The Supreme Court of South Carolina

In the Matter of James M. Williams, III, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition requesting the Court either place respondent on interim suspension or transfer him to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on incapacity inactive status and to the appointment of an attorney to protect the interests of his clients.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Karen Paige Ballenger, 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. Ms.

Ballenger shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Ballenger 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 Karen Paige Ballenger, 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 Karen Paige Ballenger, 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 Ms. Ballenger's office.

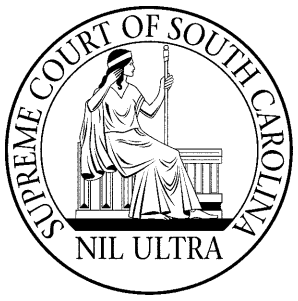
This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ James E. Moore J.
FOR THE COURT

Columbia, South Carolina

August 8, 2007



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31

August 13, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bryan Nolan Lamb, Appellant.

Appeal From Dorchester County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 26367
Heard June 7, 2007 – Filed August 6, 2007

AFFIRMED

Chief Attorney Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor David Michael Pascoe, Jr., of Summerville, for Respondent.

JUSTICE WALLER: In 2004, a jury found appellant Bryan Lamb guilty of a murder committed in 1990. The trial court sentenced Lamb to life imprisonment, and he directly appeals. We affirm.

FACTS

On November 7, 1990, 13-year-old Crystal "Cricket" Surrell was seen walking to school toward a path that went through some woods in Dorchester County. Cricket was found dead the next morning. Her panties had been cut or ripped off and stuffed in her mouth. Her jeans were pulled down to her ankles, and her bra and sweater were pulled up to her neck. She had four stab wounds to her neck. The cause of death was asphyxiation from the gag in her mouth and agonal aspiration on the blood in her throat from the stab wounds. It was estimated that Cricket died the morning of November 7. At the time of the murder, Lamb was 14 years old and went to middle school with Cricket.

In 2003, a juvenile petition was filed in family court against Lamb alleging that he murdered Cricket when he was a minor. Thereafter, the solicitor's office filed a waiver motion requesting that a pre-waiver evaluation be done and the family court thereafter determine whether Lamb should be transferred to the court of general sessions. Prior to the evaluation, however, the family court issued a "Consent Waiver Order" accepting Lamb's consent to be waived from family court to the court of general sessions. The court specifically found that Lamb, "after being advised by competent counsel, knowingly and voluntarily" consented to the waiver. After the case was transferred to general sessions court, a Dorchester County grand jury indicted Lamb for murder.

ISSUE

Did the court of general sessions have subject matter jurisdiction to try Lamb after the family court accepted Lamb's consent to transfer?

DISCUSSION

Lamb argues that because a waiver evaluation and hearing were not conducted in the family court, the court of general sessions was without subject matter jurisdiction to try him as an adult for murder. Basically, Lamb maintains the family court was not permitted to accept his consent to the waiver. We disagree.

The statute governing the transfer of jurisdiction from family court to general sessions court in a murder case states as follows:

> Within thirty days after the filing of a petition in the family court alleging the child has committed the offense of murder…, the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child coming within the purview of this article. The judge of the family court is authorized to determine this request. If the request is denied, the petitioner may appeal within five days to the circuit court. Upon the hearing of the appeal, the judge of the circuit court is vested with the discretion of exercising and asserting the jurisdiction of the court of general sessions or of relinquishing jurisdiction to the family court. If the circuit judge elects to exercise the jurisdiction of the general sessions court for trial of the case, he shall issue an order to that effect, and then the family court has no further jurisdiction in the matter.

S.C. Code Ann. § 20-7-7605(6) (Supp. 2006).[1]

[1] The predecessor transfer statute in effect at the time of this 1990 murder was S.C. Code Ann. 20-7-430 which was repealed in 1996 when the transfer of jurisdiction statute became section 20-7-7605. See State v. Corey D., 339 S.C. 107, 112, 529 S.E.2d 20, 23 (2000) (explaining that section 20-7-7605, enacted in 1996, is substantially similar to its predecessor statute, section 20-7-430, which was enacted in 1981 and repealed in 1996). In both statutes, subsection 6 governed murder cases; the language of both versions is identical.

In a murder case, the Legislature intended to give the family court discretion to transfer jurisdiction "for any juvenile, regardless of age." State v. Corey D., 339 S.C. 107, 114, 529 S.E.2d 20, 24 (2000). On appellate review, the transfer order will be affirmed unless the family court has abused its discretion. State v. Avery, 333 S.C. 284, 292, 509 S.E.2d 476, 481 (1998).

We find it was well within the family court's discretion to accept consent to the transfer of jurisdiction, especially given the unusual facts of the instant case.[2] The record indicates that Lamb's consent was intelligently and voluntarily given. Thus, the family court appropriately accepted Lamb's consent to waiver. In addition, because of the family court's transfer order and the subsequent indictment, the general sessions court was properly vested with jurisdiction to try Lamb on the murder charge.

Lamb contends that under South Carolina law, the family court must conduct a waiver hearing after an evaluation has been performed, and only then issue its waiver order. See, e.g., State v. Kelsey, 331 S.C. 50, 65, 502 S.E.2d 63, 70-71 (1998) (the family court's waiver of jurisdiction order must sufficiently state the reasons for transfer and should demonstrate that the statutory requirement of full investigation has been met); State v. Avery, supra (same). We note, however, that the facts of those cases are inapposite since waiver of the family court's jurisdiction was not at issue. Furthermore, we simply see no reason why a defendant should not be permitted to consent to the transfer of jurisdiction provided the consent is knowing and voluntary. Cf. Sanders v. State, 281 S.C. 53, 56, 314 S.E.2d 319, 321 (1984) ("The jurisdiction of the family court over juveniles is a privilege rather than a matter of right.").

Accordingly, Lamb's conviction and sentence are **AFFIRMED**.

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

[2] Although Lamb was only 14 years old at the time of Cricket's murder, he was 27 when the juvenile petition was filed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Teresa A. Bass, Respondent,

v.

Isochem and St. Paul & Marine Insurance Co., Petitioners.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from York County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 26368
Heard June 5, 2007 – Filed August 6, 2007

DISMISSED

Stanford E. Lacy and Rebecca C. Kirkland, of Collins & Lacy, of Columbia, for petitioners.

David Benson, of Elrod Jones Leader & Benson, of Rock Hill, for respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' decision in Bass v. Isochem, 365 S.C. 454, 617

S.E.2d 369 (Ct. App. 2005). After careful consideration, we dismiss the writ as improvidently granted.

TOAL, C.J., MOORE, BURNETT, PLEICONES, JJ., and Acting Justice Arthur E. Morehead, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tom Hansson, Respondent,

v.

Scalise Builders of South Carolina and Sam Scalise, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
John L. Breeden, Circuit Court Judge

Opinion No. 26369
Heard June 6, 2007 – Filed August 13, 2007

REVERSED

Henrietta U. Golding and Amanda A. Bailey, both of McNair Law Firm, of Myrtle Beach, for Petitioners.

Chalmers Carey Johnson, of Chalmers Johnson Law Firm, of Mt. Pleasant, for Respondent.

CHIEF JUSTICE TOAL: In this case, Respondent sued Petitioners alleging various tort claims arising out of Respondent's employment relationship with Petitioners. The trial court granted Petitioners' motion for summary judgment as to all causes of action. The court of appeals reversed

the trial court's decision as to Respondent's intentional infliction of emotional distress claim, and this Court granted certiorari.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner Scalise Builders of South Carolina is a construction company owned by Petitioner Sam Scalise (collectively, "Petitioners"). Petitioners hired Respondent Tom Hansson ("Hansson") as a construction worker in 1997. Hansson worked in this capacity for Petitioners until he quit in 2000. During his employment, Hansson alleges that his coworkers and supervisor, Petitioner Sam Scalise ("Scalise"), constantly derided him with callous and vulgar remarks and gestures related to homosexuality.

In 2002, Hansson filed a complaint against Petitioners alleging various causes of action, including intentional infliction of emotional distress. The trial court granted Petitioners' motion for summary judgment as to all Hansson's claims and Hansson appealed. On appeal, Hansson's sole claim was that the trial court erred in granting summary judgment as to his cause of action for intentional infliction of emotional distress.

In a split decision, the court of appeals held that the trial court erred in granting summary judgment on Hansson's emotional distress claim. Specifically, the court found that Hansson demonstrated a genuine issue of material fact regarding the element of "outrageous conduct" required for an intentional infliction of emotional distress claim. *Hansson v. Scalise Builders of South Carolina*, Op. No. 2005-UP-340 (S.C. Ct. App. filed May 18, 2005) (unpublished opinion). The dissent in the court of appeals would have affirmed the trial court's decision on the grounds that the record failed to establish a prima facie case of intentional infliction of emotional distress. *Id.* (Kittredge, J., dissenting).

This Court granted certiorari and Petitioners raise the following issue for review:

> Did the court of appeals err in reversing the trial court's grant of summary judgment because Hansson failed to

establish a prima facie case for his intentional infliction of emotional distress claim?

STANDARD OF REVIEW

When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *David*, 367 S.C. at 247, 626 S.E.2d at 3.

LAW/ANALYSIS

Petitioners argue that the court of appeals erred in reversing the trial court's grant of summary judgment because Hansson failed to establish a prima facie case for his intentional infliction of emotional distress claim. We agree.

Although this Court only recently formally recognized the tort of intentional infliction of emotional distress, the theory regarding recovery for emotional damages has an extensive history in South Carolina.[1] Prior to

[1] The following cases offer a representative timeline of the development of case theory regarding recovery for emotional damages: *Mack v. South Bound R.R. Co.*, 52 S.C. 323, 335, 29 S.E. 905, 909 (1898) (holding that a plaintiff could not recover damages for mental suffering in the absence of bodily injury, but finding that injuries to the nervous system could be regarded as "an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected" (quoting *Sloane v. S. Calif. Ry. Co.*, 44 P. 320, 322 (1896))); *Padgett v. Colonial Wholesale Distributing Co.*, 232 S.C. 593, 103 S.E.2d 265 (1958) (expressly rejecting any requirement of physical

formal recognition of the tort, this Court had already indicated that willful and malicious conduct which proximately caused another's emotional distress, and without accompanying physical injury, may be actionable.[2] The landscape dramatically changed when this Court expressly defined the tort of intentional infliction of emotional distress – also known as the tort of "outrage" – in *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981). In *Ford*, the Court held that in order to recover for intentional infliction of emotional distress, the complaining party must establish that:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
>
> (2) the conduct was so 'extreme and outrageous' so as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community;'

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impact or tangible bodily injury to recover damages for bodily injury proximately caused by shock, fright, or emotional upset resulting from a tortfeasor's negligent and willful misconduct); *Turner v. ABC Jalousie Co. of N.C.*, 251 S.C. 92, 160 S.E.2d 528 (1968) (holding that a plaintiff's allegation that she suffered a nervous breakdown after a defendant used vile, profane, and abusive language towards her was sufficient to state a cause of action); *Rhodes v. Sec. Fin. Corp. of Landrum*, 268 S.C. 300, 302, 233 S.E.2d 105, 105 (1977) (holding that a defendant is not liable for a plaintiff's emotional distress without a showing that the distress inflicted was "extreme or severe"); *Hudson v. Zenith Engraving Co., Inc.*, 273 S.C. 766, 259 S.E.2d 812 (1979) ("In order to prevail in a tortious action in which the sole damages alleged are those of mental anguish, plaintiff must show that the conduct on the part of defendant was extreme and outrageous, causing distress that is of an extreme or severe nature." (citing *Rhodes*, 268 S.C. at 302, 233 S.E.2d at 105 *and* Restatement (Second) of Torts § 46 (1965))).

[2] *See supra* note 1.

> (3) the actions of the defendant caused plaintiff's emotional distress; and
>
> (4) the emotional distress suffered by the plaintiff was 'severe' such that 'no reasonable man could be expected to endure it.'

Id. at 162, 276 S.E.2d at 778 (quoting Restatement (Second) of Torts § 46, cmts. d, i, and j) (citations omitted). Thus, in *Ford*, the Court expressly ruled that a party could recover damages for emotional distress in the absence of physical impact or physical injury. *Id.*

Recognition of this tort, however, did not come without qualification. In *Ford*, the Court emphasized the heightened burden of proof articulated in the second and fourth elements of the tort, insisting that in order to prevail in a tort action alleging damages for purely mental anguish, the plaintiff must show both that the conduct on the part of the defendant was "extreme and outrageous," and that the conduct caused distress of an "extreme or severe nature." *Id*. at 161, 276 S.E.2d at 778 (quoting *Hudson*, 273 S.C. at 770, 259 S.E.2d at 814). Chief Justice Littlejohn, writing for the Court, further reasoned that "where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious." *Id.* at 166, 276 S.E.2d at 780 (citing William L. Prosser, *The Law of Torts* § 12 (4th ed. 1971)). In this vein, our courts have since noted "the widespread reluctance of courts to permit the tort of outrage to become a panacea for wounded feelings rather than reprehensible conduct." *Todd v. S. C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct. App. 1984), *rev'd on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985).

The threshold issue raised by the parties in this case is whether a court must consider all four elements in a claim for intentional infliction of emotional distress when ruling on a summary judgment motion. Hansson contends that the court of appeals properly ended its summary judgment analysis with the determination that reasonable minds could differ as to whether Petitioners' conduct was "extreme and outrageous." Thus, Hansson argues that the court correctly found that the trial court's grant of summary

judgment was inappropriate. Hansson's argument primarily relies on prior pronouncements from this Court that in reviewing summary judgment for a claim of intentional infliction of emotional distress, "it is for the Court's determination whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons might differ is the question one for the jury." *Holtzscheiter v. Thomson Newspapers*, 306 S.C. 297, 302, 411 S.E.2d 664, 666 (1991) (quoting *Todd*, 283 S.C. at 167, 321 S.E.2d at 609). Although Hansson is correct in his recitation of precedent, his argument does not reach an accurate conclusion.

By narrowly construing the language used by the Court, Hansson misinterprets this Court's pronouncement to mean that a court need only make a determination as to the extreme and outrageous conduct of the defendant – the second element of the tort of intentional infliction of emotional distress – when ruling on a motion for summary judgment. Such a literal interpretation, however, stands in direct contradiction to the rules governing summary judgment. This Court has established that "[t]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." *Baughman v. Amer. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). Therefore, on a defendant's motion for summary judgment such as the one at issue here, a court cannot properly deny the motion after only finding that a genuine issue of material fact exists as to one element of the plaintiff's claim; rather, under *Baughman*, the court must determine that a genuine issue of material fact exists for each essential element of the plaintiff's claim. Accordingly, we hold that when ruling on a summary judgment motion, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim for intentional infliction of emotional distress.

Applying this principle to the instant case, we further hold that after finding that reasonable minds could differ as to whether Petitioners' alleged conduct was sufficiently "outrageous" to establish a claim for intentional

infliction of emotional distress, the court of appeals erred by not proceeding with a similar inquiry into whether Hansson's resulting emotional distress was sufficiently "severe." In order to prevent claims for intentional infliction of emotional distress from becoming "a panacea for wounded feelings rather than reprehensible conduct," *Todd*, 283 S.C. at 171, 321 S.E.2d at 611, the court plays a significant gatekeeping role in analyzing a defendant's motion for summary judgment. *See* Restatement (Second) of Torts § 46 cmt. j ("It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed."). For this reason, our analysis must begin in large part where the analysis by the court of appeals ended.

Under the heightened standard of proof for emotional distress claims emphasized in *Ford*, a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions. To permit a plaintiff to legitimately state a cause of action by simply alleging, "I suffered emotional distress" would be irreconcilable with this Court's development of the law in this area. In the words of Justice Littlejohn, the court must look for something "more" – in the form of third party witness testimony and other corroborating evidence – in order to make a prima facie showing of "severe" emotional distress.[3] *See also Rhodes*, 268 S.C. at 302,

[3] *Ford's* emphasis on the plaintiff's heightened standard of proof echoes the position of the Restatment (Second) of Torts, upon which this Court relied in adopting the rule of liability for intentional infliction of emotional distress. According to the Restatement:

> Emotional distress . . . includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.

233 S.E.2d at 105 (upholding the trial court's grant of judgment notwithstanding the verdict to the defendant in a plaintiff's claim for emotional distress because the plaintiff failed to show that the defendant's conduct was "unreasonable or abusive, nor that [the plaintiff]'s emotional upset was other than transient or trivial").[4]

Hansson's alleged emotional damages resulting from Petitioners' conduct rested on his testimony that he lost sleep at night and that he visited a dentist who told him he appeared to be grinding his teeth in his sleep. He further testified that his condition necessitated a second trip to the dentist and "a couple hundred dollars" for fillings and a tooth cap. Hansson admitted that he neither visited nor received treatment or medication from any other physician or counselor. Additionally, Hansson stated that his coworkers' conduct did not cause him to lose any time from work. Hansson also asserted that the conduct did not affect his relationship with his wife, or affect his ability to perform his job. In fact, Hansson testified that he was generally satisfied with his employment and that, on a few occasions, he reciprocated Petitioners' jokes with sexually-oriented jokes of his own.

Even when considered in the light most favorable to Hansson, Hansson failed to provide any legally sufficient evidence in this case to show that his resulting emotional distress was "severe" within the contemplation of this Court's mental anguish jurisprudence. Assuming, without deciding, that Petitioners' conduct was sufficiently "outrageous" to come within the ambit of intentional infliction of emotional distress, Hansson's passing references to fairly ordinary symptoms are nonetheless insufficient to create a jury question on the damages element of his claim for intentional infliction of

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Restatement (Second) of Torts § 46 cmt. j.

[4] Although this Court decided *Rhodes* before expressly recognizing the tort of intentional infliction of emotional distress, the Court cited to *Rhodes* with approval when it created liability for purely emotional damages in South Carolina. *See Ford*, 276 S.C. at 161, 276 S.E.2d at 778.

emotional distress. Accordingly, we hold that the court of appeals erred in reversing the trial court's grant of summary judgment to Petitioners.

CONCLUSION

For the foregoing reasons, we hold that Hansson failed to establish a genuine issue of material fact that he suffered severe emotional distress as a result of Petitioners' conduct. Accordingly, we reverse the decision of the court of appeals and reinstate the trial court's grant of summary judgment to Petitioners on Hansson's action for intentional infliction of emotional distress.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Retired Lee County Magistrate Davis A. White, Respondent.

Opinion No. 26370
Submitted July 2, 2007 - Filed August 13, 2007

PUBLIC REPRIMAND

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

Jacob H. Jennings, of Bishopville, for Respondent.

PER CURIAM: The Office of Disciplinary Counsel and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 502, SCACR, in which respondent admits misconduct and consents to the imposition of a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

On March 11, 2003, a State Transport Police officer issued two tickets to the driver of a truck owned by Lee County. The officer reported to Disciplinary Counsel that respondent asked for help regarding the tickets, explaining that Lee County was a poor county. The officer declined to help

the county because he frequently received complaints from private carriers that government trucks ran overweight or without tarps, an offense for which private carriers routinely would be cited. According to the officer, respondent then called the county maintenance department supervisor and advised him to make sure all drivers knew to put tarps on their loads. The county supervisor assured respondent every driver would be briefed, and it would not happen again. Respondent again asked the officer for help on the tickets, and the officer agreed. The tickets were marked to indicate that the defendant appeared, a trial was held, and the verdict was not guilty.[1] An employee in respondent's office then signed respondent's name in a box captioned "certified correct."

Respondent informed Disciplinary Counsel he recalled being contacted by the driver and the driver's supervisor about receiving help on the tickets. According to respondent, he remembered asking a State Transport Police supervisor for help regarding the tickets at a summary court seminar. The police supervisor indicated he could help with the tickets if the driver to whom the tickets were issued attended a training class. Respondent contended the tickets were marked not guilty by the officer before the officer arrived for court, and he assumed this was because the driver attended the class. Respondent admitted his employee acted on his behalf in signing the ticket, notwithstanding the fact that at least some information was incorrect, but maintained this had been the common practice in his court.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should maintain high standards of conduct and should personally observe those standards); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2B (judge shall not

[1] Apparently, this is the common practice of marking tickets when police elect not to prosecute a ticket because there is no option on the ticket to indicate that the case was *nol prossed*.

allow family, social, political or other relationships to influence the judge's judicial conduct or judgment); Canon 3 (judge shall perform the duties of the judicial office impartially and diligently); Canon 3B(2) (judge shall be faithful to the law and maintain professional competence in it); Canon 3B(7) (judge shall not initiate *ex parte* communications); and Canon 3B(8) (judge shall dispose of all judicial matters fairly).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gloria Jean Young, as Personal Representative of the Estate of Bryant L. Armstrong, Deceased, Respondent,

v.

South Carolina Department of Disabilities and Special Needs and Fairfield/Newberry Disabilities Special Needs Board, Appellants.

Appeal From Fairfield County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26371
Heard June 19, 2007 – Filed August 13, 2007

REVERSED AND REMANDED

Andrew F. Lindemann, William H. Davidson, II, and Robert D. Garfield, all of Davidson, Morrison & Lindemann, P.A., of Columbia; Ruskin C. Foster and Hoover C. Blanton, both of McCutchen Blanton Johnson & Barnette, LLP, of Columbia, for Appellants.

John K. Koon, of Koon & Cook, P.A., of Winnsboro; and William B. Salley, Jr., of Salley Law Firm, of Lexington, for Respondent.

JUSTICE BURNETT: Gloria Jean Young (Respondent), as personal representative of the Estate of Bryant L. Armstrong, brought a wrongful death and survival action against the South Carolina Department of Disabilities and Special Needs (DDSN) and the Fairfield/Newberry Disabilities Special Needs Board (Board). The trial court granted Respondent's motion for partial summary judgment. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

The decedent, Respondent's nine-year-old son, was severely disabled by cerebral palsy. He lived at home and received services from Pam Gaither, the Board's service coordinator. After noticing complications with the decedent's semi-electric hospital bed, Respondent reported her concerns to Gaither and obtained a prescription for another bed. Before the new bed arrived, Gaither attempted to secure the existing bed. On July 13, 2000, the decedent suffocated to death in his bed.

On January 14, 2002, Respondent filed a wrongful death and survival action against DDSN. DDSN asserted a general denial as well as sovereign immunity under the South Carolina Tort Claims Act.[1] On September 20, 2002, after learning Gaither is not a direct employee of DDSN, but of the Board, Respondent filed an amended complaint which joined the Board as an additional party-defendant. The Board asserted a statute of limitations defense.

DDSN and the Board moved for summary judgment. DDSN moved on the following bases: (1) a state agency cannot be held liable under the Tort Claims Act for the acts or omission of Gaither because

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[1] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2006)

Gaither is not its employee; (2) DDSN cannot be liable for the negligence of an independent contractor or its employees; (3) the doctrines of apparent agency and non-delegable duty do not apply; and (4) DDSN did not breach any duty of care owed to the decedent. The Board moved on the basis of the statute of limitations.

Respondent made a cross-motion for partial summary judgment, seeking a ruling as a matter of law that Gaither is in a master-servant relationship with both DDSN and the Board, and the statute of limitations does not prevent the addition of the Board as a party. Respondent also sought summary judgment on the issue of apparent agency, claiming DDSN held out to the public that DDSN and the Board are interrelated such that DDSN has created an apparent agency relationship with the Board and consequently with Gaither. Further, Respondent claimed DDSN has a duty to provide services to the community which is a non-delegable duty. Finally, Respondent filed a motion for sanctions against DDSN's counsel for evasive and incomplete discovery responses, requesting the trial court estop DDSN from denying Gaither is its employee.

The trial court granted Respondent's motion for partial summary judgment. Specifically, the trial court found: (1) the Board and Gaither are servants of DDSN and DDSN is estopped from denying the same; (2) DDSN is liable for torts committed by the Board and Gaither under apparent agency principles and the doctrine of non-delegable duty; (3) and the statute of limitations does not bar Respondent's claim against the Board under the relation back theory. Finally, the trial court found there is a genuine issue of material fact as to whether the Board breached the standard of care and ordered that issue to be presented to the jury.

DDSN and the Board filed motions to alter or amend pursuant to Rule 59(e), SCRCP. Following a hearing, the trial court issued an order which reiterated its prior findings and, in effect, denied the 59(e) motions. DDSN and the Board filed this appeal, and we certified the case for review from the Court of Appeals pursuant to Rule 204(b), SCACR.

STANDARD OF REVIEW

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006). A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005). The appellate court, like the trial court, must view all ambiguities, conclusions, and all inferences arising in and from the evidence in a light most favorable to the non-moving party below. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001).

ISSUES

I. Did the trial court err in finding as a matter of law the Board and Gaither are employees or servants of DDSN?

II. Did the trial court err in finding DDSN is liable for Gaither's torts based upon apparent agency principles or the doctrine of non-delegable duty?

III. Did the trial court abuse its discretion in sanctioning DDSN by estopping DDSN from denying an employment relationship with Gaither and in barring DDSN from raising an "improper defendant" defense?

IV. Did the trial court err in ruling the statute of limitations did not bar Respondent's claim against the Board?

LAW/ANALYSIS

I. Master-Servant Relationship

DDSN argues the trial court erred in finding as a matter of law the Board and Gaither are employees or servants of DDSN. Based on an analysis of S.C. Code Ann. §§ 44-20-20 and -375 to -385 (2002), we agree.

Sections 44-20-20 and -375 establish and recognize a statewide network of local boards of disabilities and special needs. Section 44-20-385 describes the powers and duties of local boards. It describes local boards as:

> [T]he administrative, planning, coordinating, and service delivery body for county disabilities and special needs services funded in whole or in part by state appropriations to the department or funded from other sources under the department's control. It is a body corporate in deed and in law with all the powers incident to corporation ….

Also, § 44-20-385(5) states:

> [Local boards] shall employ personnel and expend its budget for the direct delivery of services or contract with those service vendors necessary to carry out the county mental retardation, related disabilities, head injuries, and spinal cord injuries services program ….

Ordinances promulgated by Fairfield and Newberry Counties similarly grant the Board the authority to employ personnel. The plain language of the statutes and ordinances establishes the Board as a separate entity from DDSN and grants the Board the authority to hire employees. See Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) ("[W]here a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself.").

The trial court's order made no reference to the statutes, focusing instead on the four-factor test used to determine whether a person is an employee of a particular entity. Under that test, the court considers (1) who has the right to control the person; (2) who pays the person; (3) who furnishes the person with equipment; and (4) who has the right to fire the person. Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 329, 566 S.E.2d 536, 543 (2002). In determining the Board and Gaither are servants of DDSN, the trial court focused primarily on the amount of control DDSN exercises over the Board, noting specifically the guidelines followed by Gaither in exercising her duties as a service coordinator were promulgated entirely and directly by DDSN. The trial court also referred to the degree of supervision DDSN exercised over the Board, noting DDSN is most often the final decision-maker and recognizing documents entitled "Service Coordination Practices," which require compliance with DDSN policies and procedures by all service coordinators.

While there is evidence DDSN exercised control over Gaither, there is also evidence Gaither was hired by the Board and received her wages from the Board. Whether a master-servant relationship existed between DDSN and the Board and Gaither is a question for the jury. Viewing the evidence in the light most favorable to the non-moving party, it was error for the trial court to determine as a matter of law Gaither and the Board are servants of DDSN.

II. Agency and Non-delegable Duty

DDSN argues the trial court erred in ruling as a matter of law the Board and Gaither are agents of DDSN based on apparent agency principles and in finding DDSN is liable for torts committed by Gaither or other employees of the Board based on the doctrine of non-delegable duty. We agree.

"The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations." Moore v. North Am. Van Lines, 310 S.C. 236, 239,

423 S.E.2d 116, 118 (1992). In finding DDSN held out the Board and Gaither as its agents, the trial court relied on the definition of apparent agency stated in Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 51, 533 S.E.2d 312, 322 (2000):

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

The trial court solely relied on DDSN's description of its relationship with local boards on its website in finding Gaither and the Board are servants of DDSN based on apparent agency principles because DDSN holds itself out to the public as providing a service and, in turn, the public looks directly to DDSN for care, reasonably believing any caseworker providing service is an employee of DDSN.

Viewing the evidence in the light most favorable to Appellants, assuming there is evidence that DDSN made representations supporting a finding of an agency relationship between DDSN and the Board, there is no evidence in the record Respondent actually relied on representations made by DDSN. The trial court, therefore, erred because the record is devoid of any evidence to support the conclusion DDSN has an apparent agency relationship with the Board and Gaither.

DDSN also argues the trial court erred in finding DDSN liable for torts committed by the Board and Gaither under the doctrine of non-delegable duty. The trial court held DDSN has been entrusted with important duties and cannot delegate those duties. However, the duties exercised by the Board derive directly from the statutory scheme enacted by the General Assembly. Under S.C. Code Ann. §§ 44-20-20 and -375 to -385, the Board has been established as a separate entity with powers and duties separate from DDSN. Accordingly, the doctrine of non-delegable duty does not apply.

CONCLUSION

The trial court erred in determining an apparent agency relationship existed between DDSN, the Board, and Gaither and in conferring liability on DDSN under the doctrine of non-delegable duty. Further, based on the record and viewing the evidence in the light most favorable to Appellants, we find the trial court erred in determining as a matter of law the Board and Gaither are servants of DDSN. Appellants presented sufficient evidence to create a jury question as to whether a master-servant relationship existed. Therefore, we reverse the trial court's grant of partial summary judgment to Respondent and remand for further proceedings consistent with this opinion. Our disposition of these issues makes it unnecessary to address Appellant's remaining issues. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

REVERSED AND REMANDED.

TOAL, C.J., MOORE and WALLER, JJ., concur. PLEICONES, J., concurring in part, dissenting in part in a separate opinion.

JUSTICE PLEICONES: Respondent alleged her child died as the result of Pam Gaither's negligence. She brought a timely wrongful death and survival action against appellant South Carolina Department of Disabilities and Special Needs (State Agency). After the statute of limitations expired, respondent was permitted to amend her complaint under Rule 15(c), SCRCP, to add appellant Fairfield/Newberry Disabilities Special Needs Board (Local Board) as a defendant.

The circuit court filed an order granting summary judgment under Rule 56(d), SCRCP, holding:

1) Gaither and Local Board are employees of State Agency;

2) Gaither and Local Board are independent contractors of State Board, which is liable for Gaither's negligence because the State Board is either Gaither's "ostensible principal" or because State Board owes a non-delegable duty to respondent;

3) State Agency is estopped from arguing that Local Board and Gaither are not its independent contractors;

4) Respondent's amended complaint adding Local Board as a defendant relates back to the original complaint under Rule 15(c), SCRCP; and

5) Whether State Agency, Local Board, and/or Gaither breached the applicable standard of care is a jury issue.

Local Board and State Agency appealed.

Local Board raises only one issue: whether the circuit court erred in permitting respondent to add it as a defendant after the expiration of

the statute of limitations. Unlike the majority, I feel that we must address this issue and would reverse. Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000). State Agency raises a number of issues, which I have addressed below.

A. Employer/Employee Relationship

The circuit court concluded that Gaither and Local Board are employees of State Agency by applying a four-part test traditionally used to distinguish an employee/employer (master/servant) relationship from a principal/independent contractor relationship in the context of workers' compensation cases. E.g., Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002). In my opinion, where as here the legislature has created governmental entities and defined their duties and responsibilities, we should examine the applicable statutes to determine the nature of their relationship. Under these circumstances, there is no need to resort to the workers' compensation test.

State Agency was created by the "South Carolina Mental Retardation, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act" (the Act). S.C. Code Ann. § 44-20-240 (2002). It is authorized to coordinate and oversee programs, and to contract with other state and local agencies to provide services and programs, § 44-20-250, and to employ its own staff. § 44-20-220. The Act provides for the creation of, and continuation of, county-based special needs and disabilities boards, § 44-20-375. These local boards are "public entities," § 44-20-375(D), and, among other things, are authorized to employ personnel or contract with service vendors. § 44-20-385(5).

In my opinion, there is no evidence in the record to support the trial court's holding that Local Board is an employee of the State Agency. Moreover, I can find nothing to support the conclusion that Gaither was an employee of State Agency as opposed to Local Board. To the extent the majority reverses the order granting summary judgment to respondent on her claim that Gaither and Local Board are the State Board's employees, I concur.

B. Agency

I agree with the majority that the finding of a principal-agent relationship between State Agency and/or Local Board or Gaither must be reversed as there is simply no evidence respondent relied upon any representations by State Agency.

C. Non-delegable Duty

In my opinion, the trial court erred in granting respondent summary judgment and holding that State Agency was vicariously liable for Gaither's alleged negligence. Unlike the majority, however, I would not hold that there is no evidence of such a duty, but would instead hold that there is a material question of fact whether such a duty may exist. Compare Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (2006) (State Agency may be liable for negligent supervision by third party). I would therefore reverse the summary judgment ruling with the understanding that the trial court may conclude upon remand that there is such a duty.

D. Estoppel

As a sanction for perceived discovery abuses by State Agency the trial judge held State Agency was estopped from denying Local Board and Gaither are its independent contractors, a ruling which State Agency has appealed. Unlike the majority, I believe that we must address the issue now. If we leave it in effect, State Agency's liability will be established by estoppel. It then matters not that we have reversed the principal-agency holding, or the employer-employee/independent contractor-principal holding, or that we remain unconvinced at this juncture that there exists a non-delegable duty. For this reason, I would address the estoppel ruling, which I conclude must be reversed.

In estopping State Agency, the trial court relied on Rule 37, SCRCP. Specifically, the court cites Rule 37(a)(3) for the proposition that "an evasive or incomplete answer is to be treated as a failure to

answer," finds State Agency's discovery responses were evasive and incomplete, and estops the Agency as a sanction, citing Rule 37. As State Agency points out, however, the first clause of Rule 37(a)(3) provides "For purposes of this subdivision," thereby limiting its reach to situations where a party may move for an order compelling discovery [Rule 37(a)], and not affecting these situations in which a court may impose discretionary sanctions [Rule 37(b)]. I make no judgment whether State Agency's discovery conduct was appropriate, but would merely hold that the trial judge cannot rely upon Rule 37(a)(3) to estop State Agency under Rule 37(b).

E. Improper Defendant

The circuit court also held that State Agency waived its right to allege it was not the proper defendant because the defense of "improper defendant" is an affirmative defense under Rule 8(c), SCRCP, which the Agency failed to plead and thereby waived. I agree with State Agency that there is no such "affirmative defense:" it is the plaintiff's burden to prove her case against the defendant, not the defendant's obligation to prove he is not the proper party. I would reverse the order to the extent it holds State Agency may not deny that it may be liable for Gaither's alleged negligence.

CONCLUSION

For the reasons given above, I concur in part and dissent in part.

The Supreme Court of South Carolina

In the Matter of Michael T. Jordan, Respondent.

ORDER

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

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

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

s/ James E. Moore J.
FOR THE COURT

Greenwood, South Carolina

August 7, 2007

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

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O R D E R

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,[1] documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

[1] See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:[2]

> 1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
>
> 2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.

[2] This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.

4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only

use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

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 13, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark Nash, Joel Kennedy, David Prosser, Denise Prosser and Jerry Stevens, Appellants,

v.

Tindall Corporation, formerly Tindall Concrete Products, Inc., Defendants.

Joyce Million, Appellant,

v.

Tindall Corporation, formerly Tindall Concrete Products, Inc., Respondent.

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 4284
Submitted June 1, 2007 – Filed August 2, 2007

AFFIRMED

John S. Nichols and Mark D. Chappell, both of Columbia, for Appellants.

Norman W. Lambert, of Greenville, for Respondent.

SHORT, J.: Mark Nash, Joel Kennedy, David Prosser, Denise Prosser, Jerry Stevens, and Joyce Million (collectively Plaintiffs) appeal the trial court's grant of summary judgment to Tindall Corporation. Plaintiffs argue the trial court erred in applying North Carolina's statute of repose and holding as an alternative sustaining ground that Plaintiffs' claims for willful and wanton conduct and gross negligence were barred by the doctrines of res judicata and collateral estoppel. We affirm.[1]

FACTS

Tindall designed prestressed concreted double tees, some of which were used to support the pedestrian footbridge at Lowe's Motor Speedway, formerly Charlotte Motor Speedway, in North Carolina. In September 1995, the double tees were erected at the Speedway.[2] On May 20, 2000, the pedestrian footbridge collapsed.

In North Carolina, the cases involving the walkway collapse were designated as exceptional civil cases and assigned to Judge Erwin Spainhour. The judge managed these cases and heard selected cases. In an order dated October 29, 2002, the judge adopted previous rulings "[i]n the interest of judicial economy and in anticipation of multiple duplicative motions being filed in various pending cases." The order adopted a summary judgment order and a partial summary judgment order involving some North Carolina plaintiffs, who are not involved in this action. As part of this order the judge granted summary judgment on plaintiffs' punitive damages claims against Tindall.

Million brought an action in North Carolina on or about May 14, 2003 and in South Carolina on or about May 20, 2003. The remaining Plaintiffs brought their actions in North Carolina on or about May 15, 2003 and in

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.
[2] Plaintiffs allege the double tees were manufactured in South Carolina.

South Carolina on or about May 20, 2003. North Carolina dismissed Plaintiffs' claims with prejudice on September 19, 2003.

In an order dated March 7, 2005, the trial court in South Carolina granted summary judgment to Tindall after applying North Carolina's statute of repose and holding Plaintiffs' claims were time barred. As an additional sustaining ground, the trial court held Plaintiffs' claims for gross negligence and willful and wanton conduct were barred by res judicata and collateral estoppel. This appeal follows.

STANDARD OF REVIEW

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (S.C.,1991) (citing Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995) (citing Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991)).

LAW/ANALYSIS

I. Choice of Law

Plaintiffs argue that South Carolina law, not North Carolina law, should be applied in this case. We disagree.

"Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the lex loci delicti, the law of the state in which the injury occurred." Boone v. Boone, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001). "Procedural matters are to be determined in accordance with the law of South Carolina, the lex fori." McDaniel v. McDaniel, 243 S.C. 286, 289, 133 S.E.2d 809, 811 (1963). Lex fori refers to

the law of the forum. Black's Law Dictionary 921 (7th ed. 1999). Therefore, whether a statute of repose is a substantive or procedural matter is the deciding factor in what law applies.

Plaintiffs dispute the conclusion that South Carolina law requires the application of North Carolina law in this case by arguing this is a novel issue, alleging that prior mention of this issue in South Carolina case law is merely dicta, and directing the court to other jurisdictions for guidance. We disagree.

In Langley v. Pierce, 313 S.C. 401, 402, 438 S.E.2d 242, 242 (1993), the plaintiff sued his former doctor for misdiagnosing two removed lesions as benign between 1979 and 1980. This misdiagnosis was discovered in 1990, when a third lesion was removed and diagnosed as malignant. Id. Between 1984 and when the suit was brought, the plaintiff lived in Florida. Id. The question then became if the plaintiff's continued absence from South Carolina tolled the six year statute of repose on a medical malpractice case. Id.

In determining whether the statute of repose was tolled, the South Carolina Supreme Court explored whether the statute of repose is substantive or procedural and distinguished statute of repose and statutes of limitation. Id. at 403-04, 438 S.E.2d at 243. The court stated, "[a] statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." Id. at 404, 438 S.E.2d at 243 (emphasis added). The court in Langley additionally declared "[a] statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation." Id.; see also Florence County Sch. Dist. v. Interkal, Inc., 348 S.C. 446, 453, 559 S.E.2d 866, 869 (Ct. App. 2002) (the court distinguished statute of repose from statutes of limitation, determining that a statute of repose involves a substantive right while citing Langley).

Plaintiff argues the courts' treatment of statute of repose in Langley and Interkal was dicta, and therefore, this court should look to other jurisdictions for guidance. Judicial dicta is "not essential to the decision." Black's Law

Dictionary 465 (7th ed. 1999). Dicta or, as it is also known, dictum "is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision." 21 C.J.S. Courts § 227 (2006).

The Alabama and Connecticut case law advanced by Plaintiffs are interesting but do not constitute persuasive precedent for this court. In Connecticut, statute of repose is not per se substantive or procedural; instead, the court examines the nature of the underlying right. Baxter v. Sturm, Ruger and Co., Inc., 644 A.2d 1297, 1302 (Conn. 1994). In Alabama, the court examines the out of state statute to determine if it affects procedural or substantive rights. Etheredge v. Genie Industries, Inc., 632 So.2d 1324, 1326 (Ala. 1994).

The courts' holdings in Langley and Interkal depended on determining the type of right created by statute of repose and distinguishing statute of repose from statutes of limitation. Therefore, the clear guidance provided by the South Carolina Supreme Court and this court was not dicta and negates any need to examine other jurisdictions' treatment of this issue. The precedent created in Langley and acknowledged in Interkal illustrates that whether statute of repose is a substantive right is not a novel question.

II. Public Policy

Plaintiffs assert that the trial court erred in not applying the public policy exception to lex loci deliciti. We disagree.

"[U]nder the 'public policy exception,' the Court will not apply foreign law if it violates the public policy of South Carolina." Boone v. Boone, 345 S.C. 8, 14, 546 S.E.2d 191, 193 (2001). "[F]oreign law may not be given effect in this State if 'it is against good morals or natural justice.'" Id. at 13, 546 S.E.2d at 193. Examples of cases against good morals and natural justice are "prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquors, and others." Dawkins, 306 S.C. at 393, 412 S.E.2d at 408. "[T]he fact that the law of two states may differ does not necessarily imply

that the law of one state violates the public policy of the other." Boone, 345 S.C. 13-14, 546 S.E.2d at 408.

In Langley, the court discussed the purpose of statute of repose. "Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." 313 S.C. at 404, 438 S.E.2d at 244. The court in Langley further explained:

> Society benefits when claims and causes are laid to rest after having been viable for [a] reasonable time. When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission. This is not only for the convenience of society but also due to necessity. At that point, society is secure and stable.

Id.

South Carolina's statute of repose for actions alleging defective or unsafe conditions of an improvement to real property bars actions brought more than eight years after substantial completion of the improvement. S.C. Code Ann. § 15-3-640 (Supp. 2006). Conversely, North Carolina's equivalent statute of repose bars claims brought more than six years after substantial completion of the improvement. N.C. Gen. Stat. § 1-50(a)(5) (Supp. 2006).

Public policy is not violated by the two year difference in South Carolina and North Carolina's statutes of repose. Notably, Plaintiffs' attempt to bring this case in South Carolina constitutes forum shopping, an act which violates public policy.

Accordingly, the trial court properly applied North Carolina law and dismissed the case under summary judgment after finding the claims were time barred by the North Carolina statute of repose. Based on this conclusion, we need not address any remaining issues. See Rule 220(c), SCRCP; Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

CONCLUSION

The trial court did not err in applying North Carolina's statute of repose, and thereby, granting summary judgment to Tindall. Accordingly, the trial court's decision is

AFFIRMED.

STILWELL and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Danny Whitten, Appellant.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4285
Heard June 5, 2007 – Filed August 3, 2007

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek and Assistant Appellate Defender LaNelle C. Durant, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Shawn L. Reeves, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

GOOLSBY, J.: The question raised by appellant Danny Whitten is whether the trial court erred in refusing to charge assault and battery of a high and aggravated nature (ABHAN) as a lesser-included offense of assault with intent to commit criminal sexual conduct (ACSC) in the third degree.[1] A jury found Whitten guilty of the latter offense and the trial judge sentenced him to a ten-year sentence of imprisonment. We affirm.

The victim, a woman seventy-six-years-old at the time of trial, allowed Whitten, her thirty-year-old nephew, to live with her in her trailer home. The victim testified that on November 25, 2004, while she was watching television late that night, Whitten came home drunk and dragged or carried her into his bedroom. Whitten allegedly placed her on his bed, pulled off her blue jeans, removed all of his clothes but his shirt, crawled on top of the victim, and attempted to penetrate the victim as she crossed her legs and held them tight. The victim continued to resist and told Whitten repeatedly, "let me go." The victim's grandnephew, who had arrived at the trailer to watch television with Whitten, overheard the remark when he came to Whitten's bedroom window after receiving no response when he knocked on the front door of the trailer. Whitten did not release the victim until her grandnephew walked into the home. When he entered the trailer, the grandnephew saw the victim in "the hallway with no pants on" and Whitten behind her "trying to put his on." Whitten denied anything "was going on"; however, his aunt, "kept saying," while crying, that Whitten had tried to rape her.

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[1] A person is guilty of criminal sexual conduct in the third degree, South Carolina Code Annotated section 16-3-654(1)(a) (2003) provides, "if the actor engages in sexual battery with the victim and if . . . [t]he actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances." Section 16-3-651(h) (2003) defines a sexual battery as including "sexual intercourse." Under section 16-3-656 (2003) an "[a]ssault with intent to commit criminal sexual conduct [as] described in [section 16-3-654(1)(a)] shall be punishable as if the criminal sexual conduct was committed." (emphasis added).

For his part, Whitten testified he bought five cans of malt liquor on his way home from work but, before going home, joined a friend to "drink some Bud Lights . . . for a while"; Whitten's aunt joined him in drinking that evening upon his return home; Whitten and his aunt had had sex on two prior occasions; and she was willing to have sex again with him that night; Whitten and his aunt were about to have sex when they were surprised by her grandnephew's knock on the door; Whitten became scared at the thought of others finding out about his sexual relationship with his aunt and briefly held her down; he "let go of" his aunt when "she started hollering"; and he denied to the police the accusation that he had raped his aunt.

Whitten asked for an instruction on ABHAN as a lesser-included offense of ACSC. Whitten's counsel explained her request this way: "I think if the jury . . . believe[s] that Mr. Whitten did not assault [his aunt] with intent to commit criminal sexual conduct . . . that it would be appropriate for a lesser-included charge of a high and aggravated nature." The trial judge denied the request, noting the evidence only supported a verdict of "guilty" or "not guilty." On appeal, Whitten argues the trial court erred in refusing to charge ABHAN.

"ABHAN is a lesser[-]included offense of ACSC."[2] "ABHAN is the unlawful act of violent injury to another accompanied by circumstances of aggravation."[3] "Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority."[4]

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[2] State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729-30 (2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

[3] State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516 (2000).

[4] Id. at 274, 531 S.E.2d at 516-17.

"A trial judge must charge the jury on a lesser-included offense if there is any evidence from which it could be inferred that the defendant committed the lesser rather than the greater offense."[5]

Our review of the record does not reveal any evidence that would support a conviction for the lesser offense of ABHAN, at least during the time relevant to the allegations contained in the indictment. The only evidence that could possibly support an ABHAN instruction allegedly occurred after the sexual assault took place, that is, when Whitten heard the grandnephew come into the mobile home and Whitten held the victim to the bed.

The charge of third degree ACSC relates only to those acts committed by Whitten that preceded the grandnephew's coming into the mobile home, acts that Whitten claims were consensual in nature and the aunt claims were not. Significantly, the State did not charge Whitten with having committed ABHAN against his aunt after sexually assaulting her. Rather, the State focused entirely on the sexual assault that occurred before the other alleged assault took place. As such, the two events had no bearing upon one another and would thereby not entitle Whitten to an instruction on ABHAN as a lesser-included offense.

We do not overlook State v. White,[6] a case that neither the appellant nor the State cited in their respective briefs and a case this court later asked the parties to address. While the cases, admittedly, contain similar fact patterns, we are limited in this instance by appellate rules that allow us to consider only the precise question that was before the trial judge and that was ruled on by him or her. Here, Whitten's counsel never gave as a reason for the requested charge that Whitten's action in restraining his aunt after her

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[5] Magazine v. State, 361 S.C. 610, 618-19, 606 S.E.2d 761, 765 (2004).

[6] State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004).

grandnephew came upon the scene could serve as the basis for the requested charge.[7]

We therefore hold Whitten's claim that the victim consented to his attempt to have sexual relations with her did not reduce the offense to a lesser charge because, if the jury had found the victim consented, then in that event Whitten would have been entitled to an acquittal rather than to a conviction of another but lesser crime. To have allowed the jury, under the facts of this case, to consider the offense of ABHAN would have permitted the jury to have convicted him of an offense for which he had not been indicted.

AFFIRMED.

HEARN, C.J., and KITTREDGE, J. concur.

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[7] See Rule 20(b), SCRCrimP ("[T]he parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection.") (emphasis added); State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (holding a party cannot argue one ground at trial and argue an alternative ground on appeal); Leaphart v. Nat'l Sur. Co., 167 S.C. 327, 342, 166 S.E. 415, 421 (1932) ("It is not fair to a circuit judge to permit a party appealing to this court . . . to raise questions . . . not specifically raised before the circuit judge."); McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) (ruling that an objection should be "sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge."); Bellamy v. Payne, 304 S.C. 179, 182-84, 403 S.E.2d 326, 328 (Ct. App. 1991) (where the trial court refused to instruct the jury with the appellant's requested jury instructions, our court held the appellant's failure to distinctly state the grounds for her objections to the trial court precluded appellate review); see also 15 S.C. Juris. Appeal and Error § 81 (1992) (noting a party objecting to the trial court's refusal to give their requested jury instruction must distinctly state the grounds for the objection).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rita R. Brown, Respondent,

v.

David E. Brown, Appellant.

Appeal From Beaufort County
Jane D. Fender, Family Court Judge

Opinion No. 4286
Heard June 5, 2007 – Filed August 9, 2007

AFFIRMED AS MODIFIED

John S. Nichols, Ken H. Lester, of Columbia, for Appellant.

Peter L. Fuge, of Beaufort, for Respondent.

HEARN, C.J.: In this domestic action, David E. Brown (Husband) alleges the family court erred in finding that unallocated support payments were non-deductible to him and non-taxable to Rita R. Brown (Wife), and in ordering Husband to amend his tax returns, file a joint return with Wife, or compensate Wife for the tax consequences she suffered. We affirm as modified.

FACTS

The parties were married in May 1987. Wife instituted this action on November 13, 2003, seeking, inter alia, an award of temporary separate maintenance and support. In March, the family court entered a pendente lite order (the first order), which provided that "[t]his court will award unallocated family support to [Wife] . . . . [Husband] shall pay as unallocated family support the amount of $8,500.00 per month."

Approximately one year later, Wife filed a motion for additional temporary relief, requesting that the family court declare the unallocated support award non-taxable to Wife and non-deductible to Husband. Husband argued that according to the Internal Revenue Service, he was permitted to deduct the unallocated support payment, and he had done so in his tax return. After a hearing, the family court issued an order (second order) granting Wife's motion. The order provided:

> I know what I intended. It was and still is my intention that all pendente lite unallocated support that [Husband] was ordered to pay . . . is and shall be non-taxable to [Wife] and non-deductible to [Husband]. I have traditionally issued orders for unallocated support and when I do so, it is my intention that the unallocated support for the parties' family to be paid by [Husband] and non-taxable to [Wife] for state and federal income tax purposes. If it was to be taxable, I would have said it.

The family court also ordered Husband to either amend his tax returns to eliminate the 2004 deduction he claimed, to file a joint return with Wife, or to compensate Wife for the tax consequences of the unallocated support award. The family court denied Husband's subsequent Rule 59(e) motion. This appeal followed.[1]

STANDARD OF REVIEW

In appeals from the family court, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). In spite of this broad scope of review, we remain mindful that the family court judge saw and heard the witnesses and generally is in a better position to determine credibility. Id. The appellate court can, however, correct errors of law. E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992).

LAW/ANALYSIS

Husband argues the family court erred in holding the unallocated support payments were non-deductible to him and non-taxable to Wife. Specifically, Husband argues two errors by the family court. First, Husband alleges that the family court's first order awarding unallocated support allowed the amount to be deducted on his income tax returns. Second, he argues that the family court erred as a matter of law in holding that the unallocated support payments were non-deductible to him and non-taxable to Wife. We agree in part, disagree in part, and affirm as modified.

I.

Husband argues that an award of unallocated support is traditionally deductible by him as the supporting spouse and taxable to Wife as the supported spouse. Particularly, Husband contends that the family court's first

[1] Although Husband initially appealed from the denial of his post trial motion, this Court held the appeal in abeyance pursuant to Neville v. Neville, 278 S.C. 411, 297 S.E.2d 423 (1982), pending the issuance of the final order.

order awarding unallocated support to Wife was unambiguous, and therefore, allowed the amount to be deducted on his income tax returns. We agree.

The issue of the tax implications of an unallocated support award has been addressed in South Carolina in Delaney v. Delaney, 278 S.C. 55, 293 S.E.2d 304 (1982) and Beinor v. Beinor, 282 S.C. 181, 318 S.E.2d 269 (1984). In both cases, the supreme court cited approvingly the notion that by making the award unallocated, the amount is taxable to the supported spouse and non-taxable to the supporting spouse. The Delaney court, in reviewing an unallocated support award, noted:

> [The supporting spouse] has substantial income, [the supported spouse] has little or no income. Under these circumstances we believe shifting tax liability from the supporting spouse to the supported spouse which permits the supported spouse to net tangibly more child support and alimony because of the decrease in the supporting spouse's tax burden is good cause for non-allocation of child support and alimony.

Delaney, 278 S.C. at 56-57, 293 S.E.2d at 304-05. The Beinor court also cited this rationale, stating: "The trial judge awarded . . . unallocated support for the [supported spouse] and children. By making the award 'unallocated,' the amount is taxable to the [supported spouse] and non-taxable to the [supporting spouse]." Beinor, 282 S.C. at 183, 318 S.E.2d at 269-70. Accordingly, in South Carolina an unallocated award of support is traditionally taxable to the supported spouse and deductible to the supporting spouse.[2]

[2] Support for this South Carolina rule can also be found in Kean v. Commissioner of Internal Revenue, 407 F.3D 186 (3rd Cir. 2005), a case cited to this court by both Husband and Wife. In Kean, the third circuit, in addressing the tax consequences of an award of unallocated support, stated:

The family court's first order provided that "[t]his court will award unallocated family support to [Wife] . . . . [Husband] shall pay as unallocated family support the amount of $8,500.00 per month." This order made no reference whatsoever to the tax burdens of either Husband or Wife nor did it allocate the tax burdens in a manner different from the traditional rule found in Delaney and Beinor. Therefore, given the traditional treatment of the tax implications of an award of unallocated support, as well as the unambiguous language of the family court's order, Husband was justified in deducting the $8,500 in unallocated support from his 2004 individual tax return. Because

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> Where support payments are unallocated, as in this case, the entire amount is attributable to the [supported] spouse's income. Otherwise, we would be left with a situation in which the portion of the unallocated payment intended for the support of the [supported] spouse would be taxable to the [supporting] spouse. This treatment of support payments is not accidental, and can benefit families going through a divorce. . . . By ordering the payor spouse to make an unallocated support payment taxable in full to the payee spouse, the couple may be able to shift a greater portion of their collective income into a lower tax bracket. Consequently, an unallocated payment order not only frees the parents from restrictive court instructions that dictate who pays for what, but may allow the parties to enjoy a tax benefit at a time when they face increased expenses as they establish independent homes. This advantage would be lost by taxing all unallocated payments to the payor spouse.

Kean, 407 F.3d at 192-93.

we agree with Husband that the initial order was not ambiguous, it was error for the trial judge to make the second order retroactive.[3]

II.

The above holding, however, does not fully resolve this matter because the family court issued a second order addressing the respective tax burdens of each party.[4] Husband argues that the family court erred in holding the unallocated support payments were non-deductible to him and non-taxable to Wife in the second order. We disagree.

The South Carolina Code specifically allows a family court judge to allocate the intended tax consequences for support payments. It provides:

> The court may elect and determine the intended tax effect of the alimony and separate maintenance and support as provided by the Internal Revenue Code and any corresponding state tax provisions. The Family Court may allocate the right to claim dependency exemptions pursuant to the Internal Revenue Code and under corresponding state tax provisions and to require the execution and delivery

[3] As a result of our holding, Husband does not need to amend his tax returns to eliminate the 2004 deduction he claimed on his individual tax return, file a joint return with Wife for that year, or to compensate Wife for the tax consequences of the unallocated support award. Husband must only take the steps necessary to comply with the family court's second order that rendered the unallocated support payments taxable to him and non-taxable to Wife for the period from the issuance of the second order to the final decree of divorce that allocated the support in this matter.

[4] This second order resulted from Wife's motion for additional temporary relief that requested the family court declare the unallocated support award non-taxable to her and non-deductible to Husband.

> of all necessary documents and tax filings in connection with the exemption.

S.C. Code Ann. § 20-3-130 (F) (Supp. 2006). Additionally, the Internal Revenue Code includes in the definition of gross income an alimony or support payment only when the "the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction . . . ." 26 U.S.C.A. § 71(b)(1)(B).[5]

Both South Carolina law and the Internal Revenue Code provide the family court authority to allocate the intended tax consequences of the award of support for both Husband and Wife. Therefore, the family court has the authority to allocate the tax consequences, and we affirm the family court's decision in the second order to make the award of support non-deductible to Husband and non-taxable to Wife.[6]

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[5] The Internal Revenue Service has interpreted this section to allow courts to allocate the tax burden of an award of unallocated support. In answering how parties may alter the tax consequences of support payments to allow such payments to be excludible from the gross income of the supporting spouse and excludible in the income of the supported spouse, the IRS stated, "If the spouses are subject to temporary orders the designation of otherwise qualifying [support payments] as nondeductible [by the supporting spouse] and excludible [from the income of the supported spouse] must be made in the original or a subsequent temporary support order." 26 C.F.R. § 1.71-1T (2007).

[6] We find it necessary to provide clarification to the family court on this issue of unallocated support and the potential tax implications of such an award. The family court judge stated she traditionally issues orders for unallocated support, and it is always her intent that an award of unallocated support be non-deductible to the supporting spouse and non-taxable to the supported spouse. An award of unallocated support does not accomplish this tax consequence alone. See Delaney v. Delaney, 278 S.C. 55, 293 S.E.2d 304 (1982); Beinor v. Beinor, 282 S.C. 181, 318 S.E.2d 269 (1984). As we

CONCLUSION

For the foregoing reasons, the order of the family court is hereby.

AFFIRMED AS MODIFIED.

STILWELL, J., and CURETON, A.J., concur.

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have already noted, an unallocated award of support is traditionally taxable to the supported spouse and deductible to the supporting spouse. Therefore, absent the family court specifically allocating the tax implications among the parties, as allowed under section 20-3-130(F) of the South Carolina Code and 26 U.S.C.A. § 71, an unallocated award of support is deductible to the supporting spouse and taxable to the supported spouse. Absent such a finding, unallocated support would be deductible to the supporting spouse and taxable to the supported spouse. Here, the family court judge made a specific finding that this award was to be non-deductible to the Husband and non-taxable to the Wife; however, had the court not made that specific allocation, the unallocated award of support would have been deductible by Husband and taxable to Wife.