The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

AMENDED N O T I C E

IN THE MATTER OF THOMAS B. HALL, PETITIONER

Thomas B. Hall, who was definitely suspended from the practice of law for a period of nine months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, September 28, 2007, beginning at 10:00 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 21, 2007

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF JOHN A PINCELLI, PETITIONER

John A. Pincelli, who was definitely suspended from the practice of law for a period of two (2) years, retroactive to August 10, 2005, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, September 28, 2007, beginning at 12:00 Noon, in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 13, 2007

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

AMENDED N O T I C E

IN THE MATTER OF JEFFREY T. SPELL, PETITIONER

Jeffrey T. Spell, who was definitely suspended from the practice of law for a period of twelve months, retroactive to August 24, 2005, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, September 28, 2007, beginning at 11:00 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 21, 2007

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF MARK VICTOR EVANS, PETITIONER

On December 2, 1996, Petitioner was disbarred. In the Matter of Evans, 325 S.C. 23, 478 S.E.2d 686 (1996). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than October 15, 2007.

Columbia, South Carolina

August 16, 2007

The Supreme Court of South Carolina

RE: PROBATE COURT PILOT MEDIATION PROGRAM

ADMINISTRATIVE ORDER

Pursuant to the provisions to Article V, §4 of the South Carolina Constitution, the Court adopts the attached procedures and forms for the Probate Court Pilot Mediation Program. This Probate Court Pilot Mediation Program may be implemented by County Probate Courts. The program has the support of The Commission on Alternative Dispute Resolution, S.C. Probate Judges Association, S.C. Bar Probate Estate Planning and Trust Section Council, S.C. Bar Elder Law Committee and the S.C. Bar Alternative Dispute Resolution Section Council. This Order is effective immediately.

As soon as possible after January 1, 2009, the S.C. Commission on Alternative Dispute Resolution will issue an assessment of the pilot program to the Supreme Court.

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.

August 23, 2007

Columbia, South Carolina

PROCEDURES FOR THE PILOT PROGRAM FOR PROBATE COURT MEDIATION

1. General. These procedures and forms govern the conduct of the Pilot Program for Probate Court Mediation ("Pilot").

a. Unless otherwise specifically set forth in section 4 hereof, the default procedures and forms applicable to this Pilot are those set forth in Rules 1 - 10, Rules 14-20, and Appendices B and C of the Court-Annexed Alternative Dispute Resolution (ADR) Rules ("ADR Rules") as those Rules apply to South Carolina Circuit Courts in civil suits.

b. References in the ADR Rules to Circuit Courts, Circuit Court Judges, and Clerks of Court shall be construed for purposes of this Pilot as referring to Probate Courts, Probate Court Judges, and Probate Court staff, as applicable. ADR Forms may be re-titled to refer to the applicable county Probate Court.

c. Nothing in these procedures should be construed or interpreted to contradict or supersede provisions of the South Carolina Probate Code, the South Carolina Rules of Civil Procedure, or the South Carolina Rules of Probate Court.

d. In the event that an applicable procedure does not address a specific situation, Probate Court Judges are expected to exercise their discretion in a manner consistent with the purposes of these procedures and forms as set forth in the following section.

2. Background and Purposes. Probate Courts in South Carolina are unique in that they present a combination of traits not found elsewhere in this State's judicial system. As with our other courts, any case may confront a Probate Court Judge with the need to decide a broad range of factual, legal, and equitable issues. Unlike most of our other courts (with the notable exception of Family Courts), Probate Courts focus upon the best interests of those demographic elements of South Carolina's population least able to protect and express themselves including the very young, the very old, the incapacitated, and decedents. Further, Probate Court Judges are elected by the people and paid for by each of our State's 46 counties. With the passage of time, inevitable population growth, and the impact of unavoidable demographic trends, case loads and the needs of Probate Court "clients" have been rising, while the availability and application of funding is forcing ever more difficult choices among competing priorities. Against this background, these procedures are intended to furnish a basis for examining the utility of mediation in the Probate court context in order to

a. Permit Probate Courts and contesting parties the opportunity to save time, effort, and money;

b. Permit contesting parties the opportunity to exercise greater control over the outcome of their own contested Probate Court cases and issues;

c. Allow the Probate Courts to focus their resources and attention on those cases that cannot be settled voluntarily by contesting parties; and

d. Furnish a basis for future decisions as to the efficacy and broader implementation of mediation in Probate Courts.

3. ADR Mode(s). These procedures are intended to address the scope and application of mediation in the Probate Courts. These procedures are not intended to address in any way the subject of arbitration in the Probate Courts.

4. Procedures Specifically Applicable to Probate Court. The following procedures shall apply to the conduct of Probate Court mediation notwithstanding any inconsistent or contradictory procedures set forth in the ADR Rules (In each instance, numbering refers to the applicable ADR Rule):

Rule 3(a). Mediation. Subject to Rule 3(b), Exceptions, all contested issues in civil cases within Probate Court jurisdiction are subject to Court-ordered mediation, as follows:

(1) Absent good cause shown, mediation is required for all contested issues in guardianship and/or conservatorship cases; and

(2) Upon motion of any contesting party or of the Probate Court, mediation may be ordered for contested issues in all other classes of cases at the discretion of the Probate Court Judge.

Rule 4(c). Appointment of Mediator by Probate Court. In probate court cases subject to ADR, early mediation is encouraged. Unless the Probate Court is advised that contesting parties have selected and appointed a mediator beforehand,

(1) For contested guardianship and/or conservatorship cases, absent good cause shown, the Probate Court Judge shall appoint a primary mediator and a secondary mediator from the Roster of Certified Neutrals as soon as it is known to the Probate Court that the disagreement of the parties will result in a contested case, but in no event later than the earlier to occur of a hearing for the appointment of a temporary guardian and/or conservator or fifteen (15) days after joining of the issues in a contested matter.

(2) For all other classes of Probate Court cases, the Probate Court Judge may appoint a primary mediator and a secondary mediator from the Roster of Certified Neutrals at any time following the filing of an application/petition for appointment as Personal Representative, whether for informal or formal

proceedings, or upon the filing of any other application or petition with the court, if the Probate Judge, in his or her discretion, determines that issues have been or may be raised which may be resolved through mediation.

(3) An initial mediation conference must occur within forty-five (45) days of appointment by the Probate Court, and the parties must complete mediation and file a Proof of ADR with the Probate Court before a merits hearing can be scheduled.

Rule 5(h). Scheduling in Probate Court. The parties shall cooperate with the mediator to schedule mediation, and the mediator may recess a mediation conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference. The case shall not be scheduled for hearing in the Probate Court until a Proof of ADR is filed.

Rule 6(a). Duty to Inform. In cases subject to mediation under these procedures, notice of a mediation settlement conference shall be given to all interested parties in accordance with section 62-1-401 of the South Carolina Probate Code.

Rule 6(b). Attendance. The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Probate Court Judge:

(1) The mediator;

(2) All contesting individual parties; or an officer, director or employee having full authority to settle the claim for a contesting corporate party; or in the case of a contesting governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision-making body of the agency; and all other interested persons who have filed with or made known to the Probate Court an application or petition or objection, irrespective of the form thereof, concerning the issues to be mediated;

(3) The party's counsel of record, if any; and

(4) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

In addition, while not required to do so, though not a contesting party, an interested party who has or should have received notice of a mediation settlement conference pursuant to Rule 6(a) above may attend such mediation settlement conference with that party's counsel of record.

Rule 6(h).Agreement in Probate Court. Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys. It is the obligation of the parties to seek approval of the agreement by the Probate Court.

Rule 9(b). By Court Order — Mediation. When the mediator is appointed by the Probate Court, if the Probate Judge determines that the mediation was conducted for the benefit of the incapacitated person or estate, the mediator shall be compensated from the funds of the incapacitated person or estate. Should the Probate Judge find that such payment is not proper, or if no or insufficient funds are available to cover these costs, the mediating parties shall equally bear the reasonable costs of mediation, subject to the approval of the Probate Judge. The mediator's rate shall not exceed $175 per hour. Reasonable charges by the mediator for his or her preparation time beyond one hour shall be permitted at the discretion of the Probate Court Judge. Reasonable expenses, including but not limited to travel expenses, shall be subject to reimbursement at the discretion of the Probate Court Judge. An appointed mediator may charge no more than $175 for cancellation of a mediation settlement conference.

5. The Probate Court and Parties to the Mediation. The participants of the Mediation Program will complete the pilot assessment forms attached and submit to the Commission on ADR. The final report will be submitted to the Court at the end of the Probate Court Pilot Mediation Program by the Commission on Alternative Dispute Resolution.

PROBATE COURT PILOT MEDIATION PROGRAM
COURT REPORT and EVALUATION

County: _____ Date: _____

Type of Case: (Select One)

☐ Guardianship ☐ Conservatorship ☐ Trust

☐ Creditor Claim ☐ Will Contest ☐ Will Construction

☐ Appointment/Removal of Personal Representative

☐ Other (Please Specify) _____

Date Matter Filed: _____

Date Mediator Appointed: _____

Date Mediation Report Received: _____

For the following questions, please check the appropriate box.

	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
This process was helpful.	☐	☐	☐	☐	☐
Mediation resulted in efficient use of the court's time.	☐	☐	☐	☐	☐
The cost for mediation was reasonable considering the results obtained.	☐	☐	☐	☐	☐
The outcome was acceptable.	☐	☐	☐	☐	☐

Comments: _____

_____

_____

Number of Participant Reports Attached _____

Report Prepared by: _____ Title: _____

PROBATE COURT PILOT MEDIATION PROGRAM
PARTICIPANT REPORT and EVALUATION

County: _____ Date: _____

Type Party: (Check all that apply)

☐ Petitioner	☐ Guardian ad litem	☐ Personal Representative
☐ Respondent	☐ Beneficiary (Estate)	☐ Trustee
☐ Atty for Petitioner	☐ Beneficiary (Trust)	☐ Mediator
☐ Atty for Respondent	☐ Atty for Other: _____	

Issues Mediated: _____

_____

_____

Issues Resolved Through Mediation: _____

_____

_____

For the following questions, please check the appropriate box.

	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
This process was helpful.	☐	☐	☐	☐	☐
This was a worthwhile use of my time.	☐	☐	☐	☐	☐
I felt I was fairly treated.	☐	☐	☐	☐	☐
The cost for mediation was reasonable considering the results obtained.	☐	☐	☐	☐	☐
I had the opportunity to express my views.	☐	☐	☐	☐	☐
I felt the outcome was acceptable.	☐	☐	☐	☐	☐

Comments: _____

_____

FINAL REPORT of _____County
PROBATE COURT PILOT MEDIATION PROGRAM

County: _____

Dates of Participation:_____ to _____

Number of Matters Sent to Mediation: _____

Number of Matters Totally Settled: _____

Types of Cases (Please Provide Amount):

Guardianship	_____
Conservatorship	_____
Creditor Claims	_____
Will Contest	_____
Will Construction	_____
Appointment/Removal of Personal Representative	_____
Trust	_____
Other (Please specify type matters)	_____

Number of Matters Partially Settled: _____

Types of Cases (Please Provide Amount):

Guardianship	_____
Conservatorship	_____
Creditor Claims	_____
Will Contest	_____
Will Construction	_____
Appointment/Removal of Personal Representative	_____
Trust	_____
Other (Please specify type matters)	_____

Overall impression of Pilot Program: _____

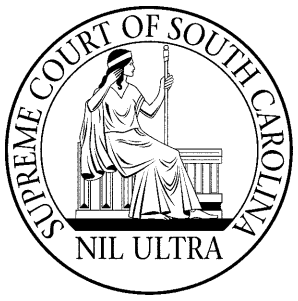
_____

_____

Suggestions for Improvement: _____

_____

Completed by: _____



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32

August 27, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe and Jane Doe, Appellants,

v.

Greenville County School District, Respondent.

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26372
Heard May 3, 2007 – Filed August 27, 2007

AFFIRMED IN PART; REVERSED IN PART

Gregg E. Meyers, of Charleston, for Appellants.

Christopher R. Antley, of Devlin & Parkinson, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: John Doe and Jane Doe ("Mr. and Mrs. Doe") sued the Greenville County School District ("the School District") asserting several causes of action arising from incidents of sexual activity between Mr. and Mrs. Doe's minor daughter and a substitute teacher employed by the School District. The trial court granted the School District's

motion to dismiss all causes of action, and Mr. and Mrs. Doe appealed. We affirm in part and reverse in part.

FACTUAL /PROCEDURAL BACKGROUND

In 2001, Mr. and Mrs. Doe discovered that their fourteen-year old daughter was involved in a sexual relationship with a substitute teacher from her school. The substitute teacher was charged and convicted of criminal sexual conduct with a minor as a result of this inappropriate relationship. Ultimately, Mr. and Mrs. Doe sued the School District alleging several causes of action based upon the alleged negligent supervision on the part of the School District.[1] Specifically, Mr. and Mrs. Doe allege that the School District had prior complaints and warnings regarding the substitute teacher's inappropriate interest in young girls, and that the School District knew or should have known about the development of this relationship.

The School District filed a motion to dismiss all causes of action, and the trial court granted the motion. Mr. and Mrs. Doe appealed, and this Court certified the case from the court of appeals pursuant to Rule 204(b), SCACR. Mr. and Mrs. Doe raise the following issue for this Court's review:

> Did the trial court err in granting the School District's motion to dismiss Mr. and Mrs. Doe's claims?

STANDARD OF REVIEW

Generally, in considering a Rule 12(b)(6), SCRCP, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). The motion may not be sustained if the facts alleged in the complaint and the inferences that can be drawn therefrom would entitle the plaintiff to any relief under any theory. *Id.*

[1] Mr. and Mrs. Doe's daughter is not a party to this action. A separate suit was filed on her behalf and was settled at trial.

LAW/ANALYSIS

Mr. and Mrs. Doe argue that the trial court erred in granting the School District's motion to dismiss. We disagree with Mr. and Mrs. Doe's argument that the trial court erred in granting the School District's motion to dismiss the causes of action for negligent infliction of emotional distress and loss of consortium. However, we agree that the trial court erred in granting the School District's motion to dismiss Mr. and Mrs. Doe's action for negligent supervision, breach of fiduciary duty, and breach of an assumed duty *in loco parentis*.

A. Negligent Infliction of Emotional Distress

Mr. and Mrs. Doe argue that the trial court erred in dismissing their claim against the School District for negligent infliction of emotional distress. Specifically, Mr. and Mrs. Doe argue that the trial court mistakenly perceived their claim for negligent infliction of emotional distress as a bystander liability claim similar to that discussed in *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582, 336 S.E.2d 465, 467 (1985). Mr. and Mrs. Doe contend that their claim should have been regarded as another basis upon which emotional distress could be inflicted through negligent acts. We disagree.

In *Kinard*, this Court recognized that a parent may bring a cause of action for negligent infliction of emotional distress as a result of injury to his or her child. *Kinard*, 286 S.C. at 582, 336 S.E.2d at 467. The Court instructed that such an action is strictly limited to the "bystander liability" scenario. *Id*. In order to prevail on this cause of action, a plaintiff must show that:

> (a) the negligence of the defendant caused death or serious physical injury to another;
> (b) the plaintiff bystander was in close proximity to the accident;
> (c) the plaintiff and the victim are closely related;
> (d) the plaintiff contemporaneously perceived the accident; and

> (e) the plaintiff's emotional distress manifests itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

Id. at 582, 336 S.E.2d at 582-83. This Court has not otherwise defined the parameters of a cause of action for the negligent infliction of emotional distress arising out of an injury to someone other than the plaintiff. 11 S.C. JUR. *Damages* § 21 (1992).

In this case, Mr. and Mrs. Doe admit that they did not and cannot allege facts which would support a bystander liability cause of action. Because South Carolina courts have limited the recognition of negligent infliction of emotional distress claims in circumstances such as the one presented in this case to bystander liability, Mr. and Mrs. Doe have not stated a claim which is cognizable under South Carolina law.

Therefore, we hold that the trial court did not err in dismissing Mr. and Mrs. Doe's cause of action for negligent infliction of emotional distress.

B. Loss of Consortium

Mr. and Mrs. Doe argue that the trial court erred in dismissing their claim for loss of consortium. Mr. and Mrs. Doe contend that this Court's decision in *Taylor v. Medenica*, 324 S.C. 200, 222, 479 S.E.2d 35, 47 (1996), is not dispositive in this case because *Taylor* dealt only with a child's claim for loss of parental consortium. Additionally, Mr. and Mrs. Doe argue that the Court should acknowledge their claim because South Carolina has long acknowledged claims arising from the seduction of a child. We disagree.

At common law, a father possessed the right to maintain an action for the injuries of his minor child. *See Hughey v. Ashborn*, 249 S.C. 470, 476, 154 S.E.2d 839, 841-42 (1967). This right was based upon the concept that a father was entitled to compensation for the loss of services and earning capacity of his minor child. *Id.* Additionally, the father could recover for other pecuniary losses, including medical expenses incurred as a result of the injury. *Id.* Conversely, the common law right of a husband to recover

damages for loss of consortium resulting from the injury of his wife was more encompassing. A spousal loss of consortium claim was based upon the husband's right to the companionship, aid, society, and services of his wife. *Cook v. Atlantic Coast Line R. Co.*, 196 S.C. 230, 243-44, 13 S.E.2d 1, 7 (1941). This common law right belonged only to the husband, and therefore, a wife could not recover similar damages resulting from the injury of her husband. In 1969, the South Carolina legislature adopted Code § (56) 615, which is now codified at S.C. Code Ann. § 15-75-20 (2005), to allow both spouses the right to recover for loss of consortium.

In *Taylor v. Medenica*, this Court held that the determination of which relationships may give rise to a loss of consortium claim in South Carolina is one best left to the discretion of the legislature. 324 S.C. 200, 222, 479 S.E.2d 35, 47 (1996) (declining to recognize a cause of action for loss of parental consortium). The United States District Court for the District of South Carolina adopted the *Taylor* analysis in finding that South Carolina law did not provide a cause of action for loss of consortium of a child or for filial consortium. *Kirkland v. Sam's East, Inc.*, 411 F.Supp.2d 639, 641 (D.S.C. 2005). Today, we extend our *Taylor* analysis in holding that South Carolina law does not recognize claims for loss of filial consortium. Such rights did not exist under the common law, and the legislature has not provided such a right by statute.

The dissent would find that parents have a common law right to sue for loss of filial consortium despite the clear distinctions between a parent's claim for loss of services and a spouse's claim for loss of consortium found in our previous jurisprudence. The cases which the dissent utilizes to support its conclusion that filial consortium claims existed at common law directly address parental claims for loss of services, not loss of filial consortium. *See Wright v. Colleton County*, 301 S.C. 282, 289, 391 S.E.2d 564, 569 (1990) (providing that a parent's claim for loss of services and medical expenses resulting from the injury of a minor child is within the tort claims act statutory definition of "loss"); *see also, e.g., Berger v. Charleston Consol. Ry. Gas & Elec. Co.*, 93 S.C. 372, 76 S.E. 1096 (1913) (addressing a father's action for medical expenses and loss of services of his injured child). As discussed above, our common law only allowed a parent to maintain an

action for the loss of a child's services and earning capacity. These common law claims did not include the intangible losses of aid, companionship, and society which have traditionally defined loss of consortium claims. Accordingly, in absence of some action from the legislature, this Court has no authority upon which it could rely in finding that South Carolina law recognizes claims for loss of filial consortium.

Additionally, Mr. and Mrs. Doe's claim that South Carolina's recognition of a cause of action for seduction is a valid basis for recognizing a claim for loss of filial consortium is misleading. A claim for seduction requires the plaintiff to establish that the defendant, by promising to marry or through some other device, enticed the plaintiff, an unmarried chaste woman, to consent to unlawful sexual intercourse. *See* 18 S.C. JUR. *Seduction* § 2 (1993). The right to sue upon an action for seduction belongs to the victim of the seduction. *See* 18 S.C. JUR. *Seduction* § 9. However, traditionally, a claim for seduction was a father's (or mother's in the absence of the father) right of action for the loss of his daughter's services. *See* 18 S.C. JUR. *Seduction* § 8. In either case, the defendant to the action must be the perpetrator of the seduction. *See* 18 S.C. JUR. *Seduction* § 2. Clearly, the School District is not the perpetrator of the seduction in this case. Accordingly, this Court's recognition of a claim for seduction would not lend support to Mr. and Mrs. Doe's argument that this Court should recognize a claim for loss of filial consortium.

Because Mr. and Mrs. Doe's loss of consortium claim is based entirely upon their allegation of a change in their relationship with their child and not a claim for loss of services, we hold that the trial court did not err in dismissing Mr. and Mrs. Doe's claim for loss of filial consortium.

C. Negligent Supervision

Mr. and Mrs. Doe contend that the trial court erred in dismissing their claim for negligent supervision. We agree.

The South Carolina Tort Claims Act ("TCA") addresses the circumstances under which a governmental entity is liable for tortious

conduct of its employees. The TCA states that "a governmental entity [is] liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005). One limitation contained in the TCA provides that a governmental entity will not be liable for a loss resulting from any "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, . . . except where the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(25) (2005).

Gross negligence is defined as "the failure to exercise slight care." *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999). It has also been defined as "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." *Id.* Gross negligence "is a relative term, and means the absence of care that is necessary under the circumstances." *Id.*

The trial court found that this cause of action could survive a motion to dismiss, but only to recover for allowable damages, such as medical bills. The trial court went on to find that Mr. and Mrs. Doe had not indicated any intention to present any medical bills. Therefore, the trial court dismissed the claim.

Mr. and Mrs. Doe's complaint alleges that the School District acted with gross negligence in failing to protect their daughter from the known danger of the substitute teacher's inappropriate interest in young girls. The complaint also alleges that Mr. and Mrs. Doe have incurred medical expenses as a result of the School District's negligence.[2] Looking only at the face of the complaint, Mr. and Mrs. Doe's claim for negligent supervision was

[2] Mr. and Mrs. Doe allege that they have incurred medical bills for the care of their daughter as a result of this incident. It is unclear from the briefs whether the medical costs resulting from this incident were considered in the settlement of their daughter's claims against the School District.

improperly dismissed. In dismissing this claim, the trial court impermissibly looked beyond the complaint and made a determination on the facts of the case. Whether Mr. and Mrs. Doe are able to show that they have incurred medical bills for which they have not already been compensated is not an issue to be determined upon a motion to dismiss pursuant to Rule 12(b)(6).

Accordingly, based only on the allegations set forth in the complaint, the trial court erred in dismissing Mr. and Mrs. Doe's cause of action for negligent supervision.

D. Breach of Fiduciary Duty and Assumed Duty *In Loco Parentis*

Mr. and Mrs. Doe argue that the trial court erred in dismissing their claims for breach of fiduciary duty and for breach of an assumed duty *in loco parentis*. We disagree.

An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). Without a duty, there is no actionable negligence. *Id*. The existence of a duty owed is a question of law for the courts. *Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001).

In the instant case, the trial court found that Mr. and Mrs. Doe's claims for breach of fiduciary duty and breach of an assumed duty *in loco parentis* were based only on their claim of negligent supervision. The trial court further found that these causes of action were alleged as an attempt to heighten any duty owed by the School District in this situation.

We agree with the trial court's analysis of these causes of action. The Legislature has clearly provided that the School District may be liable for negligent supervision of a student only if that duty was executed in a grossly negligent manner. *See* S.C. Code Ann. § 15-78-60(25). Mr. and Mrs. Doe have not alleged any facts under which this Court could find another duty owed by the School District other than the duty of supervision as outlined by the Tort Claims Act.

Accordingly, we hold that the trial court did not err in dismissing the causes of action for breach of fiduciary duty and breach of an assumed duty *in loco parentis*.

CONCLUSION

For the foregoing reasons, we affirm the trial court's dismissal of Mr. and Mrs. Doe's causes of action for negligent infliction of emotional distress, loss of consortium, breach of fiduciary duty, and breach of an assumed duty *in loco parentis*. Additionally, we reverse the trial court's dismissal of Mr. and Mrs. Doe's causes of action for negligent supervision.

MOORE, BURNETT, JJ., and Acting Justice Alexander S. Macaulay, concur. PLEICONES, J., concurring in part, dissenting in part in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that we should reverse the trial court's dismissal of the Does' negligent supervision claim, but I would also reinstate the loss of consortium claim. Like the majority, I would uphold the trial court's dismissal of the negligent infliction of emotional distress claim and affirm the trial court's dismissal of the breach of fiduciary duty claim and the breach of an *In loco parentis* claim. I have explained my reasoning for each of these conclusions using the order established in the majority opinion.

A. Negligent Infliction of Emotional Distress

I would affirm the dismissal of this cause of action for the reasons given by the majority.

B. Loss of Consortium

The trial judge held that South Carolina does not recognize a cause of action for the parents' loss of their minor child's consortium. The majority affirms. I respectfully disagree. As explained below, I believe this holding is based on a misapplication of the Court's decision in Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996).

At common law, a man could sue for loss of his wife's consortium, but not vice-versa. Berry v. Myrick, 260 S.C. 68, 194 S.E.2d 240 (1973). Moreover, he could sue for loss of his minor child's services and his companionship, that is, his consortium.[3] E.g., Berger v. Charleston Consol. Ry. Gas & Elec. Co., 93 S.C. 372, 76 S.E. 1096 (1913) (action by father for past and future medical expenses, and loss of his injured child's services); Webb v. Southern Ry. Co., 104 S.C. 89, 88 S.E. 297 (1916) (action by

[3]It may be that the difference between my view and that of the majority is one of definition, and I will readily acknowledge that "spousal consortium" includes conjugal elements obviously not included in "filial consortium." I note the broadening of the term beyond the tort field in parental rights cases, where we have repeatedly spoken of a child's right to his parent's consortium. E.g. SCDSS v. Seegars, 367 S.C. 623, 627 S.E.2d 718 (2006).

mother for loss of child's services and companionship); see also Wright v. Colleton County, 301 S.C. 282, 289, 391 S.E.2d 564, 569 (1990) ("parent's claims for loss of [child's] services and [her] medical expenses are within the statutory definition of "loss" as contained in [tort claims act]…"). . Just as the common law did not permit a wife to sue for loss of her husband's consortium, it did not permit a child to sue for loss of parental services.

In 1969, the General Assembly enacted what is now S.C. Code Ann. § 15-75-20 (2005), in order to abrogate the common law rule that a wife had no claim for loss of her husband's consortium. See Berry v. Myrick ("The obvious purpose of the General Assembly in enacting this provision was to extend to the wife the right to recover for the loss of consortium of her husband, which right existed only in favor of the husband under the common law"). In Taylor v. Medenica, the Court was asked to recognize a cause of action by a child for loss of parental consortium claim, a claim not cognizable under common law. The opinion states "By enacting [§ 15-75-20] the legislature has provided for loss of consortium actions for spouses. The statute has not been amended to provide for a similar cause of action for children. Whether South Carolina should recognize a cause of action for loss of parental consortium is a matter best left to the General Assembly." Taylor v. Medenica merely holds that any extension of consortium claims beyond that permitted at common law should be left to the General Assembly, not as the majority would read it, that by enacting § 15-75-20 the General Assembly abolished the common law right of a parent to sue for loss of her child's consortium.

Since a parent has the right to sue for loss of her child's consortium at common law,[4] a right preserved under the South Carolina Tort Claims Act,[5] I would reverse the trial court's dismissal of the Does' consortium claim.

C. Neglect Supervision

[4] Webb v. Southern Ry. Co., *supra*.
[5] Wright v. Colleton County, *supra*.

The trial court held the Does' negligent supervision claim was proper, but noted that only medical expenses would be recoverable under this theory. See Wright v. Colleton County, *supra*. The trial court held, however, that the Does' claim must be dismissed because they pleaded no such damages. I agree with the Does that they did plead these damages in paragraph 38 of their complaint. I would therefore reverse the dismissal of this claim.

D. Breach of Fiduciary Duty and Assumed Duty *In Loco Parentis*

The trial judge also dismissed the Does' claims for breach of an assumed duty *In loco parentis* and breach of fiduciary duty, finding no such heightened duties exist in a school-student setting. The question of duty is one for the court. E.g., Houck v. State Farm Fire and Cas. Ins. Co., 366 S.C. 7, 620 S.E.2d 326 (2005). I can find no error in the trial court's conclusion that these two heightened duties do not exist. I agree with the majority that we should affirm the dismissal of these two claims.

CONCLUSION

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Transportation, Respondent,

v.

McDonald's Corporation and Joel A. Pellicci and Linda Pellicci, Defendants,

of whom McDonald's Corporation is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 26373
Submitted August 22, 2007 – Filed August 27, 2007

VACATED AND DISMISSED

Michael H. Quinn, Quinn Law Firm, LLC, of Columbia, for Petitioner.

Barbara Munig Wessinger, S.C. Department of Transportation Legal Division, of Columbia; and Larry B. Hyman, Jr., of Conway, for Respondent.

PER CURIAM: In this condemnation action, both petitioner and respondent filed motions *in limine* to exclude certain evidence from the proceedings. The trial judge granted respondent's motion and denied petitioner's motion. Petitioner appealed, and the Court of Appeals affirmed. *S.C. Dep't of Transp. v. McDonald's Corp.*, Op. No. 2006-UP-237 (S.C. Ct. App. filed May 9, 2006). Petitioner seeks a writ of certiorari from the decision of the Court of Appeals. We grant the petition, dispense with further briefing, vacate the opinion of the Court of Appeals, and dismiss the appeal.

A motion *in limine* is generally not considered a final order on the admissibility of evidence and, for that reason, is not immediately appealable. *See, e.g. State v. Floyd*, 295 S.C. 518, 369 S.E.2d 842 (1988). Because the appeal should have been dismissed, the Court of Appeals erred in addressing the merits of the appeal. Accordingly, we vacate the opinion of the Court of Appeals and dismiss the appeal as the order on the motions *in limine* is not immediately appealable.

VACATED AND DISMISSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Late Terry Henson, by
Harriet Hunt, his Aunt and
Appointed Guardian ad Litem
and Personal Representative, Petitioner,

v.

International Paper Company,
Georgetown Steel Corporation,
The City of Georgetown, and
Georgetown County,
Defendants, Of Whom
International Paper Company
is, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Georgetown County
Paula H. Thomas, Circuit Court Judge

Opinion No. 26374
Heard June 8, 2006 – Filed August 27, 2007

AFFIRMED AS MODIFIED

Gregg E. Meyers, of Charleston, for Petitioner.

Andrew K. Epting, Jr., and Amanda R. Maybank, both of Pratt-Thomas Epting & Walker PA, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: In this civil action, the court of appeals held that a claim for attractive nuisance requires the injured child to be attracted onto the defendant's property by the nuisance which causes him or her injury. Although we agree with the disposition reached by the court of appeals, we disagree with the rule found both in its opinion and in our precedent. Accordingly, we affirm the court of appeals' decision, but modify it as outlined below.

FACTUAL/PROCEDURAL BACKGROUND

International Paper Company (IPC) owns and operates a canal that runs twenty-seven miles through Georgetown County. The canal diverts water from the Pee Dee River through a system of pump stations, pipes, and trenches, and ultimately delivers the water to IPC's plant in the city of Georgetown. The canal's depth is between twelve and twenty feet, and at points near the pump stations, the canal has a considerable current. Allegedly, the opaqueness of the diverted river water makes neither the canal's depth nor its current apparent from a visual inspection.

The tragic events underlying this legal action occurred in 1998. The record reveals that on the day in question, ten-year-old Terry Henson and his older brother went to the home of a friend where they agreed to accompany a companion to a go-cart "dirt jumping hill" near the city of Georgetown. Apparently, the boys ventured by the canal in their journey.

As the boys walked along the canal, they came upon what the parties refer to as a "pipe bridge." The record indicates that the "pipe bridge" is simply a large pipe spanning the canal for the purpose of allowing drainage to

pass from the surrounding land on one side of the canal to the other. Metal bracing on part of the pipe gives the pipe the appearance of a bridge.

After the boys used the pipe to cross the canal, they discovered a discarded cast net lying on the ground. Though neither he nor his older brother could swim, Terry decided to enter the water. Terry held on to one end of the cast net while his friends held on to the other end, and after being in the water for a relatively short period of time, Terry attempted to grab the metal pipe supports and lift himself out of the water. In this process, Terry slipped and fell back into the water. As Terry fell, his friends lost hold of their end of the cast net. Sadly, Terry drowned.

Petitioner instituted this wrongful death action alleging causes of action for negligence, attractive nuisance, and unguarded dangerous condition.[1] At the conclusion of Petitioner's case in chief, the trial court directed a verdict in favor of IPC on the cause of action for attractive nuisance. In support of this decision, the court stated "the case law indicates that the reason they needed to have gone [to the canal] was that they were attracted by [the canal] . . . the evidence in this case is clear they went there for another purpose and then went to [the canal]."

At the trial's conclusion, a jury found both IPC and Terry negligent in causing Terry's death. Specifically, the jury attributed twenty-five percent of the fault to IPC, and seventy-five percent of the fault to Terry. The jury determined Petitioner's total damages were $400,000, however, the trial court instructed the clerk to stop reading the verdict once the clerk stated that the jury had allotted seventy-five percent of the negligence to Terry.

[1] These were the designations Petitioner used to identify the claims presented in the complaint. Also, Petitioner initially named IPC, Georgetown Steel Corporation, the city of Georgetown, and Georgetown County as defendants. By the time of trial, however, IPC was the sole defendant.

Petitioner appealed, arguing that the trial court erred in directing a verdict on the cause of action for attractive nuisance.[2] The court of appeals affirmed the trial court's decision; reasoning that because Terry was attracted onto IPC's property by a "dirt jumping hill" and not by the canal, Petitioner could not claim that the canal was an attractive nuisance. *Henson v. Int'l Paper Co.*, 358 S.C. 133, 139-40, 594 S.E.2d 499, 502 (Ct. App. 2004). Additionally, the court of appeals held that any error in directing a verdict as to attractive nuisance was harmless because Petitioner retained causes of action for negligence and unguarded dangerous condition. *Id.*

This Court granted certiorari to review the court of appeals' decision, and Petitioner raises the following issues for review:

I. Did the court of appeals err in reasoning that attractive nuisance requires the injured party to be attracted onto the defendant's property by the very temptation which causes injury?

II. If the court of appeals erred in directing a verdict as to attractive nuisance, was the error harmless?

LAW/ANALYSIS

I. Elements of Attractive Nuisance

Petitioner argues that attractive nuisance should not require that the thing alleged to be the nuisance be the instrumentality which attracts a child onto the defendant's property. We agree.

Although the common law generally imposes no duty on a landowner to protect a trespasser from hidden dangers, *see Nettles v. Your Ice Co.*, 191 S.C. 429, 436, 4 S.E.2d 797, 799 (1939), consideration of the proclivities and

[2] Petitioner also argued the jury's verdict was inconsistent on its face. This issue was not presented for our review.

instincts of children has long provided an exception to this point in premises liability. As this Court has stated:

> [O]ne who artificially creates upon his premises any dangerous thing which from its nature has a tendency to attract the childish instincts of children to play with it is bound, as a mere matter of social duty, to take such reasonable precautions as the circumstances admit of, to the end that they may be protected from injury while so playing with it, or coming in its vicinity.

Franks v. S. Cotton Oil Co., 78 S.C. 10, 15, 58 S.E.2d 960, 961 (1907) (citing SEYMOUR D. THOMPSON, 1 COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS § 1024 (2d ed. 1901) [hereinafter THOMPSON ON NEGLIGENCE]). In South Carolina, this consideration of children's susceptibility to fail to perceive the risks of encountering dangerous instrumentalities or conditions has evolved into two exceptions to the common law's general preclusion of a trespasser's ability to maintain a cause of action for premises liability. These exceptions have commonly been termed "attractive nuisance" and "unguarded dangerous condition."

Attractive nuisance doctrine provides that where the owner or occupier of land brings or artificially creates something which, from its nature, is especially attractive to children, he is bound to take reasonable pains to see that the dangerous thing is so guarded that children will not be injured in coming into contact with it. *Franks*, 78 S.C. at 15, 58 S.E.2d at 961. South Carolina courts first recognized attractive nuisance in the "turntable cases." These cases held that infants could recover damages from railroad companies for injuries caused by the failure to lock or properly guard railroad turntables. *Bridger v. Asheville and Spartanburg R.R. Co.*, 25 S.C. 24 (1886).

At one time, the United States Supreme Court suggested that the dangerous condition or instrument must have attracted the child onto the defendant's property in order to hold a party liable under a theory of attractive nuisance. *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268, 276

(1922).[3] Although the majority of our attractive nuisance jurisprudence pays little attention to the reasons for an injured child's presence on the property, IPC correctly argues that this concept, sometimes referred to as the "property line" rule, eventually crept into this Court's jurisprudence. *See Kirven v. Askins*, 253 S.C. 110, 117, 169 S.E.2d 139, 142 (1969); *Daniels v. Timmons*, 216 S.C. 539, 550-51, 59 S.E.2d 149, 155 (1950); and *Hancock v. Aiken Mills*, 180 S.C. 93, 104, 185 S.E. 188, 193 (1936). *See also Miller v. Perry*, 308 F.Supp. 863 (D. S.C. 1970). This case requires us to determine whether this creeping was justified, and whether our jurisprudence should provide a home for the property line rule. We conclude that both answers are "no."

A close examination of the property line rule's origins is instructive. Because trespassers were generally barred from recovering from a landowner, attractive nuisance doctrine needed to either amend trespasser liability doctrine for children or create a status for these children other than that of a trespasser. Early case law in this area illustrates that courts solved this dilemma by providing that one who creates an artificial condition on his land that is dangerous to children yet, at the same time, attracts them onto his land to "play in, swim in, or wade in" it, has granted a child an "implied license" to enter his property. *Miller*, 308 F.Supp at 865; *see also Britt*, 258 U.S. at 276 (stating "[t]here can be no general duty on the part of a land-owner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."). Viewed through this lens, the property line rule appears justified given that a landowner cannot have extended an implied invitation to enter his property to the child who trespasses for a purpose other than to pursue amusement with the thing that ultimately causes him injury.

In South Carolina, however, the usefulness of this distinction is severely weakened after examining attractive nuisance's companion doctrine of unguarded dangerous condition. Quite unlike its counterpart, unguarded dangerous condition disregards the element of attraction; both to the property

[3] Of course, *Britt* addressed this issue as a matter of Kansas common law. The non-binding nature of the opinion, however, is not pivotal to its informativeness.

and to the danger. *See Everett v. White*, 245 S.C. 331, 335, 140 S.E.2d 582, 584 (1965) (providing that although an artificial condition may not have special attraction for children, when the condition is left so exposed that children are likely to come into contact with it, and where their coming into contact with it is dangerous to them, the person exposing the dangerous thing should anticipate the injury that is likely to happen and is bound to take reasonable pains to prevent it); *see also Franks*, 78 S.C. at 15, 58 S.E.2d at 961. Instead of justifying this exception on an implied license to enter another's land, we have recognized that liability in unguarded dangerous condition situations is based upon "a mere matter of social duty." *Franks*, 78 S.C. at 15, 58 S.E.2d at 961 (discussing both attractive nuisance and unguarded dangerous condition).

Though tort law often involves drawing seemingly arbitrary distinctions, it is said that judicial line drawing obligates a court to justify its choice. In this effort, we think recognizing the property line rule in attractive nuisance doctrine is intellectually inconsistent with allowing landowner liability under unguarded dangerous condition theory. In our view, it would be improper to anchor one of these companion theories in the fiction of an implied license, and ground the other in a social duty. As a matter of consistency, we find that these theories, long-recognized as being closely related, are not grounded in traditional tort concepts. *See* THOMPSON ON NEGLIGENCE § 1042: OWNERS OF PROPERTY LEAVING DANGEROUS OBJECTS UNGUARDED, LIABLE TO TRESPASSING CHILDREN. Instead, these concepts rest on the consideration of the fact that the proclivities and instincts of young children sometimes lead them to seek amusement with artificially created conditions that can cause them serious injury.[4]

[4] We believe the movement away from an "implied license" rationale in these cases is likely responsible for the property line rule's declining popularity. *See* Eric R. Tonnsen, *Henson v. International Paper Co.: A Step Backwards in South Carolina Attractive Nuisance Jurisprudence*, 56 S.C. L. Rev. 835, 849-50 (2005) (discussing the rule's decline and the rising popularity of the RESTATEMENT (SECOND) OF TORTS: ARTIFICIAL CONDITIONS HIGHLY DANGEROUS TO TRESPASSING CHILDREN § 339 (1965)).

Although an analysis of precedent may, to some degree, seem unnecessary given that we have found recognition of the property line rule to be inadvisable as a matter of doctrinal consistency, an examination of this Court's premises liability jurisprudence reveals that while the property line rule has appeared in this Court's decisions with some frequency, it has never been faithfully applied. To exhibit this, we focus on the two cases relied upon directly by the court of appeals in the instant case.

In *Hancock v. Aiken Mills*, 180 S.C. 93, 185 S.E. 188 (1936), this Court reversed a damages award to a thirteen-year-old boy who sustained serious burns when he stood near a fire workmen built and watched the workmen as they repaired a neighboring home. Although the language of the property line rule appears in that case, the strongest justification for dismissing the suit was that the child admittedly did not encounter the fire due to a failure to appreciate its danger or a desire to play with it. *Id.* at 100, 185 S.E. at 191-92. We think the *Hancock* decision properly expresses considerable doubt as to whether a fire–with dangerousness apparent to even young children–could qualify as an attractive nuisance. *Id.* at 107, 185 S.E. at 194. Additionally, because the fire in *Hancock* was on land the plaintiff's family rented, *id.* at 95, 185 S.E. at 189, the property line rule would require dismissal on that ground alone.

The second case relied upon by the court of appeals fares no better. In *Kirven v. Askins*, 253 S.C. 110, 169 S.E.2d 139 (1969), this Court affirmed a decision setting aside a jury verdict for a twelve-year-old child who sustained injuries to his eye as a result of being struck by a clod of dirt thrown by another child. Instead of disposing of the case based upon the reasons for the injured child's presence on the property, the Court relied primarily on a line of cases which held that similar construction materials were not inherently dangerous to children and that leaving these materials on a construction site did not create an unreasonably dangerous situation. *Id.* at 117, 169 S.E.2d at 142. Though the property line language undeniably appears in this opinion, the rule was of minimal relevance to the Court's holding.

In the instant case, both the trial court and the court of appeals understandably relied on our precedent in reaching their conclusions, but our

examination has revealed that the property line rule has only haphazardly appeared and rarely, if ever, been applied in South Carolina. When this is coupled with the fact that we have held this rule cannot co-exist with other firmly-rooted aspects of our premises liability jurisprudence, any case that can be made in favor of adopting the property line rule is a slim one. The better view, in our opinion, is to reject the property line rule's rigid framework as inconsistent with the aforementioned quotation from *Franks*, which has long-served as the guiding principle in our attractive nuisance jurisprudence.

For these reasons, we hold the trial court erred in reasoning that attractive nuisance requires the injured child to be attracted onto the defendant's property by the very temptation which causes injury.

II. Harmless Error

IPC argues that any error in striking the attractive nuisance cause of action was harmless. We agree.

An examination of the trial court's jury charges reveals that this must be so. In the instant case, the trial court charged the jury that a child is not required to conform to an adult standard of care, and that a child's conduct is judged by the standard of behavior to be expected of a child of similar age, intelligence and experience. Furthermore, the court stated that a child may be so young as to be incapable of exercising the attention, perception, knowledge, experience, intelligence, and judgment which are necessary to enable the child to perceive a risk and to realize its unreasonable character. In other words, the trial court charged the jury that it should consider Terry's age, childish instincts, and proclivities in determining liability.

These charges captured the distinctive characteristics of an attractive nuisance claim. The trial court made no mention of the common law's general defense to a premises liability action brought by a trespasser. Instead, the trial court charged that IPC's conduct should be judged according to a negligence standard, and the jury received the instant case with

instructions that the standard by which Terry's actions would be judged included consideration of Terry's age and his corresponding ability to understand and appreciate risks. Although the court did not identify these principles as attractive nuisance doctrine, the record reveals that the jury was nonetheless charged to consider this theory of liability.

Furthermore, the jury's verdict in favor of IPC ultimately precludes an award under an attractive nuisance theory. In addition to attractive nuisance, the jury in this case was charged on the law of unguarded dangerous condition. By allotting to Terry the majority of the fault for causing his injury, there is no reasonable interpretation of the verdict other than providing "however Terry came in contact with the canal, the canal was not an unreasonable danger to him." Like unguarded dangerous condition, attractive nuisance is premised upon the existence of a condition that poses an unreasonable danger to children. Without the necessary predicate of an unreasonably dangerous condition, recovery under an attractive nuisance theory was not possible.[5]

[5] Petitioner strenuously argues that, although attractive nuisance and unguarded dangerous condition are companion theories, attractive nuisance creates a higher standard of care for a landowner. We believe this argument is resoundingly rejected by our precedent, *see Daniels*, 216 S.C. at 550-51, 59 S.E.2d at 155 (stating that attractive nuisance cases spring from the negligence of the defendant landowner in regard to his or her property which is subject to being entered upon by children); *see also Bridger*, 25 S.C. at 25-28 (stating that the turntable cases arise out of the negligence of railroad companies in leaving their turntables unlocked or unprotected, and further defining negligence as the absence of due care). Furthermore, we decline to read "reasonable pains" to provide a "negligence plus" standard in one context and a simple negligence standard in another. *Compare Everett*, 245 S.C. at 335, 140 S.E.2d at 584 (discussing the duty to take reasonable pains to protect children from an unguarded dangerous condition), *with Franks*, 78 S.C. at 15, 58 S.E.2d at 961 (discussing the landowner's duty to take reasonable pains to prevent injury to children in attractive nuisance cases).

The instant case presents a ripe opportunity to provide some much needed clarity in this area of the law. Though Petitioner's complaint, likely taking its cue from our case law, offered "negligence, attractive nuisance, and unguarded dangerous condition" as separate and distinct causes of action, we find this presentation to be not entirely accurate. Negligence refers to a standard of care, and to be actionable, negligence requires a duty running from the alleged tortfeasor to the injured party. In this case, Petitioner sought to hold IPC liable for neglecting its duty to protect Terry, a child trespasser, on IPC's premises.

The cause of action in these cases is a claim for premises liability. Relying on the social duty to protect children from dangers of which they, through their childish instincts, are unlikely to become aware, courts created the doctrines of attractive nuisance and unguarded dangerous condition as exceptions to the general rule that there is typically no cause of action when a trespasser is injured by a dangerous condition on another's land.[6] Although the importance lies in the legal standards created and not necessarily in the nomenclature, this clarification should aid lower courts in applying the principles we have set forth in this decision.

In that same vein, we believe that by recognizing a duty to protect children from dangers to which they will not be attracted, and by disregarding the element of the child's attraction onto a landowner's property, any significant distinction between attractive nuisance and unguarded dangerous condition has outlived its usefulness. We think the better view is that there is but a single exception to the trespasser's rule in premises liability suits: dangerous conditions that injure children. This view is consistent with the Restatement (Second) § 339, which has been widely accepted in this area. The section provides:

[6] We reiterate that these exceptions apply only in cases involving artificially created dangerous conditions. *See Byrd v. Melton*, 259 S.C. 271, 276, 191 S.E.2d 515, 517 (1972).

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

RESTATEMENT (SECOND) OF TORTS § 339 (1965).

We find the Restatement to be a succinct and effective presentation of the considerations which courts should weigh in deciding these cases. Accordingly, as it is this Court's duty to declare the common law of South Carolina, *see Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992), we adopt Restatement (Second) § 339 and hold that future premises liability cases brought by or on behalf of child trespassers should be decided in accordance with the principles outlined in that section.[7]

[7] As a final point of instruction, we specify that where a landowner defines the borders of his property or of an artificial condition on his property by fence or other barrier, and such fence or barrier is of a type that should reasonably be expected to exclude children or to place children on notice that their presence is not welcome, recovery for injuries to child trespassers should generally be precluded.

CONCLUSION

For the foregoing reasons, we modify the court of appeals' decision, and affirm.

MOORE, WALLER, BURNETT, JJ., and Acting Justice Howard P. King, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carol S. Strickland, Appellant/Respondent,

v.

Krom Strickland, Respondent/Appellant.

Appeal from Lee County
R. Wright Turbeville, Family Court Judge

Opinion No. 26375
Heard May 1, 2007 – Filed August 27, 2007

AFFIRMED AS MODIFIED; VACATED IN PART

S. Bryan Doby, of Jennings & Jennings, of Bishopville, for Appellant/Respondent.

Paul M. Fata, of Stuckey, Fata & Segars, of Bishopville, for Respondent/Appellant.

CHIEF JUSTICE TOAL: This case began as an action to enforce an alimony award. The family court dismissed the claim finding it was barred

by the doctrine of laches. We affirm, but modify the family court's decision and we additionally vacate a portion of the family court's decision.

FACTUAL/PROCEDURAL BACKGROUND

Upon the parties' divorce in April 1988, the family court awarded $1200 per month in permanent periodic alimony to Appellant/Respondent Carol Strickland ("Wife") to be paid by Respondent/Appellant Krom Strickland ("Husband"). This monthly total was increased by $200 in November 1990 after the family court held Husband in contempt of court for failing to remain current on his alimony obligation. In May 1992, the parties signed a consent order providing that instead of making payments to the county clerk of court, all further alimony would be paid directly to Wife, and any arrears would be "worked out between the parties."

From November 1990 until December 1997, Husband paid Wife $300 per month in alimony payments. During this time, Wife did not object to Husband's failure to pay the full amount awarded by the court. In July 1998, Husband made a one-time payment of $500 (at Wife's request). After this, Husband made no further payments to Wife and Wife made no additional requests for alimony until December 2004 when her lawyer contacted Husband to discuss "a deficient alimony claim."

In May 2005, Wife initiated an action seeking enforcement of the $1200 per month alimony obligation and approximately $225,000 in past due alimony. As an affirmative defense, Husband argued the doctrine of laches barred Wife's claim for past due alimony and, as a counterclaim, alleged that Wife had continuously cohabitated with another man for seven years and was therefore no longer entitled to ongoing alimony under S.C. Code Ann. § 20-3-150 (Supp. 2006) (the "continued cohabitation" statute).

The family court agreed with Husband and dismissed Wife's complaint, holding that her claims for both past due and ongoing alimony

were barred by laches.[1] The court additionally found that Husband had not proven by a preponderance of the evidence that Wife had continuously cohabitated with another man within the meaning of S.C. Code Ann. § 20-3-150. Wife and Husband each appealed from the trial court's ruling.

The case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR. The parties raise the following issues for review:

I. Did the family court err in dismissing Wife's claims to enforce her alimony award based on the doctrine of laches? (Wife's issue on appeal)

II. Did the family court err in failing to terminate alimony because Wife had continuously cohabitated with another man for a period of ninety or more consecutive days? (Husband's issue on appeal)

STANDARD OF REVIEW

In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. *Wooten v. Wooten*, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). This broad scope of review does not require the reviewing court to disregard the findings of the family court; appellate courts should be mindful that the family court, who saw and heard the witnesses, sits in a better position to evaluate credibility and assign comparative weight to the testimony. *Cherry v. Thomasson*, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

[1] Although Husband only asserted that laches barred Wife's claims for past due alimony, the order of the family court decreed that laches barred Wife's claims for both past due and ongoing alimony.

LAW/ANALYSIS

I. Laches

Wife argues that the family court erred in dismissing her claims to enforce her alimony award based on the doctrine of laches. We agree.

Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant. *Kelley v. Kelley*, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct. App. 2006).

On previous occasions, this Court has alluded to the inapplicability of the defense of laches in actions to enforce a court order. In *Jefferson Pilot Life Insurance Co. v. Gum*, 302 S.C. 8, 393 S.E.2d 180 (1990), Husband was required pursuant to a 1974 divorce decree to name Wife #1 as the beneficiary of his life insurance policy. *Id.* at 9, 393 S.E.2d at 181. In 1976, Wife #1 learned Husband had changed the beneficiary to Wife #2 and thereafter, Wife #1 obtained several court orders to reinstitute herself as the beneficiary of the policy, the final order to this effect being issued in 1980. Despite these proceedings, Wife #1 was aware that Husband never designated her as beneficiary. After Husband's death in 1987, Wife #1 and Wife #2 both brought claims seeking the insurance policy proceeds. The trial court granted Wife #2's motion for summary judgment based on the doctrine of laches. *Id.* at 9-10, 393 S.E.2d at 181.

On appeal, this Court found that because there had been no modification to the court's order designating Wife #1 as the beneficiary, Husband was "still under an obligation" by order of the court to designate her as such. *Id.* at 11, 393 S.E.2d at 182. Therefore, the Court held that the trial

court erred in granting summary judgment based on laches to Wife #2. *Id.* at 12, 393 S.E.2d at 182.

In our opinion, this Court's reasoning in *Jefferson Pilot* is equally applicable to a family court award of alimony. Although the equitable nature of laches generally comports with the family court's equitable jurisdiction in determining support and maintenance between former spouses, the concept of "inexcusable delay" in the laches defense is inconsistent with the judicial authority inherent in a court order. Because court orders awarding support and maintenance do not have an expiration date, allowing a party to avoid compliance based solely on the oblique notion of delay only serves to undermine the authority of the court. *See also Stephens v. Hamrick*, 358 S.E.2d 547, 549 (N.C. Ct. App. 1987) (holding that the doctrine of laches does not bar the enforcement of a court order for child support because "the obligation to furnish support is continuous [and therefore] a lapse of time will not be a bar to commencement of an enforcement action."). Accordingly, we hold that laches is not a defense to a claim for the enforcement of an alimony award and that therefore, the family court erred in applying laches as a defense to both Wife's claim for past due alimony and Wife's claim for ongoing alimony.[2]

In holding as we do today, we do not seek to limit the concept of fairness underlying actions in equity. Instead, we believe that a court's focus in deciding an issue related to the enforcement of an alimony obligation should be on the equity of enforcing the court order rather than the general application of equitable defenses. In this context, we find that the theory of equitable estoppel appropriately balances principles of equity and judicial authority when the underlying facts of a case call into question the equity of enforcing a court order.

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[2] Recently, the court of appeals determined in *Kelley v. Kelley*, 368 S.C. 602, 629 S.E.2d 388, that the doctrine of laches only acts to bar a spouse's claim for past due alimony payments, but will not apply to bar a claim for future alimony payments. *Id.* at 606 n.2, 629 S.E.2d at 391 n.2. Our opinion today vacates this portion of *Kelley*.

The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel. *Kelley*, 368 S.C. at 608, 629 S.E.2d at 392. The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped. *Boyd v. BellSouth Tel. Tel. Co., Inc.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006). As the elements exhibit, equitable estoppel is based on affirmative conduct between the parties. In our opinion, contesting the enforcement of a court order based on the affirmative conduct of the parties is less offensive to judicial authority than the emphasis on the *lack of* conduct by a party inherent in the defense of laches. Accordingly, we hold that equitable estoppel is the appropriate defense to an action for the enforcement of a court order for support and maintenance.

Turning to the instant case, we recognize that affirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading. *Wright v. Craft*, 372 S.C. 1, 20-21, 640 S.E.2d 486, 497 (Ct. App. 2006) (quoting Rule 12, SCRCP). Therefore, because Husband only asserted laches as an affirmative defense, the question of whether Wife is equitably estopped from enforcing past due alimony is not squarely preserved in the instant case. *See id.* (noting that an issue must have been raised to and ruled upon by the trial court to be preserved for review). Noting the equitable foundation of this case, we next consider whether a decision by this Court on the merits of equitable estoppel is appropriate under these circumstances.

Laches is an equitable doctrine which arises upon the failure to assert a known right. *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct.

App. 2004). The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the "voluntary and intentional relinquishment or abandonment of a known right," *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Both laches and waiver require a party to have known of a right, and known that the party was abandoning that right.

The doctrine of equitable estoppel may be enforced in a court of law as well as in equity matters. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). Often confused with waiver, equitable estoppel focuses on a party's detrimental reliance on another party's conduct while a waiver analysis focuses on a party's "unequivocal intent to relinquish a known right." 7 S.C. Jur. *Estoppel and Waiver* § 17 (1991). Nevertheless, this Court has acknowledged that "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Parker*, 313 S.C. at 487, 443 S.E.2d at 391 (quoting *Janasik*, 307 S.C. at 344, 415 S.E.2d at 388).

Given their derivation from the legal doctrine of waiver, we note that the doctrines of laches and equitable estoppel may be similarly indistinct at times. For example, one who delays unreasonably could be said to be estopped from asserting a claim if another has relied on that delay to his detriment. *See* 7 S.C. Jur. *Estoppel and Waiver* § 28. Thus, it is possible to assert only one of these equitable defenses – yet have successfully pled both.

In the instant case, we find this precise scenario to have occurred. As it is argued in the pleadings and briefs, Husband's laches defense is virtually indistinguishable from an equitable estoppel defense – the underlying concept of waiver being the essence of Husband's argument. Therefore, regardless of the "laches" title assigned to his argument, we find that equity demands that this Court consider whether Wife is equitably estopped from pursuing her claim for past due alimony. *See also* Rule 15(b), SCRCP ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

Turning to the merits, we find that Wife's claim for past due alimony is barred under the doctrine of equitable estoppel. Beginning as early as 1990, Wife's conduct conveyed the impression that she was willing to accept alimony in an amount different from that articulated in the 1988 divorce decree. Wife accepted Husband's $300 monthly alimony payments for seven years and further testified that she "agreed on [$300 per month] as long as I could make my other payments – because he was trying to get straightened out. Furthermore, Wife pursued no alimony – other than a single request in July 1998[3] – when Husband's monthly payments altogether ceased, testifying that at that time, "I told him as long as I could make it that I would not go after him."

Furthermore, Wife intended Husband to rely on her actions and assertions. Wife's communication with Husband and use of the court system early on indicate that she was clearly aware of Husband's financial situation as well as the procedure for modification or enforcement of the alimony award. Wife herself initiated the claim which resulted in the 1992 consent order for Husband's alimony payments to be made directly to Wife and for the arrears to be "worked out between the parties." Later in 1992, Wife went so far as to initiate a claim to reduce the amount of alimony to $500 per month.[4] In our opinion, the trial court correctly determined that between 1990 and 2004, Wife "by her actions, and her inactions, lulled [Husband] into thinking they had resolved the issue between themselves and that he did not need to take any actions to protect himself by attempting to have the Court reduce or terminate his alimony."

[3] Wife requested $500 for home renovations.

[4] Wife apparently initiated the claim and had Husband sign an affidavit saying he agreed to the modification of alimony. When Husband did not appear at the hearing, Wife withdrew the claim. Husband's undisputed testimony was that Wife led him to believe that his only responsibility in the matter was to sign the affidavit, and further, that he never received notice of the hearing.

Moreover, other than her 1990 contempt action for alimony in arrears, Husband had no indication that Wife was dissatisfied with the parties' own terms of alimony. In light of Wife's 1992 court appearances, Husband justifiably relied on Wife's assertions that she did not need alimony on the terms ordered by the divorce decree. Specifically, the consent order for the parties to settle the issue of arrears themselves, and Wife's subsequent initiation of a claim to significantly reduce alimony to an amount closer to that which Husband was actually paying at the time, gave Husband no reason to believe that he either needed to seek modification of alimony in light of his financial situation or ultimately face accountability for the entire amount dating back to the 1988 divorce decree.

Lastly, Husband was prejudiced in relying on Wife's assurances that the parties had settled all issues related to alimony. The facts show, and the trial court correctly found, that Husband would not have incurred substantial farm debt beginning in 2004 if he had known he would ultimately be responsible for the full amount of his alimony obligation.

Although Husband's almost immediate failure to adhere to the divorce decree, or at the very least seek a modification of alimony at that time, is unacceptable, Wife's assurances and reassurances that Husband need only pay what he could justifiably resulted in Husband's belief that his past due alimony obligations had been settled between them. Accordingly, we hold that Wife is equitably estopped from bringing a claim for enforcement of past due alimony against Husband.[5]

[5] Given that Husband only asserted that laches barred Wife's claims for past due alimony, we do not consider whether Wife is equitably estopped from enforcing the alimony obligation on a going-forward basis. For this reason, we vacate the portion of the trial court's decision holding that Wife's claim for ongoing alimony is barred by laches.

II. Continuous cohabitation as a bar to alimony

Husband argues that the family court erred in failing to find that Wife was no longer entitled to alimony because she had continuously cohabited with another man for the last seven years. We disagree.

S.C. Code Ann. § 20-3-150 provides that permanent alimony and support requirements of a supporting spouse will terminate "upon the remarriage or continued cohabitation of the supported spouse." Unless another meaning has been agreed to in writing, § 20-3-150 defines "continued cohabitation" as when:

> the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days. . . . [or] there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement.

If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. *Vaughan v. McLeod Reg'l Med. Ctr.*, __ S.C. ___, ___, 642 S.E.2d 744, 747 (2007). The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation. *Id.*

Although neither party disputes that Wife has been in a "romantic relationship" for more than seven years, Husband attempts to bypass the statute's other requirements for termination of alimony by refusing to interpret the phrase "resides with another person" on its face. We find that the phrase "resides with" in the context of § 20-3-150 sets forth a requirement that the supported spouse live under the same roof as the person with whom they are romantically involved for at least ninety consecutive days. Any other interpretation essentially takes the "cohabitation" out of "continued cohabitation." Because Husband admits that Wife and her boyfriend do not

live together in this fashion, and further, does not contend that their living arrangement is an attempt to circumvent the statute, Husband has not shown that Wife's relationship with another man amounts to "continued cohabitation" under § 20-3-150. Accordingly, we affirm the family court's refusal to terminate Husband's ongoing alimony obligation under § 20-3-150.

CONCLUSION

For the foregoing reasons, we hold that laches is not a defense to claims for either past due or ongoing alimony. Rather, we hold that equitable estoppel is the appropriate defense to the enforcement of a court order for support and maintenance. We therefore affirm the decision of the family court dismissing Wife's claim for past due alimony on the modified grounds that Wife is equitably estopped from collecting alimony in arrears. As to ongoing alimony, we vacate the decision of the family court finding laches barred Wife's claim for ongoing alimony and affirm the family court's refusal to terminate ongoing alimony pursuant to the continuous cohabitation statute.

MOORE, BURNETT, JJ., and Acting Justice J. Michael Baxley, concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the majority's disposition of this appeal, but write separately because the fact the obligation sought to be enforced arises by virtue of a court order does not, in my opinion, preclude a plea of laches. While I appreciate the majority's sensitivity to the dignity of court orders, I do not see that interposing either laches or equitable estoppel in any way undermines a court's authority. These bars lie to prevent a party from enforcing a stale order, while the court's authority is vindicated through its contempt powers. Further, I do not agree with the application of equitable estoppel to these facts. The former husband was aware from the May 1992 consent order that he was obligated to pay his former wife $1200/month alimony and to make up arrearages as the parties agreed, and was aware that for many years his former wife had accepted less alimony than she was entitled to under this order. Assuming his former wife meant for him to believe that she was satisfied with the underpayments when she in fact was not, and assuming he relied upon her "false representation," this does not change his actual or constructive knowledge of the "true facts": he had, for years, failed to meet his court-ordered alimony obligation.

I would affirm the family court order barring the request for alimony arrearages on the ground of laches, affirm the refusal to terminate alimony under the "continual habitation" statute, and reverse the order barring future alimony payments on the ground of laches.

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

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O R D E R

The South Carolina Bar has proposed amending Rule 1.15(a), RPC, Rule 407, SCACR, to incorporate a reference to Rule 417, SCACR, within the body of the Rule 1.15(a). The Bar has also requested the Court delete a portion of Comment 1 to Rule 1.15. The Comment states that a lawyer must comply with any recordkeeping rules established by law or court order and includes a reference to Rule 417.

Rule 417 addresses a lawyer's duty to maintain financial records, and contains express instructions regarding financial recordkeeping. Because we believe the proposed amendment to Rule 1.15(a) better emphasizes the need to abide by Rule 417 as it relates to the safekeeping of clients' property, we adopt the amendment to Rule 1.15(a), as set forth in the attachment to this Order. However, we decline the Bar's request to delete a portion of Comment 1. The amendment is effective immediately.

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

RULE 1.15: SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation. A lawyer shall comply with Rule 417, SCACR (Financial Recordkeeping).

The Supreme Court of South Carolina

In the Matter of William Glenn Rogers, Jr., Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), 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 Dennis N. Cannon, Jr., 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. Cannon shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Cannon 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.

Mr. Cannon shall immediately turn over files relating to cases in which respondent provided representation as part of his duties as an employee of the Public Defender Corporation in Kershaw County to the Public Defender Corporation. For any of these files that involve pending matters, the Public Defender Corporation shall immediately assign these cases to other attorneys, notify the clients, and insure that a new attorney is substituted as counsel of record in the matter. Mr. Cannon shall not be required to give any notice to clients whose files are turned over to the Public Defender Corporation.

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 Dennis N. Cannon, Jr., 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 Dennis N. Cannon, Jr., 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. Cannon'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/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

August 17, 2007

The Supreme Court of South Carolina

Pee Dee Regional Transportation, Employer, and State Accident Fund,	Appellants,
v.	
S.C. Second Injury Fund,	Respondent,
In re: Clinton Gaskins, Jr.,	Employee/Claimant,
v.	
Pee Dee Regional Transportation,	Employer,
and State Accident Fund,	Carrier.

ORDER

On July 13, 2007, appellants served and filed a notice of appeal in the Court of Appeals and with the Florence County Clerk of Court from an order of the South Carolina Workers' Compensation Commission dated June 20, 2007. The appeal pending before the Court of Appeals was certified to this Court pursuant to Rule 204(b), SCACR, by order dated August 3, 2007. Appellants have now filed a Motion to Determine Jurisdiction and Alternatively for an Extension of Time to File Appellants' Initial Brief.

Therein, appellants ask this Court to make a determination as to the proper jurisdiction for this appeal.

S.C. Code Ann. § 42-17-60 (Supp. 2006) previously provided that an appeal from a decision of the Workers' Compensation Commission shall be to the Court of Common Pleas in the county in which the alleged accident occurred or in which the employer resides or has his principal office. On June 25, 2007, the statute was amended by 2007 Act No. 111 to require such appeals be made to the Court of Appeals. However, Part IV, Section 2 of Act 111 states the following: "Except as otherwise provided for in this act, this act takes effect July 1, 2007, or, if ratified after July 1, 2007, and except otherwise stated, upon approval by the Governor and *applies to injuries that occur on or after this date*." (Emphasis added).

The cardinal rule in interpreting Act 111 is to ascertain and effectuate the intent of the Legislature. Davis v. School Dist. of Greenville County, 374 S.C. 39, 647 S.E.2d 219 (2007). Where the language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

The language of Act 111 is not ambiguous and clearly states that it applies only to injuries that occur on or after July 1, 2007. Therefore, the change regarding the appeal procedure, like all other provisions of the Act, is only applicable to Workers' Compensation cases in which the injury occurred on or after July 1, 2007.

The injury at issue in the case at hand occurred on January 30, 2002, clearly prior to July 1, 2007. Accordingly, the amendments set forth in Act 111 do not apply and, applying the former version of section 42-17-60, jurisdiction over this appeal lies in the Court of Common Pleas. We therefore dismiss the notice of appeal filed in the Court of Appeals and certified to this Court, and the appeal shall instead proceed as filed in the Court of Common Pleas. Appellants' request to hold the timelines for this appeal in abeyance or, in the alternative, to grant them an extension of time to file their initial brief, is denied as moot.

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 24, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tony S. Bennett, Appellant.

Appeal From Spartanburg County
Gordon G. Cooper, Special Circuit Court Judge

Opinion No. 4287
Heard February 6, 2007 – Filed August 14, 2007

REVERSED AND REMANDED

Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

John Benjamin Aplin, of Columbia, for Respondent.

HUFF, J.: Tony S. Bennett appeals his Community Supervision Program (CSP) revocation on the grounds: (1) he was charged, convicted, and sentenced as a first offender and thereby not required to participate in CSP; and (2) the trial court erred in holding he was required to challenge his

sentence through a timely post-conviction relief (PCR) application. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

Bennett was indicted for distribution of crack cocaine on April 12, 1999, and pled guilty, pro se, to the charge on July 14, 1999. He was sentenced to four years imprisonment and given credit for roughly six months served. Bennett did not appeal his conviction or sentence. On June 14, 2002, after serving eighty-five percent of his term, approximately three years, four months and twenty-three days, Bennett was released and entered South Carolina Department of Probation, Parole and Pardon Services' (DPPP) CSP.

On March 27, 2003, Bennett was charged with violating the conditions of his CSP. At a CSP revocation hearing the court found Bennett violated his CSP, revoked it, and imposed a sentence of eleven months and ten days. Bennett did not appeal his revocation. On February 24, 2004, after satisfying his first CSP revocation, Bennett was released and entered CSP. On April 4, 2005, Bennett was again charged with violating conditions of his CSP. At the CSP violation hearing, Bennett did not contest the alleged violations of his CSP, but rather challenged the classification of his original sentence and placement in CSP.

Bennett's arrest warrant and indictment specify that he was charged with "Distribution of Crack Cocaine" in violation of S.C. Code § 44-53-375(B)(1). At the time of Bennett's indictment § 44-53-375(B)(1) (Supp. 1998)[1] read, in part:

> (B) A person who manufactures, distributes, dispenses . . . ice, crank or crack cocaine, in violation of Section 44-53-370, is guilty of a felony and, upon conviction:

[1] This version of the statute was produced in the 2002 bounded edition, S.C. Code § 44-53-375(B)(1) (2002), and has since been amended by 2005 Act No. 127, eff June 7, 2005, found in S.C. Code § 44-53-375(B)(1) (Supp. 2006).

> (1) for a *first offense,* must be sentenced to a term of imprisonment of not more than fifteen years . . .

Id. (emphasis added). In addition, the arrest warrant lists the Criminal Docket Report (CDR) Code, or Offense Code, #0112. CDR Code #0112 indicates a first offense, "Drugs/ Manufacture, distribution, etc., ice, crank, crack cocaine - 1st offense." The indictment cover lists a different CDR Code, #0107, indicating a Class E felony,[2] "Drugs / Distribute, sell, purchase, manuf. drug other than crack cocaine, or pwid, near school."

Bennett's sentencing sheet indicates that he pled to and was convicted of "Distribution of Crack Cocaine in violation of § 44-53-375(B)(1) of the S.C. Code of Laws, bearing CDR Code #0113." While Section 44-53-375(B)(1) indicates a first offense, CDR Code #0113 indicates a second offense, "Drugs / Manufacture, distribution, etc., ice, crank, crack cocaine - 2nd offense." There is no record of the original sentencing hearing.

At his second CSP revocation hearing, Bennett argued that he was originally sentenced as a first offender and thereby not required to participate in CSP. He averred that the ambiguity between the statute and CDR code appearing on his sentencing sheet should be construed as a scrivener's error to be resolved in his favor. The State asserted Bennett was a second offender and that if Bennett believed he had received "a wrong sentence or wrong time" he should have challenged his sentence in a timely PCR application. Thus, the State argued because Bennett did not raise his claim within a year of his sentence he was beyond the statutory period wherein he could have filed such claim. Additionally, the State contended that Bennett's failure to raise this argument in his first CSP violation hearing was a waiver of his right to raise the claim in the current CSP violation hearing.

[2] A Class E felony is a parolable offense and thereby not restricted by S.C. Code § 24-13-100 which prohibits the parole or early release, including CSP, for prisoners convicted of a Class A, B, or C Felony until they have served 85 percent of their sentences.

Ultimately, the court agreed with the State finding Bennett should have filed a PCR application and was thereby "well beyond the statutory period wherein he could file [his claim]." The court then adopted the State's recommendation to find Bennett in violation of his CSP,[3] revoked it and sentenced him to one year imprisonment. This appeal follows.

DISCUSSION

I.

Rather than determine whether Bennett was sentenced as a first offender or second offender, the CSP revocation judge held Bennett was required to challenge his sentence through a timely PCR application. The judge found, "that now is not the time or the place to bring up these arguments that should have been made, at a substantial period of time prior to now, in a PCR application." On appeal, Bennett argues "the lower court committed an error of law by ruling that appellant should have challenged his sentence through a timely application for post-conviction relief (PCR)," citing Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). We agree.

In Al-Shabbaz v. State the supreme court explained, in depth, the process by which PCR applicants and inmates raise certain types of claims. 338 S.C. 354, 527 S.E.2d 742 (2000). The court made a distinction between the process for claims attacking the validity of a conviction or sentence and claims seeking review of non-collateral or administrative matters. The court elucidated:

> PCR is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence* as authorized by Section 17-27-20(a).[4] . . .

[3] Bennett did not contest the alleged violations of his CSP at his hearing or on appeal.

[4] S.C. Code Ann. §17-27-20(a) (2003) states:

The only exceptions to our holding are two non-collateral matters specifically listed in Section 17-27-20(a)(5): the claim that an applicant's sentence has expired and the claim that an applicant's probation, parole, or conditional release has been unlawfully revoked. Under the approach we outline today, these claims are non-collateral matters because neither

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Any person who has been convicted of, or sentenced for, a crime and who claims:
(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
(2) That the court was without jurisdiction to impose sentence;
(3) That the sentence exceeds the maximum authorized by law;
(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. *Provided, however*, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

> constitutes a challenge to the validity of the underlying conviction or sentence. . .
>
> We hold that these two claims, because they are specifically listed in the PCR Act, may be raised in PCR or as a non-collateral matter in the manner outlined below. . .

Id. at 367-368, 527 S.E.2d at 749 (emphasis in original). The supreme court continued, explaining the process to be used when an inmate seeks review of a South Carolina Department of Correction's (SCDOC) final decision in a non-collateral or administrative matter.[5] Id. at 368-383, 527 S.E.2d at 749-757.

In the instant case, Bennett is not making a collateral attack challenging the validity of his conviction or sentence that would force him to bring his claim under the PCR Act. To the contrary, Bennett is trying to enforce his sentence. Bennett avers he was appropriately sentenced under § 44-53-375(B)(1), as a first offender and now is wrongly being classified and treated as a second offender. Because Bennett raises a non-collateral matter, whether it falls within the ambit of §17-27-20(a)(5) or is another form of non-collateral relief, Al-Shabbaz clearly allows for the matter to be raised in either a PCR and/or as a non-collateral matter in the manner outlined in Al-Shabbaz. Thus, Al-Shabbaz provides an avenue of relief for Bennett to challenge the classification of his original sentence other than through PCR. Although we believe Bennett is entitled to a review of his claim pursuant to Al-Shabazz, we address it now because we find Bennett was sentenced as a first offender and has exceeded his original sentence, as further discussed, and thus he should not be forced to pursue and await the outcome of such a claim. See State v. Johnston, 333 S.C. 459, 463-64, 510 S.E.2d 423, 425-27

[5] Two administrative matters the court cites as typically arising are: 1) when an inmate is disciplined and punishment is imposed and 2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status. Al-Shabbaz v. State, 338 S.C. 354, 370, 527 S.E.2d 742, 750 (2000).

(1999) (addressing defendant's claim rather than requiring her to pursue a remedy through PCR finding she already served the duration of her sentence and faced the threat of continued incarceration beyond the legal sentence due to the additional time it would take to pursue such a remedy).

II.

Bennett contends he was sentenced as a first offender and should not be subject to CSP. His sentencing sheet lists a statute indicating he was sentenced as a first offender and a CDR code indicating he was sentenced as a second offender. As a first offender Bennett would have been eligible for parole. As a second offender Bennett was not eligible for parole but after serving 85 percent of his sentence was required to participate in CSP.

Under S.C. Code Ann. § 24-21-560(A), participation in CSP is a mandatory condition of release for most no-parole offenses. DPPP sets the initial length of CSP, not to exceed two continuous years, as well as the terms and conditions of CSP, and determines whether violations have occurred. S.C. Code Ann. § 24-21-560(B) (2002); see also State v. Mills, 360 S.C. 621, 625, 602 S.E.2d 750, 752 (2004) (Pleicones, J., dissenting opinion) (discussing CSP). If DPPP determines a CSP violation has occurred, it must initiate a revocation proceeding during which a circuit court judge determines whether a prisoner has willfully violated the terms of his CSP. The judge may impose other terms or conditions and continue CSP or revoke CSP and impose a sentence up to one year. If a prisoner's CSP is revoked and the court imposes a sentence, the prisoner must also complete a CSP of up to two years when he is released. For a successive revocation, the prisoner may be sentenced for up to one year for the violation, with the limitation that the total time imposed for successive revocations cannot exceed the length of time of the prisoner's original sentence.

The supreme court addressed this statute in State v. Mills, reinforcing that a prisoner may serve an amount equal to the original sentence for CSP violations. In Mills, Appellant was originally sentenced to six months. He served five months and two days of the original sentence and was released into CSP which was to continue for two years. Appellant's CSP was revoked and he served three weeks in prison for the CSP violations. Appellant's CSP

was revoked for a second time and he was sentenced to five months and seven days. Appellant appealed this second revocation, claiming that the length of imprisonment for CSP violations could not exceed the remaining length of time left on his original sentence of six months. Since Appellant served five months and two days of his original sentence in addition to three weeks from his first CSP revocation, he argued his second revocation could not exceed five days. The supreme court disagreed and upheld the second CSP revocation sentence, explaining that the statute provides that sentences for successive CSP revocations may total the time of the original sentence.

In this case, Bennett was originally sentenced to four years and after serving approximately three years, four months and twenty three days, he was released into CSP. Bennett was to serve two years on CSP, but after eleven months and two days his CSP was revoked and he was sentenced to eleven months and ten days imprisonment for the CSP violation. After serving his first CSP revocation he was again released into CSP. After roughly one year and five months Bennett's CSP was revoked for a second time and he was sentenced to one year imprisonment for his CSP violations. After serving one year on his second CSP revocation, Bennett was again released into CSP.[6] According to the statute and Mills, Bennett still has roughly two years and twenty days which he can serve for CSP violations. Therefore, if Bennett were to violate the terms of his CSP for a third time he would again be subject to imprisonment for up to one year. Once released into CSP for a fourth time, Bennett could serve up to one additional year if he were to violate his CSP and have it revoked. And still, once release into CSP for a fifth time, if he were to violate the terms of his CSP, he would be subject to twenty more days in prison.

[6] Bennett has served roughly five years, four months, and three days in prison, of which time one year, eleven months, and ten days were for his CSP violations. Additionally, Bennett has served roughly two years, four months, and two days under CSP. The total time Bennett has been under the State's control since his original four year sentence is seven years, four months, and three days.

Bennett's placement and participation in CSP is a result of being treated as a second offender, as indicated by the CDR code on his sentencing sheet. Bennett's argument that he was a first offender rests in that the statute on the sentencing sheet indicates he is a first offender and that the statute should control, not the CDR code.

Essential to a determination on Bennett's claim is an understanding of CDR codes and how they are utilized in the overall judicial process. CDR codes are four digit numerical codes which represent the criminal offenses created by the South Carolina General Assembly and common law. See South Carolina Judicial Department, CDR Codes Frequently Asked Questions, http://www.sccourts.org/cdr/userInstructions.htm. The codes were developed in the late 1970's in a collaborative effort between the South Carolina Justice Department (SCJD), DPPP, and SCDOC. They were created at a time when computer systems had limited memory and did not have the capacity to maintain references to specific statutes which could contain many digits.[7] Id. The shorter CDR codes saved computer space and provided a consistent administrative shortcut to be used by all three departments. Id. The code developers started with a list of statutory criminal offenses and assigned each a number. As laws change and new offenses are created, the codes are updated. The master list of CDR codes is now maintained by the SCJD which monitors the legislative process to determine required changes and corrects errors in the codes.

While the codes were developed and are used to provide an administrative shortcut, they were never intended to replace statutory law. Id. The codes are normally listed after the statute on all warrants, indictments, and sentencing sheets. As the SCJD's website explains, the elements of a crime, its penalties and other related matters are governed by

[7] The abbreviation, CDR, stood for "Criminal Docket Report," indicating the paper docket sheets maintained by criminal justice agencies. Since that time, paper dockets are no longer maintained. The term has been redefined to mean "Criminal Data Report." South Carolina Judicial Department, CDR Codes Frequently Asked Questions, http://www.sccourts.org/cdr/userInstructions.htm. The Codes are also called "offense codes". Id.

the Code of Laws and the common law alone. Id. Any errors in a CDR code do not affect the crime, its characterization as violent or non-violent, for example, or even if someone can be prosecuted for a crime. Id. The website further states in a disclaimer, "[t]he South Carolina Code of Laws is the controlling authority for classifications, definitions and penalties for criminal offenses, and **the statute itself should always be consulted**." Id. (emphasis added); see also South Carolina Judicial Department, CDR Codes, http://www.sccourts.org/cdr/index.cfm.

On appeal, at oral argument, the State agreed that Bennett's sentencing sheet was filled out incorrectly and that either the CDR code or the statute could have been a mistake. The State also acknowledged that someone had to make a decision between the statute and CDR code, as to what the judge intended on the sentencing sheet, and it appeared SCDOC made a decision based on the CDR code. Further, the State conceded that the CDR code is an administrative listing of violations.

Because the South Carolina Code of Laws is the controlling authority for classifications, definitions and penalties for criminal offenses, a statute listed on a sentencing sheet, and not a CDR code, will dictate a criminal's sentence. Therefore, we find Bennett was sentenced as a first offender. Bennett's warrant, indictment, and sentencing sheet all list S.C. Code § 44-53-375(B)(1), indicating a first offense. The additional listing of the CDR code on Bennett's sentencing sheet, indicating a second offense, may not trump the listed statute. Due to SCDOC's erroneous interpretation of Bennett's sentencing sheet, Bennett has served more than the original sentence of four years and should be released from CSP. Therefore, we remand to the circuit court for an order consistent with this opinion.

III.

Lastly, the State contends that Bennett's failure to raise this argument in his first CSP violation hearing results in a waiver of his right to raise it in the current CSP violation hearing. The issue of waiver was raised but not ruled upon below, and we decline to address the issue. See I'On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding when reversing a lower court's decision it is within an appellate court's discretion

as to whether to address any additional sustaining grounds); see also Gecy v. Bagwell, 372 S.C. 237, 243-44, 642 S.E.2d 569, 572 (2007) (declining to address an additional sustaining ground); and Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 485, 623 S.E.2d 373, 378 (2005) (reversing the lower court and declining to discuss additional sustaining grounds).

For the foregoing reasons, Bennett's CSP revocation is

REVERSED AND REMANDED.

BEATTY, and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

International Fidelity Insurance Company, Appellant,

v.

China Construction America (SC) Inc., Respondent.

Appeal From Kershaw County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 4288
Heard June 5, 2007 – Filed August 21, 2007

AFFIRMED

A. Jackson Barnes and Robert E. Horner, both of Columbia and Neil L. Henrichsen, of Jacksonville, for Appellant.

Henry Pickett Wall, of Columbia and Walter Henry Bundy, Jr., of Mt. Pleasant, for Respondent.

HEARN, C.J.: International Fidelity Insurance Company (Surety) appeals the circuit court's order granting summary judgment to China Construction America (SC), Inc. (Contractor) on Surety's action seeking payment of contract funds. We affirm.

FACTS

On May 26, 1999, Contractor entered into a general construction contract with Haier Corporation to build a large manufacturing facility in Camden, South Carolina. Contractor subcontracted the electrical work to Electrical Maintenance Technicians (Subcontractor). As a precondition of the subcontract, Contractor required Subcontractor to post performance and payment bonds in the sum of the full subcontract, $1,331,167.22. On October 19, 1999, Surety issued the bonds on behalf of Subcontractor, which named Contractor as the third party beneficiary.

During the project, Subcontractor became insolvent, and several of Subcontractor's suppliers and subcontractors filed mechanic's liens. Subcontractor failed to complete the subcontract on time, delaying the project for eighty-three days. Contractor demanded that Subcontractor and Surety discharge the liens pursuant to their obligations. When the liens were not immediately bonded off, Contractor brought a civil action against Subcontractor, Surety, and the three lien creditors. Contractor sought breach of contract damages against Subcontractor and Surety; a declaration of Surety's obligation to discharge the liens; and a determination of the relative rights of the lien creditors to the subcontract retainage. Ultimately, Surety bonded off the liens and paid Subcontractor's lien creditors such that Contractor's only remaining claim was a breach of contract claim against Subcontractor.

On the day of trial, Subcontractor failed to appear, and Surety moved to be dismissed from the case without prejudice. Contractor consented to Surety's request and proceeded to try its breach of contract claim against Subcontractor. The circuit court found in favor of Contractor, holding

Subcontractor liable for delay in completion of the project and for Subcontractor's failure to perform pursuant to the terms of the subcontract. At the circuit court's request, counsel for Contractor prepared a draft order. Counsel for Surety requested a copy of the order after it was executed and suggested non-substantive changes concerning the involvement of Surety in the proceeding. Contractor consented to the proposed changes, and the circuit court issued an amended order granting judgment for Contractor against Subcontractor in the amount of $660,250.51. This judgment was not appealed.

Sometime after Contractor filed its action, Surety filed a separate action against Contractor seeking the balance of the subcontract as Subcontractor's subrogated surety. Contractor counterclaimed averring the judgment against Subcontractor was binding and conclusive on its surety, and as a matter of law, Contractor was entitled to judgment against Surety for the full amount of the judgment against Subcontractor. In response, Surety argued the prior judgment was not binding because it was beyond the scope and coverage of the bond and that there were issues of fact as to whether the judgment in the previous case was obtained by fraud or collusion. Additionally, Surety claimed three theories of estoppel, collateral, judicial, and equitable, applied to prevent Contractor from asserting its counterclaims. Both parties moved for summary judgment. The circuit court granted Contractor's motion for summary judgment finding the prior judgment against Subcontractor was binding on Surety as a matter of law. Further, the court found no merit to Surety's allegations of fraud and collusion. Lastly, the court held Surety's estoppel arguments were without merit. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). To determine whether any triable issues of fact

exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

LAW/ANALYSIS

I. Conclusiveness of the Bond

Surety argues the trial court erred in its determination that the judgment against Subcontractor was conclusive and covered within the scope of the bond. Surety attacks the conclusiveness of the prior judgment on its obligations under the bond, arguing the amount of damages awarded was beyond the scope of the bond.[1] We disagree.

In South Carolina, a judgment against a principal is binding and conclusive on a surety. Ward v. Fed. Co., 233 S.C. 561, 106 S.E.2d 169 (1958). In Ward, the supreme court addressed the effect of a prior judgment against a principal on subsequent litigation against the surety. Id. The court stated:

> As a general rule, in all cases where the liability of a surety is dependent on the outcome of litigation in which his principal is or may be involved, a judgment against a principal is binding and conclusive on the surety, and the surety may not impose defenses which should or might have been set up in the action in

[1] Surety argued at trial that the prior judgment was not binding because it was beyond the scope and coverage of the bond and, in the alternative, that Contractor obtained its judgment through a fraud perpetrated on the court. On appeal, Surety concedes that there is no issue of fraud or collusion, but maintains that the prior judgment was beyond the scope of its surety obligation.

> which the judgment was recovered, or require proof of the facts on which the judgment rests, or attack the validity of the judgment, except for fraud or collusion or want of jurisdiction. The rule is applicable even though the surety had no notice of the suit or opportunity to defend.

Ward, 233 S.C. at 564, 106 S.E.2d at 170 (citing 72 C.J.S. Principal and Surety §261).

This issue was most recently addressed in this court's opinion in Cooper v. Beauliau, 310 S.C. 392, 426 S.E.2d 819 (Ct. App. 1992). In that case, Cooper obtained a judgment against an auto dealer and sought to recover against dealer's surety. Id. at 393-94, 426 S.E.2d at 820. The surety argued it had no notice of the action, the prior judgment was not binding, and the prior damage award was beyond the scope of the bond coverage. Citing Ward as controlling authority, this court refused to revisit the issue of damages and liability absent any suggestion of fraud, collusion, or want of jurisdiction. Id. at 394, 426 S.E.2d at 820. We further noted that the surety and principal's liability was joint and several, and therefore, surety's lack of notice and participation in the previous suit between the claimant and principal was of no consequence. Id. Importantly, the court found no merit in plaintiff's argument that the damages award exceeded the scope of the bond. Id. at 395, 426 S.E.2d at 821.

As in Cooper, we hold this matter is controlled by Ward, our supreme court's most recent precedent in this area. Therefore, absent fraud, collusion, or lack of jurisdiction, which Surety concedes are not at issue here, Surety may not now argue defenses which should or might have been raised in the action in which the judgment was recovered, especially where Surety had notice and an opportunity to defend in that action.[2] As a result, the circuit court did not err in granting summary judgment to Contractor.[3]

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[2] The logic of this rule is most aptly summarized in Vigilanti v. Pfieffer-Nuemeyer Constr. Corp., 25 F. Supp. 403, 404-05 (E.D.N.Y 1938):

II. Equitable Estoppel

Surety also claims the trial court erred in finding Contractor was not equitably estopped from asserting Surety was liable for the prior judgment against Subcontractor. Specifically, Surety argues Contractor's agreement to dismiss Surety without prejudice from the action against Subcontractor amounted to a false representation or concealment on which Surety could properly rely. We disagree.

Initially, a dismissal of a claim without prejudice is not an adjudication of the merits of the controversy and has no preclusive effect as a matter of law. See, e.g., McEachern v. Black, 329 S.C. 642, 651, 496 S.E.2d 659, 663 (1998). Therefore, Contractor's consent to Surety's motion to dismiss without prejudice does not equate to a false representation or concealment on which Surety could rely to change its position. Therefore, the circuit court did not err in holding Contractor was not equitably estopped from asserting Surety was liable for the prior judgment against Subcontractor.

> A surety cannot stand idly by with full knowledge of an action pending against its principal, permit a judgment to be taken against its principal, and later on, when an action is brought upon its bond, require the plaintiff to retry his case. This would result in two trials on the same issue. It would retard and not promote the administration of justice.

[3] Because we hold this matter is controlled by the precedent of Ward and Cooper, we need not address Surety's argument regarding L.B. Price Mercantile Co. v. Redd, 231 S.C. 446, 99 S.E.2d 57 (1957). See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (stating the appellate court need not address remaining issues when resolution of a prior issue is dispositive).

III. Waiver

Surety claims the trial court erred in finding there were no material facts in dispute on the issue of waiver. Surety asserts Contractor waived its rights to pursue or assert any further causes of action against Surety when Contractor agreed to dismiss Surety without prejudice. The issue of waiver was not raised or ruled upon below, and therefore, we find the issue is not adequately preserved for review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review).

IV. Judicial Estoppel

Lastly, Surety argues Contractor took inconsistent positions during the course of the case and should, therefore, be judicially estopped from asserting its claim against Surety. We find this issue not preserved for appellate review.

On appeal, Surety argues Contractor's inconsistent positions pertain to the damages sought in its original action. However, Surety argued to the circuit court that Contractor's inconsistent positions pertained to Contractor's consent to dismiss Surety from the original action. Surety did not properly raise this issue to the circuit court, and therefore, we find it is not adequately preserved for our review. See B & A Development, Inc. v. Georgetown County, 372 S.C. 261, 271, 641 S.E.2d 888, 894 (2007) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review).

CONCLUSION

Based on the foregoing, the circuit court's grant of summary judgment is hereby

AFFIRMED.

KITTREDGE, J., and CURETON, A.J., concur.

The Supreme Court of South Carolina
P. O. Box 11330
Columbia, South Carolina 29211