Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E
July 22, 2009

The Judicial Merit Selection Commission is currently accepting applications for the following judicial office.

A vacancy will exist in the office currently held by the Honorable Donna S. Strom, Judge of the Family Court for the Fifth Judicial Circuit, Seat 4, upon her retirement on or before December 31, 2009. The successor will fill the subsequent full term that will expire on June 30, 2016.

The Commission will not accept applications only for this seat after **Noon on Monday, August 24, 2009.**

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

The Supreme Court of South Carolina

RE: Lawyer Mentoring Second Pilot Program

O R D E R

By Order dated December 2, 2008, the Court adopted the Lawyer Mentoring Second Pilot Program, which was recommended by the Chief Justice's Commission on the Profession. Originally, the Program was to be administered by the South Carolina Bar. However, we order that the program be administered by the Commission on Continuing Legal Education and Specialization, as set forth in the attachment to this Order.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

July 23, 2009

LAWYER MENTORING SECOND PILOT PROGRAM

1. DURATION OF PROGRAM.

The second pilot program will run from March 2009 until December 31, 2011 and include all qualifying lawyers admitted to the Bar between March 1, 2009, and January 1, 2011. The Program shall be administered by the Commission on Continuing Legal Education and Specialization.

2. MANDATORY PARTICIPATION.

The second pilot program is mandatory for all qualifying lawyers. Unless participation is delayed under Section 3 below, all lawyers must complete the mentoring program within the first full calendar year after admission to the South Carolina Bar.

3. QUALIFYING LAWYER DEFINED.

A qualifying lawyer is any lawyer admitted to the South Carolina Bar during the prescribed period if that lawyer (1) is a resident of the State of South Carolina or practices law in an office located in South Carolina on more than a temporary basis; and (2) has not previously practiced law actively in another jurisdiction for more than two years.

Special Circumstances:

a) A qualifying lawyer who is employed as a non-permanent, full-time clerk to a state or federal judge during the first year of admission to the South Carolina Bar may elect to participate in the mentoring program after the completion of his or her clerkship.

b) A qualifying lawyer who is not engaged in the representation of clients nor any other form of the active practice of law may request a waiver of this requirement by certifying that he or she is not engaged in the active practice of law in South Carolina and does not intend to do so for a period of at least two years. If that lawyer later begins to actively practice law in South Carolina, he or she must then notify the Commission on Continuing Legal Education and Specialization and participate in the mentoring program for one year after beginning to actively practice law. [This last sentence will not apply to lawyers who

begin to actively practice law in South Carolina after January 1, 2011, unless the mentoring program is made permanent.]

c) A qualifying lawyer who begins the mentoring program, but, prior to the completion of the program, moves his or her residency out of the state and no longer practices regularly in the state, is not required to complete the mentoring program. The new lawyer must provide notice to the Commission on Continuing Legal Education and Specialization of his or her move from the state as the basis for not completing the program. The new lawyer's license to practice law shall not be affected by the failure to complete the program in this circumstance. If that lawyer subsequently returns to South Carolina prior to having been engaged in the active practice of law as a member of another bar for at least two years, however, the new lawyer may be required to complete the mentoring program within the first full calendar year after returning to the state. [This last sentence will not apply to lawyers who return to the state after January 1, 2011, unless the mentoring program is made permanent.]

4. PURPOSE OF PROGRAM.

The purpose of the mentoring program is to provide assistance to the new lawyer in the following respects:

a) The mentor should assist the new lawyer in developing an understanding of how law is practiced in a manner consistent with the duties, responsibilities, and expectations that accompany membership in the legal profession. The mentor should provide guidance or introduce the new lawyers to others who can provide guidance as to proper law practice management, including the handling of funds, even if the new lawyer is not currently in a setting that requires the use of those practices. Guidance should be given not only as to a lawyer's ethical duties, but also as to the development of a higher sense of professionalism based upon internalized principles of appropriate behavior consistent with the ideals of the profession.

b) The mentor should assist the new lawyer in developing specific professional skills and habits necessary to gain and maintain competency in the law throughout one's career and should assist the new lawyer in developing a network of other persons from whom the

new lawyer may seek personal or professional advice or counsel when appropriate or necessary throughout their career. While a strong mentoring relationship (particularly if the mentor and new lawyer are in the same firm or office) may also include specific advice to or training of a new lawyer regarding substantive aspects of the law, such substantive legal training should not be required of a mentor in this program.

c) The mentor should assist the new lawyer in identifying and developing specific professional skills and habits necessary to create and maintain professional relationships based upon mutual respect between the lawyer and client; the lawyer and other parties and their counsel; the lawyer and the court, including its staff; the lawyer and others working in his or her office, including both lawyers and staff; and the lawyer and the public. The mentor should assist the new lawyer in understanding the appropriate boundaries between advocacy and overzealous or uncivil behavior and in developing appropriate methods of responding to inappropriate behavior by others.

d) The mentor should introduce the new lawyer to others in the lawyer's local or regional legal community and encourage the new lawyer to become an active part of that community.

5. STRUCTURE OF PROGRAM.

Mentoring shall be made available through either individual or group mentoring. Unless a different mentoring plan is approved under Section 6, each qualifying new lawyer is required to complete the mentoring tasks set forth in a standard mentoring plan prepared by the Commission on Continuing Legal Education and Specialization and approved by the Court. The standard plan may include a recommended schedule for completing the tasks, but that actual order and timing of completion of the tasks shall be within the discretion of the participants, provided that the full plan is completed as required in Section 2 above. In addition to completing the specific required tasks, it should be expected that, in an individual mentoring arrangement, the mentor and new lawyer will consult throughout the calendar year as either may deem necessary or appropriate.

The mentor and new lawyer may choose the method of communication that best suits their needs. However, if a mentor and new lawyer do not otherwise have regular in-person contact, they should schedule at least some periodic in-person discussions throughout the mentoring period. Each person should be cognizant of demands on the other's schedule and attempt to find a mutually acceptable time for these meetings. If there is a recurrent failure by either party to make time available for this purpose, or if other difficulties arise which cannot be resolved by the parties and which threaten the timely and effective completion of the mentoring program, the parties to the relationship (or either of them) should advise the Commission on Continuing Legal Education and Specialization of the situation and request the assistance of that office in resolving the matter.

a) Individual Mentoring.

Most new lawyers will have an individual mentor approved by the Commission on Continuing Legal Education and Specialization. Preference should be given to the appointment of a mentor selected by the new lawyer, who may be, but is not required to be, a lawyer working in the same firm or office as the new lawyer.

If a new lawyer does not select a qualified mentor, then one of the following options will apply:

1) if the new lawyer is employed and another lawyer in the same firm or office could serve as a mentor, the Commission on Continuing Legal Education and Specialization shall contact the firm or office and seek the voluntary agreement of a qualified lawyer in the firm or office to serve as the new lawyer's mentor;

2) if the new lawyer wishes to have an individual mentor and either no mentor is obtained under option (1) or the new lawyer is not employed in a firm or office able to supply a mentor, then the Commission on Continuing Legal Education and Specialization shall seek to recruit a qualified individual mentor from among the members of the South Carolina Bar. In this event, a reasonable effort should be made to designate a mentor from the same or a nearby geographic area with experience in a practice setting similar to that of the new lawyer; or

3) the new lawyer shall be assigned to participate in group mentoring.

b) Group Mentoring.

The Commission on Continuing Legal Education and Specialization will develop a program of group mentoring for those new lawyers not assigned an individual mentor. A group mentoring program should have some element of live contact with members of the mentoring group, but it may be a combination of live contact and electronic or other forms of distance mentoring as may be deemed sufficient by the Commission on Continuing Legal Education and Specialization. The preferred ratio of new lawyers to mentors in a group mentoring program shall be no greater than 3 to 1.

6. CERTIFICATION OF INTERNAL PROGRAMS.

A law firm or office (including, but not limited to, governmental agencies, corporate legal departments, state and local prosecutors, and public defenders) which has an internal mentoring program in place that it believes achieves all of the purposes of this program may apply to the Commission on Continuing Legal Education and Specialization to have its mentoring plan certified as compliant with the mentoring obligation under the pilot program. The application for certification should include a detailed description of the internal program and a detailed showing of how each of the purposes of this program will be achieved under the internal program. If a program is certified, completion of that program by a qualifying new lawyer should be deemed to satisfy the mentoring requirement. The new lawyer and the lawyer responsible for the certified program should be required to file a statement for each new lawyer verifying that the new lawyer has completed all requirements of the program. Once certified, a program should remain certified throughout the duration of the pilot program unless it is materially altered.

7. GENERAL QUALIFICATIONS OF MENTORS

Mentors must be active members of the South Carolina Bar, or persons who have taken retired or inactive status within the preceding two years. Mentors must have at least five [5] years experience in the active practice of law. It is preferable that mentors have experience with the court system, although it is

understood that not all mentors will have litigation experience. A lawyer without such litigation experience may nevertheless be an appropriate mentor if that lawyer has otherwise developed an understanding of appropriate behavior in a lawyer's relationship with the court.

Mentors should display, through their own conduct, an understanding of and commitment to ethical responsibilities and the prevailing expectations with regard to a lawyer's appropriate professional behavior. A mentor must have a good reputation for professional behavior and must have not been publicly reprimanded in any jurisdiction within the past 10 years or suspended or disbarred from the practice of law at any time.

Mentors should be able to assist the newer lawyer in developing a style of lawyering that is compatible both with professional expectations and with the personality of the newer lawyer.

8. APPOINTMENT OF MENTORS; EDUCATION AND SUPPORT OF MENTORS

A lawyer may serve as a mentor for purposes of this program only if first approved by the Commission on Continuing Legal Education and Specialization. The prospective mentor must submit an application to the Commission on Continuing Legal Education and Specialization in an approved form certifying that the lawyer meets the experience requirements for a mentor and has not been publicly reprimanded within 10 years, suspended, or disbarred from the practice of law.

Upon determining that a mentor applicant meets the threshold qualifications, the Commission on Continuing Legal Education and Specialization may conduct such further investigation of a prospective mentor's qualifications and reputation for professional behavior as it may deem appropriate. The Commission on Continuing Legal Education and Specialization has authority to appoint qualified lawyers as mentors or, in its discretion, to decline to appoint an applicant to serve as a mentor under this program.

An appointment shall qualify a lawyer to serve as a mentor in this program for five years, unless earlier removed as a mentor. A lawyer may be appointed to multiple consecutive terms as a qualified mentor. If at any time a lawyer appointed as a mentor is publicly reprimanded, suspended, or disbarred in any jurisdiction, the lawyer shall be removed immediately as an

approved mentor. If the lawyer is serving as a mentor at the time that his or her name is removed from the list of approved mentors, the Commission on Continuing Legal Education and Specialization shall immediately appoint a new mentor for the lawyer being mentored.

A lawyer appointed as a mentor is not required to attend a training session, but will be provided access to materials gathered or prepared by the Commission on Continuing Legal Education and Specialization that will assist the mentor in carrying out his or her responsibilities. The Commission on Continuing Legal Education and Specialization will provide at least annually a voluntary mentor orientation program that will qualify for ethics MCLE credit. Mentors are encouraged to contact other mentors to discuss issues, the most effective approaches to be used in working with new lawyers, the most effective means of resolving problems that are encountered in the relationship, or other concerns that arise during the mentoring relationship.

9. MIGRATION OF A MENTOR OR A NEW LAWYER

From time to time, either a mentor or a new lawyer may change jobs during the mentoring year. It is expected that, whenever possible, the mentoring relationship, once established, will be maintained despite such a move. When maintenance of the relationship is not possible because one of the parties to the relationship has moved to a distant location or because of other extraordinary circumstances, the mentor or new lawyer should notify the Commission on Continuing Legal Education and Specialization, and that office may assign a substitute mentor or take such other measures as are appropriate.

10. ADDRESSING SITUATIONS IN WHICH MENTOR IS IN POSITION OF AUTHORITY REGARDING THE NEW LAWYER

If a mentor participates in or has responsibility for any performance evaluations of the new lawyer being mentored, the mentor and new lawyer should set forth clearly at the outset of the relationship how information learned by the mentor during the mentoring relationship might be used in that evaluation process. If the role of the mentor as a supervisor or evaluator may conflict with the new lawyer’s need for advice in some situations, the mentor

should assist the new lawyer in making contacts with other lawyers who could provide advice in those situations.

11. CERTIFICATION OF PARTICIPATION; SANCTION FOR FAILURE TO COMPLETE

At the end of the first full calendar year after a new member is admitted to the Bar, if the new lawyer has completed all requirements of the mentoring program, he or she must file with the Commission on Continuing Legal Education and Specialization a document signed by the mentor certifying such completion. If the new lawyer has not completed all requirements of the mentoring program by that time or is otherwise unable to obtain a certificate from the mentor, the new lawyer shall report the specific reasons that a certificate has not been filed. The Commission on Continuing Legal Education and Specialization may, without requiring court approval, grant such additional time as is appropriate to file the certificate, or may recommend to the Court that other appropriate action be ordered.

Failure to complete all elements of the proposed mentoring plan during the pilot program will not result in sanction of the participants, provided that the explanatory certificate set forth above is completed and filed in a timely manner.

12. ADVICE REGARDING SPECIFIC LEGAL ISSUES

In fulfilling his or her responsibilities as a mentor, a mentor may provide general advice and guidance to the new lawyer on how to resolve substantive or procedural legal issues. However, it is not the purpose of the mentoring program to provide specific legal advice to the new lawyer or to provide the new lawyer with co-counsel in a legal matter.

When a mentor is associated with the same law firm or office as the new lawyer, the mentoring relationship does not preclude the mentor from assisting the new lawyer in resolving a specific substantive or procedural legal issue. The extent to which such advice or supervision occurs should be determined by the policies of the law firm or office.

When a mentor is not associated with the same firm or office as the new lawyer, the mentor should instruct the new lawyer at the outset of the relationship about the duty of the new lawyer not to share with the mentor

confidential information about any representation. If a new lawyer needs advice about a particular situation, the mentor may discuss with the new lawyer the general area of law at issue, without reference to the facts of a specific matter, and may direct the new lawyer to resources that may assist the new lawyer in finding the necessary information. **By virtue of acting as a mentor, the mentor does not undertake to represent the client of the new lawyer or assume any responsibility for the quality or timeliness of the work on a matter being handled by the new lawyer. The lawyer being mentored remains solely responsible for the client's matter.** If a mentor does consult with the new lawyer about a specific legal matter, however, both the mentor and the new lawyer must keep in mind that the same professional duties apply as would apply whenever two lawyers not in the same firm consult about a matter.

When appropriate, the mentor should assist the new lawyer in obtaining specific legal advice as may be necessary or appropriate with regard to the establishment or management of a law office.

13. SATISFACTION OF MCLE REQUIREMENTS

During any year in which a lawyer completes a full year as a mentor for one or more new lawyers, the mentor shall be deemed to have completed 4 hours of CLE credit, including two hours of ethics CLE. The mentor should not receive additional CLE credit for mentoring more than one lawyer in the same year.

ATTACHMENT A
(PDF Version)

UNIFORM MENTORING PLAN

OBJECTIVE A

To establish a clear understanding as to the expectations of both the mentor and the new lawyer.

ACTION STEPS

The two should meet in person as soon as possible to discuss their expectations as to how often they should communicate, how they will

attempt to achieve the nine objectives of this plan including any appropriate revisions to these action steps, and what each hopes to gain from the relationship. They should discuss the extent to which communications will be kept confidential. If the mentor serves in a supervisory role over the new lawyer, they should discuss openly any limitations that might place on their discussions, and the mentor should make clear the extent to which information learned in the mentoring relationship might be considered in the mentor's supervisory capacity. The mentor should also assist and encourage the new lawyer in identifying other persons who may serve as additional informal career and personal mentors. This is especially important if supervisory duties or other factors may limit the mentoring relationship..

OBJECTIVE B

To introduce the new lawyer to other members of the legal profession and to other participants in the legal system.

ACTION STEPS

If the new lawyer works in a different office than the mentor, the mentor should introduce the new lawyer to other lawyers and staff at the mentor's office. If they work in the same office, the mentor should either provide introductions or ensure that they have already occurred.

Throughout the year, the mentor should introduce the new lawyer to other lawyers in the community, especially those with whom the new lawyer is most likely also to have professional contact. At least some of these introductions should be made in a lawyer's office or in a similar environment that permits significant interaction between the new lawyer and the lawyer to whom he or she is introduced. In addition, the mentor and the new lawyer should attend a meeting together of a local bar association or similar lawyer's organization and discuss opportunities to participate in the work of local, state, or national bar organizations.

The mentor should escort the new lawyer on a tour of the local courts and, to the extent practicable, introduce the new lawyer to judges and court personnel.

If the new lawyer is likely to undertake any criminal defense representation, the mentor should escort or arrange for another lawyer to escort the new lawyer to the local jail and explain procedures for jail visits. The mentor should also introduce the new lawyer to local prosecutors and staff in the prosecutor's office. If the new lawyer is a prosecutor, the mentor should arrange for the new lawyer also to meet the local public defender and staff in the public defender's office.

The mentor should acquaint the new lawyer with the court appointment process, with pro bono expectations, and with various legal services organizations that provide services to indigent persons.

OBJECTIVE C

To ensure that the new lawyer has a thorough understanding of generally accepted professional values and standards of behavior, as well as an understanding of the need to regularly educate oneself throughout a professional career.

ACTION STEPS

The mentor and new lawyer should review together the Lawyer's Oath and the South Carolina Bar Standards of Professionalism and discuss how a lawyer should deal with any the practical challenges the lawyer may encounter in upholding the requirements and expectations of those documents. They should discuss the lawyer's role in the legal system and the lawyer's responsibilities to the client and to persons or institutions other than the client. If the new lawyer is a prosecutor, they should discuss the unique role and responsibilities of the prosecutor and appropriate interaction with victims. If the new lawyer is in-house counsel for a company or staff counsel for an agency, they should discuss the identity of the client and the duties owed to the entity.

The mentor should offer examples of practice situations that may place stress on a lawyer's relationship with other lawyers or with other parties and should discuss with the new lawyer ways to deal with those situations in a professional and civil manner. They should discuss client expectations, how to communicate with and involve a client effectively in a matter, and other steps that a lawyer should take to gain a client's trust and confidence in a manner consistent with the lawyer's

professional obligations. They should discuss customs, unwritten rules, and other expectations of etiquette and behavior among lawyers and judges in the community.

The mentor should discuss with the new lawyer the importance of continuing education throughout a lawyer's career and provide the new lawyer with advice as to how best to remain informed of the latest developments in the lawyer's practice areas.

OBJECTIVE D

To ensure that the new lawyer is fully aware of a lawyer's ethical obligations and how to identify and deal with any ethical issues that may arise.

ACTION STEPS

The mentor and new lawyer should discuss the importance of developing a relationship with at least one other lawyer with whom possible ethical issues can be appropriately discussed. The mentor should assist the new lawyer in identifying other resources to resolve complicated ethical issues, including, when applicable, the process for consulting a law firm's ethics committee or the Bar's ethics advisory committee. They should discuss also how and when to address situations in which the new lawyer believes that another lawyer has committed an ethical violation or in which the new lawyer believes that he or she has been instructed to engage in unethical behavior.

OBJECTIVE E

To ensure that the new lawyer is fully aware of the proper practices for avoiding mishandling of other's assets, conflicts of interest, neglect of a matter and other common ethical and civil liability problems.

ACTION STEPS

The mentor should discuss with the new lawyer the most common reasons for which an ethics grievance or civil malpractice complaint is filed, especially the mishandling of funds, conflicts of interest, and negligence, and how to recognize and avoid common problems.

The mentor should discuss or arrange for another lawyer to discuss with the new lawyer all applicable rules regarding trust account

management and emphasize the importance of keeping accurate records of property of others held by the lawyer. The discussion should include detailed advice as to when funds generally may be disbursed and a discussion of IOLTA accounts. Because of the possibility that the new lawyer could change jobs, this conversation should take place even if the new lawyer currently has no such responsibility for the funds of others. If the new lawyer works in a different office than the mentor, the mentor should advise the new lawyer to create appropriate trust accounts or to ensure that such accounts exist. If they work in the same office, the mentor should ensure that the new lawyer understands how the firm's trust accounts operate.

The mentor should discuss with the new lawyer practical situations in which unanticipated conflicts may occur and should emphasize the importance of identifying fully all possible interested persons or entities. If the new lawyer works in a different office than the mentor, the mentor should advise the new lawyer to ensure that his or her office has an appropriate system to identify potential conflicts of interest. If they work in the same office, the mentor should ensure that the new lawyer understands how the firm's conflict identification system operates.

The mentor and new lawyer should discuss time management skills and techniques as well as the desirable features of a calendaring or tickler system. They also should discuss timekeeping methods that provide accurate records of time spent on a client's matter.

They should discuss a lawyer's duties to supervise non-lawyer staff and discuss what activities a non-lawyer staff member or employee may engage in without undertaking the unauthorized practice of law.

They should discuss when and how it is appropriate to contact judges, especially to avoid impermissible contacts. They also should discuss the lawyer's duty of confidentiality and common pitfalls regarding protection of the attorney-client privilege.

If the new lawyer is a prosecutor, the mentor should discuss the appropriate considerations in making charging decisions.

OBJECTIVE F

To help the new lawyer create and implement a successful career plan.

ACTION STEPS

The mentor and the new lawyer should discuss the new lawyer's long-term career objectives and how best to achieve them. If appropriate to the practice setting, also discuss the importance of developing a long-term business plan. If the new lawyer is uncertain as to his or her career goals, the mentor should help the new lawyer to identify those goals or guide the new lawyer to others who can provide that assistance.

They should discuss the most effective approaches for handling office politics so as to avoid harm to one's career. They should discuss how to deal most effectively with inappropriate or discriminatory behavior when it is encountered and how to develop appropriate support systems of persons with whom the lawyer can discuss problems when they arise. Toward this purpose, the mentor should assist the new lawyer in identifying other individuals who may provide additional informal mentoring support.

OBJECTIVE G

To assist the new lawyer in improving professional skills necessary for the effective practice of law.

ACTION STEPS

The mentor and new lawyer should discuss appropriate negotiation techniques, focusing on expectations of behavior during negotiations as well as the effectiveness of various approaches.

They also should discuss appropriate techniques for interviewing clients and witnesses to ensure that information is completely and productively obtained without prejudice to the rights of others.

They should discuss how to conduct an effective deposition, consistent with the purposes of the deposition. If a new lawyer participates in a deposition or court proceeding during the mentoring period, the

mentor should either observe the new lawyer's performance or discuss the experience with the new lawyer afterwards to the extent permitted by rules of confidentiality and without harm to any applicable attorney-client privilege.

OBJECTIVE H

If the new lawyer is in private practice, to assist the new lawyer in developing a productive and effective law practice.

ACTION STEPS

The mentor and new lawyer should discuss how a lawyer can ethically and professionally make others aware of the availability of his or her professional services.

They should discuss how to evaluate a matter and decide whether to undertake a representation, and, if appropriate to the practice setting, how to set and memorialize a fee and how to talk with the client about the fee for a matter.

They should discuss when and how to retain additional counsel to assist in a matter.

They should discuss how to terminate a representation.

OBJECTIVE I

To help the new lawyer enjoy a healthy personal life while fulfilling his or her professional obligations.

ACTION STEPS

The mentor should provide advice to the new lawyer about the appropriate balance between one's personal and professional responsibilities. They should discuss the warning signs of substance abuse or depression and how to address those problems when they are manifested in oneself or in others. If the new lawyer has substantial educational loans or other debt, they should discuss practical ways to manage long-term debt.

ATTACHMENT B
(PDF Version)

SAMPLE LETTER TO LAWYER BEING MENTORED
[South Carolina Commission on the Profession Letterhead]

Dear _____,

As a newly admitted member of the South Carolina Bar, you will participate in a pilot South Carolina Lawyer Mentoring Program. The goal of this new program is to assist your transition into the legal profession and to provide you with a stronger understanding of its accompanying ethical and professional obligations and expectations.

Enclosed are materials describing the program as implemented by the Supreme Court of South Carolina. You should review those materials immediately. If you work in a law firm or office with other lawyers who meet the qualifications to be a mentor as set forth in those materials, you may seek a mentor from among those qualified lawyers. You should discuss the program with potential mentors and attempt to secure their consent to serve as a mentor. They should be made aware that completion of their work as a mentor would qualify for four hours of MCLE credit in the year in which the mentoring is completed. You may also work in an office or firm with an internal mentoring program that has been certified as compliant with the mentoring program. You should ask your employer if that is the case.

If you prefer, you may select a qualified mentor who does not work with you or you may request that a mentor be appointed for you. In any event, you must return the enclosed form to the Commission on Continuing Legal Education and Specialization within 30 days after your admission to the South Carolina Bar, indicating the name of a mentor who has consented to serve in that role or requesting appointment of a mentor.

Enclosed with this letter is a copy of the reporting form that you and your mentor will be required to submit at the end of your participation in the mentoring program. During the mentoring period, you will be expected to work with your mentor to achieve each of the objectives set forth in the Uniform Mentoring Plan or in your firm's mentoring plan if it has been approved. If any activities are not completed, you will be asked to explain the omission of those elements. A purpose of the pilot program is to ascertain

which activities are feasible and appropriate to require, and your explanations will be important in that determination.

Sincerely,

ATTACHMENT C
(PDF Version)

SOUTH CAROLINA LAWYERING MENTORING PROGRAM
DESIGNATION OF MENTOR/REQUEST FOR APPOINTMENT OF MENTOR

For the Mentoring Period beginning _____, 20__ and ending _____, 20__.

Full Name of Newly Admitted Lawyer to be Mentored:

_____

South Carolina Bar Number: _____

Check the appropriate response:

_____ I have selected a mentor, who has agreed to serve in that capacity during the mentoring period. The name and address of my proposed mentor is

Name: _____

Mailing Address: _____

_____

_____

_____ I have not obtained a mentor and ask that one be appointed for me or that I be assigned to a group mentoring team.

Does your employer have an internal mentoring program that has been approved as satisfying the requirements of the S.C. Lawyer Mentoring Program?___Yes ___No

Signature:

_____

Submit Completed Form within 30 days after admission to the South Carolina Bar to:

Commission on Continuing Legal Education and Specialization
Post Office Box 2138
Columbia, South Carolina 29202

ATTACHMENT D
(PDF Version)

SAMPLE LETTER TO MENTOR AT BEGINNING
OF PROGRAM PERIOD
[South Carolina Commission on the Profession Letterhead]

Dear _____,

This letter confirms your agreement to participate in the pilot South Carolina Lawyer Mentoring Program as a mentor for _____. Your active participation is vital to the success of the program and the fulfillment of its goal of improving the transition of new lawyers into the profession, with a stronger understanding of the accompanying ethical and professional expectations. At the end of the one-year mentoring period, your comments and recommendations regarding this pilot program will be vital to subsequent evaluation of the program and a decision by the Supreme Court as to whether the program should be made permanent.

As a mentor, you will have available to you materials designed to assist you in carrying out your responsibilities as a mentor.

Enclosed with this letter is a copy of the reporting form that you will be required to submit at the end of the mentoring period. During the mentoring

period, you will be expected to assist the lawyer being mentored in achieving each of the objectives of the mentoring program. Those objectives are set forth in the Uniform Mentoring Plan, attached to that form. If any activities are not completed, you will be asked to explain the omission of those elements. A purpose of the pilot program is to ascertain which activities are feasible and appropriate to require and your explanations will be important in that determination. Fulfillment of your mentoring obligations will also qualify for 4 hours of South Carolina MCLE credit in the year in which the mentoring is completed.

We thank for your participation as a mentor.

Sincerely,

ATTACHMENT E
(PDF Version)

CERTIFICATE OF COMPLETION
SOUTH CAROLINA UNIFORM MENTORING PLAN

Name of Lawyer Being Mentored (Print):
_____

For the Mentoring Period beginning _____, 20__ and ending _____, 20__.

The undersigned participants in the South Carolina Lawyer Mentoring Program certify that, with the exceptions noted below, if any, they have completed their agreed upon mentoring plan, consistent with either the Uniform Mentoring Plan or a mentoring plan approved as compliant with the requirements of the South Carolina Lawyer Mentoring Program.

The following parts of the mentoring plan were not completed:

_____
_____
_____
_____
_____
_____.

Any recommendations or suggestions of the participants for changes in the Uniform Mentoring Plan or other aspects of the mentoring program are attached as Attachment C (Recommendations by Mentor) and/or Attachment D (Recommendations by Lawyer Being Mentored).

The undersigned Mentor (___does/ ___does not) work in the same office or firm as the undersigned Lawyer Being Mentored.

MENTOR	**LAWYER BEING MENTORED**
Signature: _____	Signature: _____
Print Name: _____	Print Name: _____
S.C. Bar Membership Number: _____	S.C. Bar Membership Number: _____
Date: _____	Date: _____

Submit Completed Form within 30 days after the end of the mentoring period to:

Commission on Continuing Legal Education and Specialization
Post Office Box 2138
Columbia, South Carolina 29202

ATTACHMENT F
(PDF Version)

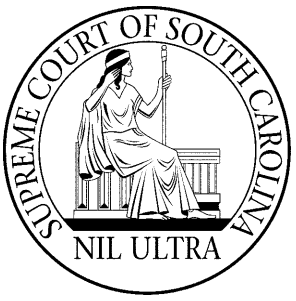
RECOMMENDATIONS AND COMMENTS BY MENTOR

(This form may be used by the Mentor to provide recommendations or comments to those evaluating the pilot mentoring program. Of particular interest to the evaluators are recommendations regarding the deletion or addition of elements in the Uniform Mentoring Plan.)

ATTACHMENT G
(PDF Version)

RECOMMENDATIONS AND COMMENTS BY NEW LAWYER

(This form may be used by the New Lawyer to provide recommendations or comments to those evaluating the pilot mentoring program. Of particular interest to the evaluators are recommendations regarding the deletion or addition of elements in the Uniform Mentoring Plan.)



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
July 27, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dan F. Williamson and Dan F. Williamson and Company, Petitioners,

v.

Alfred C. Middleton, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26689
Heard April 9, 2009 – Filed July 27, 2009

REVERSED

Desa Ballard, of West Columbia, for Petitioners.

James C. Parham, Jr., Wallace K. Lightsey, and Patricia S. Ravenhorst, all of Wyche, Burgess, Freeman & Parham, of Greenville, for Respondent.

PER CURIAM: Following litigation between Petitioners Dan F. Williamson and Dan F. Williamson and Company (collectively "Williamson") and Respondent Alfred C. Middleton ("Middleton"), a former employee, the trial court awarded Middleton $35,000 in attorney's fees. The Court of Appeals upheld the award after *en banc* rehearing. Williamson v. Middleton, 374 S.C. 419, 649 S.E.2d 57 (Ct. App. 2007). We granted certiorari. Williamson argues that the Court of Appeals committed various errors in hearing the case *en banc*, that there is no evidence on which to affirm the finding that Middleton would pay his attorneys, and that the attorney's fees are unreasonable. We reverse.

FACTS

Middleton worked for a number of years for Williamson as a salesman. Middleton received both an annual salary and commissions on sales contracts. During his employment, there was a dispute as to the amount of salary and commissions owed Middleton and he eventually resigned.

Middleton went to work with one of Williamson's suppliers. He continued to seek commissions he was due but Williamson refused his requests. Middleton then consulted with James C. Parham of the Wyche Burgess law firm, who was a personal friend of Middleton. On behalf of Middleton, Parham attempted to secure the payment of the commissions. Ultimately, Williamson filed suit against Middleton alleging breach of fiduciary duty, among other things. Middleton timely filed an Answer denying the allegations contained in the Complaint and asserting counterclaims based on the alleged non-payment of the commissions and wages owed him.

From the beginning, Williamson hindered the progress of the case by making vague and incomplete responses to interrogatories, cancelling multiple depositions and mediation at the last-minute, and attempting to add new parties and causes of action to the lawsuit despite the trial court's denial

of a motion to amend the pleadings. Williamson's actions required Middleton's counsel to devote additional time to the case.

At trial, only Williamson's cause of action for breach of fiduciary duty went to the jury, which returned a verdict in favor of Middleton. The jury also considered Middleton's counterclaim for unpaid commissions and awarded him $906.62 in actual damages. The trial judge found Middleton was entitled to attorneys' fees. After Middleton presented records showing attorneys' fees totaling approximately $106,000, the trial judge awarded $35,000 in attorneys' fees. Williamson appealed to the Court of Appeals which reversed the award. Middleton petitioned for rehearing and the Court of Appeals granted rehearing *en banc*. The Court of Appeals *en banc* voted 5-4 to affirm the trial court's decision. Williamson, supra.

ISSUES

I. Did the Court of Appeals err in granting and conducting rehearing *en banc*?

II. Did the Court of Appeals err in concluding that there was competent evidence to support the trial court's finding that there was a fee agreement?

DISCUSSION

I. Court of Appeals Procedural Issues

Williamson argues on appeal that the Court of Appeals committed a number of procedural errors in granting and conducting rehearing *en banc*. We find no error.

Following the decision by the three-judge panel, Middleton petitioned for rehearing of the case and the Court of Appeals granted rehearing *en banc*. Though the endorsement letter showing that the Court of Appeals granted rehearing *en banc* shows the signatures of only five judges, six judges

actually voted for rehearing.[1] After rehearing, the Court of Appeals *en banc* voted 5-4 to affirm the trial court's decision.

Williamson first argues that the Court of Appeals erred in granting rehearing *en banc* on the votes of only five judges because S.C. Code Ann. § 14-8-90(a)(1) requires six votes to hear a case *en banc*. S.C. Code Ann. 14-8-90(a)(1) (2008). As referenced above, a letter from the Clerk of the Court of Appeals explained that the signature of Judge Williams was mistakenly omitted from the endorsement letter. In fact, the Clerk explained that six judges voted to hear the case *en banc*. Consequently, Williamson's argument is without merit. Next, Williamson contends that even if six judges voted to hear the case *en banc*, sufficient grounds did not exist to support rehearing under Rule 219 of the South Carolina Appellate Court Rules (SCACR). We note that while Rule 219 lists certain grounds on which rehearing *en banc* may be granted, it provides only that rehearing *en banc* "ordinarily will not be ordered" except upon the listed grounds. Rule 219, SCACR (2007) (emphasis added). The Court of Appeals has discretion as to whether or not to accept rehearing and we find no error in the exercise of such discretion here.

Williamson next argues that six votes of the Court of Appeals *en banc* were required to uphold the award of attorney's fees. Williamson notes that S.C. Code Ann. § 14-8-90(b) requires six votes of the *en banc* panel to reverse "the judgment below." In Williamson's view, "the judgment below" is the opinion of the three-judge panel rather than the decision of the trial court. We disagree and find no error. See Rule 202(b)(1), SCACR (2007) (defining term "lower court" as "the circuit court . . . from which the appeal is taken"); State v. McAteer, 333 S.C. 615, 616, 511 S.E.2d 79, 80 (Ct. App. 1998), overruled on other grounds, 340 S.C. 644, 532 S.E.2d 865 (2000) (granting of rehearing *en banc* by the Court of Appeals effectively vacates the original panel opinion).

[1] The signature of Judge Bruce Williams was mistakenly omitted from the endorsement letter.

Williamson's final procedural argument is that the Court of Appeals erred in failing to limit its review to the existence or non-existence of a fee agreement, since in Williamson's view, the Court of Appeals granted rehearing only as to this issue. We disagree.

II. Did the Court of Appeals err in concluding there was competent evidence to support the trial court's finding of a fee agreement?

The jury awarded Middleton $906.62 for unpaid commissions pursuant to S.C. Code Ann. § 39-65-20 (2008), which requires that when a contract between a sales representative and principal is terminated, the principal must pay all commissions due. When an employer violates § 39-65-20, § 39-65-30 provides that the employer is liable for "attorney's fees actually and reasonably incurred by the sales representative in the action and court costs." S.C. Code Ann. § 39-65-30 (2008).

Williamson argues that the Court of Appeals *en banc* erred in finding that competent evidence supports the finding that fees were incurred. We agree.

Middleton's counsel was deposed on the issue of attorney's fees. He acknowledged that he and Middleton were personal friends, that he had handled other legal matters for Middleton in the past without taking a fee, and that Middleton was never sent any statements of attorney's fees incurred. Furthermore, Middleton's counsel answered in the negative when specifically asked if Middleton incurred any attorney's fees:

> Q. Has Mr. Middleton incurred any attorney's fees from this representation?
>
> A. No, technically, he hasn't because we don't have a fee agreement with Mr. Middleton. We talked about this with Mr. Middleton to begin with and we decided that we would try to help him collect the monies due him and at the end of the case, we would talk about a fee. So we don't have a fee agreement

> with him. But some day, he might pay us a fee. Right now, he has no obligation at this point if there is no agreement. He might feel a moral obligation. And when we talk at the end of the case, he will have the final say.

The Court of Appeals *en banc* found competent evidence to support the trial court's conclusion that attorney's fees were incurred. The majority noted that the statement cited by Williamson could be interpreted in different ways:

> While Parham's testimony . . . could be interpreted to mean Middleton would never be required to pay a fee, it also indicates that "at the end of the case, [Middleton and his attorneys] would talk about a fee." [The trial court] adopted this latter interpretation . . . .

Williamson, 374 S.C. at 429, 649 S.E.2d at 63.

We find no competent evidence to support the finding that Middleton incurred attorney's fees. Though Middleton's counsel did indeed indicate that he and Middleton would "talk about a fee" at the conclusion of the case, he also explained that Middleton had no obligation other than a moral obligation to pay a fee and that Middleton would have the final say. In our view, the only logical interpretation of the statement by Middleton's counsel is that Middleton could choose not to pay a fee to his counsel. It therefore follows that no attorney's fees were incurred.[2]

[2] At oral argument, Middleton's counsel argued that the recent opinion in Kiriakides v. School Dist. of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009), governs this case. We disagree. In Kiriakides, we found "no reason to differentiate situations where a party terminates the attorney and those where the condemnor terminates the proceeding." Id. at 24, 675 S.E.2d at 448. We therefore upheld the award of attorneys' fees where the client had a contingency fee agreement with his attorneys and the opposing party abandoned the condemnation action that was the subject of the litigation. Id. at 25, 675 S.E.2d at 448. The instant case does not concern a terminated

As evidence that attorney's fees were actually incurred, the Court of Appeals *en banc* noted that Parham testified that he was "hired" by Middleton in the Spring of 2001 and had kept extensive and diligent records detailing the amount of time spent on the case and by whom the work was done. The Court of Appeals *en banc* also found that it was unlikely that Middleton's second-chair attorney, Wyche associate Patricia Ravenhorst, who had no prior relationship with Middleton, would have volunteered her time with no expectation of being paid. We find that these facts simply cannot overcome the candid admission by Middleton's counsel that no fees were incurred.[3]

CONCLUSION

The Court of Appeals did not err in granting and conducting rehearing *en banc*. On the merits, we find no evidence to support the finding of the Court of Appeals that Middleton incurred attorney's fees. We affirm the remaining issues under Rule 220(b), SCACR. Therefore, the decision of the Court of Appeals is

REVERSED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justices Ellis B. Drew and S. Jackson Kimball, concur.

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proceeding in which the court must consider implied fees, but rather a completed proceeding in which the attorney testified that no fees were owed.

[3] Because we find that no evidence supports the Court of Appeals finding that attorney's fees were incurred, we do not reach Williamson's argument that the fees awarded were unreasonable.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronald Earl Skinner, Appellant,

v.

South Carolina Department of Transportation, Linda Drake, as Personal Representative for the Estate of Kimberly Cook, Richard S. Henson and Debra Henson, individually and d/b/a Mateeba Oaks Stables, Mateeba Oaks Stables, LLC, Peter J. and Dena Sellers, Jo-Jahn and Hiott Barry-Mier, Estate of Clara Harleston, Mella Holcombe, and Calvert C. and Frances S. Alpert, Defendants,

of whom South Carolina Department of Transportation, Richard S. Henson and Debra Henson, individually and d/b/a Mateeba Oaks Stables, Mateeba Oaks Stables, LLC are the Respondents,

and

Linda Drake, as Personal Representative of the Estate of Kimberly Cook is the Appellant.

Autumn S., a minor under the age of 14 years, by her Guardian ad litem Wendy Skinner,

Appellant,

v.

Richard S. Henson and Debra B. Henson, individually and d/b/a Mateeba Oaks Stables; Mateeba Oaks Stables, LLC; Peter J. and Dena Sellers; Jo-Jahn and Hiott Barry-Mier; the Estate of Clara Harleston; Mella Holcomb; and Calvert C. and Frances S. Alpert,
Defendants,

of whom Richard S. Henson and Debra B. Henson, individually and d/b/a Mateeba Oaks Stables; Mateeba Oaks Stables, LLC are

Respondents.

Appeal from Dorchester County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26690
Heard March 17, 2009 – Filed July 27, 2009

AFFIRMED

Caroline M. West and Gedney M. Howe, III, both of Charleston, David W. Whittington, of Knight Law Firm, of Summerville, George J. Kefalos, Gregory Daulton Keith, of Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, and Jack D. Cordray, of Cordray Law Firm, all of Charleston, for Appellants.

Bonum S. Wilson, III, of Wilson & Heyward, Jonathan J. Anderson and Lisa A. Reynolds, both of Anderson & Reynolds, Samuel R. Clawson and Margaret M. Urbanic, both of Clawson & Staubes, all of Charleston, for Respondents.

JUSTICE PLEICONES: This is an appeal from an order granting summary judgment to the respondents, finding they owed no duty to appellants, and also holding that appellants' negligence claim failed for lack of proximate cause. We affirm, finding that appellants have not shown the existence of a duty and therefore do not reach the proximate cause issue.

FACTS

Appellant Skinners were injured when their automobile was struck head on by a car driven by appellant Drake's decedent (Cook) after Cook's car crossed the center line of Highway 61. Cook apparently lost control when she veered onto the highway's shoulder near a driveway leading to a stable and subdivision. Appellants sued the highway department and

defendants.[1] The defendants include the owners of the stable and driveway, persons who own land in the subdivision accessed by the driveway, and other persons who own land adjoining Highway 61 near the driveway. Only the defendants who own the driveway and stable are respondents in the appeal.

ISSUE

Whether the circuit court erred in finding respondents did not owe a duty to appellants?

ANALYSIS

Appellants contend the circuit court erred in failing to find respondents owed a common law duty to travelers on the highway. Alternatively, appellants contend the source of respondents' duty is found in statutes or in regulatory enactments. We agree with the circuit court that respondents did not owe appellants a duty here.

Whether a duty exists is a question of law for the Court. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 651 S.E.2d 305 (2007). Here, appellants posit a duty owed by landowners whose property adjoins a public highway to travelers. Specifically, appellants contend that ruts in the highway's shoulder near the driveway entrance to respondents' property were the result of horse trailer traffic, and that respondents have a duty to warn travelers of this dangerous condition or to protect them from encountering it. We find no such duty.

[1] It appears that appellants' liability theory vis-à-vis DOT is that Cook lost control when trying to reenter the roadbed due to a low shoulder, while liability was sought to be imposed on respondents on the theory Cook could not regain control due to deep shoulder ruts caused by those using the driveway.

Appellants rely on several statutes and a Department of Transportation (DOT) Handbook[2] as the source of a duty owed by respondents to travelers on the highway.

The DOT regulations to which appellants point regulates the construction of private roads which intersect with a public highway, and allow a landowner to seek an encroachment permit to use a highway right-of-way. Here, respondents did not construct a private road, and therefore did not need to seek such a permit. In addition, DOT did not exercise its authority and require them to obtain one. These regulations are inapplicable to respondents and are not a source of any duty. Moreover, they specifically impose the responsibility for maintaining rights-of-way, such as highway shoulders, on the Department.

Appellants also maintain that respondents have a duty arising from statute. Specifically, they rely on three statutes:

1. S.C. Code Ann. § 57-7-10 "Negligent, Willful or Wanton Damage to Highways";

2. § 57-7-260 "Liability for Corporations for Obstructions by their Agent"; and

3. § 57-7-50 "Cutting Trenches or Laying Pipes or Tracks in State Highways or Bridges."

Section 57-7-10 imposes criminal liability on a person who willfully, wantonly, or negligently damages a highway. Appellants do not allege, much less prove, that this statute was intended to create a private cause of action. E.g., Adkins v. South Carolina Dep't of Corrections, 360 S.C. 413, 602 S.E.2d 51 (2006) (when criminal statute implies private duty). As for § 57-7-260, there is no evidence respondents obstructed the highway, nor any evidence they laid a pipe, tracks, or trenches as contemplated by § 57-7-50.

[2] "ACCESS AND ROADSIDE MANAGEMENT STANDARDS."

We affirm the trial court's ruling that neither the regulations nor the statutes cited by appellants create a duty owed by respondents to travelers to warn of or to protect them from shoulder ruts. Adkins, *supra*.

The circuit court held that respondents owed no common law duty to travelers on the highway as respondents neither possessed nor had control over the highway's shoulder.[3] Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997) ("one who has no control [over property] owes no duty"). The court held a duty could arise to travelers where the defendant "actually created something to cause a defect on the highway." We agree that South Carolina common law only imposes a duty for highway conditions where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers.

Appellants rely heavily on this Court's decision in Dorrell v. South Carolina Dep't of Trans., 361 S.C. 312, 605 S.E.2d 12 (2004). In Dorrell, the Court held a contractor who had repaved a highway in a manner that elevated the roadway approximately one foot above the shoulder breached its common law duty of care to the traveling public. Appellants also cite Sessions v. Dickerson, Inc., 265 S.C. 579, 220 S.E.2d 876 (1975), where the Court found there was evidence of "actionable negligence," but not specifically a duty to travelers, on the part of a contractor repairing a highway. We agree with the trial court that a contractor performing highway alterations owes a duty to travelers, but we find no analogous duty on the part of an owner of property abutting a highway who neither possesses nor controls the highway.

Appellants also contend that since respondents own the driveway, and since allegedly it is the utilization of this driveway which led to the ruts on the highway shoulder, respondents "created" a defect on the highway and thus owed a duty to travelers. We disagree.

Appellants cite a number of cases where liability has been imposed on an abutting landowner where the conduct of the landowner's business has

[3] It is undisputed that the shoulder is part of the highway.

created an **artificial hazard** on the highway. Clark v. Blue Circle, Inc., 514 S.E.2d 473 (Ga. Ct. App. 1999) (material spilled on roadway); Miller v. APAC-Ga., 399 S.E.2d 534 (Ga. Ct. App. 1990) (same); and Whitaker v. Honegger, 674 N.E.2d 1274 (Ill. App. Ct. 1996). In addition, a landowner whose plant emits smoke that drifts over the highway, or one who creates a traffic jam on the highway during plant shift changes, may be liable to a traveler. Holiday Rambler Corp. v. Gessinger, 541 N.E.2d 559 (Ind. Ct. App. 3 1989); *distinguished in* Sheley v. Cross, 680 N.E.2d 10 (Ind. App. 1997). Both smoke and a traffic jam are artificial conditions.

Here, the only evidence is that shoulder ruts are the natural consequences of highway use, and that they exist all along the shoulders of a highway, especially a curving scenic road such as Highway 61. We hold that the owner of land which abuts a highway is not liable to the traveler for conditions occurring on that highway which are normal and natural, and not the result of artificial conditions. We therefore affirm the order granting respondents summary judgment, and do not reach the issue of cause in fact.

CONCLUSION

The order granting respondents summary judgment is

AFFIRMED.

TOAL, C.J., WALLER, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brandon Leandre Brown, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Florence County
Michael Nettles, Circuit Court Judge

Opinion No. 26691
Submitted June 24, 2009 – Filed July 27, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Julie M. Thames, all of Columbia, for Petitioner.

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: In this post-conviction relief (PCR) case, this Court granted the State's petition for a writ of certiorari to review

the PCR judge's order granting Brandon Leandre Brown a new trial for his convictions of first-degree, criminal sexual conduct with a minor (CSC) and transmitting a sexual disease. The State contends the PCR judge erred in finding Brown's trial counsel was ineffective for failing to object to certain comments made by the solicitor during his closing argument. We reverse.

FACTUAL/PROCEDURAL HISTORY

At trial, four witnesses, all of whom either lived across the street or were visiting across the street from Brown's residence on August 4, 2001, testified they observed Brown in his three-year-old stepdaughter's bedroom on top of the child moving his body in a manner that indicated sexual activity. One of the witnesses testified that "[Brown was] humping up and down on her." The witnesses testified they were able to see the incident through the child's bedroom window because the blinds were wide open, the light was on in the bedroom, and it was dark outside at 11:30 p.m. One witness, upon his initial observation, retrieved a pair of binoculars to confirm what he thought he had seen. Based on their observations, the witnesses became upset, called the police, and then went to Brown's residence to assist the child and to confront Brown. All four witnesses testified that when Brown answered the door, he had an erection.

Shortly after the incident, officers with the Timmonsville Police Department responded to Brown's residence. After interviewing the witnesses for approximately two hours, the officers took Brown to the police station where he gave two audio-taped statements. These statements were admitted at trial. In these statements, Brown denied that he intended to sexually assault his stepdaughter; however, he admitted that he became aroused while wrestling with her and that he may have accidentally penetrated her. In his first statement, Brown explained that he just got too close to the child and that his penis "might have hit her a couple of times." In his second statement, Brown stated that it was possible that penetration occurred but that he did not intend to penetrate her. Toward the end of the interview, Brown stated "I came . . . into her a couple of times but not intentionally." When

questioned at trial about the incident, Brown testified that he was tickling and wrestling with the child but denied that he penetrated her.

Rhonda Turner, Brown's ex-wife and the mother of the child, testified that during the time leading up to the incident and the day of the incident, Brown was unemployed and had access to her daughter during the daytime. In describing her relationship with Brown, she stated that they were married for approximately a year and had a son, who was born on July 4, 2001. Rhonda admitted that she contracted gonorrhea from Brown. She testified that she learned of the STD when her physician's office called her and instructed her to report to the office on the Monday following the August 4, 2001 incident between Brown and her daughter. During that phone call, Rhonda was informed that she had tested positive for gonorrhea and needed to be seen by her doctor. Rhonda delayed this visit for one day because she took her daughter to be medically evaluated on the Monday following the incident. As a result of this evaluation, the child was given a shot for gonorrhea.

When questioned about the incident between Brown and her daughter, Rhonda testified that she spoke with Brown about it at the Timmonsville Police Department. During this conversation, Brown said, "Well, I mean, I may have, you know, been playing with her; and my penis may have fallen out of my boxers; and I may have gotten erected; and her panties may have gone to the side." Rhonda, however, testified that when she spoke with Brown again during a telephone conversation he said "he didn't do it."

As part of its case, the State presented Kathy Saunders as an expert witness in "child sexual assault" and "child sexual abuse." Saunders testified that she examined the child two days after the incident because she was out-of-town and unable to evaluate the child when she was taken to the emergency room immediately after the incident with Brown. As a result of her examination, Saunders discovered "copious" amounts of green discharge coming from the child's vaginal opening. Saunders characterized this finding as a "classic" symptom of gonorrhea. Although there was no evidence of

an acute injury causing vaginal tearing or bleeding, Saunders noted in her examination that there was redness around the child's labia and surrounding tissue. Specifically, Saunders testified "[t]here was some mild redness, with what appeared to be resolution of labial lesions or just some type of contact dermatitis." She further stated the tissue in the surrounding area "appeared kind of red, very thickened or swollen." Saunders indicated that these physical findings could be consistent with "someone penetrating the [child's] labia." In addition to her physical examination, Saunders testified the child's mother told her that the child had recently been wetting the bed, complained of stomach aches and nightmares, and had vaginal discharge. Saunders believed these symptoms could be indicative of sexual abuse.

In addition to Brown's testimony and the testimony of several character witnesses, the defense presented evidence attempting to refute that Brown could have transmitted gonorrhea to the child during the August 4, 2001 incident. Specifically, the defense presented medical records which indicated that Brown had been treated for gonorrhea on May 23, 2001, and July 26, 2001.

In support of its theory, the defense also offered the testimony of Dr. Elizabeth Lynn Harvey Baker-Gibbs, an expert witness on the "diagnosis and treatment of sexual abuse." Dr. Baker-Gibbs testified regarding the type and effectiveness of the medication prescribed for the treatment of gonorrhea. When presented with the facts of the instant case, she opined that if Brown had properly taken his prescribed medication on July 26, 2001, he would not have been contagious after July 29, 2001. Based on these facts, she ultimately concluded that Brown would not have been contagious on August 4, 2001, the date of the incident.

Following motions from counsel, the trial concluded with closing arguments. At end of his closing argument, the solicitor stated:

> I embrace my burden because I represent the State of South Carolina. And I think someone said at the beginning of this trial this is trying to protect the rights of people.

> Well, I tell you what. I'm here to protect the innocent. I'm here to protect [child victim] a four-year-old child now. Three-year-old little child at that time. And I am the last person that you're going to hear speak up for her.
>
> So, I ask you, when you go back in that jury room, you speak up for [child victim]. We can never put her back to where she was before this abuse occurred. But we can make sure that the perpetrator is punished. So when you go back in that jury room to deliberate, ladies and gentlemen, speak up for [child victim].

Brown's trial counsel did not object to these remarks. The jury convicted Brown of first-degree criminal sexual conduct with a minor and transmitting a sexual disease. Subsequently, the trial judge sentenced Brown to twenty-five years imprisonment for the CSC charge and a concurrent term of thirty days imprisonment for the transmission of a sexual disease charge.

Brown appealed his convictions and sentences to the Court of Appeals. In an unpublished opinion, the Court of Appeals affirmed Brown's convictions and sentences. State v. Brown, Op. No. 2004-UP-358 (S.C. Ct. App. filed June 4, 2004).

Following the decision of the Court of Appeals, Brown filed a timely PCR application. Once represented by counsel, Brown filed an amended PCR application. In these applications, Brown alleged his trial counsel was ineffective in several respects, including counsel's failure to object to the remarks made by the solicitor in his closing argument.

At the PCR hearing, Brown's counsel asserted the solicitor's comments "to speak up for the victim" amounted to a "Golden Rule" type argument that has been deemed improper by our state appellate courts. Additionally, PCR counsel contended the improper argument was prejudicial because it appealed to the passion and prejudice of the jury by asking the jury to be an advocate for the child victim.

Brown's trial counsel, the only witness called to testify, admitted that an objection should have been made to the solicitor's comments. However, he stated the reason "those statements were not objected to was because I didn't want to exacerbate a bad set of facts to point out to the jury something that would already aggravate what appeared to be a pretty bad case." Trial counsel also pointed out the "gravity of the evidence" the State presented against Brown. He further noted he did not want to give the jury a reason to dislike or hate his client.

In an oral ruling, the PCR judge informed counsel that he was granting Brown relief in the form of a new trial solely on the ground that trial counsel was ineffective in failing to object to the remarks made by the solicitor during closing argument.

In a detailed written order, the PCR judge explained that trial counsel's failure to object to the solicitor's closing argument was "clearly error." The judge further found that "[t]here is a reasonable probability, based upon the evidence before this Court, that failure to object to this inappropriate argument undermined the confidence in the outcome in this trial."

In terms of the evidence, the judge concluded that there was not overwhelming evidence of guilt given it "consisted of very questionable eyewitness testimony, [Brown's] two statements, and the fact that at some point, although not at the time of the incident, [Brown] had gonorrhea." The judge characterized the eyewitness testimony as "questionable" in light of defense counsel's contention at trial that due to the position of the child's bedroom window "there was no possible way the witnesses could have seen what they claimed to have seen." Additionally, the judge referenced the State's expert witness testimony that the child could not have tested positive for gonorrhea the day after the incident and the testimony that Brown could not have been contagious on the date of the incident. The judge further noted that Brown denied sexually assaulting the child and that there was no evidence of "tearing or obvious injury to the child's vagina."

The judge also rejected the State's contention that the solicitor's comments were so limited that they could not have affected the trial. Specifically, the judge stated that "[g]iven the seriousness of the offense and the emotions involved, these comments were more than enough to place the jury in a position of being asked to stand up for, help, protect, and advocate for a very small child." The judge believed that "[i]t is clear that the Solicitor's statements encouraged the jury to depart from neutrality and decide the case based on passion and bias rather than the evidence, which led to the jury's verdict being undermined." Ultimately, the PCR judge found trial counsel was ineffective and, as a result, granted Brown a new trial as to both of his convictions.

The State petitioned for and was granted a writ of certiorari for this Court to review the PCR judge's order.

STANDARD OF REVIEW

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Tate v. State, 351 S.C. 418, 425, 570 S.E.2d 522, 526 (2002).

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing Strickland v. Washington, 466 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "Furthermore, when a defendant's conviction is

challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" Id. (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)).

This Court will uphold the findings of the PCR court if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, if no probative evidence supports these findings, the Court will not uphold the findings of the PCR court. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003). "The decision of the PCR judge may be reversed when it is controlled by an error of law." Hiott v. State, 381 S.C. 622, 625, 674 S.E.2d 491, 492 (2009).

DISCUSSION

The State contends the PCR judge erred in granting Brown a new trial on the ground that his trial counsel was ineffective in failing to object to certain portions of the solicitor's closing argument. Initially, the State asserts that counsel was not ineffective given he "articulated a valid reason for not objecting when he stated he was worried about the jury hating his client." In support of this assertion, the State points to the testimony of trial counsel that "there was a lot of evidence against [Brown] and that he did not wish to aggravate an already bad situation." The State also references trial counsel's testimony that the solicitor's comments were limited in that they were made "quickly." Even if trial counsel's performance was deficient in that there was no objection to the solicitor's comments, the State claims that Brown was not prejudiced in view of the overwhelming evidence of guilt presented at trial.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744.

"'While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.'" State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). "'The solicitor's closing argument must, of course, be based on this principle.'" Id. "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006).

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.").

Turning to the facts of the instant case, we find the PCR judge correctly concluded the solicitor's remarks were improper in that they amounted to an impermissible "Golden Rule" type argument. See State v. Reese, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct. App. 2004) (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence), aff'd in part and rev'd in part, 370 S.C. 31, 633 S.E.2d 898 (2006) (affirming the Court of Appeals' finding that the defendant was entitled to a new trial based on the solicitor's "Golden Rule"

closing argument in which he repeatedly asked jurors to "speak" for the murdered victim).

Here, it is indisputable that the case was "emotionally charged" given it involved sexual misconduct with a three-year-old child. Thus, the solicitor's remarks imploring the jurors to "speak for" the victim undeniably asked the jurors to set aside their impartiality and, instead, consider the evidence from the subjective position of the child victim.

In view of this improper argument, we agree with the PCR judge that it was incumbent upon Brown's trial counsel to object to the solicitor's closing remarks. Furthermore, although we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this "strategy" cannot be construed as a valid one given the evident impropriety of the solicitor's remarks. Cf. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where . . . counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (recognizing that "[c]ourts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Based on the foregoing, we hold trial counsel was deficient in failing to object to the challenged portion of the solicitor's closing argument because it constituted a "Golden Rule" argument which impermissibly appealed to the passion of the jurors by asking them to "speak up" for the child victim. However, we find Brown did not satisfy his requisite burden of proving that there was a reasonable probability that but for counsel's deficient performance the result of his trial would have been different.

First, the solicitor's comments came at the very end of his closing argument and were limited in duration. Thus, we find the solicitor's comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. See Smith v. State, 375

S.C. 507, 654 S.E.2d 523 (2007) (concluding any impropriety in the solicitor's closing argument was not sufficient to grant defendant post-conviction relief where solicitor's improper use of the pronoun "I" was limited, did not recur throughout his argument, there was overwhelming evidence of the defendant's guilt, and the trial judge instructed the jury not to consider counsel's statements as evidence); see also Von Dohlen, 360 S.C. at 613-14, 602 S.E.2d at 746 (holding trial counsel, during the penalty phase of a capital case, was deficient in failing to object to solicitor's comment for the jurors to put themselves in the victim's shoes, but finding such deficient performance was not prejudicial); cf. State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (finding solicitor's use of "you" forty-five times during closing argument asking the jurors to put themselves in the place of the victim constituted reversible error and warranted a new trial).

Secondly, there was overwhelming evidence of Brown's guilt. The State presented four eyewitnesses who testified to seeing Brown commit the sexual misconduct against the child. Each of the witnesses testified they could see into the child's bedroom window because the blinds were wide open, it was dark outside, and there was a light on in the bedroom. They further explained that they were able to see more clearly when they approached the window to confront Brown by banging on the bedroom window. Additionally, each witness testified that when Brown opened the door, he had an erection.

Although Brown's defense counsel attempted to establish that the witnesses' testimony differed from their written statements regarding certain details, the witnesses were adamant that they could clearly see through the child's bedroom window. They also explained that they wrote their statements for the police immediately after witnessing the incident while sitting in the dark on top of the police cars.

The State also presented the two audio-taped statements given by Brown in which he admitted to "accidental" or "possible" penetration of the child. Brown's ex-wife also testified that when she spoke with Brown at the police station he admitted that he had been playing with

the child and said, "my penis may have fallen out of my boxers; and I may have gotten erected; and her panties may have gone to the side."

Additionally, the State's expert witness testified that the child exhibited physical and psychological symptoms which were indicative of sexual abuse. This expert witness also confirmed that the child had been diagnosed with gonorrhea. Although the defense presented evidence that Brown may not have been contagious on the day of the incident, there was testimony that prior to the incident he was diagnosed with gonorrhea and had access to the child alone during the day.

Finally, the jury only deliberated for thirty-eight minutes before finding Brown guilty of both charges. Notably, the trial judge also recognized that the evidence of guilt was overwhelming when he stated during sentencing:

> I want to say to you also that the evidence in this case, sir, was overwhelming, including four eyewitnesses, which is very unusual for a crime which generally occurs in secret; your obvious and your unnatural state of arousal when you went to the door or when you were confronted about this; the transmission of gonorrhea to a child victim; and your own admissions that are contained in your own statements, sir. All of these are overwhelming evidence in the view of this court.

Based on the foregoing, we hold that any impropriety in the solicitor's closing argument was not sufficient to warrant the PCR judge's decision to grant a new trial.

CONCLUSION

Although we find the PCR judge correctly determined that trial counsel was deficient in failing to object to the solicitor's "Golden Rule" closing argument, we hold Brown failed to prove that there was a

reasonable probability that but for this error the result of his trial would have been different. Accordingly, the decision of the PCR judge is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Frank Rogers Ellerbe, III, Respondent.

Opinion No. 26692
Submitted June 30, 2009 – Filed July 27, 2009

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John Barton, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a ninety day suspension from the practice of law. We accept the Agreement and suspend respondent from the practice of law in this state for ninety days.[1] The facts, as set forth in the Agreement, are as follows.

[1] Respondent was placed on interim suspension on May 14, 2009. In the Matter of Ellerbe, ___ S.C. ___, 677 S.E.2d 596 (2009).

FACTS

Respondent pled guilty to one count of failure to file state income tax returns. Respondent's sentence included a fine and payment of the costs of prosecution. Respondent has paid the taxes owed, the fine and the costs of prosecution.

LAW

Respondent admits that by his conduct he has violated Rule 8.4(b) of the Rules of Professional Conduct, Rule 407, SCACR (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). We also find respondent violated the following Rules of Professional Conduct: Rule 8.4(a)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b)(it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness); and Rule 8.4(d)(it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(4) (it shall be a ground for discipline for a lawyer to be convicted of crime of moral turpitude or serious crime); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law). We also find respondent has violated Rule 7(a)(1), RLDE, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

We find a ninety day suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for a ninety day period. However, we deny respondent's request that the suspension be made retroactive to the date of his interim suspension. Respondent shall not be eligible for reinstatement or readmission until he has successfully completed all conditions of his sentence, including, but not limited to, any conditions of probation. Rule 33(f)(10), RLDE, Rule 413, SCACR. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

WALLER, ACTING CHIEF JUSTICE, PLEICONES, BEATTY and KITTREDGE, JJ., concur. TOAL, C.J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Lexington
County Magistrate Jamie
Thomas Lucas, Respondent.

Opinion No. 26693
Submitted July 22, 2009 – Filed July 27, 2009

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and
Joseph P. Turner, Jr., Assistant Disciplinary Counsel,
both of Columbia, for Petitioner.

J. Steedley Bogan, of Columbia, for Respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. Respondent has also resigned his position and has agreed never to seek nor accept a judicial office in South Carolina without the express written permission of this Court after written notice to ODC. We accept the agreement and publicly reprimand respondent, the most severe sanction we are able to impose under these circumstances.

Facts

On January 30, 2008, respondent was arrested and charged with petit larceny. The charge stemmed from the removal of a statue from the yard of a member of his wife's family. The charge was nolle prossed on July 17, 2008. In the Agreement for Discipline by Consent, respondent does not admit any criminal wrongdoing, but acknowledges that as a sitting judge he should not have involved himself in his wife's family matter because it could call into question the integrity of the judiciary.

On February 6, 2008, an order was issued placing respondent on interim suspension as a result of the criminal charge. On November 6, 2008, this Court found respondent in criminal contempt for violating the terms of the order. The finding of contempt was based on telephone calls made by respondent to his former magisterial employees in an effort to obtain a continuance in a case pending before the magistrate's court to which he was not a party.

Law

By his conduct, respondent has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall observe high standards of conduct so that the integrity and independence of the judiciary is preserved); Canon 1(A) (a judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2(A)(a judge shall avoid impropriety and the appearance of impropriety by acting at all times in a manner that promotes public confidence in the integrity of the judiciary); and Canon 2B (a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment and shall not lend the prestige of judicial office to advance the private interests of the judge or others). Respondent has also violated the following provisions

of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1)(it shall be a ground for discipline for a judge to violate the Code of Judicial Conduct); Rule 7(a)(2)(it shall be a ground for discipline for a judge to willfully violate a valid order of the Supreme Court); Rule 7(a)(7)(it shall be a ground for discipline for a judge to willfully violate a valid court order issued by a court of this state or another jurisdiction); and Rule 7(a)(9)(it shall be a ground for discipline for a judge to violate the Judge's Oath of Office contained in Rule 502.1, SCACR).

Conclusion

We accept the Agreement for Discipline by Consent and issue a public reprimand because respondent is no longer a magistrate and because he has agreed not to hereafter seek nor accept another judicial position in South Carolina without first obtaining permission from this Court after due notice in writing to ODC. As previously noted, this is the strongest punishment we can give respondent, given the fact that he has already resigned his duties as a magistrate. See In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996)("A public reprimand is the most severe sanction that can be imposed when the respondent no longer holds judicial office.") Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Law Firm of Paul L. Erickson, P.A. Petitioner,

v.

James R. Boykin and Mona S. Boykin, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26694
Heard May 28, 2009 – Filed July 27, 2009

REVERSED

Karl Smith, of Smith, Watts & Associates, of Hartsville, and Paul L. Erickson, of Asheville, North Carolina, for Petitioner.

Carolyn R. Hills, of Hills and Hills, of Myrtle Beach, for Respondents.

JUSTICE PLEICONES: We granted certiorari to review an *en banc* Court of Appeals decision[1] which held that petitioner "failed to present competent evidence to show that the North Carolina [default judgment it obtained against respondents] was entitled to full faith and credit." Law Firm of Erickson, P.A. v. Boykin, 375 S.C. 204, 651 S.E.2d 606 (Ct. App. 2007). We reverse.

FACTS/PROCEDURAL HISTORY

South Carolina has adopted a modified version of the Uniform Enforcement of Foreign Judgments Act, codified at S.C. Code Ann. §§ 15-35-900 through -960 (2005 and Supp. 2008). Pursuant to § 15-35-920(A), petitioner filed a properly authenticated North Carolina judgment along with the requisite affidavit with the Horry County Clerk of Court. Petitioner then served the notice required by § 15-35-930(A) on respondents.

Respondents filed a "Motion for Relief from Enforcement of Foreign Judgment" pursuant to § 15-35-940(A), alleging the North Carolina court lacked personal jurisdiction over respondents. At a hearing in circuit court respondents presented no evidence, but relied on their attorney's argument that their contacts with North Carolina were insufficient to support personal jurisdiction.

The circuit court upheld respondents' challenge to petitioner's North Carolina default judgment. "It is well-settled that the party seeking to invoke personal jurisdiction over a non-resident defendant bears the burden "of proving personal jurisdiction…." Next, the judge noted that while petitioner had offered a copy of the parties' fee agreement into evidence at the hearing to show personal jurisdiction, he declined to admit it. Even if it had been admitted, the judge would have held "the choice of law or venue clause" was insufficient to confer jurisdiction. Finally, holding that whether the minimum

[1] The majority was comprised of Judges Short, Huff, Stillwell, Kittredge, Beatty, and Williams while Acting Judges Cureton and Lee joined Judge Goolsby's dissent.

contacts standard has been met is a fact-specific inquiry, the circuit judge held petitioner failed to offer any evidence.[2]

Petitioner filed a timely motion for reconsideration, arguing essentially that the burden of rebutting the presumption of the regularity accorded the North Carolina judgment fell on the respondents, and that they had failed to meet this burden since they produced no evidence at the hearing. After the motion was denied, petitioner appealed to the Court of Appeals.

Petitioner raised three issues on appeal:

1) That the circuit court failed to accord the proper presumption of correctness due the North Carolina judgment and that respondents did not meet their burden of proof to show the judgment was invalid;

2) That the circuit court erred in signing and filing an order prepared by respondents' counsel which contained numerous unsupported facts; and

3) That the circuit court erred in failing to take notice of facts and documents petitioner submitted after the hearing.

The Court of Appeals upheld the circuit court against all challenges. Law Firm, *supra*. We granted certiorari to review only the first issue, whether respondents had the burden to rebut the judgment's validity.

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[2] We note that the circuit judge relied entirely on South Carolina law in determining the minimum contacts issue. This was error. "The law against which a foreign judgment is evaluated for viability and effect is the law of the State rendering the judgment." PYA/Monarch, Inc. v. Sowell's Meat & Servs., Inc., 327 S.C. 469, 486 S.E.2d 766 (Ct. App. 1997).

ISSUE

Whether the burden of proof to show that North Carolina had personal jurisdiction over respondents rested on petitioner?

ANALYSIS

The Court of Appeals acknowledged, as it must, that under the Full Faith and Credit Clause,[3] personal jurisdiction is presumed when a foreign judgment appears on its face to be a record of a court of general jurisdiction. Law Firm, *supra*, citing Taylor v. Taylor, 229 S.C. 92, 91 S.E.2d 876 (1956). The Court of Appeals held, however, that § 15-35-940 "was enacted by the Legislature to extend greater protection to South Carolina citizens in the enforcement of foreign judgments and impacts the earlier presumption of validity laid out in South Carolina case law." The presumption arises not from state case law, however, but rather from the United States Constitution. E.g., Adam v. Saenger, 303 U.S. 59 (1938). To read the statute in this way arguably violates the Supremacy Clause[4] and/or the Privileges and Immunities Clause[5] of the United States Constitution.

The Court of Appeals construed § 15-35-940 to shift the burden of proving the foreign judgment's regularity to the creditor when the debtor challenges the judgment in South Carolina court proceedings. Section 15-35-940 provides:

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[3] U.S. Const. art. IV, § 1.

[4] U.S. Const. art. VI, cl. 2: "This Constitution…shall be the supreme law of the land…anything in the Constitution or laws of any state to the contrary notwithstanding."

[5] U.S. Const. art. IV, § 2, cl. 1.

Motion for relief from, or notice of defense to, foreign judgment; grounds; motion for enforcement; Rules of Civil Procedure applicable; burden of proving judgment entitled to full faith and credit.

(A) The judgment debtor may file a motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign judgment has been appealed from, that enforcement has been stayed by the court which rendered it, or on any other ground for which relief from a judgment of this State is allowed.

(B) If the judgment debtor has filed a motion for relief or notice of defenses, then the judgment creditor may move for enforcement or security of the foreign judgment as a judgment of this State, if all appeals of the foreign judgment are finally concluded and the judgment is not further contested. The judgment creditor's motion must be heard before a judge who has jurisdiction of the matter based upon the amount in controversy as the amount remaining unpaid on the foreign judgment. The South Carolina Rules of Civil Procedure apply. The judgment creditor has the burden of proving that the foreign judgment is entitled to full faith and credit.[6]

The Court of Appeals held that the presumption of the foreign judgment's regularity "ends when the judgment debtor files a motion for relief or notice of defense under § 15-35-940(A)." Law Firm, *supra*. In

[6] Although modeled on the Uniform Act, South Carolina's version "departs from the official text in such manner that the various instances of substitution, omission, and additional matter cannot be clearly indicated by statutory notes." Master Edition, 13 Uniform Laws Annotated, pt. 1 p. 158 (2002). § 15-35-940 is loosely based on § 4 of the Uniform Act. Id. at pp. 234-235.

making this assertion, the Court of Appeals relied on its decision in The Jay Group, Ltd. v. The Bootery of Haywood Mall, Inc., 335 S.C. 114, 515 S.E.2d 542 (Ct. App. 1999). The Law Firm majority also cited Jay Group for the proposition that when, as here, a judgment debtor challenges a foreign judgment for lack of personal jurisdiction, the presumption evaporates and the burden shifts to the creditor to show the foreign judgment is entitled to Full Faith and Credit. Finally, the majority overruled its decision in Sec. Credit Leasing, Inc. v. Armaly, 339 S.C. 533, 529 S.E.2d 283 (Ct. App. 2000) to the extent it is inconsistent with these holdings. We hold Armaly was correctly decided while Jay Group was not, and as explained below, we now overrule Jay Group.

In Armaly, the creditor filed an action to enforce its Florida default judgment against the South Carolina debtor. The debtor then moved to dismiss the action, alleging Florida lacked personal jurisdiction over him. The Armaly court held, citing Taylor, *supra*, which itself quoted from Cook v. Cook, 342 U.S. 126 (1951), that the debtor challenging a foreign judgment on the ground of lack of personal jurisdiction assumes the burden of overcoming, by the record or by extrinsic evidence, the constitutionally mandated presumption of the foreign judgment's regularity.

In Jay Group, however, the Court of Appeals relied upon § 15-35-940(B) to reverse a circuit court order according a North Carolina default judgment Full Faith and Credit. The court cited the statute for the proposition that the creditor bears the burden of proving the judgment is entitled to Full Faith and Credit, analyzed the evidence of personal jurisdiction under North Carolina law, and found it wanting. Jay Group refers only to § 15-35-940(B), and not to any cases or constitutional principles.[7]

The majority in this case relied solely on the statute and the Jay Group decision, to affirm the circuit court. The dissenters avoided the constitutional

[7] No petition for rehearing was filed with the court nor was a certiorari sought from this Court.

implications of the majority's decision and would have read the statute to provide that only where debtor moves for relief from the judgment, and the creditor then moves to enforce it, is the presumption of regularity removed, and the burden shifted to the creditor. See Law Firm, *supra* fn. 21. The dissenters would have upheld Armaly and overruled Jay Group. Id.

"[T]he burden of undermining the decree of a sister state 'rests heavily on the assailant'…[who can overcome the presumption of jurisdiction and validity afforded the judgment by the Full Faith and Credit Clause only] by extrinsic evidence, or by the record itself." Cook v. Cook, 342 U.S. at 128. We reverse the Court of Appeals' holding that § 15-35-940 shifts the burden of proving personal jurisdiction if the debtor files a motion for relief or notice of defense and overrule Jay Group.

The question then becomes whether § 15-35-940 is capable of being read so as not to offend the U.S. Constitution. As explained below, we find only the last sentence of § 15-35-940 (B) is offensive and sever it from the statute. E.g., Sojourner v. Town of St. George, Op. No. 26680 (S.C. Sup. Ct. filed June 29, 2009) (court can sever unconstitutional portion of a statute under certain circumstances).

Subsection (A) of § 15-35-940 permits the debtor to file a motion for relief from judgment or a notice of defense to the foreign judgment. Once a foreign judgment is properly enrolled pursuant to § 15-35-920 it "has the same effect and is subject to the same defenses as a judgment of this State and must be enforced or satisfied in like manner…." §15-35-920(C). In our view, a "Motion for Relief" refers to a Rule 60, SCRCP, motion brought by the debtor, while a "notice of defense" would be filed in a creditor's enforcement action, and raise either defenses found in Rule 12 (b), SCRCP, or those found specifically in §15-35-940 (A), i.e., that the judgment is under appeal in the rendering jurisdiction or that jurisdiction has stayed the judgment. Read this way, subsection (A) simply establishes procedures by which a debtor can raise an objection to a foreign judgment.

The more difficult questions arise from the language of section (B), which provides:

> (B) If the judgment debtor has filed a motion for relief or notice of defenses, then the judgment creditor may move for enforcement or security of the foreign judgment as a judgment of this State, if all appeals of the foreign judgment are finally concluded and the judgment is not further contested. The judgment creditor's motion must be heard before a judge who has jurisdiction of the matter based upon the amount in controversy as the amount remaining unpaid on the foreign judgment. The South Carolina Rules of Civil Procedure apply. The judgment creditor has the burden of proving that the foreign judgment is entitled to full faith and credit.

The first three sentences, like section (A), merely set forth procedures, and echo the more specific information found in § 15-35-920(C). The last sentence, however, unequivocally places the burden of proving the judgment's entitlement to Full Faith and Credit on the creditor. Such a requirement violates the federal constitution, e.g. Cook v. Cook, *supra*, and accordingly we strike this sentence from § 15-35-940(B). We find that this sentence can be severed, leaving the statute "complete in itself, wholly independent of that which is rejected, and [the remainder] is of such a character that it may fairly be presumed that the legislature would have passed it independent of that which conflicts with the constitution." Sojourner v. Town of St. George, *supra*, citing Joytime Distribs. & Amusement Co., Inc. v. State, 338 S.C. 634, 648, 528 S.E.2d 647, 654 (1999).

CONCLUSION

We reverse the decision of the Court of Appeals, hold that the last sentence of § 15-35-940(B) violates the federal constitution but is severable from the rest of the statute, and overrule The Jay Group, Ltd. v. The Bootery

of Haywood Mall, Inc., *supra*, to the extent it conflicts with our decision today.

REVERSED.

TOAL, C.J., WALLER, J., and Acting Justices Timothy M. Cain and R. Knox McMahon, concur.

The Supreme Court of South Carolina

RE: Amendment to Rule 608 of the South Carolina Appellate Court Rules (SCACR)

ORDER

Pursuant to Article V, §4 of the South Carolina Constitution,

Rule 608(d)(1), SCACR, is amended by adding the following:

(N) Members who are serving as members of the Committee on Character and Fitness.

(O) Members who are serving as members of the Commission on Lawyer Conduct.

(P) Members who are serving as members of the Commission on Judicial Conduct.

This amendment shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
July 22, 2009

The Supreme Court of South Carolina

RE: Amendment to Rule 402 of the South Carolina Appellate Court Rules (SCACR)

ORDER

Pursuant to Article V, §4 of the South Carolina Constitution, the first sentence of Rule 402(k)(1), SCACR, is amended to read: "Admission ceremonies shall be conducted by the Supreme Court in February, May, September and November." This amendment shall be effective October 1, 2009.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
July 22, 2009

The Supreme Court of South Carolina

RE: Amendment to Rule 404 of the South Carolina Appellate Court Rules (SCACR)

ORDER

Pursuant to Article V, §4 of the South Carolina Constitution, the last sentence of Rule 404(e), SCACR, is amended to read: "The tribunal in which an attorney is appearing pro hac vice or the Supreme Court of South Carolina may withdraw permission for the attorney to appear pro hac vice based on a violation of South Carolina law; a violation of the South Carolina Rules of Professional Conduct; a violation of a court order or the rules of the tribunal; the submission of an Application for Admission Pro Hac Vice which contains false, misleading or incomplete information; the pendency of a lawyer disciplinary proceeding or the imposition of a suspension, disbarment or other lawyer disciplinary sanction in this or another jurisdiction; the withdrawal or suspension of permission to appear pro hac vice in this or

another jurisdiction; or other good cause." This amendment shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
July 27, 2009

The Supreme Court of South Carolina

Bage, LLC., Respondent,

v.

Southeastern Roofing Company of Spartanburg, Inc., a/k/a Southeastern Roofing Company, n/k/a Orvis, Inc., Petitioner.

ORDER

This Court granted a writ of certiorari to review the Court of Appeals' opinion in this matter, Bage, LLC v. Southeastern Roofing Co. of Spartanburg, 373 S.C. 457, 646 S.E.2d 153 (Ct. App. 2007), and oral argument was heard on February 4, 2009. Prior to an opinion being issued, the parties settled the case through mediation, and they have now filed an Agreement of Dismissal with the Court.

The Agreement of Dismissal is accepted and this matter is dismissed. Further, we vacate the opinion of the Court of Appeals in this

matter. The remittitur will be sent to the lower court as provided by Rule 221(b), SCACR.

Finally, the Court of Appeals' opinion in Bage, LLC cited to Pilgrim v. Miller, 350 S.C. 637, 642, 567 S.E.2d 527 (Ct. App. 2002). While the petition for certiorari to this Court in Pilgrim was pending, the parties settled. The settlement was accepted, and the Pilgrim opinion was vacated by order of this Court. It appears, however, that the order vacating the Pilgrim opinion was never published. See Pilgrim v. Miller, 2003-OR-00333 (S.C. Sup. Ct. dated April 25, 2003). To correct this oversight, we now reiterate that Pilgrim v. Miller, 350 S.C. 637, 642, 567 S.E.2d 527 (Ct. App. 2002), was vacated by this Court on April 25, 2003.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Kittredge, J., not participating.

Columbia, South Carolina

July 23, 2009

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Hynes Family Trust, and
Richard W. Hynes, Trustee, Appellants,

v.

Heide Spitz, Respondent.

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 4594
Submitted April 23, 2209 – Filed July 21, 2009

AFFIRMED IN RESULT

John Martin Foster, of Rock Hill, for Appellants.

Alford Haselden, of Clover, and John Kevin Owens, of Spartanburg, for Respondent.

LOCKEMY, J.: The Hynes Family Trust and Richard W. Hynes (Hynes) allege the trial court erred in finding there was no express easement or easement by prior use permitting Hynes to maintain a storm water drainage pipe across Heide Spitz's (Spitz) property. We affirm in result.

FACTS

Hynes and Spitz own adjoining townhomes in the Daybreak community in Tega Cay, South Carolina. The town homes share a common wall and are part of a single building containing three units. Hynes's town home is the middle unit, and the Spitz's town home is an end unit. Each unit is situated on a separately owned lot which extends from front to back beyond the confines of the town home itself. The Hynes property is higher in elevation than the Spitz property. Before this dispute arose, storm water from Hynes's roof was collected into his gutters and piped down the side of his unit. At the termination of the gutter, a corrugated plastic pipe was connected to another piece of pipe which ran underground and across Spitz's property out into a common area of the Daybreak community.

Around July 2004, Spitz disconnected and diverted Hynes's storm drainage system. Spitz alleged the configuration of the drainage system caused water to be discharged onto her property and interfered with her use and enjoyment of her patio. Hynes brought suit against Spitz alleging an express easement existed permitting the drainage pipe to cross Spitz's property by virtue of the Declaration of Covenants, Conditions and Restrictions (Covenants) for the Daybreak community. Spitz denied the existence of any easement and counterclaimed requesting Hynes be enjoined from discharging water from his gutter onto her property. The trial court issued an order on March 21, 2007, denying Hynes's requested relief. Specifically, the trial court found that no express easement or easement by prior use existed permitting the placement of the drainage pipe across Spitz's property. The trial court also ordered Hynes to disconnect the means of discharging gutter water at the current location. This appeal followed.

STANDARD OF REVIEW

"On appeal of an action at law tried without a jury, the findings of fact of the trial court will not be disturbed unless found to be without evidence which reasonably supports the trial court's findings." Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 223, 647 S.E.2d 488, 491 (Ct. App. 2007). "The determination of the existence of an easement is a question of fact in a law action and subject to an 'any evidence' standard of review when tried by a judge without a jury." Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998).

LAW/ANALYSIS

I. Express Easement

Hynes argues the trial court erred in finding the Covenants did not provide an express easement permitting him to maintain a drainage pipe across Spitz's property. We agree.

Article 2, § 6 of the Daybreak Covenants states:

> Storm Drainage and Sanitary Sewer Systems. Storm drainage systems and sanitary sewer systems may be located under certain Lots throughout the Properties. Any such storm drainage and sanitary sewer systems shall be maintained in good order and repair by the Association. To the extent required to effectuate the foregoing plan, there shall be an easement in favor of each Lot for the purposes of providing connection of that Lot with the storm drainage system and sanitary sewer system most convenient thereto. Each Lot shall be subject to easements in favor of all the other Lots providing for the passage through any portion of such Lot of necessary storm drainage systems and sanitary sewer systems. All of the foregoing easements are granted and reserved subject to the conditions that their use and enjoyment shall not

> materially interfere with the use, occupancy or enjoyment of all or any part of the Lot servient to such easements or to which such easements are appurtenant.

The trial court determined the drainage system at issue was not part of any "regularly interacting storm water drainage system." The trial court noted there was no uniform system of drainage, and homeowners in Daybreak handled drainage using a variety of methods. Furthermore, the trial court noted there was no evidence the system was ever maintained or recognized by Daybreak. Thus, the trial court concluded there was no express easement permitting Hynes to discharge his gutter water into the drainage pipe located on Spitz's property.

A. Definition of "System"

Hynes argues the trial court's definition of the term "system" is too selective. Specifically, Hynes contends the language of the Covenants refers to plural systems and thus the purpose of the Covenants was to permit multiple storm drainage systems planned and built into the structure of the townhouse units. We agree.

Restrictive covenants upon real estate are contractual in nature and bind the parties thereto just like any other contract. Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). "Restrictive covenants are construed like contracts, and may give rise to actions for their breach." Id. "If a contract's language is clear and capable of legal construction, this Court's function is to interpret its lawful meaning and the intent of the parties as found in the agreement." Gilbert v. Miller, 356 S.C. 25, 31, 586 S.E.2d 861, 864 (Ct. App. 2003) "A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense." Id.

Hynes contends a "system" can consist of individual units joined only by their intended purpose, rather than in physical fact. The trial court, citing Webster's Dictionary, defined the term "system" as "a regularly interacting or

interdependent group of items forming a unified whole." Hynes argues this definition is too selective and contends the trial court should have considered an alternate definition from Webster's Dictionary. Hynes urged the trial court to define "system" as "a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose."

The Covenants specifically refer to plural storm water drainage systems and do not contain any requirement that these systems be uniform. Evidence presented at trial through testimony and photographs indicates there was no uniform drainage system for Daybreak and that homeowners handled drainage using a variety of methods. We find compelling Hynes's argument that the trial court's definition of "system" is too selective. Furthermore, we find the trial court improperly relied on the lack of uniformity as a basis for finding no express easement in the Covenants. Although we find an express easement existed, we affirm the trial court's order based on the express easement's interference with Spitz's use and enjoyment of her patio.

B. Interference with Use and Enjoyment

Hynes also argues the trial court erred in finding the storm water drainage system interfered with Spitz's enjoyment of her patio. We disagree.

The trial court found that even if an express drainage easement existed, it would be limited by the language of the Covenants. Article 2, § 6 of the Covenants provides that use of the easement "shall not materially interfere with the uses, occupancy or enjoyment of all or any part of the Lot servient to such easement." The trial court noted Spitz testified the drainage pipe caused water to be discharged onto her patio which interfered with her enjoyment of the property. Hynes argues the trial court's finding that the downspout and drain "always" left Spitz's property wet was not supported by any evidence. He contends Spitz was unable to say whether the water on her property was a result of the drainage system. Spitz testified that she wanted to extend her patio but she couldn't because she feared the discharged water would create problems after she invested her money in the project. Accordingly, we find there was evidence in the record to support the trial court's finding that the drainage system interfered with Spitz's use and enjoyment of her property.

Thus, although the Covenants grant Hynes an express easement, that easement is conditioned by the language of the Covenants because it interferes with Spitz's use, occupancy and enjoyment of her property.

C. Acknowledgement by Daybreak

Hynes also argues the trial court's finding that the Daybreak Homeowners Association (Association) failed to acknowledge and maintain the drainage system is not dispositive of his easement rights. Specifically, Hynes asserts that the trial court's finding of a lack of acknowledgement means that if the Association has not acknowledged or maintained a system, then that system does not have the right to continued existence under the Covenants. We disagree.

Hynes argues the issue of the Association's acknowledgement of or involvement in the drainage system was not plead by either party and was not raised by the trial court as an issue at trial. He contends the acknowledgement was not tried before the trial court and thus the acknowledgement issue could not serve as a basis for the trial court's decision. See 46 Am.Jur.2d Judgments § 2 ("[A] party may not be granted relief in the absence of pleadings to support that relief, and a judgment based on an issue not pleaded is a nullity."). Spitz contends Hynes asserted in his Complaint the existence of an express easement pursuant to Article 2, § 6 of the Covenants which included the language that any storm water drainage systems shall be maintained by the Association.

Furthermore, Spitz argues Hynes incorrectly assumed the trial court relied on a lack of acknowledgement as determinative of the issue of the existence of an easement. Spitz contends the trial court's reference to the lack of an acknowledgement of the drainage system by the Association was significant because if the system at issue was to be considered part of a "storm water drainage system" protected by an express easement, it would have been maintained and repaired by the Association. Article 2, § 6 of the Covenants states: "[a]ny such storm drainage and sanitary sewer systems shall be maintained in good order and repair by the Association." Spitz contends the Association's lack of repairs and maintenance on the drainage system are only evidence the drainage system was not part of a system

contemplated by the Covenants. The trial court specifically based its ruling on the definition of "storm water drainage system" and the lack of a uniform drainage system. The trial court merely noted its finding was supported by the fact that the Association never maintained the system. Accordingly, we find the trial court's findings regarding the Association's acknowledgement and maintenance of the system were not determinative of the existence of an express easement.

II. Easement by Prior Use

Hynes argues the trial court erred in finding he failed to establish a drainage easement across Spitz's property by prior use. We disagree.

"The determination of the existence of an easement is a question of fact in a law action and subject to an 'any evidence' standard of review when tried by a judge without a jury." Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). Our supreme court held a party must prove the following six factors to establish the right to an easement implied by prior use:

> (1) unity of title; (2) severance of title; (2) the prior use was in existence at the time of unity of title; (3) the prior use was not merely temporary or casual; (4) the prior use was apparent or known to the parties; (5) the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use; and (6) the common grantor indicated an intent to continue the prior use after severance of title.

Boyd v. Bellsouth Tel. Telegraph Co., 369 S.C. 410, 417, 633 S.E.2d 136, 139 (2006).

Hynes argues there is indirect evidence the drainage system has been in place since construction of the townhomes. He contends Daybreak was a planned subdivision with planned housing and draining. Hynes argues the location of the downspout, the higher elevation of his property, and the common building scheme of the subdivision lead to the conclusion that the

drainage system existed at the time the townhouses were built and sold. Furthermore, Hynes contends the prior use of the drainage system was not temporary, that it was or should have been apparent to all parties, and its location indicated the grantor's intent to continue the use after the sale of the townhomes.

There is no evidence in the record establishing how long the drainage system has been in place. Hynes testified the drainage system was in place when he purchased his townhome in 1996. While Hynes introduced the deposition testimony of two prior owners of the Spitz property, their testimony did not create a complete timeline beginning with the original grant of the property to Daybreak or the original severance. These prior owners testified the drainage system was in place in the 1990s, but could not link the drainage system to the construction of the townhomes. Therefore, the record contains no evidence the drainage system has been in existence since the original division of the property.

Moreover, Hynes failed to prove the location of the drainage system was necessary to his enjoyment of his property and no other reasonable locations were available. Evidence in the record indicates Hynes could have discharged his gutter water onto his own property without unreasonable burden or expense. Spitz's structural engineering expert witness testified Hynes could have run the drainage pipe down his property line and not across Spitz's property and that the water would have drained properly.[1] Accordingly, we find there was evidence in the record to support the trial court's finding that Hynes failed to establish an easement by prior use, and we affirm the trial court's ruling.

CONCLUSION

We find there was an express easement permitting Hynes to maintain a storm water drainage pipe across Spitz's property. However, we find the easement interferes with Spitz's use and enjoyment of her property and is therefore conditioned by the language of the Covenants. Furthermore, we

[1] Spitz's plumber testified it would cost approximately $300 for Hynes to run the storm water drainage pipe to the rear of his property.

find Hynes failed to establish an easement by prior use permitting him to maintain a storm water drainage system across Spitz's property. Accordingly, the trial court's order is

AFFIRMED IN RESULT.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bobby T. Judy, Respondent,

v.

Ronnie Judy, Appellant.

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

Opinion No. 4595
Heard May 13, 2009 – Filed July 21, 2009

AFFIRMED

Glenn Walters, Sr., and R. Bentz Kirby, of Orangeburg, for Appellant.

Capers G. Barr, III, of Charleston, for Respondent.

WILLIAMS, J.: In this civil case, we must determine whether the trial court erred in admitting evidence of a prior civil judgment obtained against Ronnie Judy (Ronnie) by a third party not involved in the present case. We affirm.

FACTS/PROCEDURAL HISTORY

This case involves a civil suit brought by Bobby Judy (Bobby) against his brother, Ronnie, for actual and punitive damages caused by Ronnie's alleged destruction of a corn crop planted by Bobby. The case involves several members of the Judy Family. Bobby and Ronnie are sons of the late Blease Judy (Blease). Blease also had a third son, Jimmy Judy (Jimmy). Ronnie has a son, Todd Judy (Todd).

In 1966, Blease conveyed approximately 133 acres of farmland (the Property) to Bobby and Ronnie, jointly. Some time thereafter, the Property was divided by the construction of U.S. Interstate Highway I-95, creating two fields, one on the east side of I-95 (the East Field) and one on the west (the West Field).[1] From 1966 until 2001, Ronnie farmed the entirety of the Property.[2] During this time, Bobby never received any rents or profits from Ronnie's farming operations on the Property. However, from 1999 until 2001, Bobby attempted to reach an agreement with Ronnie about the division of the Property. These attempts proved unsuccessful.

In 2001, Bobby decided to begin farming on the Property himself. Bobby contacted his nephew, Kevin Judy (Kevin) and his brother, Jimmy, to do the physical labor on the Property. On the day Bobby, Jimmy, and Kevin prepared to plant on the East Field, they were confronted by Ronnie on his tractor. After some discussion, Ronnie and Bobby reached a verbal

[1] At various points in the record, the East Field is referred to as "The Opening" and the West Field is referred to as "The Home Place."

[2] In 1998, Ronnie conveyed his interest in the Property to his son, Todd, for five dollars. However, Todd leased the Property to Ronnie in 2000, and Ronnie continued to farm the Property while Todd maintained full employment with a local cement plant.

agreement whereby Ronnie would farm the West Field, and Bobby would farm the East Field.[3]

Access to the East Field was through a small parcel of land titled to Todd. This access was blocked by Todd, which prompted Bobby to have Jimmy build a separate road to access the East Field. As a result of building the road, Bobby and Jimmy were able to continue farming and harvesting from the East Field in 2001. However, the following year, they were unable to use the new road because it had become too wet from excessive rain. In late 2002, Bobby called Todd to inform him due to the lack of adequate access to the East Field, he intended to farm half of the West Field and half of the East Field in 2003.[4] Bobby testified Todd's response to his proposed change to their agreement was, "We'll plow it up." Kevin and Jimmy planted two areas on the West Field with corn for the farm year of 2003 (the Corn Crop). The Corn Crop covered between twenty-five and twenty-six acres on the West Field.

On the evening of June 25, 2003, during his regular walk with his wife, Kevin went by the Property around 8 p.m. Kevin observed the Corn Crop, and he testified it was "beautiful[,] . . . about seven and a half to eight [feet] tall." He also noticed Ronnie's tractor, with a disk harrow attached to it, parked in front of Todd's trailer, which was immediately adjacent to the Corn Crop. Kevin testified he thought it was strange that the tractor and disk were left in the open yard because "[Ronnie] always keeps his stuff under his shed, [and] it never came out unless he was using it." On the morning of June 26, 2003, Kevin awoke to find the Corn Crop had been destroyed. Kevin noticed whoever had destroyed the Corn Crop during the night had specifically avoided a wellhead pipe that protruded eighteen inches to two feet from the

[3] There is some confusion as to which brother was to farm which field under this verbal agreement. In his brief, Bobby states the agreement was that Ronnie would farm the East Field while Bobby would farm the West Field. However, Bobby testified the agreement was that he would farm the East Field and Ronnie was to farm the West Field. Jimmy and Ronnie also testified this was the agreement.

[4] That same year, Bobby filed an action to partition the Property.

ground on the West Field. The wellhead pipe was not visible under the high overgrowth of the Corn Crop. Kevin also saw tractor tracks leading from the destroyed Corn Crop back to the tractor and disk he had seen parked in Todd's yard the evening before, and the tractor and disk were full of corn husks and silkings.

On November 28, 2005, Bobby filed a civil suit against Ronnie seeking damages for the destruction of the Corn Crop. At trial, Bobby sought to introduce into evidence a similar dispute between Ronnie and Jimmy over a different piece of property (the Rumph Tract) that culminated in a lawsuit and jury verdict against Ronnie. Jimmy and Ronnie owned joint interests in the Rumph Tract, which was several miles from the Property. The two brothers had been unable to agree on the division of the Rumph Tract, and Jimmy filed a partition action against Ronnie. While the partition action case was pending, a dam retaining a pond on the Rumph Tract was destroyed on May 5, 2003. Jimmy filed an additional lawsuit against Ronnie for destruction of the dam on November 22, 2005, and the case went to trial on April 4, 2007. The jury found Ronnie had maliciously and willfully destroyed the dam using a backhoe, causing the dam to be washed out and the pond to be destroyed.

At the trial of the present case, Ronnie objected to the admission into evidence of the prior judgment against him on several grounds. First, he argued it was not yet a final judgment, and it was, therefore, more prejudicial than probative. He also argued it was not necessary to prove the act in question. Finally, he argued there was no factual connection between the parties or the acts in the two cases, and that it was simply being offered to prove the crop destruction occurred. Bobby argued the evidence was admissible under Rule 404(b), SCRE, as evidence of prior acts admitted to prove motive, identity, intent, or common scheme or plan, and was relevant for punitive damages as evidence of similar past conduct. The trial court held:

> [T]he testimony of the prior conduct regarding the pond dam is admissible under the Lyle[5] exception, or the [404(b)] exception as to identity, also as to common scheme or plan . . . . [T]his conduct is so bizarre, [and it] is just not the type of conduct that occurs every day. . . . There is no question, it's prejudicial, but in weighing that it seems . . . it's very important that this type of conduct is not the type that ordinarily occurs, which would have a profound probative value on the identity, as well as a common scheme or plan. It concerns [the court] somewhat but not a whole lot that it's not necessarily a final judgment in the prior case, because from what [the court has] heard, if that case is reversed for some reason it will probably be on reasons that have no impact whatsoever on the jury's factual determination that [Ronnie] . . . destroyed the dam in that case.

This appeal followed.

STANDARD OF REVIEW

The trial court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000).

LAW/ANALYSIS

[5] In State v. Lyle, 125 S.C. 406, 416, 118 S.E.2d 803, 807 (1923), the Supreme Court of South Carolina held, "Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial."

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the South Carolina Rules of Evidence], or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Evidence meets the test of relevance if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears. Crowley v. Spivey, 285 S.C. 397, 410, 329 S.E.2d 774, 782 (Ct. App. 1985). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). Determinations of relevance are largely within the trial court's discretion, and its decision to either admit or exclude evidence will not be disturbed on appeal unless there is an abuse of discretion amounting to an error of law to the prejudice of the appellant's rights. Merrill v. Barton, 250 S.C. 193, 195, 156 S.E.2d 862, 863 (1967).

1. Admissibility of Prior Bad Acts Evidence

The trial court held the prior judgment was admissible under Lyle as evidence of a common scheme or plan and also for identity. Because we believe the prior judgment is relevant as evidence of a common scheme or plan and its probative value outweighs its prejudicial effect, we affirm.[6]

As a general rule, evidence of a person's prior bad acts is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. However, evidence of other crimes, wrongs, or acts may be admissible to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the perpetrator. Rule 404(b), SCRE; State v. Martucci, 380 S.C. 232, 251-52, 669 S.E.2d 598, 608 (Ct.

[6] This court may affirm the trial court based on any grounds found in the record. Rule 220(c), SCACR; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000).

App. 2008) (citing Lyle, 125 S.C. at 416, 118 S.E.2d at 807); see also Citizens Bank of Darlington v. McDonald, 202 S.C. 244, 265, 24 S.E.2d 369, 377 (1943) (holding Lyle is also applicable in civil cases). Where the other bad acts are not the subject of conviction, they must be proven by clear and convincing evidence. State v. Kennedy, 339 S.C. 243, 247, 528 S.E.2d 700, 702 (Ct. App. 2000). When considering whether there is clear and convincing evidence, this Court is bound by the trial court's findings unless they are clearly erroneous. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003).

"The law in civil cases, as well as in criminal cases, permits proof of acts other than the one charged which are so related in character, time and place of commission as to . . . tend to show the existence of [] a common plan or system." Citizens Bank of Darlington, 202 S.C. at 262-63, 24 S.E.2d at 376 (citations omitted). In the case of the common scheme or plan exception to the general rule barring admission of prior bad act evidence, a close degree of similarity between the prior bad act and the present case is necessary. Martucci, 380 S.C. at 255, 669 S.E.2d at 610. Prior bad act evidence is admissible where the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect. See, e.g., State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (holding testimony from victim's sisters admissible in trial for criminal sexual conduct with a minor where all three sisters were attacked by defendant beginning around their twelfth birthday, late at night, at which time defendant explained the Biblical verse that children are to “Honor thy Father”); State v. Patrick, 318 S.C. 352, 356, 457 S.E.2d 632, 635 (Ct. App. 1995) (holding evidence of a robbery in Georgia admissible in trial for burglary, armed robbery, and assault with intent to kill because in both cases, the perpetrators used the same disguises (gloves, wigs, and bandannas) and the same tools (walkie-talkies and flashlights), cut telephone lines, and generally carried the same type of weapons); State v. Blanton, 316 S.C. 31, 32, 446 S.E.2d 438, 439 (Ct. App. 1994) (holding testimony from other women that defendant sexually assaulted them was admissible in a trial for criminal sexual conduct with a minor because of the similarity of the prior acts to the charged offense).

We find the facts of the prior judgment are so similar to the present case that the probative value of the evidence outweighs its prejudicial effect. In both cases, Ronnie was embroiled in a dispute with a brother over land that was jointly titled between them. In both cases, Ronnie had refused to cooperate with each of his brothers, leading them to file a court action for partition. In both cases, substantial improvements to the land were deliberately destroyed. In both cases, the destruction of the improvements had been effected by use of heavy equipment. Finally, the two incidents occurred only a few miles from each other, and only fifty-three days apart. Although there were some slight factual differences between the prior case and this case,[7] we do not believe these differences constitute such a meaningful distinction that the trial court's admission of the prior judgment into evidence constituted an abuse of discretion.

Furthermore, to the extent the admission of the prior judgment may have prejudiced Ronnie, we find any prejudice was alleviated when the trial court gave a limiting instruction to the jury as to the proper purpose for which the evidence of the prior judgment was to be used:

> Ladies and gentlemen, you have heard testimony in this trial of . . . other acts, bad acts or improper acts allegedly committed by [Ronnie]. And [the court] tell[s] you that that testimony . . . was not given for the purpose of showing that [Ronnie] is a bad person who does bad things, and it would be improper for you to reach such a conclusion from that testimony. That testimony was allowed . . . only as to the identity of the perpetrator in this case, as to any possibly motive, and/or to the existence of a common scheme and plan, and for no other purpose.

[7] In the prior case, Ronnie used a backhoe to destroy the dam, whereas here, he allegedly used a tractor to destroy the Corn Crop. Also, the prior case involved him and Jimmy, whereas this case involves him and Bobby, his other brother.

Because the trial court specifically warned jurors not to infer from the fact of the prior judgment that Ronnie "is a bad person who does bad things," we believe any prejudice that might have otherwise resulted from the admission of the prior judgment was removed by the trial court in its curative instructions to the jury. See State v. Dawkins, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989) ("[C]urative instructions usually cure any prejudice caused by the admission of incompetent evidence"). In sum, we find no error in the trial court's admission of the prior judgment into evidence.

2. Finality of the Prior Judgment

Ronnie also argues the prior judgment should not have been admitted because his appeal in the case is still pending and, if the prior judgment is reversed, its admission into evidence in this case would taint the verdict. However, Ronnie has cited no legal authority to support the argument that this was an error of law. As such, this argument is conclusory, and such arguments are deemed abandoned on appeal. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding party abandoned an issue on appeal due to failure to cite any supporting authority and making only conclusory arguments).

3. Relevance to Punitive Damages

As an additional sustaining ground for the trial court's admission of the prior judgment, Bobby argues the trial court should be affirmed because the prior judgment is relevant to the issue of punitive damages. We agree.

Trial courts are required to conduct a post-trial review of punitive damage awards and consider the following factors: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment of the conduct; (4) existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed

appropriate. Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991)

In Burbach v. Investors Mgmt. Corp. Int'l, this c ourt affirmed a judgment against a landlord for unlawful conversion of a tenant's security deposit. 326 S.C. 492, 498, 484 S.E.2d 119, 122 (Ct. App. 1997). The Court held evidence of the landlord's treatment of prior tenants and his attempts to keep their security deposits was admissible to support the plaintiff's claim for punitive damages, even though the other tenants were not parties to the case. Id. The Court held such evidence was relevant to the first five of the Gamble factors, i.e., it went to the landlord's degree of culpability, the duration of his conduct, his awareness or concealment of his conduct, similar past conduct, and likelihood the award would deter the landlord and others from similar conduct. Id.

We believe here, as in Burbach, the evidence of the prior judgment against Ronnie is relevant to the issue of punitive damages because it pertains to at least two of the Gamble factors. Given the factual similarities between the prior judgment and this case discussed above, the prior judgment is evidence of similar past conduct by Ronnie that could assist jurors in assessing punitive damages. Moreover, the fact that Ronnie had committed similar bad acts on a prior occasion could inform the jury as to the likelihood that an award would deter Ronnie from similar conduct in the future. Accordingly, we find evidence of the prior judgment admissible as relevant to punitive damages.

4. Harmless Error

Even assuming, arguendo, the trial court erred in admitting the prior judgment into evidence, we believe such error was harmless.

As stated above, determinations of relevance are largely within the trial court's discretion, and its decision to either admit or reject evidence will not be disturbed on appeal unless there is an abuse of discretion amounting to an error of law to the prejudice of the appellant's rights. Merrill, 250 S.C. at

195, 156 S.E.2d at 863; see Powers v. Temple, 250 S.C. 149, 159, 156 S.E.2d 759, 763-64 (1967) (holding to justify reversal based upon improper admission of evidence, appellant must show prejudice and that jury was likely influenced thereby).

Whether an error is harmless depends on the circumstances of the particular case. In re Harvey, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Error is harmless where it could not reasonably have affected the result of the trial. Harvey, 355 S.C. at 63, 584 S.E.2d at 897. Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

To the extent the prior judgment was improperly admitted, we believe the other evidence presented in this case was more than sufficient to sustain the verdict that Ronnie willfully and maliciously destroyed the Corn Crop. First, there was testimony that the corn around the wellhead pipe on the West Field had not been destroyed, that it "was clearly [disced] around." Thus, whoever cut down the Corn Crop must have known the location of the pipe because it was purposefully avoided, even at night. The only people who knew about the pipe and were in the area on the night of June 25, 2003, were Jimmy, Kevin, Ronnie, and possibly Todd. It is highly unlikely Jimmy or Kevin would destroy their own crop after spending so much time and energy growing it. Moreover, even though Todd was the legal holder of the joint interest in the Property, Todd worked full-time at a local cement factory, and it was Ronnie who had farmed the property since 1966, so it is unlikely Todd was the one who destroyed the Corn Crop. Second, on the morning after the Corn Crop was destroyed, there was a trail of corn husks and silks leading from the West Field back to where Ronnie's tractor was parked, and the tractor and disk harrow were covered with stalks and husks. We believe the

only reasonable conclusion to draw from the evidence is that Ronnie destroyed the Corn Crop.

Therefore, we believe to the extent the admission of the prior judgment into evidence was error, it was an insubstantial error not affecting the result of the trial.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susette Hieronymus,
Employee, Respondent,

v.

Clarence Thomas Hamrick III, DMD, Employer, Clarendon National Ins. Co., Carrier, and Hartford Ins. Co. of the Midwest, Carrier, Defendants,

Of Whom Clarence Thomas Hamrick, III, DMD and Clarendon National Ins. Co. are Appellants,

And Hartford Ins. Co. of the Midwest, Carrier is Respondent.

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

Opinion No. 4596
Heard May 12, 2009 – Filed July 22, 2009

AFFIRMED

Andrew Kaplan, of Charlotte, for Appellants.

Jason Alexander Griggs and Kathryn Williams, of Greenville, for Respondent.

HUFF, J.: In this workers' compensation case, Clarendon National Insurance Company argues the circuit court erred in affirming the Commission's findings that: 1) Susette Hieronymus sustained an injury by accident to her neck; 2) Clarendon is liable for the alleged neck injury; 3) Hieronymus's claim against Clarendon was timely; and 4) the ganglion cyst in Hieronymus's right hand was caused by or related to the right hand injury and subsequent surgery. We affirm.

FACTS/PROCEDURAL HISTORY

Hieronymus has worked as a dental hygienist for Dr. Clarence T. Hamrick (Employer) since 1993. As a dental hygienist, she is required to constantly position her neck and upper extremities in an awkward manner while using vibrating tools. In September of 2002, Hieronymus consulted Dr. Roslyn Harris regarding pain in her upper extremities, including her right wrist. Dr. Harris suspected carpal tunnel syndrome and referred Hieronymus to Dr. Craig S. Woodward for a nerve conduction study. Following the study, Hieronymus was diagnosed with carpal tunnel syndrome on the right side. In October of 2002, Hieronymus reported her condition to Employer, who filed a Form 12-A worker's compensation claim with Clarendon, its insurance company at the time. The Form 12-A stated Hieronymus suffered a work-related injury to her right arm and wrist due to "constant repetitive motions performed by dental hygienist and assisting duties."

Subsequently, Hieronymus was referred to Dr. Edwin Rudisill for treatment of her condition. After conservative therapy failed to alleviate

Hieronymus's carpal tunnel syndrome, Dr. Rudisill performed surgery on her wrist. Following surgery, Hieronymus continued to complain of some soreness and numbness in her hand. However, in August of 2003, Dr. Rudisill released her to work without restrictions after concluding she had reached maximum medical improvement with a five percent impairment rating. In October of 2003, Dr. John P. Evans evaluated Hieronymus for her continuing pain and concluded the pain was a result of the surgery and should only last for six months to a year.

In May of 2004, Hieronymus returned to Dr. Rudisill due to the continuing pain in her hand. An x-ray of the hand revealed a small abnormality which "could represent" a ganglion cyst. However, Dr. Rudisill opined the cyst was not related to the activity in her hands or the cause of her pain. Further, Dr. Rudisill's report indicates he informed Hieronymus he did not know of any other treatment other than anti-inflammatory medicine to alleviate the pain, and he released her without work restrictions.

In November of 2004, Hieronymus filed a Form 50 request for additional treatment for injuries to her "right hand, right upper extremity, right elbow, right shoulder, and neck" alleging she suffered the injuries on October 1, 2002. On November 29, 2004, Hieronymus went to Dr. Gordon Early for an independent medical examination of the pain in her hand, wrist, and neck. Although Dr. Early found her neck pain was not attributable to her work, he opined the ganglion cyst in Hieronymus's wrist might have been a complication of the carpal tunnel release surgery.

Subsequently, Hieronymus filed additional Form 50's to request a hearing on the matter. Clarendon responded, admitting Hieronymus suffered a carpal tunnel injury on October 1, 2002, but denying she suffered any other compensable injuries or needed additional medical treatment. Prior to a hearing before the single commissioner of the Workers' Compensation Commission, both Hieronymus and Clarendon agreed to an evaluation by Dr. James Essman regarding the ganglion cyst. He opined the cyst was not related to the carpal tunnel release surgery. Dr. Essman also noted

Hieronymus's neck pain "was caused and/or aggravated by the awkward posture in which she works in her employment as a dental hygienist."

Also prior to a hearing, the single commissioner granted Clarendon's motion to join as a defendant Hartford Insurance Company, which provided coverage to Employer after Clarendon's coverage ended in April of 2003.

Following the hearing, the single commissioner found Hieronymus sustained injuries to her neck, hands, and upper extremities on October 1, 2002 as a result of repetitive trauma. Further, the single commissioner found the ganglion cyst in Hieronymus's hand was compensable because it "was caused or aggravated by the compensable injuries to her right hand and the subsequent treatment, including surgery." Accordingly, the single commissioner concluded Clarendon was responsible for all causally related treatment as the insurer at the time of her injury by accident. The Appellate Panel of the Workers' Compensation Commission (the Appellate Panel) found the single commissioner's conclusions were correct and adopted the single commissioner's order in its entirety. The circuit court affirmed the Appellate Panel's order, concluding the findings were supported by substantial evidence. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act establishes our standard of review of decisions by the South Carolina Workers' Compensation Commission. Accordingly, this court can reverse or modify the Appellate Panel's decision only if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5) (Supp. 2008); Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442. The possibility of drawing two inconsistent conclusions does not prevent the Appellate Panel's conclusions from being supported by

substantial evidence. Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

LAW/ANALYSIS

A. Neck injury

Employer and Clarendon argue the circuit court erred in affirming the Appellate Panel's finding Hieronymus sustained an injury by accident to her neck on October 1, 2002. We disagree.

The Appellate Panel held: "Claimant sustained injuries to her neck, both hands, and both upper extremities on or around October 1, 2002 as a result of repetitive trauma in her job with employer-defendant." Clarendon asserts there is not substantial evidence to support this finding that Hieronymus was experiencing neck pain at this time. Hieronymus's medical records from Dr. Woodward and Dr. Rudisill indicated Hieronymus only reported pain in her arms, wrists, elbows, and shoulders.

However, when asked about the development of her problems in October of 2002, Hieronymus testified that the problems began with numbness in her hands that "started in my right, but then, you know, it went to my left and it was both of them, the right was significantly worse . . . . And my elbows and neck, constant . . . ." She stated that the surgery helped the numbness, but she still had pain in her hands, elbows, and neck. She explained she only complained about the pain in her right hand in her intake form to Dr. Rudisill because the pain in that hand was horrid. The Appellate Panel held Hieronymus's testimony was very credible.

Hieronymus's testimony provides evidence that she was suffering pain in her neck as well as in her arms and shoulders as of October of 2002. As the determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel, we find substantial evidence in

the record supports the Appellate Panel's determination that Hieronymus had suffered an injury to her neck on October 1, 2002. See Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

Clarendon also argues the Appellate Panel erred in concluding it is liable for coverage of the neck injury, even if there is substantial evidence supporting the finding Hieronymus experienced pain in her neck in October 2002. Clarendon contends that because Hieronymus's neck injury is a repetitive trauma injury developing over time, October of 2002 is not the appropriate date for determining which insurer is liable for coverage.

Clarendon admitted Hieronymus suffered an injury by accident in October of 2002 due to "constant repetitive motions performed by dental hygienist and assisting duties." In addition, as stated above, we have found substantial evidence supports the Appellate Panel's conclusion that Hieronymus suffered an injury by accident to her neck on October 1, 2002. "[W]hen a claim is filed, all elements of compensation are included. It was not contemplated by the Act that different parts of the total result of one accident should be regarded as separate claims." Hamilton v. Bob Bennett Ford, 336 S.C. 72, 88, 518 S.E.2d 599, 607 (Ct. App. 1999), aff'd as modified, 339 S.C. 68, 528 S.E.2d 667 (2000). It is not necessary that the claim state all of the injurious effects arising out of the accident. Id.

We hold substantial evidence in the record supports the Appellate Panel's finding that Hieronymus sustained injuries to her neck, as well as to her hands and upper extremities, in October of 2002, and, as Clarendon was the carrier for Employer at that time, it is responsible for Hieronymus's claim. Accordingly, the circuit court properly affirmed the Appellate Panel on this issue.

B. Statute of limitations

Clarendon argues Hieronymus's claim of a neck injury was untimely because she did not file a claim for the injury until November of 2004, over two years after the date of the alleged injury by accident, and outside the statute of limitations set forth in Section 42-15-40 of the South Carolina Code

(Supp. 2008). However, as stated above, once a claimant files a claim, that claim encompasses all of the effects of that accident. Bob Bennett Ford, 336 at 88, 518 S.E.2d at 607. Accordingly, we find Hieronymus satisfied the statute of limitations when Clarendon accepted her original claim.

C. Ganglion cyst

Clarendon argues the circuit court erred in affirming the Appellate Panel's finding that the ganglion cyst in Hieronymus's hand was caused by her carpal tunnel syndrome or aggravated by subsequent treatment. It asserts Dr. Early's opinion the cyst "may be" related to the surgery was speculative and did not amount to substantial evidence.

"If a medical expert is unwilling to state with certainty a connection between an accident and an injury, the 'expression of a cautious opinion' may support an award if there are facts outside the medical testimony that also support an award." Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). "Proof that a claimant sustained an injury may be established by circumstantial and direct evidence where circumstances lead an unprejudiced mind to reasonably infer the injury was caused by the accident." Id. at 341, 513 S.E.2d at 846-47.

In his report of his independent medical exam, Dr. Early opined, "I think this ganglion cyst may be a post-surgical complication." He explained how the injury could occur during surgery. Dr. Early recommended Hieronymus undergo an imaging procedure of her wrist to determine if she did in fact have a ganglion cyst. He stated, "If it is a ganglionic cyst, we would consider it to be attributable to the previous carpel tunnel surgery, and I would recommend surgical excision." The issue of whether the cyst was a ganglion cyst does not appear to be in dispute. Accordingly, the Appellate Panel's conclusion that the cyst was caused by her surgery is supported by substantial evidence.

CONCLUSION

For the above stated reasons, the order of the circuit court affirming the decision of the Appellate Panel is

AFFIRMED.

PIEPER and GEATHERS, JJ. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lexington County Health Services District, d/b/a Lexington Medical Center, Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appeal From Richland County
Marvin F. Kittrell, Administrative Law Judge

Opinion No. 4597
Heard May 12, 2009 – Filed July 22, 2009

REVERSED

Milton G. Kimpson, Ray N. Stevens, Harry T. Cooper, Jr., and Nicholas P. Sipe, all of Columbia, for Appellant.

David B. Summer, Jr., and Faye A. Flowers, both of Columbia, for Respondent.

LOCKEMY, J.: The South Carolina Department of Revenue (the Department) appeals the Administrative Law Court's (ALC) determination that Lexington County Medical Center (Lexington Medical) was entitled to a refund of sales and use taxes under section 44-7-2120 of the South Carolina Code (2002). We reverse.

FACTS AND PROCEDURAL HISTORY

Lexington Medical is an incorporated health services district created in 1988 pursuant to section 44-7-2010 of the South Carolina Code (2002). Lexington Medical owns and operates numerous health care facilities in Lexington County, and it began expanding its operations in 2002. From 2002 to 2006, Lexington Medical paid various vendors for purchases of capital equipment and building materials related to the facility expansion and upgrade. The vendors passed on sales and use taxes to Lexington Medical. In 2005, Lexington Medical filed amended sales and use tax returns claiming entitlement to refunds of sales and use taxes it paid to vendors on direct purchases of tangible personal property and for sales taxes it paid for construction contracts. In 2005, Lexington Medical sought a $303,939.53 refund from the Department based on the sales and use taxes passed on from vendors in 2002. Subsequently, Lexington Medical amended its refund application and ultimately sought $8,389,717.21 in refunds from the Department for claims from April 2002 to August 2006.

The Department's Audit Service Division denied Lexington Medical's refund request by letter in 2005. Lexington Medical appealed this decision within the Department without success. In another denial letter, the Department advised Lexington Medical that it would need its vendors to assign it their right to a refund. In a final agency determination, the Department found section 44-7-2120 did not exempt Lexington Medical from sales and use taxes on its purchases of new equipment and other tangible personal property used for capital upgrades and additions to real property. In its decision, the Department noted Lexington Medical, as a regional health services district, was exempt from certain state taxes but concluded Lexington Medical misinterpreted the statute with regard to the matter at issue. The Department concluded Lexington Medical was exempt from sales

taxes only on the sale of construction materials between two health services districts or between a district and its wholly-owned subsidiary.

Subsequently, Lexington Medical petitioned for administrative review and requested a contested case hearing. On appeal, the ALC rejected the Department's interpretation of section 44-7-2120 and held health services districts were exempt from payment of sales and use taxes on materials used in the construction and equipping of a district's healthcare facilities. Consequently, the ALC found Lexington Medical was entitled to an $8,389,717.21 refund in sales and use taxes paid on its purchases of equipment and other tangible personal property used for capital upgrades and additions to real property in connection with its clinical expansion project. The ALC came to its conclusion after examining legislative history, legislative intent, and other provisions of the South Carolina Code. The Department appeals that finding.

STANDARD OF REVIEW

The standard of review for a court reviewing the decision of the ALC is set forth in the Administrative Procedures Act. S.C. Code Ann. § 1-23-610 (Supp. 2008). "The review of the administrative law judge's order must be confined to the record." § 1-23-610(D). Under section 1-23-610(B), our court may reverse or modify the decision of the ALC if its findings, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

LAW/ANALYSIS

I. Health Services District Exception

The Department argues the ALC erred in finding Lexington Medical was exempt from paying certain sales and use taxes based on its construction of section 44-7-2120. The Department states exemption statutes should be strictly construed against taxpayers, and that under this principle, Lexington Medical should not be exempt from paying certain sales and use taxes. We find the ALC erred in its interpretation of the exemption statute.

A. Exemption Statute

"Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. The legislative language in a statute is considered the best evidence of the legislative intent or will, and courts are bound to implement the legislature's expressed intent. See id. Accordingly, the question before us is whether the statutory language is clear on its face. If the language is clear, we are bound to apply its plain meaning.

Pursuant to section 44-7-2120:

> All properties owned by a district, whether real, personal, or mixed, and the income from the properties, all securities issued by a district and the indentures and other instruments executed as security therefor, all leases made pursuant to the provisions of this article, and all revenues derived from these leases, and all deeds and other documents executed by or delivered to a district, are exempt from any and all taxation by the State or by any county, municipality, or other political subdivision of the State, including, but without limitation, license excise

> taxes imposed in respect of the privilege of engaging in any of the activities in which a district may engage. A district is not obligated to pay or allow any fees, taxes, or costs to the clerk of court, the Secretary of State, or the register of deeds in any county in respect of its incorporation, the amendment of its certificate of incorporation, or the recording of any document. The gross proceeds of the sale of any property owned by the district and used in the construction and equipment of any health care facilities for a district is exempt from all other and similar excise or sales taxes. It is the express intent of this section that any district authorized under this article incurs no tax liability to the State or any of its political subdivisions except to the extent that sales and use taxes may be payable on the purchases of goods or equipment by the district.

Focusing on the third sentence of section 44-7-2120, the Department maintains this provision allows health districts to sell its tangible personal property for use in constructing and equipping health care facilities without incurring any sales or use tax obligations. Here, Lexington Medical's exemption claim focuses on its purchase of personal property rather than its receipt of gross proceeds from a sale. We agree with the Department because the following provision is clear on its face: "The gross proceeds of the sale of any property owned by the district and used in the construction and equipment of any health care facilities for a district is exempt from all other and similar excise or sales taxes." This provision seems to limit the sales and use tax exemptions to only property sold by health districts to other health districts. Specifically, we do not interpret the statute to exempt health districts from sales and use taxes when buying property from an entity which is not a health district based on the "owned by the district" language from the statute.

Furthermore, we find the last sentence of the statute, read plainly, leads to the same interpretation. The last sentence of section 44-7-2120 provides: "It is the express intent of this section that any district authorized under this

article incurs no tax liability to the State or any of its political subdivisions except to the extent that sales and use taxes may be payable on the purchases of goods or equipment by the district." (emphasis added). Therefore, it appears that the legislature's intent was to exempt health districts from certain tax obligations, with sales taxes incurred on purchases of goods or equipment as the express exception. Under the "plain meaning rule," we hold health districts are not exempt from excise or sales taxes incurred from construction and equipment of any health care facilities.

B. Absurd Result

At this point, our analysis turns to whether our interpretation would lead to an absurd result, as the ALC found and Lexington Medical now argues. If our interpretation would lead to a result unintended by the legislature and plainly absurd, we should reject it. So. Bell Tel. & Tel. Co. v. S.C. Tax Comm'n, 297 S.C. 492, 496, 377 S.E.2d 358, 361 (Ct. App. 1989) ("However plain the ordinary meaning of the words used in a statute, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the [l]egislature."). We believe our interpretation of the exemption statute would not lead to an absurd result.

Lexington Medical argues the casual or isolated sales exception, regulation 117-322 of South Carolina Code of Regulations (Supp. 2008), creates an absurdity when read in conjunction with section 44-7-2120. Non-merchants are exempt from paying sales taxes under regulation 117-322. "Casual or isolated sales by persons not engaged in the business of selling tangible personal property at retail are not subject to the sales or use tax." Id. Under regulation 117-322, "the term 'casual' means occurring, encountered, acting or performed without regularity or at random. The term 'occasional' and the term 'isolated' mean occurring alone or once, an incident not likely to recur, sporadic." During the ALC hearing, Lexington Medical's expert opined: "[I]n the unlikely event a sale of goods by a district to a parent or subsidiary or a related entity occurred, that transaction would be excluded as a 'casual sale' pursuant to S.C. Code Reg. 117-322." The ALC considered regulation 117-322 when making its conclusion that section 44-7-2120 creates an exemption for Lexington Medical. We disagree.

As the Department contends, a determination of whether a sale is "casual" depends on a number of factors and must be determined on a case-by-case basis. Therefore, section 44-7-2120 would not require such an analysis but provides a general exemption for health care districts when selling tangible property to other health care districts.

Moreover, the South Carolina Code imposes a duty to pay sales taxes on "every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A) (Supp. 2008). Here, we are dealing with contractors who went to merchants to purchase supplies for construction. Those retailers were required to pass on the sales taxes incurred from purchases to the state. See § 12-36-910(A). Furthermore, under current South Carolina law, no public entity, such as a city, municipality, or school, is wholly exempt from paying sales tax to expand its facilities.

We have considered the support asserted by Lexington Medical, including legislative history, other code sections, and the casual or isolated sales exception in regulation 117-322. After careful consideration, we disagree with Lexington Medical's assertion that the Department's interpretation of section 44-7-2120 requires one to assume that the legislature intended to create a nullity or an absurdity and find that one does not exist here.

II. Assignment of Refund

The Department maintains Lexington Medical's assignment from vendors was not in compliance with section 12-60-470(C)(3) of the South Carolina Code (Supp. 2005) because Lexington Medical obtained the assignments before receiving approval of the refund. Based on our decision to reverse the ALC's interpretation of the exception statute, we need not address whether the ALC erred in concluding Lexington Medical's assignments from third party vendors were sufficient to assign refund claims for sales taxes paid because this issue is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)

(holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We reverse the ALC based on the plain reading of section 44-7-2120. Accordingly, we hold Lexington Medical is not entitled to an $8,389,717.21 refund in sales and use taxes paid on its purchases of equipment and other tangible personal property used for capital upgrades and additions to real property in connection with its clinical expansion project. We have considered Lexington Medical's absurd interpretation argument and find it is without merit. Based on our decision to reverse the ALC's interpretation of section 44-7-2120, we need not address the Department's assignment argument. Accordingly, the decision of the ALC is

REVERSED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

William Javier Rivera and Jose M. Medero, Respondents.

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

Opinion No. 4598
Submitted June 1, 2009 – Filed July 22, 2009

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Jay E. Hodge, of Cheraw, for Appellant.

Chief Appellate Defender Joseph L. Savitz, III, of Columbia, for Respondents.

GOOLSBY, A.J.: The State appeals: (1) the trial court's finding William Javier Rivera and Jose M. Medero (collectively "Respondents") were unlawfully detained following a traffic stop, and (2) the trial court's holding that evidence seized during the detention was inadmissible. We affirm.[1]

FACTS

Police Sergeant David Lane stopped a vehicle driven by Rivera for "following too close." Lane approached the vehicle and asked Rivera to produce his driver's license and vehicle registration. Rivera handed Lane his driver's license and a rental agreement for the vehicle.

Lane then asked Rivera to step out of the vehicle. Once Rivera exited the vehicle, Lane asked Rivera several questions, including where he and the passenger, Medero, were coming from, how long they had been there, where they were going, and the purpose of their trip. Rivera responded they were returning from New York.[2] He said they had gone there to visit Medero's grandmother and also there had been a death in Rivera's family. He stated they stayed in New York for one week.

Next, Lane asked Medero a series of similar questions. Medero stated they had been in Yonkers, New York, visiting his nephew. He stated they were in New York for about five days.

Lane returned to Rivera, advised Rivera he would receive a warning ticket, and began filling out the citation. He then called for backup and began talking to Rivera about the transport of illegal drugs on the interstate. Lane asked Rivera if there were any weapons, drugs, or large sums of money in the vehicle, and Rivera responded in the negative. Lane also asked for

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.
[2] In his testimony, Lane stated he could not remember what response Rivera gave when asked about what part of New York he had visited.

permission to search the vehicle. After Rivera consented to the search, Lane and another officer searched the vehicle. They found heroin in the engine.

A grand jury indicted Respondents for trafficking in heroin. Prior to a bench trial, Respondents moved to suppress evidence found in Rivera's rental vehicle as the product of an unlawfully prolonged traffic stop and an invalid consent to search the vehicle. The State justified the detention that reached beyond the initial, valid stop for the following reasons: (1) the nervousness of the Respondents; (2) their inconsistent stories about the trip; (3) the strong odor of air fresheners within the car; and (4) the lack of luggage in the passenger compartment.

The trial court granted Respondents' motion, holding Lane lacked "sufficient indicators of criminal activity to justify any continued detention" beyond the purpose of the traffic stop; thus, any consent to search obtained from Rivera during that time amounted to an exploitation of an unlawful detention and was invalid.

The State appeals.

LAW / ANALYSIS

The State argues the trial court erred in suppressing evidence seized from Rivera's rental vehicle and holding the evidence was the product of an unlawful detention and an invalid consent to search the vehicle. We disagree.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.[3] An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.[4]

[3] State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).
[4] State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In criminal cases, we, as an appellate court, only review errors of law.[5] This standard of review also applies to preliminary factual findings in determining the admissibility of certain evidence.[6] In Fourth Amendment search and seizure cases, our review is limited to determining whether there is any evidence to support the trial court's finding.[7] We will not reverse a trial court's findings of fact merely because we would have reached a different conclusion.[8]

When probable cause exists to believe a traffic violation has occurred, the decision to stop the automobile is reasonable per se.[9] Once a vehicle has been lawfully detained for a traffic violation, a police officer may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.[10] The officer "'may request a driver's license and vehicle registration, run a computer check, and issue a citation"';[11] however, "[a]ny further detention for questioning is beyond the scope of the . . . stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime."[12]

"Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent."[13] "Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful

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[5] State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003) (citing State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)).
[6] Id.
[7] State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004).
[8] State v. Tindall, 379 S.C. 304, 309, 665 S.E.2d 188, 191 (Ct. App. 2008).
[9] Whren v. U.S., 517 U.S. 806, 810 (1996).
[10] Pennsylvania v. Mimms, 434 U.S. 106, 111 n. 6 (1977).
[11] U.S. v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998) (citation omitted).
[12] Id.; see also State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002).
[13] Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999).

detention."[14] "Proof of voluntary consent alone is not sufficient. The relevant factors include the temporal proximity of [the] illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct."[15]

Here, Lane lawfully detained the vehicle, requested Rivera's license and registration, and asked Rivera to exit the vehicle. In addition, Lane's initial questioning, including where Respondents were coming from, how long they had been there, where they were going, and the purpose of their trip, was reasonable in that the questions tangentially related to the purpose of the traffic stop. Once Lane informed Rivera he would receive a warning citation, however, the purpose of the stop ended and Lane's continued questioning concerning the transport of drugs on the interstate exceeded the scope of the stop. This amounted to a second and illegal detention[16] unless Lane entertained a reasonable suspicion of illegal activity sufficient to warrant that detention.

As we noted above, the trial court held Lane's suspicion of illegal drug activity rested on no reasonable basis, holding the Respondents' nervousness,

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[14] State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005); see also Brown v. State, 372 S.E.2d 514, 516 (Ga. App. 1988) ("[I]n order to eliminate any taint from an [illegal] seizure or arrest, there must be proof both that the consent was voluntary and that it was not the product of the illegal detention.").

[15] Brown, 372 S.E.2d at 516.

[16] See Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (citations omitted) ("Once the purpose of [the initial] stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."); see also U.S. v. Jones, 234 F.3d 234, 241 (5th Cir. 2000) ("The basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle. Accordingly, the officers should have ended the detention and allowed the defendants to leave. And the failure to release the defendants violated the Fourth Amendment.").

standing alone, did not create a suspicion of criminal behavior,[17] the "stories" the Respondents told were not so inconsistent as to indicate criminal activity, and the absence of luggage in the back-seat area of the Respondents' automobile provided no basis for a suspicion of a crime particularly where the trunk, the usual place for luggage, "was filled" with suitcases. These matters and what weight to give them related solely to questions of fact singularly committed to the trial court's discretion.[18] Regarding the presence of air fresheners in the car, we read the trial court's order as saying it found no evidence the car contained them in the first place.

The evidence also supports the trial court's finding that Rivera's consent to search the vehicle was invalid as the product of an unlawful detention. The record demonstrates a minimal amount of time passed between the illegal detention and the ensuing consent,[19] there were no intervening circumstances, and, as stated above, Lane's actions in prolonging the detention had no legal basis.[20] [21]

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[17] See U.S. v. Portillo-Aguirre, 311 F.3d 647, 656 n. 49 (5th Cir. 2002).

[18] See Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995) (holding an appellate court cannot weigh the evidence in a law case).

[19] The trial court found Lane stopped Rivera's vehicle at 6:55 p.m. At 7:05 p.m., Lane advised Rivera he would receive a warning ticket. Lane requested permission to search the vehicle at 7:06 p.m., and Rivera consented at that time.

[20] See Brown, 372 S.E.2d at 516 (finding the defendant's consent to search his vehicle was invalid where there was no significant lapse of time between the unlawful detention and the consent, no intervening circumstances dissipated the effect of the unlawful detention and the officer's conduct had no arguable legal basis).

[21] The dissent would find consent was obtained prior to any unlawful detention because Lane had not yet issued the warning citation and returned Rivera's driver's license and registration documents. The record, however, indicates the citation was never issued, at least during the stop. In fact, Lane

AFFIRMED.

CURETON, A.J., concurs. PIEPER, J., dissents in a separate opinion.

PIEPER, J., dissenting: I respectfully dissent. The learned trial judge was very thorough in his analysis and I believe all facets of the law were considered. I also recognize the analysis of the majority presents a close question. However, unlike the majority, I would find that the question of whether the purpose of the stop has been completed is a mixed question of law and fact. The moment at which a traffic stop concludes is often a difficult legal question. State v. Williams, 351 S.C. 591, 600-01, 571 S.E.2d 703, 708-09 (Ct. App. 2002). Since the officer had not yet completed and issued the warning ticket and had not yet even returned the driver's license/registration documents, I would find that consent was obtained prior to any unlawful detention. See United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) ("The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose." "[O]nce the driver has demonstrated that he is entitled to operate his vehicle, and the police officer has issued the requisite warning or ticket, the driver must be allowed to proceed on his way.") (emphasis added) (internal citations omitted); see also Williams, 351 S.C. at 598, 571 S.E.2d at 707.

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testified, "If I would have gave [sic] it to him, I would have put it in his property at the jail."

Applying the dissent's reasoning to this case, one could argue the lawful traffic stop continued until Rivera received his property after being released from jail. Although we find the issuance of a citation and the return of a driver's license and registration are factors the trial court may consider in determining at what point the purpose of a lawful stop ends and the stop becomes unlawful, such factors are not determinative.

Notwithstanding, "[o]nce the underlying basis for the initial traffic stop has concluded, any further detention for questioning is not automatically unconstitutional." State v. Tindall, 379, S.C. 304, 310, 665 S.E.2d 188, 192 (Ct. App. 2008). I disagree with the majority's response and concern that acceptance of the analysis in this dissent would lead to an argument that the traffic stop arguably continued until Rivera received his property after being released from jail. I would distinguish this routine traffic stop situation from a situation where a suspect has been arrested and placed in jail. Here, I would not find the consent rendered involuntary due to coercion, duress, or some improper means. Thus, since voluntary consent was obtained during a lawful detention, I would reverse the suppression of the State's evidence and remand the case for trial.