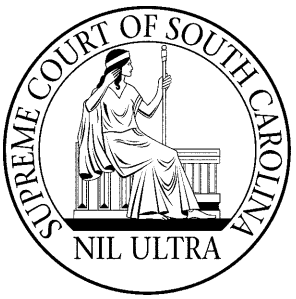

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40
October 4, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs,	Appellants,
v.	
South Carolina State Plastering, LLC,	Respondent,
and	
South Carolina State Plastering, LLC,	Respondent,
v.	
Del Webb Communities, Inc., Pulte Homes, Inc. and Kephart Architects, Inc.,	Third-Party Defendants,
Of Whom Del Webb Communities, Inc. and Pulte Homes, Inc., are	Respondents.

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

Opinion No. 26882
Heard June 23, 2010 – Filed October 4, 2010

REVERSED

John T. Chakeris, of Chakeris Law Firm, of Charleston, Phillip Ward Segui, of Segui Law Firm, of Mt. Pleasant, W. Jefferson Leath, Jr., and Michael S. Seekings, of Leath, Bouch & Crawford, LLP, both of Charleston, for Appellants.

A. Victor Rawl, Jr., and Robert L. Widener, of McNair Law Firm, PA, Everett A. Kendall, II and Christy E. Mahon, both of Sweeny Wingate & Barrow, PA, all of Columbia, for Respondents.

JUSTICE HEARN: Anthony and Barbara Grazia appeal the circuit court's grant of a motion to strike class allegations from their complaint. The Grazias contend the circuit court erred in finding the Notice and Opportunity to Cure Construction Dwelling Defect Act is in conflict with the State's class action lawsuit jurisprudence under Rule 23, SCRCP. We agree and reverse.

FACTUAL/PROCEDURAL BACKGROUND

This action involves the alleged negligent and defective construction of residential homes in a subdivision in Bluffton, South Carolina. The Grazias brought a class action on behalf of themselves and those similarly situated, asserting defective exterior stucco work by Respondent South Carolina State

Plastering, LLC (State Plastering) in the construction of approximately 2,673[1] homes in a development called Sun City. The complaint maintains the stucco exteriors had common and typical problems inherent to their design and installation that would require identical remediation across the class, namely, stripping the homes of the existing stucco and recladding with a properly installed stucco system.

State Plaster answered, and brought a third-party complaint against Del Webb Communities, Inc. (Developer), Pulte Homes, Inc. (Builder), and Kephart Architects, Inc. (Architect), (collectively referred to as Respondents). In its answer, State Plaster argued the Grazias had failed to comply with the express provisions of the Notice and Opportunity to Cure Construction Dwelling Defect Act (Right to Cure Act),[2] which entitles a contractor or subcontractor to notice of any qualifying construction defect, and the opportunity to cure, before the action is commenced. At the time this action was filed, the Grazias had not complied with the notice requirements; therefore, the parties entered into a consent order staying the action pending subsequent compliance with the Right to Cure Act. The Grazias then personally complied with the Right to Cure provisions, and the consent order was lifted. Thereafter, Respondents moved to dismiss the class allegations contained in the Grazias' complaint, or, in the alternative, requested a stay of the proceedings until each of the similarly situated plaintiffs complied with the Right to Cure Act notice requirements.

A hearing on Respondents' motions was held, and additional memoranda in support of the parties' respective positions were submitted to the court following the hearing. Ultimately, the circuit court issued an order striking the Grazias' class allegations as incompatible with the Right to Cure Act. The Grazias filed a motion for reconsideration with the circuit court, but it

[1] The number of homes affected by the alleged defective stucco is uncertain. During the hearing on Respondents' motion to strike class allegations, the number was referenced as "some four thousand homes," while the Grazias' own motion for reconsideration refers to 2,673 homes.

[2] S.C. Code Ann. § 40-59-810 et seq. (Supp. 2009).

was denied, and this appeal followed. The following issue is presented to the Court on appeal:

> I. Did the circuit court commit reversible error in granting Respondents' motion to strike class allegations?

STANDARD OF REVIEW

A motion to strike under Rule 12(f), SCRCP, which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP. *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997). In reviewing a ruling on a motion to dismiss a claim, this Court must base its decision solely on the allegations set forth on the face of the complaint. *Id.* at 632-33, 494 S.E.2d at 433. "The motion cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* at 633, 494 S.E.2d at 433 (citing *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995)). "The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief. The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action." *Id.* at 633, 494 S.E.2d at 433-34.

LAW/ANALYSIS

I. Right to Cure Act Incompatible with Rule 23, SCRCP

The Grazias contend the circuit court committed reversible error in striking the class allegations from its complaint based on its conclusion that class action lawsuits under Rule 23, SCRCP, are incompatible with the Right to Cure Act. We agree.

The Right to Cure Act is set forth in sections 40-59-810 to 860 of the South Carolina Code. The pertinent provisions of the legislation are as follows:

> § 40-59-830. **Stay of action upon non-compliance with article.**
> If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article.
>
> § 40-59-840. **Notice of claim; timing; contents; request for clarification.**
> (A) In an action brought against a contractor or subcontractor arising out of the construction of a dwelling, the claimant must, no later than ninety days before filing the action, serve a written notice of claim on the contractor. The notice of claim must contain the following:
>
> (1) a statement that the claimant asserts a construction defect;
>
> (2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and
>
> (3) a description of any results of the defect, if known.
>
> The contractor or subcontractor shall advise the claimant within fifteen days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification.
>
> § 40-59-850. **Contractor's election to inspect, remedy, settle, or deny claim; inspection of**

> **construction defect; response to contractor's offer; admissibility.**
> (A) The contractor or subcontractor has thirty days from service of the notice to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects. The claimant shall receive written notice of the contractor's or subcontractor's, as applicable, election under this section. The claimant shall allow inspection of the construction defect at an agreeable time to both parties, if requested under this section. The claimant shall give the contractor and any subcontractors reasonable access to the dwelling for inspection and if repairs have been agreed to by the parties, reasonable access to affect repairs. Failure to respond within thirty days is deemed a denial of the claim.
> (B) The claimant shall serve a response to the contractor's offer, if any, within ten days of receipt of the offer.
> (C) If the parties cannot settle the dispute pursuant to this article, the claimant may proceed with a civil action or other remedy provided by contract or by law.
> (D) Any offers of settlement, repair, or remedy pursuant to this section, are not admissible in an action.

a. Section 40-59-830 Stay Provision

It is first necessary to address the circuit court's holding with respect to the stay provision contained in the Right to Cure Act, as it formed the basis for the court's determination that the Act and Rule 23 are incompatible. The circuit court found section 40-59-830, which allows for the staying of an action, upon motion by any party to the action, applied only to those persons who mistakenly file the action prior to complying with the Right to Cure Act,

and could not be used to sanction a knowing violation of the statute. We disagree.

"This Court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation." *Ward v. West Oil Co., Inc.*, 387 S.C. 268, 273-74, 692 S.E.2d 516, 519 (2010) (citation omitted). Simply stated, there is no statutory or case law basis for the circuit court's holding that section 40-59-830 should only apply in accidental situations. The plain language of section 40-59-830 does not restrict its application beyond "[a] claimant [who] files an action in court before first complying with the requirements of this article . . . ." There is nothing in the wording of section 40-59-830 which supports the circuit court's limitation of this provision to mistaken filing situations; rather, the plain language of the statute dictates a different result. Consequently, the circuit court erred in construing section 40-59-830 in a manner contrary to the plain language of the statute.

b. Harmonization of the Right to Cure Act's Stay Provision and Notice Requirements

The circuit court also found that section 40-59-840 imposes an absolute condition precedent to the filing of lawsuits that qualify under the Right to Cure Act. Subsection 840, as provided above, encompasses civil lawsuits filed against a contractor or subcontractor, and *requires* the claimant to serve written notice no later than ninety days before filing the action. We find no error in the circuit court's analysis regarding the Right to Cure Act's notice provisions; however, in light of this Court's holding with respect to the stay provision, it is necessary to harmonize these seemingly inapposite provisions within the Right to Cure Act.

It is clear to this Court that these two provisions are at odds, as the language used in section 40-59-840 appears to require mandatory compliance with the Act's notice provisions prior to filing an action, while section 40-59-830 provides a contractor/subcontractor with a means of staying an action that is filed without first complying with the same notice provision. *Compare*

§ 40-59-840 (stating "[a] claimant *must*, no later than ninety days before filing the action, serve a written notice of claim on the contractor) (emphasis added) *and* § 40-59-830 (providing that "[i]f a claimant files an action [] before first complying with [§ 40-59-840], on a motion of a party to the action, the court *shall* stay the action until the claimant has complied with the requirements of this article") (emphasis added). The circuit court found the Right to Cure Act, *as a whole*, incompatible with Rule 23. In so doing, the court emphasized that, because the Right to Cure Act is a statute, and Rule 23 is a court rule, an attempt to harmonize the two would run counter to the general rule that any conflict between a statute and court rule must be resolved in favor of the statute. *See* S.C. Const., art. V, § 4 (2009) ("Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts."). However, in construing these two seemingly conflicting portions of the same Act, the circuit court does not appear to have utilized the same basic precepts of statutory construction, namely harmonization.

This Court's primary consideration in interpreting a statute is finding the intent of the legislature. *State v. Squires*, 311 S.C. 11, 14, 426 S.E.2d 738, 739 (1992). "In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998)). "A statute should not be construed by concentrating on an isolated phrase." *Id.* (citing *Laurens County School Districts 55 and 56 v. Cox*, 308 S.C. 171, 417 S.E.2d 560 (1992)); *but see Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991) (citing *Jolly v. Atlantic Greyhound Corp.*, 207 S.C. 1, 35 S.E.2d 42 (1945)) ("Under the 'last legislative expression' rule, where conflicting provisions exists, the last in point of time or order of arrangement, prevails."); *Eagle Container Co., LLC v. County of Newberry*, 379 S.C. 564, 572, 666 S.E.2d 892, 896 (2008) (quoting *Feldman v. S.C. Tax Commission*, 203 S.C. 49, 54, 26 S.E.2d 22, 24 (1943)) ("The last legislative expression rule, however, 'is purely an arbitrary rule of construction and is to be resorted

to only when there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted.' ").

In arguing that this Court should not, and more strongly cannot, overcome the seemingly mandatory plain language of the notice requirements in sections 40-59-840 and 850, Respondents advocate ignoring the equally plain language of the stay provision contained in section 40-59-830. This Court can no more disregard the stay provision than it can disregard the notice requirements. Instead, it is our duty to attempt to harmonize these two ostensibly at-odd provisions before analyzing whether or not the Right to Cure Act is in conflict with Rule 23. *Ex parte Chase*, 62 S.C. 353, 362-63, 38 S.E. 718, 724 (1901) (discussing the well-settled rule that where two portions of a statute appear on their face to be conflicting, every effort should be made to reconcile these apparently conflicting provisions, and bring them into harmony, if possible).

The language included in section 40-59-840 requires potential claimants to submit notice to a contractor/subcontractor prior to filing a qualifying action. Conversely, the General Assembly also included a stay provision in the Right to Cure Act to specifically address situations where claimants file an action prior to full compliance with the notice provisions. As discussed above, the circuit court erroneously found that the section 40-59-830 stay provision only applied to accidental filing situations. Upon concluding this, the circuit court did not thereafter attempt to harmonize the two provisions. We believe it is possible to construe these two provisions under the Right to Cure Act in a manner that gives each provision its due effect.

Under Respondents' theory of this case, a contractor/subcontractor's receipt of *pre-litigation* notice under section 40-59-840 should trump the General Assembly's equally plain intent to allow actions to be stayed pending compliance with the Right to Cure Act. The folly of this argument can be seen by exploring the public policy behind the Right to Cure Act, which Respondents, themselves, suggest should control.

The Right to Cure Act has an express public policy intent of: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners; and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. *See* 2003 South Carolina Laws Act 82 (S.B. 433). The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to *require compliance* with the Right to Cure Act's notice provisions.

The circuit court also erroneously found, based on an argument advanced by Respondents, that the Right to Cure Act endowed substantive rights[3] on the contractor/subcontractor, through the notice provisions, that are inconsistent with class action litigation. However, these "new rights" are consistent with those accorded to *any* defendant in litigation, and are "rights" already available to them under existing discovery and production requirements of Rule 34(a)(2), SCRCP, once a normal civil action is filed. Rule 34(a)(2) provides:

> Any party may serve on any other party a request . . . (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

[3] The alleged rights include: (1) the right to request clarification of the alleged defect (§ 40-59-840); the right to inspect the dwelling (§ 40-59-850); (3) the right to offer to remedy the alleged defect (§ 40-59-850); (4) the right to offer to settle the claims (§ 40-59-850); and (5) the right to deny the claim (§ 40-59-850).

These rights under the Right to Cure Act notice provisions are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights. In other words, the right of entry onto and inspection of the claimant's dwelling is now permitted to occur prior to the filing of the action under the notice provisions of sections 40-59-840 and 850, as opposed to during an action's normal discovery period. As the Grazias correctly point out, the Right to Cure Act does not confer any corresponding obligations on the part of the claimant that would not ordinarily be present: the claimant is not required to accept any offer by the contractor/subcontractor to remedy the alleged defect, and he or she is not required to accept an offer of settlement of the claim.

Respondents thus argue that their *pre-litigation* receipt of notice and the Act's accompanying "rights," should be the Court's prevailing concern. We believe this is contrary to the public policy of the Right to Cure Act: the predominant concern should be on the contractor/subcontractor's actual exercise of the rights to notice and the opportunity to cure, not *when* those rights are received. As discussed extensively above, we fail to discern how the rights to a pre-litigation opportunity to inspect and remedy/settle are substantially abridged when a court stays the proceedings under section 40-59-830, thereby granting the contractor/subcontractor the ability to explore those rights in full. As a result, we believe once properly harmonized, the Right to Cure Act's stay and notice provisions may be construed together to give each one its due effect, within the parameters of the Act's public policy.

c. Incompatibility with Rule 23, SCRCP

Finally, the circuit court determined that the Right to Cure Act and the procedures for certifying a class action under Rule 23[4] were incompatible,

[4] Rule 23 provides:
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or

and that any conflict between the statute and the rule must be resolved in favor of the statute. The effect of the circuit court's determination was that no class action lawsuits could be filed for claims falling under the rubric of the Right to Cure Act. We disagree that the Act and class action litigation are incompatible.

The interplay between the Right to Cure Act and Rule 23 is an issue of first impression in this state. The underlying basis for the circuit court's determination that the Right to Cure Act and Rule 23 are incompatible was its view that the section 40-59-830 stay provision cannot be used to knowingly violate the Act's notice provisions, which the court viewed as an absolute condition precedent to filing an action, in the absence of a mistaken filing. As we determined above, the circuit court's analysis of the stay provision was erroneous, and these two provisions may be harmonized in a way that furthers the policy of the Right to Cure Act. Once properly harmonized, we find no fatal conflict between the Right to Cure Act and this State's class action jurisprudence, and further find the stay provision would be a reasonable and logical way for a court to proceed when an action containing class allegations is filed under the Act.[5]

The basis for our decision is once again rooted in the public policy behind the Right to Cure Act's notice provisions: the purpose of the Act is to encourage the resolution of these types of claims without using litigation, by providing an environment that codifies a contractor/subcontractor's ability to

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defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

[5] As will be discussed below, the question of whether certification of a class in this case is proper, much less the manner in which it would be achieved and managed, is not an issue that is properly before the Court. Consequently, the issue is not whether *these* claims could be properly certified, but rather whether class certification could be achieved under *any circumstances* under the Right to Cure Act.

inspect and offer a remedy or settlement. Enforcing a stay provision does absolutely nothing to restrict the furtherance of that purpose; instead, the purpose is better served by allowing the use of the Right to Cure Act's stay provision to allow a court to determine whether or not a class action is feasible under the circumstances in each individual case, rather than striking the class allegations in toto at the outset. *See, e.g., Trimble v. Itz*, 898 S.W.2d 370, 373-74 (Tex. App. 1995) (considering similar notice provisions included in statutes requiring pre-litigation notice and concluding that the purpose of a statute is better served by abeyance than dismissal).

Respondents maintain that individual claimants under the Right to Cure Act are the sole persons authorized to bring an action for their own homes. Stated differently, Respondents allege the Right to Cure Act does not provide for representative compliance with its notice provisions; therefore, the Act is incompatible with class action litigation. However, this is nothing more than a generalized argument against class action litigation, as the named plaintiff in a class action will never have specific standing for *each* individualized claim that comprises the class. *See Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S.Ct. 2545, 2557 (1979) (providing that class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only). Upon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove. *See Gardner v. South Carolina Dep't of Revenue*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003) (quoting Rule 23, SCRCP) (internal quotations omitted) ("The prerequisites are: 1) the class must be so numerous that joinder of all members is impracticable; 2) there must be questions of law or fact common to the class; 3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; 4) the representative parties must fairly and adequately protect the interests of the class; and 5) the amount in controversy must exceed one hundred dollars for each member of the class."). If and when these prerequisites are met, the court may then find that representative notice under the Right to Cure Act is appropriate. Just as Respondents maintain the General Assembly's failure to specifically authorize representative actions

under the Right to Cure Act is persuasive, the General Assembly's silence in that regard is equally persuasive, especially when it has chosen to expressly bar class action litigation in other areas. *See* S.C. Code Ann. § 9-21-40 (Supp. 2009) (prohibiting claims prosecuted on behalf of a class); S.C. Code Ann. § 12-60-80(c) (Supp. 2009) (barring class actions for refunds of taxes); S.C. Code Ann. § 39-5-140(a) (1985) (preventing an action for actual damages from being brought in a representative capacity).

Finally, public policy arguments favor the Court finding a way to reconcile the Right to Cure Act and Rule 23. "[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano*, 442 U.S. at 701, 99 S.Ct. at 2557. This Court has expressed the viewpoint that class actions are favored in this state:

> Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999). Consequently, the circuit court erred in striking the Grazia's class allegations on the basis that the Right to Cure Act is incompatible with Rule 23.[6]

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[6] We also note that, to the extent the circuit court's order found that a purported proposal for class certification did not meet the statutory mandates of the Right to Cure Act, and that the proposed process for certification would necessarily require an opt-in procedure violating this Court's prohibition of the procedure as set forth in *Salmonsen v. CGD, Incorporated*,

The decision of the circuit court is therefore

REVERSED.

BEATTY, J., and Acting Justice James E. Moore, concur. ACTING CHIEF JUSTICE PLEICONES, concurring in a separate opinion. KITTREDGE, J., dissenting in a separate opinion

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the order is vacated. 377 S.C. 442, 661 S.E.2d 81 (2008). This case was before the circuit court on a motion to strike class allegations. A motion to certify this class has not been made; therefore, the circuit court erred in discussing the manner and mode in which the action could be certified. *See Griffin v. Capital Cash*, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct. App. 1992) (citing *Friedberg v. Goudeau*, 279 S.C. 561, 562, 309 S.E.2d 758, 759 (1983) ("It is an error of law for a court to decide a case on a ground not before it."); *see also Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions."); *In re Chance*, 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (noting South Carolina appellate courts have "consistently refrained" from issuing purely advisory opinions).

ACTING CHIEF JUSTICE PLEICONES: Because I disagree with the reasoning of the circuit court, I concur in the majority opinion. In my view, whether a class action is compatible with the Notice and Opportunity to Cure Construction Dwelling Defects Act (Act) remains an open question.

The circuit court noted that the mandatory language of S.C. Code Ann. § 40-59-840 requires a homeowner to meet notice requirements before filing a lawsuit. The circuit court held that absent compliance with the pre-filing notice requirements, putative class members could not individually bring the claims made in the complaint. Consequently, the circuit court granted the Respondents' motion to strike class allegations from the complaint, reasoning that "[t]he named-plaintiffs cannot use a class action to avoid the requirements of the Act on behalf of the putative class members." I disagree with the circuit's court premise, as I believe putative class members could individually bring claims without first meeting the pre-filing requirements of § 40-59-840, though such claims may be stayed pending compliance.

I do not disagree with the circuit court that S.C. Code Ann. § 40-59-840 requires a plaintiff to meet the notice requirements before filing a lawsuit. However, I differ with the circuit court as to the consequence of failing to do so. The circuit court would hold that the consequence of failing to meet pre-filing notice requirements is that the court will not recognize the suit as "filed." In my opinion, this position cannot be correct given § 40-59-830, which (1) explicitly recognizes a situation where a party has filed a lawsuit before satisfying the notice requirements and (2) permits the court to allow the case to proceed unless a party makes a motion to stay the case, pending compliance.

In my view, the consequence of filing a lawsuit before meeting the notice requirements is simply that, upon the motion of a party, the plaintiff may not proceed with the lawsuit without first coming into compliance. With this construction, § 40-59-840 and § 40-59-830 can be harmonized.

I disagree with the circuit court's view that § 40-59-830 applies only to those persons who mistakenly filed the action before complying with the Act.

I can find nothing in the statute to support this position. Moreover, policy reasons militate against an interpretation that not only excuses, but encourages ignorance of the law and leads to incongruous results. For example, assume two parties are within 80 days of the statute of limitations. One party researches the applicable law and the other party does not. Under the circuit court's rule, if both parties thereafter filed lawsuits, without complying with the notice requirements, the party who failed to familiarize himself with the applicable law is not barred by the statute of limitations while the party who diligently inquired into the law is barred. Such cannot be the intent of the General Assembly.

For these reasons, I disagree with the circuit court's decision to strike the class action allegations due to the putative class members' failure to comply with the notice provisions. I would therefore reverse the order of the circuit court. I express no opinion as to whether a class action is compatible with the Act.[7]

[7] It appears from the Record that the circuit court did not rule on the remainder of Respondents' motion, specifically that part of the motion requesting a stay pursuant to § 40-59-830. Consequently, under my view, the court may consider this part of the motion on remand.

JUSTICE KITTREDGE: I vote to affirm the order of the circuit court. The Court misconstrues a straightforward and unambiguous statutory scheme. Having created a phantom conflict in the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (Act), the Court resolves the purported statutory conflict in a manner that I believe is patently at odds with the intent of the South Carolina Legislature. I respectfully dissent.

The Court is called upon to construe the Act. S.C. Code Ann. §§ 40-59-810 to 860 (Supp. 2009). The Act mandates that a claimant "must" serve a residential home builder with notice of a claim related to an alleged defect in the construction of a dwelling no later than ninety days "before filing the action:"

> (A) In an action brought against a contractor or subcontractor arising out of the construction of a dwelling, *the claimant must, no later than ninety days before filing the action, serve a written notice of claim on the contractor.* The notice of claim must contain the following:
>
> (1) a statement that the claimant asserts a construction defect;
>
> (2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and

(3) a description of any results of the defect, if known.

> The contractor or subcontractor shall advise the claimant within fifteen days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification.

S.C. Code Ann. § 40-59-840 (emphasis added).

The Act specifies that within "thirty days from service of the notice," the contractor or subcontractor must notify the claimant of his "election under this section." § 40-59-850(A).[8] "Failure to respond within thirty days is deemed a denial of the claim." *Id.* "If the parties cannot settle the dispute pursuant to this article, the claimant may proceed with a civil action or other remedy provided by contract or by law." § 40-59-850(C).

The legislature further provided for a stay of an action when a "claimant files an action in court before first complying with the requirements of this article." S.C. Code § 40-59-830. ("[T]he court shall stay the action until the claimant has complied with the requirements of this article."). I would construe the stay provision in section 40-59-830 as applying only when the required pre-filing notice is not satisfied. So construed, the stay operates as a failsafe to preserve an action and avoid potential statute of limitations concerns. I part company with the majority's construction, which reads the stay provision as an invitation to willfully ignore the pre-filing notice requirement. The legislature expressed a

[8] The Act grants certain rights to a contractor and subcontractor upon receipt of the pre-filing notice: (1) the right to request clarification of the alleged defect (§ 40-59-840); (2) the right to inspect the dwelling (§ 40-59-850); (3) the right to offer to remedy the alleged defect (§ 40-59-850); (4) the right to offer to settle the claims (§ 40-59-850); and (5) the right to deny the claim (§ 40-59-850). The majority refers to these statutory provisions as "alleged rights."

preference for the pre-filing notice, and I do not believe our rules of statutory construction allow us to hold otherwise.[9]

I do agree with the proposition posed by the majority that, as a general rule, the Act's stay provision should be invoked when an action is filed in violation of the notice requirements of section 40-59-840, but that is not the issue before us. The precise question before the circuit court and us is whether the legislature intended to grant a court the authority to preemptively sanction the practice of willfully violating the pre-filing notice requirements of the Act. I am convinced, as was the circuit court, that the legislature intended no such result.

The section 40-59-830 stay provision should not be construed to trump or sanction a violation of the statutory preference for the section 40-59-840 pre-filing notice requirement. The legislature clearly mandated pre-litigation efforts to resolve construction defect claims. The majority acknowledges as much—"the purpose of the Act is to encourage the resolution of these types of claims without using litigation, by providing an environment that codifies a contractor/subcontractor's ability to inspect and offer a remedy or settlement." I believe the Court's interpretation of the Act encourages a claimant to intentionally ignore the pre-filing notice requirements and is in direct conflict with legislative intent. I believe the Court's interpretation of the Act renders the statutory requirement for pre-filing notice meaningless.

I make two final points. First, I disagree with the Court's finding that the legislature was not concerned about "*when*" a contractor or subcontractor

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[9] As a further expression of legislative intent to ensure the parties' compliance with the Act, the legislature directed Court Administration to develop a designation on the Civil Action Cover Sheet which indicates whether a stay has been granted for a civil action filed pursuant to the South Carolina Notice and Opportunity to Cure Construction Defects Act." § 40-59-860(B).

actually received notice and exercised its statutory rights. (Emphasis in majority opinion). I believe the issue of "when" notice is given was important to the legislature. I believe the legislature expressed a clear preference in section 40-59-840 that the claimant "must" serve written notice on a contractor or subcontractor "before filing the action." The argument that a contractor or subcontractor may rely on these statutory rights in normal discovery, as does "*any* defendant in litigation," misses the mark. (Emphasis in majority opinion). If the legislature was not concerned about the timing issue (the question of "when"), then the Act's stated pre-filing notice requirement serves no purpose and the legislature intended to engage in a meaningless act.

Second, the majority opinion suggests that "[t]he effect of the circuit court's determination was that no class action lawsuits could be filed for claims falling under the rubric of the Right to Cure Act." The circuit court made no such finding, nor is it the "effect" of the circuit court's ruling. The circuit court order forecloses only Appellants' attempt to create a class action lawsuit by purposely thwarting the Act's pre-filing notice mandate.

In dissenting, I would join the trial court in refusing to permit Appellants to willfully violate the pre-filing notice requirements of section 40-59-840 by adding unidentified claimants to the pending action.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy R. Wallace, Donna P. Wallace, William Andrew Wallace, Kimberly A. Wallace, David Jonathan Wallace and Christine Ponder Wallace, Respondents,

v.

Lynn Wellborn Day, Appellant.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 4700
Heard March 2, 2010 – Filed June 16, 2010
Withdrawn, Substituted, and Refiled September 29, 2010

REVERSED IN PART, VACATED IN PART, and REMANDED

Amanda A. Bailey and Henrietta U. Golding, of Myrtle Beach, for Appellant.

George Hunter McMaster, of Columbia, and Brooks

R. Fudenberg, of Mount Pleasant, for Respondents.

PER CURIAM: Respondents, Timothy Wallace and several members of his family (the Wallaces), filed this action against Appellant Lynn Day (Day), seeking damages for breach of a contract to purchase a condominium in the Camelot by the Sea Resort in Myrtle Beach. Day filed counterclaims for breach of contract, intentional interference with contractual relations, and civil conspiracy. The master-in-equity granted the Wallaces' summary judgment motion, and Day appeals the master's order. We reverse in part and vacate in part the master's order and remand for a full trial on the merits.

FACTS/PROCEDURAL HISTORY

On February 19, 2005, the Wallaces entered into a contract to purchase Day's condominium in the Camelot by the Sea Resort in Myrtle Beach.[1] The contract required a closing date of March 18, 2005; however, the parties executed an addendum to the contract to extend the closing date to April 6, 2005. The parties also executed a separate addendum stating that the Wallaces were "exercising a 1031 tax free purchase."[2]

When the April 6th closing date arrived, the Wallaces were unable to close the transaction due to problems with the loan package. On April 7, Day presented an earnest money release to the Wallaces' agent, proposing to return the Wallaces' earnest money. On April 8, the Wallaces were ready to close, but Day signed a contract to sell the condominium to Steve and Sandra Purwell (the Purwells). On April 18, Day sent a letter to her agent authorizing the return of the Wallaces' earnest money and also sent a copy of

[1] At this time, the property was titled in the name of Day's late husband, but Day had authority to sign the contract.

[2] See 26 U.S.C. § 1031(a)(1) (Supp. 2009) ("No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind [that] is to be held either for productive use in a trade or business or for investment.").

the letter to the Wallaces' agent. On April 21, the Wallaces filed a Notice of Lis Pendens as to the condominium. On May 12, Day sent a letter to her agent withdrawing the offer to refund the Wallaces' earnest money and also sent a copy of the letter to the Wallaces' agent. On that same day, the Wallaces filed an Amended Notice of Lis Pendens. Subsequently, the Wallaces filed a Second Amended Notice of Lis Pendens on June 2, a Third Amended Notice of Lis Pendens on June 22, and a complaint for breach of contract against Day on June 24. The Wallaces' complaint sought damages, or, in the alternative, specific performance.

Day filed a counterclaim for breach of contract, intentional interference with contractual relations, and civil conspiracy. Day sought summary judgment on her breach of contract claim; however, the circuit court denied the motion. While Day's motion for reconsideration was still pending, the parties agreed to a referral of the case to the master-in-equity, and the Wallaces filed a summary judgment motion. Subsequently, the parties entered into a stipulation of facts. After the circuit court denied Day's motion for reconsideration, the master granted the Wallaces' summary judgment motion and dismissed Day's breach of contract counterclaim. Although the Wallaces' summary judgment motion was originally limited to their cause of action for specific performance, they later elected to proceed on their cause of action for breach of contract. In his final order, the master awarded the Wallaces $65,000 for the difference between the condominium's market price and contract price at the time of Day's alleged breach and $15,500 for lost profits, for a total damages award of $80,500. The master also awarded the Wallaces $33,749.10 for attorney's fees and costs. This appeal followed.

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "'Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" Adamson v. Richland County Sch. Dist. One,

332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998) (quoting Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)).

"Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). "However, summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." Id. "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Doe ex rel. Doe v. Batson, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001) (citing Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)).

"In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the non-moving party." Pee Dee, 381 S.C. at 240, 672 S.E.2d at 802. "Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." Id. Further, "'[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.'" Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (quoting Brockbank v. Best Capital Corp., 341 S.C. at 378, 534 S.E.2d at 692 (2000)).

"Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument." Pee Dee, 381 S.C. at 241, 672 S.E.2d at 802. "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Id. "Construction of an ambiguous contract is a question of fact to be decided by the trier of fact." Id. (citing Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997)).

LAW/ANALYSIS

I. The Wallaces' Breach of Contract Claim

Day asserts that the master erred in granting summary judgment to the Wallaces on their breach of contract claim because he relied on an erroneous interpretation of the parties' contract. We conclude that the master erred in granting summary judgment because an ambiguity exists in the contract's default provision.

When interpreting a contract, a court must ascertain and give effect to the intention of the parties. Chan v. Thompson, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1990). To determine the intention of the parties, the court "must first look at the language of the contract . . . ." C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). Whether an ambiguity exists in the language of a contract is also a question of law. S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." McClellanville, 345 S.C. at 623, 550 S.E.2d at 302. "The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe." Pee Dee, 381 S.C. at 242, 672 S.E.2d at 803. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." McClellanville, 345 S.C. at 623, 550 S.E.2d at 303. "The determination of the parties' intent is then a question of fact." Id. (emphasis added).

Counsel stated during oral arguments that the parties were not arguing the contract's provisions were ambiguous. However, the parties presented

opposing arguments before the trial court and this Court on the interpretation of the contract. The issue of a contract's interpretation necessarily subsumes the primary question of whether the contract's language is clear or ambiguous, which determines the direction our analysis must take:

> It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact. On the other hand, the construction of a clear and unambiguous deed is a question of law for the court.

McClellanville, 345 S.C. at 623, 550 S.E.2d at 302-03 (citations omitted). Therefore, we have not only the authority but also the responsibility to recognize an ambiguity in a contract when determining whether the trial court appropriately relied on the contract's language in granting summary judgment. The Wallaces' argument to the contrary is without merit.[3]

Because the Wallaces dispute Day's interpretation of the contract's default provision, this Court is called upon to decide whether the provisions in question are reasonably susceptible to more than one interpretation and thus ambiguous. See McClellanville, 345 S.C. at 623, 550 S.E.2d at 302 ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.").

Here, paragraph 16 of the contract addresses the options available in the event of a party's default:

[3] The Wallaces contend that neither party argued before the trial court or this Court that any contractual provisions were ambiguous, and, therefore, issue preservation rules prohibit this Court from recognizing any ambiguities in the contract.

> If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to attorney fees and actual costs incurred (as defined in paragraph 17), or terminate this Agreement with a five day written notice.

(emphasis added).

The Wallaces assert that this paragraph provides a party with two options when the other party is in default: (1) elect to seek any remedy provided by law; or (2) terminate the agreement with a five day written notice. They argue that Day opted for the second alternative—termination—and therefore she was required to provide them with a five day written notice. Day, on the other hand, maintains that she opted for the first alternative—electing to seek any remedy provided by law. She asserts that this alternative allowed her to treat the contract as abandoned by the Wallaces when they failed to close on the designated date and to refrain from any further performance without having to provide notice to the Wallaces. She argues that because the contract contains multiple provisions emphasizing that time is of the essence, the contract expired pursuant to its own terms when the Wallaces failed to close by the contract's deadline. She insists that under these circumstances, she had no further obligation to the Wallaces.

We find the terms of the contract's default provision to be reasonably susceptible to more than one interpretation. Therefore, the determination of the parties' intent at the time they executed the contract is a question of fact that should not have been decided on summary judgment. See Pee Dee, 381 S.C. at 241, 672 S.E.2d at 802 (holding that summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous); McClellanville, 345 S.C. at 623, 550 S.E.2d at 302-03 (holding that a contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation and that once the court decides that the language is ambiguous, the determination of the parties' intent is then a question of fact). For this reason, we conclude that the master

erred in granting summary judgment to the Wallaces on their breach of contract claim and in dismissing Day's breach of contract counterclaim.

II. Dismissal of Day's Remaining Counterclaims

Day claims the master erred in finding that Judge Breeden's May 5, 2006 order reflected her voluntary withdrawal of her counterclaims for intentional interference with contractual relations and civil conspiracy.[4] She argues that Judge Breeden's order reflected her withdrawal of her motion for summary judgment with respect to those counterclaims.[5] We agree.

Judge Breeden's May 5, 2006 order is a form order that begins with the following boilerplate: "**IT IS ORDERED** that the MOTION BE STRUCK FROM THE ACTIVE motion calendar for the following reason(s)[.]" The following language was added in handwriting:

> Def Motion for Summary Judgment: Under Advisement
> Both Attorneys to submit a proposed order within
> 10 days.
> Defendant withdraws the intentional Interference
> with Contractual Relations and Civil Conspiracy.
> Def Motion to Refer: Plaintiff consents to the referral

This form order was obviously created for striking motions from the active roster, not the underlying claims. Viewing the May 5, 2006 order as a whole, we believe it indicates that Day was merely withdrawing her summary judgment motion with respect to her counterclaims for intentional interference with contractual relations and civil conspiracy and not the counterclaims themselves. This is confirmed by the statement of counsel

[4] The master's order and Day's brief both refer to Judge Breeden's order as being filed on May 12, 2006, but the date stamp on the order indicates that it was filed on May 11, 2006. To avoid confusion, we will refer to the order according to the date that Judge Breeden signed it, May 5, 2006.

[5] At oral arguments, counsel for the Wallaces conceded this point.

made during the hearing on Day's summary judgment motion: "We have also moved for Summary Judgment on our last two cause [sic] of action: Intentional Interference with Contractual Relations and Civil Conspiracy. And Your Honor, at this particular time . . . I would withdraw that motion as to those two causes of action."

Based on the foregoing, it is appropriate to vacate the finding that Day withdrew her counterclaims for intentional interference with contractual relations and civil conspiracy and to remand those counterclaims for a trial on the merits.

CONCLUSION

Based on the foregoing, we reverse the master's grant of the Wallaces' summary judgment motion as well as his dismissal of Day's breach of contract counterclaim. Additionally, we vacate the master's finding that Day voluntarily withdrew her counterclaims for intentional interference with contractual relations and civil conspiracy. All of the parties' respective causes of action are remanded for a full trial on the merits.

Accordingly, the master's order is

REVERSED IN PART, VACATED IN PART, and REMANDED.

HUFF, PIEPER, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Reginald R. Latimore, Appellant.

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

Opinion No. 4728
Heard June 8, 2010 – Filed August 18, 2010
Withdrawn, Substituted and Refiled September 24, 2010

AFFIRMED

Appellate Defender LaNelle C. DuRant, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr.,

Office of the Attorney General, of Columbia; Robert Mills Ariail, of Greenville, for Respondent.

WILLIAMS, J.: On appeal, Reginald Latimore (Latimore) claims the circuit court committed reversible error at his trial for failing to register as a sex offender when the circuit court (1) failed to grant a mistrial after it instructed the jury that Latimore was convicted of committing a lewd act on a child, despite a pre-trial stipulation not to disclose Latimore's specific conviction to the jury; (2) failed to grant a directed verdict, despite the State's failure to prove Latimore received notice of a new reporting requirement for sex offender registration; and (3) excluded a probation agent's testimony. We affirm.

FACTS

In 2004, Latimore pled guilty to committing a lewd act upon a child. Upon his release from the Department of Corrections in 2005, he was required under the Sex Offender Registry Act[1] to register as a sex offender with the Greenville County's Sheriff's Office. As a result, Latimore registered on August 3, 2005. Latimore acknowledged that he was required to register each year for life within thirty days after the anniversary date of his last registration. Moreover, Latimore signed a notice form at that time, which stated Latimore "MUST send written notice of a change in address to the county Sheriff's Office within ten days of establishing [his] new residence . . . ." (emphasis in original). Latimore signed an annual registration requirement form, which required his annual registration for 2006 to be completed no later than September 3, 2006.

In July 2006, the Legislature amended section 23-3-460 of the South Carolina Code[2] to require offenders to register twice a year--in their birth

[1] S.C. Code sections 23-3-400 to -550 (2007 & Supp. 2009).

[2] Section 23-3-460(A) (Supp. 2009) states, in pertinent part,

month as well as six months after their birth month. Pursuant to the amended statute, Latimore was not required to register until January 1, 2007. When Latimore failed to register with the Sheriff's Office in September 2006, a warrant was issued for his arrest. Latimore was subsequently stopped for a traffic violation in January 2007, and the police arrested him for failing to register as a sex offender.

Prior to the commencement of Latimore's trial for failing to register as a sex offender, the State stipulated not to mention Latimore's conviction for commission of a lewd act upon a child. Despite this stipulation, the circuit court mentioned Latimore's conviction when it read the indictment to the jury and during the jury charge.

During trial, Latimore contended he called Beverly Pettit, the Greenville County sex offender registry coordinator, in February 2006 to obtain approval to move into a new home. Latimore testified Ms. Pettit informed him she had all the required information from him, and his phone call to her satisfied his registration requirements for 2006. Ms. Pettit stated she did not remember Latimore calling her, but she acknowledged his file had been pulled in February 2006 and a new address was inserted in place of the address on file from Latimore's initial registration in August 2005. Latimore stated he was under the belief his phone call to Ms. Pettit in February 2006 prior to his required registration date on September 3, 2006, was sufficient for registration purposes.

After Latimore testified, he sought to introduce the testimony of probation agent, R.J. Gilbert. The circuit court found Gilbert's testimony was

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> A person required to register pursuant to this article is required to register bi-annually for life. For purposes of this article, "bi-annually" means each year during the month of his birthday and again during the sixth month following his birth month. The person required to register shall register and must re-register at the sheriff's department in each county where he resides . . . .

irrelevant and would not be considered by the jury, but the court permitted Latimore to proffer Gilbert's testimony outside the jury's presence. Gilbert stated he did not typically tell offenders when they should report because it was not his duty. Furthermore, while he was not Latimore's probation agent, nothing in Latimore's file indicated he was ever informed of the new law and the change in reporting requirements. After the court heard Gilbert's proffered testimony and denied Latimore's directed verdict motion, it charged the jury on the law. In its jury charge, the circuit court stated:

> Now, ladies and gentlemen, as you know, this defendant in this case is charged with . . . failing to register for the sex offender registry. This is a statutory offense, and Section 23-3-430 of our Code of Laws provides, among other things, that any person residing in South Carolina who has been convicted of or pled guilty to the offense of, among other things, committing a lewd act on a child must register on the sex offender registry.

After the jury exited for jury deliberations, Latimore objected to the circuit court specifying Latimore's conviction in its jury charge in light of the parties' stipulation not to mention it and requested a mistrial. The circuit court denied his motion and sentenced Latimore to ninety days of house arrest. This appeal followed.

ISSUES ON APPEAL

On appeal, Latimore presents three claims of error.

(1) The circuit court erred in denying his motion for a mistrial after it instructed the jury that Latimore was convicted of committing a lewd act on a child, despite a pre-trial stipulation not to disclose Latimore's conviction to the jury.

(2) The circuit court erred in denying his motion for a directed verdict, despite the State's failure to prove Latimore received notice of a new reporting requirement for sex offender registration.

(3) The circuit court erred in excluding the probation agent's testimony.

LAW/ANALYSIS

I. Mistrial Motion

Latimore contends the circuit court erred in denying his motion for a mistrial. We disagree.

The decision to grant or deny a mistrial is within the sound discretion of the circuit court. State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). The circuit court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. Id. The power of the circuit court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the circuit court. State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Id.

Prior to the commencement of trial, the State stipulated not to mention Latimore's conviction for commission of a lewd act upon a child during trial. When the jury entered the courtroom at the commencement of the trial, the circuit court read the indictment, which stated, "[O]n or about January 1st, 2007, [Latimore] . . . failed to register for the sexual offender registry after notice of this requirement and after having been convicted of committing a lewd act on a child." Latimore did not object. Later, during the circuit court's charge to the jury, it again stated, "[A]ny person residing in South Carolina who has been convicted of or pled guilty to the offense of, among

other things, committing a lewd act upon a child must register on the sex offender registry." After the jury exited for deliberations, Latimore made a mistrial motion, arguing the circuit court's statement about the lewd act tainted the jury's impression of Latimore and was therefore prejudicial to him. The circuit court denied Latimore's motion.

We do not believe the circuit court's denial of Latimore's mistrial motion was in error. While it was unnecessary to mention Latimore's conviction for commission of a lewd act upon a child during the reading of the indictment or the jury charge in light of the parties' stipulation, we conclude Latimore was not prejudiced. See State v. Carrigan, 284 S.C. 610, 614, 328 S.E.2d 119, 121 (Ct. App. 1985) (finding the defendant was not prejudiced at trial for driving under suspension and driving in violation of the Habitual Traffic Offender Act, where circuit court unnecessarily read section of the Act defining terms "habitual offender" and "conviction" after defendant had stipulated to his prior adjudication as a habitual offender). Moreover, his prior conviction as a sexual offender had no bearing on the jury's determination of whether he violated his reporting requirements because his conviction was not a fact in dispute. Thus, any error in commenting on this prior conviction was not prejudicial to Latimore. See Stanley, 365 S.C. at 34, 615 S.E.2d at 460 (holding a defendant must show both error and resulting prejudice in order to be entitled to a mistrial).

II. Directed Verdict Motion

Latimore claims the circuit court improperly denied his directed verdict motion. We disagree.

If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the court must find the case was properly submitted to the jury. State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. at 292, 625 S.E.2d at 648. The circuit court should grant a directed verdict when the evidence merely raises

a suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009).

Latimore was charged with violating section 23-3-470[3] of the South Carolina Code when he failed to register with the Greenville County Sheriff's Office by January 1, 2007. Latimore first contends he was not notified of the new bi-annual registration requirements when the statute was amended in July 2006, which violated his due process rights. We disagree.

Latimore relies on Lambert v. California, 355 U.S. 225 (1957), for the proposition that the State must prove he received actual notice of his duty to register in order to satisfy due process. In Lambert, a provision in a municipal ordinance of the City of Los Angeles, California required all persons convicted of a felony, whether that conviction occurred in California or another state and was punishable as a felony in California, who remained in Los Angeles more than five days to register as a felon with the Chief of Police. Id. at 226. The police discovered when Lambert was arrested that she had been residing in Los Angeles for more than seven years, and while she had been convicted of a felony, she failed to register with the Chief of Police. Id. After being convicted for failing to register, Lambert appealed to the California Superior Court, which affirmed her conviction. She then appealed to the United States Supreme Court, arguing that the municipal ordinance, as applied, denied her due process of law. Id. at 227.

On appeal, the United States Supreme Court held that Lambert's conviction violated due process because her conduct in failing to register was "wholly passive" and "[a]t most the ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies . . . ." Id. at 228-29. However, the Supreme Court emphasized that in Lambert, "circumstances which might move one to inquire as to the necessity of registration [were] completely lacking." Id. at 229.

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[3] S.C. Code section 23-3-470 states, "It is the duty of the offender to contact the sheriff in order to register[] [or] provide notification of change of address . . . . If an offender fails to register[] . . . he must be punished as provided in subsection (B)." § 23-3-470(A) (2007).

We find the registration ordinance in Lambert to be readily distinguishable from the sex offender registration statute at issue in the case at hand. In Lambert, the registration requirement was a general municipal ordinance, whereas our Sex Offender Registry Act is a statewide registration program. Unlike the registration requirement in Lambert, the sex offender registration requirement is directed at a narrow class of defendants, convicted sex offenders, rather than all felons. See State v. Bryant, 614 S.E.2d 479, 487 (N.C. 2005) (distinguishing the Supreme Court's holding in Lambert and finding North Carolina's and all other states' sex offender registration statutes are statewide registration programs specifically directed at sex offenders with the ultimate purpose of protecting the public). And, perhaps most importantly, instead of serving as a general law enforcement device, as the United States Supreme Court found the City of Los Angeles' felon registration ordinance, our statute was specifically enacted as a public safety measure based on the Legislature's determination that convicted sex offenders pose an unacceptable risk to the general public once released from incarceration. See S.C. Code § 23-3-400 (2007) (stating because "[s]tatistics show that sex offenders often pose a high risk of re-offending[,]" the Sex Offender Registry Act serves to "promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. . . ."); Williams v. State, 378 S.C. 511, 515, 662 S.E.2d 615, 617-18 (Ct. App. 2008) (internal citation and quotation omitted) ("[T]he purpose of requiring registration is to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes.").

Additionally, we note the Legislature clearly contemplated the necessity of notifying sexual offenders of the requirement to *initially* register in section 23-3-440 when it stated, "The Department of Corrections, the Department of Juvenile Justice, the Juvenile Parole Board, and the Department of Probation, Parole and Pardon Services *shall provide verbal and written notification* to the offender that he must register with the sheriff of the county in which he intends to reside within one business day of his release." S.C. Code § 23-3-440(1) (Supp. 2005 & 2007) (emphasis added). Had the Legislature intended for the State to notify Latimore of the need to

register bi-annually, it could have included such language in section 23-3-460. See generally Theisen v. Theisen, 382 S.C. 213, 219, 676 S.E.2d 133, 137 (2009) (finding if the Legislature intended a statute of limitations period to apply only to wills which were informally probated in this state, it could have included such language in the statute); see also State v. Hackett, 363 S.C. 177, 181, 609 S.E.2d 553, 555 (Ct. App. 2005) ("In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.") (internal citation and quotation omitted). Because no such language was included in section 23-3-460, we find it would be improper to construe the statute otherwise.

Latimore also claims his phone call to Ms. Pettit of the Greenville County sex offender registry in February 2006 in an effort to update his address should be deemed sufficient to comply with the statute. We disagree.

We find the plain language of the statute controls the resolution of this issue. Section 23-3-460 requires an offender to initially register and re-register "each year during the month of his birthday and again during the sixth month following his birth month . . . at the sheriff's department in each county where he resides." § 23-3-460(A) (Supp. 2009). Latimore's phone call was insufficient to satisfy the clear mandates of section 23-3-460(A), and even if we presume Latimore was not notified of the changes to the statutory scheme, ignorance of the law is no excuse. See Cheek v. United States, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."); South Carolina Wildlife & Marine Res. Dept. v. Kunkle, 287 S.C. 177, 178, 336 S.E.2d 468, 469 (1985) ("[I]t is a well-settled maxim that ignorance of the law is no excuse.").

Accordingly, we find the State presented sufficient evidence to submit the issue of whether Latimore failed to comply with the registration requirements to the jury. See Hernandez, 382 S.C. at 625-26, 677 S.E.2d at 605-06 (holding the circuit court should grant a directed verdict only when the evidence merely raises a suspicion that the accused is guilty). Thus, we

conclude the circuit court did not err in denying Latimore's motion for a directed verdict.

III. Exclusion of Probation Agent's Testimony

Finally, Latimore argues the circuit court erred when it excluded the testimony of a probation agent because this testimony would establish Latimore was never informed of the new registration requirements. We disagree.

The admission of evidence is within the discretion of the circuit court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

The circuit court refused to permit R.J. Gilbert, a probation agent for Greenville County, to testify at Latimore's trial. In doing so, the court found Gilbert's testimony was irrelevant because the probation department is not required by law to inform offenders of changes in the sex offender registration requirements. The circuit court, however, permitted Latimore to proffer Gilbert's testimony, and during Gilbert's proffer, he stated he was not Latimore's probation agent, and it was not Gilbert's duty to inform offenders of any changes in the law. Gilbert said there was nothing in Latimore's file to indicate he had ever been informed of the changes in reporting requirements.

We agree with the circuit court's conclusion that Gilbert's testimony was irrelevant as to whether Latimore had notice of the new registration requirements. Gilbert was not Latimore's probation agent at the time his registration was in issue, nor was Gilbert responsible for ensuring offenders fulfilled their registration requirements. Even if the circuit court erred in excluding Gilbert's testimony, we fail to see how Gilbert's testimony would have satisfactorily corroborated Latimore's claim that he was unaware of proper registration procedures. See State v. Taylor, 333 S.C. 159, 168-69, 508 S.E.2d 870, 875 (1998) (finding exclusion of certain evidence was proper, and moreover, any error in refusing to admit proffered testimony was harmless when proffered testimony added little favorable evidence for

defendant). As a result, Latimore was not prejudiced by the exclusion of Gilbert's testimony.

IV. Conclusion

Based on the foregoing, the circuit court's decision is

AFFIRMED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael D. Crisp, Jr.,
Employee, Respondent,

v.

SouthCo. Inc., Employer, and
Pennsylvania National Mutual
Casualty Insurance Co.,
Carrier, Appellants.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 4746
Heard June 23, 2010 – Filed September 29, 2010

REVERSED

Vernon F. Dunbar, of Greenville, for Appellants.

Kathryn Williams, of Greenville, for Respondent.

WILLIAMS, J.: In this workers' compensation case, SouthCo. Inc. (SouthCo.) argues the circuit court erred in its capacity as an appellate court by reversing the Workers' Compensation Commission's (Commission) finding that Michael Crisp (Crisp) did not sustain a physical brain injury. We agree and reverse.

FACTS

Crisp was an employee of SouthCo., a grassing and seeding company. On March 10, 2004, Crisp was assisting his coworkers in installing an erosion control fence. The installation of the fence required a Bobcat earthmover bucket to press poles into the ground. While Crisp was erecting a pole, the Bobcat bucket detached and struck Crisp's head, neck, back, and right upper extremity. Crisp was admitted to Mary Black Memorial Hospital (the hospital) and was treated for abrasions and bruises behind the back of his head and neck as well as injuries to his back and right hand. Additionally, Crisp sustained fractures to his third and fourth metacarpal bones in his right hand. On March 17, 2004, Dr. James Essman performed surgery on the fractures. Following surgery, Crisp sought medical treatment from several physicians regarding his headaches and neck and lower back pain.

Dr. J. Hunter Leigh, a physician with Mountain View Family Practice, evaluated Crisp on March 26 and April 8, 2004 and diagnosed Crisp with cervical muscle strain and fractures to his right hand. Dr. John Klekamp, a physician with Piedmont Orthopaedic Associates, evaluated Crisp on April 16, June 2, and July 7, 2004, and diagnosed Crisp with cervical and lumbar strain and fractures to his right hand.

Dr. Kevin Kopera, a physician with the Center for Health and Occupational Evaluation, evaluated Crisp on August 12, September 2, September 23, and October 8, 2004. Dr. Kopera concluded Crisp appeared to be neurologically intact but ordered a MRI scan of Crisp's brain. The MRI scan did not reveal any abnormalities.

Dr. Robert Moss, a psychologist, conducted a neuropsychological evaluation of Crisp on April 12-13, 2005. Dr. Moss noted,

> On the basis of the current examination, there are clear indications of deficits in verbal memory, attention, problem solving, and inhibition tied to his work injury. There are indications that he has likely experienced personality changes as a result of his injury. . . . Mr. Crisp is experiencing psychological distress from his injury as well. The exacerbation of obsessive-compulsive tendencies can also be associated with brain injuries involving the orbito-frontal area. This area is often affected in head injury cases due to the irregular shape of the skull and olfaction is often affected since the olfactory bulbs are there. The current findings would be consistent with a frontal lobe injury.

Dr. Moss diagnosed Crisp with the following conditions: cognitive disorder not otherwise specified, probable personality change due to head injury, exacerbation of obsessive-compulsive tendencies, traumatic brain injury consistent with a frontal lobe injury, and poly-substance abuse in full sustained remission. Additionally, Dr. Moss concluded Crisp could benefit from a brain injury program.

On May 24, 2005, Dr. Thomas Collings, a neurologist, diagnosed Crisp with a closed head injury. According to Dr. Collings, a closed head injury consists of "trauma to the brain in a global way as opposed to being a focal area of the brain and . . . causes symptoms in . . . higher competent motions." Dr. Collings asserted Crisp's head injury appeared to be "very minor," and Crisp did not sustain a significant head injury based on his medical records and the low frequency of headache complaints.

Dr. Collings also stated that he significantly relied on Dr. Moss' neuropsychological report, even though there were some inconsistent findings compared to Crisp's medical records and his personal observations. However, Dr. Collings concluded Dr. Moss' report should be followed to ascertain what happened to Crisp and to monitor his underlying psychiatric and substance abuse problems.

Dr. David Price, a psychologist and adjunct associate professor with the Medical University of South Carolina Department of Psychiatry and Behavioral Sciences and the University of South Carolina Upstate Department of Social and Behavioral Sciences, concluded there was no credible evidence that Crisp sustained a brain injury. Dr. Price noted there was "no objective medical evidence of a brain injury such as an abnormal CT scan, MRI, or EEG" and asserted Crisp suffered from Substance-Induced Persisting Dementia. Dr. Price diagnosed Crisp with the following conditions: obsessive-compulsive disorder, antisocial personality disorder, partner relational problem, adjustment disorder with depressed mood, and phase of life problem. The Commission concluded Dr. Moss' expert report and opinions were more credible than Dr. Price's report.

The Workers' Compensation Commissioner (Commissioner) concluded Crisp sustained a head injury resulting in cognitive disorders to his brain but not a physical brain injury. The Commission affirmed the Commissioner's order in its entirety. The circuit court reversed the Commission's ruling and concluded Crisp sustained a physical brain injury.[1] This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The Commission is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Lark, 276 S.C. at 135, 276 S.E.2d at 306. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.

[1] Pursuant to a statutory modification of section 42-17-60 of the South Carolina Code (2010), injuries occurring on or after July 1, 2007, are appealed directly from the Commission to the Court of Appeals.

Taylor v. S.C. Dep't of Motor Vehicles, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006).

LAW/ANALYSIS

SouthCo. argues the circuit court erred in reversing the Commission's decision because substantial evidence existed to support the Commission's finding that Crisp did not sustain a physical brain injury. We agree.

In reversing the Commission, the circuit court's order stated,

> From the foregoing, it is apparent the Commission made findings consistent with all of the symptoms and conditions on which Dr. Moss made his diagnosis of traumatic brain injury and physical brain damage, including chronic headaches, mild verbal memory problems, attention and concentration problems, problem solving and inhibition problems, probable personality change due to head injury, exacerbation of obsessive-compulsive tendencies, decrease in the sense of smell, frontal lobe brain injury, traumatic closed head injury, and Cognitive Disorder [not otherwise specified] . . . . Nevertheless, despite finding Dr. Moss credible, adopting the findings of brain injury related symptoms and conditions that he used to diagnose frontal lobe brain injury and physical brain damage, and awarding treatment in a "brain injury program" he recommended, the Commission determined that [Crisp] had not sustained physical brain injury. That conclusion contradicts the Commission's findings of brain injury related conditions, such as Cognitive Disorder [not otherwise specified], and is clearly erroneous. The Commission rejected the other expert's report, so there is no credible evidence on the record on which the Commission can base its finding that claimant did not sustain physical brain damage.

> Therefore, because the only evidence on the record is that [Crisp] has sustained frontal lobe brain injury and physical brain damage, it is the determination of this Court that the Commission's finding to the contrary is erroneous, is not supported by substantial evidence, and is reversed. Furthermore, since the only conclusion that can be reached on this evidence is that [Crisp] has sustained frontal lobe brain injury and physical brain damage, this Court finds as a matter of law that [Crisp] has sustained physical brain damage within the meaning of the Act.

To the contrary, we conclude the record is replete with substantial evidence to support the Commission's finding that Crisp did not sustain a physical brain injury based on Dr. Collings' testimony and the medical records of Crisp's physicians.

The medical records of the several physicians who treated Crisp following the accident support reversal of the circuit court's decision. The hospital's physicians did not note any symptoms commonly attendant to a physical brain injury during Crisp's treatment. The physicians who evaluated Crisp following surgery did not diagnose Crisp with a physical brain injury. In fact, Dr. Kopera's MRI scan did not reveal any abnormalities suggestive of a physical brain injury and specifically opined Crisp was neurologically intact.

Furthermore Dr. Collings testified,

> What's missing to me and what was missing when I examined him myself and tried to elicit this history is he doesn't seem to recall being hit in the head. He wasn't complaining of head trauma or pain at the time. He was not aware that he had a cut on the head. It was only when someone else was pointing out to him and he was not immediately but very briefly able to get up and run after the accident and was

> concerned about his hands. All of those things stand in contrast to someone who should've had a significant head injury. Usually when people have a significant head injury, closed head injury, they're knocked out. They're unconscious for a period of time and then they're confused when they wake up from that and they're often unable to get up and would be ataxic or have [no] control of their balance and so forth. All of these things are lacking in that report. Did he have a head injury? Yes, he had some type of head injury but it appears from the records to be very minor.

Moreover, Dr. Collings testified that Crisp's headaches were not a "big part of the problem" during his evaluation and his headaches were "out of character" and "out of severity" for a significant head injury stemming from the accident. Specifically, Dr. Collings stated,

> [T]he fact that [the headaches are] missing in the record and only occasionally he has chronic pain in his neck here but only occasional headaches implies that he wasn't complaining a lot about headaches or seeking medication or seeking treatment. I find that all unusual if he has a significant head injury.

Dr. Collings further concluded he had "great difficulty in finding any evidence to support [a physical brain injury entitling Crisp to lifetime indemnity benefits]," in the absence of Dr. Moss' report and a vocational evaluation which stated that Crisp was not employable.

Even though the record presents conflicting evidence on the issue of whether Crisp suffered a physical brain injury, we conclude the circuit court erred in reversing the Commission. See Pack v. State Dep't. of Transp., 381 S.C. 526, 536, 673 S.E.2d 461, 466 (Ct. App. 2009) (stating where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive); Taylor, 368 S.C. at 36, 627 S.E.2d at 752 (stating evidence is substantial if, considering the record as a whole, it "would allow reasonable

minds to reach the conclusion the administrative agency reached in order to justify its action"); Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994) (holding the circuit court's reversal of the Commission was error because although the evidence conflicted, the Commission's findings were supported by substantial evidence).

CONCLUSION

Accordingly, the circuit court's decision is

REVERSED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Adams Gibson, Appellant.

Appeal From Richland County
Steven H. John, Circuit Court Judge

Opinion No. 4747
Heard May 19, 2010 – Filed September 29, 2010

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Alphonso Simon, Jr., Warren Blair Giese, Solicitor, all of Columbia, for Respondent.

THOMAS, J.: During an altercation in a parking lot, Dennis Irby was shot and killed by a single 9mm gunshot. Adams Gibson and his brother Jacques Gibson were each indicted and convicted for the murder. Adams appeals, arguing the trial court erred in failing to grant a directed verdict and in failing to instruct the jury on involuntary manslaughter. We affirm.

FACTS

In September 2005, two groups of individuals, one from Ridgeway and one from Winnsboro, met at Chance's Bar in Columbia. Although the groups seemed to be getting along most of the evening, at some point, animosity developed between Demetric Davis, of Ridgeway, and Torri Boyd, of Winnsboro. Adams testified that shortly after the initial confrontation between Davis and Boyd, he called his brother, Jacques, to request a ride home.

Twenty to thirty minutes later, Jacques and two friends, Stephon and Vernon, arrived at Chance's in Jacques's white Ford sedan to pick up Adams. Jacques went inside to find Adams, while Stephon and Vernon waited in the car. Shortly thereafter, the dispute that had brewed inside Chance's spilled out into the parking lot and erupted into a physical altercation between numerous members of each group. According to several witnesses, neither Adams nor Jacques initially engaged in the fight; however, James Smith testified he saw Adams swing at someone and when Smith approached Adams in an effort to keep him away from one of the Winnsboro fellows, Jacques brandished a gun and told him "[not to] even think about it." Smith testified he fled at the sight of the gun.

Soon after the fight erupted, witnesses testified to hearing several shots. The witness accounts of the evening provide no clear picture of who fired weapons or how many shots were fired. However, many witnesses testified to seeing either Jacques, Adams, or both, or "someone" in the vicinity of Jacques's white car, firing multiple shots.

One of the State's key witnesses, Shunta Williams,[1] testified that she left the bar and walked out to the parking lot to watch the fight. Most of the witnesses testified that Jacques remained near his white sedan, away from the fight, while Adams may have engaged in the melee. However, Williams testified that Jacques was engaging in the fight and that she saw Adams walk over to the white sedan, sit in the driver seat, reach under it, pull out a gun, and fire what she recognized as a small caliber handgun, either a .22 or .25.[2] When the shots began, she retreated to the doorway of the bar to take cover. Moments later she claimed she heard another set of gunshots in the distance. She identified Adams as wearing jeans and a black tee shirt, although the other witnesses and evidence presented at trial indicated it was Jacques in the black tee shirt, and Adams was wearing a white tee shirt. Many of the accounts point to multiple sources of gunfire, but Williams maintains that Adams was the only shooter. During the melee, Dennis Irby was shot and killed by a single 9mm shot to the back of the left shoulder.

Adams spoke with the police twice. He first stated that he was not in the white Ford sedan with Jacques and did not see who did the shooting because he was in Lakisha Davis's car. He later admitted that after the altercation in the parking lot began, he exited Lakisha's car, at her request, to retrieve her cousin, Demetric. Adams denied having or firing a gun that night.

Jacques also gave two statements to the police. First he told the police that after he and his brother exited the bar, Adams went to Lakisha Davis's car and he returned to his white Ford sedan. He said he noticed a man retrieve something from a nearby SUV and place it behind his back, he suspected it was a gun but did not see it. After the fight broke out, Jacques stated Adams drove around in Lakisha's car, got out, and walked over toward the fighting. Although in his first statement Jacques denied he had a gun, Jacques later admitted that upon suspecting Smith was going to hit Adams, he pulled a gun and told Smith to "back off." Jacques said he then heard two

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[1] Although there are many witness accounts, the State relies heavily on this testimony for many of the issues in this case.

[2] Shell casings from a .25 caliber gun were found at the scene.

shots and in response fired his 9mm three or four times "into the air" as he got in his car and drove away. He later disposed of his gun by tossing it over a bridge.

Adams and Jacques were both indicted for murder; Jacques was also indicted for possession of a firearm by a person under the age of twenty-one. The pair was tried together. At the close of the State's case, Adams unsuccessfully moved for a directed verdict. In addition, the trial court denied Adams's request to instruct the jury on involuntary manslaughter. Both Adams and Jacques were convicted of murder and sentenced to thirty years' imprisonment. Adams appeals.

ISSUES ON APPEAL

I. Did the trial court err in failing to direct a verdict on the charge of murder?

II. Did the trial court err in failing to instruct the jury on involuntary manslaughter?

STANDARD OF REVIEW

In criminal cases an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

I. Directed Verdict

Adams argues the trial court erred in failing to direct a verdict on the charge of murder. We disagree.

When ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not the weight. State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct. App. 2003). When reviewing the denial of a motion for a directed verdict, an appellate court must review the evidence, and all inferences therefrom, in the light most

favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). The trial court's denial of a directed verdict will not be reversed if supported by any direct evidence or substantial circumstantial evidence of the defendant's guilt. Id.

In this case, the trial court denied Adams's motion for directed verdict, finding sufficient evidence had been presented to allow the case to proceed to the jury on the "hand of one is the hand of all" theory of liability. Adams argues the State presented insufficient evidence that he is responsible for the victim's murder under an accomplice theory.

> Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007) (internal quotations and citations omitted).

"Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " See State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (quoting State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but

rather can prove the same by circumstantial evidence and the conduct of the parties. Id. at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime).

In this case, the State does not contend Adams fired the fatal shot. Rather, the State simply maintains there is sufficient circumstantial evidence that Adams agreed to, and did, act in concert with Jacques to assault the Winnsboro group; thus, sufficient evidence of Adams's guilt existed to submit the issue to the jury under the hand of one is the hand of all theory. In order to demonstrate that Adams and Jacques intended to join together in a common design to achieve an illegal purpose, the State maintains: (1) Adams called Jacques to the scene; (2) when Jacques arrived he went inside the bar and Adams pointed out the group of Winnsboro men, rather than leaving straight away; (3) Williams testified Adams approached Jacques's white sedan in the parking lot and retrieved a gun moments before the shooting; and (4) although separately, the two men fled the scene after the shooting.

Here, at minimum, the evidence creates the inferences that Adams informed Jacques of the situation, that the reason for the call may not have been solely for the purpose of removing Adams from the scene, and that Adams was aware a firearm was available for him to retrieve from Jacques's white sedan. When viewed in the light most favorable to the State, the circumstantial evidence in this case infers Adams and Jacques may have acted in concert in assaulting the men from Winnsboro. See State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct. App. 2007) (holding in a case with similar facts, that evidence the defendant and his co-defendant together chased after two men in the melee of a parking lot brawl and fired shots, killing a bystander, was sufficient to overcome a directed verdict motion); see also Langley, 334 S.C. at 649, 515 S.E.2d at 101 (indicating evidence that the defendant and co-defendant were seen together, circumstantial evidence placing defendant at the scene of the crime, and eye-witness testimony, was sufficient to warrant submitting the case to the jury on any theory of liability, including the hand of one is the hand of all theory). Accordingly, we find the trial court did not abuse its discretion and affirm its denial of Adams's motion for a directed verdict.

II. Jury Instruction

Adams next alleges the trial court erred in failing to instruct the jury on involuntary manslaughter. We disagree.

The evidence presented at trial determines the law to be charged, and a trial court commits reversible error in failing to give a requested charge on an issue raised by the evidence. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). In determining whether to charge the lesser included offense of manslaughter the court must view the evidence in the light most favorable to the defendant. Id. Declining to charge the lesser included offense is warranted when it "very clearly appear[s] that . . . *no evidence whatsoever* [exists] tending to reduce the crime from murder to manslaughter." State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010); State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). In order to amount to reversible error, the failure to give a requested charge must be both erroneous and prejudicial. State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006).

Involuntary manslaughter is:

> (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. To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating. A person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the

> shooting. The negligent handling of a loaded gun will support a charge of involuntary manslaughter.

Brayboy, 378 S.C. at 180, 691 S.E.2d at 485 (internal citations and quotations omitted).

The State argues that under the hand of one is the hand of all theory, Adams is not entitled to this charge because Jacques was either acting unlawfully or was not lawfully armed in self-defense. More specifically, the State argues extensively that because Jacques was not acting in such a manner as to entitle him to a self-defense instruction, he is thereby not lawfully armed in self-defense for the purposes of an involuntary manslaughter charge. However, our supreme court has specifically pointed out there is a difference between being "armed in self-defense" and "acting in self-defense."[3] State v. Light, 378 S.C. 641, 649, n.6, 664 S.E.2d 465, 469, n.6 (2008); State v. Burriss, 334 S.C. 256, 265, n.10, 513 S.E.2d 104, 109, n.10 (1999); see State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003)[4] (stating "[a] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting"). Thus, for the purposes of involuntary

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[3] The issue of instructing the jury on self-defense is not appealed.

[4] The State makes a brief argument that Jacques was convicted of unlawful possession of a pistol by a person under twenty-one years of age and because of this he was "unlawfully armed." However, our supreme court has indicated section 16-23-30(c) of the South Carolina Code (2003), which outlawed possession of handguns by persons under the age of twenty-one, to be in violation of the plain language of South Carolina Constitution Article XVII, section 14. See State v. Bolin, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008) (stating that with the exception of the General Assembly's ability to restrict the sale of alcohol to individuals until age twenty-one, every citizen who is eighteen years of age or older shall be deemed *sui juris* and be given all, and full, legal rights and responsibilities). It suffices that although a non-issue in this appeal, under the jurisprudence as it currently exists, Jacques's possession of the pistol is not unlawful *per se*, by virtue of his age.

manslaughter, the inquiries associated with whether or not to instruct on the defense of self-defense are not applicable. Light, 378 S.C. at 648-49, 664 S.E.2d 468-69. Rather, the court is "concerned only with whether [the defendant] had a right to be armed for purposes of determining whether he was engaged in a lawful act, i.e. was [he] lawfully armed, and not whether he actually acted in self-defense when the shooting occurred." Id. at 649 n.6, 664 S.E.2d at 469 n.6.

However, regardless of whether Jacques was lawfully armed in self-defense, the essence of involuntary manslaughter is the involuntary nature of the killing. See Douglas v. State, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (finding no involuntary manslaughter charge warranted where defendant admitted he intentionally fired a gun into a crowd in self-defense despite testimony that the defendant had been rushed by a group of people during a fight); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) (holding where a defendant admitted he intentionally shot his gun, contending he was acting recklessly but lawfully in self-defense, involuntary manslaughter charge was not warranted); State v. Morris, 307 S.C. 480, 483-84, 415 S.E.2d 819, 821-22 (Ct. App. 1991) (noting that under involuntary manslaughter, the act must be unintentional and defendant intentionally shot his gun though he claimed self-defense); accord Light, 378 S.C. at 648-49 664 S.E.2d at 468-69 (finding the defendant had lawfully armed himself in self defense and was entitled to an instruction on involuntary manslaughter, in a case in which there existed evidence the gun *unintentionally discharged*); Brayboy, 387 S.C. at 181-82, 691 S.E.2d at 486 (holding that although unlawful to point and present a firearm, when a defendant lawfully armed himself in self defense his failure to immediately disarm himself when the threat subsided did not amount to unlawful pointing and presenting a firearm and evidence suggesting the gun *accidentally discharged* was sufficient to warrant instruction on involuntary manslaughter).

In this case, because by Jacques's own admission he voluntarily and intentionally fired his weapon, the trial court properly denied instructing the jury on involuntary manslaughter.

CONCLUSION

For the aforementioned reasons, the rulings of the trial court are **AFFIRMED.**

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Meagan Y. Nakatsu, Appellant,

v.

Encompass Indemnity Company, Respondent.

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

Opinion No. 4748
Heard May 19, 2010 – Filed September 29, 2010

REVERSED

John Robert Peace, of Greenville, for Appellant.

Robert D. Moseley, Jr. and C. Fredric Marcinak, of Greenville, for Respondent.

KONDUROS, J.: Meagan Nakatsu had an automobile accident while she resided with her sister, Kellie Buckner. Nakatsu brought a declaratory judgment action against Encompass Indemnity Company seeking to stack underinsured (UIM) coverage from her sister's Encompass insurance policy with her own UIM coverage from a different insurer. The trial court granted summary judgment to Encompass finding the policy excluded UIM coverage for resident relatives not operating covered vehicles. Nakatsu appeals. We reverse.

FACTS/PROCEDURAL HISTORY

On December 16, 2007, Zunita Mattison ran a stop sign while driving and struck Nakatsu's vehicle. Mattison fled the scene in another vehicle and was apprehended at the emergency room. As a result of the collision, Nakatsu's car was totaled, and she required surgery to repair a broken wrist and ankle.

Mattison's insurance company paid Nakatsu $25,000, the limit on Mattison's policy. Nakatsu also collected $25,000 in UIM coverage from the insurance policy she maintained on her vehicle, which she was driving during the accident. At the time of the accident, Nakatsu resided with Kellie and Kellie's husband, Adam Buckner (collectively the Buckners). The Buckners insured three vehicles under a policy with Encompass; each vehicle had UIM limits of $50,000 per person and $100,000 per accident. Their policy provided:

> In consideration of an additional premium, if the Coverage Summary shows an amount of "Underinsured Motorists" coverage, we will provide the coverage described by the provisions of this endorsement.
>
> **DEFINITIONS**
> The following words and phrases are defined for this **"UNDERINSURED MOTORISTS COVERAGE"**

endorsement. Only in regard to the coverage provided by this endorsement, the following definitions replace any corresponding definitions in the **"MOTOR VEHICLE"** Segment.

1. **Covered Person** means:
   a. You for the ownership, maintenance or use of any vehicle, except while **occupying,** or when struck by, a vehicle owned by you which is not insured for by this coverage under this policy;
   b. Any **family member:**
      (1) Who does not own an **automobile,** for the maintenance or use of any vehicle;
      (2) Who owns an **automobile,** but only for the use of an **insured motor vehicle;**

      Except while **occupying,** or when struck by, a vehicle owned by you or that person which is not insured for this coverage under this policy;
   c. Any other person **occupying** an **insured motor vehicle** with your consent, except when struck by a vehicle owned by you or that person which is not insured for this coverage under this policy;

. . . .

2. **Insured Motor Vehicle** means:
   a. An **automobile,** motorcycle or motorhome shown in the Coverage Summary if the Coverage Summary indicates "Underinsured Motorists" coverage for that vehicle. This includes an **automobile,** motorcycle or motorhome that replaces one shown in the Coverage Summary, if you ask us to insure the **automobile,** motorcycle or motorhome, and we agree.

b. Additional **automobiles,** motorcycles or motorhomes for 30 days after you become the owner, provided all the other automobiles, motorcycles and motorhomes owned by you are either covered by us or excluded by endorsement.
For coverage beyond the 30 days, you must ask us to insure the **automobile,** motorcycle or motorhome, and we must agree.

c. An **automobile,** motorcycle, motorhome or trailer not owned by you or a **family member** if being temporarily used while an **automobile,** motorcycle or motorhome shown in the Coverage Summary is out of its normal use because of its breakdown, repair, servicing, loss or destruction. It must not be available or furnished for the regular use of you or any **family member.**

d. An **automobile,** motorcycle, motorhome or trailer not owned by you or any **family member** if being operated by you. This vehicle must not be furnished for the regular use of you or any **family member.**

. . . .

Nakatsu brought a declaratory judgment action against Encompass seeking to stack up to $74,999.99 in UIM coverage from the Buckners' policy, $25,000 for each of their three cars, to the $25,000 in UIM coverage from her own policy.[1] Nakatsu stipulated the policy does not allow her UIM

[1] Although the Buckners' UIM limits were $50,000 per car, Nakatsu acknowledged she would only be permitted to stack $25,000 per car because that is the amount she carried on her vehicle. See S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham, 304 S.C. 442, 446, 405 S.E.2d 396, 398 (1991) ("[T]he amount of coverage which may be stacked from policies on vehicles

coverage because she was operating a vehicle not insured under the policy but argued that provision was invalid. Encompass moved for summary judgment, asserting the policy did not allow UIM coverage for resident relatives not driving covered vehicles and South Carolina case law allowed such a provision. Nakatsu also moved for summary judgment, arguing because she is a Class I insured, she was entitled to stack UIM coverage and the policy's language to the contrary violates South Carolina statutory law. The trial court granted Encompass's motion, relying on Burgess v. Nationwide Mutual Insurance Co., 373 S.C. 37, 644 S.E.2d 40 (2007). This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

Nakatsu argues the trial court erred in granting Encompass summary judgment because the policy excluded stacking of UIM coverage for resident relatives not driving covered vehicles. She contends that exclusion is invalid because it is inconsistent with statutory provisions and Burgess v. Nationwide Mutual Insurance Co., 373 S.C. 37, 644 S.E.2d 40 (2007), is inapplicable to this case. We agree.

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not involved in an accident is limited to an amount no greater than the coverage on the vehicle involved in the accident.").

"Stacking refers to an insured's recovery of damages under more than one insurance policy in succession until all of his damages are satisfied or until the total limits of all policies have been exhausted." State Farm Mut. Auto. Ins. Co. v. Moorer, 330 S.C. 46, 60, 496 S.E.2d 875, 883 (Ct. App. 1998). "The critical question in determining whether an insured has the right to stack is whether he is a Class I or Class II insured." Ohio Cas. Ins. Co. v. Hill, 323 S.C. 208, 211, 473 S.E.2d 843, 845 (Ct. App. 1996). "The two classes of insureds are: (1) the named insured, his spouse and relatives residing in his household; and (2) any person using, with the consent of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle." Concrete Servs., Inc. v. U.S. Fid. & Guar. Co., 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998); see also Hill, 323 S.C. at 211, 473 S.E.2d at 845 (citation omitted) ("A Class I insured is an insured or named insured who has a vehicle involved in the accident. An insured is a Class II insured if none of his vehicles are involved in the accident."). Only a Class I insured may stack. Hill, 323 S.C. at 211, 473 S.E.2d at 845.

"Statutory provisions relating to an insurance contract are part of the contract as a matter of law. To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails." State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct. App. 2000) (citation omitted). "Generally, stacking of additional coverage for which the insured has contracted is permitted unless limited by statute or a valid policy provision." Ruppe v. Auto-Owners Ins. Co., 329 S.C. 402, 404, 496 S.E.2d 631, 631-32 (1998). "[S]tacking may be prohibited by contract if such a prohibition is consistent with statutory insurance requirements." Id. at 406, 496 S.E.2d at 633. "[UIM] coverage is controlled by and subject to our [UIM] act, and any insurance policy provisions inconsistent therewith are void, and the relevant statutory provisions prevail as if embodied in the policy." Kay v. State Farm Mut. Auto. Ins. Co., 349 S.C. 446, 450, 562 S.E.2d 676, 678 (Ct. App. 2002).

"Statutorily required coverage is that which is required to be offered or provided." Ruppe, 329 S.C. at 404-05, 496 S.E.2d at 632. "[A]n insurer

must offer UIM coverage pursuant to [section] 38-77-160 when the insurer extends statutorily required liability coverage." Howell v. U.S. Fid. & Guar. Ins. Co., 370 S.C. 505, 510, 636 S.E.2d 626, 629 (2006). Stacking of UIM coverage, which is a statutorily required coverage, is governed specifically by statute. Ruppe, 329 S.C. at 405, 496 S.E.2d at 632 (citing S.C. Code Ann. § 38-77-160 (2002)). "Construing specific statutory language [found in section 38-77-160], we have held an insured is entitled to stack [UIM] . . . coverage in an amount no greater than the amount of coverage on the vehicle involved in the accident." Id. (footnote omitted). "To this extent, stacking cannot be contractually prohibited." Id.

"South Carolina courts have interpreted [section 38-77-160] to allow Class I insureds to stack UIM coverage from multiple automobile insurance policies." Kay, 349 S.C. at 449, 562 S.E.2d at 678. Section 38-77-160 (emphasis added) provides:

> Automobile insurance carriers . . . shall . . . offer, at the option of the insured, [UIM] coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, an insured or named insured is protected by . . . [UIM] coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

In Kay, 349 S.C. at 449-50, 562 S.E.2d at 678, this court determined a provision in a policy that only allowed stacking equal to the amount of the

minimum limits, regardless of the amount of UIM coverage on the vehicle in the accident, violated section 38-77-160. The court found a "provision limiting stacking of UIM coverage to the minimum limits is invalid because it purports to limit the amount of coverage to an amount less than that available on the involved vehicle's policy." Kay, 349 S.C. at 449, 562 S.E.2d at 678.

In Jackson v. State Farm Mutual Automobile Insurance Co., 288 S.C. 335, 337, 342 S.E.2d 603, 604 (1986), the court held, "A policy provision which purports to limit stacking of statutorily-required coverage is invalid." But see Ruppe, 329 S.C. at 405, 496 S.E.2d at 632 (finding the rule that stacking of statutorily required coverage cannot be contractually prohibited is an oversimplification of our stacking law and declining to apply it to the stacking of liability coverage).

Both the trial court and Encompass relied on Burgess in support of finding the policy does not violate statutory law. In Burgess, 373 S.C. at 39, 644 S.E.2d at 41, the insured did not have UIM coverage on the vehicle in the accident but had it on another vehicle he owned. The insurance policy for the vehicle in the accident did not allow UIM coverage when the insurance was driving another vehicle he owned but that did not have UIM coverage. Id. The Burgess court noted the "'[i]f, however' sentence in [section] 38-77-160, relied upon by Nationwide here, does not literally apply to these facts since Burgess is not attempting to stack excess UIM coverage from his Nationwide policy." Burgess, 373 S.C. at 41, 644 S.E.2d at 42. The court further observed because "Burgess seeks recovery under only one policy, technically he is not seeking to stack coverage." Id. at 41 n.1, 64 S.E.2d at 42 n.1. The supreme court posited:

> [T]his statutory language does provide support for Nationwide's contention that its policy provision does not violate public policy. The "[i]f, however" sentence in [section] 38-77-160 evinces the legislature's intent, in a stacking situation, to bind the insured to the amount of UIM coverage he chose to

> purchase in the policy covering the vehicle involved in the accident. Thus, the statute itself contains a limit on the "portability" of UIM coverage.

Burgess, 373 S.C. at 41, 64 S.E.2d at 42-43. The court held public policy is not offended by an automobile insurance policy provision that limits the portability of basic UIM coverage when the insured has a vehicle involved in the accident. Id. at 42, 644 S.E.2d at 43.

Because Nakatsu was living with her sister at the time of the accident, she is a resident relative. Therefore, Nakatsu is a Class I insured under her sister's policy. The issue in this case is whether Nakatsu can stack the Buckners' UIM coverage. Burgess, as the opinion notes, did not involve stacking; it involved portability. These are two distinct concepts. Stacking is only allowed if the insured has the specific type of coverage on the vehicle involved in the accident. On the other hand, portability refers to a person's ability to use his coverage on a vehicle not involved in an accident as a basis for recovery of damages sustained in the accident.

The Burgess court found disallowing Burgess UIM coverage did not offend public policy because he had declined UIM coverage. That is not the case here. Nakatsu has UIM coverage on the car in the accident through a policy she obtained on that car. She is simply seeking to stack coverage from the Buckners' policy, under which she is a Class I insured. The policy provision conflicts with section 38-77-160 because it does not allow a Class I insured to stack UIM coverage up to the limits of the vehicle in the accident in certain situations, such as the one here. Accordingly, that provision of the policy is void, and the trial court erred in granting Encompass summary judgment.[2] Therefore, the trial court's grant of summary judgment to Encompass is

[2] Nakatsu argues Encompass should be estopped from denying she is an insured under the policy because Encompass cited her driving record including this accident as a reason for non-renewal. Because our determination of the prior issue is dispositive, we need not address this issue. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518

REVERSED.

GEATHERS and LOCKEMY, JJ., concur.

S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Consumer Affairs, Appellant,

v.

Foreclosure Specialists, Inc., & Judson G. Decell, as an Individual, Respondents.

Appeal from the Administrative Law Court
The Honorable Paige J. Gossett

Opinion No. 4749
Submitted June 16, 2010 – Filed September 29, 2010

AFFIRMED

Carolyn Grube Lybarker, of Columbia, for Appellant.

Susan Foxworth Campbell, of Columbia, for Respondents.

FEW, C.J.: The South Carolina Department of Consumer Affairs filed a petition before the Administrative Law Court (ALC) alleging Foreclosure

Specialists, Inc. and its alleged owner and operator Judson G. Decell (Respondents) violated the Consumer Credit Counseling Act.[1] The Department claimed Respondents engaged in "credit counseling service" without having first obtained a license to do so. The ALC granted the petition in part, issued a "cease and desist" order, and imposed an administrative fine. However, the Department also requested an order requiring Respondents to "refund all monies collected under contracts entered into with South Carolina consumers after December 1, 2005." The administrative law judge ruled that the ALC does not have the power to grant that relief. The Department appeals this ruling. We affirm.

The scope of the power of the ALC is a question of law, which we review de novo. See Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

We frame the issue before us by reviewing, first, the statutes Respondents violated, and second, the statutory power of the Department to seek, and the ALC to grant, various forms of relief. The Consumer Credit Counseling Act (the Act) was enacted in 2005. See S.C. Code Ann. § 37-7-101 (Supp. 2009). Pursuant to the Act, no person may engage in credit counseling service[2] without a license. Id. § 102. The required license is issued by the Department of Consumer Affairs. See id. §§ 102, 104, 107(A).[3] The ALC found that Respondents violated the Act by engaging in credit counseling service without a license.

The Act grants the Department administrative powers to address this type of violation. Id. § 119. The South Carolina Consumer Protection Code

[1] S.C. Code Ann. §§ 37-7-101 to -122 (Supp. 2009).

[2] This term is defined in S.C. Code Ann. § 37-7-101(3) (Supp. 2009).

[3] The Consumer Credit Counseling Act is enforced by the Department of Consumer Affairs. See also S.C. Code Ann. § 37-7-101(9) (Supp. 2009).

(the Code) also grants powers to the Department. See S.C. Code Ann. §§ 37-6-101 to -113 (2002 & Supp. 2009). The Code provides that the Administrator of the Department may file a petition before the ALC to seek enforcement of administrative orders issued pursuant to section 37-7-119, or otherwise to seek compliance with the Act. See S.C. Code Ann. § 37-6-108(A), (C) (Supp. 2009). The ALC has exclusive jurisdiction over such an action for enforcement. Id. § 108(B). In addition to these administrative powers, the Code provides that the Administrator may bring a "civil action against . . . a person subject to this title to recover actual damages sustained and excess charges paid by one or more consumers." Id. § 113(A).

The refund sought by the Department in this case is "actual damages sustained and excess charges paid by one or more consumers." There is no statutory authority to seek such relief except in a "civil action" under section 37-6-113(A). The Department may bring a civil action in circuit court. This appeal requires us to determine whether the Department may also bring a civil action in the ALC to recover the relief provided for in section 37-6-113(A). The answer to that question will determine whether the ALC has the power to grant to the Department the refund it seeks from these Respondents. We conclude the Department has no statutory authority to bring a civil action in the ALC, and thus the ALC was correct in finding it did not have the power to grant the Department the refund it requested.

The General Assembly amended the Consumer Protection Code in 2005.[4] The former version of section 37-6-108 provided "the Administrator may obtain an order of the court for enforcement of its order in the court of common pleas."[5] The circuit court's jurisdiction over such actions was exclusive.[6] The Administrator also had the right to bring a civil action before

[4] Act No. 128, 2005 S.C. Acts 1507.

[5] S.C. Code Ann. § 37-6-108(1) (2002) (former version).

[6] Id. § 108(4) (2002). Any doubt that this "exclusive" jurisdiction provision referred to circuit court is resolved by the same subsection, which provided that a "final judgment or decree may be appealed in the manner provided by

the 2005 amendments. The former version of section 37-6-113 set forth three different types of civil actions the Administrator could bring, including "a civil action against a creditor to recover actual damages sustained and excess charges paid by one or more consumers . . . ."[7] Before 2005, there was no statutory authority for the Administrator to bring any action in the ALC. It is apparent, therefore, that before the 2005 amendments, a civil action could be brought only in circuit court.

With the 2005 amendments, the Code now distinguishes between an "administrative action," which must be brought in the ALC, from a "civil action." See S.C. Code Ann. §§ 37-6-108(A); 37-6-113(C) (Supp. 2009). There is nothing in the 2005 amendments that changes the procedure that a civil action has to be brought in circuit court. Because the relief sought by the Department in this case is available only in a civil action pursuant to section 37-6-113(A), and because a civil action must still be brought in circuit court, the ALC was correct in ruling that it did not have the power to grant the relief.

Further, when the General Assembly revised the Code in 2005 and created the administrative action under section 37-6-108, it placed limitations on the power of the ALC. Under subsection 37-6-108(F), "the administrative law judge may not award damage[s] . . . to affected customers in these hearings." S.C. Code Ann. § 37-6-108(F) (Supp. 2009). This subsection precludes the ALC from granting the type of relief the Department requested.

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the South Carolina Appellate Court Rules." Appeals from the ALC filed before July 1, 2006, went to circuit court. See S.C. Code Ann. § 1-23-610 (2005) (former version); § 1-23-610 (Supp. 2009) (current version providing appeal to court of appeals); Act No. 387, § 57, 2006 S.C. Acts 3132 (providing effective date of amendment to be July 1, 2006). The Appellate Court Rules do not apply in circuit court. The only appeal that could be governed by the Appellate Court Rules before July 1, 2006, was from circuit court to the court of appeals.

[7] S.C. Code Ann. § 37-6-113(1) (2002) (former version).

The Department argues, however, that the ALC has inherent powers and equitable powers through which it may grant the requested relief. Specifically, the Department argues that two provisions of the Administrative Procedures Act, sections 1-23-600(F) and 1-23-630(A), provide the ALC authority to grant the requested relief as an equitable remedy. This argument fails for two reasons. First, the refund sought by the Department in this case is legal, not equitable. Second, the statutes do not provide what the Department contends. Section 1-23-600(F) provides "a state agency authorized by law to seek injunctive relief may apply to the Administrative Law Court for injunctive or equitable relief pursuant to Section 1-23-630." S.C. Code Ann. § 1-23-600(F) (Supp. 2009). Section 1-23-630(A) provides that an administrative law judge "has the same power at chambers or in open hearing as do circuit court judges and to issue those remedial writs as are necessary to give effect to its jurisdiction." S.C. Code Ann. § 1-23-630(A) (2005). We do not believe it is necessary for us to decide exactly what effect these statutes have on the power of the Department or the ALC. The statutes do not grant the Department or the ALC authority to exceed their statutorily granted powers. See generally Responsible Econ. Dev. v. S.C. Dep't of Health & Envtl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) ("[R]egulatory bodies . . . have only the authority granted them by the legislature."); see also Randolf R. Lowell, South Carolina Administrative Practice and Procedure, 152 (2d ed. 2008) ("The ALC has no authority to decide civil matters or to award monetary damages in cases.").

We hold that the Administrative Law Court does not have the power to grant the Department of Consumer Affairs a refund of fees paid by consumers for credit counseling service when the provider of those services has violated the Consumer Credit Counseling Act. An action for this relief is a civil action under section 37-6-113(A) of the South Carolina Code, and must be brought in circuit court. The decision of the ALC is

AFFIRMED.

THOMAS and PIEPER, JJ., concur.