OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33

August 21, 2006
Daniel E. Shearouse, Clerk
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Skylet Morris, Kathy A. Snelling, and Jo Elizabeth Wheat, Respondents,

v.

The South Carolina Workers' Compensation Commission, J. Alan Bass, Lisa Denese Chavis, Sherry Shealy Martschink, W. Lee Catoe, Holly Saleeby Atkins, J. Michelle Childs, George N. Funderburk, as Commissioners of the South Carolina Workers' Compensation Commission, and Alicia K. Clawson, as Executive Director of the South Carolina Workers' Compensation Commission, in their official capacities, Defendants,

Of whom
Sherry Shealy Martschink, W. Lee Catoe, and George Funderburk are Respondents,

and The South Carolina Workers' Compensation Commission, J. Alan Bass, Lisa Denese Chavis, Holly Saleeby Atkins, J. Michelle Childs, and Alicia K. Clawson, as Executive Director of the South Carolina Workers' Compensation Commission, in their official capacities are Appellants.

Appeal from Richland County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 26201
Heard June 7, 2006 – Filed August 21, 2006

REVERSED

Keith M. Babcock and William A. McKinnon, of Lewis & Babcock, L.L.P., of Columbia, for appellants.

J. Lewis Cromer, of Cromer & Mabry, of Columbia, for respondents Morris, Snelling, and Wheat.

J. Dennis Bolt, of Bolt Law Firm, of Columbia, for respondents Martschink, Catoe, and Funderburk.

JUSTICE MOORE: Respondents Morris, Snelling, and Wheat (hereinafter "Court Reporters") commenced this action challenging their termination as full-time State employees with the South Carolina Workers' Compensation Commission (Commission). The trial court granted summary judgment in their favor. We reverse.

FACTS

Court Reporters' positions were eliminated on November 1, 2002, pursuant to a Reduction in Force Plan adopted by a majority of the commissioners (Majority Commissioners) in order to reduce the Commission's budget deficit during the State's fiscal crisis. The Majority Commissioners are the appellants here.

Three commissioners -- Martschink, Catoe, and Funderburk -- voted against the Reduction in Force Plan. Court Reporters worked for these commissioners. Although their positions were eliminated, Court Reporters were retained as court reporters for the Commission on an independent contractor basis. However, Court Reporters no longer received the benefits they once enjoyed as State employees, including travel reimbursement, retirement, and health insurance. Further, the Commission limited hearings to ten days per month which reduced Court Reporters' salaries because they were paid only for the hours they worked instead of full-time pay.

Court Reporters brought this suit against the Commission and all of the individual commissioners. The Majority Commissioners moved to have Commissioners Martschink, Catoe, and Funderburk realigned as plaintiffs which was granted by the trial court. Commissioners Martschink, Catoe, and Funderburk have taken no action in this matter. Commissioner Funderburk is the only one of these three commissioners still serving on the Commission.

On Court Reporters' motion for summary judgment, the trial court ordered Court Reporters' reinstatement to their prior positions under S.C. Code Ann. § 42-3-60 (1985) which provides in its entirety:

> **§ 42-3-60. Secretary and court reporter of commissioners.**
>
> Each commissioner shall be authorized to employ a secretary and a court reporter to serve at his pleasure.

The trial court ruled that under this section the Commission's court reporters could not be terminated pursuant to the Reduction in Force Plan and ordered their reinstatement.

ISSUE

Did the trial court err in ordering Court Reporters' reinstatement?

DISCUSSION

In ruling that each individual commissioner has exclusive control over the employment of his or her court reporter under § 42-3-60, the trial court looked to this Court's precedent interpreting "at pleasure" employment.

In Anders v. County Council for Richland County, 284 S.C. 142, 325 S.E.2d 538 (1985), we addressed a dispute over a solicitor's termination of an employee who was then reinstated by county council. We held the solicitor had the exclusive power to terminate the employee under S.C. Code Ann. § 1-7-405 (2005) which provides that assistant solicitors, investigators, and secretaries "serve at the pleasure of the solicitor." We concluded the employee's reinstatement by county council was therefore improper. In Heath v. Aiken County, 295 S.C. 416, 368 S.E.2d 904 (1988), we held that a sheriff's deputy was not a county employee for purposes of grievance procedures because a deputy serves "at the pleasure of" the sheriff, and the sheriff therefore has unbridled discretion over the employment and discharge of his deputies.

These cases upheld the employer's right to control the hiring and firing of "at pleasure" employees. Similarly, § 42-3-60 protects the employing commissioner's right to control the hiring and firing of the court reporter; there is nothing in the language of the statute indicating it was enacted to benefit the court reporters. *See* Adkins v. South Carolina Dep't of Corrections, 360 S.C. 413, 602 S.E.2d 51 (2004)

(where a statute does not specifically create a private cause of action, one may be implied only if the legislation was enacted for the special benefit of a private party). We conclude Court Reporters have no cause of action under § 42-3-60. We express no opinion regarding the extent of the individual commissioners' control over the employment of court reporters since no commissioner has pursued this cause of action.

The order of the trial court is **REVERSED.**

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice Roger M. Young, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Ronald Landon, Respondent.

Appeal from Richland County
G. Thomas Cooper, Circuit Court Judge

Opinion No. 26202
Heard June 21, 2006 – Filed August 21, 2006

REVERSED AND REMANDED

Assistant Solicitor Vince Smith, of Columbia, for appellant.

Desa Ballard and Jason B. Buffkin, of Law Offices of Desa Ballard, of West Columbia; and Joseph M. McCulloch, Jr., of Law Offices of Joseph M. McCulloch, of Columbia, for respondent.

JUSTICE MOORE: Respondent Landon was charged with driving under the influence (DUI) second offense. After a pre-trial hearing,

the trial judge suppressed the results of Landon's breath test. The State appeals.[1]

FACTS

Landon was involved in an auto accident at about 8:30 a.m. on December 22, 2002. When Officer Bethea arrived on the scene more than an hour later, he noticed Landon had "a high odor of alcohol," red eyes, and a flushed face. Landon told the officer he had been out drinking and dancing but had stopped drinking at 2:00 a.m. Officer Bethea administered a horizontal gaze nystagmus test[2] and concluded Landon had "a measurable amount of alcohol in his system." He then took Landon to the Richland County Detention Center for a breath test on the DataMaster machine which indicated Landon had a blood alcohol level of .14.

At a pre-trial hearing, Landon moved to suppress the DataMaster results for a violation of S.C. Code Ann. § 56-5-2954 (2006) which provides:

> The State Law Enforcement Division and each law enforcement agency with a breath testing site is required to maintain a detailed record of malfunctions, repairs, complaints, or other problems regarding breath testing devices at each site. . . .

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[1]The State may appeal such an order only if the suppression of the evidence would significantly impair the prosecution of the case. State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985). At the call of the case for trial, the solicitor represented to the trial judge that the prosecution was significantly impaired by suppression of the breathalyzer results. Although Landon contested this conclusion at the trial level, on appeal he does not challenge the State's right to appeal.

[2]This is a field sobriety test administered by holding a pen up to the subject's eyes about 15 inches away and moving the pen from left to right in order to check for a smooth eye movement. Involuntary eye jerking indicates the presence of alcohol.

After initially denying the motion, on a motion to reconsider the trial judge found that the failure to keep the required records at the site of the testing mandated suppression of the breath test results.

ISSUES

1. Did the State violate § 56-5-2954?

2. Did Landon show prejudice?

DISCUSSION

The State claims there was no violation of § 56-5-2954 and, even if there was, the breath test results should not have been suppressed because Landon failed to show any prejudice.

1. Requirements of § 56-5-2954

Lieutenant Corbett Lewis, who is supervisor of the Implied Consent Department at the State Law Enforcement Division (SLED), testified there are 158 DataMaster machines at 117 sites statewide. SLED is in charge of keeping records regarding all DataMaster machines. All of the records for each DataMaster are available on SLED's website, including an "Inquiry Report" which lists the inquiries received from individual machine operators.[3] The summary of each inquiry is very brief and does not include information regarding the specific problem reported. A typical entry lists the date and the reporting operator, and under a column entitled "Comments" reads: "BAC DataMaster information provided. No inspection necessary," or "Inspection scheduled."

Lewis testified that the Inquiry Report is generated from an inquiry form filled out whenever SLED receives an inquiry from a test site operator. The form has six codes to describe the action taken and does not provide for a verbatim description of the specific inquiry or problem. In addition, the

[3]The SLED website is http://www.sled.sc.gov/default.htm.

machine itself is programmed to detect eighteen errors that will shut down the machine and generate an error code that is reported. The machine operators do not repair the machines but simply report all problems to SLED. An inspection report is also available on SLED's website.

SLED does not require each test site to maintain separate records. The Richland County Detention Center does not keep separate records on site, however, SLED's records on the internet can be accessed at the Detention Center.

As noted above, § 56-5-2954 requires:

> The State Law Enforcement Division and each law enforcement agency with a breath testing site is required to maintain a detailed record of malfunctions, repairs, complaints, or other problems regarding breath testing devices at each site.

The trial judge found the State had failed to comply with this statute because no separate records were kept at the testing site and the records kept by SLED were not adequate.

First, the State contends the reference to a singular "record" indicates this statute does not require that a separate set of records be kept at each testing site but only that a record be kept of each device. A plain reading of the statute requires that a record be kept by both SLED and the individual agency. *See* State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2003) (words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction). We find this requirement is satisfied by the fact that SLED's internet records are available at the testing site itself. Of greater concern is the statute's requirement of a "detailed" record of specific problems with the DataMaster machines. The information available on SLED's website provides no particulars regarding problems reported by the individual testing sites. We conclude the trial judge correctly found that the records kept by SLED do not satisfy the requirement in § 56-5-2954 that a detailed record be maintained.

2. Prejudice

The State contends the trial judge should not have suppressed Landon's breath results without a finding of prejudice. We agree and remand for an evidentiary hearing on the issue of prejudice.

Rule 5, SCRCrimP, governs the disclosure of evidence in criminal cases.[4] A violation of Rule 5 is not reversible unless prejudice is shown. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). The Court of Appeals has held that the failure to disclose repair and maintenance records for breathalyzer equipment pursuant to a Rule 5 request does not warrant suppression of breath test results absent a showing that such records are material to the defense. State v. Salisbury, 330 S.C. 250, 265, 498 S.E.2d 655, 662-63 (Ct. App. 1998). We are aware, however, that information regarding the DataMaster is exclusively within the State's control. Because SLED's failure to provide a detailed record significantly hampers the defendant's ability to show prejudice in this situation, we hold that once a defendant makes a prima facie showing of prejudice, the burden must shift to the State to prove the defendant was not prejudiced, either by providing records to show the machine was working properly at the time of testing or by some other contemporaneous evidence. *Cf.* State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) (burden-shifting on element of prejudice from prosecutorial misconduct).

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[4] Rule 5(a)(1)(C) provides:

> (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Here, records from the DataMaster machine that tested Landon on December 22, 2002, indicate that repairs were made to that machine on December 30th, only eight days after Landon was tested. We find this evidence is sufficient as a prima facie showing of prejudice which the State now has the burden of rebutting. Accordingly, we reverse the suppression of the breath test results and remand for an evidentiary hearing consistent with this opinion.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Douglas E. Gressette and Mark E. Rudd, on behalf of other persons similarly situated, Appellants,

v.

South Carolina Electric and Gas Company (SCE&G), Respondent.

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 26203
Heard May 23, 2006 – Filed August 21, 2006

REVERSED

William L. Want, of Charleston, and Guyte P. McCord III, of McCord, Busbey & Ketchum. L.L.P, of Tallahassee, Florida, for appellants.

John M.S. Hoefer, Mitchell Willoughby, and Noah M. Hicks II, of Willoughby & Hoefer, P.A., of Columbia; John A. Massalon, of Will & Massalon, L.L.C., of Charleston; Stephen A. Spitz, of Charleston; and John M. Mahon, Jr.,

of SCANA Corporation, of Columbia, for respondent.

ACTING CHIEF JUSTICE MOORE: Appellants (Landowners) commenced this class action against respondent (SCE&G) for trespass, unjust enrichment, an injunction, and declaratory judgment. Landowners claim SCE&G's conveyance of excess capacity on its fiber optic cables was an improper use of the electric easements granted by Landowners to SCE&G. The trial judge granted SCE&G's motion to dismiss under Rule 12(b)(6), SCRCP. We reverse.

FACTS

A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and we must presume all well-pled facts to be true. Overcash v. South Carolina Elec. and Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005). The complaint here alleges the following.

Landowners granted easements to SCE&G giving SCE&G "the right to construct, operate, and maintain electric transmission lines and all telegraph and telephone lines . . . necessary or convenient in connection therewith. . . ."[1] Sometime in the 1990's, SCE&G began installing fiber optic communications lines on its existing poles in these easements. Fiber optic lines do not carry electricity but transmit digital signals. After setting up this communications network,[2] SCE&G began conveying excess fiber optic capacity to third-party

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[1]Another easement, also annexed to the complaint, has slightly different language and provides "communication wires . . . deemed by [SCE&G] to be necessary. . . ."

[2]According to counsel at the motion hearing, SCE&G uses the fiber optic lines for communication between substations.

telecommunications companies without notice or compensation to Landowners.

Landowners' complaint further alleges that the easements granted to SCE&G do not include the right to apportion any part of these easements to third parties for general telecommunications purposes. Landowners do not contest SCE&G's installation and use of the fiber optic lines for its own internal communications.

On the motion to dismiss, the trial judge ruled that although language of the easements does not allow third-party communications, the written easements are not determinative in light of this Court's precedent in Lay v. State Rural Electrification Auth., 182 S.C. 32, 188 S.E. 368 (1936), Leppard v. Central Carolina Tel. Co., 205 S.C. 1, 30 S.E.2d 755 (1944), and Richland County v. Palmetto Cablevision, 261 S.C. 222, 199 S.E.2d 168 (1973). The trial judge concluded these cases stand for the proposition that utility easements "confer a broad right to use the utility easement for additional purposes" and therefore SCE&G's conveyance was authorized as a matter of law.

ISSUE

Does the holder of a utility easement have the right to apportion part of its own use to third-parties as a matter of law and without reference to the written easements?

DISCUSSION

Our resolution of this case rests on our reading of Lay, Leppard, and Palmetto Cablevision. Since the complaint alleges, and the trial judge found, that the language of the easements does not allow SCE&G to convey use of its fiber optic cable to third parties, the issue is whether these cases allow apportionment of the use of a utility easement as a matter of law despite the language of the written easements.

In Lay, a 1936 case, we considered whether the placing of an electric line on a highway easement constituted an additional servitude. At issue was an Act of the General Assembly allowing the Rural Electrification Authority to install electric lines in any public highway. The plaintiff landowners contended it was a taking without compensation to allow this additional servitude of the easements granted to the State "for highway purposes." We held the placement of electric lines in the highway easements did not constitute an additional servitude because communication was within the traditional use of a highway. There was no issue regarding whether the written easements in Lay prohibited an apportionment of use to third parties. We simply held the erection of electric lines was not an additional servitude to easements that were granted "for highway purposes."

In 1944, we decided the Leppard case which involved § 8531 of the 1932 Code, now S.C. Code Ann. § 58-9-2020 (1977). This section provides:

> Any telegraph or telephone company. . . may construct, maintain and operate its line . . . under, over, along and upon any of the highways or public roads of the State . . . .

The complaining landowner had previously conveyed "an unqualified right of way" to the State Highway Department. The issue was whether the erection of telephone lines in the highway easement was an additional servitude entitling the landowner to compensation. We followed our earlier decision in Lay and concluded the erection of telephone poles and lines within the highway easement was not an addition servitude and no compensation was due. Again, no restrictive language in the underlying easement was involved.

The third case, Palmetto Cablevision, was decided in 1973. Palmetto Cablevision did not involve private landowners but was an action by Richland County (County) essentially seeking to assert County's authority over cable television services. Cablevision had an agreement with a telephone company to use the telephone company's poles and rights-of-way and was required under the terms of that

agreement to obtain consent from the State and private landowners, but not from County.

We found County's permission to use these easements was not required and, even if it was, the facts indicated such permission was actually given. 199 S.E.2d at 172. We held that the telephone company's easement was very broadly defined by statute and the stringing of additional cables for newly conceived communication uses was authorized without County's permission.[3] 199 S.E.2d at 173. In essence, we found the television cables did not constitute an additional servitude on the underlying telephone easements. Again, the case did not involve restrictive language in the easements.[4]

SCE&G would have us read these three cases as standing for the proposition that the use of a utility easement may be apportioned as a matter of law without reference to the language of the easement itself. We disagree.

First, Lay, Leppard, and Palmetto Cablevision, while settling the issue of an additional servitude, did not involve restrictions on the apportionment of an allowed use. As other courts have noted, the issue of apportionment is a slightly different issue from that of additional servitude. Where an easement is granted for some category of use, for instance "highway purposes," the question of an additional servitude addresses whether some new use fits within that category of allowed use, a question that may turn simply on an evaluation of the new use rather than an interpretation of the easement's language.

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[3]Justice Littlejohn dissented from the majority's holding on this issue and would have held that County's permission was required because anyone wishing to use County's streets must first obtain a permit. 199 S.E.2d at 176.

[4] Nor did the case involve a challenge by private owners of the servient estates. As Justice Littlejohn noted in concurrence, County had no right to raise the issue of just compensation due to private landowners. 199 S.E.2d at 177.

Apportionment, on the other hand, involves the interpretation of a restriction on the easement holder's conveyance of part of its own allowed use to a third party. *See* Jackson v. City of Auburn, 2006 WL 893617 at 9 (Ala. App. 2006) (use of fiber optic line in electric easement may be apportioned when language in instrument indicates right to apportion and when apportionment is not additional servitude); City of Orlando v. MSD-Mattie, L.L.C., 895 So.2d 1127 (Fla. App. 2005) (use of fiber optic cable not an additional servitude but cannot be apportioned under language of instrument granting easement); McDonald v. Mississippi Power Co., 732 So.2d 893 (Miss. 1999) (same); *see also* Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist., 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003) (holding that language of easement restricted use of easement).

Here, there is no real issue of an additional servitude -- Landowners concede the fiber optic lines are within the use allowed under the terms of the easements. Rather the issue is whether SCE&G may apportion its allowed use to third parties. This is clearly an issue that cannot be resolved without construing the instruments granting the easements in question. It is well-settled that the rights of an easement holder depend upon the interpretation of the grant in the easement. Patterson v. Duke Power Co., 256 S.C. 479, 183 S.E.2d 122 (1971). Moreover, were we to read our earlier decisions as broadly as SCE&G suggests, the owner of a servient estate could never limit the grant of a utility easement, no matter how specific the language in the easement.

Further, SCE&G argues it can apportion its use of the easements to third parties because the easements in question are commercial easements in gross which are alienable as a matter of law. This is not entirely correct. Even with such an easement, the court will look at the language of the easement to determine whether there was an intention to attach the attribute of assignability by the use of such language as "to his heirs and assigns." Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965) (parties may make an easement in gross assignable by the terms of the instrument; commercial easement in gross assignable where language included "successors and assigns");

Douglas v. Medical Investors, Inc., 256 S.C. 440, 182 S.E.2d 720 (1971) (commercial easement in gross assignable where instrument included "his heirs and assigns"). Here, the easements attached to Landowners' complaint do state a conveyance to SCE&G and "its successors and assigns." While this language indicates assignability, the language limiting the use of the easement to communications necessary to SCE&G's business appears to restrict that assignability. This ambiguity requires construction of the written easements themselves.

The trial judge's order dismissing Landowners' complaint is

REVERSED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice James W. Johnson, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Justin Lamar Allen, Appellant.

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

Opinion No. 26204
Heard May 4, 2006 – Filed August 21, 2006

AFFIRMED

Robert M. Dudek of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, and E. Charles Grose, Jr., of Greenwood, for Appellant.

J. Benjamin Aplin of the South Carolina Department of Probation, Parole and Pardon Services, of Columbia, for Respondent.

ACTING JUSTICE MANNING: Justin L. Allen (Appellant) challenges the circuit court judge's decision to revoke his probationary sentence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was sentenced in 2002 to an aggregate term of seven years in prison on drug-related convictions, suspended on the service of one year and three years' probation. Appellant was released from prison on probation in 2003.

Police responded to a shooting in the early morning hours of January 5, 2004, at an apartment complex in Greenwood. An agent of the South Carolina Department of Probation, Parole and Pardon Services issued a warrant for Appellant's arrest based on his involvement in events immediately following the shooting. The agent charged Appellant with violating several conditions of his probation, including associating with a person who has a criminal record.

A police officer testified at the revocation hearing that a witness stated, soon after hearing gunshots, he saw two men help an apparent shooting victim get into a yellow Cadillac which then drove away. The witness did not identify the men. The officer testified a hospital security videotape showed Appellant getting out of the Cadillac at the emergency room entrance and entering the hospital. Appellant did not remain at the vehicle when he apparently heard or noticed approaching police, but entered the hospital's emergency room and departed through another door. Police caught the other suspect in the vehicle, Nicholas Sanders, who was armed with a handgun, when he tried to flee after speaking with an officer near the vehicle. The victim, Lawson Hawkins, died of his wounds at the hospital.

A SLED agent testified the fingerprints of Appellant and Sanders were found on the Cadillac's exterior. No fingerprints were found on the interior of the car. Police found over a half of an ounce of cocaine and a handgun inside the car while searching it.

Documents found in the vehicle contained Appellant's name. A police officer testified the vehicle was registered in the name of Appellant's

grandfather. The officer testified Appellant verbally admitted driving the vehicle that night and "thought he was there at the scene when [the victim] got shot." Appellant's probation officer testified that Appellant, when asked about associating with Sanders, stated "he just took [Sanders] to the hospital that night, or that was his brother got shot and he just took him to the hospital." Sanders was on probation at the time as a result of previous convictions for unlawful sale of a pistol and a drug-related offense.

Appellant did not testify at the revocation hearing, but invoked his Fifth Amendment right to remain silent because he had been charged with possession of cocaine with intent to distribute, unlawful possession of a firearm, and attempted armed robbery. The crimes allegedly occurred on the night of the shooting.[1]

The trial court ruled Appellant had violated several conditions of his probation, including associating with Sanders, who has a criminal record. The trial court noted Appellant had not offered any evidence contradicting the State's case, including any explanation of his actions in taking the shooting victim to the hospital or his furtive departure from the hospital. The trial court revoked Appellant's probation and activated the remaining six

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[1] The trial court declined to continue the revocation hearing until the criminal charges against Appellant were resolved. This ruling was permissible because the State did not attempt to revoke Appellant's probation based solely on those charges. See State v. Gleaton, 172 S.C. 300, 304-05, 174 S.E. 12, 14 (1934) (stating that, when issue is whether probationer has committed a later crime which should result in revocation of probation, trial court may determine probationer's guilt on the charge, or impanel a jury to decide the issue, or hold the revocation matter in abeyance until the probationer is tried on the charge in the usual course, with the final option as the preferred and safest course to pursue); State v. Williamson, 356 S.C. 507, 510-12, 589 S.E.2d 787, 788-89 (Ct. App. 2003) (applying same principles to hold that trial court properly revoked defendant's probation where, although defendant had not yet been tried on assault charge, record contained sufficient evidence that defendant committed criminal offense by assaulting his mother).

years of the 2002 sentence, with probation terminating upon service of the sentence.

We certified this case for review on the motion of the Court of Appeals pursuant to Rule 204(b), SCACR. Appellant raises several issues, but we find it necessary to address only one:

> Did the trial court abuse its discretion in revoking Appellant's probation because he associated with a person who has a criminal record, a condition which is so overly broad that it violates due process?

STANDARD OF REVIEW

The determination of whether to revoke probation in whole or part rests within the sound discretion of the trial court. State v. Miller, 122 S.C. 468, 474-75, 115 S.E. 742, 745 (1923); State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct. App. 2001); S.C. Code Ann. § 24-21-460 (1989). The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation. State v. King, 221 S.C. 68, 73, 69 S.E.2d 123, 125 (1952); State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950); State v. Hamilton, 333 S.C. 642, 648-49, 511 S.E.2d 94, 97 (Ct. App. 1999). "While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." White, 218 S.C. at 136, 61 S.E.2d at 756.

An appellate court will not reverse the trial court's decision unless that court abused its discretion. White, 218 S.C. at 135, 61 S.E.2d at 756; Hamilton, 333 S.C. at 647, 511 S.E.2d at 96. An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and

capricious. Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 n.6 (2d Cir. 2001).

LAW AND ANALYSIS

A condition of Appellant's probation, included on the standard probation form he signed, stated in pertinent part, "I shall not associate with any person who has a criminal record." Appellant argues the trial court erred by revoking his probation by finding he associated with Sanders, who has a criminal record. It was necessary for Appellant to associate with Sanders in order to help place a shooting victim in the Cadillac and drive him to the hospital. Furthermore, relying on Beckner v. State, 296 S.C. 365, 373 S.E.2d 469 (1988), Appellant contends this condition violates due process and is generally unenforceable because it is overly broad. Appellant asserts the condition would, for example, prohibit someone from associating with a spouse or relative who has a criminal record, or from working at a place which employed anyone with a criminal record.[2]

The State argues this condition is authorized by statute and reasonably furthers the goals of rehabilitating a probationer and protecting the public. The State relies on South Carolina Code Ann. § 24-21-430(3) (Supp. 2005), which provides that a probationer shall "avoid persons or places of disreputable or harmful character." The State does not address whether the condition is overly broad as a general rule, but asserts the trial court did not abuse its discretion in applying the condition under the facts of Appellant's case.

We have found no South Carolina authority directly on point and only two South Carolina cases discussing the validity of "no-association" probation conditions. In Beckner, a PCR petitioner challenged a condition

[2] Appellant does not explicitly cite the Due Process Clause or freedom of association principles based on the First Amendment, but his arguments implicitly are grounded in those provisions. See U.S. Const. amends. I and XIV, § 1; S.C. Const. art. I, §§ 2 and 3.

that he not "be in a place of business that sells alcohol." We struck down the condition as unreasonable, finding it would prohibit the petitioner from entering or working in practically every grocery or convenience store, as well as many restaurants. The burden imposed on the petitioner was greatly disproportionate to any rehabilitative function the condition might serve. Beckner, 296 S.C. at 366, 373 S.E.2d at 469-70.

In State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950), this Court considered the validity of a condition that directed the probationer to "avoid persons or places of disreputable or harmful character." The probationer operated a restaurant at the state fairgrounds near Columbia, an establishment which sold beer and included a large room between the restaurant and kitchen where illegal gambling occurred. The evidence revealed the probationer was aware of illegal gambling on his premises, apparently tolerating the activity even if he was not an active participant. The Court rejected the probationer's argument he was not on notice of a potential violation because probation officers had not warned him to avoid that particular location, explaining the record showed the probationer knew he was required to avoid such sites and activities. The Court upheld the trial court's decision to revoke his probation. White, 218 S.C. at 136-41, 61 S.E.2d 757-59.

The Legislature has set forth certain conditions of probation which may be imposed by the court, and the court has the discretion to impose additional or specific restrictions within limits. S.C. Code Ann. § 24-21-430 (Supp. 2005) (listing thirteen conditions of probation and stating "[t]he court may impose by order duly entered and may at any time modify the conditions of probation and may include among them" the listed conditions or others not prohibited by this section); State v. Brown, 284 S.C. 407, 410, 326 S.E.2d 410, 411 (1985) (holding trial courts are "allowed a wide, but not unlimited, discretion in imposing conditions of suspension or probation and they cannot impose conditions which are illegal and void as against public policy"); Henry v. State, 276 S.C. 515, 280 S.E.2d 536 (1981) (holding trial court lacked authority to impose banishment from state if probation was revoked as a condition of probation, even though defendant appeared to agree to the sentence); State v. Brown, 349 S.C. 414, 563 S.E.2d 339 (Ct. App. 2002) (reversing trial court's revocation of probation where

vague probation condition requiring sex offender to "obtain treatment" resulted in confusion among the probationer and probation and mental health officials); State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996) (holding that only a court, and not a state probation agency, may exercise the judicial function of imposing or modifying conditions of probation).

The revocation of probation or parole is not a stage of criminal prosecution. However, a probationer or parolee has a constitutionally protected liberty interest and cannot be denied due process simply because probation has been described as an act of grace. Morrissey v. Brewer, 408 U.S. 471, 480-90, 92 S. Ct. 2593, 2600-05, 33 L. Ed. 2d 484 (1972) (holding that minimum requirements of due process in parole revocation proceeding include "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole"); Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S. Ct. 1756, 1760, 36 L. Ed. 2d 656 (1973) (holding that "a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in Morrissey"); State v. Riddle, 277 S.C. 110, 282 S.E.2d 863 (1981) (reversing probation revocation and remanding for hearing consistent with guidelines set forth in Morrissey and Gagnon). "It is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation. . . . [W]here the proscribed acts are not criminal, due process mandates that [a probationer or parolee] cannot be subjected to forfeiture of his liberty for those acts unless he is given prior fair warning." U.S. v. Dane, 570 F.2d 840, 843-44 (9th Cir. 1977) (citing Tiitsman v. Black, 536 F.2d 678 (6th Cir. 1976)).

Various conditions of probation generally have been upheld unless (1) the condition is so unreasonable or overly broad that compliance is

virtually impossible and the burden imposed on the probationer is greatly disproportionate to any rehabilitative function the condition might serve; (2) the condition has no relationship to the crime of which the offender was convicted; (3) the condition requires or forbids conduct which is not reasonably related to future criminality; (4) the condition relates to conduct which is not in itself criminal unless the prohibited conduct is reasonably related to the crime of which the offender was convicted or to future criminality; (5) the condition violates due process because it is overly broad or void for vagueness; or (6) the condition unnecessarily or excessively tramples upon First Amendment rights of free association. See e.g. Beckner, 296 S.C. 365, 373 S.E.2d 469 (striking down an unreasonable and overly broad condition); U.S. v. Paul, 274 F.3d 155, 164-67 (5th Cir. 2001) (stating condition of supervised release under federal law will be deemed overly broad when it involves greater deprivation of liberty than is necessary to protect the public and prevent recidivism; thus, condition requiring child pornography offender to avoid both "direct or indirect" contact with minors was not overbroad because "indirect contact" would not be interpreted to encompass chance or incidental encounters with children); People v. Lent, 541 P.2d 545, 548 (Cal. 1975) (discussing analysis of probation conditions); State v. Donaldson, 666 P.2d 1258, 1266-67 (N.M. App. 1983) (discussing analysis of probation conditions); People v. Lopez, 78 Cal. Rptr. 2d 66, 74-75 (Cal. App. 5 Dist. 1998) (holding probation condition which prohibited defendant from involvement in gang activities, association with any gang members, or use of gang insignia, was unconstitutionally overbroad because it prohibited him from associating with persons not known to him to be gang members; but overbreadth was correctable by inserting a knowledge requirement in each prohibition); In re Justin S., 113 Cal. Rptr. 2d 466, 470-71 (Cal. App. 2 Dist. 2001) (prohibiting association with gang members without restricting the prohibition to known gang members is a classic case of vagueness; such a condition violates due process and is void for vagueness and overbreadth); Dawson v. State, 894 P.2d 672, 680-81 (Alaska App. 1995) (special condition of probation which forbade defendant from having any contact with his wife unless contact was approved by probation officer was unduly restrictive of liberty and could not withstand scrutiny; court made no effort to tailor scope of marital association restriction to specific circumstances of case); Huff v. State, 554 So. 2d 616 (Fla. App. 2 Dist. 1989)

(condition of probation that defendant not live with member of opposite sex was invalid as not relating to defendant's crime of burglary or reasonably tailored to prevent future criminal conduct); West's Digests, Sentencing and Punishment, Key Nos. 1960-1988 (collecting cases regarding validity of various conditions of probation).

With regard specifically to a probation condition prohibiting association with a person with a criminal record, courts generally have upheld such a condition on the ground it is related to the crime for which the offender was convicted, is intended to prevent future criminal conduct, or bears a reasonable relationship to an offender's rehabilitation. It is recognized that restrictions on the rights of association of probationers and parolees are a necessary part of the criminal justice process. The evidence must show, however, that the probationer knew about the person's criminal record during the period of association before the condition may be applied to revoke probation. E.g. White, 218 S.C. at 136-41, 61 S.E.2d at 757-59 (upholding application of condition which directed probationer to "avoid persons or places of disreputable or harmful character" where evidence revealed probationer was aware of the condition and potential violation); U.S. v. Furukawa, 596 F.2d 921, 922-23 (9th Cir. 1979) (upholding probation condition which allowed probationer to associate only with law-abiding persons); Birzon v. King, 469 F.2d 1241, 1242-43 (2d Cir. 1972) (upholding parole condition prohibiting contact with persons having a criminal record and rejecting argument the condition was so vague it violated due process); U.S. v. Albanese, 554 F.2d 543, 546-47 (2d Cir. 1977) (although probation conditions phrased in terms of "law-abiding persons" should be avoided, condition that defendant associate only with law-abiding persons was not unconstitutionally vague or overbroad as applied to defendant who was found to have continually and consistently associated over period of years on more than casual basis with large number of convicted criminals); Alessi v. Thomas, 620 F. Supp. 589, 593 (S.D.N.Y. 1985) (rejecting probationer's argument that he could not have known receipt of numerous telephone calls from felons violated condition forbidding association with persons with criminal record, a condition probationer unsuccessfully argued was void for vagueness); People v. Miller, 452 N.W.2d 890 (Mich. App. 1990) (holding probation condition which prohibited defendant from associating with man,

who was father of defendant's young child and who had criminal record, for the rest of defendant's life could not be enforced; however, condition could be amended so as to prohibit defendant from associating with the man until further order of the court); People v. Robinson, 245 Cal. Rptr. 50 (Cal. App. 1 Dist. 1988) (upholding probation condition which prohibited convicted drug offender from associating with persons with criminal record because condition was reasonably related to offender's rehabilitation and preventing future criminal conduct); Donaldson, 666 P.2d at 1266-67 (upholding probation condition which prohibited defendant from associating with co-defendant, who had a criminal record and with whom defendant had formed a close personal relationship; condition was intended to prevent future criminal conduct and was reasonably related to defendant's rehabilitation); Annot., Propriety of Conditioning Probation on Defendant's Not Associating with Particular Person, 99 A.L.R.3d 967 (1980).

A probationer's "association" with a person who has a criminal record must entail more than incidental or unknowing encounters before the probationer will be found in violation of the condition. "Association" generally has been interpreted to mean intentional, knowing and substantial contact, or the development of a significant or meaningful relationship, with a convicted criminal over a substantial period of time. E.g. Arciniega v. Freeman, 404 U.S. 4, 92 S. Ct. 22, 30 L. Ed. 2d 126 (1971) (holding a parole condition restricting association with persons with criminal record was not intended to apply to incidental contacts between ex-convicts while working on a legitimate job for a common employer); U.S. v. Bonanno, 452 F. Supp. 743, 752 (N.D. Cal. 1978) ("'association' within the context of parole or probation conditions must be more than an incidental contact"); Alessi v. Thomas, 620 F. Supp. at 593 (finding more than forty telephone calls with convicted felons over fifteen-month period, in which probationer accepted the collect charges, was sustained and extensive contact which constituted association with persons with criminal record).

In the present case, we reject Appellant's arguments and uphold the validity of the standard condition that Appellant not associate with persons with a criminal record. The condition is not so overly broad as a general rule that it violates due process in all cases; nor does application of

the condition under the facts and circumstances of this case violate due process.[3] The condition is reasonably related to the crime for which Appellant was convicted, is intended to prevent future criminal conduct, and should aid in Appellant's rehabilitation.

We further hold, as the trial court and other courts have recognized, that the no-association condition implicitly requires a finding that the probationer knew the person in question had a criminal record during the period of association, and that the association was not simply an unknowing or incidental encounter. Thus, in order to demonstrate a prima facie violation, the State must present sufficient evidence, which may be direct or circumstantial, that a probationer intentionally had knowing and substantial contact with a person who has a criminal record, or developed a significant or

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[3] In the present case, the totality of all the evidence produced supports the decision to uphold the rulings of the courts below. First, there was a witness who testified that after hearing gunshots, she saw two men carry a wounded man into the backseat of a yellow Cadillac. A short period later, a yellow Cadillac was found at the emergency room of the local hospital. That vehicle contained documents with Appellant's name on them, and was registered under the Appellant's grandfather. A hospital security camera showed the Appellant and another man getting out of the Cadillac at the emergency room drop off area.

Second, the Appellant abandoned his car and fled through the emergency room on foot after noticing police inquiry into the vehicle. Nicholas Sanders, the man accompanying the Appellant in the car, also tried to leave the scene after speaking with police. He was a convicted felon and was armed with a handgun.

Third, the Appellant was additionally charged with possession with intent to distribute cocaine, possession of a firearm, and attempted robbery. All of these crimes allegedly occurred during the night of the shooting.

Fourth, while Appellant was serving a probationary sentence for prior drug related convictions, there were 8.72 grams of cocaine and a .22 caliber handgun found in the yellow Cadillac.

Fifth, there was a body found oozing life in the backseat of the yellow Cadillac. That gentleman later died at the hospital from gunshot wounds.

meaningful relationship with that person over a substantial period of time. The probationer then has the opportunity to demonstrate a lack of knowledge of the person's criminal record, a lack of any association with the person or an association which amounts to no more than an unknowing or incidental contact, or offer an explanation for the forbidden contact sufficient to excuse it.

Appellant did not offer any testimony or evidence at the revocation hearing, leaving only the State's evidence for consideration on the extent of Appellant's association with Sanders as well Appellant's knowledge of Sanders' criminal record. The State's evidence, and inferences which may be reasonably drawn therefrom, reveals Appellant associated with Sanders while both were involved in an illicit drug transaction which ended in a fatal shooting. A yellow Cadillac belonging to Appellant, which was driven by Appellant that night to the hospital, arrived on the scene immediately after the shooting. The record reveals substantial and significant contact between Appellant and Sanders during a criminal transaction, not merely an unknowing or incidental encounter. Accordingly, we conclude sufficient evidence supports the trial court's decision to revoke Appellant's probation.

Appellant attempted to portray himself as a mere passerby who helped carry an injured person to the hospital. We find no evidence in the record supporting this position. We have little doubt the result in this case would have been different if the evidence showed Appellant merely happened to drive by a crime scene and, acting as a Good Samaritan, unknowingly ferried a felon or two to the hospital.

When the trial court's revocation decision is upheld on one ground, it ordinarily is immaterial whether probation was properly revoked on other grounds unless the entire proceeding was tainted by a given error. See State v. Williamson, 356 S.C. 507, 512, 589 S.E.2d 787, 789 (Ct. App. 2003) (declining to address probationer's arguments regarding other grounds for revocation after concluding trial court properly revoked probation on one ground); Deal v. State, 640 S.W.2d 664 (Tex. App. 14 Dist. 1982) (finding that any error in revoking probation on one ground will not result in reversal of the revocation where another legitimate ground for revocation exists and

was properly enforced); cf. Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive). Therefore, we decline to address the remaining issues raised by Appellant.

CONCLUSION

We uphold the validity of the standard probation condition that a probationer not associate with a person with a criminal record. The condition is not so overly broad as a general rule that it violates due process in all cases. Application of the condition under the facts and circumstances of Appellant's case does not violate due process. We further hold that the no-association condition implicitly requires a finding that Appellant knew the person in question had a criminal record during the period of association, and that the association was not simply an unknowing or incidental encounter. We conclude the trial court did not abuse its discretion in revoking Appellant's probation because the record contains sufficient evidence that Appellant associated with a person with a criminal record.

AFFIRMED.

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

The Supreme Court of South Carolina

RE: Amendment to Rule 607, SCACR

ORDER

Pursuant to Article V, §4A, of the South Carolina Constitution, Rule 607(h), SCACR, is amended to read:

(h) Fees for Transcription and Other Services.

(1) By Judicial Department Court Reporter. A court reporter shall receive the following fees:

(A) A fee of Three Dollars and Twenty-Five Cents ($3.25) per page for producing an original transcript.

(B) A fee of Seventy-Five Cents ($.75) per page for furnishing a copy of a previously prepared transcript.

(C) A fee of One Dollar and Fifty Cents ($1.50) per page for each person receiving Real-time output when a Real-time Request is signed by the requestor.

(D) A fee of One Dollar and Fifty Cents ($1.50) per page for unedited (rough copy) ASCII Disks when no request for an original transcript has been made.

(E) A fee of Thirty-Five Dollars ($35) for edited ASCII disks. This service is only available to a requestor who has requested an original or a copy of the transcript.

(F) A fee of One Dollar ($1) per page for condensed transcripts, which contain no more than four pages of text. This service is only available to a requestor who has requested an original or a copy of the transcript.

(G) A fee of Fifty Cents ($.50) per page for Keyword Indexing. This service is only available to a requestor who has requested an original or a copy of the transcript.

(H) A fee of Thirty-Five Dollars ($35) for e-mailed transcripts. This service is only available to a requestor who has requested an original or a copy of the transcript.

(I) A fee of One Dollar and Fifty Cents ($1.50) per page for unedited (rough draft) e-mailed transcripts.

(2) By Private Court Reporter. In the event the court reporter is not an employee of the Judicial Department, the fees to be charged shall be that agreed upon by the court reporter and the parties. The transcript produced by the Judicial Department court reporter is the official transcript.

This amendment is effective September 1, 2006, and it shall be applicable to all requests received by a court reporter on or after that date.

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 14, 2006

The Supreme Court of South Carolina

RE: Appeals from Administrative Decisions

ORDER

Until recently, all appeals from agency decisions, including decisions of the administrative law court, have been to the circuit court. Act No. 387 of 2006, effective July 1, 2006, now provides that appeals from decisions of the administrative law court and certain agencies will be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

Since the South Carolina Appellate Court Rules contain no provisions regarding appeals from administrative decisions, we find that it is appropriate to promulgate the attached emergency amendments to the South Carolina Appellate Court Rules until this Court can submit amendments to the General Assembly as required by Article V, §4A, of the South Carolina Constitution. These emergency amendments shall be effective immediately.

Act No. 387 is not consistent regarding when the notice of appeal must be served and filed. Compare Section 2 (under S. C. Code Ann. §1-23-380(A)(1), notice of appeal must be served and filed within thirty days after the final agency decision, or if rehearing is filed, within thirty days after a decision is rendered) with Section 5 (under S.C. Code Ann. §1-23-610(B), the notice of appeal must be served and filed within thirty days of receipt of the decision of the administrative law judge). Since we have previously construed similar language in §1-23-380(A)(1) to mean that the time to appeal runs from receipt rather than issuance of the agency decision, Hamm v. South Carolina Public Service Commission, 287 S.C. 180, 336 S.E.2d 470 (1985), we find that the Legislature intended the time to appeal under the Act to run from receipt of the administrative decision, and the emergency rules reflect this construction.

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 15, 2006

AMENDMENTS TO THE SOUTH CAROLINA APPELLATE COURT RULES

(1) Rule 201, SCACR, is amended to read:

RULE 201
RIGHT TO APPEAL

(a) Judgments, Orders and Decisions Subject to Appeal. Appeal may be taken, as provided by law, from any final judgment, appealable order or decision. The procedure for petitioning for a writ of certiorari to review final judgments in post-conviction relief cases is provided by Rule 227. Further, the review of decisions of the State Board of Canvassers in election cases shall be by petition for a writ of certiorari under S.C. Code Ann. §§ 7-17-250 and 7-17-270.

(b) Who May Appeal. Only a party aggrieved by an order, judgment, ~~or~~ sentence or decision may appeal.

(2) Rule 202, SCACR, is amended to read:

RULE 202
DESIGNATION OF PARTIES AND DEFINITIONS

(a) Designation of Parties. The party appealing shall be known as the appellant and the adverse party as the respondent.

(b) Definitions. For the purpose of Part II of the South Carolina Appellate Court Rules, the following definitions shall apply:

(1) Lower Court: the circuit court (including masters-in-equity), family court or probate court from which the appeal is taken.

(2) Administrative Tribunal: the administrative law court or agency from which the appeal is taken.

(3) Rule 203, SCACR, is amended to read:

RULE 203
NOTICE OF APPEAL

(a) Notice. A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 233.

(b) Time for Service.

(1) Appeals From the Court of Common Pleas. A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

(2) Appeals From the Court of General Sessions. After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed. In all other cases, a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment. When a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion. In those cases in which the State is allowed to appeal a pre-trial order or ruling, the notice of appeal must be served within

ten (10) days of receiving actual notice of the ruling or order; provided, however, that the notice of appeal must be served before the jury is sworn or, if tried without a jury, before the State begins the presentation of its case in chief.

(3) Appeals From the Family Court. A notice of appeal in a domestic relations action shall be served in the same manner as provided by Rule 203(b)(1). A notice of appeal in a juvenile action shall be served in the same manner as provided by Rule 203(b)(2).

(4) Appeals From Masters and Special Referees. The notice of appeal from an order or judgment issued by a master or special referee shall be served in the same manner as provided by Rule 203(b)(1).

(5) Appeals From Probate Court. When a direct appeal is authorized by S. C. Code Ann. §62-1-308 (g), the notice of appeal shall be served in the same manner as provided by Rule 203(b)(1).

(6) Appeals From Administrative Tribunals. When a statute allows a decision of the administrative law court or agency (administrative tribunal) to be appealed directly to the Supreme Court or the Court of Appeals, the notice of appeal shall be served on the agency, the administrative law court (if it has been involved in the case) and all parties of record within thirty (30) days after receipt of the decision. If a timely petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from receipt of the decision granting or denying that motion.

(c) Cross-Appeals. A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties, or in the case of an appeal from the administrative tribunal, by serving a notice of appeal on the agency, the administrative law court (if it has been involved in the case) and all parties of record, within five (5) days after receipt of appellant's notice of appeal, or within the time prescribed by Rule 203(b), whichever period last expires.

(d) Filing.

(1) Appeals from the Circuit Court, Family Court and Probate Court.

(A) Where to File. The notice of appeal shall be filed with the clerk of the lower court and with the Clerk of the Supreme Court in the following cases:

(i) Any final judgment from the circuit court which includes a sentence of death;

(ii) Any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is one of the constitutionality of the law or ordinance; provided, however, in any case where the Supreme Court finds that the constitutional issue raised is not a significant one, the Supreme Court may transfer the case to the Court of Appeals.

(iii) Any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the State, its agencies, political subdivisions, public service districts, counties, and municipalities, or any other indebtedness now or hereafter authorized by Article X of the Constitution of this State.

(iv) Any final judgment from the circuit court pertaining to elections and election procedure.

(v) Any order limiting an investigation by a State Grand Jury under S.C. Code Ann. § 14-7-1630.

(vi) Any order of the family court relating to an abortion by a minor under S.C. Code Ann. § 44-41-33.

In all other cases, the notice of appeal shall be filed with the clerk of the lower court and the Clerk of the Court of Appeals.

(B) When and What to File. The notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served. The notice filed with the appellate court shall be accompanied by the following:

(i) Proof of service showing that the notice has been served on all respondents;

(ii) A copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing; and

(iii) A filing fee as set by order of the Supreme Court;[1] this fee is not required for criminal appeals or appeals by the State of South Carolina or its departments or agencies.

(C) Form and Content. The notice of appeal shall be substantially in the form designated in the Appendix to these Rules. It shall contain the following information:

(i) The name of the court, judge, and county from which the appeal is taken.

(ii) The docket number of the case in the lower court.

(iii) The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken, or, if a cross-appeal, when the respondent received appellant's notice of appeal.

(iv) The name of the party taking the appeal.

[1] By order dated April 17, 1990, this filing fee was set at one hundred ($100.00) dollars.

(v) The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

(2) Appeals from Administrative Tribunals.

(A) Where to File. Appeals from a decision of the Public Service Commission setting public utility rates pursuant to Title 58 of the South Carolina Code of Laws shall be filed with the clerk of the Supreme Court. Unless otherwise required by statute, all other appeals from administrative tribunals shall be filed with the clerk of the Court of Appeals.

(B) When and What to File. The notice of appeal shall be filed with the clerk of the appellate court within the time required to serve the notice of appeal under Rule 203(b)(6). The notice filed with the appellate court shall be accompanied by the following:

(i) Proof of service showing that the notice has been served on the agency, the administrative law court (if it has been involved in the case), and all parties of record;

(ii) A copy of the decision(s) to be challenged on appeal; and

(iii) A filing fee as set by order of the Supreme Court;[2] this fee is not required for criminal appeals or appeals by the State of South Carolina or its departments or agencies.

(3) Effect of Failure to Timely File. If the notice of appeal is not timely filed or the filing fee is not paid in full, the appeal shall be dismissed, and shall not be reinstated except as provided by Rule 231.

(e) Form and Content. The notice of appeal shall be substantially in the form designated in the Appendix to these Rules.

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[2] By order dated April 17, 1990, this filing fee was set at one hundred ($100.00) dollars.

(1) Appeals from the Circuit Court, Family Court and Probate Court. In appeals from lower courts, the notice of appeal shall contain the following information:

(A) The name of the court, judge, and county from which the appeal is taken.

(B) The docket number of the case in the lower court.

(C) The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken, or, if a cross-appeal, when the respondent received appellant's notice of appeal.

(D) The name of the party taking the appeal.

(E) The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

(2) Appeals from Administrative Tribunals. In appeals from administrative tribunals, the notice of appeal shall contain the following information:

(A) The name of the agency and the name of the administrative law judge (if applicable).

(B) The docket number of the case before the administrative law court, or if the appeal is from an agency, the docket number before the agency.

(C) The date of the decision from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received the decision from which the appeal is taken, or, if a cross-appeal, when the respondent received appellant's notice of appeal.

(D) The name of the party taking the appeal.

(E) The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

(3) Rule 205, SCACR, is amended to read:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 225. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

(4) Rule 207, SCACR, is amended to read:

RULE 207
TRANSCRIPT OF PROCEEDING

(a) Appeals From a Lower Court.

(1) Ordering the Transcript. Where a transcript of the proceeding must be prepared by the court reporter, appellant shall, within the time provided for ordering the transcript, make satisfactory arrangements (including agreement regarding payment for the transcript), in writing with the court reporter for furnishing the transcript. In appeals from the court of common pleas, masters in equity, special referees or the family court in domestic actions, the transcript must be ordered within ten (10) days after the date of service of the notice of appeal. In appeals from the court of general sessions or the family court in juvenile actions, the transcript must be ordered within thirty (30) days of the date of service of the notice of appeal. Appellant shall contemporaneously furnish all counsel of record, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter. Unless the parties otherwise agree in writing, appellant must order a transcript of the entire proceedings below. If a party to the appeal unjustifiably refuses to agree to order less than the entire transcript, appellant may move to be awarded costs for having

unnecessary portions transcribed; this motion must be made no later than the time the final briefs are due under Rule 211.

(2) Delivery of Transcript. The court reporter shall transcribe and deliver the transcript to appellant no later than sixty (60) days after the date of the request. Records shall be transcribed by the court reporter in the order in which the requests for transcripts are made.

(3) Extension for Court Reporter. If a court reporter anticipates continuous engagement in the performance of other official duties which make it impossible to prepare a transcript in compliance with this Rule, the reporter shall promptly notify the Office of Court Administration in writing of the fact, setting forth the caption of the case involved, the length of time required to complete the transcript, and the nature and probable duration of the conflicting official duties. The Office of Court Administration may grant an extension of up to ninety (90) days. An extension in excess of ninety (90) days shall not be allowed except by order of the Chief Justice.

(4) Notice of Extension. Upon the granting of any extension of time for delivery of the transcript, the Office of Court Administration shall notify all parties and the clerk of the appellate court.

(5) Failure to Receive Transcript. If appellant has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, appellant shall notify the Office of Court Administration, the clerk of the appellate court, and the court reporter in writing.

(6) Failure to Comply. The willful failure of a court reporter to comply with the provisions of this Rule shall constitute contempt of court enforceable by order of the Supreme Court.

(b) Appeals From an Administrative Tribunal.

(1) Ordering the Transcript. Within ten (10) days after the date of service of the notice of appeal, appellant shall, in writing, make satisfactory arrangements with the administrative law court or the agency (administrative tribunal) to obtain a transcript of the proceeding before that body. Appellant

shall contemporaneously furnish all counsel of record, and the clerk of the appellate court with copies of all correspondence with the administrative tribunal. Unless the parties otherwise agree in writing, appellant must order a transcript of the entire proceedings before the administrative tribunal. If a party to the appeal unjustifiably refuses to agree to order less than the entire transcript, appellant may move to be awarded costs for having unnecessary portions transcribed; this motion must be made no later than the time the final briefs are due under Rule 211. The administrative tribunal may establish reasonable rates for providing the transcript or a copy thereof.

(2) Delivery of Transcript. The administrative tribunal shall insure that the transcript is delivered to the appellant within (60) days after the date of the request.

(3) Extension. If the administrative tribunal cannot deliver the transcript in the time specified, it shall promptly seek an extension from the appellate court. The request for an extension shall be in writing and shall comply with Rule 224, SCACR.

(4) Failure to Receive Transcript. If appellant has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, appellant shall notify the clerk of the appellate court, and the administrative tribunal in writing.

(c) Duty of Appellant. The transcript received from the court reporter or the administrative tribunal must be retained by appellant during the entire appeal and for a period of at least one (1) year after the remittitur (See Rule 221) is sent to the lower court or administrative tribunal.

(5) Rule 208(b)(1)(C), SCACR, is amended to read:

(C) Statement of the Case. The statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain, as a minimum, the following information: the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court, jury, master, or administrative

tribunal; the date(s) of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of the service of the notice of appeal; the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal; and any changes made in the parties by death, substitution, or otherwise. Any matters stated or alleged in appellant's statement shall be binding on appellant.

(6) Rule 210(c), SCACR, is amended to read

(c) Content. The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 238. The Record shall not, however, include matter which was not presented to the lower court or tribunal. Matter contained in the Record on Appeal shall be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcript, charges, exhibits and other materials or documents, and a certificate by appellant. Each page of the Record on Appeal shall be numbered consecutively beginning with the index. Where a portion of a page of the trial transcript, or a page of an exhibit or document, is to be included in the Record on Appeal, the entire page shall be included. When a portion of an order, judgment, decision or pleading is to be included in the Record on Appeal, the entire order, judgment, decision or pleading shall be included in the Record, to include the caption and signature(s); provided, however, that the portion of a pleading showing verification or service shall not be included unless relevant to the appeal. If the original court reporter's numbering has been deleted, the Record on Appeal shall contain ellipses or other notation indicating when pages of the court reporter's transcript have been omitted.

(7) Rule 210(e), SCACR, is amended to read:

(e) Index. Every Record on Appeal shall contain an index to the principal matters therein to include orders, judgments, decisions, pleadings, pretrial matters, opening statements, testimony, motions, closing arguments, jury charges, post-trial motions and exhibits. For witness testimony, the index

shall show the pages on which direct, cross, redirect and recross examination begins.

(8) Rule 212(a), SCACR, is amended to read:

(a) By the Court. The appellate court may require copies of all or any part of the transcript of proceedings or other matter which was before the lower court or administrative tribunal to be sent up for its inspection and consideration. It may likewise require a report of the trial or hearing or of any matter relative thereto, to be made by the trial judge or administrative tribunal. These matters shall become part of the Record on Appeal.

(9) Rule 214, SCACR, is amended to read:

RULE 214
CONSOLIDATION

Where there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order the appeal to be consolidated.

(10) Rule 220(c), SCACR, is amended to read:

(c) Affirmance on Any Ground Appearing in Record. The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

(11) Rule 221(b), SCACR, is amended to read:

(b) Remittitur. The remittitur shall contain a copy of the judgment of the appellate court, shall be sealed with the seal and signed by the clerk of the court, and unless otherwise ordered by the court shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent

pending disposition of the petition by the court. Where a petition for rehearing has been denied, the Court of Appeals shall not send the remittitur to the lower court or administrative tribunal until the time to petition for a writ of certiorari under Rule 226(c) has expired. If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the remittitur.

(12) Rule 225, SCACR, is amended to read:

RULE 225
STAY AND SUPERSEDEAS IN CIVIL ACTIONS

(a) General Rule. As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

(b) Exceptions. The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:

(1) Money judgments as provided in S.C. Code Ann. §18-9-130.

(2) Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. §18-9-150.

(3) Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. §18-9-160.

(4) Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. §18-9-170.

(5) Judgments directing the sale of perishable property as provided in S.C. Code Ann. §18-9-220.

(6) Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. §20-7-2220.

(7) Worker's compensation awards as provided in S.C. Code Ann. §42-17-60.

(8) An appeal from an order granting an injunction or temporary restraining order.

(9) Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. §20-7-420(2).

(10) Ejectment orders as provided in S.C. Code Ann. §27-37-130 and S.C. Code Ann. §27-40-800.

(11) Appeals from administrative tribunals as provided in S.C. Code Ann. §1-23-380(A)(2) and §1-23-600(G)(5).

(c) Supersedeas or Lifting of Automatic Stay.

(1) After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule. In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal and, where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, to revive the terms of the prior order or decision.

(2) In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

(3) The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

(4) If an order is issued pursuant to Rule 225(c)(1), the terms of that order continue in effect during the pendency of the appeal unless modified or revoked by the lower court, the administrative tribunal or the appellate court or judge or justice of the appellate court which issued it, or by a superior court. The granting of any relief pursuant to this Rule shall not be construed to affect the validity of the judgment, order, decree, decision and any liens until the judgment, order, decree or decision is reversed or modified by the appellate court.

(d) Procedure for Obtaining Lift of Stay or Supersedeas.

(1) Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

(2) After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending or an individual judge or justice for review of this order. The individual judge or justice may grant or deny the relief on a temporary basis, and refer the matter to the full appellate court to hear and determine the matter, or he or she may issue a final order. Upon the issuance of a final order by an individual judge or justice, an aggrieved party may petition the full appellate court for review of that decision.

(3) A person seeking an order lifting an automatic stay or granting a writ of supersedeas must file a written petition verified by the client. The petition shall be captioned the same as the appeal. In addition to the petition and verification, the moving party must contemporaneously file a certified copy of the order, judgment, decree or decision of the lower court or administrative tribunal and a copy of the notice of appeal with its proof of service.

(4) The petition shall contain:

(A) the factual background necessary for an understanding of the petition. If the facts are subject to dispute, the petition shall be supported by affidavits or other sworn statements;

(B) the grounds for the petition, and legal arguments with supporting points and authority;

(C) a showing that an application for this relief was made to the lower court or administrative tribunal, and was unjustifiably denied or that the relief granted failed to afford the relief which the petitioner requested. A certified copy of the lower court's or administrative tribunal's ruling must be included. If no application was made to the lower court or administrative tribunal, then the petition shall state the extraordinary circumstances which made it impracticable to make such an application.

(5) The petition and accompanying documents shall be served on the opposing party(ies). Upon application to the full appellate court, one original and six copies, and a certificate of service shall be filed with the clerk of the appellate court. If the relief is sought from an individual judge or justice, the original and two copies must be filed with the judge or justice. The individual judge or justice shall forward the original documents, including a copy of any order issued by the judge or justice in the matter, to the clerk of the appellate court as soon as possible.

(6) A supersedeas or order lifting the automatic stay may be issued *ex parte* only where exigent circumstances require that action be taken before there is time for a hearing. An *ex parte* order shall issue only if:

(A) it clearly appears from specific facts shown by affidavits or included in the verified petition that immediate and irreparable injury, loss or damage will result before the opposing party can respond; and

(B) the moving party's attorney certifies in writing, as an officer of the court, the efforts which have been made to give notice, or the reasons supporting the claim that notice should not be required.

(7) Any party aggrieved by the decision of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision.

(13) Rule 231(a), SCACR, is amended to read:

(a) Involuntary Dismissal and Reinstatement. Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. The clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing being excluded).

(14) Rule 232(b), SCACR, is amended to read:

(b) Vacation of Prior Opinions, Orders or Judgments. As part of their agreement, parties may request vacation of previously rendered opinions, orders, decisions and judgments. However, an appellate court retains the authority to deny any request for vacation. If an agreement which includes a request for vacation is rejected, the parties are free, if they so choose, to resubmit their agreement absent the request for vacation.

(15) Rule 238(a), SCACR, is amended to read:

(a) Captions. All documents filed in the appellate court shall be headed by a caption. Except as provided below for appeals from administrative tribunals, the caption shall contain the name of the appellate court where the document is to be filed (i.e., Supreme Court or Court of Appeals); if the matter involves review of a lower court decision, the name of the county and judge from which the appeal is taken including the title of the judge (e.g., Circuit Court Judge, Family Court Judge, Master-in-Equity, Probate Judge, Special Referee, Special Circuit Court Judge); the title of the case (the party commencing the action in the lower court shall always appear first in the title regardless of whom is appellant or petitioner); the title of the document (e.g., RECORD ON APPEAL; APPENDIX; BRIEF OF APPELLANT; PETITION FOR WRIT OF CERTIORARI; MOTION TO DISMISS); and the name, address and phone number of the counsel submitting the document, or in the case of a Record on Appeal or Appendix, the names, addresses and phone numbers of all counsel in the case. The caption should be substantially in the form shown by this example:

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Howard S. Barnes, Circuit Court Judge

Paul L. Doe, ...Appellant (or Respondent),

v.

Mary M. Roe, ...Respondent (or Appellant).

RECORD ON APPEAL

John T. Smith, Esquire
P.O. Box 123
Columbia, SC 29000
(803) 000-0000
Attorney for Appellant

Wanda D. Jones, Esquire
P.O. Box 456
Columbia, SC 29000
(803) 000-0000
Attorney for Respondent

In appeals from administrative tribunals, the caption shall contain the name of the appellate court where the document is to be filed (i.e., Supreme Court or Court of Appeals); the name of the tribunal from which the appeal is taken (e.g., Administrative Law Court, Public Service Commission, etc.); the name of the administrative law judge (if applicable); the title of the case (the title shall remain the same as the title before the tribunal regardless of whom is the appellant); the title of the document (e.g., RECORD ON APPEAL; BRIEF OF APPELLANT; MOTION TO DISMISS); and the name, address and phone number of the counsel submitting the document, or in the case of a Record on Appeal, the names, addresses and phone numbers of all counsel in the case. The caption should be substantially in the form shown by this example:

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

_____

APPEAL FROM THE ADMINISTRATIVE LAW COURT [OR NAME OF AGENCY]

George E. Brown, Administrative Law Judge

_____

Case No. 05-ALJ-00-0000-CC

_____

South Carolina
Department of Revenue, Respondent,

v.

Jane C. Roe, Appellant.

_____

BRIEF OF APPELLANT

_____

John E. Smith
Post Office Box 123
Greenville, South Carolina 29000
(864) 000-0000
Attorney for Appellant

(16) Forms 6-19 of Appendix C to Part II are renumbered as Forms 7-20 and the attached is added as Form 6.

FORM 6
NOTICE OF APPEAL FROM ADMINISTRATIVE TRIBUNAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

_____

APPEAL FROM THE ADMINISTRATIVE LAW COURT [OR NAME OF AGENCY]

George E. Brown, Administrative Law Judge

Case No. 05-ALJ-00-0000-CC

South Carolina Department of Revenue, Respondent,

v.

Jane C. Roe, Appellant.

NOTICE OF APPEAL

Jane C. Roe appeals the decision of the Honorable George E. Brown dated September 1, 2006. Appellant received a copy of this decision on September 3, 2006.

September 15, 2006

s/ John E. Smith
John E. Smith
Post Office Box 123
Greenville, South Carolina 29000
(864) 000-0000
Attorney for Appellant

Other Counsel of Record:
Mary P. Jones
Post Office Box 456
Greenville, South Carolina 29000
Attorney for Respondent

(864) 000-0000

The Supreme Court of South Carolina

In the Matter of Blaine T. Edwards, Respondent.

ORDER

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

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

IT IS FURTHER ORDERED that James H. Cassidy, 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. Cassidy shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Cassidy may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James H. Cassidy, 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. Cassidy's office.

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

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

Columbia, South Carolina
August 16, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alice Ruth L. Avery, Appellant/Respondent,

v.

Gerald W. Avery, Respondent/Appellant.

Appeal from Florence County
A. E. Morehead, III, Family Court Judge

Opinion No. 4147
Heard June 14, 2006 – Filed August 14, 2006

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

James M. Saleeby, Sr., of Florence and Marian D. Nettles, of Lake City; for Appellant-Respondent.

Cheryl Turner Hopkins, of Florence and Stephanie Pendarvis McDonald, of Charleston; for Respondent-Appellant.

HEARN, C.J.: This is a cross-appeal from an order of the family court, granting Alice Ruth L. Avery and Gerald W. Avery a decree of separate

maintenance and support, declining to award alimony to Wife or attorney's fees to either party, and awarding Husband 62.5 percent of the $1.5 million marital estate. On appeal, Wife argues she is entitled to alimony, a larger portion of the marital estate, and attorney's fees. She also argues the family court's valuation of her jewelry and mink coat was inflated. Husband argues the family court failed to include certain funds in the marital estate and erred by including certain other funds. We affirm in part, reverse in part, and remand.

FACTS

After twenty-five years of marriage, Husband and Wife separated in February 2004. At the time of the final hearing, which took place on December 15, 2004, Husband was sixty-seven years old, and Wife was fifty-eight years old. The parties have no children together, though they have children from previous relationships. Husband has two adult daughters, both of whom have children. Wife has one forty-year-old daughter who is autistic and lives in a group home.

During the marriage, Husband worked as a chemical engineer and had management responsibilities. For much of his career he worked overseas in places such as Egypt, Pakistan, Saudi Arabia, China, and several countries in Europe. While he was out of the country, Husband sent his paychecks to Wife, and she was in charge of their financial affairs and maintaining the marital home. Wife has a business college degree, but with the consent of Husband, did not work outside the home for much of the marriage. In fact, her only job outside the home was working part-time for Husband's business, which she did only sporadically during the marriage. Together the parties amassed a large estate, totaling over $1.5 million.

In October of 2002, Husband had a heart attack, and he retired shortly thereafter. After Husband's retirement, the parties' relationship, which may already have had its difficulties, took a turn for the worse. Wife testified Husband belittled her family and was very controlling of her. In 2003, she suggested they get counseling, but Husband refused. Wife left the marital home because she "just couldn't take the constant bickering."

According to Husband, the couple's problems coincided with Wife's renewed friendship with an old friend, Gayle Britt. He testified that Wife spent more time with Gayle than she did with him. He also believed Wife's greed was a driving force behind the parties' separation. He testified that he wanted to reconcile with Wife, but when he suggested counseling, Wife would go only on the condition that Husband give her "half of the assets" in their vacation home in Beaufort, South Carolina.

On February 4, 2004, the parties had a serious argument, and Wife left the marital home. On February 9, Husband gave $89,000 to his children, purportedly to pay for his grandchildren's college education. Most of this money, $71,500, came from a money market account. On February 20, Wife filed a complaint seeking an order for separate maintenance and support.

At the final hearing, several issues were litigated. Wife sought alimony, a fifty percent division of the marital estate, and attorney's fees. She also argued that the money market account Husband divested just days before she filed her complaint should be included in the marital estate.

Husband argued Wife should not receive alimony because he was no longer earning an income. He also argued he was entitled to more than half of the marital estate because his contributions accounted for ninety-nine percent of the parties' assets. During the course of the litigation, Husband questioned how Wife had the money to add approximately $54,000 to a bank CD that was jointly titled between Wife and her aunt. Both Wife and her aunt testified that this deposit was made with the aunt's money. Husband, however, believed it was money Wife had siphoned off from the marital estate over the years, and he sought to have the money included in the marital estate. Husband also sought to include a checking account jointly titled to Wife and her aunt, which contained $64,000. Both Wife and her aunt testified this was also the aunt's money. The family court sided with Wife and her aunt as to both accounts, and declined to include the $54,000 bank CD or the $64,000 checking account in the marital estate.

As to the money market account with the $71,500 Husband gave to his children, Husband argued he inherited those funds when his mother died in 1999.[1] The family court, however, included the $71,500 in the marital estate.

The family court specifically found neither party was at fault for the marriage's deterioration, but declined to award Wife alimony because Husband no longer earned an income. The family court also awarded Husband 62.5 percent of the marital estate and ordered the parties to pay their own attorney's fees. Both parties filed Rule 59(e) motions. In its order addressing those motions, the family court clarified how certain funds held in escrow were to be disbursed and otherwise denied both motions to reconsider. Both parties appeal.

STANDARD OF REVIEW

When considering an appeal from the family court, appellate courts have the authority to find the facts in accordance with their view of the preponderance of the evidence. Ex parte Morris, 367 S.C. 56, 61, 624 S.E.2d 649, 652 (2006). However, appellate courts defer to the family court judge's determinations of witnesses' credibility because the family court judge had the opportunity to see and hear the witnesses testify. Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003).

LAW/ANALYSIS

I. Wife's Appeal

Wife argues the family court erred in (1) awarding her a mere 37.5 percent of the marital estate; (2) failing to award her alimony, especially in light of the lopsided equitable distribution; (3) valuing her jewelry at $40,000; (4) valuing her twenty-year-old mink coat at $8,000; and (5) failing to award her attorney's fees and costs. We address these issues in turn below.

[1] With interest over the years, Husband testified that his $51,660 inheritance had grown to $71,500.

A. Equitable Distribution

Wife argues the family court erred in awarding her 37.5 percent of the marital estate when this was a long-term marriage throughout which she provided homemaker services, and neither party was found to be at fault for the marriage's breakup. We agree.

The division of marital property is in the family court's discretion and will not be disturbed on appeal absent an abuse of that discretion. Craig v. Craig, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005). Section 20-7-472 of the South Carolina Code (Supp. 2005) provides fifteen factors for the family court to consider when apportioning marital property, and it is within the family court's discretion to determine how much weight to give each of these factors. On appeal, even if this court might have weighed specific factors differently, we will affirm the family court's apportionment so long as it is fair overall. Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002).

In making its decision to award Husband the bulk of the marital estate, the family court focused on the parties' financial contributions to the marriage. Specifically, the family court found:

> It appears Husband has contributed 99%, or thereabouts, of the funds into this marriage. On the other hand, without objection by Husband, Wife contributed through her services as a homemaker. She also, for a period of time, assisted Husband in one of his business ventures serving as his bookkeeper/secretary. Wife also assisted in overseeing the building and selling of several homes during the marriage. Wife did physical work in and around the home and houses built for resale during the marriage and, as mentioned, maintained the home. Wife was frugal, buying most items "on sale."

> Husband indicated he completely trusted Wife's handling of finances during the marriage.

Despite the family court's recognition of Wife's contributions as a homemaker, the family court divided the marital estate in such a way that Husband received over one-and-a-half times the amount of property Wife received. Because the court specifically found neither party to be at fault for the couple's separation, this uneven division must have been based almost exclusively on the parties' direct financial contributions to their accumulation of wealth.

In our recent case of Doe v. Doe, (S.C. Ct. App. filed July 3, 2006) (Shearouse Adv. Sh. No. 26 at 78), which involved a marriage of over thirty years, we found the family court abused its discretion by awarding Husband seventy percent of the marital estate, despite Husband having been the primary breadwinner in the family. We stated: "While there is certainly no recognized presumption in favor of a fifty-fifty division, we approve equal division as an appropriate starting point for a family court judge attempting to divide an estate of a long-term marriage." Id. at 83 (citing Roy T. Stuckey, Marital Litigation in South Carolina (3rd ed. 2001 and Supp. 2005)). A fifty-fifty starting point is appropriate, we went on to explain, because in many long-term marriages, the spouses have an agreed-upon arrangement whereby one spouse works outside the home and is the primary wage earner while the other spouse makes little or no money but provides a valuable service in maintaining the household. Under these circumstances, "it would be unfair to the spouse who undertook household duties for the family court to apportion the marital estate solely based on the parties' direct financial contributions." Id. at 84 (citing Walker v. Walker, 295 S.C. 286, 288, 368 S.E.2d 89, 90 (Ct. App. 1988) ("Equitable distribution is based on a recognition that marriage is, among other things, an economic partnership.")).

That is not to say that all long term marriages ending in divorce will necessarily have estates that are divided equally. The family court is charged with looking at all fifteen factors of section 20-7-472, and may give one party a larger portion of the estate based on the circumstances of each case. For instance, although we reversed the seventy-thirty split in Doe, we modified

the award to a sixty-forty division because Wife's adultery caused the marriage's dissolution.

In the case before us, however, we cannot discern any special circumstances tilting the equitable division scale in favor of one spouse. This was a lengthy marriage wherein the parties agreed to a traditional breadwinner/homemaker arrangement. With such an arrangement, both parties made significant, albeit different, contributions to the acquisition, preservation, depreciation, and appreciation in value of their marital property. Neither party was at fault for the separation, nor does either party earn a significant income.[2] Although Husband suffered a heart attack in October of 2002, he testified that most of his medical expenses are paid through Medicare. The parties are not likely to pursue careers for which they will need additional training or education, and neither party has significant non-marital property. Finally, neither party has support obligations, though Wife does provide clothing to her disabled daughter.

Considering the circumstances of this case, we find the family court abused its discretion by awarding twenty-five percent more of the marital estate to Husband. Accordingly, we reverse the 62.5-37.5 split and remand the case so that the marital estate can be divided equally between the spouses.

B. Alimony

Wife argues the family court erred in denying her alimony. We disagree.

The decision to award alimony rests within the sound discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Craig v. Craig, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005). When awarding alimony, the family court considers the following thirteen factors set forth in section 20-3-130(C) (Supp. 2005) of the South Carolina

[2] According to Husband's financial declaration, he receives $2,040 per month from social security and other pensions. Wife's financial declaration indicates she receives $400 per month from social security.

Code: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other relevant factors the court considers relevant.

In its final order, the family court specifically stated it "considered all applicable factors in [§ 20-3-130]." After considering those factors, the family court declined to award Wife alimony because Husband had very little income to speak of and Wife would receive a substantial sum in the equitable division. In our opinion today, we increase the amount of property Wife receives in the equitable division. Considering this equal division of the marital estate and Husband's meager income, we find the family court did not abuse its discretion in denying Wife alimony.

C. Valuation of Jewelry and Mink Coat

Wife argues the family court erred in valuing her jewelry at $40,000. Specifically, she contends the family court (1) failed to specify which pieces of jewelry were included in the marital estate, and (2) erred by using the jewelry's insurance value to determine its fair market value. She further argues the family court erred in valuing her twenty-year-old mink coat at $8,000. We disagree.

When making an equitable distribution of marital property, the family court is charged with identifying the marital property and determining the property's fair market value. Cannon v. Cannon, 321 S.C. 44, 48, 467 S.E.2d 132, 134 (Ct. App. 1996). A family court's valuation determination will be affirmed on appeal if the valuation is within the range of values presented by the parties. Woodward v. Woodward, 294 S.C. 210, 215, 363 S.E.2d 412, 416 (Ct. App. 1987).

At trial, Wife submitted an appraisal, which listed seven pieces of jewelry valued at $2,900. Wife testified she had other, less expensive jewelry at home that was worth a total of $300. Husband, who claimed there were twelve pieces of jewelry purchased during the marriage, valued the jewelry at over $50,000. In support of his valuation, Husband submitted an insurance document, listing twelve pieces of jewelry that were insured for $40,305. Husband also submitted numerous appraisals from 1987 through 2001 that supported, and in some cases exceeded, the values listed on the insurance documents. Additionally, Husband testified that he purchased an Ebel watch for Wife during their marriage and that the watch was worth $4,000.

In its order, the family court valued Wife's jewelry at $40,000, explaining: "I have discounted the value of Wife's engagement ring and am using, essentially, the value the parties have utilized for insurance purpose for a number of years." In so ruling, it is clear the family court included all pieces of jewelry testified to, with the exception of Wife's engagement ring. Considering the evidence presented by the parties, we find the family court did not abuse its discretion in valuing the jewelry at $40,000, a figure within the range of values presented by the parties. See id.

As for the mink coat, Wife testified that its fair market value is $1,000. Husband testified its value was $8,000, and submitted into evidence a document showing that as the amount for which the coat was insured. While we recognize that an item's insurance value may be higher than its fair market value, the family court judge only had two values offered to him: one from Wife, which was unsupported by documentation, and one from Husband, which was supported by the parties' decision to insure the coat for $8,000. Under these circumstances, we find no error in the family court's decision to adopt Husband's estimation of the coat's fair market value. See id.; cf. Honea v. Honea, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987) ("[A] party cannot sit back at trial without offering proof, then come to this Court complaining of the insufficiency of the evidence to support the family court's findings.").

D. Attorney's Fees

Lastly, Wife argues the family court erred in failing to award her attorney's fees. We disagree.

In deciding whether to award attorney's fees, the family court should consider: (1) each party's ability to pay his or her own fees; (2) the beneficial results obtained by counsel; (3) the respective financial condition of each party; and (4) the effect of the fee on each party's standard of living. Upchurch v. Upchurch, 367 S.C. 16, 28, 624 S.E.2d 643, 648-49 (2006). The family court's decision regarding attorney's fees will not be disturbed absent an abuse of discretion. Green v. Green, 320 S.C. 347, 353, 465 S.E.2d 130, 134 (Ct. App. 1995).

In light of our decision today, the parties' ability to pay attorney's fees, the results obtained by counsel, their respective financial conditions, and the effect of the fee on their standard of living are virtually equal. Thus, we agree with the family court's decision requiring each to pay his or her own attorney's fees.

II. Husband's Appeal

Husband first argues the family court erred in failing to include in the marital estate $54,000 Wife added to a bank CD and $64,000 Wife had in a checking account with her aunt. We disagree.

Both Wife and aunt testified that the funds in the CD and checking account belonged exclusively to aunt. While Husband called into question how aunt had accumulated such large amounts of money, the family court ultimately found Wife and aunt to be credible, and declined to include the money in the parties' marital estate. Because we defer to the family court on issues of witnesses' credibility, we find no reversible error in the refusal to include these accounts in the marital estate. See Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003).

Next, Husband argues the family court erred by including in the marital estate a $71,500 money market account he claims contained the money he inherited when his mother died. We note the family court did not rule on whether these particular funds derived from Husband's inheritance. Rather, it found the money should be included in the marital estate because Husband divested himself of it while the parties were contemplating separation. Husband filed a Rule 59(e), SCRCP, motion, requesting a ruling on this issue, but again, the family court did not rule on it. Therefore, we remand the issue to the family court to make a finding as to whether the funds Husband divested to his children during the parties' separation were the funds he inherited after his mother passed away.

CONCLUSION

We find the family court erred in awarding Husband 62.5 percent of the marital estate; we modify the division to a fifty-fifty split; and, we remand the actual division of the property to the family court. We affirm the family court's valuation of Wife's jewelry and mink coat, its refusal to award Wife alimony and attorney's fees, and its refusal to include $54,000 from a CD and $64,000 from a checking account owned by Wife's aunt. Finally, we remand the issue of whether the $71,500 CD that Husband divested to his children during separation was non-marital, inherited funds. Accordingly, the family court's order is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

GOOLSBY, J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert William Metts,	Respondent/Appellant,
v.	
Judy Mims, Berkeley Independent Publishing Company, Inc. d/b/a The Berkeley Independent and Summerville Communications, Inc. d/b/a The Goose Creek Gazette,	Defendants,
Of Whom Berkeley Independent Publishing Company, Inc. d/b/a The Berkeley Independent and Summerville Communications, Inc. d/b/a The Goose Creek Gazette are the,	Appellants/Respondents.

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge
Roger M. Young, Circuit Court Judge
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4148
Heard May 9, 2006 – Filed August 14, 2006

AFFIRMED

John J. Kerr, of Charleston for Appellants-Respondents.

Edward Paul Gibson, of North Charleston and Steve Frederick DeAntonio, of Charleston, for Respondent-Appellant.

HEARN, C.J.: In this action for libel, Robert Metts, the Deputy Assistant Administrator of Berkley County, appeals the order of the circuit court granting Berkley Independent Publishing and Summerville Communications (Newspaper) summary judgment. Additionally, Newspaper appeals from the order requiring it to produce financial information, and Metts appeals from an order declining to impose sanctions upon Newspaper after it refused to comply with the discovery order. We affirm.

FACTS

On July 30, 2003, Newspaper published an article entitled "It was helpful, but was it legal?" The story centered around a controversial work policy established by Metts's boss, County Supervisor Jim Rozier, which allowed county employees to perform yard work on private property. The article questioned whether the policy violated the state constitution. According to the article, county council member Judy Mims stated: "[A] constituent called [her] . . . about seeing county trucks in Robbie Metts' driveway in Pinopolis, and employees cutting limbs from trees in his yard."

On the day Newspaper published the article, Mims called the reporter who wrote the story and claimed she had not made the statement which the article attributed to her. Although the reporter still believed Mims made the statement, Newspaper agreed to print a correction. The correction stated: "Mrs. Mims told The Independent she would like to correct [the previous statement] to say that constituents told her they had seen county trucks in [Metts's] yard." The correction further stated that "Metts told The Independent that what was reported 'was not the least bit accurate.'" Metts was extremely upset by the article's implication he was utilizing county employees without paying the county a fee for the services.

Metts brought suit against Newspaper and Mims alleging libel, civil conspiracy, and invasion of privacy. The complaint sought actual and punitive damages. During discovery, Metts served Newspaper with a request for production of its financial records. Newspaper refused to produce the documents on the ground that the records were only relevant to the issue of punitive damages, which Newspaper considered would most probably not go to a jury. In response to Metts's motion to compel, Judge Deadra Jefferson ordered Newspaper to produce the financial information.

Newspaper continued to refuse to produce its financial records, so Metts moved to have Newspaper held in contempt. Before the contempt hearing was held, Newspaper filed a motion for summary judgment on the grounds that Metts was a public official and there was no evidence Newspaper acted with constitutional malice in publishing the article.

Judge R. Markely Dennis, Jr., presided over the motion hearing. Newspaper contended that it was unlikely the financial records would ever be needed because Metts could not prove constitutional malice. Newspaper maintained that if it complied with the discovery order it would lose its right to appeal because the issue would be moot. Newspaper, therefore, believed it had no choice but to have the court find it in contempt so it could appeal the order. Judge Dennis agreed,

finding Newspaper had the right to challenge the order. Accordingly, Judge Dennis held Newspaper in contempt but imposed no sanctions.[1] At the hearing, Judge Dennis also orally held Newspaper's motion for summary judgment in abeyance until the contempt issue was resolved. Judge Dennis changed his mind, however, and issued a formal written order allowing Newspaper to proceed with its motion for summary judgment.

Thereafter, Judge Roger Young heard Newspaper's motion for summary judgment. Metts argued that Newspaper was aware of the adversarial relationship between Mims and Metts's supervisor, Jim Rozier. Further, Metts contended the reporter responsible for the article had received a government document listing the officials who had used county employees to perform lawn work at their houses, and that document did not have Metts's name on it. Therefore, Metts asserted that Newspaper's failure to investigate the story before publishing the article when the reporter had sufficient reason to doubt the veracity of Mims's statement constituted actual malice. For purposes of summary judgment, Newspaper conceded that Mims's statement was false, but maintained the position that the reporter believed the statement to be true.

Judge Young found that in order for Metts to prevail on summary judgment, he needed to establish that Newspaper made the publication with knowledge that it was false or with reckless disregard as to the statement's truthfulness. Taken in the light most favorable to Metts, Judge Young found no evidence suggested the reporter purposefully failed to investigate why Metts's name was not included on the list. Judge Young found Metts failed to establish clear and convincing evidence allowing a trier of fact to find that Newspaper was aware the contested quote was false, or that it acted with reckless disregard as to the truth of Mims's allegations. Accordingly, Judge Young granted Newspaper's motion for summary judgment. Both Newspaper and Metts appeal.

[1] Judge Dennis also ruled Metts was a public official.

Newspaper argues the trial court erred in requiring it to produce private financial information without any evidentiary showing that Metts was entitled to it. Metts appeals the circuit court's failure to impose sanctions when Newspaper refused to comply with the discovery order. Metts also claims the circuit court erred by allowing Newspaper's motion for summary judgment to proceed, after initially holding the matter in abeyance pending the contempt order's appeal. Finally, Metts appeals the circuit court's order granting Newspaper's motion for summary judgment on his defamation claim.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the circuit court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Peterson v. West American Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003).

LAW/ANALYSIS

First, Metts argues the trial court erred in allowing Newspaper's motion for summary judgment to proceed after initially holding the summary judgment motion in abeyance pending the resolution of the contempt order. We disagree.

South Carolina law is well-settled that until an order is entered by the clerk of court, the trial court retains control of the case. See Upchurch v. Upchurch, 367 S.C. 16, 22-23, 624 S.E.2d 643, 646 (2006) ("An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case."); Bowman v. Richland Mem'l Hosp., 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) ("An order is not final until it is written and entered by the clerk of court. Until an order is written and entered by the clerk of court, the judge retains discretion to change his mind and amend his ruling accordingly."). Therefore, the oral ruling from the bench was not binding upon the parties. Accordingly, the circuit court did not err by ordering the summary judgment motion to proceed. In the interest of judicial economy, it made sense to allow the summary judgment motion to go forward because if the motion was resolved in favor of Newspaper, there would be no reason for Newspaper to produce its financial records to Metts.

Next, Metts argues there is ample evidence in the record of Newspaper's actual malice and therefore the trial court erred in granting summary judgment.[2] We disagree.

There is no dispute that Metts, the Deputy Assistant Administrator of Berkley County, is a public figure. In a defamation case involving a public figure or official, the complaining party must prove, by clear and convincing evidence, "actual malice," i.e., that the defendant published the defamatory statement with either the knowledge it was false or with a reckless disregard as to whether it was false. Anderson v. Augusta Chronicle, 365 S.C. 589, 619 S.E.2d 428 (2005) (citing George v. Fabri, 345 S.C. 440, 451, 548 S.E.2d 868, 874 (2001)).

In deciding whether actual malice exists in a given case, we note '"the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term."' George, 345

[2] For purposes of summary judgment, we will assume the statement was false and defamatory.

S.C. at 456, 548 S.E.2d at 866 (quoting Harte-Hanks Communications., Inc. v. Connaughton, 491 U.S. 657, 666 (1989)). Further, as the South Carolina Supreme Court reiterated in Anderson, failure to investigate in and of itself is insufficient to establish that a defendant "'recklessly disregarded' the falsity of a published article." 365 S.C. at 598, 619 S.E.2d at 431. See also George, 345 S.C. at 456, 548 S.E.2d 868 ("[T]he reckless conduct contemplated by the New York Times standard 'is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.'") (citations omitted).

Rather, the actual malice standard is governed by a subjective standard that tests a defendant's good faith belief in the truth of the published statement. Elder v. Gaffney Ledger, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000). Additionally, South Carolina has declined to impose rigorous investigatory duties for members of the press. Anderson, 365 S.C. at 596, 619 S.E.2d at 431. Therefore, in order to establish recklessness there must be an "extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers." Id. (citing Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 266, 478 S.E.2d. 284, 285 (1997)). The complaining party must show sufficient evidence to conclude that "the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

Metts argues the reporter's knowledge of the adversarial relationship between Mims and Metts's supervisor, coupled with the fact that Metts's name was not included in the official list of people who had county employees perform work at their homes put the reporter on notice that further inquiry into the matter was required. Metts asserts the reporter's failure to investigate the conflicting information and instead, proceeding with publication establishes actual malice by clear and convincing evidence.

Viewing the evidence in the light most favorable to Metts, the reporter's testimony reveals the following about her subjective belief about Mims's statement: (1) Mims made the statement to the reporter at 11:30 a.m.; (2) the reporter knew Mims and Rozier did not get along

and that Metts worked for Rozier; and (3) the reporter believed she had no reason to doubt Mims's statement because Mims was a county official speaking about a county policy. The record also reveals that Newspaper received the official document at 4:30 p.m. and that the paper had been held from going to press until the list could be included in the publication.

We hold the evidence yields only one conclusion – that the reporter subjectively believed the truth of Mims's statement. Metts correctly argues that the subjective awareness of probable falsity can be shown "if there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Anderson, 365 S.C. at 596, 619 S.E.2d at 432 (emphasis added). However, simply because the reporter was aware that Mims and Metts's supervisor were political adversaries does not mean the reporter had obvious reasons to doubt Mims's credibility as a source of information.

In short, Metts's claim of actual malice in this case hinges on the reporter's failure to investigate Mims's story after receiving a document that apparently contradicted Mims's statement. Newspaper is a small weekly publication, and the evidence reveals the reporter received the list a few hours before the deadline for submitting final articles. We agree with the circuit court that the evidence indicates the reporter failed to investigate due to time constraints and a number of other obligations, including numerous editorial and administrative tasks. Although the reporter's actions may have been negligent, we cannot say that they constituted an extreme departure from the standards of investigation normally employed by publishers so as to rise to the level of constitutional actual malice. See also Elder, 341 S.C. at 118-19, 533 S.E.2d at 904 (finding that failure to investigate an anonymous phone call prior to publishing plus testimony that editor possibly harbored some ill will toward plaintiff was "patently insufficient" to establish actual malice).

Because we find the circuit court properly granted summary judgment in favor of Newspaper, we need not address any issues involving the contempt order. See Jarrell v. Petoseed Co., 331 S.C. 207, 209-10, 500 S.E.2d 793, 794 (Ct. App. 1998) ("Civil contempt

proceedings designed to coerce compliance generally terminate along with the termination of the main action.") (citations omitted).

CONCLUSION

For the foregoing reasons, the circuit court's decision is

AFFIRMED.

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

LaToya Guider, Respondent,

v.

Churpeyes, Inc., Appellant.

Appeal From Richland County
J. Ernest Kinard, Circuit Court Judge

Opinion No. 4149
Heard June 15, 2006 – Filed August 14, 2006

REVERSED

Regina H. Lewis and James C. Leventis, Jr., both of Columbia, for Appellant.

Paul W. Owen, Jr., of Columbia, for Respondent.

HEARN, C.J.: In this action for malicious prosecution and abuse of process, Churpeyes, Inc., (Church's) appeals a jury verdict in favor of LaToya Guider. Church's alleges the trial court erred in denying its directed verdict motions, admitting testimony from Guider's coworker, instructing the

jury on punitive damages and breach of trust with fraudulent intent, and failing to deny or reduce actual and punitive damages. We reverse.

FACTS

Church's operates a chicken restaurant on Taylor Street in Columbia. Guider worked as general manager of the restaurant in May 2003.

Shortly before closing on the night of May 25, 2003, someone entered the restaurant through an unlocked rear door and robbed it of approximately $860. The shift manager on duty, Selena Harrison, called Guider at home to inform her of the robbery. Guider went to the restaurant, where she found police investigating the incident. She contacted Church's area manager, Jimmy Bailey, to inform him of the incident. Bailey told Guider to let police continue their investigation and that he would discuss the matter with her later.

The next day, Bailey met with Guider and told her that leaving the back door of the restaurant unlocked violated company policy and that the employees who worked on the shift when the robbery occurred would be fired. Guider protested the decision to terminate the employees as unfair, arguing the policy had never been enforced. She also intervened on Harrison's behalf with Jerome York, the Vice President of Operations for Church's.

On June 4, 2003, Guider received a paycheck from which $430 had been deducted. Guider also received a document entitled "Deduction Contract" that Bailey drafted with York's approval. The document styled itself as a "contract" between Guider and Church's in which Guider agreed to have $859 deducted from two paychecks in installments of $430 and $429. According to Bailey and York, the document represented an agreement reached with Guider in which she would reimburse Church's for the money taken in the robbery. In return, Church's would not terminate Harrison.

Guider disputed reaching any such agreement, but nevertheless signed the Deduction Contract.[1]

Guider resigned the following morning. Later that day, she took $1,004 cash from the restaurant's sales proceeds to deposit in Church's bank account. She presented the bank with a deposit slip indicating $1,004 was being deposited. However, she only included $204 in cash with the deposit slip and intentionally kept the remaining $800.

Immediately after leaving the bank, Guider returned to the restaurant and told Bailey, "I need to speak to you about my money. I got my money back." She neither specified that she had kept $800 of the money she was supposed to deposit nor offered to return the money. Bailey told Guider he was busy with customers and did not have time to talk to her. Guider gathered her personal items and left. Later that evening, Guider again spoke to Bailey after she called and paged him throughout the day. She told him, "I did something that was wrong. I took money out of that $1,004 deposit." She added that she would like to meet and discuss returning the $800 to Church's and receiving the money it withheld from her paycheck. However, despite Guider's repeated attempts to meet with Bailey regarding the money, he either ignored her calls or claimed he was too busy to meet with her.

On June 11, 2003, Bailey asked police to issue an arrest warrant for Guider on breach of trust charges. Six days had passed since Guider informed him that she kept part of the money she was supposed to deposit. The arrest warrant affidavit provided by Bailey alleged Guider admittedly withheld the money she was entrusted to deposit for Church's. The affidavit further alleged Guider retained the money "for her own personal use."

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[1] Guider challenged Church's actions in a complaint she filed with the South Carolina Department of Labor, Licensing and Regulation (LLR) on June 11, 2003. LLR's Office of Wages and Child Labor eventually found the Deduction Contract invalid and ordered Church's to repay Guider the money it withheld from her paycheck.

Guider eventually returned the money to Church's by depositing the funds in the company's bank account on June 13, 2003. She had retained possession of the funds for eight days, during which time Church's did not have access to the funds. A municipal court judge signed the arrest warrant on June 19, 2003. Police served Guider with the warrant on June 29, and arrested her on the charges. The charges were dismissed the following day when Church's failed to appear at Guider's hearing.

Thereafter, in October 2003, Guider initiated the present action alleging malicious prosecution, abuse of process, failure to pay wages, false arrest, and violation of Guider's civil rights. Guider voluntarily dismissed her civil rights claim before the trial. The trial court dismissed the false arrest claim in pretrial proceedings.

The matter proceeded to jury trial in November 2004. The jury returned a verdict in the amount of $75,000 in actual damages and $100,000 in punitive damages on the malicious prosecution and abuse of process claims. Church's made timely post-trial motions for judgment notwithstanding the verdict (JNOV), new trial *nisi*, and new trial *nisi remittitur*. The trial court denied the motions. This appeal followed.

STANDARD OF REVIEW

"In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999). However, "the appellate court should not ignore facts unfavorable to the opposing party." Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 296, 504 S.E.2d 347, 350 (Ct. App. 1998). "Rather, it must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." Id. The issue must be submitted to a jury when material evidence tends to establish the issue in the mind of a reasonable juror. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). "However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury." Id. "[W]hen only one reasonable inference

can be deduced from the evidence, the question becomes one of law for the court." Id.

LAW/ANALYSIS

I. Directed Verdict on Malicious Prosecution

Church's argues the trial court erred in denying its directed verdict motion on Guider's malicious prosecution claim because she failed to prove Church's lacked probable cause to bring a breach of trust charge against her. We agree.

A plaintiff in a malicious prosecution action must show (1) institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the insistence of, the defendant; (3) termination of such proceeding in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause; and (6) resulting injury or damage. Parrott v. Plowden Motor Co., 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965). Church's does not dispute its actions satisfy the first two prongs of this test. Instead, it focuses its argument on the prong related to probable cause.[2]

"An essential element of malicious prosecution is the institution of judicial proceedings without probable cause against the plaintiff." Kinton v. Mobile Home Indus., Inc., 274 S.C. 179, 181, 262 S.E.2d 727, 728 (1980). "Probable cause in this context does not turn upon the plaintiff's guilt or innocence, but rather upon whether the facts within the prosecutor's knowledge would lead a reasonable person to believe the plaintiff was guilty of the crimes charged." Id. When determining if probable cause exists, the court must consider the facts from the point of view of the party prosecuting. Eaves v. Broad River Elec. Co-op., Inc., 277 S.C. 475, 478, 289 S.E.2d 414,

[2] Church's also briefly argues Guider failed to meet her burden of proving the remaining elements of malicious prosecution. The issues of malice and damages were not raised in the directed verdict motion, and thus are not preserved for our review. See Scoggins v. McClellion, 321 S.C. 264, 267, 468 S.E.2d 12, 14 (Ct. App. 1996) (finding issues not raised in directed verdict motion unpreserved for appellate review).

416 (1982). "[T]he question is not what the actual facts were, but what [the prosecuting party] honestly believed them to be." Id.

Looking at the facts from Church's point of view for the determination of probable cause, Church's filed the breach of trust charges knowing Guider had admittedly retained $800 in company funds with which she had been entrusted on June 5, 2003. Moreover, Guider retained possession of the $800 for a total of eight days before she returned the money to Church's. Church's filed the charges after Guider told Bailey, "I got my money back," "I did something that was wrong," and "I took money out of that $1,004 deposit." Guider had not returned the funds when the charges were filed.

A reasonable party could only conclude Church's had probable cause to believe Guider guilty of breach of trust. We find Guider failed to meet her burden of proving Church's lacked probable cause to bring breach of trust charges against her. See Parrott, 246 S.C. at 322, 143 S.E.2d at 609 (holding the plaintiff bears the burden of proving the person or entity bringing the charges lacked probable cause to pursue charges against him). Thus, viewing these facts in the light most favorable to Guider, the trial court should have granted Church's motion for directed verdict on the malicious prosecution charge as a matter of law. Id. at 323, 143 S.E.2d at 609 (holding although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion).

II. Directed Verdict on Abuse of Process

Church's next argues the trial court erred in denying its directed verdict motion on Guider's abuse of process claim. We agree.

"The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). "The essential elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding." Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136, 429 S.E.2d 103, 107 (1997). "An

ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct. App. 1994). "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." Hainer, 328 S.C. at 136, 492 S.E.2d at 107. Regardless, "there is no liability when the process has been carried to its authorized conclusion, even though with bad intentions." Thomas, 317 S.C. at 74-75, 451 S.E.2d at 914.

Viewing the facts in the light most favorable to Guider, we find the record devoid of evidence that Church's misused the legal process or operated with an illegitimate purpose. Instead, the evidence shows Church's used the legal process with the objective of seeking redress against a former employee who admittedly took and retained company funds. Moreover, when Guider returned the funds, Church's stopped pursuing the criminal charges against her. This is clearly a legitimate use, not a perversion, of the legal process.

CONCLUSION

We find the trial court should have granted directed verdicts to Church's on Guider's claims for malicious prosecution and abuse of process. For the forgoing reasons, the verdict in favor of Guider is

REVERSED.[3]

GOOLSBY and ANDERSON, JJ. concur.

[3] Because we reverse on this issue, we decline to address Church's remaining arguments. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (holding an appellate court need not address remaining issues when the resolution of a prior issue is dispositive).