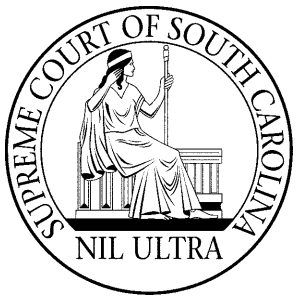

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 38
September 20, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Eric Reed Martin, Respondent.

Opinion No. 26881
Heard August 4, 2010 – Filed September 20, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Eric Reed Martin, *pro se*, of Columbia.

PER CURIAM: In this attorney disciplinary matter of admitted misconduct, we find the appropriate sanction is a public reprimand.

In 2003 and 2004, Respondent Eric Reed Martin conducted three real estate transactions in which he failed to follow proper procedures. In response to the first two complaints, ODC and Respondent entered a Deferred Discipline Agreement that required Respondent to obtain a Law Office Management Advisor and meet with that advisor for a thorough and ongoing review of Respondent's law office management practices. Respondent failed to comply with the terms of the Agreement, and the Agreement was terminated. In the meantime, ODC received a third complaint arising from the same general time frame as the first two complaints. ODC brought formal charges against Respondent based on the three complaints. Respondent admitted the

charges, and a Hearing Panel of the Commission on Lawyer Conduct ("the Panel") recommended a definite suspension of ninety days. As noted, we issue a public reprimand.

I.

Matter I

On October 8, 2003, while employed at the Dallis Law Firm, Respondent represented Client A in a real estate closing. Following the closing, Respondent failed to promptly record the deed, issue the title insurance policy, and deliver the closing documents to the lender. In addition, Respondent failed to ensure the HUD statement was accurate, and he disbursed a portion of the proceeds of the transaction prior to depositing those proceeds into the firm's trust account. Respondent did not reply when Client A called with concerns about the closing. Finally, Respondent did not ensure the outstanding tasks in Matter I were completed before he left the Dallis Law Firm.

Matter II

On October 4, 2004, as a solo practitioner, Respondent represented Client B in a real estate closing. Respondent did not record the deed and mortgage from this closing until December 2006. He did not adequately respond to Client B's inquiries about the matter.

Matter III

On October 31, 2003, while still employed at the Dallis Law Firm, Respondent represented Client C in a real estate refinance. According to Respondent, he was not aware that Client C was married until he began to review the loan documents with the client. Upon learning Client C was married and the property was jointly titled in the name of both spouses, Respondent determined that he would move forward with the refinance and have the client's wife sign the appropriate documents at a later date.

Respondent did not obtain the appropriate documents from Client C's wife. He processed the file and submitted a title insurance policy to the lender, and the title policy and other documents indicated Client C was the sole owner of the property. Respondent did not disclose to the lender that the property was jointly owned by the client and his wife. As a result, the lender disbursed the loan and obtained a security interest in only one half of the property.

II.

At the hearing before the Panel, Respondent conceded that ODC's allegations were true, although he denied any intent to deceive the lender in Matter III. Respondent asserted he scheduled at least three appointments with Client C's wife so that she could sign a deed, but she did not keep the appointments. Respondent stated that, after these failed attempts, he "basically . . . just forgot about [Client C's wife]."

Respondent asserted his failure to timely file documents resulted from his inexperience and from a high turnover in the nonlawyer staff to which he delegated duties such as recording documents and preparing title policies when he practiced at the Dallis Law Firm. He stated he was not informed by his staff that Client A had attempted to contact him about her concerns.

Respondent attributed his failure to comply with the Deferred Discipline Agreement to scheduling conflicts with his Law Office Management Advisor. He admitted he did not notify ODC that he was having difficulty scheduling a meeting with his advisor and he did not seek out a substitute advisor. There is no excuse for Respondent's failure to take the minimal steps to meet the assigned advisor. Respondent asserted that, despite his failure to meet with an advisor, he had implemented improvements to the management of his solo practice. In addition, Respondent stated he had participated in the Legal Ethics and Practice Program (LEAPP) administered by ODC.

The Panel found Respondent committed misconduct in these three matters, and in light of the failed Deferred Discipline Agreement,

it recommended a definite suspension of ninety days. The Panel found "Respondent simply disregarded his obligations pursuant to the [Deferred Discipline] Agreement and gave no plausible justification for doing so." However, the Panel expressed concern that Respondent might suffer from an undiagnosed mental health problem. Accordingly, the Panel recommended Respondent be required to undergo a mental health evaluation and, if treatment was recommended, submit quarterly reports from his treating physician. Moreover, the Panel recommended Respondent be required to obtain and meet with a Law Office Management Advisor according to the terms set forth in the Deferred Discipline Agreement. Finally, the Panel recommended Respondent be required to pay the costs of the proceedings.

III.

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). We "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the [Panel]." Rule 27(e)(2), RLDE, Rule 413, SCACR.

IV.

We find that, in 2003 and 2004, Respondent conducted a series of real estate transactions without following proper procedures. He prepared an inaccurate HUD statement, disbursed funds prematurely, and unreasonably delayed in filing deeds. In addition, he failed to respond to clients' requests for information. Most troublesome is Matter III, in which Respondent moved forward with a real estate refinance in the absence of his client's wife even though he was aware the property was titled jointly in the name of both spouses.

Our sanctions for attorneys who exhibit a lack of diligence in legal matters have varied according to the egregiousness of the conduct. *Compare In re Day*, 352 S.C. 41, 572 S.E.2d 291 (2002) (issuing a

public reprimand to an attorney who exhibited a pattern of failing to promptly handle client matters and failing to adequately communicate with clients), *and In re Bruner*, 321 S.C. 465, 469 S.E.2d 55 (1996) (issuing a public reprimand to an attorney who failed to forward closing documents to the appropriate parties, resulting in a misrepresentation to a title insurer about the status of a lien), *with In re Sims*, 380 S.C. 61, 668 S.E.2d 408 (2008) (imposing a ninety day suspension where an attorney failed to timely act on his clients' behalf, failed to promptly remit unearned fees, and failed to respond to ODC's investigation), *and In re Tootle*, 319 S.C. 392, 461 S.E.2d 824 (1995) (imposing a four month suspension where an attorney failed to diligently pursue client matters and unreasonably delayed in remitting unearned fees and other client funds). We have recognized that improper procedures in real estate transactions merit severe sanctions. *In re Johnson*, 386 S.C. 550, 560, 689 S.E.2d 623, 628 (2010).

V.

We conclude Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication with clients); Rule 1.15 (safekeeping property); Rule 4.1 (truthfulness in statements to others); Rule 5.3 (responsibilities regarding nonlawyer assistants); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (conduct prejudicial to the administration of justice).

We note that Respondent's conduct results not from fraud or deceit, but from carelessness and inattention to the precise requirements associated with real estate transactions and closings. We have further considered Respondent's cooperation and candor with ODC. We hold that a public reprimand is the appropriate sanction under the circumstances of this case.

Respondent shall pay costs in the amount of $671.43. *See* Rule 27(e)(3), RLDE, Rule 413, SCACR. Respondent shall submit to a mental health evaluation, follow the treatment recommendations of his mental health professional, and submit quarterly updates to the Office

of Commission Counsel regarding his mental health status for a period of two years. At oral argument, Respondent asserted he was in the process of closing his law office and withdrawing from the practice of law. In the event Respondent continues or resumes the practice of law, he shall obtain and meet with a Law Office Management Advisor according to the terms set forth in his Deferred Discipline Agreement, with responsibility for monitoring compliance to be determined by the Office of Commission Counsel.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Farm Bureau
Mutual Insurance Company, Appellant,

v.

Henry Kennedy, Respondent.

Appeal From Laurens County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4738
Heard May 18, 2010 – Filed September 15, 2010

REVERSED

Karl S. Brehmer and L. Darby Plexico, III, of Columbia, for Appellant.

Eric H. Philpot, of Greenville, for Respondent.

SHORT, J.: South Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) appeals from the trial court's order finding Henry Kennedy

was entitled to underinsured motorist (UIM) coverage, arguing the court erred in finding Kennedy was occupying the manure truck when he was hit by the pickup truck because he was not "upon" the insured vehicle at the time of the accident. We reverse.

FACTS

On October 23, 2002, Kennedy was hurt in a pedestrian-vehicle accident.[1] Kennedy was employed by Irons Poultry Farms, Inc. (Irons Poultry), and at his employer's direction, Kennedy drove the company's manure truck to a restaurant to tell the owner he could pick up some chicken feed at his employer's farm. After delivering the message, Kennedy paused in the restaurant parking lot to talk to his half-brother, Teddy Robinson, who worked at the restaurant. While Kennedy was talking to Robinson, an accident occurred on the highway adjacent to the parking lot, and one of the vehicles careened into the parking lot, striking Kennedy and Robinson who were standing behind the manure truck. The vehicle that struck Kennedy was a pickup truck driven by George Counts. Kennedy sustained injuries with medical costs and lost wages totaling more than $64,000; however, he settled with Counts' insurance company for $50,000 in exchange for a covenant not to execute. Kennedy then made a demand for the full amount of UIM coverage available under Irons Poultry's policy with Farm Bureau. The policy provided UIM coverage in the amount of $50,000 per individual, and $100,000 per occurrence. Farm Bureau denied Kennedy coverage, claiming Kennedy was not entitled to UIM coverage under the policy because he was not occupying Irons Poultry's manure truck at the time of the accident as required by the policy to qualify for UIM coverage. Farm Bureau's policy defined "occupying" as "having actual physical contact with an auto while in, upon, entering, or alighting from it."

On April 21, 2004, Farm Bureau filed a declaratory judgment action to determine if Kennedy was entitled to UIM coverage under Farm Bureau's commercial auto policy issued to Irons Poultry. Kennedy filed a motion for

[1] Most of the facts of this case were stipulated in an agreement entered into by the parties in May 2005.

summary judgment, asserting he was entitled to coverage under the policy because the evidence conclusively proved he was pinned between the manure truck and Counts' truck, thus establishing he was "upon" the truck. The case was set for a non-jury trial on May 11, 2005. Before trial, Kennedy requested Judge Saunders hear his motion for summary judgment. Judge Saunders granted the motion in an order dated June 16, 2005.[2] Farm Bureau filed a motion for reconsideration, which was denied. Farm Bureau then filed an appeal with this court. After oral arguments on the case, this court found a genuine issue of material fact existed as to whether Kennedy was pinned or knocked against the manure truck. Therefore, in an unpublished opinion, this court reversed the circuit court's decision granting summary judgment to Kennedy, and remanded the case to the circuit court for a hearing on the merits.[3] Kennedy filed a Petition for Rehearing with this court, which was denied.

Upon remand from this court, the non-jury trial was conducted on July 15 and 17, 2008.[4] Several months later, Judge Hayes filed his order finding Kennedy was entitled to UIM coverage because he was momentarily pinned against the manure truck during the accident; therefore, he was "upon" the

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[2] In his order, Judge Saunders stated, "There was irrefutable testimony by eyewitnesses, [Kennedy], and medical documentation that indicated [Kennedy] was momentarily pinned between the rear of the manure truck and the rear of [Counts'] truck. [Farm Bureau] presented no evidence to dispute the fact that [Kennedy] was pinned against the manure truck and therefore did not meet the scintilla of the evidence burden to make this a genuine issue of material fact."

[3] S.C. Farm Bureau Mut. Ins. Co. v. Kennedy, Op. No. 2006-UP-423 (S.C. Ct. App. filed Dec. 19, 2006).

[4] During the trial, Kennedy's counsel stated, "We have never alleged that there was any collision from the Counts truck with the manure truck. . . . [T]here was a collision in the Counts truck to [Kennedy's] leg and momentarily pinned him against the manure truck."

insured vehicle and "occupying" it according to the policy.[5] This appeal followed.

STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable; therefore, the standard of review is determined by the nature of the underlying issue. Hardy v. Aiken, 369 S.C. 160, 164, 631 S.E.2d 539, 541 (2006). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." Auto-Owners Ins. Co. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings." Id.

[5] Judge Hayes made the following findings of fact in his order: (1) "The engine to the insured vehicle [Kennedy] was driving was running and a dog was inside"; (2) "[Kennedy], prior to the collision, rested his hand on the insured vehicle"; and (3) "The vehicle driven by George Counts pushed and momentarily pinned [Kennedy] against the insured vehicle causing injury." Kennedy testified the keys were still in the ignition and his dog was in the truck. Kennedy also testified that he was leaning on the truck when he saw the pickup truck coming at him. Then, he said he took his hand off the truck and ran from the pickup truck before he was pinned to the manure truck by the pickup truck. Robinson stated in his deposition that he and Kennedy "took out running" when they saw Counts' truck headed in their direction. Robinson said he was hit first by Counts' truck, so he did not see Kennedy get hit, but he did hear Kennedy hollering in pain and saw him lying next to him on the ground. Ronald Long, who witnessed the accident, testified that for a second it appeared Kennedy was pinned between the pickup truck and the manure truck.

LAW/ANALYSIS

Farm Bureau argues the trial court erred in finding Kennedy was occupying the manure truck when he was hit by the pickup truck because he was not upon the manure truck at the time of the accident. We agree.

The general rules of contract construction apply to insurance policies. MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct. App. 1999). "[T]he law is clear that, in construing an insurance contract, all of its provisions must be considered together." Id. "Therefore, the court must consider the entire contract between the parties to determine the meaning of its provisions, and that construction will be adopted which will give effect to the whole instrument and each of its various parts, so long as it is reasonable to do so." Id. "This court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning." Id. at 548-49, 520 S.E.2d at 823. "An insurer's obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction." Id. "[A]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." Id. "However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." Id.

Farm Bureau's policy defined "occupying" as "having actual physical contact with an auto while in, upon, entering, or alighting from it." In this case, Kennedy was not getting in or out of the manure truck at the time of the accident. He was standing near the truck when he was hit. Kennedy argues the pickup truck hit him and briefly pinned him against the manure truck. The issue now before us is whether the impact of the pickup truck pushing Kennedy into the manure truck was enough for Kennedy to have been "upon" the manure truck so as to fall under the policy. Two South Carolina cases have dealt with similar issues, but neither is the exact issue presented in this case.

In McAbee v. Nationwide Mutual Insurance Co., 249 S.C. 96, 98-99, 152 S.E.2d 731, 732 (1967), our supreme court was presented with the sole question of whether the insured, while standing on the ground with his back against a parked truck in an effort to keep a tractor from rolling against him, was "upon" the truck within the meaning of the policy.[6] The court stated it did not think the meaning of the word "upon" is restricted to "on top of," such as a person resting the weight of his or her body upon the vehicle or being supported by the vehicle. Id. at 100, 152 S.E.2d at 732. The court noted that according to Webster's Third New International Dictionary, "[o]ne of the common and ordinary meanings of the word 'upon' is that of 'contact with'." Id.; see S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518 n.2, 548 S.E.2d 880, 883 n.2 (Ct. App. 2001) (stating that McAbee discussed that the term "upon" was synonymous with "contact with"). The court stated that because the policy contained no restrictions as to how or in what manner the insured was to be upon the vehicle, the court thought "it reasonable to conclude that the parties contemplated a construction of the word that would include actual physical contact with the vehicle the insured was using." Id. at 100, 152 S.E.2d at 732-33. Therefore, the court held the insured was in actual physical contact with the vehicle and was "upon" it within the meaning of the policy provision when he placed his back against the vehicle in an attempt to protect himself from the rolling tractor. Id. at 100, 152 S.E.2d at 733.

This case is distinguishable from McAbee because in McAbee, the insured had his back to the truck and was pushing against it when he was crushed to death. Therefore, the insured was physically touching the truck when he was killed. Here, Kennedy was near the manure truck when he was hit by the other vehicle and asserts he was pushed into the manure truck by the pickup truck. Therefore, Kennedy was not physically touching the truck when he was first hit by the pickup truck.

[6] The Nationwide policy insured against injury "while in or upon, entering or alighting from" the motor vehicle. McAbee, 249 S.C. at 98, 152 S.E.2d at 732.

In South Carolina Property and Casualty Guaranty Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001), this court held the owner of a disabled car, Yensen, was not "occupying" a tow truck when a car struck him as he stood alongside his disabled car. The court found Yensen was not an "insured" entitled to UIM benefits under the tow truck owner's policy, even though he intended to occupy the tow truck for a ride, because at the time of the accident he was not in, upon, getting in, on, out or off the truck, and no causal connection existed between the truck and the injuries. Id. at 518-20, 548 S.E.2d at 883-84. The tow truck's policy defined "insured" as "anyone else 'occupying' a covered auto." Id. at 517, 548 S.E.2d at 883. According to the policy, "occupying" was defined as "in, upon, getting in, on, out or off." Id. Therefore, this court determined Yensen was not occupying the tow truck as the policy defined that term. Id. at 518, 548 S.E.2d at 883. The court found that under the plain meaning of the words, Yensen was not "in, upon, getting in, on, out or off" the tow truck at the time of the accident. Id. at 518-19, 548 S.E.2d at 883. While the court noted there was some testimony Yensen intended to leave the scene in the tow truck, he was not "in or on" or in the process of getting into the truck at the time of the accident. Id.

Yensen is also distinguishable from this case because in Yensen the court noted Yensen may or may not have intended to get into the tow truck, which was the insured vehicle from which he was seeking coverage. In this case, Kennedy had driven the manure truck to the restaurant and was intending to leave the restaurant in the manure truck; therefore, there was no question of his intent to depart in the insured vehicle. However, like Yensen, Kennedy was not "in, upon, getting in, on, out or off" the manure truck at the time of the accident. Kennedy had departed the truck, gone inside the restaurant, and then returned to the parking lot to talk to Robinson near the vehicle. Although there was testimony Kennedy was headed back to the manure truck when he was hit, he was not "getting in" the truck when he was struck by Counts' pickup truck.

In Yensen, this court noted that in Whitmire v. Nationwide Mutual Insurance Co., 254 S.C. 184, 191-92, 174 S.E.2d 391, 394-95 (1970),[7] our supreme court "held that where a passenger was struck while within two or three feet of the car he had immediately 'alighted from,' that passenger may collect uninsured motorist coverage from the insurer of the car he had been riding in." Yensen, 345 S.C. at 519, 548 S.E.2d at 883-84. Yensen argued Whitmire was controlling because Yensen intended to occupy the tow truck and, thus, he should have been able to collect insurance from the tow truck's insurance provider. Id. This court found Whitmire was distinguishable because there, the plaintiff had unquestionably been occupying the car, whereas in Yensen, at most, Yensen's intent to occupy the tow truck was expressed after the accident and during litigation. Id. at 519, 548 S.E.2d at 884. This court stated it was reluctant to extend Whitmire to the facts in Yensen because Yensen was not "still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions." Id. (quoting Whitmire, 254 S.C. at 191, 174 S.E.2d at 394). In Whitmire, the court noted "[t]he words 'in' and 'upon' encompass situations where a person has some physical contact with the vehicle at the time of injury." 254 S.C. at 191, 174 S.E.2d at 394.

Here, if Kennedy had been hit soon after he had alighted from the manure truck, under Whitmire, he would have been deemed to have been "occupying" the truck; however, Kennedy had gone inside the restaurant, returned to the parking lot, and was standing near the truck talking when the accident occurred. Therefore, he was not "occupying" the truck as a result of having recently alighted from the truck because of the intervening act of going into the restaurant.

While McAbee and Yensen are helpful, they are not dispositive of the issue in this case. Therefore, we look to other jurisdictions for guidance on this issue. Many states have been faced with a similar issue and some have adopted tests to determine whether a person is "occupying" a vehicle as to

[7] The policy in Whitmire defined "occupying" as "in or upon or entering into or alighting from" the insured vehicle. Whitmire, 254 S.C. at 188, 174 S.E.2d at 393.

have coverage under an insurance policy. In Utica Mutual Insurance Co. v. Contrisciane, 473 A.2d 1005, 1009 (Pa. 1984), the Pennsylvania Supreme Court established a four-part test to determine whether a person engaged in the lawful use of an insured vehicle will be considered to be "occupying"[8] that vehicle within the meaning of the policy:

> (1) there is a causal relation or connection between the injury and the use of the insured vehicle;
> (2) the person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;
> (3) the person must be vehicle oriented rather than highway or sidewalk oriented at the time; and
> (4) the person must also be engaged in a transaction essential to the use of the vehicle at the time.

See also Loyd v. State Auto. Prop. & Cas. Co., 265 S.W.3d 901, 905 (Mo. Ct. App. W.D. 2008) (stating the four-part test "does express reasonable and sensible considerations to determine whether a person is occupying a vehicle," but declining to adopt the test); Cuevas v. State Farm Mut. Auto. Ins. Co., 130 N.M. 539, 541 (N.M. Ct. App. 2001) (citing the Utica test, and noting it has been adopted in the majority of jurisdictions and "is broader and is concerned with whether 'the person claiming benefits was performing an act (or acts) which is (are) normally associated with the immediate 'use' of the [vehicle]'" (quoting Utica, 473 A.2d at 1009)); Downing v. Harleysville Ins. Co., 602 A.2d 871, 874 (Pa. 1992) (applying the Utica test); General Accident Ins. Co. of Am. v. Olivier, 574 A.2d 1240, 1241 (R.I. 1990) (finding the Utica test persuasive); Roden v. Gen. Cas. Co. of Wisc., 671 N.W.2d 622, 627-28 (S.D. 2003) (noting a majority of the jurisdictions have adopted the four-part test established in Utica and finding "the four-part test set forth above should be utilized in this jurisdiction when determining

[8] The Utica policy provided, "'occupying' means in or upon or entering into or alighting from." Utica, 473 A.2d at 1008.

whether or not an individual is 'occupying' the insured vehicle under the policy definitions").

In Moherek v. Tucker, 230 N.W.2d 148, 151-52 (Wis. 1975), the Supreme Court of Wisconsin adopted a different test to determine whether an injured party was "occupying" the vehicle.[9] The test considered whether the party was vehicle-oriented or highway-oriented at the time of the injury. Id.; Kreuser by Kreuser v. Heritage Mut. Ins. Co., 461 N.W.2d 806, 808 (Wis. Ct. App. 1990) ("In Moherek, the supreme court established a test to determine whether or not an injured party was 'occupying' the vehicle. The test considers whether the party was vehicle-oriented or highway-oriented at the time of the injury."). "[A] person has not ceased 'occupying' a vehicle until he has severed his connection with it – i.e., when he is on his own without any reference to it. If he is still vehicle-oriented, as opposed to highway-oriented, he continues to 'occupy' the vehicle." Moherek, 230 N.W.2d at 151 (quoting Allstate Ins. Co. v. Flaumenbaum, 308 N.Y.S.2d 447, 462 (N.Y. Sup. Ct. 1970)). In Kreuser, the court of appeals noted the "vehicle-orientation" test considers the nature of the act engaged in at the time of the injury and the intent of the person injured, and added a third consideration: whether the injured person was within the reasonable geographical perimeter of the vehicle. 461 N.W.2d at 808.

In Wickham v. Equity Fire and Casualty Co., 889 P.2d 1258, 1261 (Okl. Ct. App. 1994), the Oklahoma Court of Appeals discussed the Kreuser and Utica tests and declined to adopt a bright-line test. Instead, the court held that "the determination of whether the policy definition of 'occupying' is satisfied should be left to a case-by-case analysis, depending on the circumstances of the accident, the use of the vehicle, the relevant terms of the coverage at issue, and any underlying public policy considerations." Id. Therefore, the court found a man who was struck by another car while fixing the tire on a car was "occupying" the vehicle.[10] Id.

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[9] The policy in Moherek defined "occupying" as "in or upon, entering into or alighting from" the insured vehicle. Moherek, 230 N.W.2d at 149.

[10] The Equity policy defined "occupying" as "in, on, getting in or on, or getting off or out of" the insured vehicle. Wickham, 889 P.2d at 1260.

Similarly, in United Farm Bureau Mutual Insurance Co. v. Pierce, 283 N.E.2d 788, 791 (Ind. Ct. App. 1972), the Indiana Court of Appeals determined that Pierce was "upon" his vehicle when he cut his hand on the fender of his car because he was pushing on the front fender in an attempt to push it out of the snow.[11] The court noted "[t]he majority of 'in or upon' cases appear to rely primarily upon physical support." Id. at 790. Almost ten years later, in Michigan Mutual Insurance Co. v. Combs, 446 N.E.2d 1001, 1007 (Ind. Ct. App. 1983), the court of appeals held the claimant, who was working on the insured vehicle's engine and resting his knees on the bumper, was "upon" the insured vehicle when he was hit by another vehicle.[12] The court noted the application of the "physical contact" rule relied upon in Pierce could unduly restrict coverage in some factual settings and serve to expand coverage beyond the contemplation of the contracting parties in other settings. Id. at 1005. The court also noted that in Robson v. Lightning Rod Mutual Insurance Co., 393 N.E.2d 1053, 1055 (Ohio Ct. App. 1978), the Ohio Court of Appeals held in cases in which a gray area existed concerning whether a person was "in or upon, entering into or alighting from" an insured vehicle, the determination of whether the vehicle was "occupied" should be based on an analysis of the relationship between the vehicle and the claimant within a reasonable geographic perimeter. The Robson court also rejected the physical contact rule. Id. However, in Combs, the court found that both the physical contact rule and the Robson claimant-vehicle relationship analysis supported coverage for the claimant because he was in physical contact with the car and his actions evidenced a relationship with the vehicle and its operation. Combs, 446 N.E.2d at 1007.

Other courts have declined to find coverage when, as in this case, the injured person was not touching the insured vehicle at the time of the accident. In Rednour v. Hastings Mutual Insurance Co., 661 N.W.2d 562, 567 (Mich. 2003), Rednour argued he was "upon" a car when he was pinned

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[11] The policy defined "occupying" as being "in or upon, entering into or alighting from" the vehicle. Pierce, 283 N.E.2d at 789.

[12] According to the policy, "occupying" means "in or upon or entering into or alighting from" the insured vehicle. Combs, 446 N.E.2d at 1007.

against it after being struck by another car. Rednour admitted he was not touching his friend's car and was approximately six inches from the car when the other vehicle struck him. Id. at 563. The Michigan court noted that "physical contact by itself does not, however, establish that a person is 'upon' a vehicle such that the person is 'occupying' the vehicle." Id. at 567. The court held that under the policy's definition of "occupying," Rednour was not occupying the insured automobile when he was injured.[13] Id. at 568.

In State Farm Mutual Automobile Insurance Co. v. Farmers Insurance Co., 569 S.W.2d 384, 384-85 (Mo. Ct. App. 1978), the insured was beside his friend's car, walking towards the car door when another car rear-ended the car. At the time of the impact, the insured was completely outside the car and was not touching any part of the car; however, the force of the impact moved the car and caused it to collide with the insured. Id. The court stated it found no cases in which the claimant's reason for being outside the automobile was unrelated to the operation of the vehicle itself that held the "upon" requirement was met when the claimant was not in contact with the vehicle immediately prior to the accident. Id. at 385-86. Therefore, the court determined the insured was not "occupying" the vehicle at the time of the accident and was not covered by the insurance policy. Id.

In Kelleher v. American Mutual Insurance Co. of Boston, 590 N.E.2d 1178, 1180 (Mass. App. Ct. 1992), Kelleher argued he was "occupying" the insured vehicle when he was struck by another car because he was "upon" the vehicle he had just exited. The court noted:

> [I]n determining whether a claimant is "upon" an insured vehicle, courts have invariably required some physical contact with the vehicle, or at a minimum, the performance of an act directly related to the vehicle, such as the changing of a tire. Such a requirement is consistent with the commonly understood definition of "upon", that of "on."

[13] The policy defined "occupying" as "in, upon, getting in, on, out or off." Rednour, 661 N.W.2d at 564.

Id. The court then determined:

> [N]o facts indicate[d] that Kelleher was either "in," "upon," "entering into" or "alighting from" the insured motor vehicle at the time he was struck; instead, the uncontroverted facts demonstrate that the operation of the Larson vehicle had come to an end, Kelleher had completed the act of leaving the vehicle, and he was approximately four feet away from it when the accident occurred.

Id. at 1181. Therefore, the court found "Kelleher had completely severed his relationship with the vehicle" and did not qualify as an insured under the policy. Id. at 1180-81.

In Miller v. Mabe, 947 S.W.2d 151, 154 (Tenn. Ct. App. 1997), the Tennessee court found that, at the time of the accident, Miller was neither getting into the van nor getting out of it, and although he was utilizing the lights from the van, he was not using the van itself at the time of the accident. Therefore, the court determined there was no "causal relation" between Miller's use of the van and his being struck by Mabe's vehicle. Id. Miller was standing in the middle of the road three or four feet from his van, closer than the decedent in another case, but far enough away that he could not be considered "upon" the vehicle. Id. Miller's attention was focused on using the limb to work the cable wire through the tree branches and was not focused on his van; therefore, the activity was not "essential" to the use of the van. Id. Consequently, under the criteria established in Utica, Miller was not "occupying" his work van at the time of his accident, and therefore, was not covered under the uninsured motorist provision of his employer's policy. Id.

In reaching our decision in this case, we need not adopt a bright-line test, as adopted by some foreign jurisdictions, because we can rely on the South Carolina cases of Yensen and McAbee. Therefore, based on Yensen and McAbee, we conclude the trial court in this case erred in finding

Kennedy was "upon" the manure truck when he was hit by the pickup truck and momentarily pinned to the manure truck because he was not "in, upon, getting in, on, out or off" the manure truck at the time of the accident. He had departed the truck, gone inside the restaurant, and returned to the parking lot to talk to his half-brother near the vehicle when he was hit by the pickup truck. As a result, there was no causal connection between Kennedy's use of the manure truck and his being struck by Counts' pickup truck. Hence, Kennedy was not occupying his employer's truck at the time of the accident, and is not entitled to UIM coverage from his employer's policy.

CONCLUSION

Accordingly, the trial court's order is

REVERSED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Margaret O'Shea, Respondent,

v.

South Carolina Law Enforcement Division, Appellant.

Appeal From Richland County
John D. Geathers, Administrative Law Judge

Opinion No. 4739
Heard May 19, 2010 – Filed September 15, 2010

AFFIRMED

Attorney General Henry McMaster, Assistant Attorney General J.C. Nicholson, III, Assistant Attorney General Natalie Armstrong, all of Columbia, for Appellant.

Christian Stegmaier, of Columbia, for Respondent.

THOMAS, J.: The South Carolina Law Enforcement Division (SLED) appeals an order from the Administrative Law Court (ALC) finding (1) Respondent Margaret O'Shea did not have to be licensed as a private investigator in order to work as a court appointed mitigation specialist on death penalty cases and (2) the files in O'Shea's possession were not subject to SLED's review because they were protected by the work product doctrine. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2001, following a thirty-year career as an investigative reporter covering high profile stories and court cases, O'Shea began working as a death penalty mitigation specialist. Based on advice that a professional license would be a good credential for obtaining work in her new field, she applied to SLED for a private investigator's license.

Currently, there are about six individuals doing death penalty mitigation work, four or five of which are licensed as private investigators. According to O'Shea, her work as a death penalty mitigation specialist includes: compiling social histories, gathering documents and other information, interviewing family members of clients and other individuals, and analyzing the material she acquires to help attorneys for capital defendants develop strategies. Although her work is geared toward the penalty phase of a capital case, she occasionally participates in the guilt phase. She rarely, if ever, testifies.

O'Shea described herself as "self-employed," with death penalty mitigation work as her primary job. She is usually contacted directly by an attorney desiring her services. If she agrees to take the case, counsel then requests the presiding judge to appoint her. She charges by the hour according to the fee approved by the presiding judge. The approved fees are paid by the Office of Indigent Defense. It is undisputed that O'Shea does not work exclusively for any one attorney or law firm. Nevertheless, she considers herself part of each defense litigation team that uses her services.

In 2007, after she had worked as a death penalty mitigation specialist for about six years, O'Shea was unable to renew her private investigator's license because of financial problems resulting mainly from medical problems that prevented her from working. As a result, her license lapsed on September 16, 2007. When she was able to resume working, she did not renew her license; however, she notified SLED that she was working on only one case and was not gathering any new information.

Later, however, a SLED agent contacted O'Shea to arrange an inspection of her records, explaining this was a routine procedure that should have been done every two years.[1] O'Shea initially intended to comply with the request until SLED demanded access to all of her records for the past year. O'Shea refused to comply with this demand because of the volume of paper involved. She contacted the attorneys with whom she had worked in the past year, all of whom took the position that the files in her possession belonged to counsel and were protected by the work product doctrine. O'Shea offered to provide invoices with names redacted, but SLED did not respond to this offer.

On October 24, 2007, O'Shea applied to renew her license. SLED refused to authorize the renewal for several reasons, among them O'Shea's prior refusal to allow an inspection of her records. In December 2007, O'Shea, now represented by counsel, filed this action in the ALC, seeking an order directing SLED to renew her license or, in the alternative, an order declaring that death penalty mitigation specialists were not subject to the licensure requirements that applied to private investigators.

The ALC heard the matter on April 24, 2008, and issued a final order on June 4, 2008, holding (1) O'Shea was not required to be licensed as a private investigator in order to work as a death penalty mitigation specialist; (2) regardless of whether any licensing requirements applied to O'Shea, the

[1] In its brief, SLED indicates that, pursuant to its protocol, a lapsed license automatically triggers a field visit by a SLED regulatory agent to the private investigator's office to inspect the investigator's file.

files in her possession were protected by the attorney work product doctrine; (3) SLED needed to obtain a court order to inspect an individual's files while investigating whether that person is operating a private investigation business without a license if the subject asserts the files are privileged; and (4) because O'Shea did not need a private investigator's license to work as a death penalty mitigation specialist, there was no need for SLED to review the files in her possession. Following an unsuccessful attempt to alter or amend the ALC's decision, SLED filed its notice of appeal.

ISSUES

I. Did the ALC err in finding O'Shea did not have to be licensed as a private investigator because she worked as a death penalty mitigation specialist?

II. Did the ALC err in holding O'Shea's files were entitled to protection under the work product doctrine?

STANDARD OF REVIEW

The standard of review for judicial review of a final decision of an ALC is set forth in section 1-23-610 of the South Carolina Code (Supp. 2009). Under Paragraph (B) of this section,

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

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

LAW/ANALYSIS

I. Licensing Requirements

SLED challenges the ALC's ruling that O'Shea did not need to be licensed as a private investigator in order to work as a death penalty mitigation specialist, arguing the court misinterpreted portions of the statutory law on licensing and registration requirements for private investigators. We disagree.

Chapter 18 of Title 40 of the South Carolina Code is entitled "Private Security and Investigation Agencies." Under this chapter, "[a] person who desires to operate a private investigation business in this State must apply for a Private Investigation License from SLED and pay an annual license fee which must be set by SLED regulation." S.C. Code Ann. § 40-18-70(A) (Supp. 2009). Under section 40-18-140(3), however, the provisions of Chapter 18 do not apply to "an attorney-at-law while in the performance of his duties."

The ALC relied on section 40-18-140(3) in ruling O'Shea did not need to be licensed as a private investigator in order to work as a death penalty mitigation specialist. Citing ABA Guidelines, law review articles, and other authority, the court noted (1) a mitigation specialist is recognized as an essential component of a capital defense team and (2) the mitigation specialist's only role is to assist attorneys in the defense of death penalty cases. Based on this recognition, the ALC reasoned that in her work as a death penalty mitigation specialist, O'Shea was acting as an agent of the attorney representing the capital defendant and her performance would be monitored by extensive judicial oversight. Though acknowledging O'Shea's work was on a case-by-case basis, the ALC nevertheless found she was no less an agent of defense counsel, who requested her appointment, than a salaried paralegal, investigator, or associate. Based on the finding that O'Shea was acting as an agent for defense counsel while performing her duties as a mitigation specialist, the ALC found she was exempt from the licensing requirements of Chapter 18 pursuant to section 40-18-140(3).

In challenging this ruling, SLED argues only that the ALC failed to consider section 40-18-80(D) of the South Carolina Code (Supp. 2009).[2] This paragraph provides as follows:

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[2] During oral argument, counsel for SLED acknowledged SLED did not dispute the ALC's determination that section 40-18-140(3) exempts not only attorneys but also their employees from licensing requirements and further conceded that an investigator who worked for only one law firm did not need a private investigator's license. Moreover, we agree with the ALC that the legislature has recognized, at least implicitly, that an individual performing investigatory duties under the supervision of an attorney does not need a private investigator's license. See S.C. Code Ann. § 40-18-70(E)(9)(b) (Supp. 2009) (allowing SLED to issue a private investigator's license to a person who "has at least three years' experience . . . as an investigator for a law firm . . .").

> A person is exempt from the registration and licensing requirements of this section when the employer is not a private investigation business and the employee is exclusively employed by that employer. The exemption from registration and licensing requirements applies only to work performed for the exclusive employer. If the person, during the period of his exclusive employment, performs or is available to perform investigative work for a different employer or more than one employer, the person must obtain a private investigation license or registration pursuant to this section.

(Emphasis added.) A careful examination of section 40-18-80, however, reveals there are no licensing requirements whatsoever within that section. Therefore, under section 40-18-80(D), an individual performing private investigation work for a single employer is exempt from registration requirements. The question before us is one of licensing and not registration. This section is therefore not applicable here.

The inclusion of the term "licensing requirements" in the first sentence of section 40-18-80(D) could suggest the legislature intended that the exemption in section 40-18-80(D) would apply to registration and licensing requirements within Chapter 18 rather than within only section 40-18-80. Nevertheless, the appearance of the word "chapter" elsewhere in several statutes within Chapter 18—including section 40-18-80 itself—indicates otherwise, i.e., that the legislature intended for the exemption in section 40-18-80 to be only from whatever registration or licensing requirements were provided within that particular section rather than other sections within Chapter 18. Because, as we have stated earlier, section 40-18-80(D) includes only registration provisions, it follows that, regardless of whether it overrides any exemption O'Shea could claim under section 40-18-140(3), it does not subject her to any licensing requirements.

In holding section 40-18-80(D) does not subject individuals who perform investigatory work for multiple law firms to any specific licensing requirements, we are following the established principle that "[w]here [a] statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Here, although section 40-18-80(D) references licensing requirements within the section, we do not believe the incongruity between this reference and the absence of any such requirements within the defined language presents a sufficient basis to reject the plain meaning of the statute in its present form on the ground that it would lead to an absurd result. See Kiriakides v. United Artists Commc'ns, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (stating courts will reject the plain meaning of the language in a statutory provision "when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention").

II. Work Product Doctrine

The issue of whether O'Shea's files are protected by the work product doctrine arose in the context of whether they were subject to inspection by SLED as part of O'Shea's application to have her private investigator's license reinstated. Because we have determined that O'Shea is not required to be licensed as a private investigator in order to work as a death penalty mitigation specialist, a ruling on this issue is not necessary in deciding this appeal. See Futch v. McAllister Towing of Georgetown, 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).

CONCLUSION

We affirm the ALC's determination that O'Shea is not required to be licensed as a private investigator in order to work as a death penalty mitigation specialist. Because this affirmance renders any ruling on the

applicability of the work product doctrine unnecessary to the resolution of this appeal, we decline to address this issue.

AFFIRMED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carlisle McNair, Appellant,

v.

United Energy Distributors, Respondent.

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

Opinion No. 4740
Heard June 16, 2010 – Filed September 15, 2010

AFFIRMED

David M. Ratchford and William R. Calhoun, Jr., of Columbia, for Appellant.

John E. Grupp, of Charlotte, and Larry Dwight Floyd, Jr., of Columbia, for Respondent.

THOMAS, J.: Carlisle McNair (McNair) appeals a circuit court order upholding a magistrate's dismissal of his application to eject a lessee from his property. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 26, 2002, United Energy Distributors (United Energy) entered into an agreement to lease twenty acres of real property from James McNair, McNair's father. Pursuant to the lease terms, United Energy was to use the land for "processing, storing, pumping, transferring, and otherwise beneficiating and handling diesel fuel oil and other oils and liquids."

The signed and dated lease includes an acknowledgement that United Energy paid consideration of $500 "cash in hand" to James McNair. Although the lease does not state a rental amount, the parties agree United Energy was to pay rent of $500 per month during the initial lease term.[1]

Regarding the duration of the arrangement and the rent to be paid, the lease provides as follows:

> 4. The term of this lease shall commence on July 1, 2002, and extend for a period of five years from that date, together with the right to renew said lease for three additional five-year periods upon the condition that upon each of said renewals, the monthly rent shall be increased by 10% of the monthly rent of the preceding period. Such rental shall be paid monthly and in advance and, in the event of a failure of the Lessee to pay any monthly rent for a period of thirty (30) days after having been notified by the Lessor that the rent was in default, the

[1] Paragraph Two of the lease describes the use to be made of the premises "for consideration paid and the monthly rental hereinafter specified," but no monthly rental appears in any of the eight paragraphs following Paragraph Two. (emphasis added).

> Lessor shall have the right to declare the lease forfeited and terminated by the Lessee.

The lease includes the following provision regarding termination:

> 5. Lessee shall have the right to terminate this lease at any time by giving written notice to the Lessor of Lessee's election to terminate and upon the giving of such notice Lessee shall have no further liability or obligation of any kind to Lessor hereunder except as follows: Lessee shall be liable for the payment of the monthly rental for the time remaining in the then-current five year period.

James McNair died on October 19, 2004, and McNair inherited the property. In 2005, McNair began receiving the monthly rental payments of $500 from United Energy. McNair, however, believed the fair market rental value of the property was $5,000 per month and claimed to have received an offer to lease the property for $3,500 per month.

On July 3, 2007, after the end of the first five-year lease term, United Energy paid McNair $500 in rent. By letter dated July 12, 2007, McNair's attorney advised United Energy that the lease had expired and it was now a holdover tenant. The letter further instructed United Energy to vacate the premises before the end of the month or renegotiate the lease. By letter dated July 17, 2007, counsel for United Energy advised McNair's attorney that his client had exercised its right to extend the lease for an additional five-year period. Acknowledging that the rent was to increase by ten percent upon extension of the lease, counsel enclosed a check of $50 to McNair as additional rent and advised in a letter sent with the payment that it was "made within the time allowed (30 days) to cure." Counsel for McNair responded by returning the check for the additional rent to United Energy's attorney along with a letter advising that McNair would begin eviction proceedings after August 1, 2007.

On August 20, 2007, McNair filed an application for ejectment with the summary court for Aiken County. In his application, he asserted the rental term had ended. A magistrate heard the matter the following month, and on October 3, 2007, she issued an order holding (1) the lease unambiguously contained an option for the lessee to renew the lease but (2) the lease expired on June 30, 2007, because United Energy had not taken any affirmative action to exercise its option. The magistrate further held she lacked jurisdiction to entertain the equitable defenses United Energy sought to present at the hearing.

United Energy appealed the magistrate's order, and the circuit court heard the matter on January 8, 2008. The circuit court later issued an order reversing the magistrate's refusal to adjudicate the equitable matters that United Energy raised and ordered a trial de novo in the magistrate's court.

On August 7, 2008, the matter came before another magistrate for a second hearing. A few days later, the magistrate issued an order holding (1) the lease includes an option to renew, (2) United Energy demonstrated its intent to continue the lease arrangement beyond the initial five-year term by spending more than $600,000 on improvements, and (3) based on Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994), United Energy had exercised its option to renew the lease.

McNair appealed the magistrate's decision to the circuit court, which heard the matter and affirmed the magistrate's order, holding (1) United Energy renewed the lease for a second five-year term, (2) the lease did not expire on June 30, 2007, and (3) the magistrate properly relied on Kiriakides as the controlling authority. McNair appeals.

STANDARD OF REVIEW

Whereas the circuit court maintains a broad scope of review in deciding an appeal of a magistrate's order, this court, when reviewing the circuit court's adjudication of an appeal of an ejectment proceeding in magistrate's court, does so under a more limited standard, under which (1) findings of fact

are to be upheld if there is any supporting evidence and (2) absent an error of law, the circuit court's holding is to be affirmed. Bowers v. Thomas, 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007). Moreover, as with any other appeal before this court, the respondent may argue any additional reasons why we should affirm the appealed ruling, "regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). This court may in its discretion review the additional reasons presented by the respondent and "if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. at 420, 526 S.E.2d at 723 (emphasis added).

LAW/ANALYSIS

On appeal, McNair alleges the circuit court erred in (1) rewriting the parties' contract to make it a twenty-year lease instead of a five-year lease with an option for three renewals, (2) ignoring pertinent statutory authority concerning the expiration of a tenancy of a term of years, (3) applying case law concerning a tenant's default in paying rent rather than a decision concerning a tenant's attempt to exercise an option to continue the lease beyond the purported end of the lease period, and (4) considering parol evidence and equitable defenses. We hold none of these arguments provides sufficient reason to reverse the circuit court's decision.

I. Rental Term

Citing Cotter v. James L. Tapp Co., 267 S.C. 647, 230 S.E.2d 715 (1976), and other cases concerning option contracts, McNair argues that in order to exercise its right to renew the lease for a second term, United Energy was required to tender the increased rent for July 2007 on or before June 30, 2007, the date the initial lease term was scheduled to expire. McNair correctly points out the lease in the present case expressly provides for an initial term of five years with the right to renew for three additional five-year periods. We disagree, however, with the suggestion that the provisions in the lease regarding the terms under which the lessee can exercise this right are

not distinguishable from corresponding provisions in the lease at issue in Cotter.

Cotter concerned a lease with two options: (1) a five-year option for the tenant to lease additional space and (2) a renewal option under which the tenant could renew the first option "for an additional three years 'upon the payment by tenant of thirty cents ($0.30) per sq. ft. per year for said expansion area, payable monthly as an option cost.' " Id. at 650, 230 S.E.2d at 716. The central dispute was whether the tenant had exercised the renewal option merely by giving written notice to the landlord without paying the stated option cost. Id. at 651, 230 S.E.2d at 716-17. Holding notice alone was insufficient to exercise the option to renew, the court adhered to the rule that "if the option requires performance in a certain manner, time is of the essence and exact compliance with the terms of the option [is] required." Id. at 653, 230 S.E.2d 717-18.

Here, however, the only provisions concerning conditions to be fulfilled before the termination of any lease period appear in Paragraph Five of the lease. Under this paragraph, United Energy has the right to "terminate this lease at any time" upon written notice to McNair; however, it remains responsible "for the payment of the monthly rental for the time remaining in the then-current five year period." Therefore, under the terms of this lease, the burden is then on United Energy to notify McNair only if it intends to terminate at the end of a five-year term rather than to give notice to McNair if it intends to extend the lease beyond the end of that term. In the event United Energy desires to renew for an additional term, the lease provides that the monthly rent is increased upon the renewal for an additional term, not that renewal is contingent on United Energy's tender of increased rent before the end of the initial term of the lease. In other words, whereas the renewal option at issue in Cotter could be exercised "upon payment by the tenant" of the option cost, the lease in the present case expressly provides for an increase in the monthly rent only "upon each of said renewals." Furthermore, because the lease does not require advance notice or satisfaction of any other conditions before the expiration of the initial term, we hold United Energy's continued occupation of the premises was sufficient to keep the lease in

effect for an additional term. See 49 Am. Jur. 2d Landlord and Tenant, § 166, at 186 (2006) ("Where there is a general privilege to extend a lease, holding over by a tenant may be sufficient, even without any notice to the lessor, to extend the lease under the option."); 52 C.J.S. Landlord and Tenant § 111, at 174 (2003) ("[W]here the lease requires no notice, an option to extend or renew may be exercised by holding over, without any notice being given by the tenant.").

Furthermore, assuming without deciding that McNair is correct that United Energy could exercise its renewal option only by the payment of the increased rent before the expiration of the current lease term, we believe the record supports a determination that United Energy fulfilled this requirement. This determination is based on our re-examination of the record in view of representations by counsel for McNair during oral argument.

This court requested counsel for McNair to support his client's position that the lease requires United Energy to tender the increased rent before the end of the initial lease term to renew the lease for a second term. In response, counsel directed the court's attention to the stated consideration in the lease of $500 cash in hand that had already been paid to James McNair when the parties executed the lease, explaining that these funds were to be applied toward the rent for July 2002, the first month during the lease term. According to the ledger included in the record, however, United Energy made an additional payment of $500 before the early part of July 2002 as well as for each succeeding month thereafter through June 2007. From this schedule we further conclude: (1) on June 7, 2007, United Energy paid McNair $500 and McNair accepted the payment; (2) as of June 30, 2007, the last day of the initial lease term, United Energy paid $500 more than what it owed on the lease at that time; (3) although as of July 1, 2007, United Energy owed $50 in rent because of the increase that took effect after the renewal of the lease for a second term, it made an additional payment of $500 that was accepted by McNair during the first week of July 2007; and (4) therefore, by July 12, 2007, the date McNair gave notice that he considered the lease to have expired, United Energy had paid McNair $450 in excess of what was due for July 2007. Under these circumstances, we hold McNair's own actions

indicate he did not view the $50 that United Energy owed as of July 1, 2007, as a fatal defect in United Energy's exercise of its option to renew the lease for a second term. Cf. J.R. Kemper, Annotation, Necessity for Payment or Tender of Purchase Money Within Option Period in Order to Exercise Option, in Absence of Specific Time Requirement for Payment, 71 A.L.R. 3d 1201, 1215 (1976) (noting courts have held that payment or tender is not necessarily a condition precedent to the optionee's exercise of an option if the parties to the option agreement had "by their own actions or conduct, indicated that such was also their interpretation and understanding").

Furthermore, in the same section of the lease that requires the rental increase upon renewal of a five-year term is language that grants United Energy thirty days to cure a default after it has been notified by McNair that it is in arrears. As indicated above, we find that although the lease provides the monthly rent would increase by ten percent in the event of a renewal for an additional term, this increase is not, under the terms of the parties' agreement, a condition precedent for the renewal to take effect. United Energy's payment of the $50 increase within the thirty-day period following notice from McNair's attorney to vacate the premises or renegotiate the lease is therefore in compliance with the terms of the parties' agreement. See Litchfield Co. of S.C. v. Kiriakides, 290 S.C. 220, 225, 349 S.E.2d 344, 347 (Ct. App. 1986) ("Because the lease set[s] forth the acts which would result in default, and the mode of terminating the tenancy, the parties' rights are to be determined by a fair construction of the contract, not by statutory ejectment principles.") (citing Biber v. Dillingham, 111 S.C. 502, 504, 98 S.E.2d 798, 799 (1919)).

II. Statutory Law

McNair also contends the circuit court erred in disregarding section 27-35-110 of the South Carolina Code (2007), arguing that under this statute, the absence in the lease of any notice requirement for renewal beyond the initial five-year term is of no effect. We disagree.

Under section 27-35-110, "[w]hen there is an express agreement, either oral or written, as to the term of the tenancy of a tenant for a term or for years such tenancy shall end without notice upon the last day of the agreed term." In this case, the lease was to "extend for a period of five years" from July 1, 2002, the date the term commenced; however, the lease further allows for renewal for three additional five-year rental periods. United Energy's tenancy, then, would have ended on "the last day of the agreed term" only if it did not renew the lease for an additional term. See Jordan v. Sec. Group, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.") (emphasis added). Because we have determined the lease was renewed for a second term pursuant to the terms of the parties' agreement, United Energy's tenancy did not automatically end pursuant to section 27-35-110.

III. Remaining Issues

McNair also contends the circuit court incorrectly applied case law concerning a tenant's default in paying rent rather than case law concerning the exercise of an option and should not have considered parol evidence and equitable defenses. Because any determination of the merits of these arguments would not affect our holding that United Energy had exercised its option to renew the lease according to the lease terms, we decline to address them. 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 discuss remaining issues if the disposition of a prior issue is dispositive of the appeal).

CONCLUSION

We hold the parties' lease did not end on the stated date for the termination of the initial lease term based on our determination that United Energy's actions were sufficient to renew the lease for an additional term.

AFFIRMED.

FEW, C.J., concurs. PIEPER, J., concurs in a separate opinion.

PIEPER, J., concurring:

I concur in the majority opinion. I write separately only to clarify for the bench and bar what I see as a continued misconception about the authority of magistrates to determine equitable defenses that may arise from time to time in matters otherwise properly within their jurisdiction. Pursuant to section 22-3-10 of the South Carolina Code (2007), magistrates have concurrent civil jurisdiction "in all matters between landlord and tenant and the possession of land. . . ." S.C. Code Ann. §22-3-10(10) (2007). The State Constitution of 1868 provided "[t]hat justice may be administered in a uniform mode of pleading without distinction between law and equity," thus abolishing the historical distinction between courts of law and courts of chancery. See S.C. Const. of 1868, art. V, § 3, *reprinted in* S.C. Code Vol. I (1922); see also Rule 2, SCRCP ("There shall be one form of action to be known as 'civil action.'"). Despite the merger of courts of law and equity, magistrates were still constitutionally prohibited from deciding equitable cases until more than a century later. See S.C. Const. art. V, § 21 (1962), *amended by* S.C. Const. art. V, § 26 (1973) ("Magistrates shall have jurisdiction in such civil cases as the General Assembly may prescribe: *Provided*, such jurisdiction shall not extend . . . to cases in chancery.") (emphasis in original).

In 1973, the General Assembly ratified an amendment rewriting Article 5 of the South Carolina Constitution. See Act No. 132, 1973 S.C. Acts 161-166. The constitutional prohibition against magistrates deciding cases in equity was removed and replaced by a shortened provision entrusting magistrate court jurisdiction solely to the General Assembly. See S.C. Const. art. V, § 26 ("The General Assembly shall provide for [magistrates'] terms of office and their civil and criminal jurisdiction."). Today, there are no longer any constitutional or statutory provisions that prohibit magistrates from deciding equitable defenses. Although I concur with the majority that we need not address the application of any equitable defenses, I merely wish to

clarify that the magistrate had jurisdiction to consider United Energy's equitable defenses because these defenses arose as part of the dispute between a landlord and a tenant, which is within the jurisdiction of the magistrate court pursuant to section 22-3-10. See S.C. Code Ann. § 22-3-10(10).

As the sixteen-time world heavyweight wrestling champion Ric Flair once said, "Space Mountain may be the oldest ride in the park, but it has the longest line." The same holds true for equity. For justice to be rendered in cases properly before a magistrate, equitable and legal principles must "ride together" and be applied according to applicable established principles.