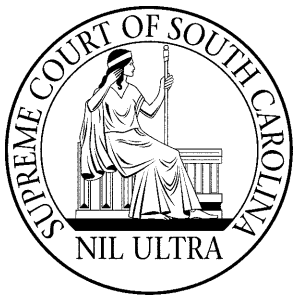

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

August 11, 2003

ADVANCE SHEET NO. 30

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

25650 - Emma Hessenthaler v. Tri-County Sister Help	Pending
25678 - David Jackson, Jr. v. State	Pending
25679 - State v. Emory Alvin Michau, Jr.	Denied 08/06/03
25681 - In the Matter of the Case and Treatment of Peter E.J. Harvey	Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

None

UNPUBLISHED OPINIONS

2003-UP-476-James P. Mastronardi /Joe H. Norwood, d/b/a/ Ultra Tan Inc. v. S.C. Dep't of Health and Environmental Control
(Greenville, Judge G. Thomas Cooper, Jr.)

2003-UP-477-Elizabeth Ann Berry et al. v. Roger Logan and Brenda Logan
(Greenville, Judge J.C. Nicholson, Jr.)

2003-UP-478-DeBordieu Colony Community Association Inc. v. Furman D. Wingate
(Georgetown, Judge Benjamin H. Culbertson)

2003-UP-479-Frederick Peter Poznick, Jr. v. Susan Swain Poznick
(Greenwood, Judge Joseph W. McGowan, III)

2003-UP-480-Victor L. Smalls v. Fuji Photo Film, Inc.
(Greenwood, Judge Gary E. Clary)

PETITIONS FOR REHEARING

3602-The State v. Al-Amin	Pending
3634-Murray v. Bank of America	Pending
3635-The State v. LaQuinces Davis	Pending
3640-The State v. Adams	Pending
3642-Hartley v. John Wesley United	Pending
3643-Eaddy v. Smurfit-Stone	Pending
3645-Hancock v. Wal-Mart	Pending

3646-O'Neal v. Intermedical	Pending
3647-The State v. Andre Tufts	Pending
3648-Walsh v. Woods	Pending
3649-The State v. Chisolm	Pending
3650-Cole et al. v. SCE&G	Pending
3652-Flateau v. Harrelson et al.	Pending
3653-The State v. Uuno Mattias Baum	Pending
3654-John Miles v. Rachel Miles	Pending
3655-Kibby Daves v. Jim R. Cleary	Pending
3656-The State v. Carlos Gill	Pending
3658-Swindler v. Swindler	Pending
3660-Venture Engineering v. Tishman	Pending
3661-Neely v. Thomasson	Pending
3664-Lighthouse Tennis v. South Island Public Service Dt.	Pending
3667-Overcash v. SCE&G	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-317-State v. Jimmy Jones	Pending
2003-UP-324-McIntire v. Columbia	Pending
2003-UP-328-The State v.Tuck	Pending
2003-UP-335-State v. Rogers	Pending
2003-UP-336-Tripp v. Price et al.	Pending

2003-UP-353-The State v. Holman	Pending
2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-366-King v. Poston	Pending
2003-UP-368-State v. Walker	Pending
2003-UP-376-Heavener v. Walker	Pending
2003-UP-381-Dickey v. Holloway	Pending
2003-UP-394-Windham v. McLeod	Pending
2003-UP-396-Coaxum v. William Washington	Pending
2003-UP-397-BB&T v. Chewning	Pending
2003-UP-404-Thurmond Guess v. Benedict College	Pending
2003-UP-409-The State v. Legette	Pending
2003-UP-412-McCormick v. McCormick	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Carol Bates v. William Fender	Pending
2003-UP-433-State v. Eugene Kearns	Pending
2003-UP-437-Shirley Jones v. Denmark Police Dept.	Pending
2003-UP-439-Belton v. Jordan	Pending
2003-UP-444-The State v. Donald Roberts	Pending
2003-UP-447-Samantha Crooks v. Richard Crooks	Pending
2003-UP-451-The State v. Shantone D. Curry	Pending

2003-UP-453-Elizabeth Way v. Three Rivers Apartments	Pending
2003-UP-458-InMed Diagnostic v. MedQuest	Pending
2003-UP-459-The State v. Anthony Nellis, Jr.	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-469-Adams v. Cook	Pending
2003-UP-472-Proctor v. SCDHEC	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3518-Chambers v. Pingree	Pending
3533-Food Lion v. United Food	Granted 8/6/03
3551-Stokes v. Metropolitan	Pending
3558-Binkley v. Burry	Denied 8/6/03
3563-The State v. Missouri	Pending
3565-Ronald Clark v. SCDPS	Pending
3580-FOC Lawshe v. International Paper	Pending
3585-The State v. Murray Roger Adkins, III	Pending
3588-In the Interest of Jeremiah W.	Pending
3592-Gattis v. Murrells	Pending
3597-Anderson v. Augusta Chronicle	Pending
3598-Belton v. Cincinnati	Pending
3599-The State v. Grubbs	Pending

3600-State v. Lewis	Pending
3604-State v. White	Pending
3606-Doe v. Baby Boy Roe	Pending
3607-State v. Parris	Pending
3608-The State v. Oscar Roy Padgett	Pending
3610-Wooten v. Wooten	Pending
3614-Hurd v. Williamsburg	Pending
3623-Vergie Fields v. Regional Medical Center	Pending
3626-Nelson v. QHG of S.C. Inc.	Pending
3627-Pendergast v. Pendergast	Pending
3629-Redwend Ltd. v. William Edwards et al.	Pending
3631-The State v. Michael Dunbar	Pending
3633-Loren Murphy v. NationsBank, N.A.	Pending
3638-The State v. Delbert Louis Smalls	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
2002-UP-220-The State v. Hallums	Pending
2002-UP-329-Ligon v. Norris	Denied 8/6/03
2002-UP-368-Roy Moran v. Werber Co.	Pending
2002-UP-489-Fickling v. Taylor	Pending
2002-UP-514-McCleer v. City of Greer	Pending
2002-UP-537-Walters v. Austen	Pending

2002-UP-538-The State v. Richard Ezell	Pending
2002-UP-586-Ross v. University of S.C.	Pending
2002-UP-598-Sloan v. Greenville	Pending
2002-UP-615-The State v. Floyd	Denied 7/24/03
2002-UP-656-SCDOT v. DDD (2)	Pending
2002-UP-662-State v. Morgan	Pending
2002-UP-715-Brown v. Zamias	Pending
2002-UP-734-SCDOT v. Jordan	Pending
2002-UP-742-The State v. Johnson	Denied 7/24/03
2002-UP-749-The State v. Keenon	Pending
2002-UP-753-Hubbard v. Pearson	Pending
2002-UP-760-State v. Hill	Pending
2002-UP-769-Babb v. Estate of Charles Watson	Denied 8/6/03
2002-UP-785-The State v. Lucas	Pending
2002-UP-787-Fisher v. Fisher	Denied 7/24/03
2002-UP-788-City of Columbia v. Jeremy Neil Floyd	Pending
2002-UP-794-Jones v. Rentz	Pending
2002-UP-795-Brown v. Calhoun	Granted 7/24/03
2002-UP-800-Crowley v. NationsCredit	Pending
2003-UP-014-The State v. Lucas	Pending
2003-UP-019-The State v. Wigfall	Pending

2003-UP-023-The State v. Killian	Denied 7/24/03
2003-UP-029-SCDOR v. Springs	Pending
2003-UP-032-Pharr v. Pharr	Pending
2003-UP-033-Kenner v. USAA	Pending
2003-UP-036-The State v. Traylor	Pending
2003-UP-062-Lucas v. Rawl	Pending
2003-UP-087-The State v. Major	Pending
2003-UP-088-The State v. Murphy	Pending
2003-UP-098-The State v. Dean	Pending
2003-UP-101-Nardone v. Davis	Pending
2003-UP-111-The State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-113-Piedmont Cedar v. Southern Original	Pending
2003-UP-116-Rouse v. Town of Bishopville	Pending
2003-UP-125-Carolina Travel v. Milliken	Pending
2003-UP-126-Brown v. Spartanburg County	Pending
2003-UP-127-City of Florence v. Tanner	Pending
2003-UP-143-The State v. Patterson	Pending
2003-UP-144-The State v. Morris	Pending
2003-UP-148-The State v. Billy Ray Smith	Pending
2003-UP-150-Wilkinson v. Wilkinson	Pending
2003-UP-161-White v. J. M Brown Amusement	Pending

2003-UP-163-Manal Project v. Good	Pending
2003-UP-165-The State v. Sparkman	Pending
2003-UP-171-H2O Leasing v. H2O Parasail	Pending
2003-UP-175-BB&T v. Koutsogiannis	Pending
2003-UP-179-State v. Brown	Pending
2003-UP-180-State v. Sims	Pending
2003-UP-184-Tucker v. Kenyon	Pending
2003-UP-188-State v. Johnson	Pending
2003-UP-190-Henfield v. Taylor	Pending
2003-UP-196-T.S. Martin Homes v. Cornerstone	Pending
2003-UP-205-The State v. Michael Bohannan	Pending
2003-UP-228-Pearman v. Sutton Builders	Pending
2003-UP-244-The State v. Tyronne Edward Fowler	Pending
2003-UP-245-Bonte v. Greenbrier Restoration	Pending
2003-UP-255-BB&T of South Carolina v. Fleming	Pending
2003-UP-269-Golf Restaurants v. Tilghman Ins. Agency	Pending
2003-UP-270-Thurmond Guess v. Benedict College	Pending
2003-UP-271-Bombardier Capital v. Green	Pending
2003-UP-274-The State v. Robert Brown	Pending
2003-UP-284-Washington v. Gantt	Pending
2003-UP-293-Joseph Panther v. Catto Enterprises	Pending

2003-UP-294-Herman Langley v. Keisha Bowers	Pending
2003-UP-308-Nazir Ahmad v. Randolph Davis	Pending
2003-UP-325-Joyce Miller v. Johnny Miller (6)	Pending
2003-UP-348-The State v. Earnest Battle	Pending
0000-00-000-Dreher v. Dreher	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Susan Jinks, as Personal Representative of the Estate of Carl H. Jinks, Respondent,

v.

Richland County and Dr. Charles Eskridge, Defendants,

of whom Richland County is Appellant.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 25690
Submitted May 8, 2003 - Filed August 11, 2003

AFFIRMED

Andrew F. Lindemann, William H. Davidson, II, David L. Morrison, and Alice Price Adams, of Davidson, Morrison, and Lindemann, P.A., of Columbia, for appellant.

Bradford P. Simpson, Theile Branham, and John D. Kassel, of Suggs & Kelly Lawyers, P.A.; and James Mixon Griffin, of Simmons and Griffin, L.L.C., all of Columbia, for respondent.

PER CURIAM: Respondent Susan Jinks brought this wrongful death and survival action on behalf of her husband, Carl H. Jinks (Jinks), who died while incarcerated at Appellant Richland County's (County's) Detention Center. The jury returned a verdict in Jinks' favor.[1] County appeals.[2] We affirm.

ISSUES

I. Did the trial judge err by denying County's motions for a directed verdict and judgment notwithstanding the verdict on the basis Jinks failed to present evidence of gross negligence and proximate cause?

II. Did the trial judge err by failing to hold collateral estoppel barred relitigation of certain issues?[3]

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[1] The jury returned a defense verdict in Jinks' medical malpractice action against the detention center's physician.

[2] Originally, the Court issued an opinion in this matter addressing County's claim that Jinks failed to file this action within the statute of limitations. The Court held the federal statute tolling the applicable state statute of limitations violated the Tenth Amendment to the United States Constitution. Jinks v. Richland County, 349 S.C. 298, 563 S.E.2d 104 (2002). The United States Supreme Court reversed and remanded this matter to the Court for further proceedings. Jinks v. Richland County, ___ U.S. ___, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003). Accordingly, this opinion addresses County's remaining issues.

[3] In its Statement of Issues on Appeal, County also asserts the lower court erred by failing to grant its motions for a directed verdict and judgment notwithstanding the verdict on the basis of sovereign immunity. See S.C. Code Ann. § 15-78-60(4) (Supp. 2002). Since County failed to argue this issue in the body of its brief, the issue is deemed abandoned. First Savings

DISCUSSION

I.

County asserts the trial court erred by denying its directed verdict and judgment notwithstanding the verdict (JNOV) motions because Jinks failed to establish that its correctional officers acted in a grossly negligent manner or that their alleged negligence proximately caused Jinks' death. We disagree.

The South Carolina Tort Claims Act provides that the State, its agencies, political subdivisions, and other governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations and exemptions with the Act. S.C. Code Ann. § 15-78-40 (Supp. 2002). Section 15-78-60 sets out "exceptions" to this waiver of sovereign immunity. These exceptions act as limitations on the liability of a governmental entity. One exception provides:

> The governmental entity is not liable for loss resulting from:
>
> responsibility or duty including but not limited to supervision, protection, control, confinement or custody of any … prisoner, inmate… of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner.

S.C. Code Ann. § 15-78-60(25) (Supp. 2002).

Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal); Fields v. Fields, 342 S.C. 182, 536 S.E.2d 684 (Ct. App. 2000) (same).

Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Etheredge v. Richland County School Dist. 1, 341 S.C. 307, 534 S.E.2d 275 (2000). It is the failure to exercise slight care. Id. Gross negligence has also been defined as a relative term and means the absence of care that is necessary under the circumstances. Hollins v. Richland County School Dist. 1, 310 S.C. 486, 427 S.E.2d 654 (1993). Gross negligence is ordinarily a mixed question of law and fact. Clyburn v. Sumter County School Dist. 17, 317 S.C. 50, 451 S.E.2d 885 (1994).

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Strange v. South Carolina Dep't of Highways & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "The trial court can only be reversed by this Court when there is no evidence to support the ruling below." Id. at 430, 445 S.E.2d at 440.

In his complaint, Jinks alleged County's correctional officers were grossly negligent in various ways. In particular, Jinks asserted County's employees failed to properly monitor inmates, failed to call for medical attention, and failed to provide adequate and proper medical care. At trial, Jinks argued the correctional officers' failure to properly monitor his medical condition proximately caused his death.

Viewing the evidence and its inferences in the light most favorable to Jinks, there was evidence that County was grossly negligent by failing to properly monitor Jinks' medical condition. The trial record establishes Jinks was arrested and booked on Friday, October 14, 1994, for failure to pay child support and spent the weekend at County's detention facility. On Monday morning, Officer Williams, a first shift correctional officer, and Walter Carlo, a detention center paramedic, observed Jinks shaking, sweating, laughing, and gripping the cell bars; Jinks did not respond to conversation. Officer Williams and Paramedic Carlo determined Jinks should be seen by the detention center physician.

The detention center physician saw Jinks at noon. The medical assessment form notes Jinks' complaint as "? D.T.'s."[4] The physician diagnosed Jinks as suffering from alcohol withdrawal, prescribed Librium, and ordered that Jinks be re-evaluated in two days.

Officer Williams testified he placed Jinks in "tank one" for medical observation as directed by the paramedic. Officer Williams stated he was not instructed what symptoms or behavior to monitor. Jinks was alone in the cell. Officer Williams testified he checked on Jinks every fifteen to thirty minutes until he left work at 2:30 p.m. He did not recall speaking with Jinks. At 2:30 p.m., Jinks was still shaking, sweating, and laughing.

Officer Williams testified he returned to the jail at 6:00 the following morning. He saw Jinks lying on the cell floor at 6:30 a.m. Jinks appeared to be sleeping. Officer Williams looked in on Jinks every thirty minutes. At 9:30 a.m., he asked Jinks to get up off the floor; Jinks did so and sat on a bench.[5] Officer Williams testified, because Jinks "appeared to be okay," two other detainees were placed in his cell. When Officer Williams looked in on Jinks after 10:00 a.m., Jinks was slumped over on the cell bench and appeared to be asleep. Shortly thereafter, Jinks' cellmates notified jail attendees that Jinks needed attention. Officer Williams entered the cell. According to the officer, Jinks' skin had darkened and he appeared to be dead.

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[4] It is undisputed Jinks did not verbally convey this complaint to the detention center staff, but rather the staff interpreted Jinks' symptoms as possible delirium tremens.

[5] Officer Williams admitted his incident report, transcribed the day of Jinks' death, does not indicate he asked Jinks to get off the floor. Similarly, Officer Williams' deposition testimony does not state he asked Jinks to get off the floor.

Officer Peay testified he observed Jinks in the "holding tank" on October 17th. Jinks was sweating and pale. Officer Peay testified, when he first saw Jinks the following morning, Jinks was lying on the cell floor and appeared to be sleeping. Officer Peay did not speak to Jinks. Officer Peay stated he found Jinks dead on the cell bench at 10:30 a.m.[6]

The paramedic testified, when he entered Jinks' cell at 10:33 a.m., Jinks "had passed away for a sufficient amount of time."

The autopsy report stated Jinks' death resulted from complications from alcohol withdrawal.

Retired Richland County Detention Training Director James Haley testified that detention center officers receive instruction on alcohol and drug abuse. Part of this instruction addresses alcohol withdrawal syndrome and the progressive nature of its medical symptoms. Training materials state officers should observe all alcohol abuse admissions closely.

An expert in jail supervision and management procedure testified the Richland County Detention Center's established procedures require those inmates on medical observation to be observed every fifteen minutes for any change in condition. In addition, medical observation requires the inmate be aroused every hour to make certain his condition is not deteriorating. The expert testified, according to Officers Williams' and Peay's deposition testimony, they did not know Jinks' medical condition and, therefore, could not determine whether his condition was improving or deteriorating.

Expert witness Peter Bower, M.D., testified people suffering from alcohol withdrawal need to be observed intensively and methodically. Dr. Bower stated it was his opinion that, to a reasonable degree of medical

[6] Jinks' prescription, filled by an outside pharmacy, arrived after he had passed away.

certainty, Jinks would have survived alcohol withdrawal if he had been properly monitored.[7]

The trial judge did not err by denying County's directed verdict and JNOV motions. The evidence indicates, even though the correctional officers were aware Jinks was not well, they were not apprised of the nature of his medical condition as diagnosed by the infirmary physician, but were simply told Jinks was to be placed on medical observation. Without knowledge of Jinks' diagnosis, the officers could not have adequately monitored his condition. Failure of medical personnel to advise or the officers to inquire as to Jinks' medical condition constitutes evidence of an absence of care necessary under the circumstances amounting to gross negligence.

Assuming the officers were aware that Jinks was suffering from alcohol withdrawal, the evidence indicates the officers' monitoring of his medical condition was inadequate. Although the officers may have observed Jinks on a periodic basis, on the morning of October 18, Officers Williams and Peay neither spoke to nor aroused Jinks on an hourly basis to ensure that his condition was not deteriorating.[8] This failure was contrary to County's established detention center policies. Moreover, it was contrary to the medical expert's opinion that individuals suffering from alcohol withdrawal be observed "intensively and methodically."

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[7] Dr. Bower suggested, when the officers saw Jinks on the cell floor hours before his death, he could have been recovering from a seizure rather than sleeping.

[8] County argues Jinks offered no testimony as to the actions of its employees between 2:30 p.m. on October 17 and 6:00 a.m. on October 18. Officer Williams testified the officers on other shifts had his same duties and would have been aware Jinks was under medical observation. The inference from his testimony suggests that from 2:30 p.m. on October 17 to 6:00 a.m. on October 18, Jinks received the same degree of attention that he received from Officer Williams.

Additionally, there is evidence that the correctional officers failed to observe Jinks every fifteen minutes as required by the detention center's own policies concerning medical observation. The trial record contains evidence which supports the conclusion the officers' failure to properly monitor an inmate known to be suffering from alcohol withdrawal constitutes gross negligence.

Finally, Jinks offered expert testimony that, to a reasonable degree of medical certainty, he would have survived if he had been properly monitored. Accordingly, Jinks presented evidence that failure to properly monitor his medical condition proximately caused his death.

In our capacity as an appellate court, we are bound by the applicable standard of review. Since there is evidence which supports the trial judge's ruling denying County's motions for a directed verdict and JNOV, we must affirm. Id.

II.

Initially, Jinks brought this action in the United States District Court for the District of South Carolina. Among other claims, Jinks alleged County and other defendants violated 42 U.S.C. § 1983. The district court granted the defendants' motions for summary judgment on the Section 1983 claim.

County claims that three specific rulings by the district court judge in his order granting summary judgment on Jinks' Section 1983 claim collaterally estop Jinks from recovering in this state court action. Specifically, County contends the federal court's rulings -- that neither County's failure to adopt certain policies concerning medical observation nor the arrival of Jinks' medication after his death proximately caused Jinks' death -- bar his present negligence claim. Additionally, County claims the district judge's finding that correctional officers did observe Jinks and followed the infirmary physician's instructions bar relitigation of this issue. We disagree.

Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action. Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 481 S.E.2d 706 (1997).

It is unnecessary for us to decide whether the federal court's findings concerning the sufficiency of County's medical observation policies and the arrival of Jinks' prescription after his death collaterally estopped Jinks' current negligence claim as Jinks presented other evidence of gross negligence.[9] Finally, the federal court's finding that correctional officers observed Jinks and followed the physician's instructions is not preclusive on the issue of whether the officers properly observed Jinks. Accordingly, collateral estoppel did not bar relitigation of this issue. Id.

AFFIRMED.

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

[9] See Discussion I.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

P. Kenneth Huggins, Jr., Plaintiff,

v.

Citibank, N.A., Capital One Services, Inc., and Premier Bankcard, Inc., Defendants.

CERTIFIED QUESTION

The Honorable Joseph F. Anderson, Jr.
United States District Court for the District of South Carolina

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Opinion No. 25691
Heard May 13, 2003 - Filed August 11, 2003

CERTIFIED QUESTION ANSWERED

Richard A. Harpootlian, of Richard A. Harpootlian, and James B. Richardson, Jr., of Richardson & Birdsong, both of Columbia, for plaintiff.

Marcus A. Manos, of Nexsen Pruet Jacobs & Pollard, LLC, of Columbia; and Burt M. Rublin and John K. Semler, Jr., of Ballard Spahr Andrews & Ingersoll, LLP, of Philadelphia, Pennsylvania, for Citibank, N.A., and Capital One Services, Inc., defendants.

Stephen P. Groves, Sr., and H. Michael Bowers, of Nexsen, Pruet, Jacobs, Pollard & Robinson, of Charleston; and Roberto A. Lange, of Davenport, Evans, Hurwitz & Smith, L.L.P., of Sioux Falls, South Dakota, for Premier Bankcard, Inc., defendant.

James Bernard Spears, Jr., of Haynsworth, Baldwin, Johnson & Greaves, of Columbia, for Dillard National Bank, defendant.

John T. Moore and B. Rush Smith, III, of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia; and L. Richard Fischer, Oliver I. Ireland, Beth S. Brinkmann, and Seth M. Galanter, of Morrison & Foerster, LLP, of Washington, D.C., for American Bankers Association, American Financial Services Association, America's Community Bankers, Consumer Bankers Association, The Financial Services Roundtable, Mastercard International, Inc., and Visa U.S.A., Inc., amici curiae.

JUSTICE BURNETT: We accepted this certified question from the United States District Court for the District of South Carolina to determine whether South Carolina recognizes a cause of action for negligent enablement of imposter fraud. We hold South Carolina does not recognize such a cause of action.

FACTS

Plaintiff P. Kenneth Huggins, Jr., (Huggins) brought this action in federal court against Defendants Citibank, N.A., Capital One Services, Inc., and Premier Bankcard, Inc., (the Banks) claiming the Banks negligently issued credit cards to an unknown imposter, "John Doe." The complaint alleged Doe applied for a credit card, asserting he was Huggins. Doe then used the credit cards, but failed to pay the Banks.

Huggins alleged the Banks were negligent in various ways: 1) issuing the credit cards without any investigation, verification, or

corroboration of Doe's identity; 2) failing to adopt policies reasonably designed to verify the identity of credit card applicants; 3) adopting policies designed to result in the issuance of credit cards without verifying the identity of applicants; and 4) attempting to collect Doe's debt from Huggins. Huggins asserted, as a result of the Banks' issuance of credit cards to Doe, his credit was damaged, he was "hounded by collection agencies," he was distressed and embarrassed, and he expended much time and effort attempting to rectify the damage, with only partial success.[1]

The Banks filed a motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., contending the complaint failed to state a claim upon which relief could be granted. The Banks asserted they owed no duty to Huggins because he was not their customer. Huggins disagreed, arguing the Banks have a duty to protect potential victims of identity theft from imposter fraud.

ISSUE

The Court agreed to answer the following question certified from the United States District Court for the District of South Carolina:

> Does South Carolina recognize the tort of negligent enablement of imposter fraud and, if so, what are the elements of the tort and does plaintiff's complaint state an actionable claim for the tort?

DISCUSSION

In order to establish a claim for negligence, a plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff, 2) a breach of that duty by negligent act or omission, and 3) damage proximately caused by the breach. Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001). An essential element in a cause of action for negligence is the

[1] Under the Consumer Credit Protection Act, an individual cannot be held liable for charges incurred on a credit card for which the individual did not apply and did not receive. 15 U.S.C. A. § 1643(a)(1)(A) & (d), § 1602(l) & (m) (1998).

existence of a legal duty of care owed by the defendant to the plaintiff. Id. In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff. Faile v. South Carolina Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002). If there is no duty, the defendant is entitled to judgment as a matter of law. Simmons v. Tuomey Regional Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000).

Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." Hubbard v. Taylor, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (2000), quoting Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977); see Prosser and Keaton On the Law of Torts § 53 (5th ed. 1984) (" . . . 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same – to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty.").

Duty arises from the relationship between the alleged tortfeasor and the injured party. South Carolina Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986). In order for negligence liability to attach, the parties must have a relationship recognized by law as the foundation of a duty of care. Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993). In the absence of a duty to prevent an injury, foreseeability of that injury is an insufficient basis on which to rest liability. South Carolina Ports Authority v. Booz-Allen & Hamilton, supra. The concept of duty in tort liability will not be extended beyond reasonable limits. Morris v. Mooney, 288 S.C. 447, 343 S.E.2d 442 (1986) (employer has no duty to employee's wife to investigate or prevent employee's adulterous relationship with co-employee).

In Polzer v. TRW, Inc., 682 N.Y.S.2d 194 (N.Y. App. Div. 1998), individuals in whose names an imposter had obtained credit cards sued the credit card issuers for negligent enablement of imposter fraud. A New York appellate division court held summary judgment was properly granted because New York did not recognize a cause of action for negligent

enablement of imposter fraud. The court stated the defendant credit card issuers "had no relationship either with the imposter who stole the plaintiffs' credit information and fraudulently obtained credit cards, or with plaintiffs, with whom they stood simply in a creditor/debtor relationship." Id. at 195. At least one other court has relied on the New York decision. Smith v. Citibank, 2001 WL 34079057 (W.D. Mo. 2001) (credit card issuer not liable in negligence to plaintiff where imposter applied for and received credit card in plaintiff's name because credit card company has no duty to plaintiff, a noncustomer).

We are greatly concerned about the rampant growth of identity theft and financial fraud in this country. Moreover, we are certain that some identity theft could be prevented if credit card issuers carefully scrutinized credit card applications. Nevertheless, we agree with the New York appellate court decision in Polzer v. TRW, Inc., supra, and decline to recognize a legal duty of care between credit card issuers and those individuals whose identities may be stolen. The relationship, if any, between credit card issuers and potential victims of identity theft is far too attenuated to rise to the level of a duty between them.[2] Even though it is foreseeable that injury may arise by the negligent issuance of a credit card, foreseeability alone does not give rise to a duty. South Carolina Ports Authority v. Booz-Allen & Hamilton, supra.

Finally, we note that various state and national legislation provides at least some remedy for victims of credit card fraud. See Pub. L. No. 107-56, 115 Stat. 272 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001); 15 U.S.C.A. § 1681 (Fair Credit Reporting Act) (1998); 15 U.S.C.A. § 1692(d) (1998) (Fair Debt Collection Practices Act); S.C. Code Ann. § 16-13-500 to -530 (2003) (South Carolina Personal Financial Security Act); S.C. Code Ann. § 37-5-108(2) (2002) (South Carolina Consumer Protection Code). While these regulations may not fully compensate victims of identity theft for all of their injury, we conclude the legislative arena is better

[2] Huggins concedes he was not the Banks' customer.

equipped to assess and address the impact of credit card fraud on victims and financial institutions alike.

Since there is no duty on the part of credit card issuers to protect potential victims of identity theft, we answer the certified question negatively: South Carolina does not recognize the tort of negligent enablement of imposter fraud. See South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., supra (absence of any element of negligence renders cause of action insufficient).

CERTIFIED QUESTION ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James W. Sprouse, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Newberry County and Laurens County
Frank L. Eppes, Newberry County Plea Judge
H. Dean Hall, Laurens County Plea Judge
J. Derham Cole, Post-Conviction Relief Judge

Opinion No. 25692
Submitted June 25, 2003 - Filed August 11, 2003

REVERSED AND REMANDED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, Capital & Collateral Litigation Donald Zelenka, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Petitioner, James W. Sprouse, argues that the post-conviction relief ("PCR") court erred in denying his application for PCR.

FACTUAL / PROCEDURAL BACKGROUND

On May 22, 1998, Petitioner pled guilty to second-degree burglary, violent, in Newberry County ("Newberry plea"). Petitioner was represented by counsel and was sentenced to 12 years, suspended on service of 10 years, to run concurrent with all other sentences, and to begin running June 15, 1997. On June 2, 1998, Petitioner pled guilty to three counts of second-degree burglary, violent, and one count of safecracking in Laurens County ("Laurens plea").[1] Petitioner was not represented by counsel during the Laurens plea, and was sentenced to 12 years for each offense, suspended on the service of 10 years, to run concurrent with each other and with the sentence Petitioner was already serving.[2]

At the Newberry plea, Eighth Circuit Assistant Solicitor Jerry Pearce described the State's agreement with Petitioner as follows:

> The agreement we have reached with the defendant and his attorney is that he receive a sentence of 12 years, and that be suspended to 10 years, and that we would nol-pross the other charges on the indictment. That those charges would run concurrent with any charges he has pending in Laurens County,

[1] Newberry County and Laurens County are both in the Eighth Judicial Circuit and, thus, the plea negotiations were handled by the same prosecuting authority, the Eighth Circuit Solicitor's office.

[2] In addition to the burglary sentence resulting from the Newberry plea, Petitioner was serving a 10-year sentence for Assault and Battery with Intent to Kill. It is our understanding that all of Petitioner's sentences are concurrent to each other.

> and that the sentence will begin on June 15, 1997. . . . *The sentence in Laurens would be nonviolent.*

(emphasis added). At the Laurens plea just a week or so later, Eighth Circuit Assistant Solicitor Benjamin L. Shealy classified the burglaries as violent offenses, and then recommended Petitioner be sentenced to 12 years suspended on service of 10 years, to run concurrent, beginning June 15, 1997.

Petitioner did not file a direct appeal from the Newberry or Laurens pleas. Petitioner filed an application for PCR, alleging that ineffective assistance of counsel caused his pleas to be involuntary. The PCR court denied relief, and this Court granted certiorari to review the following issue:[3]

> I. Did the PCR judge err in finding that Petitioner's pleas were voluntary despite Petitioner's claim that the State failed to honor the plea agreement it made with Petitioner on the Newberry and Laurens charges?

LAW /ANALYSIS

Petitioner argues that the State failed to honor the plea agreement it made with him regarding his Newberry and Laurens burglary charges. He argues that this failure and the ineffective assistance of his Newberry attorney in failing to ensure that the State adhered to the plea agreement on the Laurens charges rendered both of his pleas involuntary. We agree.

In *Santobello v. New York,* the United States Supreme Court established that state prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants

[3] We have consolidated the issues raised by Petitioner into one question as each of the three issues on which the Court granted certorari depends on resolution of whether or not the solicitor's office breached Petitioner's plea agreement. The Newberry and Laurens pleas hatch out of one string of crimes, and, based on Assistant Solicitor Pearce's description of the plea agreement to the Newberry plea judge, it appears all the offenses were contemplated together for purposes of negotiating the plea.

to plead guilty. 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). In *Santobello,* the Assistant District Attorney negotiated with the defendant and agreed to permit him to plead guilty to a lesser-included offense, conviction of which would result in a maximum prison sentence of one year. 404 U.S. at 258, 92 S. Ct. at 497, 30 L. Ed. 2d at 431. In addition, the prosecutor agreed to make no sentence recommendation. *Id.* The court accepted the guilty plea and set a date for sentencing. *Id.* At the sentencing, another prosecutor appeared for the state, and the prosecutor that originally negotiated the plea was not present. *Id.* at 259, 92 S. Ct. at 497, 30 L. Ed. 2d at 431. This new prosecutor recommended that the judge impose the one-year maximum sentence in violation of the defendant's plea agreement with the original prosecutor. *Id*.

Recognizing the fundamental rights that a defendant forfeits when he pleads guilty, the Supreme Court made the following statements:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement of consideration, such promise must be fulfilled.

Id. at 262, 92 S. Ct. at 499, 30 L. Ed. 2d at 433. The Court found that the state had promised to abstain from making a sentencing recommendation, and that the promise of one prosecutor in the office bound all prosecutors in the office. *Id.* The Court found it unnecessary to engage in a prejudice analysis, concluding that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the jury for further consideration." *Id.* at 262-63, 92 S. Ct. at 499, 30 L. Ed. 2d at 433.

This Court has recognized the principles espoused in *Santobello* on numerous occasions. *State v. Thrift,* 312 S.C. 282, 440 S.E.2d 341 (1994);

State v. Thompson, 278 S.C. 1, 5, 292 S.E.2d 581, 584 (1982) ("[*Santobello*] stands for the proposition that when an accused pleads guilty upon the promise of a prosecutor, the agreement must be fulfilled.").[4] In *Thrift,* this Court contemplated the common problem of how to uncover the terms of an *oral* plea agreement. 312 S.C. 282, 440 S.E.2d 341. The Court resolved this issue prospectively by establishing a bright line rule limiting its review of plea agreements "to those terms which are fully set forth in the record." *Id.* at 295, 440 S.E.2d at 348.

In the present case, the PCR court denied Petitioner relief, finding his claim that the State failed to fulfill the terms of his negotiated plea to be "without credible evidentiary support." Based on this Court's holding in *Thrift,* this Court's review of a plea agreement is limited to the terms set forth in the record. During his recitation of Petitioner's plea agreement at the Newberry plea, Assistant Solicitor Pearce stated, "[t]he sentence in Laurens would be nonviolent."

In our opinion, the subsequent classification by Assistant Solicitor Shealy of the Laurens offenses as *violent* can only be interpreted as a deviation from the original plea agreement.[5] The State argues that the classification of the Laurens offenses as violent was the result of further negotiations with Petitioner and represented a concession by Petitioner in return for the State agreeing to drop charges pending against his sister. Unfortunately, this *change* in the plea agreement is not represented in the record, and, in the face of *Thrift's* bright line rule, cannot be considered by this Court.

In *Santobello,* the Supreme Court applied what amounts to a *per se* prejudice analysis after it found the defendant's plea agreement had not been

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[4] *See also United States v. Ringling*, 988 F.2d 504 (4th Cir. 1993).

[5] As noted, both solicitors involved in this case represent the Eighth Judicial Circuit. Accordingly, each are bound to fulfill the plea agreements made by the other. *Santobello; Thrift.*

fulfilled. 404 U.S. at 262-63. The Court reasoned, "[w]e need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea." *Id.* at 262. Recognizing the "interests of justice" and the "duties of the prosecution in relation to promises made in the negotiation of pleas" would be best served by remanding the case to the state courts for one of two dispositions, the Court did not conduct a prejudice analysis. The Court indicated that the state court could either (1) require specific performance of the plea agreement or (2) allow Petitioner to withdraw his guilty plea altogether and start over. *Id.* at 263.

We choose to require specific performance of the plea agreement in this case. Here, requiring specific performance is the most efficient option because it eliminates the need for a new trial or new plea hearings, and also grants the parties nothing more and nothing less than the benefit for which they originally bargained.

CONCLUSION

For the foregoing reasons, we **REVERSE** the PCR court's denial of relief, **VACATE** the Laurens County sentences, and **REMAND** for resentencing on the Laurens County charges consistent with the original plea agreement.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry R. Todd, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Horry County
Paul Moore, Trial Judge
John L. Breeden, Jr., Post-Conviction Judge

Opinion No. 25693
Submitted January 23, 2003 - Filed August 11, 2003

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, Assistant Attorney General Edgar R. Donnald, and Chief, Capital & Collateral Litigation Donald J. Zelenka, all of Columbia, for Petitioner.

John Christopher Mills, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State argues that the post-conviction relief ("PCR") judge erred in granting respondent's PCR application because the trial judge's reasonable doubt charge was unconstitutional.

FACTUAL/PROCEDURAL BACKGROUND

Larry Todd ("Todd") was convicted of murder and assault with intent to commit first degree criminal sexual assault ("CSC") in 1985 and was sentenced to life imprisonment for murder and thirty years for CSC. This Court affirmed his convictions and sentences on direct appeal. *State v. Todd*, 290 S.C. 212, 349 S.E.2d 339 (1986).

Todd applied for PCR, which was denied, and this Court denied his petition for writ of certiorari. In 1990, Todd petitioned for a writ of habeas corpus, which was denied. This Court denied his petition for writ of habeas corpus in 1995 pursuant to *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356 (1991).

In March 1995, Todd petitioned for a writ of habeas corpus in circuit court, which was denied. The Court of Appeals reversed, finding that the trial judge's reasonable doubt charge was unconstitutional and remanded the case to the circuit court with instructions to treat the matter as an application for PCR. *Todd v. State*, Op. No. 98-UP-252 (S.C. Ct. App. Filed May 18, 1998).

This Court granted the State's Petition for Certiorari to review the circuit court's grant of PCR for Todd. The State raises the following issue for review:

> Did the PCR judge err in finding that the trial judge's reasonable doubt charge was unconstitutional?

LAW/ANALYSIS

The State asserts that the PCR court erred in finding that the trial judge violated Todd's constitutional right of due process when he charged the jury on the reasonable doubt standard. We agree.

The standard for reviewing the trial judge's charges on reasonable doubt has evolved over the last 15 years. In *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), the United States Supreme Court held for the first time that a trial judge's reasonable doubt charge violated the Due Process Clause because it diminished the high burden that the Due Process Clause requires that the state must establish. The Court found that the appropriate standard for determining the constitutionality of a reasonable doubt charge is whether "a reasonable juror *could have* interpreted the instruction to allow a finding of guilt based on a degree of proof below that required of the Due Process Clause." *Id*. at 41, 111 S.Ct. at 329 (emphasis added).

In 1991, this Court adopted the *Cage* "*could have*" standard in *State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991). The Court ruled a reasonable doubt jury charge unconstitutional because the judge equated reasonable doubt with a "moral certainty" standard and used a definition of circumstantial evidence which required the jury to "seek some reasonable explanation of the circumstances proven other than the guilt of the [d]efendant and if such reasonable explanation can be found [the jury] would find the [d]efendant not guilty." *Id*. at 416, 409 S.E.2d at 374. The Court found that the jury charge was so confusing that a reasonable juror "*could have*" found the defendant guilty based on a standard that did not reach the level of proof encompassed by the reasonable doubt standard that is mandated by the Due Process Clause. *Id*. at 416-417, 409 S.E.2d at 374-375.

The United States Supreme Court redefined the reasonable doubt standard in less restrictive terms in *Boyde v.California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). *See also, Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). The new standard became whether there was a "*reasonable likelihood*" that the jury applied the charge in an unconstitutional manner. *Boyde*, 494 U.S. at 380, 110 S.Ct. at 1198.

Writing for the United States Supreme Court in *Victor v. Nebraska*, 511 U.S. 7, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), Justice O'Connor pointed out that *Cage* is the only case in which the Supreme Court declared a reasonable doubt charge unconstitutional. The *Cage* charge was as follows:

> [A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*

Id. at 5-6, 1145 S.Ct. at 1243 (quoting *Cage*, 498 U.S. at 40, 111 S.Ct. at 329) (emphasis added by the U.S. Supreme Court in *Cage*). Justice O'Connor stated that the emphasized language is what the Court in *Cage* found offensive to due process. She then wrote for the Court:

> In a subsequent case, we made clear that the proper inquiry is not whether the instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it. *Estelle v. McGuire*, 502 U.S. 62, 72 and n. 4, 112 S.Ct. 475, 482 and n. 4, 116 L.Ed.2d 385 (1991). The constitutional question in the present cases, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship*[1] [reasonable doubt] standard.

Id. at 6, 114 S.Ct. at 1243 (emphasis in the opinion). The opinion then provided a comprehensive review of the use of the phrases "moral certainty" and "substantial doubt" in the American jurisprudence of reasonable doubt charges. The Court analyzed challenged charges from Nebraska and California in which these phrases were used and found that neither of the phrases automatically rendered a reasonable doubt charge constitutionally defective. The Court held:

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[1] In *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the U.S. Supreme Court proclaimed that the Due Process Clause mandates that the government prove every element of the charged offense beyond a reasonable doubt.

> The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires. In these cases, however, we conclude that "taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury." *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954). There is no reasonable likelihood that the jurors who determined petitioners' guilt applied the instructions in a way that violated the Constitution.

Id. at 22-23, 114 S.Ct. at 1251.

Post *Victor*, it is clear that under the "reasonable likelihood" standard, many charges which would be found defective under *Cage* are now held to meet the due process requirements.[2]

In the instant matter, the PCR court order,[3] relying heavily on the *Cage* standard and this Court's adoption of that standard in *Manning*, found the trial judge's reasonable doubt and circumstantial evidence charges unconstitutional.

The trial judge in this case set forth this reasonable doubt standard for the jury before evidence was presented:

> The term "reasonable doubt" means exactly what it implies. It is a reasonable doubt. The definition which I prefer is that a reasonable doubt is a *substantial doubt* for which a person honestly seeking to find the truth can give a reason.

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[2] A year before *Victor* was issued, in 1993, Acting Justice Goolsby recognized the stricter *Estelle* standard in his dissent in *State v. Charping*, 313 S.C. 147, 167, 437 S.E.2d 88, 99 (1993), where he found that the jury charge did not violate defendant's due process rights.

[3] Written in December, 1999.

At the close of evidence, the judge again instructed the jury on reasonable doubt:

> Ladies and gentlemen, when I use the term "reasonable," what we mean there is that that is not some whimsical or imaginary doubt. Nor is it a slight, fanciful, or weak doubt. It is none of those things. I charge you that a *reasonable doubt is a substantial doubt* arising out of the testimony or lack of testimony in the case for which a person honestly seeking to find the truth can give a reason. If you have such a doubt in your mind as to whether the State has proven this defendant guilty, of course, you must resolve that doubt in his favor, and write a verdict of not guilty. If, however, on the other hand, the State of South Carolina, through the Solicitor's Office, has established the guilt of the defendant beyond a reasonable doubt, it would equally be your duty under your oath to return a verdict of guilty.

The judge continued as he gave the charge of circumstantial evidence and reasonable doubt:

> Circumstantial evidence is good, provided it meets the legal test to the extent that the State relies on circumstantial evidence. It must prove all the circumstances relied on beyond a reasonable doubt. They must wholly and in every particular perfectly consistent with one another. *They must point conclusively, that is, to the moral certainty of the guilt of the accused* to the exclusion of every other reasonable hypothesis, that is, they must be absolutely inconsistent with any reasonable hypthesis other than the guilt of the accused.
>
> . . .
>
> The two phrases "*beyond a reasonable doubt"* and *"proof to a moral certainty" are synonymous* and the legal equivalent of each other.

The PCR judge focused on similar language that was found in both the *Manning* and *Todd* instructions, for example, equating "reasonable doubt" with "moral certainty," and asking the jury to "seek" to find a reasonable explanation other than the defendant's guilt, which lowered the standard to something below reasonable doubt as defined by the *Cage-Manning* standard. The judge also pointed out that this Court had had many opportunities to adopt the *Estelle-Victor* standard but failed to do so.

This Court finally adopted the *Estelle-Victor* "*reasonable likelihood*" standard in 2000 in *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). Accordingly, we will apply that standard to this matter.

Further, jury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated. *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994). A complete review of the jury instruction in this case evinces an appropriate charge of the reasonable doubt and circumstantial evidence standards. While the trial judge equated "reasonable doubt" with "moral certainty," he also used alternative methods of describing the standard. He said:

> Our South Carolina Supreme Court has stated this presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant, and it remains with him and assigns him to that class, the innocent, until that presumptive robe of righteousness has been stripped from his body by evidence satisfying you of that guilt beyond a reasonable doubt.

The trial judge's charge on circumstantial evidence is almost verbatim of the charge this Court directed be given in *Manning*. 305 S.C at 317, 409 S.E.2d at 374 (citing *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989).

While the trial judge mentioned "moral certainty," which is part of the charge that the *Manning* court disfavored, "the moral certainty language cannot be sequestered from its surroundings." *Victor*, 511 U.S. at 16, 114 S.Ct. at 1248. We find that the trial judge's careful and exhaustive articulation of the reasonable doubt and circumstantial evidence standard,

when examined in its entirety, effectively communicated the high burden of proof that the state was required to establish by the Constitution.

CONCLUSION

We reiterate our adherence to the *Estelle-Victor* standard as adopted in the *Aleksey* decision, which states that the standard of review of a reasonable doubt instruction is "*whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution*." *Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251. We find that there is no reasonable likelihood that the jurors who determined Todd's guilt applied the judge's instruction in a way that violated the Due Process Clause of the Fourteenth Amendment. Accordingly, we **REVERSE** the PCR judge's grant of this application.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the record supports the post-conviction relief (PCR) judge's findings that the jury charge given at respondent's trial violated the Due Process Clause. Further, I find there is a reasonable likelihood that the jury applied the instructions in a way that violates the Constitution. Accordingly, I would affirm the PCR judge's order granting respondent a new trial.

This matter comes before the Court in an unusual procedural posture. In 1998, the Court of Appeals remanded the case to the circuit court with instructions that the case be treated as one involving a claim for PCR, and that the issue to be decided was whether "the reasonable doubt instruction given in [respondent's] trial was unconstitutional…." Todd v. State, 98-UP-252 (S.C. Ct. App. filed May 18, 1998). To the extent the State now argues that we should decide whether the reasonable doubt charge cases decided since respondent was tried should be applied retroactively, its argument comes too late. The State did not seek certiorari to review the Court of Appeals' 1998 decision, and therefore the law of this case is that the "Cage-Victor"[4] standard applies retroactively. See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unchallenged ruling, whether correct or not, is law of the case). Further, because this case comes before us in the posture of a PCR certiorari, we must uphold the factual findings in the order if supported by any probative evidence in the record. E.g., Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002).

The PCR judge found, correctly in my view, that the charge given in respondent's trial unconstitutionally diluted the State's burden to prove respondent guilty beyond a reasonable doubt. Specifically, the PCR judge found the charge instructed the jury that: (1) reasonable doubt was synonymous with moral certainty; (2) reasonable doubt meant a "doubt which honest people, such as you, when searching for the truth can give a real reason" and (3) it was required to seek some reasonable explanation other than the accused's guilt when considering the circumstantial evidence in this case. The majority view, in my opinion, minimizes the multiple

[4] Cage v. Louisiana, 498 U.S. 39 (1990); Victor v. Nebraska, 511 U.S. 1 (1994).

deficiencies in the charges by stressing only the 'moral certainty' language. The majority then holds that the 'robe of righteousness' portion of the instructions, coupled with the 'good' circumstantial evidence charge, effectively cured any constitutional infirmities. I disagree.

In State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991), we approved a circumstantial evidence charge derived from earlier decisions:

> [E]very circumstance relied upon by the State [must] be proven beyond a reasonable doubt; and … all of the circumstances so proven [must] be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.
>
> Id., citing State v. Edwards, 295 S.C. 272, 379 S.E.2d 858 (1989), citing State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955).

In contrast, the circumstantial evidence charge given in respondent's trial was:

> Circumstantial evidence is good, provided it meets the legal test to the extent that the State relies on circumstantial evidence. It must prove all the circumstances relied on beyond a reasonable doubt. They must be wholly and in every particular perfectly consistent with one another. **They must point conclusively, that is, to the moral certainty to the guilt of the accused to the exclusion of every other reasonable hypothesis**, that is, they must be absolutely inconsistent with any reasonable hypothesis other than the guilt of the accused.
>
> **In other words, in the consideration of circumstantial evidence, the jury must seek some**

> **reasonable explanation thereof other than the guilt of the accused**, and if such reasonable explanation can be found, you cannot convict on such evidence. Of course, you can consider the circumstantial evidence along with all the direct evidence that you heard from this witness stand.
>
> I charge you further that the mere fact that the circumstances are strongly suspicious and the defendant's guilt probable, is not sufficient to sustain a conviction because the proof offered by the State must exclude every other reasonable hypothesis except that of guilt, and must satisfy you the jury of that guilt beyond a reasonable doubt.
>
> **The two phrases "beyond a reasonable doubt," and, "proof to a moral certainty" are synonymous and the legal equivalent of each other.**
> (emphasis supplied).

Viewing the circumstantial evidence charge here in its entirety, I disagree with the majority's characterization of this charge as "almost verbatim" the Edwards charge approved in State v. Manning, *supra*. In my opinion, respondent's circumstantial evidence charge was riddled with burden shifting language and cannot be said to 'remedy' other constitutional infirmities in the charge.

I find there is some evidence of probative value in the record to support the PCR judge's finding that the charge unconstitutionally lessened the State's burden of proof. This factual finding should therefore be upheld. Tate v. State, *supra*.

The more difficult issue in this case is whether it can be said "there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000).[5] In Aleksey, we found no reversible error where the trial

[5] The PCR judge decided this case before we issued our opinion in Aleksey, and therefore applied the less rigorous pre-Aleksey standard: whether a

judge made a single isolated reference to the jury's "duty to seek the truth" in the context of the charge on witness credibility. Here, however, the charge is rife with constitutional error, especially in the context of the circumstantial evidence portion, in a case in which the State relied largely on circumstantial evidence to prove respondent assaulted the victim with the intent to commit first degree criminal sexual conduct, and then killed her. I would therefore affirm the PCR judge's order granting respondent a new trial.

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reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required of the Due Process Clause. State v. Manning, *supra*. Given the protracted nature of this litigation, I agree that we should decide the question presented under the Aleksey standard rather than remand the case to the circuit court with instructions to redecide the matter applying the correct standard.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State, Respondent,

v.

Linda Taylor, Petitioner.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Colleton County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 25694
Heard June 25, 2003 - Filed August 11, 2003

AFFIRMED IN RESULT

L. Scott Harvin, of Hetrick Law Firm, of Walterboro, for petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles W. Richardson and Senior Assistant Attorney General Norman Mark Rapoport, of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for respondent.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision[1] affirming petitioner Linda Taylor's conviction on two counts of issuing a fictitious driver's license. We affirm in result.

FACTS

Taylor was charged with violating S.C. Code Ann. § 56-1-515(1) (1991) which provides:

> It is unlawful for any person to alter a motor vehicle driver's license so as to provide false information on the license or to sell or issue a fictitious driver's license.

(emphasis added). At trial, the State presented evidence that on April 24, 1998, Taylor was working as a manager at the Walterboro Division of Motor Vehicles (DMV) when she processed driver's licenses for two illegal Mexican immigrants without requiring any identification, written exams, or driving tests.

Lilia Macias testified she made arrangements with one Maria Cortez who agreed to take Macias to the DMV and ensure she received a driver's license without the necessary documentation in exchange for $1,000. Macias received her license as promised after giving only her name and birthdate, taking a vision test, and paying the $12.50 application fee. Macias identified Taylor as the person who processed her license. Armando Ramirez testified to receiving a license in the same manner from Taylor on the same day. Neither one ever paid Cortez and there is no evidence Taylor received any money for her part in processing the licenses.

After the State's case, Taylor moved for a directed verdict. The trial judge denied the motion. The jury then returned a guilty verdict on both counts. On post-trial motion for a verdict in arrest of judgment,

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[1] 348 S.C. 152, 558 S.E.2d 917 (Ct. App. 2001).

Taylor reargued the substance of her directed verdict motion. The trial judge granted the motion and entered a verdict of acquittal.

On appeal by the State,[2] the Court of Appeals found it was inappropriate procedurally for the trial judge to grant Taylor's motion for a verdict in arrest of judgment based on the sufficiency of the evidence; moreover, the evidence was sufficient to support a charge of issuing a fictitious license. The Court of Appeals reversed and reinstated Taylor's convictions.

ISSUE

Was a verdict in arrest of judgment properly granted on these facts?

DISCUSSION

Taylor contends the Court of Appeals should not have reversed based on the procedural inappropriateness of a verdict in arrest of judgment because the State never argued this defect below. We agree.

It is well-settled that a verdict in arrest of judgment should not be granted based on the insufficiency of the evidence; the proper remedy is a new trial. State v. Dasher, 278 S.C. 305, 297 S.E.2d 414 (1982); State v. Syphrett, 27 S.C. 29, 2 S.E. 624 (1887); State v. Hamilton, 17 S.C. 462 (1882). Because the State never argued this procedural bar to the trial court, the issue was not preserved for appeal and the Court of Appeals should not have reversed on this ground. We find, however,

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[2]Although the State may not appeal a directed verdict of acquittal, State v. McKnight, 353 S.C. 238, 577 S.E.2d 456 (2003), it may appeal a verdict of acquittal in arrest of judgment. State v. Dasher, *infra.* In such a case, the defendant is not subjected to double jeopardy because the jury's original conviction is merely reinstated. *Id.*

that the Court of Appeals properly reversed the verdict of acquittal based on the sufficiency of the evidence.[3]

Taylor concedes she processed the two driver's licenses without requiring the necessary documentation or tests. Her argument is that although she processed the licenses, the DMV issued them, and therefore they are not "fictitious licenses" as a matter of law. Taylor contends § 56-1-515(1) should apply only to licenses manufactured by others outside the DMV.

First, although the license is issued under the authority of the DMV, the license is physically "issued" by the employee who processes the application. The employee's actions therefore are fairly encompassed within the statutory term "issue."

Further, a license issued by an employee of DMV may still be "fictitious." South Carolina Code Ann. § 56-19-50 (1991) provides:

> **§ 56-19-50. Department shall seize expired, fictitious and certain other certificates, cards, permits, licenses, and plates.[4]**
>
> The Department may take possession of any . . . license . . . issued by it (a) upon

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[3]Because the trial court essentially granted a belated directed verdict, on review we apply the standard applicable to a directed verdict *i.e.,* whether there was evidence sufficient to submit the charge to the jury. *See* State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001).

[4]Although this section is found in Chapter 19 of Title 56 which is entitled "Protection of Titles to Interests in Motor Vehicles," some of the provisions in this chapter have broad application. *See, e.g.,* § 56-19-40 ("Department shall examine and determine the genuineness, regularity and legality of every application for registration of a vehicle or for a certificate of title therefor and of any other application lawfully made to the Department. . . .") (emphasis added).

> expiration, revocation, cancellation or suspension thereof, (b) which is fictitious or (c) which has been unlawfully or erroneously issued.

(emphasis added). Under this section, a license issued by DMV may be "fictitious."

We construe § 56-1-515(1) to require that the issuance of a "fictitious" license is unlawful if knowingly done. *See* State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990) (unless otherwise indicated, prohibited act must be accompanied by criminal intent); State v. Rothschild, 351 S.C. 238, 596 S.E.2d 346 (2002) (construing statute to include an element of intent to avoid vagueness). Accordingly, a DMV employee who processes a driver's license based on information she knew or should have known was fictitious is guilty under § 56-1-515(1) for issuing a fictitious license.

Here, the fact that Taylor never demanded any documentation from Macias or Ramirez is evidence she knew or should have known the information she used to process the licenses was fictitious. Further, there is evidence neither applicant gave a social security number although the computer would not complete the application process without one, indicating Taylor fabricated social security numbers for the two applicants. Neither applicant gave Taylor an address and neither lived at the address on the license, again indicating Taylor fabricated the information. This evidence was sufficient to support Taylor's convictions under § 56-1-515(1).

We find the Court of Appeals correctly ruled that the trial judge improperly entered a verdict of acquittal based on the sufficiency of the evidence.

AFFIRMED IN RESULT.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mary F. Hardee, Respondent/Petitioner,

v.

Jerry N. Hardee and Hardee Construction Company, Inc., Petitioners/Respondents.

On Writ of Certiorari To The Court of Appeals

Appeal From Sumter County
Marion D. Myers, Family Court Judge

Opinion No. 25695
Heard June 24, 2003 - Filed August 11, 2003

AFFIRMED AS MODIFIED

James T. McLaren and C. Dixon Lee, III, of McLaren and Lee, and Jan L. Warner, all of Columbia, for Respondent-Petitioner.

Harry C. Wilson, Jr. of Lee, Erter, Wilson, James, Holler, and Smith, LLC., of Sumter, for Petitioners-Respondents.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion reported at 348 S.C. 84, 558 S.E.2d 264 (2001). We affirm as modified.

FACTS

Jerry Hardee (Husband) and Mary Hardee (Wife) met in 1986, while Wife was working as officer manager for the law firm which was handling Husband's second divorce. Both Husband and Wife had children from prior marriages. Wife moved into Husband's home in April 1987, and they lived together until December 24, 1988, when Husband proposed. They planned a March 18, 1989 wedding day. In early February 1989, Husband presented Wife with a prenuptial agreement drafted by his attorney (Miles). Wife showed the agreement to her employer/attorney (Young), who advised her not to sign it. Although Wife was upset about the agreement, she signed it on February 22, 1989. The parties were married on March 18, 1989.

The prenuptial agreement noted that Wife, age 41 at the time, had diabetes and sponge kidneys. It also provided, *inter alia*:

> 1.That all properties of any kind or nature, real, personal or mixed, wheresoever the same may be located, which belong to each party, shall be and forever remain the personal estate of the said party, including all interest, rents, and properties which may accrue therefrom **unless otherwise so stated in this Agreement**.
>
> 4. That **each party, in the event of separation or divorce, shall have no right against the other by way of claims for support, alimony, attorney's fees, cost, or division of property, except as specifically stated hereinafter.**
>
> 7. It is specifically understood and agreed that should a separation or divorce occur between the parties, each of the parties would maintain all of their property as if the marriage had never occurred and each of the parties will have no interest whatsoever in the property of the other **except as hereinafter provided.**
>
> 9. The provisions contained herein **shall in no way affect the property, whether real, personal or mixed which shall be**

acquired by the parties, whether titled separately or jointly, subsequent to the date of this Agreement.

10 . . . Each party acknowledges that they shall have no right against the other by way of claim for support, alimony, attorney fees, costs or division of property, except as stated within this agreement. (Emphasis added).

In 1995, Wife discovered Husband was having an affair with another woman. As a result, Husband left the marital home. Thereafter, Wife instituted this action seeking a divorce on grounds of adultery, habitual drunkenness, and physical cruelty. She sought alimony, spousal support, equitable distribution of marital property, and attorney's fees. The family court granted Wife a divorce on the ground of adultery. The family court also ruled the waivers of alimony, spousal support and attorney's fees were contrary to public policy and void; it further held the agreement did not bar equitable division of property acquired during the marriage. The court also found that there had been a substantial and material change in circumstances since the execution of the agreement inasmuch as Wife was, at the time of the final hearing, totally disabled and unable to support herself.[1] The family court awarded Wife permanent periodic alimony of $4,250 per month and ruled that property acquired by the parties during the marriage be divided with Husband receiving 70% of the assets and Wife receiving 30%. Lastly, the family court awarded Wife $85,000 in attorney fees and $15,000 in accounting fees and costs.

The Court of Appeals affirmed in part and reversed in part. 348 S.C. 84, 558 S.E.2d 264 (2001). The Court upheld the family court's determination that the prenuptial agreement did not bar the equitable division of property acquired by the parties during the marriage. However, it held the family court erred in finding the waivers of alimony, support, and attorney fees were void and unconscionable. Both parties appeal.

[1] The court found Wife suffered from even more serious conditions than those that existed prior to the marriage, including diabetes mellitus, sponge kidney, Lupus, neuropathy of the extremities, heart irregularities, vision problems, and thyroid problems, and that she was unable to be gainfully employed.

ISSUES

1. Did the Court of Appeals err in upholding the family court's determination that the prenuptial agreement did not bar equitable distribution of property acquired during the marriage? (Husband's Appeal).

2. Did the Court of Appeals err in holding that the prenuptial agreement's provisions relating to alimony, support, and attorney's fees were not unconscionable or contrary to public policy? (Wife's Appeal).

1. EQUITABLE DISTRIBUTION

Husband argues the Court of Appeals erred in holding the prenuptial agreement allowed for equitable distribution of assets acquired by the parties during the marriage. We disagree.[2] As noted previously, paragraph 9 of the agreement provides:

> 9. The provisions contained herein **shall in no way affect the property, whether real, personal or mixed which shall be acquired by the parties, whether titled separately or jointly, subsequent to the date of this Agreement.**

(Emphasis added). We agree with the Court of Appeals that this provision patently and unambiguously allows Wife equitable distribution of any and all property acquired by the parties during the marriage, whether titled in Husband's name, Wife's name, or both.

When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. B.L.G. Enterprises, Inc. v. First Financial Ins. Co., 334 S.C. 529, 514 S.E.2d 327 (1999). The

[2] S.C. Code Ann. § 20-7-473(4) (Supp. 2002) permits exclusion of property from the marital estate if excluded by a written antenuptial agreement which was voluntarily executed and both parties were represented by separate counsel.

judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. S.S. Newell & Co. v. American Mut. Liab. Ins. Co., 199 S.C. 325, 19 S.E.2d 463 (1942). Accordingly, we affirm the Court of Appeals' ruling concerning the equitable distribution of property acquired during the marriage.

2. ALIMONY, SUPPORT & ATTORNEY'S FEES

The issue we must decide is whether a prenuptial agreement purporting to waive alimony, support, and attorney's fees is void and unenforceable as against the public policy of this state.

Recent case law of this Court supports Husband's contention that parties are free to contractually alter the obligations which would otherwise attach to marriage. In Stork v. First Nat'l Bank of South Carolina, 281 S.C. 515, 516, 316 S.E.2d 400, 401 (1984), this Court held that antenuptial agreements "will be enforced if made voluntarily and in good faith and if fair and equitable. . . . Such contracts are not opposed to public policy but are highly beneficial to serving the best interest of the marriage relationship." Similarly, in Moseley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983), we addressed a family court's jurisdiction over a separation agreement which had not been merged into the parties' divorce decree. This Court directly acknowledged that, although subject to family court approval, that the parties may contract concerning their property settlement, and alimony, and that "they may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily and reasonably." 279 S.C. at 353, 306 S.E.2d at 627.

More recently, in Gilley v. Gilley, 327 S.C. 8, 488 S.E.2d 310 (1997), the husband brought an action for an order of separate maintenance and support, equitable distribution, and attorney's fees. Although the validity of the prenuptial agreement was not at issue in Gilley, this Court affirmed the family court's finding that husband's action did not belong in family court since the prenuptial agreement provided neither party could claim alimony or separate maintenance.

As noted by the Court of Appeals in this case, "[t]he current trend and majority rule allows parties to prospectively contract to limit or eliminate spousal support." 348 S.C. at 98, 55 8. S.E.2d at 269, *citing* Pendleton v. Fireman, 5 P.3d 839, 845-46 (Cal. 2000); Allison A. Marston, Planning for Love: The Politics of Premarital Agreements, 49 Stan. L. Rev. 887, 897-99 (1997). As noted in Richard A. Lord, 5 Williston on Contracts § 11:8 (4th ed.) (May 2003):

> In the past two decades . . . the courts have reconsidered . . . public policy in light of societal changes, and today, premarital agreements, so long as they do not promote divorce or otherwise offend public policy, are generally favored as conducive to the welfare of the parties and the marriage relationship as they tend to prevent strife, secure peace, and adjust, settle, and generally dispose of rights in property.

Accord Cary v. Cary, 937 S.W.2d 777, 782 (Tenn. 1996) (declaring agreements waiving or limiting alimony enforceable, "so long as the antenuptial agreement was entered into freely and knowledgeably, with adequate disclosure, and without undue influence or overreaching"); Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law, 116 Harv. L. Rev. 2075 (May 2003) (noting that states have shifted from holding antenuptial agreements *per se* invalid as contrary to public policy to holding them judicially enforceable). We concur with the majority of jurisdictions which hold that prenuptial agreements waiving alimony, support and attorney's fees are not *per se* unconscionable, nor are they contrary to the public policy of this state.[3]

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[3] Wife cites Towles v. Towles, 256 S.C. 307, 182 S.E.2d 53 (1971) for the proposition that a contractual waiver of spousal support or alimony is against public policy and void. Towles involved a reconciliation agreement entered into subsequent to the marriage; it is therefore distinguishable from the present case. In any event, we take this opportunity to overrule Towles in light of its outdated views concerning women. There, we invalidated a reconciliation agreement finding it "tantamount to a release of the husband of his duty to perform his essential marital obligations and . . . therefore, void as against public policy." Id. at 311, 182 S.E.2d at 54. We went on to state, "Among the essential incidents to marriage is the **duty of the husband to support his wife.** 41 Am.Jur. 2d, Husband and Wife, Sections 329 and 330; State v. Bagwell,

The Court of Appeals adopted the following test, to determine whether a prenuptial agreement should be enforced: "(1) Was the agreement obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?" *Citing* Scherer v. Scherer, 292 S.E.2d 662, 666 (Ga. 1982); Brooks v. Brooks, 733 P.2d 1044, 1049 (Alaska 1987); Gentry v. Gentry, 798 S.W.2d 928, 936 (Ky. 1990); Rinvelt v. Rinvelt, 475 N.W.2d 478, 482 (Mich. App. 1991). See also Blue v. Blue, 60 S.W.3d 585 (Ky. 2001); Cantrell v. Cantrell, 19 S.W.3d 842 (Tenn. 1999); Booth v. Booth, 486 N.W.2d 116 (Mich. 1992). Applying these factors to the case at hand, the Court of Appeals found the agreement had been entered after fair and full disclosure, with advice from Wife's attorney, it was not unconscionable, and that circumstances had not so changed as to render the agreement unfair and unenforceable. We adopt this test and agree with the Court of Appeals' conclusion that the prenuptial agreement in this case was enforceable.

It is patent that the agreement here was not obtained through fraud, duress, misrepresentation or nondisclosure. Wife was separately represented by her own counsel, by whom she was employed, was fully aware of the extent of husband's assets, and was advised by her attorney not to sign the agreement.

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125 S.C. 401, 118 S.E. 767. An agreement whereby the **husband is relieved of this obligation to support his wife**, as a condition of the marital relationship, is against public policy and void." Id. at 312, 182 S.E.2d at 55. (emphasis supplied).

We find Towles represents an outdated and unwarranted generalization of the sexes which is no longer warranted in today's society. See e.g. United States v. Virginia, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996)(gender classifications should not be used as they once were to create or perpetuate the legal, social, and economic inferiority of women; cautioning reviewing courts to closely scrutinize generalizations or tendencies of the sexes). As we have done in other cases, we find the distinction between men and women is based upon "old notions" that females should be afforded special protection. Accord In the Interest of Joseph T, 312 S.C. 15, 430 S.E.2d 523 (1993); Richland Mem'l Hosp. v. Burton, 282 S.C. 159, 318 S.E.2d 12 (1984). Accordingly, we overrule Towles to the extent it relies upon outdated notions which are violative of equal protection.

As to unconscionability, this Court has held that unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001); Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996). Clearly, Wife here had a meaningful choice: she could have refused to sign the agreement and opted against marrying Husband if he insisted on a prenuptial agreement. Further, Wife received some substantial benefits from being married to Husband for the five-year duration of their marriage, such as a heightened standard of living, owning several homes, and driving luxury cars. Accord Gant v. Gant, 329 S.E.2d 106, 116 (Ga. 1985)(noting that "marriage can be of substantial economic, as well as emotional value to a financially weak party").

Lastly, the inquiry is whether the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable? The family court found Wife totally disabled and unable to support herself; it also found Wife would be a public charge if substantial support were not given. The Court of Appeals held the facts and circumstances at the time of enforcement of the agreement had not changed to such an extent that it was unfair or unreasonable to enforce the agreement. It stated:

> At the time Wife signed the agreement, she had serious health problems, including diabetes and sponge kidney disease. The premarital agreement specifically noted Wife's health problems. It was completely foreseeable to Wife that her health would worsen. Wife's attorney advised Wife not to sign the agreement because of her health problems. Although it is unfortunate that Wife's health has deteriorated, we do not find that fact alone sufficient to justify nullifying a contract Wife freely and voluntarily signed, fully aware that under its terms she would not receive any spousal support.

348 S.C. at 96, 558 S.E. 2d at 270. Under the circumstances of this case, we agree with the result reached by the Court of Appeals. We concur with Husband that it would be unfair and inequitable to permit a party who, fully aware of serious health issues and declining health, knowingly signs a prenuptial agreement against the advice of her attorney, to thereafter recover alimony and/or support. Accordingly, we affirm the Court of Appeals' ruling in this case.[4]

Finally, Wife asserts that if this Court affirms the Court of Appeals' holding that prenuptial agreements are valid and enforceable, our opinion should be given prospective application only as it creates new substantive rights. We disagree.

Judicial decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively; prospective application is required when liability is created where formerly none existed. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001). We find the Court of Appeals' holding in this case does not create any new substantive rights. On the contrary, the Court of Appeals' holding is simply a matter of basic contract enforcement. Moreover, in light of our prior precedents of Stork, supra, and Gilley, supra, our holding in this case is not a departure from established precedent. The Court of Appeals' opinion is

AFFIRMED AS MODIFIED.

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

[4] However, we note that, in a case in which a party is unaware of health issues at the time a prenuptial agreement is entered, but who becomes aware of serious health issues subsequent to its execution, a different result may well ensue.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the interest of: Ronnie A., a minor under the age of seventeen, Appellant.

Appeal from Richland County
Leslie Kirkland Riddle, Family Court Judge

Opinion No. 25696
Heard June 24, 2003 - Filed August 11, 2003

AFFIRMED

Senior Assistant Appellate Defender Wanda H. Haile, of S.C. Office of Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., and Solicitor Warren B. Giese, all of Columbia, for respondent.

JUSTICE MOORE: At age eleven, appellant was adjudicated delinquent for committing first degree criminal sexual conduct with a minor (CSCM). He was nine years old at the time of the offense. Appellant contends the family court's order requiring him to register as a sex offender violates due process. We affirm.

DISCUSSION

Under S.C. Code Ann. § 23-3-430(C)(4) (Supp. 2002), appellant is required to register as a sex offender because of his adjudication for first degree CSCM. This section applies to "any person regardless of age. . . who has been adjudicated delinquent" for certain sex offenses. § 23-3-430(A). Because appellant was under the age of twelve at the time of his adjudication, however, information collected for the registry may not be made available to the public. S.C. Code Ann. § 23-3-490(D)(3) (Supp. 2002).[1] Appellant contends the lifelong "stigma" of registration violates due process because he was a juvenile at the time of his offense.

The substantive due process guarantee requires a rational basis for legislation depriving a person of life, liberty, or property. In re: Care and Treatment of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002). The burden of showing that a statute is unreasonable falls on the party attacking it on due process grounds. *Id.;* State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997).

We recently held sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated. Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003). The intent of the legislature in enacting the sex offender registry law is to protect the public from those offenders who may re-offend. State v. Walls, 348 S.C. 26, 358 S.E.2d 524 (2002). The registration of offenders, including juveniles who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective. *Accord* In re: Joseph G., 623 N.W.2d 137 (Wis. App. 2000). Appellant has offered no valid basis upon which to distinguish juvenile sex offenders for purposes of due process.

Further, since the registry information will not be made available to the public because of appellant's age at the time of his adjudication,

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[1]Registry information remains available to law enforcement under subsection (E).

there is no undue harm to his reputation even if we were to recognize a liberty interest in a juvenile's reputation. *Cf.* In re: M.A.H., 20 S.W.3d 860 (Tex. App. 2000) (noting no authority for finding juvenile's reputation is a protected liberty interest).

Accordingly, we hold the requirement that appellant register as a sex offender under § 23-3-430 does not violate due process.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Reather B. Tilley, Willis E. Wood, Owena R. Wood, and Louise Williams, on behalf of themselves and all others similarly situated, Respondents-Appellants,

v.

Pacesetter Corporation, Appellant-Respondent.

Appeal From Barnwell County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 25697
Heard May 14, 2003 - Filed August 11, 2003

AFFIRMED IN PART; REVERSED IN PART

Terry E. Richardson, Jr., Daniel S. Haltiwanger, of Richardson Patrick, Westbrook & Brickman, LLC, of Barnwell; and Daryl L. Williams, of Jeter & Williams, P.A., of Columbia, for Appellant-Respondent.

Bradford P. Simpson, Randall Dong, D. Michael Kelly, and Michael J. Cone, all of Suggs & Kelly Lawyers, P.A., of Columbia; Steven W. Hamm, of Richardson, Plowden, Carpenter & Robinson, P.A., all of Columbia; Daniel W. Williams, of Bedingfield & Williams, of Orangeburg; T. Alexander Beard, of Beard Law Offices, of Mount

Pleasant; and C. Bradley Hutto, of Williams & Williams, of Orangeburg; all for for Respondents-Appellants.

CHIEF JUSTICE TOAL: This is a class action in which the trial court granted Respondents/Appellants ("Buyers") summary judgment based on Appellant/Respondent's, Pacesetter Corporation ("Pacesetter"), failure to comply with the attorney and insurance agent preference provisions of the South Carolina Consumer Protection Code.[1] This Court affirmed summary judgment on the issue of liability and remanded for a determination on damages. *Tilley v. Pacesetter Corp.,* 333 S.C. 33, 508 S.E.2d 16 (1998) ("*Tilley I"*). This appeal was taken following the circuit court's determination of damages.

FACTUAL / PROCEDURAL BACKGROUND

Pacesetter is a Nebraska corporation that sells aluminum windows, awnings, and doors in South Carolina. Buyers in this case each entered into a "Retail Installment Sales Contract and Mortgage" to purchase products from Pacesetter secured by a mortgage on their homes.[2] After entering into these

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[1] S.C. Code Ann. § 37-1-101 et seq.

[2] The contracts contained the following provision:

> OBLIGATIONS PERTAINING TO PROPERTY INSURANCE AND MY REAL ESTATE: 1. I promise to keep my house in good repair and keep it insured for at least 80% of its replacement value by buying fire and extended coverage insurance policy. The insurance company must be approved by you, ... and the company must agree that it will not cancel my policy without first telling you. I authorize the insurance company to pay you directly for any loss. You can choose to use this insurance payment to either repay any amounts I owe you or to repair my house. I have the option of providing property insurance through an existing policy or through a policy independently obtained and paid for by me ... 5. If I do not insure my house or fulfill my obligations to my real estate, then you can do it for me (but you do not have to). If you do pay any of these obligations for me, I agree to pay you back on demand plus interest. Until I pay you back, these amounts will be added to my debt to you which is secured by my real estate

contracts, Buyers instituted this action pursuant to S.C. Code Ann. § 37-2-413 (Supp. 1996),[3] contending that Pacesetter failed to ascertain their preference of attorney and insurance agent in violation of S.C. Code Ann. § 37-10-102 (Supp. 1996).[4] The trial court granted Buyers summary judgment on the issue of liability, and this Court affirmed in *Tilley I,* 333 S.C. 33, 508 S.E.2d 16.[5]

Following this Court's *Tilley I* decision, the case was remanded for a determination of damages and was assigned to the Honorable James C. Williams, Jr. On March 12, 2001, Judge Williams issued an order awarding damages pursuant to S.C. Code Ann. § 37-10-105(a) (Supp. 1996). Section 37-10-105 was amended in 1997, altering the penalties for violations of the

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> and house. I know that if you decide to buy insurance for me you do not have to obtain any homeowner or liability insurance.

[3] Section 37-2-413(2) provides:

> With respect to a consumer credit sale that is secured in whole or in part by a lien on real estate the provisions of § 37-10-102(a) apply whenever the seller requires the debtor to purchase insurance or pay any attorney's fees in connection with examining the title and closing the transaction.

[4] Section 37-10-102(a) provides, in relevant part,

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for personal, family, or household purposes –
>
> (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and . . . the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

[5] In addition to determining that Pacesetter had violated section 37-10-413(2), this Court held (1) that Buyers could seek remedies set forth in section 37-10-105 as well as section 37-5-202, (2) that the old usury statute, S.C. Code Ann. § 34-31-50, provided the applicable statute of limitations for Buyers' claims - 3 years from the date of each payment made on the loan, and finally (3) that certification of Buyers' class by the trial court was proper. *Tilley I.*

chapter.[6] See 1997 S.C. Acts 99, § 1, eff. June 15, 1997. Buyers initiated this action in 1995, and the trial court granted summary judgment for Buyers in April 1997, prior to the effective date of the amendment. Judge Williams applied the pre-1997 version to award damages, finding that the retroactive application of the amended version of the statute would violate the Due Process clauses of the South Carolina and United States Constitutions.

Judge Williams then ordered Pacesetter to pay damages in an amount equal to the total of the finance charges actually paid by Buyers in all of the consumer credit transactions involving the Class pursuant to subsection (a) of § 37-10-105 and refused to assess penalties pursuant to subsection (b) of § 37-10-105. Judge Williams also declined to award pre-judgment and post-judgment interest on the award, and allowed Pacesetter to set off the damages owed by the amount of the unpaid debt written off by Pacesetter. Finally, Judge Williams granted Pacesetter's post-trial motion to exclude class members who died during the pendency of the proceedings. The order calculated the total amount of the judgment, prior to setoff, to be $3,273,010.52.

Both Buyers and Pacesetter appealed, raising the following issues in their cross-appeals:

Buyers' Issues:

I. Did the circuit court err in applying the pre-1997 version of § 37-10-105 to assess penalties against Pacesetter based on its finding that applying the 1997 amendment to § 37-10-105 to Buyers' claims would violate Due Process?

II. Did the circuit court err in refusing to award damages under subsection (b) of original § 37-10-105 after awarding damages under subsection (a) of original § 37-10-105?

[6] The amendment prohibited class actions prospectively, and established that debtors proving violations would be awarded penalties ranging from $1,500 to $7,500. The circuit court found that, in this class action, the penalties assessed against Pacesetter would be far greater under the amendment than under the pre-1997 version.

III. Did the circuit court err in refusing to award pre-judgment interest on the award?

IV. Did the circuit court err in ordering that the damages awarded to the class members be set off by the amount of any unpaid debts written off by Pacesetter?

V. Did the circuit court err in excluding class members who died during the pendency of this action where the applicable statute does not require fraud and deceit to award damages?

Pacesetter's Issues:

VI. Did the circuit court err in finding Pacesetter had charged an improper fee and, thereby, in awarding any damages under original § 37-10-105(a)?

VII. Did the circuit court err in granting Buyers' motion to conform, and then in modifying the class definition that was originally pled by Buyers and certified in June 1996?

VIII. Did the circuit court err in adding a subclass of plaintiffs whose claims were barred by the statute of limitations set out in *Tilley I*?

IX. Did the circuit court err in refusing to send notice of the pendency of this action to absent class members?

LAW /ANALYSIS

I. Application of § 37-10-105

Buyers argue that the circuit court erred in applying the pre-1997 version of § 37-10-105 ("**original § 37-10-105**") to determine Buyers' damages instead of applying the 1997 amended version of § 37-10-105 ("**new § 37-10-105**). We disagree.

Judge Williams refused to apply new § 37-10-105 on grounds that applying it would violate Pacesetter's right to Due Process because Buyers' claims accrued and were filed prior to the amendment, summary judgment had been granted for Buyers prior to the effective date of the amendment, and Pacesetter's penalties would be greater under new § 37-10-105 than they would be under original § 37-10-105.[7] The circuit court recognized that the purpose of the amendment was to decrease liability for violations of the attorney and insurance preference statutes, but found that, in this case, the amended version would have the opposite effect, resulting in far greater penalties for Pacesetter's violations.

Original § 37-10-105 provided, in relevant part,

> With respect to a loan transaction subject to the provisions of this chapter, any person who shall receive or contract to receive a loan finance charge or other charge or fee in violation of this chapter shall forfeit –
>
> (a) the total amount of the loan finance charge and the costs of the action; and the unpaid balance of the loan shall be repayable without any loan finance charge;
>
> (b) double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party, to be collected by a separate action or allowed as a counterclaim in any action brought to recover the unpaid balance.

S.C. Code Ann. § 37-10-105 (Supp. 1996). The 1997 amendment to § 37-10-105 changed the penalty structure to a per debtor penalty and prohibits class actions. New § 37-10-105 provides, in relevant part,

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[7] The circuit court dismissed Pacesetter's argument that applying the amendment would violate separation of powers under the rationale explained in *Steinke v. South Carolina Dept. of Labor, Licensing & Reg.,* 336 S.C. 373, 520 S.E.2d 142 (1999). We agree; the statute was amended by the legislature, and there was no intervening action by this Court. Consequently, nothing has occurred to create a separation of powers conflict.

> (A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

S.C. Code Ann. § 37-10-105 (Supp. 1997 & Rev. 2002).[8]

The circuit court appears to have based its decision on the "harsh and oppressive" results that applying new § 37-10-105 would have on Pacesetter. *See U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 17 n. 13 (1977) (noting that "[t]he Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive'") (citations omitted). Throughout its order, the circuit court expressed a sense that applying new § 37-10-105, enacted *after* the Buyers' claims accrued and were filed and after summary judgment on the issue of liability was granted, was unfair under some other, yet undefined, principle. The circuit court explained,

[8] The stated purposes of the 1997 amendment to § 37-10-105 were to (1) delete certain penalty provisions, (2) to create a private cause of action and to prohibit class actions for violations of this chapter, (3) to set elements of recoverable damages, and (4) to make the new provisions apply to causes of action, including appeals, pending on May 2, 1997, and to limit recovery in class actions filed before that date. 1997 S.C. Acts 99.

> Without relying on – and being bound by – definitions and distinctions, such as "vested," "right," "remedy," and the like, the Court finds that, at the time [Buyers] were granted summary judgment on liability, the interests of the parties to this action became fixed. They knew that any damages awarded to [Buyers] and assessed against Pacesetter were somewhere within the parameters of original § 37-10-105. Who can say that their respective actions in this litigation from that point were not determined by this knowledge of the potential damages under the original statute? This Court certainly cannot and must hold that the amendment should not be applied in this action.

We agree that original § 37-10-105, not new § 37-10-105, should be applied to determine Buyers' damages. We base this conclusion on South Carolina's "retroactivity" jurisprudence, and, accordingly, find that it is unnecessary to address whether new § 37-10-105, as applied to Pacesetter, violates Due Process.

In *Stephens v. Draffin,* 327 S.C. 1, 488 S.E.2d 307 (1997), this Court discussed the impact of its earlier decision in *Nelson v. Concrete Supply Co.,* 303 S.C. 243, 399 S.E.2d 783 (1991) (prospectively abrogating the doctrine of contributory negligence in favor of comparative negligence). In *Stephens,* Stephens brought a medical malpractice action against his doctor when he became addicted to the narcotic drug (Percocette) prescribed to him by his doctor. Stephens' wife brought a loss of consortium claim against the doctor. *Stephens*, 327 S.C. at 3, 488 S.E.2d at 308. Stephens was a patient of the doctor's from 1985 until May 1992. *Id.* This Court abrogated contributory negligence, effective July 1, 1991. *Nelson.* The Stephenses argued that the trial court erred in charging the jury with both contributory and comparative negligence, and that comparative negligence alone should have been charged.

The Court found the question of *when* the Stephens' causes of action arose to be dispositive because "the law in effect at the time the cause of action accrued controls the parties' legal relationships and rights." *Stephens,* 333 S.C. at 5, 488 S.E.2d at 309. Applying *Brown v. Finger,* 240 S.C. 102, 134 S.E.2d 781 (1962), the Court found that "[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it." *Stephens*, 333

S.C. at 4-5, 488 S.E.2d at 309. The Court then held that both Stephens' and his wife's actions accrued long before July 1, 1991, the date contributory negligence was abrogated, and, therefore, that their claims were controlled by the doctrine of contributory negligence, as that was the rule in effect when their claims first accrued. *Id.*

In the present case, all of the Buyers' claims accrued prior to the date they filed this class action in 1995.[9] At the time Buyers' claims accrued and were filed, original § 37-10-105 was in place. In addition, original § 37-10-105 was in effect when the trial court granted summary judgment on the issue of liability in April 1997. Under this analysis, original § 37-10-105 should be applied to determine Buyers' damages, not the 1997 amendment to that section.

II. Applicability of § 37-10-105(b)

Buyers argue that the circuit court erred in awarding damages only under subsection (a) of original § 37-10-105, and finding subsection (b) inapplicable in this case. We disagree.

As noted previously, original § 37-10-105 provides, in relevant part,

> With respect to a loan transaction subject to the provisions of this chapter, any person who shall receive or contract to receive a loan finance charge or other charge or fee in violation of this chapter shall forfeit –
>
> (a) the total amount of the loan finance charge and the costs of the action; and the unpaid balance of the loan shall be repayable without any loan finance charge;
>
> (b) double the amount of the ***excess*** loan finance charge or other charges or fees actually received by the creditor or

[9] In *Tilley I,* we determined that the statute of limitations for these claims runs for three years from the time each payment is made on the loan. *Tilley I,* 333 S.C. at 42, 508 S.E.2d at 20. Consistent with this finding, we find that the Buyers' claims *accrued* with the first payment each buyer made on his or her loan.

> paid by the debtor to a third party, to be collected by a separate action or allowed as a counterclaim in any action brought to recover the unpaid balance.

S.C. Code Ann. § 37-10-105 (Supp. 1996) (emphasis added). In its order, the circuit court determined that subsection (b) created an additional penalty for those who charged interest rates in excess of the statutory maximum. Because no evidence was presented that Pacesetter charged "excess" interest on any of the transactions at issue, the circuit court refused to award damages under subsection (b).

In our opinion, the circuit court's analysis is correct. Although the provisions of the consumer protection code are to be liberally construed in favor of the consumer, its provisions must still be read in accordance with the first rule of statutory construction: giving words their plain and unambiguous meaning.

> When the language of a statute is plain, unambiguous, and conveys a clear and definite meaning, the application of standard rules of statutory interpretation is unwarranted. *Paschal v. State Election Comm'n,* 317 S.C. 434, 454 S.E.2d 890 (1995); *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994). The statutory terms, therefore, must be applied according to their literal meaning. *Paschal*, 317 S.C. at 436, 454 S.E.2d at 892; *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994). In such circumstances, this Court simply lacks the authority to look for or impose another meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. *Paschal*, 317 S.C. at 437, 454 S.E.2d at 892; *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993).

State v. Benjamin, 341 S.C. 160, 163, 533 S.E.2d 606, 607 (Ct. App. 2000). In our view, use of the word "excess" in subsection (b) is plain and unambiguous. Giving "excess" its literal meaning is thus required; this Court cannot overlook the word's plain meaning in an attempt to apply the statute liberally.

Beyond the plain meaning of the word "excess," there is historical support for the circuit court's interpretation of subsection (b). The circuit court conducted a thorough review of the legislation that preceded original § 37-10-105: the various versions of South Carolina's now repealed usury penalty. In so doing, the circuit court followed this Court's lead in *Tilley I* when it used the statute's history to conclude that the appropriate statute of limitations was that previously available for a usury claim. *Tilley I,* 333 S.C. at 42, 508 S.E.2d at 20.

> Section 37-10-105 recodifies the penalty for usury in former S.C. Code Ann. § 34-31-50. The statute of limitations for an action seeking the remedies recoverable for usury begins to run at the time each payment is made on the loan. Accordingly, although we find the three year statute of limitations applicable, it begins to run from each payment, such that plaintiffs' claims are not barred.

Id. Similarly, the circuit court compared § 34-31-50 (the old usury statute), repealed by 1982 S.C. Acts 835, with prior versions of § 34-31-50, and with § 37-10-105 at issue here.

Section 34-31-50 provided,

> Any person who shall receive or contract to receive as interest any greater amount than is provided for in § 34-31-30 shall forfeit all interest and the costs of the action and such portion of the original debt as shall be due shall be recovered without interest or costs. When any amount so charged or contracted for has been actually received by such person he shall also forfeit *double* the *total* amount received *in respect of interest*.

S.C. Code Ann. § 34-31-50 (1976) (emphasis added). Section 34-31-50 was very similar to the 1898 version of the usury statute which provided that any person or corporation charging or contracting for interest in excess of the legal rate who has actually received such interest "shall also forfeit *double* the *total* amount received *in respect of interest*." 1898 S.C. Acts 39, § 2

(emphasis added).

The 1898 Act was construed by this Court in *Frick Co. v. Tuten*, 204 S.C. 226, 232, 29 S.E.2d 260, 262 (1944), as follows:

> upon contracting for illegal interest, the userer forfeits all interest, that which he may have contracted legally to receive and the excess as well; and should he actually receive usurious interest he is made to forfeit (pay back) double the total amount received.

Apparently, the 1898 Act was a reaction by the General Assembly to the Court's interpretation of the 1882 usury statute. *Frick.* In *Hardin v. Trimmier,* 30 S.C. 391 (1888), the Court interpreted the following language to impose double the sum of the amount of interest collected *in excess of* the legal interest rate: "That any person or corporation who shall receive as interest any greater amount than is herein provided for shall, in addition to the forfeiture herein provided for [all interest], forfeit also *double the sum so received."* 1882 S.C. Acts 21. The *Hardin* court made the following interpretation,

> It seems to us clear that the meaning is, that if the lender, on such a contract as this, receives an amount greater than seven per cent., he shall forfeit double the sum received in excess of seven per cent. The thing forbidden is to receive interest in excess of seven per cent., and when the act declares a forfeiture of double the amount so received, it must mean double the amount of such excess, and not double the whole amount of interest received.

Hardin v. Trimmier, 30 S.C. at 396 (emphasis in original).

As § 34-31-50 shares language most similar to the 1898 version, it follows that under that provision, the penalty was double the total amount of interest received. When the legislature then repealed § 34-31-50 in 1982 and simultaneously enacted § 37-10-105, the use of the word "excess" in the latter marks an intentional change. In light of the historical interpretation of the usury statute, it is apparent that the legislature chose the word excess with

the purpose of altering the existing usury penalties. As Buyers have presented no evidence of interest in excess of the legal interest rate, the circuit court correctly refused to assess penalties under subsection (b) of original § 37-10-105.

III. Pre-Judgment Interest

Buyers argue they are entitled to prejudgment interest from October 27, 1995, the date the action was filed, to April 3, 1997, the date of entry of summary judgment. We disagree.

This Court requires parties to plead for pre-judgment interest in order for it to be recovered. *Hopkins v. Hopkins,* 343 S.C. 301, 540 S.E.2d 454 (1996); *Calhoun v. Calhoun,* 339 S.C. 96, 529 S.E.2d 14 (2000). If no request for pre-judgment interest is made in the pleadings, it cannot be recovered on appeal. *Id.* If pre-judgment interest is pled for in the complaint, it "is allowed on obligations to pay money from the time the payment is demandable, either by agreement of the parties or by operation of law, if the sum is certain or capable of being reduced to certainty." *Future Group, II v. Nationsbank,* 324 S.C. 89, 101, 478 S.E.2d 45, 50 (1996).

In this case, the Buyers did not plead for pre-judgment interest in their original complaint of October 27, 1995, or in their amended complaint of January 23, 1996. Under the rule established in *Calhoun* and *Hopkins*, Buyers cannot now recover pre-judgment interest.[10] Further, Buyers had no right to demand Pacesetter pay penalties until Pacesetter's liability was established because the amount recoverable was not a "sum certain." *See Future Group, II.* Buyers claimed penalties under new § 37-10-105, and Pacesetter claimed penalties should be assessed under original § 37-10-105. As the amount of damages varies greatly depending on which version of the statute is applied, it is difficult to see how the amount recoverable could qualify as a "sum certain."

For these reasons, Buyers are not entitled to pre-judgment interest.

[10] Buyers moved to amend their complaint to request pre-judgment interest when their damages case was pending before the circuit court. Judge Williams found their request for pre-judgment interest untimely and denied it.

IV. Setoff

Buyers argue that the circuit court erred in granting Pacesetter's request for setoff of the amount of any principal written off by Pacesetter and could deduct such amount from the penalties it paid to Buyers. We disagree.

After the circuit court issued its order granting setoff, Buyers moved for the circuit court to reconsider, claiming the court erred by ordering setoff of amounts claimed to be in default without affording any opportunity for evidentiary review by Buyers or the court. In response, the circuit court ordered Pacesetter to produce to Buyers' counsel, prior to disbursement of funds, all identifying information in Pacesetter's possession pertaining to each individual class member, and the amount of any setoff to which Pacesetter claims to be entitled, along with all evidence to support its entitlement to setoff. Buyers note in their brief that Pacesetter has produced no such evidence to date.

Although Buyers claim that Pacesetter's claim for setoff came too late (after summary judgment on liability was granted), they offer no authority in support of this proposition. As such, we see no reason why Pacesetter cannot request setoff before the circuit court during the damages portion of the case. The circuit court's post-trial order requires Pacesetter to produce evidence of its entitlement to setoff prior to disbursement of funds, and that order still stands. In order to receive any setoff, Pacesetter will have to produce this evidence. Therefore, Pacesetter should be allowed to setoff the award by the amount of principal Pacesetter has written off per class member. As the circuit court noted, set offs will be applied on an individual class member basis only and will have no effect on the awards to class members not in default and whose principal loan amount was not written off by Pacesetter.

V. Deceased Class Members

Buyers argue that the circuit court erred in granting Pacesetter's motion to exclude deceased class members. We agree.

The circuit court held that the interests of the parties became fixed with the April 3, 1997, order granting summary judgment on the issue of liability. Pacesetter concedes that the class members alive on the date of summary judgment remain part of the class regardless of subsequent death, but argues that those members of the originally defined class who predeceased the April 3, 1997, order do not survive as members of the class.

South Carolina's general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions. South Carolina Code Ann. § 15-5-90 (1976) provides that "[c]auses of action for and in respect to . . . any and all injuries to the person or to personal property shall survive both to and against the personal or real representative . . . of a deceased person . . . any law or rule to the contrary nothwithstanding." Over the years, this Court has created certain exceptions to the survivability statute. *See, e.g., Estate of Covington v. AT&T Nassau Metals Corp.,* 304 S.C. 436, 405 S.E.2d 393 (1991) (workers' compensation claims); *Brown v. Bailey,* 215 S.C. 175, 54 S.E.2d 769 (1949) (actions for malicious prosecution); *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948) (actions for slander); *See Ferguson v. Charleston Lincoln Mercury,* 349 S.C. 558, 564 S.E.2d 94 (2001) (actions for fraud and deceit).

Pacesetter argues that this action does not survive the deceased class members' deaths pursuant to the fraud and deceit exception to the general survivability statute. *Ferguson.* In *Ferguson*, this Court held that a cause of action brought under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act")[11] did not survive the death of the plaintiff. *Id.* The plaintiff alleged that the Dealer included an improper fee in the purchase price of the car and concealed that price through either fraudulent actions or negligent practices. *Id.* The Dealers Act defined fraud broadly, to include "a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact." S.C. Code Ann. § 56-15-10(m). This Court

[11] S.C. Code Ann. § 56-15-130 (Supp. 2001).

reasoned that plaintiff's cause of action was grounded in fraud and deceit and thus did not survive his death under that exception. *Ferguson.*

The Consumer Protection Code and the Dealers Act share a common purpose: protection of the consumer. However, the Dealers Act arguably expanded the definition of fraud to include actions that would not normally amount to fraud. The Consumer Protection Code does not define fraud at all. Ferguson alleged that the Dealer had committed an unfair act by failing to disclose a closing fee in the price of the car Ferguson purchased. *Ferguson.* In this case, Buyers charge Pacesetter with violating the statutory mandate of S.C. Code Ann. § 37-10-102 in failing to notify them of their right to choose an attorney and insurance agent of their preference. Neither § 37-10-102 nor the penalty section, § 37-10-105, refer to violation of the statutory preference requirements in terms of unfairness, fraud, or deceit.

Whether or not a cause of action for violation of the attorney /insurance preference statute amounts to an action brought on a theory of fraud and deceit is an issue of first impression for the court. The Buyers' claims here are based on a simple violation of a statutory requirement; the penalties for violating the statutory preference provisions of § 37-10-102 are absolute and do not depend on actual fraud. Further, the Consumer Protection Code, within which the preference provisions are contained, does not define fraud. For these reasons, we hold that the claims presented here are not grounded in fraud and deceit and, accordingly, survive a class member's death.[12]

VI. Improper Fee

In its status as Appellant, Pacesetter argues that the circuit court erred in awarding damages under original § 37-10-105 at all because Pacesetter did not charge any "improper" fees. We disagree.

[12] In addition, Pacesetter argues that the members of the class added following Pacesetter's February 19, 2001, motion to conform who predeceased entry of that order do not survive as members of the class. Because we reverse the circuit court's decision to conform the class in Part VII of this opinion, it is unnecessary for us to address the status of those who would have been added to the class by that order but who are now deceased.

This Court's finding of liability in *Tilley I* answers this question in the negative. As discussed in Part II of this opinion, there is no evidence that Pacesetter charged Buyers an illegal interest rate, in the sense that the rate was beyond that legally allowable. However, original § 37-10-105(a) only requires that the defendant receive or contract to receive a fee "in violation of this chapter" in order to be subjected to the statute's penalties under subsection (a). S.C. Code Ann. § 37-10-105 (Supp. 1996). The chapter is violated whenever a creditor fails to ascertain the buyer's preference as to legal counsel and insurance agent. S.C. Code Ann. § 37-10-102(a). Therefore, charging any fee, no matter how reasonable, triggers the penalties of original § 37-10-105(a) when the creditor fails to ascertain the buyer's attorney/insurance agent preference as Pacesetter did here. Accordingly, we find this issue to be without merit.

VII. Motion to Conform

Pacesetter argues that the circuit court erred in granting Buyers' motion to conform the class definition to the statute of limitations established by this Court in *Tilley I*, which resulted in the addition of almost 1,500 class members to the class as originally defined by Buyers. We agree.

The original complaint, filed on October 27, 1995, contained the following definition of the class to be certified:

> The class consists of all individual mortgagors who executed Promissory Notes and Mortgages in South Carolina to Pacesetter after July 1, 1982, and ***said mortgages are still outstanding*** in connection with the transactions more particularly described hereinafter.

(emphasis added). The January 19, 1996, amended complaint contained an identical class description. In addition, the interrogatories that Buyers submitted to Pacesetter inquire about the mortgages currently held by Pacesetter. Summary judgment on liability was granted without any change in the class definition, and was then affirmed by this Court in *Tilley I.*

On February 19, 2001, Buyers moved to conform the pleadings and class definition, arguing that the statute of limitations established in *Tilley I* modified the class definition. In *Tilley I,* this Court held that the applicable statute of limitations ran three years from the date of each payment made on the loan. 333 S.C. at 42, 508 S.E.2d at 20. Buyers now contend that the class definition should be modified because the statute of limitations set by this Court made more of Pacesetter's customers eligible than Buyers had contemplated.[13] The circuit court recognized that granting this motion would expand the putative class membership by some 1,500 persons whose mortgages had been released before this lawsuit was filed, but concluded that the "expansion was required by the Supreme Court's ruling."

We disagree that our *Tilley I* opinion requires any such modification to the class, and believe that allowing the Buyers to modify the class definition they chose at this late date would be unfair. *Tilley I* did not address the choice of class definition made in the pleadings, and it was not raised by the parties, or by this Court *sua sponte*.

Rule 23(d)(1), SCRCP, addresses the procedure for entering and altering a certification order.

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

When the circuit court's grant of summary judgment on the issue of liability and this Court's affirmed, a "decision on the merits" was made. The definition espoused by the Buyers in their original and amended complaints was adopted by the courts and used by the parties as the working definition of the class. The fact that the Buyers limited the class more than was necessary to fit within the statute of limitations was the result of a strategy choice, and, according to Rule 23(d)(1),

[13] Buyers had limited the class to those customers of Pacesetter with outstanding mortgages when the complaint was filed in October 1995.

SCRCP, is one that they have to live with since a decision on the merits was made. The portion of the circuit court's order granting Buyers' Motion to Conform the class is therefore reversed.

VIII. Statute of Limitations for New Subclass

In our opinion, the circuit court improperly expanded the class definition. As such, it is unnecessary to determine whether the claims of the added subclass are barred by the statute of limitations.

IX. Notice to Absent Class Members

Pacesetter argues that the circuit court erred in agreeing to defer the mailing of the class notice to absent class members until the conclusion of this appeal. We disagree.

During the damages phase, the Buyers informed the circuit court that they intended to appeal some of that court's rulings, and requested that the mailing of the class notice be deferred until the issues had been resolved on appeal. Recognizing that this Court could modify the content of any class notice Buyers created, in order to avoid the expense and confusion that mailing two notices could cause, the circuit court agreed to defer mailing the class notice.

Rule 23(d)(2), SCRCP, provides that the court "may order that notice be given in such a manner as it may direct of the pendency of the action by the party seeking to maintain the action on behalf of the class." The Notes to this rule, however, state that "[t]his rule requires those seeking to maintain an action on behalf of a class to notify the members of the class of the pendency of the action."

In our opinion, the circuit court made a good practical decision in agreeing to defer the mailing of the class notice until after the conclusion of this appeal. As it turns out, the definition of the class has changed since the circuit court issued its order. If the circuit court had ordered Buyers to mail the class notices in 2001 when it issued its order, approximately 1,500 class members would have received notices indicating they could join the class

who, in fact, are not eligible to join the class. The circuit court did not eliminate the requirement that a class notice be mailed to absent class members; it simply delayed the mailing of the notice until this Court finalized the definition of the class. As such, we believe the circuit court made the correct decision. Following this Court's decision, the parties must mail a notice to the absent class members according to the definition created by the Buyers in their original complaint and used by the parties throughout *Tilley I.*

CONCLUSION

For the foregoing reasons, we **AFFIRM** the circuit court on issues I, II, III, IV, VI, and IX, and **REVERSE** on issues V and VII, and find it unnecessary to address issue VIII.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kenneth W. Crouch, Appellant.

Appeal From Saluda County
William P. Keesley, Circuit Court Judge

Opinion No. 25698
Heard June 25, 2003 - Filed August 11, 2003

VACATED

Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Deputy Director for Legal Services Teresa A. Knox, Legal Counsel Tommy Evans, Jr., and Legal Counsel J. Benjamin Aplin, all of South Carolina Department of Probation, Parole, and Pardon Services, of Columbia, for Respondent.

JUSTICE PLEICONES: Kenneth Crouch ("appellant") was charged with three probation violations. The court revoked in full the remaining fifty-one months of a five year sentence, partially revoked two lesser sentences,

and continued appellant on probation on these latter two charges. The court ordered the continued probationary terms tolled while appellant was incarcerated on the fifty-one month sentence. Appellant contends this was error. We vacate the probation revocations related to the two latter charges.

ISSUE

Did the trial court err in revoking appellant's probation?

FACTS

On October 20, 1998, appellant pled guilty in Saluda County ("Saluda County charges") to two counts of burglary in the second degree, and one count of grand larceny of property valued at less than $5,000. On June 18, 1999[1], appellant was sentenced on each charge to concurrent terms of five years imprisonment, suspended upon service of nine months imprisonment and five years probation.

On January 26, 1999, and January 27, 1999, in Newberry County ("Newberry County charges"), appellant pled guilty to two counts of obtaining property by false pretenses, and was sentenced on each charge to concurrent terms of three years imprisonment, suspended upon time served and two years probation.

On March 30, 1999, in Aiken County ("Aiken County charge") appellant pled guilty to burglary and was sentenced to eight years imprisonment, suspended upon service of four years imprisonment, and four years probation. Appellant did not appeal any of his convictions. All sentences were concurrent since in no case did the sentencing judge specify the sentences were to be served consecutively. Finley v. State, 219 S.C. 278, 64 S.E.2d 881 (1951).

On November 8, 2000, appellant was released on parole on the Aiken County charge, with parole to expire on May 17, 2001. On May 1, 2001, 16 days before parole was to expire, a probation arrest warrant was issued on the

[1] The record is unclear as to why sentencing was deferred.

Aiken County charge. On June 27, 2001, a probation arrest warrant was issued on the Saluda County charges, and on June 29, 2001, a probation arrest warrant was issued on the Newberry County charges.

On July 26, 2001, at the probation revocation hearing, the judge revoked the Saluda County sentence in full, requiring appellant to serve the remaining fifty-one months of the sentence. The judge also revoked the Newberry County sentences, requiring service of 37 days. The judge purported to toll the two year Newberry County probationary period while the appellant served the Saluda County sentence. Finally, the judge revoked the Aiken County sentence, requiring service of 37 days. The judge also "tolled" the Aiken County probation until after appellant served the 51 month active sentence for the Saluda County charges.

ANALYSIS

Appellant contends that the trial judge erred in tolling the Newberry and Aiken County probationary periods while he was incarcerated on the Saluda County charge. We address each charge individually.

1. Newberry County charges

Appellant was sentenced on the Newberry County charges on January 26 and 27 of 1999. Appellant received two sentences to be served concurrently: the first was suspended upon credit for time served and two years probation and restitution (the 1/26/99 sentence), the second was suspended upon credit for time served and two years probation (the 1/27/99 sentence). Appellant's probation began to run, at the latest, on January 27, 1999. Therefore, appellant's probation on the Newberry County charges ended no later than January 27, 2001.[2] The probation violation arrest warrant for the Newberry County charges was not issued until June 29, 2001. On July 26, 2001, the judge purportedly revoked the Newberry County sentence and

[2] The record reveals no appropriate period of tolling, e.g., absconding or partial revocation and continuance.

sought to toll the running of probation during appellant's incarceration on the Saluda County charge.

Under S.C. Code Ann. § 24-21-450 (Supp. 2002), an arrest warrant for violation of terms of probation may be issued "[a]t any time during the period of probation or suspension of sentence." The statute "authorizes the court to issue or cause the issuing of a warrant only during the period of probation and, in the absence of the timely issuance of such warrant, the court is without authority to revoke the probation after the probationary period has passed, even though the violation occurred during such period." State v. Hutto, 252 S.C. 36, 45-46, 165 S.E.2d 72, 76 (1968). Because the warrant implicates the trial court's subject matter jurisdiction, the issue can be raised at any time. Id.

A decision "to revoke probation generally rests within the circuit court's discretion, [however] an appellate court should reverse when that decision is based on an error of law or lacks supporting evidence." State v. Brown, 349 S.C. 414, 417-18, 563 S.E.2d 339, 340 (Ct. App. 2002). The Newberry County probationary sentences expired approximately five months prior to the issuance of the probation arrest warrant. We need not reach the tolling issue since the judge did not have subject matter jurisdiction to revoke the Newberry County sentences because a probation arrest warrant was not issued during the probationary period. We vacate the judge's purported revocation of the Newberry sentences.

2. Aiken County charge

Appellant was incarcerated for the Aiken County crime, and was paroled on November 8, 2000, with parole expected to expire on May 17, 2001. On May 1, 2001, sixteen days prior to the expiration of parole, a probation arrest warrant was issued on the Aiken County charge. Appellant was on parole for the Aiken County sentence when the probation arrest warrant for the Aiken County sentence was issued.

In South Carolina, parole and probation are governed by statute. When a prisoner is released on parole, the prisoner "must remain in the jurisdiction

of the [Board of Probation, Parole, and Pardon Services] and may at any time on the order of the board be imprisoned as and where therein designated." S.C. Code Ann. § 24-21-660 (Supp. 2002). When a parolee violates the terms of his parole, "the parole agent must issue a warrant or citation charging the violation of the parole, and a final determination must be made by the board as to whether the prisoner's parole should be revoked…the board shall be the sole judge as to whether or not a parole has been violated…." S.C. Code Ann. § 24-21-680 (Supp. 2002), Sanders v. McDougall, 244 S.C. 160, 161, 135 S.E.2d 836, 837 (1964).

Many states have statutes that specifically address the issue of whether parole and probation for the same charge run simultaneously. See eg., Alaska Stat. § 33.20.040(c) (2002); Ark. Code Ann. § 5-4-307(b) (2002); N.C. Gen. Stat. § 15A-1375 (2003). South Carolina has no such statutory provision. In this case, appellant was on parole, not probation, when the probation arrest warrant was issued. The Parole Board had revocation authority over the appellant, not the court. The Department of Probation, Parole and Pardon Services is the supervising agency whether a person is on probation or parole. Since, however, the General Assembly has seen fit to provide for different revocation authorities depending upon the status of a person as a parolee or a probationer; it is logical to conclude that the legislature did not intend for the two states to co-exist. In the absence of a specific statutory direction from the General Assembly that parole and probation for the same offense can exist simultaneously, we decline to judicially impose such a standard.

The probation arrest warrant was a nullity since it was not issued "during the time of probation." S.C. Code Ann. § 24-21-450 (Supp. 2002). Thus, the alleged revocation of probation on the Aiken County charge was a nullity, as the judge had no subject matter jurisdiction. State v. Hutto, supra; S.C. Code Ann. § 24-21-680 (Supp. 2002). Therefore, the judge could not toll the probation on the Aiken County sentence while appellant served the Saluda County sentence. We vacate the judge's purported revocation of the Aiken County sentence. Since we have held the two lesser probation revocations should be vacated, we need not address whether probationary sentences can be tolled so as to turn concurrent sentences into consecutive ones.

CONCLUSION

The revocation of the Saluda County sentence was proper.

However, the judge's revocation of the Newberry County and the Aiken County sentences are **VACATED** because the trial court lacked subject matter jurisdiction.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of F. Marion Moise, III, Respondent.

Opinion No. 25699
Submitted July 14, 2003 - Filed August 11, 2003

DEFINITE SUSPENSION

Henry B. Richardson, Jr. and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Richard S. Rosen, of Charleston, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a nine month suspension from the practice of law. We accept the agreement and suspend respondent from the practice of law for nine months. The facts, as set forth in the agreement, are as follows.

Facts

Respondent was retained to represent clients in eight domestic matters and one post-conviction relief matter. Respondent admits that his representation of these clients lacked diligence and that he failed to keep the clients adequately informed about the status of their actions. In one of the domestic matters, respondent failed to file an action on his client's behalf. In another domestic matter, respondent failed to timely serve the opposing party. In a third domestic matter, he failed to timely complete the Qualified Domestic Relations Order and the action, in general, took an inordinate amount of time to complete. Respondent acknowledges that in two other domestic matters he abandoned his representation of the clients. In four of the domestic matters, respondent failed to timely refund the unused portion of the retainer fees to the clients, although those clients have now received a refund of their fees. In seven of these matters, and one matter where there was no underlying misconduct found, respondent failed to respond to inquiries from the Office of Disciplinary Counsel.

Respondent acknowledges a pattern of misconduct, but represents, in mitigation, that he was suffering from serious depression during the period of time in which the misconduct occurred. As a result of his depression, respondent was unable to attend to, or was tardy in performing, some of his work. Respondent regrets his misconduct and has sought professional medical help to address his problems.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information); Rule 1.15(b) (a lawyer shall promptly deliver to the client

any funds the client is entitled to receive); Rule 1.16(a)(2) (a lawyer shall not represent or, where representation has commenced, shall withdraw from representation of the client if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.1 (a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits that his misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(3) (it shall be a ground for discipline for a lawyer to fail to respond to a lawful demand from a disciplinary authority including a request for a response); and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute).

Conclusion

We hereby accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for nine months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charles W. Blackwell, Respondent.

Opinion No. 25700
Submitted July 14, 2003 - Filed August 11, 2003

DISBARRED

Henry B. Richardson, Jr. and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for the Office of Disciplinary Counsel.

Charles W. Blackwell, of Rock Hill, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the sanction of disbarment. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

Facts

Respondent has had an ongoing shortage of client funds in his law firm trust account since approximately 1994. Since that time he has

misappropriated approximately $800,000 in client funds to purposes other than those for which they were intended. Currently, there is a shortage of $542,000 in client funds. Respondent's trust account has had repeated overdrafts, negative balances and dishonored checks. Respondent has commingled approximately $300,000 of personal funds with client funds in an effort to reduce or cure the shortages.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.15(a) (a lawyer shall hold property of clients that is in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 1.15(b) (a lawyer shall promptly deliver to the client any funds that the client is entitled to receive); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also acknowledges that his misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute); and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office taken upon admission to practice law in this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent shall pay restitution to presently known and

subsequently identified clients, banks, and other persons and entities who have incurred losses as a result of respondent's misconduct in connection with this matter. Respondent shall also reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of his misconduct in connection with this matter. Respondent shall not apply for readmission unless and until all such restitution has been paid in full.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

The Supreme Court of South Carolina

In the Matter of Ronald W. Hazzard, 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.

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 James L. Hills, 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. Hills shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Hills 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 James L. Hills, 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 James L. Hills, 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. Hills' office.

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

IT IS SO ORDERED.

s/Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina
August 6, 2003

The Supreme Court of South Carolina

RE: Amendment to Rule 607, SCACR, Court Reporter Transcripts and Tapes

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ORDER

We find that the retention schedule for court reporter tapes should be amended. Accordingly, pursuant to Article V, §4, of the South Carolina Constitution, we amend Rule 607(i), SCACR to read as follows:

> (i) Retention of Tapes. Except as provided below, a court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that period. If the proceeding was a hearing or trial which lasted for more than one day, the time shall be computed from the last day of the hearing or trial. In any proceeding which has been transcribed, the court reporter shall retain the primary and backup tapes which have been transcribed for a period of at least thirty (30) days after the original transcript is sent to the requesting party, to allow any party to challenge the accuracy of the transcription. If no challenge is received by the court reporter within the thirty (30) day period, the tapes may be reused or destroyed.

This amendment shall become effective immediately. Further, the Order issued by this Court on June 26, 2002, ordering court reporters to cease destruction of all tapes in criminal and post-conviction relief cases is hereby vacated.

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

August 6, 2003