat. Ins. Co., 329 S.C. 522, 496 S.E.2d 417 (Ct. App. 1997) (under § 38-39-90, cancellation must be at least fifteen days from mailing notice of intent).

Applying this timeline to the facts here, the February 5 NOC properly gave notice to Employer that the policy cancellation could be effected as of February 13, which was more than fifteen days after the date of mailing the Notice of Intent on January 20. Similarly, the August 6 NOC properly gave notice that the policy could be cancelled as of August 14, which was more than fifteen days from the date the Notice of Intent was mailed on July 20. The commissioner erred in calculating the required ten days' notice by using the date the NOC was mailed rather than the date the Notice of Intent was mailed.

Further, the commissioner erred in applying Regulation 69-10(22) to add an additional two days to the cancellation date. This regulation provides:

> 22. Where a valid statutory, regulatory or contractual provision requires that notice be given a particular period of time before cancellation shall become effective, the insurer shall not be required to effect cancellation prior to the elapse of the period of time prescribed by such statute, regulation or contract; the running of such time shall commence the second business day following receipt by the insurer of the request for cancellation.

(emphasis added). This regulation tracks the requirement of § 38-39-90(d) which provides:

> (d) All statutory, regulatory, and contractual restrictions providing that the insurance contract may not be canceled unless notice is given to a governmental agency, mortgagee, or other third party apply where cancellation is effected under this section. The insurer shall give the prescribed notice in

> behalf of itself or the insured to any governmental agency, mortgagee, or other third party by the **second business day** after the day it receives the notice of cancellation from the premium service company and shall determine the effective date of cancellation taking into consideration the number of days' notice required to complete the cancellation.

(emphasis added).

Under the plain language of the statute, the additional two-day period calculated from the time the insurance carrier receives the NOC applies only in situations where a third-party, such as a lienholder, is entitled to notice. *E.g.*, Auto Now Acceptance Corp. v. Catawba Ins. Co., 351 S.C. 377, 570 S.E.2d 168 (2002) (before insurer may cancel a policy, it must provide notice of intent to cancel to third parties where it is affirmatively required to do so by statute, regulation or contract). Since there is no third-party involved here, this provision does not apply.

We conclude the commissioner erred in ruling that the policy was not cancelled in compliance with the notice requirements of § 38-39-90.

b. Failure to return unearned premium

As an alternative ground for finding the cancellation invalid, the commissioner ruled that Carrier's failure to refund unearned premiums to Finance Company with notice to Employer violated § 38-39-90.

Section 38-39-90(e) requires that "[w]henever an insurance contract is canceled, the insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company which financed the premium for the account of the insured."[4] Under subsection (f), the

[4]In addition, Regulation 69-10(21) requires the return of unearned premiums within thirty days of cancellation and that a copy of the statement regarding the return to be sent to the insured.

premium service company must refund any surplus over three dollars[5] to the insured. By its terms, § 38-39-90 is the exclusive means for cancellation of an insurance contract by a premium service company. An insurance contract "may not be canceled by the premium service company unless the cancellation is effectuated in accordance with this section." § 38-39-90(a). Any violation of this section therefore invalidates cancellation. South Carolina Ins. Co. v. Brown, 280 S.C. 574, 313 S.E.2d 348 (Ct. App. 1984).

Here, Carrier never refunded the unearned portion of the annual premium. Since Carrier did not comply with all the requirements of § 38-39-90, neither attempted cancellation was valid. *Accord* Government Employees Ins. Co. v. Taylor, 310 A.2d 49 (Md. 1973).

The return of unearned premiums is not a mere "accounting matter" as appellants claim. We have held that where an insurance policy provides for the return of unearned premiums upon cancellation, the tender of a refund is a condition precedent to an effective cancellation. McElmurray v. American Fid. Fire Ins. Co., 236 S.C. 195, 113 S.E.2d 528 (1960). Here, the refund of unearned premiums is required by statute; all statutory provisions relating to insurance contracts become part of the insuring agreement. Allstate Ins. Co. v. Thatcher, 283 S.C. 585, 325 S.E.2d 59 (1985). A return of unearned premiums as required under § 38-39-90(e) is in effect part of Carrier's obligation under its policy and is therefore a condition precedent to an effective cancellation.

Appellants complain that requiring the return of unearned premiums to effectuate cancellation goes against the interest of Finance Company, the entity requesting cancellation, and therefore could not have been intended by the legislature. We disagree. Once Finance Company requested cancellation, it had the right to demand repayment of the unearned premium.[6] Further, subsection (f) requires the premium service company to credit any return of

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[5] This amount is now five dollars under the amended version of the statute.

[6] Finance Company's notice of cancellation in fact includes a demand for return of the unearned premium.

unearned premiums to the account of the insured and "promptly refund" any surplus over three dollars. This provision works to the benefit of the insured and is an added protection ensuring notice to the insured.

Because Carrier failed to meet the requirement of subsection (e) of § 38-39-90 that it refund unearned premiums, cancellation was invalid under subsection (a) of the statute.

CONCLUSION

We need not address the commissioner's alternative ruling regarding waiver and estoppel. The judgment of the circuit court affirming the Commission's order is

AFFIRMED AS MODIFIED.

WALLER, BURNETT, PLEICONES, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent because I disagree with the majority on the second issue. The majority affirms the commissioner's ruling on the basis that the insurer failed to refund insured's unearned premiums according to S.C. Code Ann. § 38-39-90 (2002). I disagree.

Section 38-39-90(e) provides in part, the following:

> Whenever an insurance contract is canceled, the insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company which financed the premium for the account of the insured.

According to the plain meaning of this statute, in my opinion, an insurer's duty to refund unearned premiums is not a precondition for cancellation. Although the statute requires that a refund be tendered, the plain meaning of the statute requires the insurer to refund the unearned premiums after cancellation. In my opinion, therefore, the statute makes the insurer liable for unearned premiums. It does not, however, operate to invalidate the insurer's prior cancellation of coverage.

Accordingly, I would reverse and hold that insurer's cancellation of coverage was effective despite insurer's failure to tender the refund as required in S.C. Code Ann. § 38-39-90(e).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Epworth Children's Home,

v.

W.F. Beasley, Personal Representative of the Estate of Mary Etta Johnson; Prospect United Methodist Church; and Attorney General Henry D. McMaster,

Of whom Attorney General Henry D. McMaster is Appellant,

and Epworth Children's Home; W.F. Beasley, Personal Representative of the Estate of Mary Etta Johnson; and Prospect United Methodist Church are Respondents.

Appeal From Chesterfield County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26012
Heard May 5, 2005 – Filed July 18, 2005

REVERSED

Attorney General Henry D. McMaster, Deputy Attorney General T. Stephen Lynch, and Senior Assistant Attorney General C. Havird Jones, Jr., all of Columbia, for Appellant.

Gregory G. Williams, of Columbia, for Respondent Epworth Children's Home; Bryan W. Braddock, of Saleeby & Cox, PA., of Hartsville, for Respondent Prospect United Methodist Church; and J. Anthony Floyd, of Floyd & Gardner, P.C., of Hartsville, for Respondent W.F. Beasley.

JUSTICE BURNETT: This case raises issues regarding the authority of a personal representative and a trustee, in administering a will and testamentary trust, to modify the plan established by a testatrix-settlor under an interpretation of the document's language and the doctrines of equitable deviation and merger. We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Mary Etta Johnson (Testatrix) died testate on December 3, 1999, and her will was duly submitted to probate court. The will provides, in pertinent part:

> ITEM II: I give and devise unto the EPWORTH CHILDREN'S HOME[1] in Columbia, South Carolina, all of my personal effects including my jewelry, clothing, and furnishings.

[1] Epworth Children's Home was established in 1895 by the Methodist Church. It is a private, non-profit child and family service organization supported by church and private contributions, will bequests, and trust funds. It provides services to children who are orphans, from broken homes, or who have disabilities or special needs without regard to race, religion, national origin, or ability to pay.

ITEM III: I give and devise any remaining funds in accounts which have always been in my name alone at [two financial institutions] unto EPWORTH CHILDREN'S HOME, IN TRUST NEVERTHELESS, for management and distribution of the interest as follows:

1. One thousand and No/100ths ($1,000.00) Dollars per year unto my beloved sister, EDNA POSTON, for as long as she may live, which sum shall be paid directly to her or for her benefit in the discretion of my said Trustee.[2]

2. Five hundred and No/100ths ($500.00) Dollars per year unto PROSPECT METHODIST CHURCH, for so long as it shall exist.

3. The balance of the interest paid on my said accounts shall be paid annually to the EPWORTH CHILDREN'S HOME.

. . .

ITEM IX: By way of illustration and not of limitation, in addition to the inherent, implied or statutory powers granted to my Co-Personal Representatives and Trustee under law, I authorize said Co-Personal Representatives with respect to any and all property at any time constituting part of my estate or trust to hold and retain such property, to sell and dispose of same at public or private sale, at such prices and upon such terms as my Co-Personal Representatives and Trustee shall deem proper, to invest and reinvest in any kind of property, real and personal, without limitation to the class of investments in which Co-Personal Representatives or Trustee may be authorized by statute or rule of Court; to manage, repair and improve real property belonging to my estate or trust, but said Co-Personal Representatives shall not be required to set up reserves for

[2] Edna Poston is now deceased.

> depreciation out of income; to lease any such real property regardless of the fact that the terms of any such lease may extend beyond the period of administration of my estate or the term of any trusts; to borrow money for the benefit of my estate or trust; to distribute any property in kind or in cash or partly in kind or partly in cash; to allocate any receipt or expense between income and principal, and to do all other acts which in Co-Personal Representatives' discretion may be necessary or appropriate for the proper and advantageous management, investment and distribution of my estate or trust, all of which may be done without order of or report to any Court.

Testatrix named Epworth Children's Home as Trustee of the testamentary trust. Testatrix named three relatives as co-personal representatives: her brothers, W.F. Beasley and John Beasley, and her nephew, John G. Johnson. W.F. Beasley has acted as the sole Personal Representative in this litigation.

In Items IV through VI, the will separately devised Testatrix's interest in three parcels of real property to the co-personal representatives for life, with the remainder interest devised to Trustee. The will devised two parcels of real property directly to Trustee. Trustee was directed to sell all the properties at fair market value when it received them, giving relatives of the life tenants or other family members the first option to purchase them. Upon selling the properties, Trustee was in each case directed to pay the sale proceeds "into my said testamentary trust established in Item III hereinabove." The present total value of the charitable trust assets is about $300,000.

In 2002, Trustee filed a petition in probate court seeking a court order declaring the charitable trust terminated *ab initio*. Prospect Methodist Church (Church) would receive a lump sum payment of $10,000, with the remainder of trust assets distributed in a lump sum to Trustee. Church filed an answer agreeing with Trustee's petition to terminate the trust. Personal Representative filed an answer asking the probate court to protect the interest of family members, but otherwise agreed with Trustee's petition to terminate

the trust. The South Carolina Attorney General's Office (the State), as authorized by statute,[3] responded by opposing Trustee's petition and asking the probate court to protect the interests of the charitable trust.

The probate court, after a hearing, terminated the testamentary trust from its inception and ordered the immediate distribution of trust assets to the beneficiaries. The probate court relied on its interpretation of Item IX of the will and the doctrines of equitable deviation and merger. The circuit court affirmed and adopted the probate court order by reference.

ISSUES

I. Did the probate and circuit courts err in interpreting Item IX of the will to give Trustee and Personal Representative the authority to seek termination of the testamentary trust from its inception and distribute the trust assets immediately to the beneficiaries?

II. Did the probate and circuit courts err in ruling that the equitable deviation doctrine provides a basis for terminating the testamentary trust from its inception and immediately distributing the trust assets to the beneficiaries?

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[3] South Carolina Code Ann. § 1-7-130 (2005) provides that the "Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof and, when necessary, prosecute corporations which fail to make to the General Assembly any report or return required by law." Similarly, S.C. Code Ann. § 62-7-503 (1987) provides that the Attorney General shall, when necessary, bring an action to compel trustees to discharge duties imposed upon them by a charitable trust or comply with statutory provisions concerning the administration of charitable trusts. The Attorney General is the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts. Furman Univ. v. McLeod, 238 S.C. 475, 482, 120 S.E.2d 865, 868 (1961).

III. Did the probate and circuit courts err in ruling that the merger doctrine provides a basis for terminating the testamentary trust from its inception and immediately distributing the trust assets to the beneficiaries?

STANDARD OF REVIEW

An action to construe a will is an action at law. See Kemp v. Rawlings, 358 S.C. 28, 34, 594 S.E.2d 845, 848 (2004); Epting v. Mayer, 283 S.C. 517, 323 S.E.2d 797 (Ct. App. 1984). When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law. The appellate court will not disturb the judge's findings of fact as long as they are reasonably supported by the evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

DISCUSSION

I. LANGUAGE OF WILL AND TESTAMENTARY TRUST

The State argues the probate and circuit courts erred in interpreting Item IX of the will to give Trustee the authority to seek termination of the testamentary trust from its inception and distribute the trust assets immediately to the beneficiaries. We agree.

Item IX of the will, as set forth above, grants certain general powers to Trustee and Personal Representative. Trustee, in an argument accepted by the lower courts, focuses on a single phrase of the paragraph: "and to do all other acts which in Co-Personal Representatives' discretion may be necessary or appropriate for the proper and advantageous management, investment and *distribution of my estate or trust*" (emphasis added). Trustee argues this phrase demonstrates Testatrix placed great confidence in Trustee and authorized it to distribute all assets of the trust if it determines that is the best course of action. Further, Trustee contends the language of the will contemplates the trust may terminate at some point because it allows Trustee to enter into leases extending beyond termination.

The cardinal rule of will construction is to determine and give effect to the testator's intent from a reading of the will as a whole. Matter of Clark, 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992); May v. Riley, 279 S.C. 248, 250, 305 S.E.2d 77, 78 (1983); Albergotti v. Summers, 205 S.C. 179, 182, 31 S.E.2d 129, 130 (1944). In construing the language of a will, the appellate court must give words their ordinary, plain meaning unless it is clear the testator intended a different sense, or unless such a meaning would lead to an inconsistency with the testator's declared intention. Buist v. Walton, 104 S.C. 95, 88 S.E. 357 (1916); In re Estate of Fabian, 326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct. App. 1997). A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole will, would follow from such construction. Clark, 308 S.C. at 330, 417 S.E.2d at 857; Love v. Love, 208 S.C. 363, 369, 38 S.E.2d 231, 233 (1946).

A court may not consider the will piecemeal, but must give due weight to all its language and provisions, giving effect to every part when, under a reasonable interpretation, all the provisions may be harmonized with each other and with the will as a whole. King v. S.C. Tax Commn., 253 S.C. 646, 649, 173 S.E.2d 92, 93 (1970); Wise v. Poston, 281 S.C. 574, 578, 316 S.E.2d 412, 414 (Ct. App. 1984). The rules of construction are of secondary importance to the need to ascertain what the testator meant by the terms used in the written instrument itself, and each item of a will must be considered in relation to other portions. Allison v. Wilson, 306 S.C. 274, 278, 411 S.E.2d 433, 435 (1991). An interpretation that fits into the whole scheme or plan of the will is most likely to be the correct interpretation of the intent of the testator. Lemmon v. Wilson, 204 S.C. 50, 69, 28 S.E.2d 792, 800 (1944).

As with a will, the primary consideration in construing a trust is to discern the settlor's intent. Bowles v. Bradley, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995). In fact, the law relating to discerning the drafter's intent is identical for wills and trusts. All Saints Parish, Waccamaw v. Protestant Episcopal Church, 358 S.C. 209, 224 n.10, 595 S.E.2d 253, 262 n.10 (Ct. App. 2004). "Charitable trusts are entitled to peculiar favor; the

courts will construe them to give them effect, if possible, and to carry out the general intention of the donor." Colin McK. Grant Home v. Medlock, 292 S.C. 466, 470, 349 S.E.2d 655, 657 (Ct. App. 1986) (citing Porcher v. Cappelmann, 187 S.C. 491, 499, 198 S.E. 8, 11 (1938)).

While precedent is helpful at times, "no will has a brother." A court may find little guidance in prior decisions interpreting wills and testamentary trusts in other cases due to the different intent and circumstances of each testator or settlor. *E.g.* Estate of Houston, 421 A.2d 166, 170 n.5 (Pa. 1980) ("'No will has a brother,' declared Sir William Jones. . . . Each will is its own best interpreter, and a construction of one is no certain guide to the meaning of another."); Ball v. Phelan, 49 So. 956, 963 (Miss. 1909) ("If any one thing can be evident, after the review of the authorities, it is what Sir William Jones said more than 200 years ago, that 'no will has a brother.' Every will must be determined upon considerations pertaining to its own peculiar facts and terms alone.")

In the present case, Testatrix and the will drafter could have given greater scrutiny to the potential impact of the phrase – "distribution of my estate or trust" – contained in the recitation of general powers set forth in Item IX. Testatrix could have stated explicitly whether the "distribution" at issue was distribution of all trust assets or simply distribution of the annual interest income as provided in Item III. She did not.

Nevertheless, we conclude the lower courts' interpretation of the language is not reasonably supported by a plain reading of the will and testamentary trust. The lower courts erred in discerning Testatrix's intent by isolating this single phrase and interpreting it in a manner which conflicts with the remainder of the will. A reading of the will and testamentary trust as a whole, giving due weight to all their provisions in an effort to read them in harmony, reveals Testatrix did not intend by this phrase to give Trustee the power to terminate the trust and immediately distribute all trust assets.

The grant of various general powers in Item IX, including the cited phrase, was intended to give substantial latitude to Trustee and Personal Representative in the management and administration of Testatrix's trust and

estate. However, the "distribution" contemplated by Testatrix as shown by the terms of her will was not the immediate distribution of all trust assets, but distribution of the annual sum of interest on the invested funds. Testatrix intended to ensure Trustee had ample freedom to spend the annual sum as it wished without extensive oversight or interference. We conclude this single phrase, although inartfully drafted, can not be read in isolation in a manner which conflicts with the obvious, stated intent of Testatrix as shown throughout the remainder of her will.

This interpretation accurately reflects Testatrix's intent because, first, Item III plainly and explicitly states the assets are to be held in trust, with specific amounts paid annually to Testatrix's sister "for as long as she may live" and to Church "for so long as it shall exist." Remaining accrued interest must be paid annually to Trustee, an event which Testatrix expected to occur for the foreseeable future because that provision contained no limiting language. Second, each provision relating to five parcels of real property requires "proceeds of the sale of this property shall be paid into my said testamentary trust established in ITEM III hereinabove." This requirement again reflects Testatrix's desire to establish a trust in perpetuity for the benefit of Trustee and Church. Third, it is evident from the face of the document that Testatrix understood the difference between an outright devise and one placed in trust because she devised her personal property outright to Trustee in Item II while placing other assets in trust in Item III.

Trustee further argues that obtaining the money in a lump sum would allow Trustee to more effectively accomplish its mission than receiving interest income in smaller, incremental amounts. Therefore, because Testatrix admired Trustee's mission and efforts, she would approve of an immediate disbursal of the trust assets. Trustee also asserts administrative costs will consume a substantial portion of the annual income and Trustee in truth does not wish to serve as Trustee. We note Trustee did not present any testimony or evidence in the probate court supporting its conclusory assertions.

These arguments are decidedly unpersuasive. Trustee's wish that Testatrix would have disposed of her estate differently and its beliefs about

the best way for Testatrix to make a charitable gift, as well as Trustee's understandable desire to receive the corpus now, are irrelevant and of no legal import in these circumstances. Trustee is a well established and respected institution which undoubtedly could use the trust assets for current needs.

However, Testatrix has established an enforceable testamentary trust, and the courts are required to enforce it. Administrative costs should not be prohibitive, assuming Trustee has invested the funds conservatively. See S.C. Code Ann. § 62-7-302 (Supp. 2004) (Uniform Prudent Investor Act).

II. EQUITABLE DEVIATION DOCTRINE

The State argues the probate and circuit courts erred in ruling the equitable deviation doctrine provides a basis for terminating the testamentary trust from its inception and immediately distributing the trust assets to the beneficiaries. The doctrine does not apply. Trustee has not shown any changed circumstances or conditions which have occurred since Testatrix established the charitable trust. We agree.

This Court has rejected the doctrine of *cy pres*, which allows a court in limited circumstances to apply the funds of a charitable trust to a purpose not designated by the terms of the trust, but related to the original purpose. S.C. Natl. Bank v. Bonds, 260 S.C. 327, 337, 195 S.E.2d 835, 840 (1973); Mars v. Gilbert, 93 S.C. 455, 465, 77 S.E. 131, 134 (1913); All Saints Parish, Waccamaw v. Protestant Episcopal Church, 358 S.C. 209, 227, 595 S.E.2d 253, 263 (Ct. App. 2004); Colin McK. Grant Home v. Medlock, 292 S.C. 466, 470, 349 S.E.2d 655, 657 (Ct. App. 1986). However, our appellate courts have approved of and applied the doctrine of equitable deviation, which "permits deviation from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. Under these circumstances a court may direct or permit a trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust." Colin McK. Grant Home, 292 S.C. at 473, 349 S.E.2d at 659

(allowing trustees to deviate from original terms of charitable trust by selling six homes built in Charleston to serve needy, elderly, white Presbyterians and investing proceeds of sale with income distributed as housing subsidy to elderly, needy Presbyterians of all races).

When circumstances change, it is not always required "that the details of the plan laid down in the will must be followed to the letter. The main purpose [of the will and testamentary trust] being kept in view, considerable flexibility will always be allowed in the details of the execution of a trust, so as to adapt it to the changed conditions." Mars, 93 S.C. at 466, 77 S.E. at 135 (refusing to allow trustees of John de la Howe School to deviate from original terms of charitable trust contained in 1797 will by devoting funds to college scholarships instead of early education, but explaining trustees could establish a school at a different location, which could work in conjunction with public school system to teach agricultural and mechanical arts); see also S.C. Natl. Bank, 260 S.C. 327, 195 S.E.2d 835 (allowing trustees to deviate from original terms of charitable trust contained in a 1947 will to provide college funds to "deserving students of Greenville City High Schools" to include such students attending all high schools within a reorganized, consolidated, and much-changed school district encompassing most of Greenville County in 1970s when the trust provision took effect); Furman Univ. v. McLeod, 238 S.C. 475, 120 S.E.2d 865 (1961) (allowing university trustees, in light of changed conditions related to growth of city, advent of automobile, and changes in neighborhood, to deviate from trust established by nineteenth century deeds by selling original college sites and relocating university to area outside city).

Trustee, repeating some of same arguments discussed in Issue I, contends its situation is analogous to those present in S.C. Natl. Bank, Furman Univ., and Colin McK. Grant Home. Trustee argues Testatrix intended to assist Trustee and Church in their respective missions, but the "real value in [Testatrix's] gift is not its ability to produce income, but its ability to provide current assistance to the beneficiaries in carrying out their missions. . . . Even if [Testatrix's] Will does not provide the power to distribute the trust assets, the court should alter the terms of the trust to allow the distribution."

The lower courts' finding is not reasonably supported by a plain reading of the testamentary trust. The equitable deviation doctrine simply is not implicated in the present case. Trustee has not identified any changed conditions or circumstances which would justify deviation from the terms of Testatrix's charitable trust. Trustee and Church still exist and are engaged in the same mission and efforts they were pursuing when Testatrix wrote her will. As explained in Issue I, Testatrix intended to establish a fund which would generate income annually for the beneficiaries, and that is exactly what must occur.

III. MERGER DOCTRINE

The State contends the probate and circuit courts erred in ruling that the merger doctrine provides a basis for terminating the testamentary trust from its inception and immediately distributing the trust assets to the beneficiaries. We agree.

A testamentary trust arises when a testator, in his will, declares the creation of a trust, identifies the property to which the trust pertains, and names a trustee and a beneficiary. Johnson v. Thornton, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975). In a trust, the trustee holds the legal estate or title for the benefit of the beneficiary. The beneficiary holds the equitable estate or title and enjoys the benefits of the estate. Id. at 257, 214 S.E.2d at 127; Morgan v. Merchants & Planters Natl. Bank, 247 S.C. 435, 441, 147 S.E.2d 702, 705 (1966); Albergotti v. Summers, 203 S.C. 137, 143-44, 26 S.E.2d 395, 398 (1943); Board of Directors of Theological Seminary v. Lowrance, 126 S.C. 89, 104, 119 S.E. 383, 388 (1923).

This Court has explained the merger doctrine in the trust context as follows:

> An essential to the existence of any trust is the separation of the legal estate from the beneficial enjoyment; and no trust can exist where the same person possesses both. If the legal and equitable estates come together in the same person the equitable is merged

> in the legal, and the trust is terminated. . . . A man cannot hold in trust for himself, but the whole interest vests in him absolutely, and any limitations over are void.

Board of Directors, 126 S.C. at 104-06, 119 S.E. at 388; see also Bogert, Trusts & Trustees, § 129 (2d ed. 1984); 28 Am.Jur.2d Estates § 429 (2000); 31 C.J.S. Estates §§ 129-131 (1996) (all stating same principles).

"The equitable doctrine of merger is not one to be applied with rigidity. Equity will not apply merger if serious injustice would result or if the settlor's intent obviously would be frustrated." Bogert, supra, at § 129. "The merger of an equitable title into the legal title will not be permitted when the result would defeat the intention of the grantor or testator or the holder of the estates. Thus, equity will not recognize a merger or union of the legal and equitable estates in the same person if this is contrary to the intention of the parties and a merger would be to destroy a valid trust, and will prevent the merger of an equitable and a legal estate to work substantial justice." 28 Am.Jur.2d Estates § 429.

Trustee contends that, because Church has expressed its desire to disclaim its interest under the testamentary trust, Trustee would become the sole beneficiary of the trust. Both legal and equitable title would merge and vest solely in Trustee, which would then hold legal title to the trust assets.

The State argues that Testatrix intended to provide an ongoing annual benefit for Trustee and Church. Furthermore, even if Church no longer existed, Trustee would still be required to comply with the terms of the trust and distribute the annual income for the benefit of the children cared for by Trustee.

We conclude, based on our enforcement of the terms of the trust as explained in Issue I, there is no merger of legal and equitable interests. Trustee, as holder of legal title to the assets, has the duty of complying with the terms of the trust – managing the assets and distributing the annual income to the beneficiaries (itself and Church). The merger doctrine will not

be applied so as to defeat or frustrate the intent of Testatrix as revealed by an interpretation of the provisions of her will and testamentary trust as a whole.

CONCLUSION

For the foregoing reasons, we reverse the probate and circuit courts and uphold the terms of the charitable trust established by Testatrix in her will. Trustee has the duty of managing the trust assets and distributing

the annual interest income to itself and Church as provided in the testamentary trust.

REVERSED.

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

The Supreme Court of South Carolina

Sharon Brown, Administratrix of the Estate of Ronnie Lee Brown, Appellant,

v.

Suzanne E. Coe, Respondent.

ORDER

Respondent moves to dismiss this appeal on the ground that the notice of appeal was served and filed by appellant, who is not a lawyer, in violation of S.C. Code Ann. § 40-5-310 (2001). Appellant has filed a return in opposition to the motion, arguing that she properly served the notice of appeal. She notes that she has filed two prior appeals on behalf of the estate in the Court of Appeals, one of them being a prior appeal in this case. In addition, she previously represented the estate before this Court. She argues there is no South Carolina law prohibiting her from representing the estate.

Appellant argues further that she and Ronnie Lee Brown have the same biological mother and father and that they agreed to her being the personal representative of the estate. Appellant states further that her father

passed away a few years ago and she and her mother are the only heirs to Ronnie's estate.

The South Carolina Constitution provides this Court with the duty to regulate the practice of law in this state. S.C. Const. art. V, § 4; see also S.C. Code Ann. § 40-5-10 (2001). South Carolina, like other jurisdictions, limits the practice of law to licensed attorneys. In re Lexington County Transfer Court, 334 S.C. 47, 512 S.E.2d 791 (1999). "No person may practice or solicit the cause of another in a court of this State unless he has been admitted and sworn as an attorney." S.C. Code Ann. § 40-5-310 (2001). The generally understood definition of the practice of law embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts. Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003); State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995); In re Duncan, 83 S.C. 186, 65 S.E. 210 (1909).

"The adjudicative power of the Court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." Renaissance Enters., Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 651,

515 S.E.2d 257, 258 (1999)(citing Williams v. Bordon's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980)). "The goal of the prohibition against the unauthorized practice of law is to protect the public from incompetent, unethical, or irresponsible representations." Id.

The Court has held that non-attorneys may not prepare legal documents for others to present in family court when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law. State v. Despain, supra. The Court noted its holding was for the protection of the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law.

The Court has also held that non-attorneys cannot negotiate guilty pleas on behalf of a party or represent a party in a guilty plea. In re Lexington County Transfer Court, supra.

In State v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939), this Court held that a corporation must act through licensed attorneys in legal matters. That holding was modified in In re Unauthorized Practice of Law, 309 S.C.

304, 422 S.E.2d 123 (1992), in which the Court held a non-lawyer, officer, agent, or employee may represent a business entity pursuant to S.C. Code Ann. § 40-5-80 (1986) in civil magistrate's court proceedings.[1] The Court stated further that the magistrate shall require a written authorization from the entity's president, chairperson, general partner, owner or chief executive officer. Finally, in Renaissance Enters., Inc. v. Summit Teleservices, Inc., supra, the Court held a non-lawyer cannot represent a corporation in circuit or appellate courts and once again held that a corporation may appear *pro se* only in magistrate's court.

However, appellant is correct that this Court has never specifically addressed whether a nonlawyer executor or personal representative can represent an estate in matters such as this appeal. Courts that have addressed the issue have concluded such conduct constitutes the

[1] At that time, § 40-5-80 stated the following:

> This chapter shall not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires, or the cause of another, with leave of the court first had and obtained; *provided*, that he declare on oath, if required, that he neither has accepted nor will accept or take any fee, gratuity or reward on account of such prosecution or defense or for any other matter relating to the cause.

The statute was amended, effective June 5, 2002, to state, "This chapter may not be construed so as to prevent a citizen from prosecuting or defending his own cause."

unauthorized practice of law. Ex parte Ghafary, 738 So.2d 778 (Ala. 1999)(relying on a statute which states only persons who are regularly licensed may practice law and its prior holdings that a person must be a licensed attorney to represent a corporation, the Alabama Supreme Court held a nonlawyer executrix could not represent the interests of an estate, a separate legal entity with interests other than her own, in a wrongful death action); Davenport v. Lee, 72 S.W.3d 85 (Ark. 2002)(holding administrators or other fiduciaries cannot proceed pro se in their representative capacity and that filing of pro se complaint by administrators of estate in a wrongful death action constituted the unauthorized practice of law); Ratcliffe v. Apantaku, 742 N.E.2d 843 (Ill. App. 2000)(holding that a nonlawyer personal representative could not represent the legal interest of the decedent's estate in a pro se capacity in a wrongful death action); State v. Simanonok, 539 A.2d 211 (Me. 1988)(holding nonlawyer personal representative cannot represent estate in court because practice of law reserved to persons who have established their qualifications therefore by admission to the bar); Waite v. Carpenter, 496 N.W.2d 1 (Neb. Ct. App. 1992)(holding nonlawyer personal representative who filed complaint on behalf of estate in wrongful death

action violated statute stating no person shall practice law in a proceeding in which he is not a party unless admitted to the bar); Kasharian v. Wilentz, 226 A.2d 437 (N.J. Super. Ct. App. Div. 1967)(holding wrongful death action brought by nonlawyer administrator on behalf of estate was required to be brought and appealed by a lawyer; "nominal representatives or even active fiduciaries of the persons in beneficial interest, not themselves lawyers, should not be permitted to conduct legal proceedings in court involving the rights or liabilities of such persons without representation by attorneys duly qualified to practice law."); State ex rel. Baker v. County Court of Rock County, 138 N.W.2d 162 (Wis. 1965)(denying petition of nonlawyer executor of estate to compel lower court to consider and act on petitions presented by executor on ground that presentation of probate matters to court for adjudication, when done in behalf of another, is the practice of law; "an executor's appearance in the conduct of a probate proceeding is not to be deemed the mere appearance of an individual in his own behalf, but is also a representation of others, and therefore an executor not licensed to practice law must appear by an attorney."); see also State Bar Ass'n of Conn. v. Conn. Bank and Trust Co., 153 A.2d 453 (Conn. 1959)(holding banks serving as

executors or administrators of estates could not be represented in probate court by employees not licensed to practice law); In re Brainard, 39 P.2d 769 (Idaho 1934)(holding preparation and filing of papers in connection with probate matters constitutes practice of law and must be performed by person admitted to practice law); In re Otterness, 232 N.W. 318 (Minn. 1930)(holding executors, administrators and guardians are not authorized to conduct proceedings in probate except in matters where his personal rights as representative are concerned, as, for instance, where his account as representative is in question or misconduct is charged against him as representative); Ferris v. Snively, 19 P.2d 942 (Wash. 1933)(holding appearance on behalf of others in court in probate proceedings constitutes practice of law).

The same holds true in this state. In the case at hand, the filing of a notice of appeal on behalf of the estate and preparation of briefs that will be required to further perfect this appeal clearly constitutes the practice of law as defined by this Court. Section 40-5-310 prohibits appellant who, while the administratrix of the estate, is not a lawyer, from taking such actions on behalf of the estate because the estate is a separate legal entity with interests

other than Ms. Brown's alone. Moreover, the further reasoning employed by this Court in previous opinions, that such a prohibition is necessary to protect the public from representation by those unlearned in the law, also applies to the situation at hand, as noted by many of the courts cited above.

In addressing appellant's argument that she has represented the estate previously in matters before the Court of Appeals and this Court, we note that this issue was never raised in those cases; therefore, they do not serve as precedent for the issue in this case. Renaissance Enters., Inc., supra. Finally, appellant's argument that she and Ronnie have the same parents and that the parents agreed to her being the personal representative of Ronnie's estate is also without merit. While they may have agreed to her being the personal representative of the estate, she does not state that they agreed to her representing the estate, nor could they given the provisions of section 40-5-310. Accordingly, for the reasons set forth above, we find that appellant, because she is not admitted to the practice of law, cannot represent the estate in court as administratrix of the estate.

Respondent argues that because appellant is prohibited from representing the estate, a proper notice of appeal has never been served and

filed in this case. Accordingly, she contends the appeal should be dismissed.

As noted by the Supreme Court of Arkansas in Davenport, supra, there is a split of authority as to whether the unauthorized practice of law renders a proceeding a nullity or merely amounts to an amendable defect. The court in Davenport followed the line of cases that, finding paramount the importance of protecting the public from those not trained or licensed to practice law, have concluded the unauthorized practice of law results in a nullity.

> In light of our duty to ensure that parties are represented by people knowledgeable and trained in the law, we cannot say that the unauthorized practice of law simply results in an amendable defect. Where a party not licensed to practice law in this state attempts to represent the interests of others by submitting himself or herself to jurisdiction of a court, those actions such as the filing of pleadings, are rendered a nullity.

Davenport, 72 S.W.3d at 94; see also Ex parte Ghafary, supra (holding that an attempt by a nonlawyer executrix, acting pro se to represent the interest of an estate in a wrongful death action constituted the unauthorized practice of law, and as such, the pro se complaint was a nullity); Waite, supra (finding Waite's violations of the statutory prohibition against the unauthorized

practice of law flagrant and persistent and holding that if the lower court and the appellate court were to allow Waite additional time to retain counsel instead of dismissing the action, Waite would have engaged in the unauthorized practice of law to the possible detriment of the heirs, the defendants, and the courts with complete impunity).

Other jurisdictions have found that the interests of the individuals represented by the personal representative call for giving the personal representative an opportunity to retain counsel rather than summarily dismissing the complaint or appeal. See Kasharian, supra (holding that the fact that there had been no previous case addressing the issue, that retained counsel would presumably file a brief and appendix in compliance with court rules, and that administrator's failure to file proper papers was due to his ignorance of the law and legal procedure warranted giving him the opportunity to retain counsel instead of dismissing the appeal).

Based on the facts and circumstances of this case, we deny the motion to dismiss the appeal and allow appellant a reasonable amount of time to retain counsel to continue with the appeal. We base our decision on the fact that appellant has represented the estate in three previous appellate

proceedings, leading her to believe that such was acceptable. As in Kasharian, supra, there has been no previous case addressing this issue. Moreover, in Renaissance Enters., Inc., supra, a case in which the shareholder of a corporation filed the notice of appeal and the Court of Appeals informed him a lawyer would have to be hired to represent the corporation, this Court, after determining the shareholder could not represent the corporation, remanded the case to the Court of Appeals for further proceedings consistent with its opinion, which presumably included retaining counsel to represent the corporation. We grant appellant the same opportunity.

Appellant shall, within thirty days of the date of this order, provide the Court with the name of the attorney who will be representing her in this matter. Failure to provide this information within the time allotted will result in this appeal being dismissed.

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 7, 2005

The Supreme Court of South Carolina

In the Matter of Samuel F. Crews, III, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has filed a return opposing the petition.

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

IT IS FURTHER ORDERED that W. Joseph Isaacs, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Isaacs shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Isaacs may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law

office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

July 13, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ernest Miller and Patricia Miller, **Appellants,**

v.

Blumenthal Mills, Inc., **Respondent.**

Appeal From Marion County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 4013
Heard June 15, 2005 – Filed July 5, 2005

AFFIRMED IN RESULT as to Ernest Miller;
REVERSED and REMANDED as to Patricia Miller

Chalmers C. Johnson, of Charleston, for Appellants.

Michael S. Thwaites, of Greer, for Respondent.

ANDERSON, J.: This appeal arises from the trial court's grant of summary judgment to the employer in a case brought by employees pursuant to the Fair Labor Standards Act for unpaid overtime wages. We affirm in result as to Ernest Miller. We reverse and remand as to Patricia Miller.

FACTUAL/PROCEDURAL BACKGROUND

Blumenthal Mills, Inc., is a textile manufacturer located in Marion, South Carolina. Patricia Miller (Patricia) is employed by Blumenthal. Ernest Miller (Ernest), Patricia's husband, worked for Blumenthal before being terminated in May 2003 after a confrontation with a Blumenthal supervisor. The Millers filed suit against Blumenthal alleging an unwritten plant rule required its workers to clock in approximately twenty minutes early every day to "perform . . . machine preparation" or look over their work. The Millers aver that during training, they were instructed to come in about twenty minutes before their shift started to check and make sure the prior shift left them in good shape. The Millers were not paid for this extra time. They contend the failure to pay overtime violates the Fair Labor Standards Act (FLSA).[1]

Blumenthal has a written policy contained in an employee handbook permitting its employees to clock in "a reasonable amount of time before the commencement of their shift." Blumenthal asserts "[t]his guideline is designed as a convenience to [employees] and to ease congestion at the time clock during starting and quitting times." This policy prohibits employees from beginning any work-related activity before their regularly scheduled starting time, unless such activity is first approved in writing by management.

In order to provide a degree of exactitude in regard to the testimony of Patricia, we quote her deposition extensively:

> Q. It has down here, "Today had a meeting with Tim Richardson . . . . Tim also said I was doing a good job coming in early and checking my cloth. Julia was in there with me." Where was this meeting?
> A. In the supervisor's office.
> Q. Who is Julia?
> A. She is another weaver. Julia Davis.
>
> . . . .

[1] 29 U.S.C. §§ 201-219 (1998 & Supp. 2005).

Q. When you went to work for Blumenthal, initially, was it as a weaver?
A. No, sir. I was a creeler.

. . . .

Q. Now, the creelers, are they required to be there twenty minutes ahead of time?
A. They have been told to get in there and check their job early to make sure everything was right.
Q. OK. . . . [W]ere you told to do that when you first went to work there?
A. Yes.
Q. How long did it take you to do that?
A. At l[e]ast fifteen, twenty, twenty-five minutes.
Q. What would you have to do?
A. Go down the set I was creeling and check to see if all the filling was on the creel stand and make sure that I wasn't being left bad.
Q. You mean by the other shift when you say left bad?
A. Yes.
Q. Why couldn't you do that when your shift started as opposed to twenty minutes before?
A. Because if I was left bad, there was nothing I could do about it.
Q. All right. But, if you were left bad, what could you do about it then if you observed it before the shift?
A. I can have the other creeler took into the office and had said something about it to see if she couldn't tighten up in doing her job a little bit better.

. . . .

Q. But . . . basically what you had to do is come in early to check on what the creelers were doing before you?
A. Yes.

. . . .

Q. How did you find out that you as a creeler were expected to be there early to check your work?
A. From the creeler that was training me.

Q. Who was that?
A. Sylvia.

. . . .

Q. What exactly did Sylvia say to you?
A. She would say "Come in early. Check your job and make sure it is right. If it is not, then you can take care of it."
Q. Would she tell you how early to come in?
A. She would say at least twenty minutes ahead of time.

. . . .

Q. Did you [later] go through a specific training course [to become a weaver]?
A. Yes.
Q. Who conducted that?
A. Ms. Diane.

. . . .

Q. OK. Tell me about your weaver training. What did that involve?
A. . . . Ms. Diane would say "You come—need to come—be on your job at least twenty minutes ahead of time."

. . . .

Q. . . . [Y]our testimony is that Diane told the entire weave class they had to come in twenty minutes early?
A. Yes.
Q. And, did she tell you why?
A. To make sure our jobs were running good.
Q. Did she tell you what that involved . . . making sure your jobs ran good?
A. Yes. That was . . . to check your cloth. Walk the back of your looms to make sure none of your lenos was running out.

. . . .

Q. . . . Check the cloth on your looms to make sure there were no defects?
A. No defects.

. . . .

Q. Well, why would you need to come in early to do that?

A. To make sure it is running no defects. If it is running defects, I can stop it off.

. . . .

Q. OK. So, you check cloth for defect. What else would you do?

A. Check the back of the looms to make sure we had no lenos running out.

. . . .

Q. So, you would go in early to check and make sure that you had ten [lenos on one side] and eight [lenos on the other side]?

A. Yes. If not, we can stop off the loom and have that weaver to put them lenos in.

. . . .

Q. Well, did you say that . . . you would go before your shift started and check this?

A. Yes.

Q. And, did you then have the ability to stop the loom?

A. Yes.

Q. So, you would stop the loom on somebody else's shift?

A. Yes. That is exactly what they told us we are allowed to do.

Q. Did you ever actually do that?

A. Yes.

. . . .

Q. OK. And, would you then prior to your shift starting have to physically go to each of the fifteen looms and check for quality?

A. Yes.

Q. How long would that take?

A. It usually takes no more than about twenty, twenty-five minutes.

. . . .

Q. OK. How long would it take you to check [the lenos]?

A. It is probably no more than about a minute.

Q. Well, what if you found that there weren't enough lenos? There was some problem with it. Would you then have to—

A. Stop the loom off and . . . put the right amount of lenos in.

Q. How often did that happen or does that happen?

A. It happens every day.

. . . .

Q. And, you do this before your shift starts?

A. Yes.

Q. How long does it take you in an average day—how many lenos do you have to swap out?

A. Anywhere from two to three.

Q. How long does it take you to do that?

A. It takes a good three minutes to run one—one leno in.

Q. So, that could take in an average day ten minutes?

A. Yes, sir.

Q. OK. So, we have got checking cloth and making sure about the lenos. Anything else that you have to do?

A. Yes. We have to make sure it is running the right filling.

Q. How do you do that?

A. The weave order, we go and look to see what color the filling is that is supposed to be on the loom, then we take the weave order and match it up with the filling that is on the creel stand.

. . . .

Q. OK. And, then you look at the weave order and you do what with it?

A. Take it and go around to the filling to make sure it is running the right filling.

Q. OK. And, you do that for each of your fifteen looms?

A. Yes.

Q. How long would that take total time?

A. No more than about two or three minutes [per loom].

. . . .

Q. . . . So, we are still talking about before your shift starts. We have got checking cloth for defects. Dealing with the lenos. And, then I forgot what you called this last thing. Matching up the orders to the filler?

A. Yes. To the filling.

. . . .

Q. . . . [W]hen you had a bunch of [lenos] you had to swap out, how long could that take to do?

A. Well, if you couldn't get them before work, then it would take all day to put them in. . . .

. . . .

Q. . . . When you are matching up the orders to the filling and you find there's mismatches, what would you have to do then?

A. Stop the loom off and take the wrong filling off and make—get the right filling and put it on there.

Q. Now, would you . . . also do that before your shift would start?

A. Yes.

Q. So, you would stop another weaver's loom?

A. Yes.

. . . .

Q. OK. Well, does that mean that you would . . . come to work, go out and do the prep work, and then go back to the time clock and clock in?

A. No, sir. I would clock in, then I would go to work.

. . . .

Q. . . . And this coming in early has been the rule the whole time, is that right?

A. Yes.

. . . .

Q. I mean, were you aware you weren't getting paid for this time?

A. Yes, sir.

. . . .

Q. But, even with these written guidelines in place, it is your testimony that the real rule is that you do have to come in twenty minutes ahead of time and do prep work?

A. Yes, because they tell us to.

Q. Who is they?

A. Trainees, our supervisor. If we are having a problem with the weaver that—that is leaving us and they will say if we don't want our job running bad to come in and check it out a little bit early.

. . . .

Q. . . . I want you to give me the—a list of the names of any witness, any person who can provide first hand testimony that is can say that they have seen you perform work-related activity before your shift started?
A. OK. Julia Davis.
Q. Let me write them down as we are going along. Julia Davis. She still works there?
A. Yes. Jackie. I don't know Jackie's last name.
Q. What does Jackie do?
A. She's a weaver.
Q. On what shift?
A. My shift. Woody Church. Was Roger Hilderbrand, but he ain't there no more.
Q. All right. Woody Church is your immediate supervisor?
A. Yes. And, he knows every morning when I clock in and when I go to my job, right along with Roger Hilderbrand, because I will be checking my cloth when Roger be doing his job and Roger will walk right by me.
Q. OK.
A. Tim Richardson, whenever Woody was out, he would come by and tap me on the shoulder and say, "Good job," and keep right on getting it. Deborah, James Wallace.
Q. All right. What's Deborah's last name?
A. I do not know Deborah's last name.
Q. She work there still?
A. Yes.
Q. Is she a weaver?
A. Yes.
Q. On your shift?
A. Yes.
Q. OK. I'm sorry. The next person.
A. James Wallace, Tim Martin.
Q. James Wallace is a weaver?
A. Well, he's a smash hand now.
Q. Right. And Tim?
A. Martin.

Q. Who is he?
A. He is a pattern-change man. He is the—what is the next one in command? I can't—I can't remember what they call him. But, he is next in command. If Woody is out, he is supposed to take over Woody's place.
Q. Was he like a lead man or something?
A. Something like that.
Q. OK. Anybody else?
A. The creelers. Tanya. The doffers, which I do not know their names.

. . . .

Q. . . . But, Julia Davis, again, who was she?
A. She's a weaver.
Q. And, she works the same shift you do?
A. The same shift I do.
Q. All right. What is it exactly that she can testify about? What could she say?
A. That I come in early and do my job. Start my job.
Q. Is that what they can all say? I mean—
A. Yes.
Q. So, Woody Church, your supervisor could say that—that he has seen you come in early and actually perform work-related activity twenty minutes before your shift started?
A. Yes.

Patricia listed nine employees who saw her "pre-shift" work, including her two supervisors. In his deposition, Woody Church, one of Patricia's supervisors, declared he could not confirm or deny any pre-shift work because he would not have been in those work areas during the times around the shift changes. According to Ernest, at a team meeting, a fellow employee complained: "Why in the hell do we have to come in here early if we don't get paid for it?" Kenneth Gunnin, the mill president, told him: "If you don't want your damn job, don't let the door hit you."

Blumenthal moved for summary judgment, which the trial court granted.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). If triable issues exist, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, Op. No. 25980 (S.C. Sup. Ct. filed May 9, 2005) (Shearouse Adv. Sh. No. 20 at 20); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them,

summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).

LAW/ANALYSIS

The Millers argue the trial court incorrectly held they must provide competent, corroborative evidence to support their allegations that they worked overtime and that management had either actual or constructive knowledge of the overtime hours worked.

I. Fair Labor Standards Act

"The main federal law regulating wages and hours of employment is the Fair Labor Standards Act [of 1938]." 48A Am. Jur. 2d Labor and Labor Relations § 3808 (1994). The purpose of the FLSA is to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944). The FLSA was enacted in response to a congressional finding that some industries, engaged in commerce, maintained labor conditions which were detrimental to a minimum standard of living necessary for health, efficiency, and the general well-being of workers. See 29 U.S.C. § 202(a) (1998). The Act attempts to eliminate unfair labor practices without substantially curtailing employment or earning power. 29 U.S.C. § 202(b). Because the FLSA is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals. Tennessee Coal, Iron & R.R. Co., 321 U.S. at 597; Benshoff v. City of Virginia Beach, 180 F.3d 136 (4th Cir. 1999).

The FLSA's overtime provision, contained in Section 207(a)(1), reads in pertinent part:

> Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (1998). Section 216(b) of the FLSA gives employees a cause of action against employers who have violated § 207(a)(1) and allows them to recoup the overtime wages plus liquidated damages, attorney's fees, and costs. 29 U.S.C. § 216(b) (1998).

In order to recover for a violation of section 207(a)(1), an employee must prove (1) he worked overtime hours without compensation; (2) the amount and extent of the overtime work as a matter of just and reasonable

inference; and (3) the employer had actual or constructive knowledge of the overtime work. Davis v. Food Lion, Inc., 792 F.2d 1274 (4th Cir. 1986). When employer knowledge is at issue, it has consistently been held that the employee has the initial burden of proving that the employer knew or should have known of the overtime work. See Davis, 792 F.2d at 1276; see also Pforr v. Food Lion, Inc., 851 F.2d 106 (4th Cir. 1988) (noting the burden is on the plaintiff to establish knowledge, either actual or constructive, that the employer suffered or permitted the performance of uncompensated overtime work). "The case law uniformly supports this proposition." Davis, 792 F.2d at 1276.

The circuit court based its decision to grant Blumenthal's motion for summary judgment on the following conclusion: "At summary judgment, Plaintiffs may not rest on unsupported allegations that they worked overtime and that management knew it; rather, plaintiffs must provide competent, corroborative evidence to support each of these elements." This fatal determination is premised singularly on two decisions: Darrikhuma v. Southland Corp., 975 F. Supp. 778, 783-84 (D. Md. 1997), aff'd, 129 F.3d 1258 (4th Cir. 1997) (unpublished), and Doran v. Sigman, 1998 U.S. Dist. Lexis 6219 (W.D. Va. 1998). Importantly, a careful search of FLSA case law demonstrates no court has required this increased burden of proof from the plaintiff.

The case of Lyle v. Food Lion, Inc., 954 F.2d 984 (4th Cir. 1992), is indicative of a standard FLSA claim. The Lyle court inculcated: "To prevail in the district court, [the employees] had to prove by a preponderance of the evidence that they worked overtime hours without compensation and that Food Lion knew of such work." Id. at 987. In Lyle, Food Lion appealed a decision holding it violated the FLSA on the basis that the evidence was insufficient to prove overtime hours were either worked or that Food Lion knew of the work. Id. The Fourth Circuit quoted and agreed with the district court's finding:

> This case hinges on a credibility determination. The plaintiffs testified that they regularly worked off-the-clock with the knowledge of Food Lion officials at the store level. These

> officials testified that they had no such knowledge and that it would have been impossible for the plaintiffs to have worked off-the-clock without their knowledge. The court believes the plaintiffs and not the store managers.

Id. Nowhere in the Lyle case does the court of appeals find that (1) employees cannot rest on unsupported allegations that they worked overtime and the management knew it and (2) employees must provide competent, corroborative evidence.

Although the circuit court relied on Darrikhuma, that case is distinguishable from the case sub judice. Darrikhuma applies to a set of facts that are inapposite to the facts of the instant case. Darrikhuma is dissimilar from this case and many other FLSA cases because Darrikhuma took steps to hide his off-the-clock work from his employer. Darrikhuma's alleged unauthorized use of overtime was documented by his supervisor and he was informed that any unauthorized overtime would result in disciplinary action or termination. Darrikhuma had previously requested overtime but was refused and told if he needed overtime he would be replaced. 975 F. Supp. at 783. Darrikhuma then started working overtime hours in order to complete his duties but did not report them on his time sheet. Id. Darrikhuma's time sheet contained a statement from the employer warning employees not to work off-the-clock. Id. at 780.

Darrikhuma tried to impute constructive knowledge of his employment to his employer by stating a field consultant, who was not Darrikhuma's manager, knew about his working off-the-clock hours. Id. at 783. However, the field consultant thought Darrikhuma was a salaried employee and thus not subject to overtime restrictions. After declaring this was not enough to justify the claim, the district court explicated: "Additionally, Plaintiff offers no more than his own unsupported allegations that Defendant was actually advised of his working on the job and not being paid for those hours. Thus, Plaintiff has failed to establish that Defendant had constructive or actual knowledge." Id. at 784. The district court's order, which involved numerous other issues, was affirmed by the Fourth Circuit Court of Appeals in an unpublished decision that did not address any of the issues but simply

affirmed the district court's opinion. See Darrikhuma v. Southland Corp., 129 F.3d 1258 (4th Cir. 1997).

The present case shares none of the factual similarities of Darrikhuma. The Millers did not intentionally hide their off-the-clock hours. In fact, a review of their time sheets demonstrates the Millers clocked in early. Unlike Darrikhuma, Patricia testified she had been trained and instructed by Blumenthal to engage in this pre-shift activity. Patricia specifically named the trainers, supervisors, and other members of management who had directed her to perform this pre-shift work. Patricia indicated there were a number of employees who heard the trainers, supervisors, and members of management when they instructed her in this regard. Unlike Darrikhuma, who performed his overtime hours on the weekend when management was not on site, Patricia performed her work during working hours and during a time when management was present at the mill. In contrast to Darrikhuma, who was threatened with termination if he worked the extra hours, Patricia testified that, when she was working uncompensated, pre-shift hours, one of her supervisors "would come by and tap [her] on the shoulder and say, 'Good job,' and keep right on getting it."

The Millers' case bears a striking resemblance to the Fourth Circuit's decision in Lyle. In Lyle, the employer had a policy preventing off-the-clock work. 954 F.2d at 986. Blumenthal had a putative policy preventing pre-shift work. In Lyle, the employees' case rested solely on their statement they worked overtime and management knew it. Similarly, Patricia alleged she worked overtime and management knew it. In addition, Patricia submitted an affidavit from John Schaeffer, a former co-worker, who stated in relevant part:

> 2. While I worked at Blumenthal Mills, Inc., I was told to come in about 20 to 30 minutes before my shift to begin work.
>
> 3. I regularly did this, and understood that it was a requirement.
>
> 4. Other employees also regularly came in before their shifts to work.

5. The work we did was the same kind of work that we performed while on our regular shifts.

6. Management of Blumenthal Mills, Inc. was aware that we were being told to come in and work before our shifts. They enforced this as a rule.

7. We did not get paid for the time we worked before our shifts.

Lyle was not as strong as Patricia's case because the managers in Lyle affirmatively testified that the employees did not work off-the clock. Patricia's manager testified he would not have known if Patricia came to work earlier than her shift. Patricia explained her decision to keep quiet: "I seen [sic] a lot of people lose their job out there for no reason at all, because they complained about certain things out there."

Moreover, Darrikhuma is not the pronouncement of a new rule but is limited to the facts of that case. In fact, under "Summary Judgment Standard," the court articulates established summary judgment principles, NOT an increased burden for the plaintiff:

II. SUMMARY JUDGMENT STANDARD

Summary judgment will be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The movant must demonstrate that there is no genuine dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 2552-54, 91 L.Ed.2d 265 (1986). While the Court views the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment, Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), the mere existence of a "scintilla of evidence" is not enough to frustrate the motion. To defeat it, the party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find

> for him. Anderson, 477 U.S. at 252, 106 S.Ct. at 2512; Celotex, 477 U.S. at 322-23, 106 S.Ct. at 2552-53.

Id. at 783. The ruling in Darrikhuma does not allow a court to ignore a plaintiff's testimony as evidence in an FLSA case concerning overtime claims.

Darrikhuma does not hold that a plaintiff must present more than his own testimony to support a claim for unpaid overtime under the FLSA. Instead, the court explained that Darrikhuma failed to produce any evidence beyond his own speculation to prove that a third party who saw him working on weekends (1) knew that Darrikhuma was an hourly worker; (2) knew that, when she saw Darrikhuma working on weekends, he was working overtime hours, not part of his usual schedule; and (3) actually told Darrikhuma's management that she had seen Darrikhuma working on the weekends. When presented with the question of whether he could prove the employer's management knew or should have known about his overtime work, Darrikhuma could only produce his speculation that the third party may have told management. Both the third party and management denied this. Unlike Darrikhuma, Patricia presented more than mere speculation about whether Blumenthal knew or should have known about the overtime hours for which she was not being compensated.

According to the controlling case law, an employee in a section 207(a)(1) case must prove the employer knew or should have known about his overtime work and need only show facts from which a reasonable inference can be drawn as to the amount of overtime he worked without compensation. There is no heightened burden of proof beyond that in other civil cases. An employee plaintiff's own testimony in a section 207(a)(1) case is evidence from which a reasonable juror could find the plaintiff worked the overtime hours he alleged and that management was aware of the uncompensated overtime hours worked. There is no requirement that the employee do more than testify himself as to the elements.

Significantly, in Higgins v. Food Lion, Inc., 197 F. Supp. 2d 364 (D. Md. 2002), the district court cited Darrikhuma for the following principle: "Additionally, a plaintiff must show that the employer had actual or

constructive notice of the fact that the uncompensated person was working without compensation." Id. at 368. Higgins did NOT include a requirement that a plaintiff must present more than his own unsupported allegations that employer was actually advised of his working on the job and not being paid for those hours.

II. Portal-to-Portal Act

In 1947, Congress enacted the Portal-to-Portal Act to clarify the duties of employers regarding the compensation of employees for activities that constitute work but which occur before, after, or during the work shift. Gonzalez v. Farmington Foods, Inc., 296 F. Supp. 2d 912 (N.D. Ill. 2003). The Portal-to-Portal Act provides in pertinent part:

> (a) Activities not compensable
> [N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee . . .
>
> . . . .
>
> (2) activities which are preliminary or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a)(2) (1998).

The Portal-to-Portal Act established two categories of activities: (1) those which are principal and (2) those which are preliminary or postliminary. Gonzalez, 296 F. Supp. 2d at 924. Thus, even when an activity is properly classified as "work," the Portal-to-Portal Act exempts from compensation activities which are preliminary or postliminary to an employee's principal activity or activities. In Steiner v. Mitchell, 350 U.S.

247 (1956), the United States Supreme Court established an exception to this rule:

> [A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1) [of the Portal-to-Portal Act].

Id. at 256; see also Davis v. Charoen Pokphand (USA), Inc., 302 F. Supp. 2d 1314 (M.D. Ala. 2004) (noting that activities are within coverage of FLSA, and outside exception in Portal-to-Portal Act, if those activities are integral and indispensable part of principal activities for which covered workmen are employed). "An activity is integral to a principal activity if the activity is made necessary by the nature of the work performed, it fulfills mutual obligations between the employer and his employees, the activity directly benefits the employer in the operation of his business, and the activity is closely related to other duties performed by the employees." Hiner v. Penn-Harris-Madison Sch. Corp., 256 F. Supp. 2d 854, 859 (N.D. Ind. 2003).

"As the Department of Labor stated in an interpretive bulletin, 'Congress intended the words principal activities to be construed liberally . . . to include any work of consequence performed for an employer, no matter when the work is performed." Lindow v. United States, 738 F.2d 1057, 1061 (9th Cir. 1984) (quoting 29 C.F.R. § 790.8(a)). In order for a particular activity to be "integral and indispensable," it must be necessary to the principal activity performed and done for the benefit of the employer. Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47 (8th Cir. 1984); Lee v. Am-Pro Protective Agency, Inc., 860 F. Supp. 325 (E.D. Va. 1994).

Activities spent predominantly in the employees' own interests are preliminary or postliminary. Dunlop v. City Elec., Inc., 527 F.2d 394 (5th Cir. 1976); Truslow v. Spotsylvania County Sheriff, 783 F. Supp. 274 (E.D. Va. 1992). However, an activity is not deemed "preliminary or postliminary"

and excluded from FLSA merely because it takes place before or after the work shift. See Mitchell v. King Packing Co., 350 U.S. 260 (1956); Lee, 860 F. Supp. at 327. In Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), the Supreme Court discussed pre-shift duties and found the ones alleged were compensable. The Court illuminated:

> The employees proved, in addition, that they pursued certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools. These activities are clearly work falling within the definition enunciated and applied in the Tennessee Coal and Jewell Ridge cases. They involve exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit. They are performed solely on the employer's premises and are a necessary prerequisite to productive work. There is nothing in such activities that partakes only of the personal convenience or needs of the employees. Hence they constitute work that must be accorded appropriate compensation under the statute.

Id. at 692-93.

"Decisions construing the Portal-to-Portal Act in conjunction with the FLSA make clear that the excepting language of section 4 was intended to exclude from FLSA coverage only those activities predominantly . . .spent in the employees' own interests." Dunlop, 527 F.2d at 398 (internal quotations omitted). No benefit may inure to the company. Id. The Portal-to-Portal Act excluded from FLSA coverage activities undertaken for the employees' own convenience, not required by the employer and not necessary for the performance of the employee's duties. Id. The exemption was not intended to relieve employers from liability for any work of consequence performed for an employer from which the company derives significant benefit. Id. at 398-99. Necessity to the principal activity and benefit to the employer are

the two critical tests. Lee, 860 F. Supp. at 327. The Lindow court noted it had not found any authority "which suggests that an employee's labor is not integral and indispensable if it could have been performed during regular hours. As long as the work is 'suffered' or 'permitted' outside of normal hours, the work is compensable." Lindow, 738 F.2d at 1061. The Portal-to-Portal Act exception is to be construed narrowly. Dunlop, 527 F.2d at 398-99.

Blumenthal allows an early clock-in in part to ease congestion at the time clock during shift changes. This transition is made for the benefit of the mill so the mill can have seamless and continuous production. Additionally, there is evidence of an unwritten rule requiring the workers to arrive early. Patricia alleges she was trained to be at work approximately twenty minutes early. Patricia's testimony showed the purpose of her early arrival is to prevent defects and, if there is a problem or defect, she can stop the machine and correct it during her pre-shift time. While a disciplinary policy was not in place to discipline employees that did not arrive early, an effective policy existed because the employees could be written up if they did not reach a pre-set quota of completed work at the conclusion of their shift.

The work Patricia asseverates she was required to perform prior to the beginning of her shift is not similar to the examples found in other Portal-to-Portal Act cases. For instance, in Lindow v. United States, the district court found that prior to the start of their shifts the employees socialized and engaged in other non-work related activities. Lindow, 738 F.2d at 1059.

There is evidence in the record from which a reasonable jury could find that the work in which Patricia engaged, prior to the start of her shift, was actually the same work she did while on shift, rather than minor preparatory work.

III. De Minimis Rule

Under the FLSA, employees cannot recover for otherwise compensable time if it is de minimis. Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984). The de minimis rule is concerned with the practical administrative

difficulty of recording small amounts of time for payroll purposes. Id. Employers, therefore, must compensate employees for even small amounts of daily time unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes. Id.

The Supreme Court, in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 693 (1946), held that activities which involve "insubstantial and insignificant" periods of time are de minimis and should "not be included in the statutory workweek." The Anderson Court concluded:

> When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Id. at 692.

One factor in determining whether a claim is de minimis is the amount of daily time spent on the additional work. Lindow, 738 F.2d at 1062; see also Gonzalez v. Farmington Foods, Inc., 296 F. Supp. 2d 912, 928 (N.D. Ill. 2003) ("In Lindow, the court set out four factors for determining whether an activity is de minimis as a matter of law."). There is no precise amount of time that may be denied compensation as de minimis. Lindow, 738 F.2d at 1062. No rigid rule can be applied with mathematical certainty. Id.; Frank v. Wilson & Co., 172 F.2d 712 (7th Cir. 1949). Rather, common sense must be applied to the facts of each case. Lindow, 738 F.2d at 1062.

Most courts have found daily periods of approximately ten minutes de minimis even though otherwise compensable. See, e.g., E.I. du Pont De Nemours & Co. v. Harrup, 227 F.2d 133 (4th Cir. 1955) (ten minutes); Green v. Planters Nut & Chocolate Co., 177 F.2d 187, 188 (4th Cir. 1949) ("obvious" that ten minutes is de minimis); Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984) (seven to eight minutes); Carter v. Panama Canal Co., 314 F. Supp. 386 (D.D.C. 1970) (two to fifteen minutes), aff'd, 463 F.2d 1289 (D.C. Cir. 1972). However, the Ninth Circuit Court of Appeals, in

Ballaris v. Wacker Siltronic Corp., 370 F.3d 901 (9th Cir. 2004), recently found twenty to thirty minutes was NOT de minimis. Id. at 912; see also Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706 (2d Cir. 2001) (fifteen minutes is not de minimis); Mireles v. Frio Foods, Inc., 899 F.2d 1407 (5th Cir. 1990) (fifteen minutes not de minimis); Reich v. Monfort, Inc., 144 F.3d 1329, 1333 (10th Cir. 1998) ("[W]e have cited with approval cases finding that 'as little as ten minutes of working time goes beyond the level of de minimis and triggers the FLSA.'"); Metzler v. IBP, Inc., 127 F.3d 959 (10th Cir. 1997) (fourteen minutes is not de minimis). Case law suggests it would be inappropriate to find that approximately twenty minutes of daily time spent on the additional work constitutes a de minimis amount of time.

The second factor that must be considered in determining whether otherwise compensable time is de minimis is "the practical administrative difficulty of recording the additional time." Lindow, 738 F.2d at 1063. "Employers . . . must compensate employees for even small amounts of daily time unless that time is so minuscule that it cannot, as an administrative matter, be recorded for payroll purposes." Id. at 1062-63.

The third factor that must be considered is the size of the aggregate claim. Id. at 1063. Courts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim. Id. The fourth factor that must be considered in applying the de minimis rule is whether the employee performed the work on a regular basis. Id.; see also 29 C.F.R. § 785.47 (noting that employer should compensate "fixed or regular" working time, however small).

"To summarize, in determining whether otherwise compensable time is de minimis, we will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." Lindow, 738 F.2d at 1063.

Applying the Lindow factors to the case at bar, jury issues are presented as to whether: (1) the time is easily recorded on the actual time cards of Patricia; (2) twenty minutes, factored in the aggregate, is a de minimis amount of time; and (3) the work is performed regularly and is not a sporadic requirement.

IV. FLSA Designed to Protect Employees

The FLSA was designed to protect employees. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), the Supreme Court articulated:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided.

Id. at 706-07 (footnotes omitted). Doe v. United States, 372 F.3d 1347 (Fed. Cir. 2004), clarifies that employers cannot escape liability if they permit or suffer an employee to work overtime. Id. at 1360-61; see also 29 C.F.R. 185.11 (noting that work not requested but suffered or permitted is work time).

V. Ernest Miller's Claim

In contrariety to the deposition of Patricia, the deposition of Ernest is imbued with generalities, lack of particularity, vagueness, and inexactitude in regard to any mandatory, specific pre-shift activities. The conclusory and non-specific testimony of Ernest fails to survive the grant of summary judgment. We agree with the circuit judge in his grant of summary judgment as to all claims of Ernest.

CONCLUSION

Amalgamating our analysis of the FLSA, the Portal-to-Portal Act, the de minimis rule, and policy aspects of the FLSA, we come to the ineluctable

conclusion that the grant of summary judgment as to the claim of Patricia Miller is erroneous and is reversed. We affirm the grant of summary judgment as to all claims of Ernest. Accordingly, the trial judge's order granting summary judgment as to Ernest Miller is **AFFIRMED IN RESULT and REVERSED and REMANDED** as to Patricia Miller.

AFFIRMED IN RESULT as to Ernest Miller; REVERSED and REMANDED as to Patricia Miller.

STILWELL and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Danny Orlando Wharton, Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 4014
Heard January 13, 2005 – Filed July 5, 2005

REVERSED

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

BEATTY, J.: Danny Orlando Wharton was convicted of voluntary manslaughter and possession of a weapon during the commission of a violent

crime. He appeals, arguing the trial judge erred in: (1) charging the law of voluntary manslaughter; (2) failing to charge the jury on the law of involuntary manslaughter; and (3) failing to charge the jury on the law of accident. We reverse.

FACTS

Danny Orlando Wharton and several of his friends were at a neighbor's house playing cards when his ex-girlfriend, Pam Suber, confronted him about his new girlfriend. The two began arguing, and several people gathered around to break up the argument. Suber left the area after the argument, while five or six people, including Wharton's best friend, Chris Luster, and Clifton "Smokey" Shaw, attempted to calm Wharton down. Wharton resisted the attempts to calm him down and did not want to be touched. At some point, he exchanged words with Shaw about Suber. Wharton retrieved a gun from a vehicle parked nearby. Shaw told his girlfriend to take his son home out of the way. He then approached Wharton in an aggressive manner. The two continued to argue. Shaw placed his necklace beneath his shirt collar to prepare for a physical altercation and Wharton pulled the gun out. According to Shaw, who was the object of the argument, Wharton pulled the gun out like he was trying to shoot it into the air. Shaw testified that he turned and lay down, the gun discharged, and Luster, who was attempting to end the argument between Wharton and Shaw, was fatally shot. A witness testified that Wharton was shocked that Luster was shot.

Wharton was indicted for murder and possession of a weapon during the commission of a violent crime. The State requested a jury charge on murder and voluntary manslaughter. Wharton opposed the voluntary manslaughter charge. He argued alternatively that if the judge gave the voluntary manslaughter charge, he was entitled to a charge on involuntary manslaughter and accident. The judge denied the requests, and the jury was charged on the law of murder, voluntary manslaughter, and possession of a weapon during the commission of a violent crime.[1] The jury found Wharton

[1] In fact, the jury was charged twice with the law of voluntary manslaughter because the jury requested the definition of manslaughter and asked whether

guilty of voluntary manslaughter and possession of a weapon during the commission or attempt to commit a violent crime. The judge sentenced him to prison for a total of fifteen years. This appeal followed.

STANDARD OF REVIEW

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "Only the law applicable to the case should be charged to the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." Id.

LAW/ANALYSIS

Wharton argues the trial judge erred in charging the jury on voluntary manslaughter.[2] We agree.

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involuntary manslaughter was an option. The jury was also charged three times with the law of transferred intent after the jury requested a clarification and a question arose regarding whether or not transferred intent could be used for voluntary manslaughter. See Harris v. State, 354 S.C. 382, 387, 581 S.E.2d 154, 156 (2003) ("Sufficient provocation necessary to justify a voluntary manslaughter charge *must come from the victim and not be transferred from a third party to the victim.*").

[2] The State argues that this issue is not preserved for our review because Wharton's counsel did not specify reasons for his objection to the voluntary manslaughter charge. The State failed to raise this issue in its brief and raised it for the first time at oral argument. Rule 220(c), SCACR, allows us to affirm the lower court on any grounds appearing in the record, if we choose to do so. We do not. The appellant was not put on notice that preservation of his objection was an issue. The grounds for the objection are arguably general in nature, however any argument should have been contained in the State's brief, thereby giving the appellant notice and an opportunity for a thoughtful reply.

Voluntary manslaughter is the "unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation." Knoten, 347 S.C. at 302, 555 S.E.2d at 394. Both heat of passion and sufficient legal provocation must be present for the killing to constitute voluntary manslaughter. Id.; State v. Cole, 338 S.C. 97, 101-02, 525 S.E.2d 511, 513 (2000). Sufficient legal provocation must come from the victim, not from a third party. Harris, 354 S.C. at 387, 581 S.E.2d at 156. To constitute sufficient legal provocation to support a voluntary manslaughter charge, the provocation "must come from some act of or related to the victim." State v. Locklair, 341 S.C. 352, 363, 535 S.E.2d 420, 425 (2000).

We find no evidence of sufficient legal provocation that would support a charge of voluntary manslaughter. The pertinent facts are undisputed as to the lack of provocation by the victim, Chris Luster. Although Wharton was arguing with Shaw at the time of the shooting, the evidence elicited at trial showed there was never any argument or discord between Wharton and Luster.

The State argues, however, that the principle of transferred intent is applicable. This argument is unavailing. As previously discussed, sufficient provocation necessary to justify a voluntary manslaughter charge must come from the victim and not transferred from a third party. Harris, 354 S.C. at 387, 581 S.E.2d at 156; Locklair, 341 S.C. at 363, 535 S.E.2d at 425. Moreover, "[w]here death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation." State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996); State v. Cooley, 342 S.C. 63, 68, 536 S.E.2d 666, 669 (2000). Here, Wharton and Shaw were only arguing. Thus, there was no legal provocation to transfer.

Because there is no evidence of sufficient legal provocation, the trial judge should not have given a voluntary manslaughter instruction. Wharton was clearly prejudiced because he was found guilty of voluntary manslaughter. Accordingly, we reverse Wharton's conviction for voluntary manslaughter.

Further, Wharton's conviction for voluntary manslaughter was a prerequisite to his conviction for possession of a firearm during the commission of a violent crime. See S.C. Code Ann. § 16-23-490(E) (2003) (noting that the additional punishment for possession of a firearm during the commission of a violent crime may not be imposed unless the defendant is convicted of the underlying violent crime); State v. Taylor, 356 S.C. 227, 235 n.4, 589 S.E.2d 1, 5 n.4 (2003) (noting that defendant's conviction for possession of a weapon during the commission of a violent crime must be reversed where the court was reversing defendant's murder conviction). Thus, because we reverse the voluntary manslaughter conviction, we necessarily must reverse the conviction for the weapon charge.

Having reversed the trial court on the voluntary manslaughter charge, we need not address appellant's remaining issues.

CONCLUSION

Because the trial judge erred in charging the law of voluntary manslaughter, Wharton's convictions and sentences are

REVERSED.

HUFF and KITTREDGE, JJ., concur.