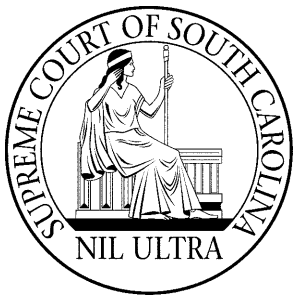

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36
September 7, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Ambulatory Surgery Center Association; Ambulatory Surgery Center of Spartanburg, LLC; Blue Ridge Surgery Center; Low Country Orthopedics & Sports Medicine, LLC; Lowcountry Surgery Center, LLC; Midland Orthopaedics Surgery Center, LLC; Moore Orthopaedic Clinic Outpatient Surgery Center, LLC; Surgery Center at Pelham, LLC; Ocean Ambulatory Surgery Center; Upstate Surgery Center, L.L.C., Respondents/Appellants,

v.

The South Carolina Workers' Compensation Commission, Appellant/Respondent.

Appeal From Richland County
John M. Milling, Circuit Court Judge

Opinion No. 26875
Heard February 16, 2010 – Filed September 7, 2010

AFFIRMED IN PART AND REVERSED IN PART

William H. Davidson, II and Kenneth P. Woodington, Davidson & Lindemann, of Columbia, for Appellant-Respondent.

Steven W. Hamm and C. Jo Anne Wessinger Hill, of Richardson, Plowden & Robinson, of Columbia, for Respondents-Appellants.

JUSTICE BEATTY: In this cross-appeal, we consider the central question of whether the South Carolina Workers' Compensation Commission ("the Commission") was required to promulgate a new regulation in order to change the fee payment schedule for ambulatory care centers. Because we find the Commission's actions were specifically authorized by an extant regulation and did not implicate the requisite private right to warrant due process protections, we reverse the portion of the circuit court's order finding that a new regulation was necessary to effectuate the Commission's change to the fee payment schedule. Accordingly, we affirm in part and reverse in part.

I. FACTUAL/PROCEDURAL BACKGROUND

In this action, several ambulatory surgery centers and their trade association (collectively "Surgery Centers") challenged the revised schedule for maximum allowable payments to outpatient medical providers approved by the Commission.

Under the South Carolina Workers' Compensation Act, the medical fees charged claimants by physicians and hospitals are subject to the submission and approval by the Commission. S.C. Code Ann. § 42-15-90 (1985).[1] The purpose of fee payment schedules is for medical cost

[1] Section 42-15-90 provides in relevant part:

> Fees for attorneys and physicians and charges of hospitals for services under this title shall be subject to the approval of the Commission; but no

containment[2] as most employers are required to carry workers' compensation insurance. Id. Medical care providers voluntarily treat workers' compensation patients, but are not required to do so. Although the Commission is authorized by statute to conduct a hearing to review each bill that is submitted, it has instead published schedules listing the maximum allowable payment. If the amount to be paid is under the cap, the Commission does not conduct a review. Id.

The Commission currently publishes three schedules of maximum allowable payments: (1) Payments for Physicians' Services, known as the Medical Services Provider Manual, first published in 1953; (2) Payments for Inpatient Hospital Services, first published in 1984; and (3) Payments for Outpatient Services, including those services provided by Surgery Centers, first published in 1997.

In 1997, the Commission also revised its regulations to reflect certain changes to the way the maximum allowable payment schedules would operate. Regulation 67-1304, the regulation for hospital outpatient services and ambulatory surgical centers, states:

> physician or hospital shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Commission in connection with the case.

S.C. Code Ann. § 42-15-90 (1985). The approval process is outlined in 25A S.C. Code Ann. Regs. 67-1305 (Supp. 2009), which provides that a fee dispute between a medical provider and an employer or insurance carrier is referred to the Commission's medical division for final resolution. Any policies or procedures implementing the provisions of section 42-15-90 are governed by the South Carolina Administrative Procedures Act. S.C. Code Ann. § 42-3-185 (1985).

[2] In terms of medical cost containment, the General Assembly has provided that medical costs should be limited to reasonable costs. See S.C. Code Ann. § 42-15-70 (1985) ("The pecuniary liability of the employer for medical, surgical and hospital service or other treatment required, when ordered by the Commission, shall be limited to such charges as prevail in the community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person . . . .").

> A. The Commission shall develop a prospective payment system for outpatient hospital services and services rendered by ambulatory surgical centers.
>
> B. Until such time as the prospective payment system is operational the payments for hospital outpatient services and ambulatory surgical centers shall be set by the Commission based on a discount to the provider's usual and customary charge.

25A S.C. Code Ann. Regs. 67-1304 (Supp. 2009) (emphasis added).

The Commission set the interim discount amount at 12.1 percent during a Commission business meeting in 1997, rather than by regulation. As a result, all outpatient bills would be discounted 12.1 percent and payment would be made at an amount no higher than 87.9 percent of the charged amount.

In November 2004, the Commission convened its Hospital Advisory Committee (Advisory Committee) to discuss, among other things, the establishment of a new schedule of maximum allowable payments for hospital outpatient services and ambulatory surgical centers pursuant to Regulation 67-1304(A), to replace the interim discount amount adopted in 1997. The Advisory Committee met six times over an eighteen-month period. An additional subcommittee was formed and met twice more to fully collect and analyze data related to the schedule.[3]

On June 19, 2006, the Advisory Committee issued its report, recommending revisions to the existing schedules for payments. The Advisory Committee recommended the maximum allowable payments be no

[3] To a limited extent, articles about the issues and the process were published in the following periodicals: (1) the Winter 2004 and 2005 editions of Workers' Comp Notes, a publication of the South Carolina Workers' Compensation Educational Association; (2) the April 2005 Commission Update; and (3) the State Register that was published in April 2006.

more than 140 percent of the applicable Medicare payment, i.e., the cap would be equal to what Medicare would pay out, plus 40 percent. Subsequently, in the course of a Full Commission business meeting, the Commission adopted the Advisory Committee's recommended schedules with an effective start date of October 1, 2006.

On September 29, 2006, Surgery Centers filed this action challenging the Commission's revised schedule for maximum allowable medical payments under the Administrative Procedures Act (APA)[4] and on due process grounds. In conjunction, Surgery Centers filed a motion to restrain and enjoin the Commission *pendente lite* from instituting the revised schedule. Following a hearing, a circuit court judge granted Surgery Centers' motion for a preliminary injunction; thus, the Commission was ordered to maintain the pre-existing payment schedule pending a determination of the merits of Surgery Centers' original suit.

The Commission appealed and filed a petition for *supersedeas* with the Court of Appeals to stay the *pendente lite* injunction. A single judge denied this petition. The Commission then sought full panel review of the denial of its request for *supersedeas*. After the single judge's decision was affirmed by the full panel, the Commission withdrew its appeal of the circuit court's enjoinment of the new payment schedule. In turn, the Court of Appeals dismissed the appeal.

Subsequently, both parties filed motions for summary judgment. At the hearing on these motions, the parties agreed the underlying facts were not in dispute and the matter presented solely a question of law to be decided by the circuit court.

In prefacing its order, the circuit court stated the "[t]he question before the Court is whether or not the Commission followed the proper procedures established by the laws of the State of South Carolina or complied with the due process clause of the South Carolina Constitution." In answering this

[4] S.C. Code Ann. §§ 1-23-10 to -660 (2005 & Supp. 2009).

question, the circuit court granted each party's motion for summary judgment in part and denied it in part.

Specifically, the court held section 1-23-310(3) of the South Carolina Code, defining a "contested case" that requires a hearing, was inapplicable for several reasons.[5] First, the court noted that the APA "does not itself create the right to a hearing, but instead only provides for procedures to be followed when some other provision of law creates a right to a hearing." Because Surgery Centers had no right required by law, the court concluded the APA did not mandate that Surgery Centers be afforded a hearing prior to the Commission's adoption of the revised payment schedule. Secondly, given the Commission's actions did not involve "rate making," the court concluded there was no "contested case" as that term is used under the APA.

Despite this holding, the court found the Commission was required to promulgate a new regulation that would be subject to the review and approval of the General Assembly. In reaching this conclusion, the court reasoned "the Constitution provides some requirement of notice and an opportunity to be heard in this matter, and that the Commission must adopt a regulation in accordance with the APA." Thus, the court found "[s]uch regulation will provide the type of due process rights required by law and to which [Surgery Centers] are entitled." Furthermore, the court concluded that "a specific regulation was required in order to implement changes to R. 67-1304." The court explained that "[s]uch regulation would contain a defined procedure whereby the methodology for these payments would be established as has been done in Regulations 67-1302 and 1303."

The court, however, concluded that Surgery Centers "do not have any 'property' interest or rights in the payment schedule established by the Commission and are not entitled to any due process rights on those grounds." In so ruling, the court rejected Surgery Centers' contention that a property

[5] Section 1-23-310(3) defines a "contested case" as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." S.C. Code Ann. § 1-23-310(3) (2005).

right was established by the mere fact the revised payment schedule could potentially reduce its earnings by 4.4 million dollars. Notwithstanding this ruling, the court found Surgery Centers would be "afforded appropriate due process protections by the adoption of a proper regulation relating to the change of the payment schedule affecting [Surgery Centers]."

Following the issuance of this order, both parties filed motions for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. With the exception of the correction of a scrivener's error, the court denied each party's motion in full.

Both parties appealed the circuit court's order to the Court of Appeals. Upon request of the parties, this Court certified the appeal from the Court of Appeals pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. DISCUSSION

A.

Although Surgery Centers articulate several issues, they essentially argue the circuit court erred in concluding that they were not entitled to due process protections concerning the implementation of the Commission's revised payment schedule. Specifically, Surgery Centers claim the Commission's actions constituted a "contested case" under the APA, thus, warranting the APA hearing procedures. Additionally, Surgery Centers assert they have a substantive property interest in the payment schedule process and that, in turn, Article I, Section 22 of the South Carolina Constitution required the Commission to give notice and provide an opportunity to be heard before adopting the Advisory Committee's recommended schedules.

In contrast, the Commission contends the circuit court erred in holding Surgery Centers had a due process right to have any revision of the payment schedules promulgated in a regulation, while at the same time holding

Surgery Centers had no property interest in the payment schedule established by the Commission.

For reasons that will be more thoroughly explained, we agree with the circuit court's findings that Surgery Centers did not establish a right to a "contested case" hearing under the APA and did not have the requisite property interest to invoke our state's constitutional due process protections. We disagree, however, with the circuit court's fundamental holding that the Commission was required to promulgate a new regulation in order to change the fee payment schedule.

B.

Initially, we believe the circuit court correctly held Surgery Centers did not establish the necessary independent right to a "contested case" under section 1-23-310(3) of the APA.

Significantly, Surgery Centers failed to set forth any specific argument establishing that the Commission's actions fell within the ambit of criteria required for a "contested case." Although they reference the term in their brief, Surgery Centers do not identify the necessary South Carolina or Federal law that would warrant their entitlement to a "contested case" hearing. See Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987) (recognizing that a "contested case" does not exist where there is no requirement deriving from South Carolina or Federal law that there be an opportunity for a hearing).

Furthermore, we do not believe nor do Surgery Centers expressly argue that the Commission's actions involved "ratemaking" or "price fixing" as required by section 1-23-310(3), which defines a "contested case" as "a proceeding including, but not restricted to, ratemaking, price fixing." S.C. Code Ann. § 1-23-310(3) (2005). As the circuit court correctly noted, the "Commission does not determine how much a regulated utility must charge

to its customers, or conversely, how much the utility's customers must pay." Moreover, unlike in public utility or regulated industry cases, there is no such statute in the instant case that clearly creates a requirement for a hearing. Cf. S.C. Code Ann. § 58-27-870(A) (Supp. 2009) (providing that Public Service Commission "must hold a public hearing concerning the lawfulness or reasonableness of the proposed changes" in electric rates); S.C. Code Ann. § 58-9-540(A) (Supp. 2009) (stating Public Service Commission "shall . . . hold a hearing concerning the lawfulness or reasonableness of the [telephone utility] rate or rates").

Our conclusion, however, is not dispositive of this appeal. Instead, we must still consider whether Surgery Centers, apart from the "contested case" provision of the APA, were entitled to notice and an opportunity to be heard.

C.

Unlike the circuit court, we do not believe the Commission was required to promulgate a new regulation and provide Surgery Centers an opportunity to be heard before adopting the Advisory Committee's recommended schedules. Rather, we find the Commission's actions were specifically authorized by existing Regulation 67-1304 and did not implicate the requisite private right to warrant the due process protections of Article I, Section 22 of the South Carolina Constitution.

In reaching this conclusion we must examine Regulation 67-1304 by utilizing the well-established rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

As a threshold matter, we note that Surgery Centers have never asserted that Regulation 67-1304 was promulgated in violation of their due process rights. Thus, this extant regulation is controlling as to the authority allocated to the Commission.

Based on our review of this regulation, the plain and unambiguous terms authorize the Commission to establish a fee payment system applicable to Surgery Centers. Significantly, subsection A of the regulation, states "The Commission shall develop a prospective payment system." 25A S.C. Code Ann. Regs. 67-1304 (Supp. 2009) (emphasis added). This legislatively-endorsed mandate permits the Commission to act without the need for additional approval.

Furthermore, we find the circuit court's reliance on section 1-23-110 of the South Carolina Code to be misplaced. In its order, the circuit court concluded that section 1-23-110 "establishes a requirement for a public hearing for proposed regulations." Based on this conclusion, the circuit court determined that "a specific regulation was required in order to implement changes to R. 67-1304."

We do not interpret section 1-23-110 as being the source for which Surgery Centers have a right to have a regulation promulgated. Rather, the statute merely provides for the procedures that must be followed whenever a regulation is otherwise mandated. Based on our reading of the statute, we discern nothing that establishes when a regulation is required for changes to the Commission's fee payment schedule for ambulatory surgery centers.[6]

[6] Although not relied upon by the circuit court, we likewise reject Surgery Centers' contention that section 42-3-30 of the South Carolina Code required the Commission to promulgate a regulation in this instance. Section 42-3-30 provides that the Commission "shall promulgate all regulations relating to the administration of the workers' compensation laws of this State necessary to implement the provisions of this title and consistent therewith." S.C. Code Ann. § 42-3-30 (1985). We believe this general code provision merely represents the General Assembly's intent to identify the Commission as the sole authority for the administration of workers' compensation law. Given the absence of a specific statutory provision, we decline to read into section 42-3-30 a

Finally, we hold the protections provided by our state Constitution are inapplicable in the instant case. Under our state Constitution, due process in the administrative context has been established by Article I, Section 22.[7] This section provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. art. I, § 22 (emphasis added).

In explaining this provision, we have stated, "[i]n recognition of the increasing number of governmental powers delegated to administrative agencies, South Carolina Constitution article I, § 22 was added to the 1895 Constitution in 1970 'as a safeguard for the protection of liberty and property of citizens.'" Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997) (quoting Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 21 (1969)).

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requirement that the Commission promulgate a regulation in order to change the fee payment schedule for ambulatory care centers.

[7] In terms of our state's general due process protection, Article I, Section 3 provides:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

S.C. Const. art. I, § 3.

Although our appellate courts have not always used the term "due process rights" when discussing Article I, Section 22, we have consistently indicated that the protections provided under this section are the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions. See, e.g., Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing Article I, Section 22 and stating "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." (citation omitted)); Harbit v. City of Charleston, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) (citing Amendments V and XIV of the United States Constitution and Article I, Section 22 of the South Carolina Constitution and stating "[t]he fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review").

Given the absence of distinction in our jurisprudence, we conclude a traditional due process analysis is required to assess whether the Commission's actions deprived Surgery Centers of constitutionally-protected interests.

Applying this analysis, we hold Surgery Centers have not established the requisite liberty or property interest to invoke the due process protections of Article I, Section 22. Initially, we agree with the circuit court's conclusion that Surgery Centers have no property interest that was implicated by the Commission's revision of the maximum allowable payment schedules. Furthermore, Surgery Centers have not set forth any argument that the result of the Commission's actions implicated a liberty interest. Instead, as we interpret Surgery Centers' argument, they are primarily concerned with receiving future income based on desired future work. The mere desire for future work, however, is not sufficient to constitute a private right.

Moreover, we emphasize that Surgery Centers' decision to provide medical care to workers' compensation claimants is entirely voluntary.

Accordingly, we conclude Surgery Centers have failed to establish any private right that warrants the protections provided in Article I, Section 22. See 16C C.J.S. Constitutional Law § 1516 (2010) ("[A]n interest in property which is protected by due process arises only when there is a legitimate claim of entitlement, as created and defined by independent sources, and a person clearly must have more than an abstract need or desire for it, and the person must have more than a unilateral expectation of it."); see also Am. Soc'y of Cataract & Refractive Surgery v. Thompson, 279 F.3d 447 (7th Cir. 2002) (holding physicians providing Medicare services had no protected property interest in statutory transition formula used to determine practice expense relative value units as a component of a Medicare physician fee schedule); Painter v. Shalala, 97 F.3d 1351 (10th Cir. 1996) (concluding physicians, who voluntarily participated in Medicare program, failed to demonstrate a legitimate property interest in having reimbursement payments calculated in a specific manner).

Our conclusion should not be interpreted as providing the Commission with "unfettered authority" to adjust the reimbursement rate. If Surgery Centers believe that the authorized payment for services rendered is inadequate, they may invoke the due process protections afforded by the Commission. See 25A S.C. Code Ann. Regs. 67-1305 (Supp. 2009) (outlining appellate procedures for when a medical provider disagrees, based on Commission payment policy, with a charge reduction).

Furthermore, to the extent Surgery Centers claim our decision will in essence provide all state agencies with unlimited authority, we find this concern to be unfounded. Given the analysis outlined in the opinion, we emphasize our decision is controlled by specific statutory and regulatory provisions at issue in the instant case. Thus, our holding should not be construed as advocating for state agencies to exceed the authority granted to them by the General Assembly. See Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) ("An administrative agency has only such powers as

have been conferred by law and must act within the authority granted for that purpose."); Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) (stating that "[a]s a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged").

III. CONCLUSION

Based on the foregoing, we affirm the circuit court's findings that Surgery Centers did not establish a right to a "contested case" hearing under the APA and did not have the requisite property interest to invoke our state's constitutional due process protections. We, however, reverse the circuit court's holding that the Commission was required to promulgate a new regulation in order to change the fee payment schedule. In light of our decision, we lift the *pendente lite* order enjoining the Commission from instituting the new payment schedule.

AFFIRMED IN PART AND REVERSED IN PART.

TOAL, C.J. and PLEICONES, J., concur. HEARN, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE HEARN: I respectfully dissent and would affirm the decision of the circuit court. In my opinion, the Workers Compensation Commission (Commission), when changing the reimbursement rate for ambulatory surgery centers in a manner that substantially alters the prior rate, must afford notice and an opportunity to be heard to those affected by the change. The proper means to achieve notice and an opportunity to be heard is by requiring these revisions to be promulgated through regulations submitted to the General Assembly for its approval, and I would require the Commission to do so in this case.

Although both sides agree this issue should be decided as a matter of law, both disagree with the decision of the circuit court. Surgery Centers argue the circuit court erred in finding they did not have the right to a contested case under Section 1-23-310(3).[8] Conversely, the Commission contends the circuit court erred in holding Surgery Centers had a right to have any revision of the schedules promulgated in a regulation, while at the same time holding Surgery Centers had no property interest in the payment schedule established by the Commission. Unlike the majority, I would find no error, because I believe the right to notice and a hearing claimed by Surgery Centers does not hinge on the existence of a liberty or property interest.

Section 42-3-30 of the South Carolina Code (1985) requires the Commission to promulgate regulations relating to the administration of the

[8] I agree with the majority that the circuit court correctly held Surgery Centers did not establish the necessary independent right to a contested case under section 1-23-310(3). *See Triska v. Dep't of Health and Envtl. Control*, 292 S.C. 190, 196-97, 355 S.E.2d 531, 534 (1987) (stating a contested case does not exist where there is no requirement deriving from South Carolina or Federal law that there be an opportunity for a hearing). However, that ruling does not foreclose Surgery Centers' right to notice and an opportunity to be heard on other grounds, as set forth herein. *See Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991) (finding parties are entitled to notice and an opportunity to be heard, apart from the APA, under article 1, section 22 of our Constitution).

workers' compensation laws of this State. Section 1-23-110 of the South Carolina Code (2005 & Supp. 2009) provides that, before the Commission promulgates a regulation, it must publicize notice of the change, detailing an address where interested persons may submit written comments before the regulations are tendered to the General Assembly. Thus, generally speaking, section 42-3-30 requires the Commission to promulgate regulations for matters affecting workers' compensation programs in this state, and section 1-23-110 requires the Commission to give notice before promulgating a regulation and provide interested individuals with the opportunity to be heard. Therefore, pursuant to the statutes detailed above, I believe the Commission is required to give notice and provide for an opportunity to be heard before adopting the new schedules contained in the recommendations of the Hospital Advisory Committee.

The Commission maintains, and the majority holds, the necessary regulation authorizing its conduct has already been promulgated in regulation 67-1304. Following this reasoning, the Commission's conduct in commissioning the Advisory Committee to study the situation, then subsequently adopting its recommendations, is simply fulfilling the directive of regulation 67-1304, albeit nine years later. Additionally, the Commission cites the affidavit of its Executive Director, Gary Thibault, wherein he stated that since 1984, "in each case where the Commission has established a new or revised schedule of maximum allowable payments for services, the Commission did so by a vote of the Full Commission at a monthly Business Meeting." The mere fact that this practice has existed, without apparent challenge until today, is, in my opinion, not dispositive of its legitimacy.

Furthermore, "there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (citing *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993); 82 C.J.S. *Statutes* § 316, at 541-42 (1953)). Therefore, absent specific language in regulation 67-1304, or other qualifying statute, that authorizes the Commission to act in the revision of these maximum allowable payment schedules for ambulatory

surgery centers without promulgating a new regulation as provided in sections 42-3-30 and 1-23-110, this Court must presume the General Assembly intended the Commission to promulgate a regulation in this matter. Instead, the majority reads a mandate in favor of the Commission that does not expressly exist within the plain and unambiguous terms of regulation 67-1304: instead of adhering to the general rule that all changes in the administration of Workers' Compensation must be accomplished through the promulgation of regulations, the majority holds that a legislative directive contained in a prior regulation absolves the Commission in perpetuity from thereafter complying with an express statute. Importantly, although regulations authorized and adopted by the General Assembly generally have the force of law, a regulation may not alter or add to an existing statute. *See Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995) (stating that insofar as a regulation added a requirement to a statute, the specifications set forth in the statute must prevail). Therefore, even assuming such a "mandate" can be read into regulation 67-1304, it is invalid insofar as it could be interpreted to permit the Commission to act absent promulgation of a regulation under section 42-3-30.

Moreover, article 1, section 22 of the South Carolina Constitution, which was adopted by the General Assembly in 1970, provides: "No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency[9] affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review." Commenting on the basis for the recommended addition of section 22, the Committee authorized to make proposals to change the existing Constitution stated:

> More and more governmental decisions are being made under powers delegated to administrative

[9] The Commission qualifies as an agency under section 1-23-10(1) of the South Carolina Code (2005). (providing an "'[a]gency' or 'State agency' means each state board, commission, department, executive department or officer . . . authorized by law to make regulations or to determine contested cases").

> divisions of State Government. In many cases, the decisions of administrative divisions are more significant than laws enacted by the General Assembly or decisions made by the courts. The Committee agrees with many other constitutional study groups throughout the country that judicial and quasi-judicial decisions of administrative agencies should be consistent with due process of law and complete fairness to the citizen. This provision is recommended as a safeguard for the protection of liberty and property of citizens.

Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 21 (1969).

I agree with the majority that the circuit court correctly found Surgery Centers had no "property" interest that was implicated by the Commission's revision of the maximum allowable payment schedules, in the sense that Surgery Centers had no right to a guaranteed payment schedule at the discount rate of 12.1 percent. In order to determine the effect of Surgery Centers' lack of a cognizable property interest on their entitlement to notice and an opportunity to be heard under article 1, section 22, it is imperative that this Court examine the source of these private rights. While the circuit court, the parties, and the majority by acquiescence, have denominated the rights sought by Surgery Centers as "due process rights," I believe a closer examination reveals the label to be incorrect. In previous cases, this Court has been inconsistent in the manner in which it has labeled rights flowing from article 1, section 22 of our State Constitution. In some cases, we have referred to the guarantees of notice and the right to be heard emanating from article 1, section 22 as "due process rights." *See League of Women Voters of Georgetown County v. Litchfield-by-the-Sea*, 305 S.C. 424, 426-27, 409 S.E.2d 378, 380 (1991) (overruled on specific grounds by *Brown v. S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002); *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998). In other cases, the Court has, without calling them

"due process rights," simply stated article 1, section 22 guarantees "persons the right to notice and an opportunity to be heard by an administrative agency . . . ." *Ross v. Medical Univ. of S.C.*, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997).

I do not think the rights guaranteed under article 1, section 22 are the same as those classically protected under the Due Process Clause of our State and National Constitutions. *See* U.S. Const. amend. XIV § 1; S.C. Const. art. V, § 5 (stating no person shall be deprived of life, liberty, or property without due process of law). Even if the Court has referred to the rights under article 1, section 22 as "due process rights," for claims under section 22, we have neither focused on, nor required the existence of a liberty or property interest, in the sense of a prerequisite to the Court's analysis of claims under the Due Process Clause. *Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991); *League of Women Voters of Georgetown County*, 305 S.C. at 426-27, 409 S.E.2d at 380; *Ross*, 328 S.C. at 68, 492 S.E.2d at 71; *Garris*, 333 S.C. at 444, 511 S.E.2d at 54.

As stated above, I recognize the right to notice and an opportunity to be heard are typically identifiable with rights incident to the Due Process Clause of the Fourteenth Amendment. *See Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007) ("Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses."). However, in this case, the right of Surgery Centers to notice and an opportunity to be heard emanates, not from the Due Process Clause, but from article 1, section 22 of our State Constitution and from section 1-23-110. Therefore, because the rights in this case do not flow from the Due Process Clause, I believe it unnecessary, as the majority has done, to employ a traditional due process analysis to determine whether Surgery Centers' constitutionally protected interests have been deprived. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006) (stating in order for due process rights to attach, a party must show that he

was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law).

Instead, I would look solely to the process through which the Commission enacted its new prospective payment system for Surgery Centers. In my view, the Commission's actions in forming the Advisory Committee to study, develop, and propose a new prospective payment system for outpatient hospital services and the services rendered by ambulatory surgical centers, and the Commission's subsequent adoption of the Advisory Committee's proposal, all without the proper notice and opportunity to be heard by Surgery Centers, constitute *exactly* the sort of quasi judicial decision section 22 was intended to address.

Finally, I am not persuaded that the General Assembly intended to provide the Commission with unfettered authority to adjust this reimbursement rate in perpetuity without affording the safeguards which attach to provisions promulgated within the framework of the regulatory process. Consequently, I would vote to affirm the circuit court's determination that Surgery Centers are entitled to the proper notice and opportunity to be heard under section 1-23-110. Under out State's jurisprudence, should the Commission want to establish a new prospective payment system it should do so by promulgating a new regulation subject to the participation of interested parties under sections 42-3-30 and 1-23-110, and the subsequent adoption by the General Assembly.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richland
County Magistrate's Court,
Fifth Judicial Circuit Solicitor
W. Barney Giese, Petitioner.

ORIGINAL JURISDICTION

Opinion No. 26876
Heard January 5, 2010 – Filed September 7, 2010

PRACTICE DECLARED UNAUTHORIZED

W. Barney Giese, Solicitor, and Aaron S. Jophlin, Assistant Solicitor, both of Columbia, for Petitioner.

Douglas S. Strickler, Chief Public Defender, Chris S. Truluck, Assistant Public Defender, and Charlie W. Cochran, Assistant Public Defender, all of Columbia, for Respondent.

JUSTICE PLEICONES: Petitioner, Fifth Judicial Circuit Solicitor W. Barney Giese, filed this declaratory judgment action in the Court's original jurisdiction seeking a determination whether it is the unauthorized practice of law for a non-lawyer to represent a business as prosecutor of a

criminal misdemeanor charge, other than a traffic offense, in magistrate's court. We hold that such action constitutes the unauthorized practice of law.

BACKGROUND

In May 2009, two cases involving the prosecution and recovery of worthless checks were called in Richland County magistrate's court. In each case, a non-lawyer field agent from the local business purported to act as prosecutor and both defendants were represented by the Richland County Public Defender's Office. At the call of each case, defense counsel moved to dismiss for lack of prosecution, arguing that the practice of representative agents proceeding against criminal defendants in magistrate's court constitutes the unauthorized practice of law. Without proceeding to trial, the trial judge took the motions under advisement, and thereafter granted a continuance in order to notify Petitioner, who then filed this action. This Court granted Petitioner's request to hear the matter in its original jurisdiction.

ISSUE

Is it the unauthorized practice of law for a non-lawyer representing a business to prosecute a criminal misdemeanor charge, other than a traffic offense, in magistrate's court?

DISCUSSION

The unique nature of criminal law and the corresponding unique role of the prosecutor illustrate the danger in allowing private prosecutions. Black's Law Dictionary defines "criminal law" as "[t]he body of law defining offenses *against the community at large*, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders." Black's Law Dictionary 403 (8th ed. 2004) (emphasis added). As the Supreme Court of the United States has noted, "'The purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the *public interest* in the enforcement of the criminal law

while at the same time safeguarding the rights of the individual defendant." Standefer v. United States, 447 U.S. 10, 25, 100 S.Ct. 1999, 2008, 64 L.Ed.2d 689, 701 (1980), citing United States v. Standefer, 610 F.2d 1076, 1093 (3d Cir. 1979) (emphasis added). Because a prosecutor is an attorney representing community, rather than private interests, the prosecutor's role is very different from that of a civil attorney:

> A solicitor should bear in mind that he is an officer of the court, who represents all the people, including [the] accused, and [he] occupies a quasi-judicial position, whose sanctions and traditions he should preserve. It is his duty to see that justice is done. He must see that no conviction takes place except in strict conformity with the law, and that [the] accused is not deprived of any constitutional rights or privileges. However strong the prosecuting attorney's belief may be of the prisoner's guilt, it is his duty to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, . . . and not say or do anything which might improperly affect or influence the jury or [the] accused's counsel.[1]

See State v. Rayfield, 369 S.C. 106, 114-15, 631 S.E.2d 244, 248-49 (2006), citing State v. King, 222 S.C. 108, 119, 71 S.E.2d 793, 798 (1952).

In carrying out his duty, the prosecutor independently decides whether to prosecute, decides what evidence to submit to the court, and negotiates the State's position in plea bargaining. See Ex parte Littlefield, 343 S.C. 212, 218, 540 S.E.2d 81, 84 (2000). The South Carolina Constitution, South Carolina statutes and case law place the unfettered discretion to prosecute solely in the prosecutor's hands. See State v. Thrift, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346 (1994), citing S.C. Const. art. V, § 24; S.C. Code Ann. § 17-1-10 (2009). "The importance to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be

[1] See also Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935), for discussion of the role of the United States Attorney.

exercised 'with the highest degree of integrity and impartiality, and with the appearance thereof' cannot easily be overstated." People v. Dehle, 83 Cal.Rptr.3d 461, 465 (Cal. Ct. App. 2008), citing People v. Superior Court, 561 P.2d 1164 (Cal. 1977).

If a private party is permitted to prosecute a criminal action, we can no longer be assured that the powers of the State are employed only for the interest of the community at large. In fact, we can be absolutely certain that the interests of the private party will influence the prosecution, whether the self-interest lies in encouraging payment of a corporation's debt, influencing settlement in a civil suit, or merely seeking vengeance. Petitioner candidly acknowledges in its brief that the non-lawyers are authorized by the companies "to represent their interests" in the criminal proceedings.

We find that allowing prosecution decisions to be made by, or even influenced by, private interests would do irreparable harm to our criminal justice system. At the very least, there is "too much opportunity for abuse and too little motivation for detachment."[2] See State v. Martineau, 808 A.2d 51, 55 (N.H. 2002), Nadeau, J., concurring. Though we certainly understand the practical concerns raised by the dissent, we are confronted with a higher question here. The convenience and fiscal economy of private prosecution may be facially appealing, but we must not embrace them at the expense of fundamental fairness and justice.[3]

Petitioner contends that S.C. Code Ann. § 33-1-103 (2009) "clearly authorizes the conduct in Richland County magistrate's court when

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[2] If the business wishes to be party to the action, it may, through private counsel, seek to assist the solicitor. See State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) ("Private counsel's participation in a trial to assist the solicitor has been sanctioned . . . .").

[3] As the dissent notes, then acting circuit judge John Kittredge in In Re Lexington County Transfer Court acknowledged the limited resources and budgetary constraints faced by solicitors. 334 S.C. 47, 512 S.E.2d 791 (1999). However, Justice Kittredge ultimately concluded that no exception was warranted, despite such important practical considerations.

companies authorize their employees or agents to represent their interests" in criminal magistrate's court. Section 33-1-103 provides that a corporation or partnership may designate an employee or principal to represent it in magistrate's court. S.C. Code Ann. § 33-1-103 (2009). We find this statute merely comports with our case law, which allows for a non-lawyer to represent a corporation in magistrate's court in certain civil actions. See, e.g., State ex rel. Daniel v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939); In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 422 S.E.2d 123 (1992). It does not, as Petitioner contends, authorize such representation in a criminal matter. Moreover, we note that our Constitution vests this Court with the sole authority to regulate the practice of law. S.C. Const. art. V, § 4; S.C. Code Ann. § 40-5-10 (2009).

Petitioner correctly notes that this Court has previously permitted persons other than solicitors to prosecute criminal cases in magistrate's court. See, e.g., State v. Messervy, 258 S.C. 110, 187 S.E.2d 524 (1972); City of Easley v. Cartee, 309 S.C. 420, 424 S.E.2d 491 (1992). Though this Court sanctioned the practices of allowing the arresting South Carolina Highway Patrol officer to prosecute traffic-related offenses and licensed security officers to prosecute misdemeanor cases in magistrate's court, such non-attorneys are law enforcement officers acting in the capacity of public officials and are sworn to uphold the law. See Messervy, 258 S.C. at 112, 187 S.E.2d at 525; Cartee, 309 S.C. at 422, 424 S.E.2d at 491; S.C. Code Ann. § 8-11-20 (2009). Consequently, they act on behalf of the State. See State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997) ("[A]s law enforcement officers, they are charged with the discretionary exercise of the sovereign power. Specifically, they must enforce the 'traffic and other related laws.'"). This classification was essential to the Court's holding in Cartee. Cartee, 309 S.C. at 422, 424 S.E.2d at 491 ("Therefore, *in light of the legislature's extension of law enforcement authority to licensed security officers*, we hold that licensed security officers may prosecute misdemeanor cases in magistrate's or municipal court.") (emphasis added). As a non-lawyer representing a corporation is not a law enforcement officer, we cannot assume that he will act in the interests of the community. Moreover, as a non-lawyer, the representative of the corporation is not bound by professional

ethical restraints. Consequently, the non-lawyer prosecutor not only acts on interests other than those of the community but is also not bound by ethical rules, yet his prosecution may result in the imprisonment of the defendant. See S.C. Code Ann. § 22-3-550 (2007).[4]

The dissent contends that our decision today represents "a marked departure from prior jurisprudence of this Court . . . ." We disagree. On the contrary, we rest our decision on centuries-old principles of law. See 1 W. Blackstone, Commentaries on the Laws of England, 200 (1851) (The king is "the proper person to prosecute for all public offenses and breaches of the peace, being the person injured in the eye of the law."); 1 F. Wharton, Criminal Law § 10, p.11 (11th ed. 1912) ("Penal justice, therefore, is a distinctive prerogative of the State, to be exercised in the service and in the satisfaction of the duty of the State . . . ."); J. Locke, Second Treatise of Civil Government, § 88, p. 55 (1905) ("[E]very man who has entered into civil society, and is become a member of any commonwealth, has thereby quitted his power to punish offences against the law of nature in prosecution of his own private judgment[.] . . . [H]e has given a right to the commonwealth to employ his force for the execution of the judgments of the commonwealth . . . ."); Huntington v. Attrill, 146 U.S. 657, 669, 13 S.Ct. 224, 228, 36 L.Ed. 1123, 1128 (1892) ("Crimes and offenses against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State.").

CONCLUSION

The dignity and might of the State are brought to bear in decisions to prosecute. These decisions must not be made by interested parties. We therefore find that a non-lawyer's representation of a business entity in criminal magistrate's court runs afoul of South Carolina law, is repugnant to our system of justice and constitutes the unauthorized practice of law.

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[4]We acknowledge the differences between magistrate's court and general sessions court, as cited by the dissent, but the forum does not change the criminal nature of the action. The power of prosecution and the might of the criminal justice system must rest solely with the community as a whole.

PRACTICE DECLARED UNAUTHORIZED.

BEATTY and KITTREDGE, JJ., concur. HEARN, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

JUSTICE HEARN: I respectfully dissent. Employing a practical and realistic approach to the analysis of whether or not questionable conduct qualifies as the unauthorized practice of law, as this Court has always endeavored to do, I would hold the representation of business entities by non-lawyer officers, agents, or employees is authorized in criminal magistrate's court proceedings.

Today, in a marked departure from prior jurisprudence of this Court as to what constitutes the practice of law, the majority focuses on the status of the individual presenting evidence rather than on the character of the services rendered, and holds that the role of the business entity's representative in this context is "repugnant to our system of justice." As a pragmatist who is mindful, not only of the purpose behind the magistrate's court system, but also the impact which the majority's decision will have on this State's business community and solicitors' offices, I must disagree.

The Constitution of South Carolina grants this Court the power to regulate the practice of law. S.C. Const. art. V, § 4; *see also* S.C. Code Ann. § 40-5-10 (2001). Rather than attempt a comprehensive definition of the practice of law, we have instead resolved to decide what is and what is not the unauthorized practice of law on a case by case basis. *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 309 S.C. 304, 305-07, 422 S.E.2d 123, 124-25. This issue of what constitutes the unauthorized practice of law has evolved over time. In *State ex rel. Daniel v. Wells*, the Court held a non-lawyer insurance adjuster could not represent a corporation before the South Carolina Industrial Commission. 191 S.C. 468, 5 S.E.2d 181 (1939). Rejecting the argument that a corporation acts through its agents, and was therefore authorized to represent itself, the Court stated: "A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys." *Id.* at 480, 5 S.E.2d at 186 (citation omitted).

In *Unauthorized Practice of Law*, the Court modified the bright line established in *Wells* by holding a non-lawyer, officer, agent, or employee

may represent a business entity in civil magistrate's court. 309 S.C. at 305-06, 422 S.E.2d at 124.[5] The issue presented in this case is whether the Court should now sanction the similar representation of business entities' interests in criminal magistrate's court, a practice which has gone on, unchallenged, and apparently without incident, for years. I would find the practice is authorized, and further modify *Wells* accordingly.

I begin my analysis with an examination of what type of conduct constitutes the practice of law. The United States Supreme Court has defined attorneys at law as "[p]ersons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients . . . ." *Nat'l Sav. Bank of Dist. of Columbia v. Ward*, 100 U.S. 195, 199 (1879); *see also In re Duncan*, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909) (adopting the Supreme Court's definition of an attorney as articulated in *Ward*). In accordance with this definition, we have recognized that the practice of law extends beyond litigation and includes "activities in other fields which entail specialized legal knowledge and ability." *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). However, in determining whether the activity in question constitutes the practice of law, this Court has always focused on the *character* of the services rendered. *Matter of Peeples*, 297 S.C. 36, 41, 374 S.E.2d 674, 677 (1988) (citing *Wells*, 191 S.C. 468, 5 S.E.2d 181 (1939) (stating "[i]t is the *character* of the services rendered . . . which determines whether the acts constitute the practice of law") (emphasis in original)).

As described above, in *Unauthorized Practice of Law*, the Court determined a non-lawyer's representation of a business entity in civil magistrate's court did not constitute the unauthorized practice of law. 309 S.C. at 305-06, 422 S.E.2d at 124. In applying the same rationale used there, I fail to discern any viable reason to treat a non-lawyer's representation of a business entity in criminal magistrate's court any differently. Initially, non-lawyer representatives in civil and criminal magistrate's court perform

[5] Thereafter, in *Renaissance Enterprises*, the Court declined to extend *Wells* to allow a non-lawyer to represent a corporation in the circuit or appellate courts of this State. 334 S.C. at 653, 515 S.E.2d at 259.

identical services. In both settings, non-lawyer representatives are responsible for marshalling and presenting evidence the corporation has against the defendant. The character of these services is more similar to those performed by a fact witness testifying at trial, rather than to services provided by an attorney or a solicitor. Significantly, the compilation, maintenance, and presentation of evidence does *not* require legal analysis or prosecutorial discretion.

Conversely, and I might add in contravention to what was argued by the State, the majority maintains that the effect of a decision authorizing this conduct will encroach upon the prosecutorial power reserved exclusively to solicitors. *See* S.C. Code Ann. § 17-1-10 (2003) (stating a criminal action is prosecuted by the State, as a party, against a person charged with a public offense). However, this Court has previously permitted persons other than solicitors to prosecute criminal cases in magistrate's court. In *State v. Messervy*, the Court upheld the common practice in magistrates' courts of allowing arresting officers of the South Carolina Highway Patrol to prosecute traffic-related offenses without the assistance of a solicitor. 258 S.C. 110, 187 S.E.2d 524 (1972). While in *Messervy* the argument that this practice constituted the unauthorized practice of law was not raised, in *State ex rel. McLeod v. Seaborn*, a declaratory judgment action was brought to challenge the Highway Patrol's practice of assigning supervisory officers to assist new or inexperienced arresting officers in the prosecution of their cases. 270 S.C. 696, 244 S.E.2d 317 (1978). The Court found no distinction between the practice previously permitted in *Messervy* and the procedure challenged in *Seaborn*, and specifically held the practices did not constitute the unauthorized practice of law. *Id.* at 698-99, 244 S.E.2d at 319. Important to the facts presented here, the Court in *Seaborn* noted these individuals did not hold themselves out to the public as attorneys, and their participation rendered "an important service to the public by promoting the prompt and efficient administration of justice." *Id.* at 699, 244 S.E.2d at 319. Admittedly, the analysis was bolstered by the Court's acknowledgment that the arresting or supervisory officers were acting in their official capacities as law enforcement officers and employees of the State in presenting cases before the magistrate's court. *Id.* at 698-99, 244 S.E.2d at 319. The Court

has also held a probation officer acts in his official capacity in the presentation of a probation revocation case on behalf of the state. *See State v. Barlow*, 372 S.C. 534, 539, 643 S.E.2d 682, 685 (2007) (citing *Seaborn*, 270 S.C. 696, 698-99, 244 S.E.2d 317, 319).

The majority's decision today effectively overrules and undermines the continued viability of the Court's longstanding and practical jurisprudence adopted in *Messervy*, *Seaborn*, and *State v. Sossamon*, 298 S.C. 72, 378 S.E.2d 259 (1989), as affirmed in *Unauthorized Practice of Law*. 309 S.C. at 307, 422 S.E.2d at 125. Alluding to *Seaborn*, the majority focuses on the absence of a State actor or representative in the actions in question here. Unlike the majority, however, I would not allow the status of the individual presenting the case to trump the character of the services being rendered because in my view, the non-lawyer's status as a State employee in the earlier trilogy of cases serves as a distinction without a difference. Indeed, the majority's selective reliance on the differences between civil and criminal law, and its corresponding determination that solicitors retain the exclusive jurisdiction to pursue criminal prosecutions, calls into question the continued viability of permitting police officers or their supervisors to prosecute traffic offenses in magistrate's court. The majority does not undertake a practical analysis of the character of the actual services to be provided by non-lawyer agents in criminal magistrate's court as compared to the activities already permitted by this Court in its case law, possibly because there *is* no practical or meaningful difference between the representation of a corporation in civil versus criminal magistrate's courts, insofar as whether the conduct by non-lawyers should be authorized or not.

I believe the majority's strong emphasis on the criminal nature of the proceedings involved misses the mark. According to our Constitution, the Attorney General serves as the State's chief prosecuting officer, with the authority to supervise the prosecution of all criminal cases *in courts of record*. S.C. Const. art. V, § 24 (emphasis added); *cf. State ex rel. McLeod v. Snipes*, 266 S.C. 415, 420, 223 S.E.2d 853, 855 (1976) (recognizing that the duty to actually prosecute criminal cases is performed primarily and almost exclusively by the solicitors except in those situations when a solicitor calls

upon the Attorney General for assistance). Magistrate's court is summary in nature and is not a court of record. *State v. Duncan*, 269 S.C. 510, 514, 238 S.E.2d 205, 207 (1977); *see also* S.C. Code Ann. § 22-3-730 (2007). Furthermore, as discussed by the Court in *In re Lexington County Transfer Court*, the solicitor's office is under no duty to prosecute a case brought under the original jurisdiction of the magistrate's court. 334 S.C. 47, 54, 512 S.E.2d 791, 794 (1999) (citing S.C. Code Ann. § 22-3-545(C) (2007)) (explaining a difference between magistrate's court and the transfer court system established by the General Assembly, wherein cases transferred to the magistrate's court from general sessions court "must be prosecuted by the solicitor's office"). Therefore, contrary to the majority's view, there is no requirement that the Attorney General or a solicitor prosecute criminal misdemeanor charges in magistrate's court.

The majority relies heavily on what it perceives to be the inevitable confluence of self-interest and our criminal justice system. *See supra* ("[W]e can be absolutely certain that the interests of the private party will influence the prosecution . . . ."). It is argued that the State, and by extension the solicitor, prosecutes an individual for a crime in the pursuit of justice alone, while allowing a self-interested party to assume that role would interject issues that would corrupt the integrity of magistrate's courts. While I am mindful of the pitfalls that could potentially accompany the decision to allow representation by non-lawyers in this context, these concerns are, in my view, wholly speculative. Moreover, it is worth noting that whether evidence is presented by a solicitor, an attorney, or a non-lawyer agent, the magistrate judge retains complete control over the pursuit of justice in his or her courtroom. Accordingly, I do not share the majority's apparent lack of confidence that a business-entity's self-representation will somehow undermine magistrate's court system. As noted by the Court in *Messervy*, the practice of allowing non-lawyer participation in magistrate's court is not without its problems; nevertheless, the non-lawyer's conduct is subject to the same level of scrutiny by the magistrate that has heretofore adequately overseen this critical level of our court system. 258 S.C. at 113, 187 S.E.2d at 525.

Furthermore, I believe consideration of the very nature of magistrate's court hits the bulls-eye in terms of whether or not this practice should be sanctioned. Magistrates have exclusive jurisdiction of all criminal cases for which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days. S.C. Code Ann. § 22-3-540 (2007). In addition, magistrates have jurisdiction over all offenses which are subject to: penalties of a fine or forfeiture not exceeding five hundred dollars; imprisonment not exceeding thirty days per offense, or a total of ninety days if sentencing consecutively;[6] and magistrates also have the power to order restitution in an amount not exceeding five thousand dollars. S.C. Code Ann. § 22-3-550 (2007). Rather than by indictment, criminal magistrate's court proceedings are commenced on information under oath, plainly and substantially setting forth the offense charged, after which an arrest warrant is issued. S.C. Code Ann. § 22-3-710 (2007). Additionally, our law provides that where the arrest warrant is signed by non-law enforcement personnel, the person charged is given a courtesy summons notifying him or her of the charge or charges. S.C. Code Ann. § 22-3-330 (Supp. 2009).

One of the purposes of magistrate's court is to dispense with the formalities required of a court of general sessions, allowing for a more expedient and layperson-friendly disposition of certain select grievances and offenses. The fact that the General Assembly has not required magistrates to be attorneys is further indication of its intention to retain the citizen focus of the court. *See* S.C. Code Ann. § 22-1-10 (2007). In short, magistrate's court was created by the General Assembly to be the "peoples' court," a distinction that seems to have been overlooked by the majority in its analysis.

Finally, at the risk of discussing a possible parade of horribles, the practical consequences of the majority's decision should nonetheless be

[6] An exception to the rule that a magistrate may not sentence someone to more than ninety days imprisonment, if sentencing consecutively, does not apply to convictions resulting from violations of Chapter 11 of Title 34, pertaining to fraudulent checks, or violations of section 16-13-110(B)(1) of the South Carolina Code (2003), relating to shoplifting. S.C. Code Ann. § 22-3-550(B) (2007).

examined. This decision will place an additional burden on the South Carolina business community, as well as on the already budget-strained and time-challenged prosecutorial arm of the State. Without the ability to make a cost/benefit analysis of whether to pursue their own claims, corporations may be more willing to pursue prosecution, secure in the knowledge that the burden of prosecuting the claims rests squarely on the shoulders of the solicitor's office. On the other hand, overburdened solicitor's offices may exercise prosecutorial discretion to *not* prosecute these minor cases, which might very well have the end result of businesses refusing to accept checks in payment for merchandise. As discussed by then acting circuit judge, John Kittredge in *Lexington County Transfer Court*, limited resources and budgetary constraints can serve as a valuable consideration in determining whether practices should qualify as an exception to the prohibition against the unauthorized practice of law. 334 S.C. at 53-54, 512 S.E.2d at 794. As a state, we certainly want these and all crimes to be prosecuted; nonetheless, a process that becomes too cumbersome and costly for the State to pursue does not successfully address the problem. Permitting a process whereby business entities can pursue these claims through an agent, in a manner which is cost-effective for both the State and the corporations, yet checked by the integrity of our judicial system, is, in my opinion, a practice which should be sanctioned by this Court.

I would therefore further modify *Wells* today and logically extend our case law to permit a business entity to be represented by a non-lawyer officer, agent, or employee in criminal magistrate's court proceedings. Under my view, businesses would be able to continue the practice which has been going on for years and thus make informed decisions about whether their interests are adequately protected by non-lawyer representatives in magistrate's court, both civil and criminal. Any potential pitfalls in this process would be counterbalanced by the direct control and oversight of the magistrate's courts of this State.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Marlon Rivera, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26877
Heard April 8, 2010 – Filed September 7, 2010

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Robert Mills Ariail, of Greenville, for Petitioner.

Chief Appellate Defender Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, the Court granted a writ of certiorari to review the court of appeals' decision in *State v. Rivera*, Op. No. 2008-UP-187 (S.C. Ct. App. filed March 18, 2008).

FACTS/PROCEDURAL BACKGROUND

At about 12:30 a.m. on July 18, 2005, law enforcement officers were called to the scene of a shooting outside a Greenville, South Carolina night club. Upon arrival, the officers found Wilfredo Solis Monge (Victim), lying on the ground. Victim was transported to the hospital, placed on life support, and later died.

Investigators interviewed witnesses at the scene of the shooting. One witness, Alvaro Fernandez (Fernandez), told police that the shooter, Marlon Rivera (Respondent), was at The Mexicali, a nearby night club. Officers went to The Mexicali with Fernandez, who identified Respondent. Officers arrested Respondent.

Investigation

During the investigation of this matter, Respondent and multiple witnesses gave conflicting and inconsistent statements concerning the events surrounding the shooting of Victim. First, while at the station the night of the shooting, Fernandez told police he saw two men arguing and a third man standing nearby. The third man, according to Fernandez, reached down and grabbed something at his leg. Fernandez heard two shots fired, but did not see who fired the weapon.

Second, Nelson Castro (Castro) told police that Respondent came to his house immediately after the incident and admitted to shooting Victim. Castro said Respondent told him he got in a fight in which he struggled over his gun with the person whom he was fighting. During this struggle, Respondent told Castro, the weapon accidentally discharged, striking an onlooker.

Finally, Respondent gave a confession to police the night of his arrest in which he admitted to shooting Victim. Respondent claimed that Victim harassed him for hanging out with African-Americans, grabbed his shirt, and the two began to fight. Respondent admitted he was mad because Victim harassed him and confessed that he pulled a gun from his pant leg. According to Respondent, he dropped the gun, picked it up, and shot at Victim two times.[1]

Trial

At trial, the State presented its case, including the above evidence. The defense presented several witnesses who told additional, conflicting versions of the events surrounding the shooting of Victim. First, Courtney Robles (Robles) testified that she witnessed a fight between two men that was broken up by a third man. The man who broke up the fight took a gun from one of the men involved, pointed it in the direction of one of the men in the fight, and fired. The bullet, she testified, struck Victim who was an onlooker not

[1] Specifically, Respondent said:

> This guy that I know but is not my friend approached me and asked me why I was hanging around with those black people. He then grabbed my shirt and started pushing me around. We struggled for a little bit. Finally the guy let go of me. I was mad because he hit me. I went to grab my gun but [it] fell down my pant leg. The gun fell on the ground and I grabbed it. I pointed it at him and shot two times. One of my friends said "Ok, you already shot him, let's go." . . . A little while later the police came and arrested me.

involved in the fight. Robles stated that she did not know the identities of the men involved.

Second, Norberto Ortiz (Ortiz) testified on behalf of the defense. Ortiz said that Respondent and Delman Mauricio Arias (Arias) were kicked out of the bar after they became unruly. Once outside, Arias attacked Respondent, who fired his weapon into the ground in order to intimidate Arias. Then, another onlooker took the weapon from Respondent and shot in the direction of Arias. Finally, Respondent regained control of the weapon and fired another shot into the ground. At this time, according to Ortiz, the men realized that Victim, an onlooker, had been shot.

Third, Respondent took the stand and testified in his defense. Contrary to his confession, Respondent testified he shot his weapon into the ground in an attempt to scare Arias, who had attacked him. Further, Respondent stated that a third man grabbed the gun and shot at Arias. Respondent testified he then grabbed the weapon and shot at the ground. Respondent said he only fired the weapon because he wanted to scare Arias away. On cross examination, Respondent admitted he and Arias were simply fighting and he did not think Arias was going to kill him.[2] Respondent did not suffer serious injuries in the fight.

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[2] The following colloquy occurred:

> Prosecution: You didn't think the person you were fighting with was going to kill you, did you?
>
> Respondent: I didn't think . . .
>
> Prosecution: Just fighting?
>
> Respondent: Yes. He was just fighting and he was kicking me.
>
> Prosecution: So just a typical fist fight to start with?

Defense counsel requested a charge on involuntary manslaughter, arguing that the jury could find from the evidence that Respondent lawfully armed himself in self-defense and shot his weapon with no intent of harming anyone. The trial court denied defense counsel's request, questioning the lawfulness with which Respondent was armed.

Respondent was convicted of murder and sentenced to thirty years imprisonment. The court of appeals reversed, finding that the trial court's failure to charge the jury as to involuntary manslaughter was error and prejudiced Respondent. Specifically, the court of appeals found that while there were several inconsistent explanations for the fatal shot, viewing the evidence in the light most favorable to Respondent, Castro's testimony supported a jury finding the weapon discharged during a struggle between Respondent and another party over the weapon. The court of appeals also found that Respondent's admission that he fired the gun towards the ground was evidence of recklessness in the absence of self-defense.

ISSUE

This Court granted a writ of certiorari and the State presents the following issue for review:

> Did the court of appeals err in finding Respondent was entitled to a jury instruction on involuntary manslaughter?

ANALYSIS

The State argues the court of appeals erred because Respondent's brandishing of a weapon was unlawful conduct naturally tending to cause

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> Respondent: He hit me hard. And he just [threw] me to the ground. And he was even on the ground just hitting me some more, kicking me.

death or great bodily harm, thus he was not entitled to a charge on involuntary manslaughter.[3] We agree.

The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001). Where there is evidence from which the jury could infer that the defendant committed a lesser offense, the trial judge must submit the lesser-included offense to the jury. *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004); *State v. Hill*, 315 S.C. 260, 433 S.E.2d 848 (1993).

Involuntary manslaughter is defined as: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. *State v. Mekler*, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008).

Respondent argues that sufficient evidence exists in the record from which a jury could find that Respondent was guilty of the second form of involuntary manslaughter: the unintentional killing of another while

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[3] The State presents three specific arguments in support of its general thesis that the court of appeals erred in finding that Respondent was entitled to a charge on involuntary manslaughter. First, the court of appeals erred because Respondent's brandishing of a weapon was unlawful conduct naturally tending to cause death or great bodily harm. Second, assuming *arguendo* Respondent was lawfully armed, the court of appeals erred because it went too far in "cherry picking" facts from disparate accounts of the incident to synthesize a defense theory that would justify a jury charge on involuntary manslaughter. Third, assuming *arguendo* Respondent was lawfully armed, the court of appeals erred because, under the facts of this case, an intentional firing into the ground would not support involuntary manslaughter. We find no evidence in the record to suggest that Respondent was lawfully armed in self-defense. Thus, the State's second and third arguments are moot.

recklessly engaged in a lawful activity.[4] Respondent argues that he was in lawful possession of a firearm because he was acting in self-defense.[5] However, Respondent admitted at trial he was not in imminent fear of death or serious bodily injury.[6] Thus, the trial judge concluded that Respondent was not acting in self-defense and refused to charge the jury on those grounds. We agree with the trial court's conclusion and find that there is no evidence in the record indicating that Respondent was acting in self-defense.

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[4] Because the death at issue here occurred as a result of the discharge of a firearm, there is no evidence in the record to support a jury charge on the first theory of involuntary manslaughter: the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm.

[5] The elements of self-defense are:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

[6] Contrary to the dissent's suggestion, nothing in the record supports a finding that Rivera armed himself in self-defense.

Thus, Respondent was not entitled to a charge on involuntary manslaughter. *See State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 901 (2006) (finding that, in the absence of self-defense, pointing and presenting a firearm precludes an involuntary manslaughter charge).

CONCLUSION

There is no evidence in the record to support the conclusion that Respondent was lawfully armed, thus we reverse the decision of the court of appeals.

KITTREDGE, J., and Acting Justice James E. Moore, concur. BEATTY, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE BEATTY: I dissent. The majority reverses the opinion of the Court of Appeals which held that the trial court erred in refusing a requested jury instruction on involuntary manslaughter. The majority reasons there is no evidence of self defense; therefore, Rivera did not arm himself lawfully and, as a result, a jury instruction on involuntary manslaughter was not warranted.

The record in this case is replete with testimony that Rivera was the victim of an unprovoked physical attack by Delman Mauricio Arias. The testimony also indicates that although Rivera had the gun on his person he did not present it until after he was beaten, knocked to the ground, and repeatedly kicked. Even then, the gun was unintentionally presented when it fell down Rivera's pant leg and onto the ground resulting in a scramble for the gun between Rivera and Arias. Rivera testified that he got control of the gun and fired it into the ground when Arias continued to advance. Furthermore, in response to the solicitor's question concerning why Rivera pulled the gun, Rivera testified "The truth is that I did it just because I was nervous and because somebody was hitting me, beating me." In my view, there is no question that there is evidence that Rivera lawfully armed himself in self defense.

The majority appears to infer that Rivera had no right to arm himself in self defense because he may not have believed that Arias was going to kill him. I can find no support for this position in our jurisprudence. What a person believes to be the threat level of bodily harm is irrelevant if the actual threat of imminent serious bodily harm is present. It is axiomatic that circumstances indicative of serious bodily harm or the imminent threat thereof yields the right to self defense and the right to arm oneself accordingly. See State v. Slater, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007) ("To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must

show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger." (emphasis added)).

Being repeatedly beaten about the head and body, thrown to the ground, and repeatedly kicked constitute circumstances that give rise to the right to arm oneself in self defense. The law does not require a person to submit to a physical beating and to refrain from defending himself until the beating results in serious injury.

Moreover, the Court of Appeals opined an involuntary manslaughter instruction was required because there was testimony that the gun accidentally fired during a struggle for the gun. Not only is there evidence in the record to support that finding, but this Court's jurisprudence supports an involuntary manslaughter charge on similar facts. See, e.g., State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) (finding the defendant, who was convicted of murder, was entitled to a jury charge on involuntary manslaughter where the defendant was lawfully armed in self-defense, the defendant negligently handled the weapon prior to the shooting, and the defendant and the victim struggled over the weapon); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (holding the trial judge erred in refusing to charge involuntary manslaughter where there was evidence that the defendant did not intentionally discharge the weapon given the defendant claimed he was trying to break up a fight between three women, one of whom was the victim's girlfriend, and the victim charged at the defendant prior to the shooting with his hands behind his back); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) (concluding the defendant, who was convicted of murder, was entitled to an involuntary manslaughter charge where there was evidence from which the jury could have inferred that the defendant was lawfully armed in self-defense given: the defendant, after being attacked and pushed to the ground by the victim and another man, pulled his weapon; the defendant fired twice in the ground, causing both assailants to back away;

and the defendant grabbed the gun and accidentally fired the fatal shot when one of the assailants advanced toward him).

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Linda Mc Company, Inc., Respondent,

v.

James G. Shore and Jan Shore, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lancaster County
The Hon. William T. Moody, Circuit Court Judge
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 26878
Heard February 16, 2010 – Filed September 7, 2010

AFFIRMED AS MODIFIED

John Martin Foster, of Rock Hill, for Petitioners.

James Ross Snell, of Lexington, for Respondent.

CHIEF JUSTICE TOAL: In this case, the Court granted James G. Shore and Jan Shore's (Petitioners) request for a writ of certiorari to review the court of appeals' decision in *Linda Mc Company, Inc. v. Shore*, 375 S.C. 432, 653 S.E.2d 279 (Ct. App. 2007) affirming the trial court's issuance of an order to execute and levy a judgment against Petitioners.

FACTS/PROCEDURAL HISTORY

On December 8, 1994, Petitioners agreed to give The Linda Mc Company, Inc. (Respondent) a judgment by confession as settlement of litigation over unpaid sales commissions. That judgment was entered June 2, 1995,[1] and provided in pertinent part:

> 1. [Petitioners] confess judgment to [Respondent] in the amount of $110,000.00 and hereby authorize the Clerk of Court for Lancaster County, South Carolina, to enter judgment in favor of [Respondent] against [Petitioners], jointly and severally, for such amount, plus such costs and reasonable attorneys' fees incurred by [Respondent] in enforcing the unconditional guaranty, a copy of which is attached hereto as Exhibit 1 (the "Guaranty"). [Petitioners] further waive the service of any summons and complaint praying for such judgment.
>
> 2. [Petitioners] agree that [Respondent] may immediately, by affidavit through its attorneys, set forth the correct amount of this Judgment by adjusting the amount stated above for any credits previously applied by [Respondent], and that [Respondent] may apply to a court of competent jurisdiction for a judgment against [Petitioners], jointly and severally, in the amount of the total sum due and owing hereunder, plus costs and reasonable attorneys' fees incurred by [Respondent] in enforcing the Guaranty, without further notice to [Petitioners] and without further authority from [Petitioners]; provided, however, that in no event may said sum exceed $110,000.00, plus costs and reasonable attorneys' fees

[1] The judgment was subject to execution and levy until June 2, 2005.

> incurred by [Respondent] in enforcing the Guaranty. [Petitioners] authorize the entry of judgment for the amount due and owing as set out in the affidavit, which judgment will continue to bear interest at the highest legal rate permitted by law. The Judgment by Confession is not contingent upon any other considerations or proceedings and the Court is authorized to enter judgment for the amount set forth in the affidavit.

Sometime after the judgment was entered, Petitioners paid Respondent $55,000. On February 20, 2004, Respondent wrote a letter to Petitioners acknowledging an agreement to waive all post-judgment interest if Respondent received the remaining $55,000 before May 7, 2004. Petitioners paid Respondent $26,750 by check dated May 13, 2004.[2]

On July 29, 2004, Respondent filed a petition for supplemental proceedings alleging that Petitioner possessed assets subject to execution on the judgment. Petitioners issued a check to Respondent in the amount of $28,500 on August 3, 2004. On August 9, 2004, the trial court granted Respondent's petition for supplemental proceedings and referred the matter to a special referee.

On October 1, 2004, the special referee conducted a hearing to determine whether Petitioners had any assets that could satisfy the balance of the judgment. Petitioners filed a motion to dismiss under Rule 12(b)(1), SCRCP, alleging the judgment was void. Petitioner's motion was denied and the special referee concluded the judgment was valid and enforceable.

On May 24, 2005, the special referee conducted another hearing at which Petitioners argued the February 20, 2004 agreement was modified by a

[2] The sheriff sought to execute on the judgment, but the execution was returned nulla bona. Nulla bona is "[a] form of return by a sheriff or constable upon an execution when the judgment debtor has no seizable property within the jurisdiction." *Black's Law Dictionary* 1172 (9th ed. 2009).

phone message left by Jan Shore (Jan) to Respondent's attorney such that the parties reached an accord and satisfaction. Jan testified that on May 13, 2004 she called and left a message on Respondent's attorney's answering machine stating she intended to split the remainder of the balance into two payments and "that if there was any problem with that to please call me."[3] In that message she also stated she would pay the balance by the end of next quarter, which would have been July or August. Respondent's attorney testified that he recalled receiving phone calls from Petitioners but did not know what they were about and never called them back.[4]

On June 3, 2005, the special referee issued his report to the circuit court finding Petitioners owed interest outstanding from the entry of the judgment to date, as well as costs and attorneys' fees, and there had been no accord and satisfaction. On that same day, the circuit court issued an order to execute and levy upon assets owned by Petitioners. Petitioners did not raise the matter of the judgment's expiration in the trial court.

Petitioners appealed to the court of appeals, which held: (1) the absence of an affidavit did not render the judgment void; (2) because Petitioners did not argue that S.C. Code Ann. § 15-39-30 (2005) deprived the judgment of active energy to the trial court, that issue was not preserved for appellate review; (3) there was no accord and satisfaction; and (4) because estoppel was not presented to and ruled upon by the trial court, it was not preserved for appellate review. *Linda Mc Company, Inc.*, 375 S.C. at 437-42, 653 S.E.2d at 281-84.[5] This appeal followed.

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[3] The balance was due on May 7, hence the May 13 partial payment and phone message came after the date the balance was to be paid under the February 20, 2004 agreement.

[4] He testified that his secretary would check and log his messages, but often did not include the substance of the message.

[5] The court of appeals affirmed the circuit court.

ISSUES

I. Was the filing of the judgment void because Respondent failed to follow the terms of the parties' agreement to fix the amount of the judgment?

II. Does section 15-39-30 deprive the judgment of active energy?

III. Was there an accord and satisfaction?

IV. Should Respondent be estopped from arguing that there was no accord agreement because it did not respond to the phone message?

V. Did the expiration of the judgment render it and any supplemental proceedings to it moot?

VI. Did the expiration of the judgment deprive the circuit court of jurisdiction to proceed with supplemental proceedings or execution?

VII. Did the court of appeals decision establish an unworkable rule of procedure?

STANDARD OF REVIEW

"The question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007) (citations omitted). "The issue of interpretation of a statute is a question of law for the court." *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) (citation omitted). An appellate court may decide questions of law with no particular deference to the trial court. *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

LAW/ANALYSIS

I. Terms of the Parties' Agreement

Petitioners argue Respondent failed to follow the terms of the parties' agreement to fix the amount of the judgment. Thus, its filing was void and the court's actions flowing from that filing are without jurisdiction. We disagree.

S.C. Code Ann. § 15-35-360 (2005) states:

> Before a judgment by confession shall be entered a statement in writing must be made and signed by the defendant and verified by his oath to the following effect:
> (1) It must state the amount for which judgment may be entered and authorize the entry of judgment therefor;
> (2) If it be for the money due or to become due, it must state concisely the facts out of which it arose and must show that the sum confessed therefor is justly due or to become due; and
> (3) If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and must show that the sum confessed therefor does not exceed the liability.

Rule 60(b)(4), SCRCP provides the court may relieve a party or his legal representative from a final judgment, order, or proceeding if the judgment is void. "The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) (citations omitted).

Petitioners contend the lack of an affidavit from Respondent setting forth the exact amount due under the judgment renders the judgment void.[6] However, the language pertaining to the affidavit in the judgment is permissive and not mandatory. It states an affidavit setting forth the correct amount of the judgment "may" be filed by Respondent. The judgment complies with the statutory requirements of section 15-35-360 because it was made in writing, signed by Petitioners, and verified by their oath. Moreover, the lack of an affidavit does not render the judgment void under Rule 60, SCRCP, because the absence of an affidavit has no bearing on the subject matter jurisdiction of the court. Hence, because the judgment satisfies section 15-35-360 and the entrance of an affidavit was permissive and not mandatory, the court of appeals correctly held the judgment was not invalid for lack of an affidavit.

II. Section 15-39-30

Petitioners argue section 15-39-30 deprives the judgment of active energy and execution may not issue thereon because ten years have passed since the filing of the judgment. We disagree.

The court of appeals held this argument was not presented to the trial court and was therefore not preserved for appellate review. *Linda Mc Company, Inc.*, 375 S.C. at 438, 653 S.E.2d at 282. In reaching this conclusion the court of appeals found "our supreme court construes the ten-year time limit on judgments in section 15-39-30 as a statute of limitations." *Id.* at 440, 653 S.E.2d at 283. Moreover, the court of appeals noted Petitioners had the opportunity to raise the defense in a motion to amend their pleadings or a motion to alter, amend, or vacate and did not do so. *Id.* at 439, 653 S.E.2d at 282. In reaching this conclusion the court of appeals relied on *LaRosa v. Johnston*, 328 S.C. 293, 493 S.E.2d 100 (Ct. App. 1997), in which the debtor did assert the statutory defense as it became available by way of a motion to alter. Because the issue was preserved in that case, the court of appeals reversed the court below and held the judgment expired seven days

[6] Petitioners argue that the judgment required Respondent to submit an affidavit setting forth the exact amount due under the judgment.

before a master's order was filed compelling payment of LaRosa's judgment. *LaRosa*, 328 S.C. at 297, 493 S.E.2d at 102. Thus, the judgment expired and could not be enforced. It is clear from the court of appeals' holding in the present case that if Petitioners had filed a motion to alter, amend, and vacate in the trial court, its decision would have favored Petitioners. While the proper interpretation of section 15-39-30 will have no impact on the present case's outcome because Petitioners lost on issue preservation in the court of appeals, it will have an impact on future litigants.

Section 15-39-30 states:

> Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

In *Hardee v. Lynch*, 212 S.C. 6, 46 S.E.2d 179 (1948), this Court dismissed the argument that the statutory period in which an execution may issue served as a statute of limitations, which would be considered waived unless pleaded. The Court in that case stated:

> In order for a law to be a statute of limitations, it must contain within itself a specific statement limiting the time within which an action is to be brought. . . . [The statute at issue] provides no limitation period, but completely destroys any right of action upon judgments. The logical result of the [statute] was to utterly extinguish a judgment after the expiration of ten years from the date of entry.

Hardee, 212 S.C. at 16-17, 46 S.E.2d at 183. Therefore, the court of appeals in this case committed error when it found section 15-39-30 is a statute of limitations.

However, the Court in *Hardee* also stated our state's statutes "clearly evince the legislative purpose to nullify the effective force of a judgment after ten years, unless revived, or suit thereon be brought before the expiration of the period allowed by law." *Id.* at 14, 46 S.E.2d at 182; *see also Hughes v. Slater*, 214 S.C. 305, 312, 52 S.E.2d 419, 422 (1949) (indicating filing an action preserves lien even though statutory period expires while the matter is pending). *But see Garrison v. Owens*, 258 S.C. 442, 446-47, 189 S.E.2d 31, 33 (1972) ("A judgment lien is purely statutory, its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried.").[7] Hence, while section 15-39-30 is not a statute of limitations it operates like a statute of limitations under the facts presented here. Moreover, as long as a party takes steps within the ten year period to enforce the judgment, such as bringing an action to enforce a judgment or filing supplementary proceedings, the active energy of the judgment will last until the conclusion of those proceedings even if the final disposition occurs after ten years. To hold otherwise would put those trying to enforce their judgments at the mercy of the court system to conclude the matter within the ten-year period.[8]

In this case, the judgment was entered June 2, 1995 and the order was issued June 3, 2005. While the order came after the ten-year period, a petition for supplemental proceedings was filed before the ten-year period expired. Therefore, the judgment had active energy on June 3, 2005 because that order was the result of the supplemental proceedings filed during the ten-year period. This result renders the court of appeals application of issue preservation in this case moot.

In conclusion, section 15-39-30 is not a statute of limitations but it does operate similar to one under these factual circumstances. Furthermore, if a

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[7] The better and more equitable approach is that taken in *Hardee*. The *Garrison* approach produces harsh results for those seeking to enforce judgments.

[8] *LaRosa* and *Garrison* are overruled to the extent they are inconsistent with this opinion.

party takes action to enforce a judgment within the ten-year statutory period of active energy, the resulting order will be effective even if issued after the ten-year period has expired. Hence, regarding this issue the decision of the court of appeals should be affirmed as modified.

III. Accord and Satisfaction

Petitioner contends the court of appeals erred in affirming the special referee's decision that there was no accord and satisfaction. We disagree.

"In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997) (citation omitted). The elements of an accord and satisfaction are (1) an agreement between the parties to settle a dispute and (2) the payment of the consideration which supports the agreement. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 430, 673 S.E.2d 448, 455 (2009) (citation omitted). Like any contract, in order to constitute an accord and satisfaction, there must have been a meeting of the minds. *Id.* (citation omitted). "The debtor must intend and make unmistakably clear that the payment tendered fully satisfies the creditor's demand." *Tremont Const. Co., Inc. v. Dunlap*, 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct. App. 1992) (citation omitted). "Without an agreement to discharge the obligation there can be no accord, and without an accord there can be no satisfaction." *Id.* (citation omitted).

Petitioners argue that due to Jan's phone messages to counsel for Respondent, Respondent was aware of Petitioners' proposal to modify the accord agreement, and by not responding, Respondent accepted that proposal allowing for the remaining payment to be late. The special referee found there was never a meeting of the minds such that an accord and satisfaction occurred. Moreover, the special referee found the Petitioners did not comply with the terms of the February 20, 2004 agreement because payment of the outstanding balance came after the date called for in the agreement. The court of appeals correctly affirmed the special referee's decision because

there was never a meeting of the minds regarding the alleged modification of the February 20 agreement. It was never unmistakably clear that the late payment and telephone message left to Respondent's attorney modified the agreement. Because there is evidence to support the special referee's finding, the court of appeals correctly affirmed the special referee.

IV. Estoppel

Petitioners argue Respondent should be estopped from denying a modification of the agreement took place. This issue has not been preserved for review.

Petitioners contend Respondent had a duty to respond to Jan's phone message, and by not responding they are now estopped from denying a modification of the agreement. The court of appeals found this argument was neither presented to nor addressed by the trial court and thus not preserved for appellate review. *See In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). The court of appeals correctly held this issue is not preserved for appellate review because it was not raised to and ruled upon below.

V. Mootness

Petitioners contend the expiration of the judgment renders it and any proceedings supplemental to it moot. We disagree.

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citation omitted). "Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable." *Id.* (citation omitted). "'A

case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.'" *Id.* at 567-68, 549 S.E.2d at 596 (quoting *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

Petitioners argue an actual controversy ceased to exist upon the expiration of the statutory period making the case moot. Even if this Court agreed with Petitioners' interpretation of section 15-39-30, there would still be a dispute regarding issue preservation. Nonetheless, there is an actual controversy between the parties and expiration of the ten-year time limit did nothing to extinguish that controversy or render this Court unable to grant effectual relief.

VI. Subject Matter Jurisdiction

Petitioners argue the expiration of the judgment deprived the circuit court of jurisdiction to proceed with either the supplemental proceedings or execution. We disagree.

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 472 A.2d 21, 22 (Conn. 1984)). The issue of subject matter jurisdiction may be raised at any time including when raised for the first time to an appellate court. *See Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002).

Even if this Court were to hold that the expiration of the judgment foreclosed Respondent's ability to enforce the judgment, it would not affect the subject matter jurisdiction of the circuit court to hear the dispute. The running of the ten-year period does not influence the power of the circuit court to hear disputes related to section 15-39-30.

VII. Unworkable Rule of Procedure

Petitioner argues the effect of the court of appeals decision is to establish an unworkable rule of procedure. This issue has not been preserved for review.

An argument not made to an intermediate appellate court and ruled on by that court is not preserved for review in this Court. *See City of Columbia v. Ervin*, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998). Because this issue was not presented to the court of appeals, it is not preserved for our review.

CONCLUSION

For the aforementioned reasons, the decision of the court of appeals is affirmed as modified.

Acting Justices James E. Moore and John H. Waller, Jr., concur.
BEATTY, J., concurring in part, dissenting in part in a separate opinion.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE BEATTY: While I concur in parts I, III, IV, V, VI, and VII, of the majority opinion, I disagree with the majority's analysis in part II dealing with the import and interpretation of section 15-39-30. The majority is correct in concluding that section 15-39-30 is not a statute of limitation. In my view, the majority is incorrect in concluding that it operates similar to one under the facts of this case.

Section 15-39-30 is not a statute of limitation, but it is clearly a statute of repose. There is a significant difference between the two. A statute of limitation is an affirmative defense that allows a party to avoid suit. A statute of limitation has no effect on the validity of the claim; it only effects the claim's enforcement. In contrast, a statute of repose is not a claim-avoidance mechanism. Instead, a statute of repose extinguishes the claim, in this case the judgment. As we have stated:

> A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. Langley v. Pierce, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). **A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body**. Id. at 404, 438 S.E.2d at 243.

Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (emphasis added); Harrison v. Bevilacqua, 354 S.C. 129, 138, 580 S.E.2d 109, 113-14 (2003).

This Court has repeatedly stated that a statute of repose is not tolled for any reason. Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993); Capco, 368 S.C. at 142, 628 S.E.2d at 41. Therefore, in my view, the majority's reliance on Hardee v. Lynch, 212 S.C. 6, 46 S.E.2d 179 (1948) and Hughes v. Slater, 214 S.C. 305, 52 S.E.2d 419 (1949) is misplaced. Neither

case supports extending the life of a judgment after the expiration of the statute of repose. Furthermore, the majority's reference to language in Hardee stating that our state's statutes "clearly evince a legislative purpose to nulify the effective force of a judgment after ten years, unless revived, or suit thereon be brought" is taken out of context. Hardee, 212 S.C. at 14, 46 S.E.2d at 182. Additionally, it ignores the fact that the statutory scheme referred to in Hardee has been repealed and its obsolescence acknowledged by the Hardee court. Id. at 13, 46 S.E.2d at 182. The Hardee court was referring to the way judgments were treated prior to the change in the law. Although the judgment in Hardee was more than ten years old, the applicable law affecting the judgment allowed the judgment to be revived for another ten years if suit was brought. After the expiration of twenty years, there was a presumption of payment. This presumption of payment was effective unless the judgment creditor brought suit prior to the expiration of the twenty-year period. Id. at 12, 46 S.E.2d at 181. The law, however, subsequently changed and eliminated the possibility of suit on the judgment after twenty years. The statute that allowed for the revival of a judgment was also repealed, thus ending the active energy of a judgment after ten years. Id. at 13, 46 S.E.2d at 182.

In reaching its conclusion, the Hardee court referred to its decision in United States Rubber Company v. McManus, 211 S.C. 342, 45 S.E.2d 335 (1947), for an understanding of the effects of Act No. 516 of the Acts of the General Assembly for the year 1946, 44 Statutes at Large, 1436. Hardee, 212 S.C. at 13, 46 S.E.2d at 181. In recognizing that Act 516 radically changed the operation and effect of existing statutes governing judgments, the McManus court stated:

> Prior to the passage of the 1946 Act . . . the limitation for bringing an action on a judgment was twenty years, Section 387, subsection 1. Section 743, subsection 1, provided that judgments shall constitute a lien on the real estate of the judgment debtor for ten years from date of entry. And the procedure was set forth in subsection 2, 4, 5, 6 and 7 of Section 743 as to how judgments could be renewed or revived within the period of ten years by the

> service of a summons upon the judgment debtor. Section 745 permitted an action on a judgment after the lapse of twenty years from the date of its entry.
>
> By Act of the general assembly approved March 22, 1946, 44 Stat. at Large, 1436, the legislature repealed subsection 1 of Section 387, thus taking away the right to bring an action upon a judgment within twenty years. The Act likewise repealed subsections 2, 4, 5, 6 and 7 of Section 743 of the Code, which authorized the renewal or revival of judgments within the period of ten years, and also repealed Section 745 of the Code, which permitted an action upon a judgment after a lapse of twenty years from the date of the original entry thereof.

McManus, 211 S.C. at 345-46, 45 S.E.2d at 336.

As noted by the Hardee court, "[t]he logical result of the 1946 enactment, 44 Stats. 1436, was to utterly extinguish a judgment after the expiration of ten years from the date of entry." Hardee, 212 S.C. at 17, 46 S.E.2d at 183.

The Hardee court specifically declined to address the question of what happens when a timely-filed action to enforce a judgment is not concluded prior to the expiration of the ten-year repose period as it was unnecessary to resolve the issue before it. Hardee, 212 S.C. at 13, 46 S.E.2d at 182. But, the Court in Garrison v. Owens, 258 S.C. 442, 189 S.E.2d 31 (1972), squarely confronted the question and concluded that an action to enforce the lien will not preserve it beyond the time by statute if such time expires before the action is tried. Id. at 446-47, 189 S.E.2d at 33 ("A judgment lien is purely statutory, its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried."). I believe the Garrison court was correct and, thus, I would uphold its decision. If the law is to be changed, it must be done by the Legislature not the Court.

JUSTICE PLEICONES: I respectfully dissent, and would vacate the Court of Appeals' opinion and the circuit court's "Order to Execute and Levy" filed June 3, 2005. I concur fully in Justice Beatty's analysis of S.C. Code Ann. § 15-39-30 (2005). Moreover, any question whether a judgment can be enforced more than ten years after it was filed is answered conclusively by S.C. Code Ann. § 15-39-130 (2005). This statute provides that the sheriff's or other officer's authority to levy and execute final process ceases when the judgment's "active energy" ends "as provided by law," i.e. ten years after the original entry of judgment. In fact, an officer who fails to return the process at the first regular term of common pleas after the expiration of the judgment is subject to penalties for neglect of duty. S. C. Code Ann. § 15-39-140 (2005).

Since the judgment cannot be enforced by execution and levy after ten years, it is futile to continue court proceedings after that date. Upon the passage of ten years, the judgment is unenforceable as a matter of law, and all process related to it, whether in the courts or in the hands of the sheriff or other officer, must cease. Such a bright line rule benefits debtors, creditors, and other commercial entities by allowing all interested parties to review the judgment rolls and know with certainty the date upon which a judgment will lose its efficacy.

Since the "Order to Execute and Levy" cannot be performed as the judgment upon which it is predicated has no "active energy," I would vacate both the decision of the Court of Appeals and that order itself.

I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Faye Fletcher, Appellant,

v.

Medical University of South Carolina, Respondent.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 4732
Heard June 23, 2010 – Filed September 1, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James H. Moss, of Beaufort, for Appellant.

M. Dawes Cooke, Jr., and Lucinda Gardner Wichmann, both of Charleston, for Respondent.

KONDUROS, J.: Faye Fletcher appeals the circuit court's granting of a directed verdict in favor of the Medical University of South Carolina (MUSC) on her claims for medical malpractice. We affirm in part, reverse in part, and remand.

FACTS

Fletcher suffered from a blockage in the artery leading to her left arm. As a result, she was experiencing dizziness and numbness in the arm. Fletcher had seen Dr. Bruce Elliott about this issue, and he ordered some tests suspecting that a subclavian bypass could alleviate the problem. When the test results were received, Dr. Thomas Brothers, Dr. Elliott's partner, was in their Beaufort clinic where Fletcher was seen. Dr. Brothers testified he discussed the surgery with Fletcher although he could not specifically recall the content of that discussion. Fletcher scheduled her surgery so that it did not conflict with her work schedule and that resulted in Dr. Brothers performing the operation. Fletcher had a preoperative appointment at which time she spoke with a nurse practitioner and the anesthesiologist. She testified she was never warned of the risks associated with the procedure. Fletcher underwent the surgery on October 28, 1999. Dr. Gloria Rios, a surgical resident, assisted.[1]

Upon returning home, Fletcher experienced significant bloating, discomfort, and shortness of breath. After two days, she went to the area emergency room where it was discovered that chylothorax was leaking into her pleural cavity and her diaphragm was not functioning properly. One treating physician indicated these problems were likely a result of her recent surgery in which damage to the thoracic artery and phrenic nerve are possible complications. Fletcher was treated and did make improvements although she still suffers from significant fatigue that she testified she did not experience prior to the surgery.

Fletcher brought this medical malpractice claim against MUSC alleging Dr. Brothers and Dr. Rios were negligent in performing the surgery and she

[1] Dr. Rios married and took the surname Marlowe after Fletcher's surgery.

was not properly advised of the risks associated with subclavian bypass. At trial, Dr. Thomas Wood testified on Fletcher's behalf and stated he believed Drs. Brothers and Rios had deviated in the standard of care during Fletcher's surgery and that as a physician, he thought it was a good idea to advise patients of the risks associated with medical procedures. Dr. Thomas Appleby testified as an expert for MUSC and opined he did not believe Drs. Brothers and Rios had deviated from the standard of care in performing Fletcher's operation and that it was the standard of care to advise patients of the risks associated with any surgical procedure. Fletcher testified she would not have undergone subclavian bypass had she known the procedure was not guaranteed to resolve her symptoms and that it could turn out the way it did. The circuit court granted a directed verdict in favor of MUSC on both claims, and this appeal followed.

LAW/ANALYSIS

"A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability." Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). On review, an appellate court will affirm the granting of a directed verdict in favor of the defendant when there is no evidence on any one element of the alleged cause of action. Id. "In a medical malpractice action, the plaintiff must establish proximate cause as well as the negligence of the physician." Id.

I. Medical Malpractice – Negligence in Performance of Procedure

Fletcher argues the circuit court erred in granting MUSC's directed verdict motion when Dr. Wood opined Dr. Brothers and Dr. Rios deviated from the standard of care in performing her surgery. We disagree.

In a medical malpractice action the plaintiff must establish "(1) 'the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances,' and (2) a departure by the defendant 'from the

recognized and generally accepted standards, practices and procedures . . . .'" Jones v. Doe, 372 S.C. 53, 61, 640 S.E.2d 514, 518 (Ct. App. 2006) (quoting Cox v. Lund, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985)). Furthermore the plaintiff must present evidence that the defendant's failure to adhere to the standard of care proximately caused the complained of injury. Id. "The probative value of expert testimony stands or falls upon an evidentiary showing of the facts upon which the opinion is, or must logically be, predicated." Ward v. Epting, 290 S.C. 547, 563, 351 S.E.2d 867, 876 (Ct. App. 1986).

In the present case, Dr. Wood testified the standard of care in a subclavian bypass surgery is to preserve the phrenic nerve and thoracic duct. With respect to MUSC's deviation from the standard of care, he opined:

> Q. Do you have an opinion, Doctor, as to whether or not Dr. Brothers and Dr. Rios, the agents of MUSC, in performing this surgery deviated from the standard of care?
>
> A. I think so. I think they did.

However, Dr. Wood testified on cross-examination that complications such as trauma to the phrenic nerve and damage to the thoracic duct could have occurred during this procedure even in the absence of any surgical negligence. He also testified:

> Q. Do you see anything in there [the operative note and records] that indicates that Dr. Brothers used any improper technique to do this operation?
>
> A. No.

Essentially, Fletcher asks us to conclude that the occurrence of a complication is itself evidence of negligence. However, South Carolina does not recognize the doctrine of res ipsa loquitur. Snow v. City of Columbia,

305 S.C. 544, 555 n.7, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991) ("In an action for negligence, the plaintiff must prove by direct or circumstantial evidence that the defendant did not exercise reasonable care. South Carolina's rejection of res ipsa loquitur is consistent with its general adherence to fault based liability in tort."). Simply no evidence establishes how Dr. Brothers or Dr. Rios deviated from the standard of care. Unfortunately, two of the risks associated with this procedure did befall Fletcher. Nevertheless, we are not permitted to speculate that misfortune was the result of negligence in the absence of any evidence as to how the physicians deviated from the standard of care.

Bowie v. Hearn, 292 S.C. 223, 355 S.E.2d 550 (Ct. App. 1987) (Bowie I), addresses this very point. This case was reversed based on the particular facts presented, but the reasoning employed by the court of appeals is instructive. Bowie sued the physician who delivered him via cesarean section because he was cut on the cheek during the procedure, resulting in a scar. Id. at 224-25, 355 S.E.2d at 551. Bowie's expert testified the standard of care required the physician not to cut the baby. Id. at 226, 355 S.E.2d at 552. In analyzing the sufficiency of this testimony, the court alluded to another oft-cited medical malpractice case and stated:

> Under the plaintiff's reasoning in this case [Bowie I] the doctors in Cox[2] could simply have testified that normally colons are not perforated during colonoscopies, the standard of care, therefore, is a doctor should not perforate the colon, and to do so violates the standard of care. Such reasoning would, in effect, make a doctor an insurer of perfect result in every surgical procedure. A doctor is not an insurer of health and negligence may not be inferred.

[2] Cox v. Lund, 286 S.C. 410, 334 S.E.2d 116 (1985). In Cox, the supreme court found evidence showing the defendant physician had deviated from the standard of care in failing to properly clear the patient's colon for a colonoscopy was sufficient evidence to send the malpractice action to the jury when the patient's colon was perforated during the procedure.

Id. at 227, 355 S.E.2d at 552.[3]

The analysis in Bowie I is precisely on point with this case, and we discern no factual basis that would cause the reasoning in that case to be inapplicable to the facts presented here. Therefore, we affirm the circuit court's granting of a directed verdict as Fletcher presented no evidence, only speculation, that MUSC's agents deviated from the standard of care.

II. Medical Malpractice – Lack of Informed Consent

Fletcher also contends the circuit court erred in granting MUSC's directed verdict motion with respect to her informed consent claim. We agree.

Although the circuit court's decision rested on its conclusion that Fletcher failed to present any evidence regarding proximate cause, we will address the elements of duty and breach first as they are preconditions to a finding of proximate cause, and MUSC raises them as additional sustaining grounds.[4]

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[3] The supreme court found the defendant-physician's testimony that he took three or four swipes with his scalpel was enough evidence of negligence to withstand summary judgment when testimony showed the procedure for a cesarean was to make a series of progressively deepening incisions. Bowie v. Hearn, 294 S.C. 344, 345-46, 364 S.E.2d 469, 469-70 (1988) (Bowie II). No self-incriminating testimony from Dr. Brothers in this case suggests a deviation in the standard of care.

[4] The circuit court stated: "We still have to get to the third prong [proximate cause]. I don't quarrel with anything that you said, I don't disagree with that. That's what I just said, assuming everything you've said, no question he set a standard, no question that he said that if you didn't do it, that it was a departure. The question that you asked was, did it proximately cause an injury in this case? No. No expert has testified that it did."

Under the doctrine of informed consent, a physician has a duty to disclose "(1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the material risks involved in the procedure, (4) the probability of success associated with the procedure, (5) the prognosis if the procedure is not carried out, and (6) the existence of any alternatives to the procedure." Hook v. Rothstein, 281 S.C. 541, 547, 316 S.E.2d 690, 694-95 (Ct. App. 1984). Because the question of whether a physician has acted unreasonably often involves the exercise of medical judgment in most cases, expert medical testimony is necessary to establish negligence in failing to adequately disclose the information necessary for a patient to give informed consent. Id. at 551, 316 S.E.2d at 697. "Indeed, our [s]upreme [c]ourt has held that in any 'area beyond the realm of ordinary lay knowledge, expert testimony will usually be necessary to establish both the standard of care and the defendant's departure therefrom.'" Id. (quoting Kemmerlin v. Wingate, 274 S.C. 62, 65, 261 S.E.2d 50, 51 (1979)).

In the instant case, Fletcher provided a modicum of expert testimony that MUSC's agents deviated from the accepted standard of care, which allows her to withstand a motion for directed verdict. Fletcher's expert, Dr. Wood, testified as follows:

> Q. Doctor, in your opinion should Dr. Brothers have informed Mrs. Fletcher of the risks associated with the thoracic duct and the phrenic nerve, prior to surgery?
>
> A. I think it is a good idea. I believe in informing the patient what the risks are. I don't see anything wrong with it.
>
> Q. Do you believe that is a deviation from the standard of care, -- that it should be done by every physician?

> A. From what I could tell from the notes, there was no opportunity for him to because he wasn't there.
>
> Q. There wasn't any information?
>
> A. Well, I don't think that she had a full explanation what was going to go on. And of course, everybody hopes that every operation goes as slick as it can and that everything goes perfect, but sometimes that doesn't happen.

The primary expert testimony on this point was proffered testimony from MUSC's expert, Dr. Appleby. Over the course of several pages of testimony, including references to his deposition, Dr. Appleby testified a physician should discuss risks with his patient. He further testified he considered damage to the phrenic nerve and thoracic duct to be risks of this procedure.

> Q. And is it your opinion to a reasonable degree of medical certainty that a [doctor] needs to explain the material risks associated with the subclavian bypass surgery to his patient before performing it?
>
> A. I believe they should discuss risks, yes.
>
> Q. And is it your opinion, to a reasonable degree of medical certainty, that a thoracic duct injury and a phrenic nerve injury are material risks associated with this procedure?
>
> A. They are low but definite risks.

With respect to whether the failure to inform Fletcher of these particular risks was a deviation from the standard of care, Dr. Appleby stated:

> Q. And if a physician fails to inform his patient undergoing a subclavian bypass surgery that the phrenic nerve and/or the thoracic duct may be damaged, is that a deviation of the standard of care?
>
> A. Not as long as he's talked about generalized risks, is what I would say. I think the standard of care mandates that you have to talk to the patient about risks. The specifics of that risk is up to the physician, the physician's judgment, and the patient and how their relationship is "maturing," I guess.

On a directed verdict motion, we are to view the evidence presented in the light most favorable to the nonmoving party. See J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 368, 635 S.E.2d 97, 100 (2006) ("When reviewing the grant of a directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed."). The testimony regarding the standard of care and any deviation in this case is equivocal. Nevertheless, Fletcher presented some evidence the standard of care is to inform a patient of potential damage to the thoracic duct and phrenic nerve and that to fail to do so is a deviation from that standard.[5]

[5] In Stallings v. Ratliff, 292 S.C. 349, 351-52, 356 S.E.2d 414, 416 (Ct. App. 1987), the plaintiff presented expert testimony indicating the defendant-physician had a duty to disclose the risk of a perforated esophagus during the procedure performed. The court stated that when testimony conflicted regarding whether that information was conveyed to the patient, the jury could infer the deviation from the standard of care and a "ritual incantation of certain words" from the expert that it constituted a deviation was not necessary. Id. at 353, 356 S.E.2d at 417. Therefore, while Dr. Appleby's answer to the deviation question was a qualified no, it is not fatal to Fletcher's claim at the directed verdict stage.

Having determined Fletcher presented at least some evidence establishing the first two elements of her claim, the standard of care (duty) and deviation from it (negligence), we move to the third and final element in any negligence claim, proximate cause. We disagree with the circuit court's reasoning that because Fletcher failed to present expert testimony that the lack of information proximately caused her injuries, she could not succeed in her claim.

The circuit court was correct in holding Fletcher had the burden to show any deviation from the standard of care was the proximate cause of her injury. Hook, 281 S.C. at 564, 316 S.E.2d at 704. To do so, Fletcher must show a reasonable person, having been properly informed, would have elected not to have the procedure. Id. at 565, 316 S.E.2d at 705. However, the circuit court misinterpreted that requirement to mean that expert testimony must establish this point.

In Hook, the court rejected the subjective test and adopted the objective, reasonable man test for discerning proximate cause. The court cited a Maryland case to support its decision.

> [I]f a subjective [test] were applied, the testimony of the plaintiff as to what he [or she] would have hypothetically done would be the controlling consideration. Thus, proof of causation under a subjective [test] would ultimately turn on the credibility of the hindsight of a person seeking recovery after he had experienced a most undesirable result. Such a test puts the physician in "jeopardy of the patient's hindsight and bitterness." Furthermore, in cases where the plaintiff dies as a result of an unforewarned collateral consequence, the subjective [test] would bar recovery on an informed consent claim altogether.

Hook, 281 S.C. at 565, 316 S.E.2d at 705 (quoting Sard v. Hardy, 379 A.2d 1014, 1025 (Md. 1977)).

While Hook adopted the objective test, nothing indicates the reasonable man test requires expert testimony. As in most cases, the determination of whether a reasonable person, knowing the risks, would have had the procedure is a question left to the fact-finder. This notion is supported by the cases Hook relies upon in adopting the objective test. See Canterbury v. Spence, 464 F.2d 772, 791 (C.A.D.C. 1972) (stating the objective test requires the fact-finder to interpret the plaintiff's testimony through the filter of reasonableness in determining the proximate cause issue); Woolley v. Henderson, 418 A.2d 1123, 1132 (Me. 1980) (agreeing with trial court's instruction to the jury to employ the objective standard in considering proximate cause); Sard, 379 A.2d at 1026 (stating the plaintiff's testimony is relevant although not determinative and alluding to no expert testimony regarding causation).

Assuming expert testimony was not required to establish proximate cause in this informed consent claim, we must next consider whether any evidence was presented that would support a finding by the jury that Fletcher, using the reasonable person standard, would not have moved forward with her subclavian bypass had she been advised of the risks. Dr. Appleby testified:

> Q. Doctor, do you have an opinion to a reasonable degree of medical certainty whether a well-informed patient, one that was told of a phrenic nerve injury and chylotorax, whether that patient, given the condition that Mrs. Fletcher had, would have elected to have this procedure done?
>
> A. I do. I think it was a reasonable operation to offer and I think it was a reasonable choice by the patient.

Fletcher's own testimony on the matter at least raises some issue with respect to the reasonableness of proceeding with the surgery having known of the risks involved.

> Q. Okay. Now, had you known the risks or had you known what has occurred to you now and the risk of that, would have had this surgery?
>
> A. No, I wouldn't have. There was – why put myself through something that wasn't even a guarantee that it was going to stay fixed? I mean, less than a year later, I was back seeing Dr. Elliott for a very similar reason. I still have that artery problem under my arm, and I guess I will die with it because I certainly am not going to put myself under the knife again. It's just everything that I have been through since I had that surgery did not make it worthwhile. Had I known that there was no guarantee that it was a fix-it, and if I had been told what happens to a phrenic nerve and all these other things, I wouldn't – I would not have been willing to take that, risk.

Fletcher's testimony is not determinative under an objective standard, but it is some evidence that proceeding with the surgery was unreasonable in light of the risks and potential outcome. The jurors could weigh this evidence against their own experiences and in light of Dr. Appleby's testimony to arrive at a conclusion concerning what a reasonable person would have done under the circumstances.

CONCLUSION

We affirm the circuit court's granting of a directed verdict on Fletcher's claim of medical malpractice in performance of her surgery. We reverse the granting of a directed verdict with respect to her informed consent claim and

remand that issue for a new trial. Accordingly, the decision of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services, Respondent,

v.

Randy S., Dawn S., Sandra B., and Sherry G., Defendants,

of whom Randy S. is the Appellant.

In the interest of two minor children under the age of 18.

Appeal From Dorchester County
Nancy Chapman McLin, Family Court Judge
William J. Wylie, Jr., Family Court Judge

Opinion No. 4733
Heard July 14, 2010 – Filed September 1, 2010

REVERSED AND REMANDED

John Harleston, of Mount Pleasant, for Appellant.

Graves H. Wilson, Jr., of Summerville, for Respondent.

Benjamin Andre LaFond, of Summerville, for Guardian ad Litem.

KONDUROS, J.: The Department of Social Services (DSS) filed an intervention action against Randy S. (Father) and Dawn S. (Mother). Subsequently, Mother consented to a finding that she neglected her two minor children (Children). Following a merits hearing, the family court issued an order (1) finding Father neglected or abused Children; (2) awarding custody of Children to his sister, Sandra B. (Aunt); (3) only allowing Father supervised visitation with Children; and (4) permitting DSS to close its case. We reverse and remand.

FACTS

Father and Mother are married and are the biological parents of Children. At the time of the removal, Children were four years old and three weeks old.

DSS became involved in this case on June 2, 2006, when it investigated a report of physical neglect and abandonment. According to DSS, Mother abused drugs and left Children with a neighbor and did not return, while Father did not protect Children from the threat posed by Mother's substance abuse.[1] DSS arrived at Father and Mother's home with law enforcement. According to Father, DSS wanted to place Children in DSS custody; however, DSS agreed to allow Aunt to take custody of Children. DSS offered safety plans to Mother and Father. Thereafter, DSS instituted a treatment plan for Mother and Father. Father agreed to the March 6, 2007 treatment plan ordering him to (1) complete parenting classes and follow any DSS recommendations and (2) continue supervised visitation with Children.[2]

[1] Father admitted Mother has a substance abuse problem.

[2] Mother also agreed to the treatment plan.

On March 13, 2007, DSS filed a complaint for intervention. On April 19 and 20, 2007, a merits hearing was conducted. On June 15, 2007, Father made a motion requesting the family court return Children because DSS had not filed a petition for removal pursuant to section 63-7-1660(A) of the South Carolina Code (2010). According to Father, despite DSS's characterization of this as an intervention action, Children were actually removed from his home. Thereafter, on August 20, 2007, the family court issued its order from the April merits hearing. The family court's order reflected DSS, Mother, and Father agreed to the "findings and the treatment plan" and temporary custody of Children would remain with Aunt. The order also indicated DSS, Mother, and Father agreed Mother and Father would (1) receive supervised visitation; (2) refrain from the influence of drugs or alcohol during visitation; and (3) cooperate with any requested drug testing. Subsequently, on November 9, 2007, the family court denied Father's motion to return Children, stating: "The previous order was based on parties' agreement. Additionally, [Mother] admits drug use in the last two weeks and that she continues to stay in Father's home."

On October 22, 23, and 27, 2008, the family court conducted a second merits hearing. Following the hearing, the family court issued a merits order finding Mother and Father neglected Children. The family court found Children were neglected and "could not be protected without removal from the home and intervention and services." The family court also found Mother and Father were entitled to supervised visitation. However, after three consecutive months of negative hair strand drug tests, Mother could have unsupervised visitation. Further, the family court awarded Aunt custody of Children and permitted DSS to close its case. Father filed a Rule 59(e), SCRCP, motion, which the family court denied. This appeal followed.

LAW/ANALYSIS

Father contends Children were improperly removed from his custody and the family court erred in failing to follow the proper statutory procedure following removal. Father argues as a result the family court erred in finding

the case warranted both intervention and removal when DSS had only filed an action for intervention. We agree.

DSS has the statutory duty to investigate all reports of suspected child abuse and neglect. S.C. Code Ann. § 63-7-900 (2010). Upon investigation, if DSS determines a preponderance of the evidence supports the conclusion a child is abused or neglected, it may petition the family court for authority to offer services with or without removal of the child from the parents' home.

Pursuant to section 63-7-1650(A) of the South Carolina Code (2010), DSS may "petition the family court for authority to intervene and provide protective services without removal of custody if [DSS] determines by a preponderance of the evidence that the child is an abused or neglected child and that the child cannot be protected from harm without intervention." The family court is then required to hold a hearing within thirty-five days. See S.C. Code Ann. § 63-7-1650(C) (2010). After the hearing, the family court may intervene and provide protective services if "the allegations of the petition are supported by a preponderance of the evidence including a finding that the child is an abused or neglected child as defined in [s]ection 63-7-20 and the child cannot be protected from further harm without intervention." S.C. Code Ann. § 63-7-1650(E) (2010). Child abuse or neglect occurs when a parent "inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child, including injuries sustained as a result of excessive corporal punishment." S.C. Code Ann. § 63-7-20(4)(a) (2010).

Section 63-7-1660(A) of the South Carolina Code (2010) grants DSS authority to petition the family court to remove a child from custody of a parent if DSS "determines by a preponderance of evidence that the child is an abused or neglected child and that the child cannot be safely maintained in the home in that he cannot be protected from unreasonable risk of harm affecting the child's life, physical health, safety, or mental well-being without removal." As with intervention, the family court is also required to hold a hearing within thirty-five days of receipt of the petition to determine whether removal is necessary. S.C. Code Ann. § 63-7-1660(D) (2010). The family

court shall not order that a child be removed from the custody of the parent unless the allegations in the petition are supported by a preponderance of evidence including a finding that the child is an abused or neglected child as previously defined and "that retention of the child in or return of the child to the home would place the child at unreasonable risk of harm affecting the child's life, physical health or safety, or mental well-being and the child cannot reasonably be protected from this harm without being removed." S.C. Code Ann. § 63-7-1660(E) (2010). If the family court removes custody of the child, the court's order shall contain a finding of whether DSS made reasonable efforts to prevent removal and a finding of whether continuation of the child in the home would be contrary to the welfare of the child. S.C. Code Ann. § 63-7-1660(G) (2010). Pursuant to section 63-7-1660(G)(1)-(4):

> The order shall state: (1) the services made available to the family before the removal of the child and how they related to the needs of the family; (2) the efforts of the agency to provide these services to the family before removal; (3) why the efforts to provide services did not eliminate the need for removal; and (4) whether the efforts to eliminate the need for removal were reasonable . . . .

However, if DSS's "first contact with the child occurred under such circumstances that reasonable services would not have allowed the child to remain safely in the home, the court shall find that removal of the child without services or without further services was reasonable." § 63-7-1660(G)(4).

If there is not time to apply for a court order pursuant to section 63-7-1660, law enforcement may take emergency protective custody (EPC) of a child without the consent of the child's parents if "the officer has probable cause to believe that by reason of abuse or neglect the child's life, health, or physical safety is in substantial and imminent danger if the child is not taken into emergency protective custody." S.C. Code Ann. § 63-7-620(A)(1) (2010). When an officer takes a child into EPC, the officer is required to

notify DSS immediately, which then has the responsibility of notifying the parent unless there are compelling reasons to the contrary.[3] S.C. Code Ann. § 63-7-630 (2010). Within twenty-four hours after a child is taken into EPC, DSS is required to conduct a preliminary investigation to determine whether EPC was proper and whether a means to avoid removal from the home exists. S.C. Code Ann. § 63-7-640 (2010). If DSS determines probable cause exists that a "child's life, health, or physical safety is in imminent and substantial danger" because of abuse or neglect, DSS may assume legal custody of the child. S.C. Code Ann. § 63-7-660 (2010). DSS is then required to initiate a removal proceeding pursuant to section 63-7-1660 on or before the next working day after initiating the investigation. S.C. Code Ann. § 63-7-700(B)(1) (2010). The family court is then required to hold a probable cause hearing within seventy-two hours of the time the child was taken into EPC and conduct a merits hearing within thirty-five days. S.C. Code Ann. § 63-7-710(A), (E) (2010).

After the family court conducts a hearing pursuant to section 63-7-1650 of the South Carolina Code (2010) or section 63-7-1660 of the South Carolina Code (2010) and finds the child should remain in the home, the family court must review and approve a treatment plan "designed to alleviate any danger to the child and to aid the parents so that the child will not be endangered in the future." S.C. Code Ann. § 63-7-1670(A) (2010). If a child is removed from the home, the family court must approve a placement plan, which DSS must submit in writing to the family court at the removal hearing or within ten days after the removal hearing. S.C. Code Ann. § 63-7-1680(A) (2010).

The family court is then required to conduct a permanency planning hearing "no later than one year" following removal of a child. S.C. Code Ann. § 63-7-1700(A) (2010). "At the initial permanency planning hearing, the court shall review the status of the child and the progress being made toward the child's return home or toward any other permanent plan approved

[3] We are cognizant of the fact that DSS is often present when law enforcement takes a child into EPC.

at the removal hearing. The family court's order is required to make specific findings in accordance with this section." Id.

Initially, we note that pursuant to section 63-7-1650, DSS brought this child abuse and/or neglect proceeding as an action for intervention. At the time DSS filed its complaint, Children were not in Father and Mother's custody, and at no point did DSS move to amend its complaint to seek relief pursuant to the removal statute, section 63-7-1660.

When law enforcement arrived at Father's home, rather than have law enforcement take Children into EPC, Father agreed to place Children with relatives. Subsequently, Father filed a motion requesting the family court return Children to his custody, arguing Children were improperly removed from his home when DSS did not file a petition for removal. Despite DSS's contention that this was only an intervention action, we find the evidence supports a finding that Children were removed from Father's custody.

As a result, we find the family court erred in granting custody of Children to Aunt and allowing DSS to close its case because intervention does not contemplate placement of children with third parties. Instead, the statute specifically states its purpose is to "intervene and provide protective services without removal." § 63-7-1650(A) (emphasis added). Because DSS in actuality initiated a removal action instead of an intervention action, it was required to follow the statutory procedures for removal and file a petition with the family court after Children were taken into EPC. Then, the family court would have conducted a probable cause hearing within seventy-two hours and determined whether probable cause existed for DSS to assume legal custody of Children. If the family court determined probable cause existed to remove Children from the home, a merits hearing should have been conducted within thirty-five days. Here, Children were out of the home for almost eleven months before a merits hearing was held on April 20, 2007. By following the comprehensive scheme outlined in the statutes, Father would have been afforded the safeguards the statutes are designed to provide. See S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002) ("The statutory proceeding is a civil action aimed at protection of

a child, not a criminal action geared toward punishing a defendant.") (internal quotation marks omitted).

We recognize the unique procedural posture before this court and the fact that Children have been out of Father's home for over four years. As a result, an immediate change in custody may not be proper under the facts of this case because the best interests of Children is the paramount consideration. See Pountain v. Pountain, 332 S.C. 130, 135-36, 503 S.E.2d 757, 760 (Ct. App. 1998) ("In all child custody controversies, the welfare and best interests of the children are the primary, paramount, and controlling considerations of the court."). Therefore, DSS is granted custody, exercising its full discretion as to placement as in every other removal case. Accordingly, we remand the case to the family court for a permanency planning hearing pursuant to section 63-7-1700 of the South Carolina Code (2010). A permanency planning hearing will allow all parties and the guardian ad litem an opportunity to update the family court on what has occurred in the four years Children have been out of Father's custody. This will also give DSS an opportunity to offer Father further services, if necessary, and give Father the opportunity to present evidence of compliance and a plan for Children if they are returned. We urge the family court to conduct a hearing as expeditiously as possible, including presentation of a new guardian ad litem report and updated home evaluation on Father's residence. If necessary, the family court may, inter alia, change custody, modify visitation, and approve a treatment plan offering additional services to Father.

CONCLUSION

Based on the foregoing, we reverse the family court's order granting custody of Children to Aunt and allowing DSS to close its case. We remand the case for a permanency planning hearing. DSS is granted custody of Children pending further order of the family court.[4]

[4] In light of our decision, we need not address Father's remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining this court need not review

REVERSED AND REMANDED.

WILLIAMS, J., and CURETON, A.J., concur.

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remaining issues on appeal when its determination of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jill A. Marchant, Appellant,

v.

Leslie C. Marchant, Respondent.

Appeal From Lexington County
Leslie K. Riddle, Family Court Judge

Opinion No. 4734
Heard May 20, 2010 – Filed September 1, 2010

AFFIRMED AS MODIFIED

Katherine Carruth Goode, of Winnsboro; Sheila McNair Robinson, of West Columbia, for Appellant.

Jean Perrin Derrick, of Lexington, for Respondent.

KONDUROS, J: Jill Marchant (Wife) appeals the family court's failure to impute income to Leslie Marchant (Husband) in this divorce action based on theories of voluntary underemployment and the receipt of loans

from his employer. Wife also contends the provision of a vehicle and residence to Husband by his employer constituted income. Additionally, Wife appeals the family court's imputation of income to her and the resulting impact of these decisions on the family court's award of alimony and child support. She also appeals the amount of the family court's attorney's fees award. We affirm as modified.

FACTS

Husband and Wife married in 1993. Approximately six weeks into the marriage, Wife discovered Husband had been unfaithful to her in the months immediately preceding their wedding. The couple stayed together and their first child was born in 1994. The parties did not have sexual relations with one another from that time until 2001 when, after Husband's admitted extramarital affair, Wife agreed to have a sexual relationship with him again. The parties' second child was born in 2002, and at that time Wife maintains she was willing to participate in a sexual relationship with Husband, but Husband rejected her.[1] Wife eventually moved into another bedroom and testified this arrangement allowed her to better care for their youngest child, who suffered from esophageal reflux, without disturbing Husband's rest.

In 2004, Wife suspected Husband was having an ongoing adulterous relationship, and a private investigator confirmed her suspicions. Wife filed for divorce. By agreement she had custody of both children, and Husband paid her $662.50 per month in child support and $662.50 per month in alimony.[2] The older child eventually went to live with Husband by agreement of the parties, and Husband's child support obligation was reduced to $275 per month.

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[1] Husband admits not having sex with Wife by his choice during both pregnancies.

[2] Husband testified Wife told him at the time they separated she would be going back to work and he believed after that time his alimony obligation would cease.

At the time of trial, the parties had resolved many issues but asked the family court to determine alimony and child support. Wife alleged Husband received considerably more income than he reported on his disclosure statement. She maintained Husband had received $27,000 from his employer and intimated he was underemployed. Husband claimed these amounts were loans from his employer that he would have to pay back. Additionally, Wife contended Husband should be charged with income as a result of his employer providing him a truck and a place to live. Husband testified the truck was the property of his employer but his employer did allow him to use it personally as well because his former truck was unsafe for transporting his children. Husband valued his use of the truck at $300 per month. Husband further indicated the company was paying rent temporarily on a property located beside the business and allowing him and the oldest child to live there in exchange for making improvements to the property.

Husband argued Wife was underemployed. Wife was not working at the time of the final hearing. She took the civil service exam after the parties separated, but did not pursue employment based on the exam. Wife earned a degree in journalism from the University of South Carolina in 1986 and obtained her teaching certificate shortly thereafter. However, Wife never used her teaching certificate and was primarily, by agreement of the parties, a stay-at-home mother. She did work intermittently for her father's law practice as a receptionist, in a daycare, and at the produce business Husband started with his cousin. Wife testified she had been taking prerequisite courses at an area college and would enter the two-year radiology program in the fall. According to Wife, she would be attending school full-time and students are discouraged from working outside of their studies and clinical work. The school would guarantee her placement, and her projected income would be somewhere between $30,000 and $40,000.

The family court did not impute income to Husband based on the loans from his employer and did not treat Husband's employer-provided residence or vehicle as income except to value the use of the company truck at $300 per month. Additionally, the family court imputed income to Wife in the amount of $1,732 per month. Based on these incomes, the family court ordered

Husband to pay Wife $375 in alimony and $108 in child support per month. The family court also ordered Husband to pay $2,000 of Wife's $12,000 attorney's fees. This appeal followed.

STANDARD OF REVIEW

While the appellate court may take its own view of the preponderance of the evidence in family law issues, "[q]uestions concerning alimony rest within the sound discretion of the family court judge whose conclusion will not be disturbed absent a showing of abuse of discretion." Degenhart v. Burriss, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004). Questions concerning child support are likewise ordinarily committed to the discretion of the family court. Blackwell v. Fulgum, 375 S.C. 337, 347, 652 S.E.2d 427, 432 (Ct. App. 2007). The family court also has discretion in determining attorney's fees to be awarded. Eason v. Eason, 384 S.C. 473, 481, 682 S.E.2d 804, 808 (2009).

I. Husband's Income

Wife claims the family court erred in failing to find Husband was voluntarily underemployed and impute income to him based upon loans, a truck, and a residence provided by his employer. We disagree.

While Wife alluded to the fact Husband was capable of earning more, she did not request a finding that Husband was voluntarily underemployed. The testimony regarding his past income was elicited primarily to aid in establishing the parties' standard of living during the marriage. Furthermore, the family court did not rule on this point. Consequently, Wife was required to file a Rule 59(e), SCRCP, motion to seek a ruling on this point, and she failed to do so. A point not raised to and ruled upon by the family court will not be considered on appeal. Smith v. Smith, 386 S.C. 251, 273, 687 S.E.2d 669, 732 (Ct. App. 2009); Feldman v. Feldman, 380 S.C. 538, 545, 670 S.E.2d 669, 672 (Ct. App. 2008) (finding issue of whether Wife's and Boyfriend's relationship was tantamount to marriage not preserved for

appellate review when issue was not ruled upon and Husband failed to make a Rule 59(e) SCRCP, motion).

Wife also claims the family court erred in not including $27,000 from Husband's company and the use of a company car and home in Husband's income. Husband admitted to receiving pay advances or loans from his employer to aid in his paying his child support and alimony obligations during the pendente lite stage of this proceeding. He testified there were no formal documents associated with the loans but he was nevertheless obligated to repay them based on a handshake deal with his partners. The employer's records show when advances were made and in what amount. The family court believed Husband's explanation for the additional funds, and we give deference to its findings on credibility. See Terwilliger v. Terwilliger, 298 S.C. 144, 147, 378 S.E.2d 609, 611 (Ct. App. 1989) ("Resolving questions of credibility is a function of the family court judge who heard the testimony."). Under these circumstances, we conclude the family court did not abuse its discretion in failing to impute the loans to Husband as income.

With respect to the allowance for a company truck, Husband declared a benefit in the amount of $300 per month for use of the vehicle. Declaring the use of the company truck as income is appropriate in accordance with the South Carolina Child Support Guidelines (the Guidelines). "[T]he court should count as income expense reimbursements or in-kind payments received by a parent from self-employment or operation of a business if they are significant and reduce personal living expenses, such as a company car, free housing, or reimbursed meals." Mobley v. Mobley, 309 S.C. 134, 139, 420 S.E.2d 506, 510 (Ct. App. 1992) (quoting S.C. Code Ann. Regs. 114-4720(A)(3)(C) (Supp. 2009)).

The payment for the vehicle is $596 per month, with the business paying property taxes and insurance on the vehicle as well. According to Husband's testimony, the truck was not his property and was not solely for his use. However, it appears the truck was primarily for Husband's business and personal use. Nevertheless, at the conclusion of the term of the loan for the truck, the truck will belong to the company, not Husband. Additionally, while Husband was the primary user of the truck, the truck was occasionally

utilized by the other members of the company. Consequently, we find support in the record for declaring a benefit to Husband less than the full amount of the truck's monthly payment and therefore discern no abuse of discretion.

Concerning his employer-provided housing, Husband's testimony revealed he was occupying a rental property being paid for by the company and was making improvements to the property while living there for six months.[3] The property was located next door to the business and according to Husband would eventually be purchased by the company. Husband also testified he would start making monthly rental payments of $800 the following month.

While this arrangement is somewhat suspect, questions of credibility are left to the discretion of the family court. See Terwilliger, 298 S.C. at 147, 378 S.E.2d at 611. If this situation were to continue, an analysis of whether it constitutes in-kind income would be required. However, because Husband testified he would begin paying rent, we again discern no abuse of discretion in the family court's decision not to impute the provision of the residence as income.

II. Wife's Income

Wife argues the family court erred in imputing income to her based on a wage of ten dollars per hour and a forty-hour work week. We agree in part and modify the family court's award to reflect our view of the preponderance of the evidence presented in the record.

"Whether termed voluntary underemployment, imputation of income, or the failure to reach earning potential, the case law is clear that when a payor spouse seeks to reduce support obligations based on his diminished income, a court should consider the payor spouse's earning capacity." Gartside v. Gartside, 383 S.C. 35, 44, 677 S.E.2d 621, 626 (Ct. App. 2009).

[3] The improvements were financed through loans or advances from the company, but Husband was apparently responsible for overseeing the work.

Likewise, it is proper to consider a supported spouse's earning capacity and impute income to a spouse who is underemployed or unemployed. See Patel v. Patel, 359 S.C. 515, 532, 599 S.E.2d 114, 123 (2004) (affirming the family court's imputing minimum wage income to Wife, who had been out of the workforce for twenty years but was capable and energetic). "However, courts are reluctant to invade a party's freedom to pursue the employment path of their own choosing or impose unreasonable demands upon parties." Kelley v. Kelley, 324 S.C. 481, 489, 477 S.E.2d 727, 731 (Ct. App. 1996). "Nonetheless, even otherwise unreviewable career choices are at times outweighed by countervailing considerations, particularly child support obligations." Id.

In this case, the evidence adduced at trial indicated Wife had worked sporadically and infrequently during the marriage. She had worked in her father's office, as a day-care worker, and in her Husband's company, all for a brief time. Wife was by-and-large a stay-at-home mother as agreed upon by the parties.[4] She had obtained her bachelor's degree in journalism and her teaching certificate prior to the marriage but had never used it. According to Husband's vocational rehabilitation expert, Wife was capable of earning a gross income of around $28,000 per year with minimal additional training if she were willing to work in the field of education.[5] However, Wife indicated she had no desire to teach and instead hoped to obtain a degree in radiology, in which she would be guaranteed job placement.

The family court did not impute income to Wife that would be the equivalent of a teacher's salary, so that particular point is not before this court. Instead, the family court imputed a lower amount to mother of approximately four hundred dollars per week. This figure came from using a forty-hour work week and the ten dollars per hour Wife earned while

[4] Husband testified he had asked Wife to seek employment in the latter years of their marriage.

[5] Wife would need to take six credit hours of classes and pass the Praxis examination to obtain a current teaching certificate. We also note that securing a teaching job in the current economic climate with no experience is less than a certainty.

working at her father's law firm. The figures were based on the family court's determination that Wife had not displayed a pattern indicating she would complete her radiology degree.

We believe the family court abused its discretion in imputing this level of income to Wife. According to the Guidelines, "[i]n order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community." S.C. Code Ann. Regs. 114-4720(A)(5)(B) (Supp. 2009). The family court imputed income to Wife based on a full-time job earning ten dollars per hour and at the same time was encouraging Wife to complete her radiology program. Wife had custody of the parties' younger child and testified her radiology coursework would require her to attend school full time. Furthermore, Wife had no real recent work experience and her prior employment had been primarily working for family. Considering Wife's parental and educational commitments and her lack of recent work experience, the family court imputed too much income to Wife.

Recognizing Wife had shown a lack of initiative in finding any employment, we affirm the family court's imputation of income based on a forty-hour work week, but at the rate of $5.85 per hour, the minimum wage at the time of the family court hearing. This results in Wife having imputed income of $1,014 per month.

III. Child Support/Children's Health Expenses

Wife argues the family court's computation of child support was erroneous in light of the pa rties' true incomes. We agree. Based on our modification of Wife's income, we adjust Father's child support obligation to $171 per month. This figure is proper pursuant to the Guidelines substituting Wife's new income of $1,014 in the calculation.

IV. Alimony

Wife contends the family court erred in awarding her only $375 per month in alimony. Again, based on our modification of Wife's income, we agree.

> Section 20-3-130(C) of the South Carolina Code (Supp. 2008) sets forth twelve factors which must be weighed when determining alimony. In deciding whether to award alimony, the family court must consider:
>
> (1) the duration of the marriage and the ages of the parties at the time of the marriage and at separation; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse and the need for additional education; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated income of each spouse; (7) the current and reasonably anticipated expenses of each spouse; (8) the marital and nonmarital properties of the parties; (9) the custody of any children; (10) marital misconduct or fault; (11) the tax consequences of the award; (12) the existence of support obligations to a former spouse; and (13) such other factors the court considers relevant.

Smith v. Smith, 386 S.C. 251, 265-66, 687 S.E.2d 720, 728 (Ct. App. 2009). "The family court may weigh these factors as it deems appropriate." Id.

The record illustrates the family court considered the relevant factors in awarding alimony. In fact, the family court weighed the factors and gave

Wife permanent, periodic alimony even though rehabilitative alimony, which was not pled, was likely more appropriate. The court noted the duration of the marriage and that both parties were in good health and capable of contributing to their own financial well-being. The court recognized Wife had custody of one child and Husband had custody of the other. The parties had little or no marital or non-martial property, and the court considered Husband's fault in the break-up of the marriage. That appears to be one of the primary reasons for the award of permanent, periodic alimony. The family court also considered the parties' lifestyle during the marriage and noted they had always spent more than they earned.

Essentially, the family court gave proper consideration to the various factors. Therefore, we find the family court abused its discretion only to the extent it based its award on imputing to Wife income of $1,732 per month. Because we have reduced that amount, we believe she is entitled to an adjustment in her alimony award so that Husband shall now pay Wife $500 per month.

V. Attorney's Fees

The family court ordered Husband to pay $2,000 of Wife's $12,000 attorney's fees. Wife argues on appeal the family court failed to make findings with respect to each Glasscock[6] factor and abused its discretion in not awarding her more attorney's fees because she does not have income to pay her fees. We disagree.

"In determining whether [or not] to award attorney's fees, the court should consider each party's ability to pay his or her own fees, the beneficial results obtained by counsel, the parties' respective financial conditions, and the effect of the fee on the parties' standard of living." Eason v. Eason, 384 S.C. 473, 481-82, 682 S.E.2d 804, 808 (2009) (citing E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992)). In determining the amount of attorney's fees to award, the court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case,

[6] Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991).

counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock, 304 S.C. at 161, 403 S.E.2d at 315.

First, the family court's failure to include specific findings as to each Glasscock factor does not require reversal of an attorney's fee award, as long evidence in the record supports each factor. See Townsend v. Townsend, 323 S.C. 309, 318, 474 S.E.2d 424, 430 (1996). In this case, the record contains Wife's attorney's fees affidavit and itemization of costs. While the affidavit could have been more specific, it does state that Wife's counsel has always had a domestic law practice and one-hundred percent of her work was in family law cases. The affidavit further notes the court is aware of the litigation and what has been required to handle the dispute between the parties. Furthermore, the affidavit contains the time spent on the matter and the charge per hour. The affidavit addresses counsel's standing, the fees for such services, and the time devoted to the case. The family court reviewed this information and found the fees to be "in the ballpark."

The family court found Wife's attorney had obtained beneficial results for her in getting the divorce on the grounds of adultery and securing permanent, periodic alimony for Wife. The court also remarked that neither party was really in a position to pay their attorney's fees but that Husband had a little more disposable income than Wife. While we are modifying the amount of income imputed to Wife, the adjustment is not so significant as to warrant a change in the attorney's fees award in light of the totality of the circumstances. Accordingly, the family court did not abuse its discretion in failing to award Wife more attorney's fees.

CONCLUSION

We conclude the family court did not abuse its discretion in declining to impute additional income to Husband, and we find the issue of Husband's voluntary underemployment is not preserved for our review. With respect to Wife's income, we find the family court abused its discretion in imputing monthly income of $1,732 to Wife, and we modify that amount to $1,014.

Based on the alteration to Wife's income, we likewise modify Husband's child support and alimony obligations to $171 per month and $500 per month respectively, retroactive to the date of the family court's final order. Finally, we affirm the family court's award of attorney's fees. Accordingly the judgment of the family court is

AFFIRMED AS MODIFIED.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William R. Crews, Employee,
Claimant, Respondent,

v.

W. R. Crews, Inc. &
Architectural Railings and
Grilles, Employers, and Liberty
Mutual Insurance Corp., and
The Hartford, Carriers, and
South Carolina Workers'
Compensation Uninsured
Employers' Fund, Defendants,

of whom W. R. Crews, Inc. &
Architectural Railings and
Grilles, Employers, The
Hartford, Carriers, and South
Carolina Workers'
Compensation Uninsured
Employers' Fund are Respondents,

and

Liberty Mutual Insurance Corp.
is the Appellant.

Appeal From Hampton County
Honorable Carmen T. Mullen, Circuit Court Judge

Opinion No. 4735
Heard February 2, 2010 – Filed September 1, 2010

AFFIRMED

Allison Molony Carter, of Charleston, for Appellant.

A. G. Solomons, Jr., of Estill, John E. Parker, of Hampton, Latonya Dilligard Edwards and Matthew C. Robertson, both of Columbia, Stephen L. Brown, Francis Drake Roger, and Russell G. Hines, all of Charleston, for Respondents.

THOMAS, J.: In this workers' compensation case, the circuit court held Liberty Mutual Insurance Corporation's cancellation of W.R. Crews, Inc.'s policy was invalid and remanded the matter to the commission to order Liberty Mutual to begin paying benefits and providing treatment to the claimant, William R. Crews.[1] Liberty Mutual appeals. We affirm.

FACTS AND PROCEDURAL HISTORY

Crews was in the business of installing handrails and performed installation work for Architectural Railings and Grilles (ARG). Initially, he operated as a sole proprietorship and was insured under ARG's workers' compensation policy. Later, ARG notified him that he would have to obtain his own workers' compensation coverage. As a result, Crews incorporated

[1] For purposes of this appeal, the interests of W.R. Crews, Inc., and William R. Crews are essentially the same; therefore, the name "Crews" will refer interchangeably to either party or to both parties collectively.

his business in 2003 and contacted independent insurance agent Tim Loadholt of the Loadholt Agency to obtain workers' compensation coverage.

Loadholt procured workers' compensation insurance for Crews through the Assigned Risk Pool by submitting an application to the National Council on Compensation Insurance (NCCI).[2] Crews obtained financing from a premium financing company to pay for coverage. The premium financing company paid the premiums in advance for the entire year and then received installment payments from Crews. Crews' coverage was assigned to Liberty Mutual.

Liberty Mutual issued the policy using estimated payroll information provided by Crews and Loadholt to compute the premiums. Because neither Crews nor Liberty Mutual would know the exact payroll exposure until the end of the policy term, the premiums were estimates until the completion of an actual audit. In order to complete the audit, Liberty Mutual needed actual payroll and tax documentation to verify the exposure. The central issue in this appeal is Crews' alleged noncompliance with Liberty Mutual's audit requests.

On September 22, 2003, Liberty Mutual issued Crews a policy covering the period beginning August 8, 2003, and ending August 8, 2004. This policy will be identified here as the "013 Policy."[3] On May 11, 2004,

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[2] An "assigned risk pool" is a group of servicing carriers who enter into an assigned risk agreement "with respect to the equitable apportionment among them of insurance which may be afforded to applicants who are in good faith entitled to, but who are unable to procure, insurance through ordinary methods." S.C. Code Ann. § 38-73-540(A)(1) (2002). In 2000, the NCCI filed the South Carolina Workers Compensation Assigned Risk Plan with the South Carolina Department of Insurance, which has adopted and followed the Plan. Rodriguez v. Romero, 363 S.C. 80, 85, 610 S.E.2d 488, 490 (2005).

[3] The policies discussed are identified by the last three digits of the corresponding policy numbers.

Liberty Mutual sent Crews and Loadholt a renewal quote for the policy period beginning August 8, 2004, and ending August 8, 2005. The renewal quote related to a policy that would have been assigned a different number had it been issued. That policy will be referred to as the "014 Policy."

On August 2, 2004, towards the end of the term of the 013 Policy, Liberty Mutual sent Crews a mail form audit request in order to determine whether Crews owed additional premium payments on this policy or was entitled to a refund of estimated premiums he had already paid. If the audit showed the actual premium should have been higher than what was originally estimated, Crews' coverage was still effective during the policy period; however, Liberty Mutual would be entitled to an additional payment to cover the increased exposure.

The quoted premium for the 014 Policy was due before coverage on that policy was scheduled to begin. Because Crews did not timely pay the premium, Liberty Mutual did not issue the policy and voided the renewal quote. Crews paid the quoted amount three days later. As a result, Liberty Mutual issued a third policy covering the period from August 11, 2004,f through August 11, 2005. Like the 013 Policy, this policy, which was assigned a different number and will be referred to as the "024 Policy," was financed so that the whole year's premium was paid in advance.

Liberty Mutual did not receive a response to the mail form audit request it sent Crews on August 2, 2004, and sent another request on August 30, 2004. Because Liberty Mutual received no response to the follow-up request, on October 14, 2004, it issued an estimated audit to Crews indicating neither party owed money to the other but this determination was subject to revision once Crews sent the requested information with proper tax documentation. On the same day, Liberty Mutual sent Crews a separate letter, advising that the 024 Policy "has been canceled" effective November 18, 2004. The letter further stated the reason for the cancellation was "non-compliance with plan rules," explaining Crews failed to comply with auditing or loss prevention service department requests. The letter further advised in block letters the policy would not be reinstated and suggested Crews submit

another application to NCCI for workers' compensation coverage. In a deposition, Cindy Thiel, a senior customer account representative with Liberty Mutual Involuntary Market Operations, further clarified that the auditing request with which Crews allegedly failed to comply concerned the 013 Policy.

In response to a telephone call from Crews, Liberty sent an additional mail form audit report to him on October 22, 2004. This mailing was documented in a timeline prepared by Thiel. According to the the timeline, this form was for the 013 Policy. The Loadholt Agency faxed the completed audit form to Liberty Mutual on November 12, 2004; however, no supporting tax documentation was included.

On November 19, 2004,[4] Liberty Mutual sent a letter to Crews requesting tax documentation. Contrary to Liberty Mutual's assertion on appeal that the purpose of the request was to do a final premium calculation for the 024 Policy, the letter contained the following warning: "If the proper documentation is not sent along with your mail audit your current policy may be canceled for non-compliance with audit." (Emphasis added.)

The Loadholt Agency alleged it faxed the requested documents to Liberty Mutual on December 21, 2004; however, Liberty Mutual denied receiving the documents and the only fax verification report in the record pertaining to that time indicated that the transmission had failed. Moreover, Thiel testified that on December 8, 2004, Liberty Mutual sent another follow-up request on the 024 Policy and, on December 23, 2004, issued "the final warning letter for the 024 term." On January 25, 2005, Liberty Mutual sent Crews an estimated audit on the 024 Policy in which it advised that the policy was cancelled on November 18, 2004, and that neither party owed anything to the other. The correspondence further advised that the calculations were subject to revision when Crews submitted a report of actual amounts and

[4] As noted earlier, Liberty Mutual had already advised Crews in its October 14, 2004 correspondence it intended to cancel his 024 Policy effective November 18, 2004.

proper tax documentation. On November 17, 2004, the NCCI received a notice that the 024 Policy had been cancelled on October 21, 2004, and under applicable regulations, it would have considered coverage cancelled thirty days after that date.[5]

Crews suffered a serious workplace injury on February 2, 2005. Liberty Mutual acknowledged receiving a fax containing the tax documents on the same day. By letter dated February 4, 2005, however, Liberty Mutual advised Crews it was denying his claim for benefits because his workers' compensation policy had been cancelled effective November 18, 2004. On February 14, 2005, Liberty Mutual issued a revised audit bill, showing that based on the documents he submitted the day of his accident, Crews owed an additional $1,347 on the 013 Policy and would receive an invoice for this amount under separate cover.

Crews filed a Form 50 on December 20, 2005. The single commissioner heard the matter on July 27, 2006, and by order dated April 10, 2007, upheld Liberty Mutual's cancellation of the 024 Policy for "[Crews'] lack of substantial compliance with reasonable audit requirements for the 013 policy." In addition, the single commissioner found although ARG was Crews' statutory employer, it had relied in good faith on what it believed to be a valid Certificate of Insurance and, based on this finding, allowed its carrier to transfer liability to the Uninsured Employers' Fund (the Fund).

In a divided decision, the appellate panel affirmed the single commissioner.[6] Pursuant to a petition for judicial review filed by Crews, the circuit court issued an order on May 8, 2008, reversing the appellate panel's

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[5] See S.C. Code Ann. Regs. 67-406(F)(2) (1990) ("Insurance expiration, termination or cancellation shall not be effective until after thirty days from the date of receipt by NCCI of the NCCI [Policy Termination/Cancellation/Reinstatement Notice]").

[6] One member of the appellate panel stated she would reverse the transfer of liability to the Fund on the ground that ARG's carrier should pay in the first instance before liability could be transferred.

order and remanding the matter to the commission with instructions to find that Liberty Mutual was responsible for paying Crews' workers' compensation benefits. The court further determined Liberty Mutual's cancellation of the 024 Policy was invalid based on the following findings: (1) none of the circumstances under which the assigned risk plan allows cancellation of a policy was present in this case, (2) Crews complied to the best of his ability with Liberty's Mutual's audit procedures, and (3) any breach by Crews affected only the 013 Policy and not the 024 Policy. This appeal followed.

ISSUES

I. Did the circuit court err in holding Liberty Mutual could not cancel the 024 Policy based on Crews' alleged noncompliance with an audit request on the 013 Policy?

II. Did the circuit court err in finding Crews substantially complied with Liberty Mutual's audit requirements?

III. Did the circuit court err in failing to uphold the appellate panel's findings that Liberty Mutual provided Crews sufficient notice that the policy was to be cancelled and reason for cancellation of the policy?

IV. Was the purported cancellation ineffective because of Liberty Mutual's alleged failure to return any unearned premium to Crews?

V. Should Liberty Mutual be estopped from denying coverage?

VI. Should ARG be allowed to transfer liability to the Fund?

STANDARD OF REVIEW

In an appeal from the workers' compensation commission, "neither this Court nor the circuit court may substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law." Hopper v. Terry

Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 163, 164 (Ct. App. 2007), aff'd, 386 S.C. 310, 680 S.E.2d 1 (2009); see also Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007) (stating appellate review of a workers' compensation decision "is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law").

LAW/ANALYSIS

I. Cancellation of the 024 Policy

Liberty Mutual argues the appellate panel correctly found it properly cancelled the 024 Policy, noting that the policy expressly advised as follows: "If requested information is not made available in a timely fashion, your premium will be estimated and your policy may be canceled." It further cites provisions in the policy under which insureds are required to "keep records of information needed to compute premium" and "will provide us with copies of those records when we ask for them." Liberty Mutual points to a provision in the Assigned Risk Plan under which an employer's failure to comply with reasonable audit requirements is a ground for cancellation of a workers' compensation policy. Finally, Liberty Mutual contends the circuit court improperly decided the matter as a question of law when it should have focused on whether substantial evidence supported the appellate panel's finding that cancellation was proper. We disagree.

As the circuit court noted, both Loadholt and Thiel testified that Crews was in full compliance with the policy requirements of the 024 Policy. Although Thiel asserted the plan rules in the NCCI manual required Liberty Mutual to cancel any current policy due to noncompliance with an audit request for a prior policy, we found no rules with this precise language in the record. Moreover, as the circuit court noted: "There is no provision of the Plan requiring or allowing cancellation of a current policy due to an alleged failure to comply with the requirements of a previous policy, Policy 013 in this case." We believe the circuit court's interpretation of the Assigned Risk

Plan is correct as a matter of law, and based on this interpretation, the court's reversal of the appellate panel's order was proper.

The Assigned Risk Plan specifies five circumstances allowing a carrier to cancel an insurance policy: (1) the employer is not in good faith entitled to workers' compensation coverage, (2) the employer has failed to comply with reasonable health, safety, or audit and loss prevention requirements, (3) the employer has violated one or more of the terms under which the insurance was issued, (4) the employer refuses to allow the assigned carrier reasonable access to its facilities or its files and records for audit or inspection, and (5) the employer refuses to disclose to the assigned carrier the full nature and scope of the assigned carrier's exposure. The only circumstance applicable here was Crews' alleged failure to comply with reasonable audit requirements. We hold that under the terms of both the 024 Policy and the Assigned Risk Plan, Crews' alleged noncompliance with an audit request for the 013 Policy does not constitute a failure to comply with a "reasonable" audit request for the 024 Policy.

As to audit requirements, the Plan requires carriers "to complete a final audit and to bill for any additional premium or refund any excess premium paid during the policy year." The wording of this provision indicates that settlement of any discrepancies between the amount paid by an insured for the policy period and the amount owing for the corresponding term is to be handled directly between the carrier and the insured, without adjustments to any subsequent policies between them. That is exactly what happened here; once Liberty Mutual completed the final audit on the 013 Policy, it advised Crews it would be sending him an invoice for the surcharge.

Furthermore, contrary to Liberty Mutual's contention that "NCCI rules speak to coverage under the plan and do not differentiate between separate policies," the payroll audit provision of the plan provides that "[f]ailure by the employer to allow a preliminary or final audit will result in the cancellation of the policy for noncompliance with policy terms and conditions." Here, the audit pertained to the 013 Policy; thus, any

noncompliance on Crews' part would affect only his coverage under that policy.

As support for its position, Liberty Mutual cites Budget Premium Co. v. American Casualty Co., 483 N.E.2d 389, 391 (Ill. App. 3d Dist. 1985), for the proposition that "[s]uccessive policies issued by the same insurer to the same insured, for the same or similar coverage are considered renewal policies." The quoted passage, however, is from a section of the Illinois Code. We have not found, nor has Liberty Mutual directed to our attention, any analogous statute in the South Carolina Code. Moreover, case law from our jurisdiction suggests otherwise. See Webb v. S.C. Ins. Co., 305 S.C. 211, 213, 407 S.E.2d 635, 636 (1991) (holding a policy renewal is a new contract "unless (1) the expiring policy mandates the same terms shall remain in effect and (2) the terms of the policy do not change upon renewal"). In the present case, Thiel herself admitted Crews was in compliance with the terms of the 024 Policy when it was cancelled by Liberty Mutual and agreed the 024 Policy was a separate policy from the 013 Policy. We therefore agree with the circuit court that Crews' alleged noncompliance with an audit request to determine what he owed on the 013 Policy was not a valid reason for Liberty Mutual to cancel the 024 Policy.

II. Substantial Compliance

As an additional ground for reversing the appellate panel's decision, the circuit court noted Crews had complied to the best of his ability with Liberty Mutual's audit request. In response, Liberty Mutual contends Crews' compliance efforts were insufficient because of provisions in the Assigned Risk Plan that purportedly prohibit reinstatement of coverage if an item correcting a deficiency is received more than sixty days from the date of cancellation. Based on this argument, Liberty Mutual asserts its receipt of the tax documentation the same day Crews was injured did not warrant reinstatement of his coverage. We disagree with Liberty Mutual's position that Crews' compliance efforts were insufficient.

The South Carolina Supreme Court has recognized that although none of the provisions of the Assigned Risk Plan have been promulgated as regulations, the Plan "has the force of law" because it has been approved by the Director of the Department of Insurance. Avant v. Willowglen Acad., 367 S.C. 315, 318-19, 626 S.E.2d 797, 799 (2006). Furthermore, because the focus of the Plan is on assigned risk insurance, its provisions prevail over workers' compensation regulations, which address workers' compensation generally. Id.

The Assigned Risk Plan allows a carrier to initiate cancellation procedures if it determines one of the five conditions enumerated above exists; however, Plan rules specify the carrier must first provide an opportunity to cure. Furthermore, the Plan requires a servicing carrier "[t]o work with and assist the . . . employer . . . on problems relating to coverage and service under the Plan." It follows that a carrier is to adopt a flexible approach when dealing with an insured who is unable to strictly comply with the policy terms but is making reasonable efforts to do so.

To determine whether Crews substantially complied with the audit request, the critical time period is the interval between August 2, 2004, when Liberty Mutual issued its initial mail form audit request for the 013 Policy, and November 18, 2004, the date the 024 Policy was scheduled to be cancelled. During that interval, Crews had not yet filed his 2003 tax returns for his business; therefore, he was unable to send the tax documentation that Liberty Mutual requested. Nevertheless, he completed and returned the audit form several days before the scheduled cancellation. Only after Liberty Mutual cancelled the 024 Policy did it notify him additional documents were necessary. Because Liberty Mutual had time to notify Crews before the scheduled cancellation that he needed to provide additional information but failed to give such notice until after it cancelled the 024 Policy, we agree with the circuit court that Liberty Mutual did not act reasonably in providing an opportunity for cure, as it was required to do under the terms of the Assigned Risk Plan. Furthermore, as the circuit court noted, Liberty Mutual advised Loadholt the cancellation would stand even if the fax transmission of the tax documents had been successful. This finding is consistent with Liberty

Mutual's position that its reason for sending a request on November 19, 2004, for tax documentation was for a final audit of the now-cancelled 024 Policy rather than for purposes of reinstating it.[7]

III. Notice of Cancellation

Liberty Mutual next argues the record has substantial evidence supporting the appellate panel's finding that it gave the statutorily required notice to Crews. Assuming without deciding that this argument is correct, we hold it is not a reason to reverse the circuit court's decision.

Under section 38-75-730(c) of the South Carolina Code (2002 & Supp. 2009), an insurer may cancel a policy "for any reason by furnishing to the insured at least thirty days' written notice of cancellation, except where the reason for cancellation is nonpayment of premium, in which case not less than ten days' written notice must be furnished." This provision, however, must be read in conjunction with the portions of the Assigned Risk Plan concerning when and how an assigned risk carrier may cancel a policy. We have already concluded (1) the circuit court correctly ruled Liberty Mutual could not cancel Crews' current policy because of his alleged noncompliance with audit requests for his former policy and (2) in the alternative, Liberty Mutual did not comply with Plan requirements that it provide Crews an opportunity to cure the deficiencies in the information he sent at its request. It follows, then, that because Liberty Mutual's cancellation of Crews' insurance policy was not permitted under the Assigned Risk Plan, its

[7] Moreover, if in fact Liberty Mutual's only reason for its November 19, 2004 correspondence was to gather information for a final audit of the 024 Policy rather than to give Crews another chance to remedy the deficiency in the information so that his coverage could be reinstated, Liberty Mutual arguably would have violated the Assigned Risk Plan. Under the Plan provisions, "[i]f an item correcting a fault which resulted in cancellation is received on or within sixty (60) days after the effective date of cancellation, the carrier shall reinstate insurance with a lapse in coverage . . . ." (Second emphasis added.)

compliance with statutory notice requirements about the cancellation is of no effect.

IV. Failure to Return Unearned Premiums

Liberty Mutual next argues the circuit court should have upheld the finding by the single commissioner and the appellate panel that its failure to return unearned premiums to Crews did not render its cancellation of Crews' workers' compensation policy ineffective. The issue of whether Liberty Mutual should have returned unearned premiums to Crews to effect cancellation of his insurance policy does not affect our prior determination that Liberty Mutual could not cancel the 024 Policy because of Crews' failure to provide information for the 013 Policy. Likewise, the issue of unearned premiums would have no impact on our ruling that Crews was entitled to an opportunity to cure any deficiencies in his response to the audit requests before his policy could be cancelled. Because these two reasons are sufficient to uphold the circuit court's decision to reverse the appellate panel's order, we decline to address the arguments concerning the obligation of an insurer under the Assigned Risk Plan to return unearned premiums to an insured following the cancellation of a policy. See Weeks v. McMillan, 291 S.C. 287, 292, 518 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous.").

V. Estoppel

Liberty Mutual further argues it should not be estopped from denying coverage. In the appealed order, the circuit court noted that estoppel was one of the questions presented in Crews' petition for judicial review; however, based on the court's decision that Liberty Mutual's cancellation of the 024 Policy was invalid for other reasons, it declined to rule on this issue. We likewise hold it is unnecessary in this appeal to address the question of whether the doctrine of estoppel should prevent Liberty Mutual from denying coverage for Crews' injury. See Futch v. McAllister Towing of Georgetown,

Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

VI. Transfer of Liability from ARG to the Fund

Finally, the Fund contends that, in the event this court holds in favor of Liberty Mutual, we should reverse the appellate panel's decision to allow ARG to transfer its own liability to the Fund. Because we have upheld the circuit court's decision that Liberty Mutual's cancellation of the policy was invalid, we need not address this argument. See Colleton County Taxpayers Ass'n v. Sch. Dist. Of Colleton County, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006) ("[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review."); Hitter v. McLeod, 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980) (declining to rule on an issue that was not ripe for adjudication and noting it "presents [the court] with nothing more than a vehicle for rendering an advisory opinion").

CONCLUSION

We affirm the circuit court's ruling Liberty Mutual is the liable party for workers' compensation benefits in this case; however, our holding is based solely on our determinations that Liberty Mutual could not cancel Crews' current policy because of auditing difficulties with his prior policy and that Liberty Mutual could not cancel either policy without giving Crews a reasonable opportunity to cure any alleged noncompliance. Because neither ARG nor the Fund would be responsible for paying workers' compensation benefits in this case, we decline to address the Fund's argument that it should not have been required to assume liability in the first instance.

AFFIRMED.

HUFF and KONDUROS, JJ., concur.