The Supreme Court of South Carolina

In the Matter of John
Howarth Bennett, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on April 6, 2992, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 1, 2009, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of John Howarth Bennett shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

December 17, 2009

The Supreme Court of South Carolina

In the Matter of Charmaine Carrithers, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 22, 2004, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated December 10, 2009, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Charmaine Carrithers shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

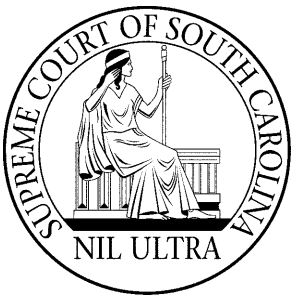
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

December 17, 2009



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 55
December 21, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Lois King and Deloris Sims, on behalf of themselves and all others similarly situated, Appellants,

v.

American General Finance, Inc., Respondent.

ORDER

The petition for a rehearing is denied. The attached opinion, however, is substituted for the opinion previously filed in this matter.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

December 21, 2009

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lois King and Deloris Sims, on behalf of themselves and all others similarly situated, Appellants,

v.

American General Finance, Inc., Respondent.

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

Opinion No. 26710
Heard June 10, 2009 – Re-filed December 21, 2009

REVERSED AND REMANDED

C. Bradley Hutto, of Williams & Williams, of Orangeburg, Charles L. Dibble, of Dibble Law Offices, of Columbia, Daniel W. Williams, of Bedingfield & Williams, of Barnwell, Steven W. Hamm, C. Jo Anne Wessinger-Hill, and Jocelyn T. Newman, all of Richardson, Plowden & Robinson, of Columbia, T. Alexander Beard, of Beard Law Offices, of Mt. Pleasant, Thomas M. Fryar, of Columbia, for Appellants.

James Y. Becker and Sarah P. Spruill, both of Haynsworth, Sinkler Boyd, of Columbia, T. Thomas Cottingham, III and Sarah B. Kemble, of Hunton & Williams, of Charlotte, for Respondent.

JUSTICE KITTREDGE: In this case, Lois King and Deloris Sims, on behalf of themselves and those similarly situated, brought an action against American General Finance alleging the loan company violated the attorney preference statute by failing to timely ascertain the borrower's preference for legal counsel. S.C. Code Ann. § 37-10-102 (1989 & Supp. 1995). The class was certified, and subsequently decertified by a different trial court. The individual actions brought by King and Sims continued. American General was granted summary judgment as to King's action, and Sims's claim resulted in a defense jury verdict. We reverse the class decertification as well as the trial court's holdings in the individual cases. We remand this case to continue as a class action and allow the class action to once again envelop the individual cases.

I.

This case is governed by section 37-10-102(a) (1989 & Supp. 1995), the so-called attorney preference statute, as it existed prior to May 30, 1996.[1] The statute provided that "[w]henever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose[,]" lenders such as American General were required to "ascertain the preference of the borrower as to the legal counsel that is

---

[1] Effective May 30, 1996, the Legislature amended section 37-10-102(a). *See* Act No. 355, § 1, 1996 S.C. Acts 2187. Following this amendment, a lender was required to notify the borrower prior to closing of the borrower's attorney preference rights by either: (1) including the information on or with the credit application, or (2) providing the borrower written notice of the preference information that is "delivered or mailed no later than three business days after the application is received or prepared." S.C. Code Ann. § 37-10-102(a) (1989 & Supp. 1996).

employed to represent the debtor . . . *and the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower*." S.C. Code Ann. § 37-10-102(a) (1989 & Supp. 1995) (emphasis added).

The South Carolina Department of Consumer Affairs interpreted the timing provision of section 37-10-102(a) as follows:

> In summary, the attorney and insurance agent preference need not be indicated directly on the application form so long as the borrower is presented a clear and conspicuous disclosure of this right prior to or contemporaneously with the application form.

S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 10.102(a)-8302 (1983).

Relying on the statutory language that "the credit application on the first page" must ascertain the borrower's attorney preference, together with the 1983 Department of Consumer Affairs "administrative interpretation," King and Sims allege American General violated section 37-10-102(a) by failing to provide the necessary attorney preference disclosure at the time of their credit applications. King and Sims brought this action on behalf of themselves and those similarly situated, and they allege this action implicates approximately five thousand loans.[2]

King and Sims each closed a loan with American General in 1995. King sought a home improvement loan that was secured by her home. American General presented King with a Federal Disclosure Statement, which stated: "You are giving a security interest in your Real Estate . . . ." King additionally signed a "Security Agreement" that specifically listed an

---

[2] Section 37-10-105 of the South Carolina Code was amended again in 1997 to preclude class actions for subsequent violations of the attorney preference provision of section 37-10-102. *See* Act No. 99, 1997 S.C. Acts 482.

automobile as security for her loan. The "Security Agreement" further stated that the "mortgaged property" included "[a]ll property listed as security in a certain Federal Disclosure Statement executed by and delivered to the Mortgagor(s) on even date." For reasons that are not entirely clear, King eventually received a debt consolidation loan that American General alleges was not secured by real estate.

Undisputedly, Deloris Sims received a loan from American General secured by real property; however, the document American General relied on was an undated attorney preference statement.

In 1996, King and Sims brought this action on behalf of themselves and those similarly situated. In 1998, Judge T. L. Hughston, Jr. denied American General's motion for summary judgment and certified the class. The court analyzed the proposed class under Rule 23(a), SCRCP, and found all the following elements were satisfied: numerosity, commonality, typicality, adequacy of King and Sims as class representatives, and the amount in controversy exceeded one hundred dollars per class member.

Importantly, when discussing typicality, the court stated:

> [American General] has asserted a 'substantial compliance' argument based upon *Davis v. NationsCredit Fin. Serv. Corp.*, [326 S.C. 83,] 484 S.E.2d 471 (1997). This argument is misplaced. *Davis* dealt with an issue of form, not one of timing. In *Davis*, the plaintiff had received the required notice at the time of application as required by [s]ection 37-10-102, but the notice was on a separate sheet rather than on the first page of the application. Timing is a critical issue of informed disclosure. The definition proposed by [King and Sims] excludes those who received the form at the time of application . . . . [T]he requirement of typicality is satisfied.

Further, Judge Hughston's order stated:

> This Court therefore orders the certification of the proposed class consisting of all persons who, since July 1, 1982, have taken a loan from [American General] which was secured in whole or in part by a lien on real estate in South Carolina for personal, family, or household purposes, whether recorded or not, and
>
> a. for whom the debt secured is: i) still outstanding, or ii) (sic) payment was made on the loan within three years of the date of the filing of this action on August 1, 1996, and
>
> b. for whom [American General] failed to ascertain the attorney or insurance preference of the borrower at the time of application in the manner required by S.C. Code Ann. § 37-10-102.

American General petitioned this Court for Writ of Mandamus and Writ of Certiorari from Judge Hughston's order. This Court denied both petitions. Subsequently, this case was designated as complex, and thereafter, it was assigned to Judge James C. Williams, Jr.

In 2001, Judge Williams decertified the class after finding "there is no such thing as a typical plaintiff in this case" because the timing of when a loan attached to property differed among the borrowers. In a later ruling, the trial court granted summary judgment in favor of American General in King's case, finding the loan King eventually received was not secured by real property.

Additionally, the trial court granted partial summary judgment in favor of Sims, noting "there can be no substantial compliance where the preferences are not ascertained until closing." Subsequently, the trial court granted American General's motion to reconsider the ruling for Sims, vacated its earlier ruling, and conducted a jury trial.

The jury found for American General. First, the jury was asked:

> Did the actions of American General in this case give a clear and prominent disclosure of the information necessary to ascertain the relevant preference of Deloris Sims? In other words, did American General substantially comply with the statutory requirements?

The jury answered "yes." Next, the jury was asked to determine when the disclosure was made. Eleven jurors found American General made the disclosure on the day of the closing, and one juror found American General made the disclosure prior to the closing. Judgment was entered for American General.

This appeal of the decertification and treatment of King's and Sims's individual cases followed.

II.

A.

King and Sims argue the trial court erred in decertifying the class. We agree.

It is within a trial court's discretion whether a class should be certified. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998). Additionally, "[a] court may not look to the merits when determining whether to certify a class." *Id*. at 43, 508 S.E.2d at 21.

As discussed above, at the relevant time, section 37-10-102 stated:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose–
>
> > (a) *The creditor must ascertain the preference of the borrower* as to the legal counsel that is employed to represent the debtor in all matters of the transaction

> relating to the closing of the transaction . . . *and the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower*. The creditor may require that the attorney or agent so chosen be able to provide reasonable security to the creditor by way of mortgage title insurance in a company acceptable to the creditor and other insurance in a company acceptable to the creditor. If title insurance is made a condition of the loan at any point during the negotiations, it must remain a condition all the time thereafter regardless of which attorney ultimately closes the transaction. Any legal fees other than for examination and certification of the title, the preparation of all required documents, and the closing of the transaction required or incurred by the creditor in connection with the transaction is the responsibility of the creditor regardless of which party pays for the title work, document preparation, and closing.

S.C. Code Ann. § 37-10-102(a) (1989 & Supp. 1995) (emphasis added).

This Court interpreted the applicable version of section 37-10-102 in *Davis v. NationsCredit Financial Services Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997). In *Davis*, this Court answered certified questions arising from a mortgage loan transaction where Davis received an attorney preference statement on a separate sheet of paper contemporaneously with her credit application. *Id.* at 84, 484 S.E.2d at 471. The issue in *Davis* was one of form: whether the presentation of the attorney preference disclosure on a separate paper from the application violated section 37-10-102.

In answering those questions, we construed the legislative purpose of section 37-10-102 to be "to protect borrowers." *Id.* at 86, 484 S.E.2d at 472. This Court held that a lender may deviate from section 37-10-102 by

assessing the borrower's preference for legal counsel on a separate piece of paper, provided the disclosure is "clear and prominent" and made contemporaneously with the actual loan application. The Court sanctioned such a deviation on the basis of substantial compliance. *Id*. at 86, 484 S.E.2d at 472. Thus, this Court held substantial compliance may be achieved if the form of the disclosure is clear and meaningful. The *timing* of the attorney preference disclosure was not an issue in *Davis*, as the lender provided the attorney preference statement contemporaneously with the loan application.

Timing is the central issue in this case. Consistent with Judge Hughston's ruling, we construe section 37-10-102(a) as requiring the attorney preference disclosure to occur contemporaneously with the credit application. Our construction of legislative intent flows from the clear language of the statute—"the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower"—and from the 1983 interpretation by the Department of Consumer Affairs."[3]

The Court will construe legislative intent in accord with unambiguous statutory language:

> In interpreting statutes, th[is] Court looks to the plain meaning of the statute and the intent of the Legislature. Furthermore, if possible, legislative intent should be found in the plain language

[3] As noted, section 37-10-102 was amended on May 30, 1996. Notably, the amendment affects causes of action accruing on or after May 30, 1996. Act No. 355, 1996 S.C. Acts 2187. The amended statute requires that "[t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction." The amended statute allows creditors to comply by "including the preference information on or with the credit application … or [by] providing written notice to the borrower . . . no later than three business days after the application is received or prepared." The three day post-credit application option under the 1996 amendment is not present in the prior version of the statute which is before us today.

> of the statute itself. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning.

Binney v. State, 384 S.C. 539, 683 S.E.2d 478, (2009) (internal citations and quotation marks omitted); *see also Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009) (noting that an agency's construction of a statute within its purview is entitled to respectful consideration and, absent compelling reasons, should not be rejected).

The timing feature of section 37-10-102 imposes a bright-line approach which is manifestly at odds with the notion of "substantial compliance." To permit a construction of section 37-10-102 as sanctioning the lender's furnishing the borrower with the attorney preference disclosure after the application was completed would undermine the legislative purpose "to protect borrowers." *Davis*, 326 S.C. at 86, 484 S.E.2d at 472; *see also McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). And the suggestion that the attorney preference disclosure may be made at closing borders on frivolity.

The trial court correctly observed the varying times in the loan process during which the attorney preference disclosure was made. A disclosure not made contemporaneously with the credit application is untimely. The typicality requirement of Rule 23, SCRCP, is found in the common feature of the lender failing to timely provide the attorney preference disclosure. The additional prerequisites to class certification are similarly present, including numerosity, commonality, and the adequacy of King and Sims as class representatives. In decertifying the class, we hold the trial court committed legal error. Accordingly, we reverse the class decertification. The class shall be deemed certified as of July 2, 1998, without interruption.

B.

We turn to Sims's individual case, which involved a signed but undated attorney preference disclosure form. Sims argues the trial court erred in merging the principle of substantial compliance with the timing element of section 37-10-102. We agree.

As discussed above, the trial court impermissibly entangled the concepts of timeliness and substantial compliance. It was error to instruct the jury on substantial compliance with respect to the timing element of the attorney preference disclosure. As a matter of law, providing the attorney preference disclosure after the completion of the credit application violated section 37-10-102. This prejudicial error is clear in the inconsistent jury verdict forms. Accordingly, we reverse due to the trial court's error of law in permitting the timing element in section 37-10-102 to be satisfied by substantial compliance.

C.

King argues the trial court erred in granting American General summary judgment on the basis that her loan ultimately was not secured by real property. We are not persuaded on the record before us that American General is entitled to summary judgment.

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Cafe Assoc., Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991); *see Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) ("In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party.").

As part of the December 1995 loan application, King executed a disclosure form furnished by American General that stated: "You are giving a

security interest in your Real Estate."[4] As noted, King also signed a "Security Agreement," which indicates King granted American General a mortgage in "[a]ll property listed as security" in the disclosure form. We further point out that it appears the King loan was initially intended to be secured by her real estate, and the law required the attorney preference disclosure at the time of the application. We make no finding on the matter of liability and merely hold that the record before us does not warrant summary judgment in favor of American General.

III.

King and Sims make additional arguments that we decline to reach due to our above holdings. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not discuss remaining issues when disposition of prior issue is dispositive).

We reverse the trial court's rulings regarding King's and Sims's individual claims and the decertification of the class. We remand the case to proceed as a class action effective as of the date of Judge Hughston's original order to certify the class filed on July 2, 1998.

---

[4] The federal disclosure form was not recorded. Gail Laney, the manager of deeds in the county where King's home is located, stated in her affidavit no mortgage is recorded for King's property in the land records office. The absence of recording, however, affects priority among creditors, not the existence of a lien. *Epps v. McCallum Realty Co.*, 139 S.C. 481, 497, 138 S.E. 297, 302 (1927) (holding as to the two parties involved in making an instrument, recording is not necessary for the instrument to be valid). American General argues that the federal disclosure form cannot, as a matter of law, create a security interest in real property. There is, however, additional evidence in the record (beyond the federal disclosure form) which also points to a security interest in King's real property.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

I. Jenkins Mikell, Jr. and Pinkney V. Mikell, Petitioners,

v.

County of Charleston and Timothy E. Scott, A.D. Jordan, Curtis E. Bostic, Carolyn Condon, Ed Fava, Barrett Lawrimore, Francis J. Roberts, Leon E. Stavrinakis, and Charles T. Wallace in their capacity as Members of Charleston County Council, George Lee Mikell, Julia Mikell Flowers, Daisy Mikell Pedrick, Mary Mikell, John Mikell, and Peters Point Associates, LP, Defendants,

of whom George Lee Mikell, Julia Mikell Flowers, Daisy Mikell Pedrick, Mary Mikell, John Mikell, and Peters Point Associates, LP are the Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Mikell R. Scarborough, Circuit Court Judge

Opinion No. 26749
Heard May 12, 2009 – Filed December 21, 2009

REVERSED

Capers G. Barr, III, of Barr, Unger & McIntosh, of Charleston, Frances I. Cantwell, and William B. Regan, both of Regan & Cantwell, of Charleston, for Petitioners.

Carolyn H. Blue, of Tecklenburg Law Firm, of Charleston, Morris A. Ellison, of Buist, Moore, Smythe & McGee, of Charleston, Perrin O. Dargan, III, of Hagood & Kerr, of Mount Pleasant, for Respondents.

James M Brailsford, III, of Edisto Island, for Amicus Curiae.

JUSTICE WALLER: We granted a writ of certiorari to review Mikell v. County of Charleston, 375 S.C. 552, 654 S.E.2d 92 (Ct. App. 2007), in which the Court of Appeals held Charleston County Council (County) properly enacted a zoning ordinance for a Planned Development (PD) on Edisto Island. We reverse.

FACTS

The property in question is a 160 acre tract of land on Edisto Island which is known as Peters Point Plantation, a former cotton plantation owned by the Mikell family since 1715. Peters Point forms a point, or peninsula, at the intersection of two tidal creeks: St. Pierre's Creek on the north, and Fishing Creek on the south.

Peters Point is intersected in the middle by Peters Point Road. Petitioners are I. Jenkins Mikell, Jr. and Pinkney V. Mikell, who own land on the north side of Peters Point Road; Respondents, distant family members of Petitioners, own six tracts of land, a total of 161 acres, on the north and south of Peters Point Road. The furthermost tract borders Fishing Creek.

In 1999, Charleston County enacted a Comprehensive Land Use Plan (Plan). The Plan describes that the "Agricultural Area is the outmost portion of the Rural Landscape in Charleston County. Included within it are Wadmalaw Island, Edisto Island [and others]." The Plan calls for preservation of the rural community character. The preferred uses of agricultural areas include "farming and resource management, along with preservation of existing rural settlements, compatible low-density residential development, and small-scale neighborhood commercial development." Id. The recommended development densities within such Agricultural Areas of Charleston County are as follows:

> -Agricultural Residential (AGR) - 1 dwelling per acre to 1 dwelling per 5 acres.
> -Agricultural Preservation (AG-10) - 1 dwelling per 5 acres to 1 dwelling per 10 acres.

The Plan states "the designation of Agricultural Areas is also intended to direct residential development to existing settlement areas and to avoid the scattering of development into . . . Agricultural Preservation Areas."

In 2001, County enacted Zoning and Land Development Regulations (ZLDR) in order to implement the Plan. The ZLDR incorporate the Agricultural Areas of the Plan, and reiterate that an AG-10 Agricultural Preservation District is subject to a maximum density of 1 dwelling per 10 acres. ZLDR § 4.5. However, an AG-10 district may be increased to a "highest allowed density" of 1 dwelling unit per 5 acres, if a request is processed through the Planned Development process of § 3.5 of the ZLDR. The ZLDR sets the maximum density for AGR districts at 1 dwelling per acre, in accordance with the Plan.

Under the Plan and the ZLDR, of the six tracts of land owned by Respondents, four of the tracts were zoned AGR, and the remaining two tracts were zoned AG-10, such that the total parcel of 161 acres was subject to maximum densities as follows:

> -106.64 Acres (2 tracts)- Zoned AG-10- 1 unit per 10 acres = total 10 units[1]
> -55 Acres (4 tracts)- Zoned AGR- 1 unit per acre = 54 total units.

Accordingly, as initially zoned, the tracts were subject to a total maximum of 65 units.

In 2003, Respondents filed an application with County to rezone their Peters Point property to a Planned Development (PD) District. The stated purpose of the application was to allow family members to construct homes for themselves and their children at Peter's Point Plantation; they do not intend to permit commercial or multi-family development. On May 4, 2004, County Council enacted Ordinance # 1300 rezoning the parcels from AGR and AG-10 to a PD-103 District. The Planned Development submitted by Respondents (and approved by Ordinance # 1300) had the effect of reducing the total number of units on the entire tract from a maximum of 64, to a total maximum of 55 units. However, the Ordinance also had the effect of increasing the overall density to 1 dwelling unit per 3.8 acres. As to the 106 acre tract of land which was zoned AG-10, the PD had the effect of increasing to a maximum density of 1 unit per 2.4 acres.

Petitioners instituted this declaratory judgment action, contending the ordinance conflicted with County's Comprehensive Plan and the ZLDR. Petitioners' motion for summary judgment was granted by the Master. The Master held Ordinance # 1300 conflicted with the clear, unambiguous requirements of § 4.5.3(B) of the ZLDR limiting the density in an AG-10 district to a maximum of one dwelling per five acres. The Master found §

[1] This number could be increased to a maximum of 1 unit per 5 acres if done through Planned Development process, allowing a total maximum of 20 units.

4.5.3 was, at best, inconsistent with § 3.5.7 of the ZLDR, such that the more specific regulation, § 4.5.3, controlled.

The Court of Appeals reversed. Mikell v. County of Charleston, 375 S.C. 552, 654 S.E.2d 92 (Ct. App. 2007). It held County Council's decision to allow the PD was at least fairly debatable, and was neither arbitrary nor unreasonable. It found § 3.5.2 and § 3.5.7 of the ZLDR authorized County's exercise of discretion in approving a PD with a higher density than base zoning districts would have allowed. The Court of Appeals found no conflict existed between §§ 3.5.2, 3.5.7 and § 4.5.3(B). We reverse.

ISSUE

Did the Court of Appeals err in reversing the Master's grant of summary judgment to Petitioners and reinstating Ordinance # 1300?

STANDARD OF REVIEW

Although summary judgment issues are generally reviewed under a fact-based inquiry, issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact. Eagle Container LLC v. County of Newberry, 379 S.C. 564, 666 S.E.2d 892 (2008). Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, "a broader and more independent review is permitted when the issue concerns the construction of an ordinance." Id. at 568, 666 S.E.2d at 894 *citing* Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). The determination of legislative intent is a matter of law. Id.[2]

[2] As to fact based issues, an appellate court applies the same standard as the trial court under Rule 56(c), SCRCP; Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 659 S.E.2d 496 (2008).

DISCUSSION

County's Comprehensive Land Use Plan establishes four distinct areas within County, and sets forth the general types and intensities of development which should occur in each. The only areas pertinent to this case are those designated as Agricultural, for which there are two categories:

> - Agricultural Residential (AGR) - 1 dwelling per acre to 1 dwelling per 5 acres.
> - Agricultural Preservation (AG-10) - 1 dwelling per 5 acres to 1 dwelling per 10 acres.

The ZLDR passed by County to implement the Plan requires an AG-10 District to have a maximum density of 1 dwelling per 10 acres. ZLDR § 4.5.2. However, this density may be increased to a "**highest allowed density**" of **1 dwelling unit per 5 acres**, **if a request is processed through the Planned Development process** of § 3.5 of the ZLDR. ZLDR § 4.5.3.B.

Section 3.5.7 of the ZLDR states:

> Unless expressly stated in this section or approved at the time of a Planned Development approval, all applicable standards of this Ordinance shall apply . . . . **Planned Developments may provided for variations from other ordinances and the regulations of the other established zoning districts concerning use, setbacks, lot area, density**, bulk and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare.

(Emphasis supplied).[3]

[3] County also relies upon S.C. Code Ann. § 6-29-740, which mimics the language of § 3.5.7, relating to planned developments and allows variations from other ordinances and regulations concerning use, setbacks, lot size, and density. For the reasons set forth below, we find the

The Court of Appeals held that inasmuch as § 3.5.7 permits the Commission to approve a PD with a higher density than other established zoning districts, the action of the Commission in approving respondents' application was at least "fairly debatable." The Court of Appeals also held that, because County has the legislative power to amend its general zoning ordinance and rezone small areas, it acted within its authority. This was error.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). When interpreting an ordinance, the legislative intent must prevail if it can be reasonably discovered in the language used. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). Further, where two provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails. Capco of Summerville v. J.H. Gayle Constr. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006). See also Wooten ex rel. Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (specific statutory provision prevails over a more general one); Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (general rule of statutory construction is that a specific statute prevails over a more general one). When reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law. Eagle Container, supra.

We find the legislative intent, as it relates to AG-10 districts, was to ensure a **maximum** density of 1 dwelling unit per 5 acres on AG-10 districts. This intent is clearly reflected in the Comprehensive Land Use Plan and the ZLDR.

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provisions specifically relating to County's planned developments, as set forth in § 4.5.3B of the ZLDR, control.

We find it highly implausible that, in setting forth a maximum density of 1 unit per 10 acres for AG-10 Districts, and then allowing for an increase of **up to** 1 unit per 5 acres for a Planned Development, the County intended to authorize the approval of a Planned Development which would completely vitiate the maximum density requirements set forth in § 4.5.3B. Had County intended such a result, § 4.5.3B would have permitted a **higher density** to be approved if processed as a Planned Development, without restricting it to a "**highest allowed density of 1 unit per 5 acres."** We find County clearly intended to limit those tracts zoned AG-10 to a maximum density of one dwelling per 5 acres, and intended to preserve "existing rural settlements" and "compatible low-density residential development." It was, therefore, error to authorize maximum densities in excess of those specifically outlined by the ZLDR. The Court of Appeals' opinion is reversed, and the order of the Master is reinstated.

REVERSED.

TOAL, C.J., PLEICONES, J., and Acting Justice James E. Moore, concur. Acting Justice G. Thomas Cooper dissenting in a separate opinion.

Acting Justice G. Thomas Cooper, (dissenting): This Court would reverse not only the Court of Appeals, but also the Charleston County Planning and Zoning Commission and the Charleston County Council for enactment of Ordinance #1300, the Peters Point Planned Development. Ordinance #1300 created a Planned Development, an entity described and authorized in Section 6-29-740 of the South Carolina Code as an independent, distinct zoning district. In doing so, the majority finds:

> … it highly implausible that, in setting forth a maximum density of 1 unit per 10 acres for AG-10 Districts, and then allowing for an increase of up to 1 unit per 5 acres for a Planned Development, the County intended to authorize the approval of a Planned Development which would completely vitiate the maximum density requirements set forth in Section 4.5.3B.

However, that is exactly what the Act and the Charleston County Zoning and Land Development Regulations (ZLDR) allows the Charleston County Council to do. Its decision is supported by the State statute and the Charleston County Comprehensive Plan and the Charleston County ZLDR. To reverse the action of County Council flies in the face of this Court's frequent pronouncement that it will acknowledge and respect the actions of the pertinent legislative body if its actions are "fairly debatable." Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (S.C. Ct. App. 1995); Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965).

> Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is "so unreasonable as to impair or destroy citizen's constitutional rights"; and the decision should not be overturned by a court so long as the decision is "fairly debatable." This policy of judicial restraint has been echoed in a recent decision.
>
> We have long recognized the principal that the power to zone is exclusively for the legislature and that zoning decisions will not be interfered with when made in the exercise of the governing

> body's police power to accomplish the desired end unless there is a plain violation of the citizens" constitutional rights.

Knowles v. City of Aiken, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991) (internal citations omitted). Modern legal treatises frequently define a "Planned District" as a "Planned Unit Development."

> "Planned unit development" means an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, and commercial and industrial uses, if any, the plan for which does not correspond in lot size, bulk, or type of dwelling or commercial or industrial use, density, lot coverage and required open space to the regulations established in any one or more districts created, from time to time, under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state.

Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law 283 (2007). This definition is not dissimilar to South Carolina Code Section 6-29-740.

The essential question is, therefore, does the Charleston County Ordinance #1300 conflict with the Charleston County Comprehensive Plan or with the ZLDR? And, if so, can the County Council enact an Ordinance which overrides the perceived conflict?

> Because of its flexibility as a land use approval mechanism, the PUD may create a conflict with the formal land use and intensity designations of a comprehensive land use plan. The extent to which such a conflict is fatal depends on whether the comprehensive plan in the particular jurisdiction is considered advisory only, or whether state legislation mandates that local zoning regulations be consistent with the comprehensive plan. In those states in which the comprehensive plan is advisory only, the courts have rejected arguments that approval of a PUD was

> invalid because it was inconsistent with the comprehensive plan or amounted to spot zoning.

Brian W. Blaesser, Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion 288-289 (2009 Ed.).

Code Section 6-29-720 (B) requires that in adopting a zoning ordinance, the regulations must be made in accordance with the comprehensive plan for the jurisdiction. The comprehensive plan for Charleston County clearly states that the land use plan area designations and residential density guidelines are **recommendations** to the County Council (see County of Charleston Comprehensive Plan Section 3-2-5b and Section 3-2-8(4)). Similarly, in Evans v. Teton County, 73 P.2d 84 (Idaho 2003), a neighbor challenged approval of a planned unit development and subdivision on the basis of nonconformity with the local plan. The Supreme Court of Idaho discussed the relationship as follows:

> A comprehensive plan is not a legally controlling zoning law, it serves as a guide to local government agencies charged with making zoning decisions …. The "in accordance with" language of [the zoning enabling legislation] does not require zoning decisions to strictly conform to the land use designations of the comprehensive plan …. However, a board of county commissioners cannot ignore their comprehensive plan when adopting or amending zoning ordinances …. Whether approval of a zone change is "in accordance with" the comprehensive plan is a question of fact, which can only be overturned when the factual findings supporting the zone change are clearly erroneous.

Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law 283 (2007).

The court conducted its review on the basis of a strong presumption of validity and proceeded on the basis that it must affirm the Board of Commissioners unless it violated constitutional or statutory standards,

exceeded its statutory authority, followed unlawful procedures, was not supported by substantial evidence, or was arbitrary and capricious. In other words the courts used the "fairly debatable" standard accorded to legislative decisions.

I disagree with the majority's holding that the Charleston County Council cannot modify or supersede its own zoning ordinance, if done within the confines of South Carolina Code Section 6-29-740. The statute plainly states:

> Planned development districts may provide for variations from other ordinances and the regulations of other established zoning districts concerning use, setbacks, lot size, density, bulk, and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare.

And, when adopted, the planned development district becomes a new and distinct zoning district.

Ordinance #1300 found "…after thorough consideration, the County Planning Commission recommended in favor of the proposed rezoning;…the rezoning complies in all respects with Article 3.4 of the Charleston County Zoning and Land Development Regulations;…the development plan meets the objectives of Article 3.5 the Charleston County Zoning and Land Development Regulations;…and the development plan conforms to and implements the Charleston County Comprehensive Plan."

In my opinion, the Court of Appeals correctly ruled that the County Council's actions were authorized and not arbitrary, unreasonable, or in devious abuse of its discretion if the action of the Council in adopting the ordinance was fairly debatable.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

H. Dewain Herring, Appellant.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26750
Heard June 23, 2009 – Filed December 21, 2009

AFFIRMED

Graham L. Newman and Richard A. Harpootlian, both of Columbia, and Katherine Carruth Goode, of Winnsboro, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

JUSTICE WALLER: Appellant, H. Dewain Herring, was convicted of murder and pointing and presenting a firearm. We affirm.[1]

[1] The appeal was certified to this Court from the Court of Appeals on motion of counsel for Herring.

FACTS

Herring was charged with the January 29, 2006 shooting of an employee of Chastity's Gold Nightclub (Chastity's), a strip club in Columbia. The facts giving rise to the shooting are as follows.

After golfing in Aiken with friends on the day of January 28, 2006, at which he had consumed numerous beers, Herring stopped by a bar for a few drinks on the way home, and then returned home around 7:30 p.m. Herring had a couple more drinks at his home with a golfing buddy before the friend left. Herring laid down intending to go to sleep, but got up and decided to go a Forest Acres restaurant. When the restaurant was closed, Herring changed his mind and went to Platinum Plus, a Columbia strip club. He had a drink and paid a dancer for a lap dance and left Platinum Plus. On his way home, he decided to stop by Chastity's on River Drive; he arrived shortly after 11:00 p.m. According to Herring, he ordered a drink at the bar, but he has very little recall of any events for several hours thereafter.

According to witnesses and employees of Chastity's, Herring purchased a drink and paid for a $30.00, three minute lap dance from a dancer named Mia. After the lap dance, Herring paid Mia for a $300 dance in what was known as the Champagne room.

Mia took Herring to the Champagne room and told him to wait while she went to freshen up. A bouncer, Carl Weeks, went to check on Herring a few minutes later and found him naked and masturbating on the sofa. The bouncer told Herring he could not do that and told him he would have to leave. When Herring did not move, the bouncer got the manager, John Johnson (John John). When they returned, Herring was dressed. Weeks told Herring he would either have to leave, or they would call police and have him arrested for solicitation of prostitution. According to Weeks, Herring responded, "No. I will fucking shoot you." John John and a bouncer named Donnie Hawkins escorted Herring to the front door at 11:57 p.m. John John

walked outside with Herring and used a two-way radio to call Herring's license plate number out to Weeks, who was standing in the doorway, as Herring drove away. Weeks and Hawkins watched as Herring backed up his black SUV, and fumbled with his glove compartment with his right hand. Herring slowly pulled away, putting down the passenger side windows as he went. Hawkins, Weeks and John John had just gone inside when they saw Herring's vehicle coming back down River Drive toward Chastity's. According to Hawkins, John John was right inside the door. Hawkins saw a flash of light come from the side of the vehicle, and heard John John say, "Oh shit!" John John fell to the floor, having been hit in the left ear by a bullet which came through the front door. He died a short while later at the hospital.

Upon arriving at the scene of Chastity's, police were given Herring's license tag number, which was registered to his office address in Columbia. Police patrolled the office parking lot, but did not find the vehicle. They then determined Herring's home address and went there at 2:10 a.m. on January 29, 2006. A police officer, seeing a light on in the garage, peeked in the garage window to see if the suspect was there. Although the suspect was not there, the officer did see the vehicle, which they realized was Herring's. They knocked on the door and rang the doorbell several times and, receiving no answer, they returned to the police station and obtained a search warrant for the home.[2]

Police went back to Herring's residence at approximately 4:00 a.m. to execute the search warrant. They rang the doorbell several times but received no answer. They entered forcibly, announcing they were police with a search warrant. Officer Linfert testified that he saw Herring in the hallway and recognized him from the photo on his driver's license. Linfert told Herring to get down on the ground, but Herring ran back down the hall toward a bedroom. He followed Herring to the bedroom, and saw Herring pull a gun from a nightstand and point it in his direction. Officer Linfert yelled at him to drop the gun and then fired one shot at him. Other officers also opened fire, and Herring was hit in the arm. Herring called 9-1-1 and told them he

[2] Several officers remained outside the premises while the warrant was obtained.

believed there were intruders in his home. After talking with the 9-1-1 operator, Herring surrendered upon realizing the "intruders" were indeed police officers.

Herring initially told police he had not left the house after returning home from Aiken; he did not recall going to Chastity's. When police told him of the video tape which showed him entering and leaving Chastity's, he remembered only being at the bar, having a drink, and a gunshot firing; the next memory he had was of police bursting into his home. He subsequently began remembering more details, such as paying for a lap dance from a light skinned black woman.

Bullet fragments removed from John John's head conclusively matched a .357 Magnum Ruger owned by Herring; the Ruger was found under some clothing in his bedroom closet during a SLED search of the home.[3] Gunshot residue was found on the passenger side of Herring's vehicle. A jury convicted Herring of murder and pointing and presenting a firearm.

ISSUES

1. Did the trial court err in denying Herring's motions to suppress evidence found during the search of his residence?

2. Did the trial court err in allowing lay witnesses to testify as to their opinion of what could be seen on a videotape which recorded Herring as he exited Chastity's?

1. SEARCH WARRANTS/SUPPRESSION OF EVIDENCE

Herring contends the trial court erred in denying his motion to suppress evidence seized by police during the searches of his home and automobile. We disagree.

[3] SLED searched the residence relative to the shooting which occurred between police and Herring at the time of Herring's arrest.

a. Initial Search

Herring contends the initial peek by police into his garage (when his black SUV was seen), was an illegal search, which thereby led to the issuance of a search warrant. Accordingly, Herring asserts the subsequent search of his home was the impermissible fruit of the illegal garage search, and that police otherwise had no basis upon which to search the residence. Herring also contends the subsequent SLED search of his home was illegal inasmuch as it a) resulted from the two prior illegal searches, and b) the SLED warrant was invalid as it was not issued in compliance with S.C. Code Ann. § 17-13-140. For numerous reasons, we find the evidence seized by police was properly admitted.

Regarding the initial search, Herring contends that when police crossed the curtilage of his yard and peered into his garage windows, it constituted an illegal search. The trial court agreed with Herring and held Officer Linfert's peek into Herring's garage violated Herring's expectation of privacy. However, the trial court found that since no evidence was seized as a result of that search, there was nothing to suppress; it therefore went on to address the validity of the other searches, which it found permissible.

Initially, as discussed below, we disagree with the trial court's conclusion that Officer Linfert's initial peek into the garage window constituted an illegal search. Regardless, however, we find the peek into the window did not lead to discovery of any further evidence, such that it was not "fruit of the poisonous tree" and therefore did not taint the subsequent searches.

As noted previously, prior to going to Herring's residence, police responded to a shooting at Chastity's nightclub at which the manager of the club was shot and killed. While at Chastity's, police were given a description of Herring's black SUV, as well as the corresponding South Carolina license plate number which was written down by witnesses. Police watched the video which showed the suspect as he entered and departed from the

nightclub, and police were given a color photograph of the suspect from the video.

Police obtained Herring's identifying information from the license tag number. When they went to the registered address for the vehicle, a business office, there was no black SUV in the parking lot. Officer Linfert checked the Department of Motor Vehicle website for other addresses listed for Herring, which revealed his home address. Based upon this information, police went to the address at approximately 2:00 a.m. Officer, seeing a light on in the garage, peeked in the garage window to see if the suspect was there. Although the suspect was not there, Linfert saw the black SUV, and recognized it as the suspect's vehicle. Police knocked on the door and rang the doorbell several times; receiving no answer, they returned to the police station and obtained a search warrant for the home.

Private residences are places in which an individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is one society recognizes as justifiable. Accordingly, searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. United States v. Karo, 468 U.S. 705 (1984). The Fourth Amendment extends that same protection to outbuildings in the curtilage of the home. United States v. Dunn, 480 U.S. 294 (1987); Rogers v. Pendleton, 249 F.3d 279, 287 (4th Cir.2001).[4]

However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. Katz v. United States, 389 U.S. 347, 357 (1967). The United States Supreme Court has recognized that one exigency obviating the requirement for a warrant is the need to protect or preserve life or avoid serious injury. Brigham City, Utah v. Stuart, 547 U.S. 398 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual

[4] It is equally well settled that searches and seizures of property in plain view are presumptively reasonable. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. California v. Ciraolo, 476 U.S. 207, 213 (1986) (quoting Katz v. United States, 389 U.S. 347, 351 (1967).

officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action." Scott v. United States, 436 U.S. 128, 138 (1978). A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement. Schmerber v. California, 384 U.S. 757, 770-771 (1966). The likelihood a suspect will imminently flee is also an exigency warranting such an intrusion. Johnson v. United States, 333 U.S. 10, 15 (1948). Protecting the safety of police officers has also been held an exigent circumstance. Chimel v. California, 395 U.S. 752 (1969). A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. Minnesota v. Olson, 495 U.S. 91, 100 (1990). In such circumstances, a protective sweep of the premises may be permitted. See Maryland v. Buie, 494 U.S. 325, 337 (1990); cf. State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004).

Under the circumstances presented, we find the exigencies of the situation justified Officer Linfert's look into Herring's garage at 2:00 a.m. It is undisputed that police had knowledge of Herring's identity, his residence, the make and model of his vehicle, and his license tag number. Officer Linfert testified that upon arriving at the home, he saw a light on in the garage and therefore looked through the window to see if the suspect was inside. Police officers were looking for a suspected murderer whom they knew was likely to be armed with a deadly weapon.

We find it was objectively reasonable for Officer Linfert to take precautions to protect his own safety, and the safety of the officers around him, by looking into the garage to see if the suspect was there. When nobody was in the garage, police followed proper procedure by knocking on the door and ringing the doorbell. Receiving no answer, they stationed men at the house and went to obtain a warrant. Given the exigent circumstances then and there presenting, we find Officer Linfert's minimal intrusion was objectively reasonable and did not constitute a Fourth Amendment violation. Cf. Chimel v. California.

Moreover, Officer Linfert's peek into the garage yielded no evidence against Herring. Police already had knowledge of the make, model and license plate number of the vehicle the suspect drove; they knew the automobile was registered to Herring, and they knew his residential address was 406 Alexander Circle. Officer Linfert's observation of the vehicle in the garage yielded no evidence which further inculpated Herring. We find the trial court erred in holding this initial "search" violated Herring's Fourth Amendment rights; the *de minimis* intrusion to secure the officers' safety did not necessitate suppression.

b. Search of residence

Herring next asserts the subsequently issued warrant was defective such that the search conducted by the Richland County Sheriff's Department (RCSD) was illegal. He contends the affidavit supporting the warrant failed to connect his residence to the crime at Chastity's; he also contends the information in the affidavit was false because the officer who prepared the affidavit did not actually appear before the magistrate but, instead, sent another officer. We find the warrant was supported by probable cause and was properly issued.

The affidavit states that deputies responded to Chastity's to find the Victim, John Johnson, who had been shot in the head and who subsequently died upon arrival at the hospital. Witnesses at Chastity's described the suspect, the clothing he was wearing, the car he was driving as a black Toyota Forerunner, and gave the license tag number of SC 1891. Department of Motor Vehicle records indicated the car was registered to Dewain Herring, of 1361 Landmark Drive, which was a closed business. A search of Richland County records provided an additional address for Herring at 460 Alexander Circle. Based upon this information, the affidavit lists the property sought as "firearms, ammunition, burgundy sweater, white turtleneck shirt, khaki pants, eyeglasses, black 1996 Toyota Forerunner, SC/EU1891, and any and all other evidence associated to a shooting incident."

A search warrant may issue only upon a finding of probable cause. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006), *cert. denied* 129 S.Ct. 733 (2008). The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. Id.; State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). A "totality-of-the-circumstances" test is utilized in probable cause determinations:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983).

We find the affidavit sufficient to establish probable cause for police to look for Herring, a murder weapon, and the Toyota Forerunner at his known residence.

Herring asserts the RCSD warrant was defective because, notwithstanding the affidavit contained the name of Officer Linfert at the top, it was actually Officer Davis who appeared before the Magistrate. However, Officer Linfert clarified that the reason his name was listed is that Officer Davis did not have a search warrant form on his computer, and the form was typed by Linfert on his computer and his name was automatically inserted at the top; Linfert simply forgot to change the name to Davis. Officer Davis personally appeared before the magistrate and swore to the information; he was familiar with the information and background of the case, having been to Chastity's and having interviewed the witnesses. We find the fact that Linfert's name was at the top of the affidavit did not vitiate the validity of the warrant. State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974) (typographical error did not affect validity of search warrant). Accordingly,

we find the evidence seized during the RCSD's search of the residence was properly admitted by the trial court.

c. SLED Search

Finally, Herring challenges the search performed by SLED. He contends the SLED warrant, which was obtained by facsimile, was invalid; he also asserts the methodology employed, which was authorized by an order of the Chief Justice,[5] violates the search warrant statute, S.C. Code Ann § 17-13-140. We find the trial court properly upheld SLED's search of the residence.

SLED was called in to investigate after the sheriff's deputies wounded Herring during their attempt to arrest him at the home. SLED obtained a warrant utilizing the telephone procedure set forth in the Chief Justice's order of July 2001. Agent Lawrence testified that he had prepared the search warrant, and faxed it to Magistrate McDuffie, who was in bond court. The Magistrate swore him over the phone. Although SLED was not directly investigating the murder, they were investigating the shooting by police officers, and were looking for firearms, cartridges, blood, projectiles, blood, and any evidence relating to a shooting incident at that address. As a result of the search, they found the khaki pants, white turtle neck, burgundy sweater Herring was wearing at the time of the shooting, and two weapons, a Smith and Wesson .357 revolver and a Ruger .357 pistol. The Ruger was in the bedroom closet under some clothes.

S.C. Code Ann. § 17-13-140 states, in pertinent part:

> A warrant issued hereunder shall be issued only upon affidavit **sworn to before the magistrate**, municipal judicial officer, or judge of a court

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[5] See http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2001-07-26-01. The order was issued pursuant to Art. V, § 4 of the SC CONST (Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system). The order allows for issuance of search warrants by facsimile under controlled conditions, and sets forth the requirements therefore.

> of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

(Emphasis supplied). Herring asserts the statute requires the affiant appear before the magistrate **in person**. We disagree.

Contrary to Herring's contention, the language does not state an affidavit must be sworn in person. It only requires the affidavit be sworn. Officer Lawrence, who prepared the affidavit, was sworn over the telephone by the Magistrate. We find this complies with the literal terms of the statute such that there was no defect in the warrant. Cf. Gay v. Ariail, 381 S.C. 341, 673 S.E.2d 418 (2009) (literal terms of statute prevail); Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002) (where terms of a statute are clear, there is no room for construction).

Herring cites State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) as supporting his contention that issuance of a warrant via facsimile was invalid. In McKnight, police officers appeared before a magistrate to obtain a warrant, but did not complete an affidavit in support thereof. Notwithstanding the officers were sworn and gave oral testimony to the magistrate, we held a "search warrant affidavit which itself is insufficient to establish probable cause may be supplemented before the magistrate by sworn oral testimony. . . . However, sworn oral testimony, standing alone, does not satisfy the statute." 291 S.C. at 113, 352 S.e.2d at 473 (internal citations omitted). In McKnight, we found the mandatory requirement of an affidavit lacking, thereby requiring suppression. The Court noted § 17-13-140 imposes stricter requirements than does the Fourth Amendment, and that "[a] search warrant that would survive constitutional scrutiny may still be defective under the statute." Id.

Recently, however, we recognized that there is a "'good faith' exception to the statute's [S.C. Code Ann. 17-13-140] requirements where

the officers make a good faith attempt to comply with the statute's affidavit procedures." State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *citing* McKnight.[6]

We find the present circumstances give rise to such a good faith exception. It was 4:00 in the morning, and SLED agents were attempting to obtain a warrant to investigate a shooting by Richland County Sheriff's deputies of a prominent Columbia attorney. We hold the officers made a good faith attempt to comply with the affidavit procedures, and accordingly, we affirm the trial court's ruling.

Moreover, even if we were to hold the SLED search illegal, we would hold any error was harmless. A videotape from Chastity's shows Herring entering and leaving the club. Several witnesses identified Herring from the videotape, and his vehicle and license tag number were identified. Two witnesses saw him drive away from the club, and then testified they saw his vehicle returning down River Drive. Donald Hawkins saw Herring's car come back into the parking lot, saw a flash come from the side of the vehicle, heard John John say "oh shit," and then saw that John John had been hit by a bullet. Further, although Herring denied intentionally shooting anyone, he admitted he owns several guns, including a .357 Ruger, which he usually carries with him in his Toyota Forerunner, and he admitted he had some memory of a gun going off. Finally, gunshot residue was found on the passenger side of the vehicle, which was ultimately connected to Herring's Ruger. Accordingly, admission of the evidence seized in the SLED search, even if erroneous, was harmless. State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (holding improperly admitted evidence harmless error given overwhelming

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[6] In Covert, we left open the question of whether a good faith exception applies when "the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid." Id. at ___, 675 S.E.2d at 742-743. Given our recognition of an exception for officers' good faith attempt to comply with the affidavit requirement, we find no reason not to extend such a good faith exception to a warrant reasonably believed to be valid, but later determined invalid. Accordingly, even if we were to determine the affidavit was improper, we would find the SLED agents acted in good faith and reasonably believed the warrant valid, such that the search should be upheld.

evidence of guilt). We affirm the trial court's ruling concerning the SLED search.

2. LAY OPINIONS REGARDING VIDEOTAPE

Herring next contends the trial court should not have allowed lay witnesses to testify as to what they could see on the videotape of Herring exiting Chastity's, because they did not personally observe the events in question but only viewed them on a tape; he also asserts reversible error in the denial of his motion for a mistrial.

The admission or exclusion of testimonial evidence falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent abuse resulting in prejudice. State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009). Similarly, whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. State v. Sweet, 374 S.C. 1, 647 S.E.2d 202 (2007). The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct.App.2007), *aff'd as modified* 2009 WL 1518780 (June 1, 2009); State v. Dawkins, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989) curative instructions usually cure any prejudice caused by the admission of incompetent evidence).

Three witnesses testified as to their interpretations of a video, depicting the outside of Chastity's at 12:05:05-12:05:06 a.m. on the night in question (which is the precise time when John John was shot). Two witnesses, Donald Hawkins (a bouncer), and an Officer Gwyn, testified they saw a flash of light coming from the vehicle. The third witness, Officer Linfert testified he saw a shot fired from the vehicle, later clarifying that "obviously we saw the video where the shot was fired from inside the vehicle."

In response to Herring's objections to this testimony, the trial judge issued a curative instruction to the jury in each instance, to the effect that the witness could not give an opinion as to whether or not the flash was a gunshot, and that the jury should strike any such inference from its memory. The trial court instructed the jury that "you are the only ones who can draw from conclusions from what you saw on the tape and his testimony in this regard." He stated, further:

> It's the same instruction I gave you with regard to another witness that looked at the same video and saw what he thought was- one said a light, one said a shot. That's an opinion. Just take it at that. Nobody saw the shot fired based on the testimony we've heard so far. It's all from the video. You are going to have the video. You can look at it. You can determine whatever you choose to determine from it.

As to Gwyn's testimony, the trial court re-instructed, "this witness has repeated something that another witness said regarding a light or a flash. You are not to interpret that as any evidence of a gunshot wound again or a gunshot. It is your responsibility to see what you see on the video, if you see anything. This witness has merely told you what he thinks he saw."

We find the trial court's curative instructions sufficient to cure any prejudice, such that there was no error in denying Herring's motions for a mistrial. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (grant of a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way); Dawkins, supra.

Herring's convictions and sentences are affirmed.[7]

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[7] The remaining issues are affirmed pursuant to SCACR Rule 220(B)(1) and the following authorities: Issue 4 (failure to charge the law of accident)- State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999) (for homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon); State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002) (to warrant reversal, trial court's refusal to give requested charge must be both erroneous and prejudicial to defendant): Issue 5 (involuntary manslaughter instruction)- State v. McKnight, 378

AFFIRMED.

TOAL, C.J. and BEATTY, J., concur. KITTREDGE, J., concurring in a separate opinion in which PLEICONES, J., concurs.

S.C. 33, 661 S.E.2d 354 (2008) (failure to give requested jury instructions is not prejudicial error where instructions given adequately cover the law): Issue 6 (State v. Mouzon instruction) - State v. Reese, 370 S.C.31, 633 S.E.2d 898 (2006) (upholding Mouzon instruction); Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009) (in determining prejudiced from jury instructions, court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution): Issue 7 (directed verdict) - State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (if State presents any evidence from which the defendant's guilt can be fairly and logically deduced, case must go to the jury): Issue 8 (cumulative error) - State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) (to qualify for reversal on ground of cumulative effect of trial errors, defendant must demonstrate errors adversely affected right to fair trial).

JUSTICE KITTREDGE: I concur in affirming the convictions and sentence of H. Dewain Herring. I join the majority in all respects save its determination concerning the initial search. I disagree that, from an objective standard, exigent circumstances existed upon the arrival of law enforcement at Herring's residence two hours after the shooting of John Johnson at Chastity's strip club.

What the majority characterizes as a "peek by police into [Herring's] garage" was, in my judgment, an unwarranted trespass and warrantless search. Upon the arrival of the police at Herring's residence approximately two hours after the crime, exigent circumstances for Fourth Amendment purposes did not exist. More to the point, nothing occurred at the residence to create an exigency to justify a warrantless search. There was neither hot pursuit, nor an imminent threat of danger to police or others, nor other conditions that reasonably fit exigent circumstances jurisprudence. *See State v. Abdullah*, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004) (discussing law of exigent circumstances).

The majority acknowledges that at the time of "Officer Linfert's peek into the garage …[,] [i]t is undisputed that police had knowledge of Herring's identity, his residence, the make and model of his vehicle, and his license tag number." The police responded to this purported exigent circumstance by ringing the doorbell. When no one answered the doorbell, police "stationed men at the house and went to obtain a warrant." Even from a subjective point, it is clear that law enforcement did not harbor the view that exigent circumstances justified a warrantless search.

Although I believe the peek into the garage constituted an illegal search, I agree with the majority that the search yielded no evidence. The evidence at the residence linking Herring to the shooting was seized as a result of the subsequent valid SLED search warrant.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Richard P. Anderson, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Paula H. Thomas, Circuit Court Judge

Opinion No. 26751
Heard October 7, 2009 – Filed December 21, 2009

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Julie M. Thames, all of Columbia, and Solicitor John Gregory Hembree, of Conway, for Respondent.

JUSTICE BEATTY: After a jury convicted Richard P. Anderson of first-degree burglary, the trial judge sentenced him to twenty years in prison. Anderson appealed his conviction and sentence to the Court of Appeals. In his appeal, Anderson argued the trial judge erred in admitting into evidence an unauthenticated ten-print card as maintained in the "Automated Fingerprint Identification System" (AFIS). The Court of Appeals affirmed Anderson's conviction and sentence. State v. Anderson, 378 S.C. 243, 662 S.E.2d 461 (Ct. App. 2008). This Court granted Anderson's petition for a writ of certiorari to review the decision of the Court of Appeals. We affirm.

FACTUAL/PROCEDURAL HISTORY

On August 15, 2003, Priscilla Ward returned home after work around 11:10 a.m. to find someone had broken into her home. The intruder had entered the home by breaking a bedroom window. Following the break-in, Ward and her husband discovered several items missing from the home, which included jewelry and firearms.

Stephen Hardee, an officer with the Horry County Police Department, responded to investigate the break-in at the Wards' home. During his investigation, Hardee lifted two fingerprints from the broken window. At trial, Hardee identified two lift cards on which he transferred the latent fingerprints from the crime scene.

In an effort to identify the intruder's fingerprints, the State offered the testimony of Sergeant Jeffrey Gause, an expert in the field of fingerprint analysis. Gause testified he analyzed the latent fingerprints found at the Wards' home by checking them through the AFIS. In describing the AFIS, Gause explained a digital camera takes a picture of the latent print which is downloaded into the computer. The computer then sends the picture through the AFIS, which searches the database for fingerprints with comparable characteristics. As a result of this process, the AFIS produces twenty to thirty possible matches. The operator then has to physically review each print to compare similarities in ridge detail and the pattern of the prints. In using this technology, Gause determined that the latent print found at the Wards'

home matched a known print in the database with the identifying number SC00454508. In explaining this identification number, Gause testified that when a person is arrested, the police or jail personnel roll the person's fingerprints onto a ten-print card. These ten-print cards are then retained on file through SLED and the FBI. Gause testified the ten-print card matching the identifying number SC00454508 belonged to Anderson.

Immediately after this statement, Anderson's counsel objected to any evidence concerning Anderson's ten-print card. Counsel argued the rolled ten-print card from the database was inadmissible given it had not been properly authenticated pursuant to State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987).[1]

After considering this Court's decision in Rich, the trial judge ruled that the State, in order to authenticate the ten-print card, had to present testimony as to when and how it was taken. In response to this ruling, Anderson's counsel asserted the State was also required to establish by whom the fingerprints were taken. The trial judge disagreed with this interpretation of Rich, finding the State did not have to show which particular officer took the fingerprints. Instead, the State was only required to present testimony as to which correctional facility[2] took the fingerprints.

Following the judge's ruling, the State offered the testimony of Lieutenant Joseph Means, who is in charge of the crime information center at SLED and oversees the AFIS. Means explained that SLED maintains ten-print cards on every person who is arrested in South

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[1] State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987) (holding admission of fingerprint comparison without proper authentication required reversal of conviction given crucial nature of evidence to the State's case).

[2] Although Anderson's counsel still maintained his objection to the testimony, he consented to the State's use of the term "law enforcement agency" as opposed to a state "correctional facility" apparently in an effort to avoid any possible inference of a prior conviction. Because any issue regarding the admission of prior bad act evidence was not raised at trial, we express no opinion as to whether this type of evidence was properly admitted.

Carolina. According to Means, the AFIS stores all the digital fingerprint images of every ten-print card in South Carolina. In order to positively identify each person who has been arrested, a unique state identifying number is assigned to the person at the time of the first arrest. This identifying number remains constant regardless of the number of times the person is arrested. Means testified that the ten-print card with identification number SC00454508 belonged to Anderson and was originated from a law enforcement agency on April 7, 2004. He further stated he was the custodian of the ten-print cards, and when a ten-print card is submitted to SLED it is maintained in the condition in which it arrives. Means emphasized that every fingerprint is unique and that it could not be changed legally.

On cross-examination, Means acknowledged that it was possible for a fingerprint to be altered. He further admitted that he was not present when Anderson's fingerprints were taken for the ten-print card. However, he stated Anderson's ten-print card was sent to him and entered into the AFIS by someone in his office.

Over Anderson's objection, the trial judge admitted into evidence Anderson's ten-print card. Ultimately, the jury convicted Anderson of first-degree burglary. The trial judge sentenced him to twenty years in prison.

On appeal, Anderson challenged his conviction and sentence on the ground the trial judge erred in admitting into evidence the ten-print card as maintained in the AFIS.

The Court of Appeals affirmed, holding the State presented sufficient evidence to authenticate the ten-print card as Anderson's known fingerprints. State v. Anderson, 378 S.C. 243, 662 S.E.2d 461 (Ct. App. 2008). More specifically, the Court of Appeals stated:

> [W]e find the evidence presented by the State, showing when and where the fingerprints were taken and how they were submitted to SLED, and describing the process implemented by law enforcement for taking the fingerprints

> and maintaining an accurate record of them in AFIS, was sufficient to authenticate the fingerprints as Anderson's known prints.

Id. at 249, 662 S.E.2d at 464.

This Court granted Anderson's petition for a writ of certiorari to review the decision of the Court of Appeals.

DISCUSSION

Anderson argues the Court of Appeals erred in finding the trial judge properly admitted the master fingerprint card with Anderson's known fingerprints. He contends the fingerprint card was inadmissible given the person who actually took the fingerprints did not testify and, thus, the card was not authenticated. Because the fingerprint evidence was the only evidence connecting Anderson to the crime scene, he contends the admission of the fingerprint card constituted reversible error and could not be considered harmless error.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

The analysis regarding the admissibility of the fingerprint card involves a two-prong approach. The initial question is whether the fingerprint card was testimonial in nature and, if so, fell within an exception to the hearsay rule. If a hearsay exception is applicable, then the next consideration in assessing admissibility is authentication.

Regarding the first question, Anderson never challenged the admissibility of the fingerprint card on the ground that it constituted

inadmissible hearsay. Thus, we confine our analysis solely to a determination of the authenticity of the fingerprint card.[3]

As recognized by the Court of Appeals, the decision in the instant case is governed by an interpretation and application of State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987).[4]

In Rich, the defendant was convicted of second-degree burglary, grand larceny, and failure to stop for a blue light stemming from a break-in at a pharmacy. At trial, the SLED agent who lifted the latent fingerprints at the crime scene testified regarding his comparison of the these fingerprints with the "inked impressions" of a set of fingerprints on file. Id. at 173, 359 S.E.2d at 281. Over the objection of Rich, the trial judge admitted the testimony.

On appeal, Rich contended the inked impressions were erroneously admitted into evidence because the State failed to lay the proper foundation. Id. This Court agreed with Rich and reversed his convictions and sentences.

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[3] Even assuming that Anderson raised a hearsay challenge, such an argument would be without merit. In Rich, this Court definitively held that police fingerprint cards do not violate the prohibition against hearsay given they fall within the business records exception or the public records exception. Rich, 293 S.C. at 173, 359 S.E.2d at 281. Notably, appellate courts have continued to recognize this principle and have emphasized that fingerprint cards are not "testimonial" and, thus, do not violate the rule in Crawford v. Washington, 541 U.S. 36 (2004). See United States v. Thornton, 209 Fed. Appx. 297, 299 (4th Cir. 2006) (relying on decisions of the Fifth, Sixth, and Ninth Circuits and concluding that fingerprint cards are not "testimonial," and that the admission of such business or public records does not violate the rule in Crawford).

[4] In his brief, Anderson relies on this Court's decision in State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992). In Cribb, this Court reversed a felony driving under the influence (DUI) conviction on the ground the State failed to establish the chain of custody regarding the blood sample at issue given no testimony was provided as to the identity of the persons handling the blood sample. Because the instant case does not involve an issue regarding the chain of custody of a fungible item, we find Cribb is inapposite.

Initially, this Court recognized the admission of police fingerprint records is generally considered not to violate the prohibition against hearsay, either under the public records exception[5] or the business record exception.[6] Id. at 173, 359 S.E.2d at 281. We, however, emphasized that the proponent of the evidence must still comply with authentication requirements. Id.

Given the State neither attempted to lay a foundation that the fingerprints on the master file card were in fact those of Rich, nor sought to introduce the master file card, this Court found the police fingerprint records should have been excluded from evidence. Id. at 173, 359 S.E.2d at 282. We explained that the testimony regarding the police fingerprint records was inadmissible "'without evidence as to when and by whom the card was made and that the prints on the card were in fact those of [the] defendant.'" Id. at 174, 359 S.E.2d at 282 (quoting State v. Foster, 200 S.E.2d 782, 793 (N.C. 1973)).

Because the SLED agent should not have been allowed to testify about data contained in an unauthenticated document, which was crucial to the State's case, we found the admission of the evidence constituted reversible error. Id. at 174, 359 S.E.2d at 282.

The facts in Anderson's case provided the Court of Appeals an opportunity to interpret and apply this Court's decision in Rich. As will be discussed, we find the Court of Appeals correctly held the State presented sufficient evidence to authenticate the ten-print card.

As discussed by the Court of Appeals, Rich does not establish an authentication requirement that necessitates the testimony of the actual person who took the fingerprints on the master fingerprint card. Instead, it merely requires "'evidence as to *when and by whom* the card was made and that the prints on the card were in fact those of this

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[5] Rule 803(8), SCRE.

[6] Rule 803(6), SCRE; see S.C. Code Ann. § 19-5-510 (1985) (providing for evidence which falls within the "Uniform Business Records as Evidence Act").

defendant.'" Anderson, 378 S.C. at 248, 662 S.E.2d at 464 (quoting Rich, 293 S.C. at 174, 359 S.E.2d at 282).

Here, through the testimony of Gause and Means, the State provided evidence that: Anderson's known ten-print card was taken at a correctional facility on April 7, 2004; it was submitted to SLED; it was maintained in the condition in which it arrived; and it was stored in the AFIS. Thus, we agree with the Court of Appeals that the State satisfied its burden of authentication under Rich. Additionally, we find the instant case is readily distinguishable from Rich given the State introduced into evidence Anderson's known fingerprint card and provided testimony which substantiated the process used in obtaining and maintaining this fingerprint card.

Because this Court decided Rich prior to our state's adoption of the Rules of Evidence,[7] we believe it is necessary to supplement the analysis in Rich with an application of the pertinent Rules of Evidence as well as subsequent appellate decisions. Given the significance this Court has placed on the Rules of Evidence, we take this opportunity to clarify our decision in Rich.

In terms of initial admissibility,[8] Rule 901(a) provides: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. Although not exhaustive, Rule 901 further provides examples of authentication or identification which conform with the requirements

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[7] The South Carolina Rules of Evidence became effective on September 3, 1995. Rule 1103(b), SCRE.

[8] We use the term "initial" admissibility because this rule only relates to the authentication of evidence. Even if properly authenticated, the evidence must still be assessed for relevance as well as probative versus prejudicial value. Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

of the rule. Rule 901(b), SCRE. We find several of these illustrations are applicable in the instant case.

First, subsection four provides that a proponent of physical evidence may satisfy the threshold authentication requirement of Rule 901(a) by "internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Rule 901(b)(4), SCRE. Here, Sergeant Gause, an expert in the field of fingerprint analysis, analyzed the latent fingerprints found at the Wards' home by checking them through the AFIS. Using this technology and comparing the characteristics of the latent fingerprints with those of the known prints, Gause determined that Anderson's known prints matched the latent prints. Gause further explained that the prints on the master fingerprint card were taken at a correctional facility, on a specific date, and assigned a unique state identifying number.

We find this testimony regarding the distinctive characteristics of the ten-print card was sufficient to support a finding that the fingerprint card was properly authenticated. See State v. Lee, 577 So. 2d 1193, 1196 (La. Ct. App. 1991) (finding original fingerprint card was properly authenticated under Rule 901(b)(4) where testimony was offered regarding the signatures on the card, the law enforcement agency where the prints were taken, and the date the prints were taken); see also United States v. Patterson, 277 F.3d 709, 713-14 (4th Cir. 2002) (holding, pursuant to Federal Rule of Evidence 901(b)(4), government provided sufficient authentication of a Tenprinter image where testimony that one of the fingerprints recorded by the Tenprinter matched the fingerprint recovered from the crime scene evidence); United States v. Lauder, 409 F.3d 1254, 1265-66 (10th Cir. 2005) (referencing Federal Rule of Evidence 901(b)(4) and finding government presented sufficient evidence that fingerprint card generated by the "live-skin" method accurately reflected defendant's fingerprints where evidence was presented that: defendant's known fingerprint was properly recorded; the "live-skin" method functioned properly when it recorded the defendant's print; and the chain of custody was maintained).

Second, subsection seven, the public records example, provides for authentication by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." Rule 901(b)(7), SCRE. Here, Lieutenant Means and Sergeant Gause testified that law enforcement takes the fingerprints of every person who is arrested in this state.[9] SLED then receives and maintains these known prints on the ten-print card in the condition in which it arrives. The AFIS stores all of the digital fingerprint images of every ten-print card in South Carolina. We conclude this testimony established the fingerprint card of Anderson constituted a public report or record[10] given its production was authorized by law to be recorded or filed at SLED. See State v. DuBray, 77 P.3d 247, 259-60 (Mont. 2003)

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[9] Section 23-3-120 of the South Carolina Code mandates this procedure. S.C. Code Ann. § 23-3-120(B) (Supp. 2008) ("A person subjected to a lawful custodial arrest for a state offense must be fingerprinted at the time the person is booked and processed into a jail or detention facility or other location when the taking of fingerprints is required. Fingerprints taken by a law enforcement agency or detention facility pursuant to this section must be submitted to the State Law Enforcement Division's Central Record Repository within three days, excluding weekends and holidays, for the purposes of identifying record subjects and establishing criminal history record information." (emphasis added)).

[10] A public record or report under this provision only requires that the document be produced and maintained in a public office. The fact that the general public does not have access to the document, i.e., fingerprint cards, does not negate this method of authentication. See S.C. Code Ann. § 30-4-20(c) (2007) (defining the term "public record" to include "documentary materials regardless of physical form or characteristics prepared . . . or retained by a public body"); see also Rule 1005, SCRE ("The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.").

(concluding, based on Rule 901(b)(7), that known fingerprint card of person that defendant attempted to cast suspicion upon was properly authenticated given it was taken and preserved by law enforcement and, thus, constituted a "public report or record"); Rule 901(b)(7), SCRE, cmt. (citing Rich and providing for authentication of police fingerprint records under this subsection); see also State v. Carruth, 166 S.W.3d 589, 591 (Mo. Ct. App. 2005) (holding AFIS fingerprint card was admissible under business records exception to the hearsay rule where witness, who did not take the actual prints, established the standard procedures used by the jurisdiction to collect and maintain fingerprints and testified regarding her determination that the latent prints and the known prints came from the defendant).

Third, as referenced by the Court of Appeals, subsection nine provides for authentication by "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." Rule 901(b)(9), SCRE. The State in this case presented evidence regarding: when and where Anderson's fingerprints were taken; how they were submitted to SLED; the process implemented by law enforcement for taking the fingerprints; and how an accurate record of them was maintained in the AFIS. We hold this testimony satisfied the authentication requirement of Rule 901.

Even if the evidence presented by the State did not precisely fit within one of the enumerated examples provided in Rule 901, we find Anderson's known ten-print card was, nevertheless, authenticated under a more generalized approach to Rule 901. The State provided expert testimony which linked the latent fingerprints with Anderson's known prints. Sergeant Gause, who was qualified as an expert in the field of fingerprint analysis, testified regarding the method and technology in which he analyzed the latent fingerprints with the known prints. This testimony included a thorough explanation of how an arrestee's fingerprints are taken, stored, and maintained. Using the officially-maintained known fingerprints, Gause opined that the latent print found at the Wards' home matched Anderson's known print in the AFIS database. Thus, this expert testimony was sufficient "to support a finding that the matter in question [was] what [the State] claim[ed]."

Rule 901(a), SCRE; see State v. Foreman, 954 A.2d 135, 153-62 (Conn. 2008) (concluding State established proper foundation for admission of "live-scan" fingerprint card identified as that of defendant under Rule of Evidence 901 where "highly trained" latent fingerprint examiner testified regarding the methodology used to compare known and unknown fingerprints and his conclusion that the print from defendant's finger was a "100 percent match" with the unknown print obtained from the crime scene).

As we interpret Anderson's argument, he is primarily concerned with whether the known fingerprints could have been tampered with or altered in some way. In order to alleviate this concern, Anderson contends that Rich should be strictly construed to require the person who actually took his fingerprints to testify regarding the reliability or authenticity of the ten-print card.

To require this type of testimony would create an unrealistic standard and, at times, an insurmountable obstacle for the State. Given the thousands of fingerprints on file with SLED, it would be difficult to locate and procure testimony from the actual person. There may be instances where the person has changed jobs, has relocated out of state, or may be deceased. If the actual person is unavailable for any of these reasons, then the State could never definitively establish the authenticity of a suspect's fingerprint card.

CONCLUSION

In view of these factors, we find the Court of Appeals correctly interpreted Rich as not requiring such a strict authentication requirement. Thus, based on the foregoing, we conclude the State presented sufficient evidence to satisfy the authentication requirements pursuant to Rich and, more specifically, Rule 901.

Accordingly, the decision of the Court of Appeals is

AFFIRMED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of an Anonymous Member of the South Carolina Bar, Respondent.

Opinion No. 26752
Heard December 1, 2009 - Filed December 21, 2009

DISMISSAL AND LETTER OF CAUTION

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

Desa Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct (the Commission) investigated allegations involving two methods used by Respondent to promote his services as a real estate attorney. A Hearing Panel of the Commission found no misconduct and recommended dismissal of the first allegation involving his distribution of discount coupons for attorney's fees to realtors and lenders. In the second allegation, which involved using forms of the words "expert" and "specialist" in the attorney biographies on his website, the Hearing Panel found Respondent had violated Rule 7.4(b) of the South Carolina Rules of Professional Conduct (RPC), Rule 407, SCACR by using these words when neither he nor his colleagues were certified as specialists by the Supreme Court of South Carolina. For this

violation, the Hearing Panel recommended that Respondent receive a Letter of Caution with a finding of minor misconduct and that he pay the costs of these proceedings. We agree in full with the Hearing Panel's findings and recommendations and hereby dismiss the first allegation and issue a Letter of Caution to Respondent as to the second allegation.

FACTS

Prior to attending law school, Respondent worked in the real estate field for nearly thirty years. Respondent obtained his license to practice law in South Carolina in 2001. Since that time, he has worked at his own law firm, which has several offices and a total of five attorneys, including Respondent. Respondent primarily performs real estate closings, which is also the firm's predominant practice.

Formal Charges. The Office of Disciplinary Counsel (ODC) filed formal charges against Respondent in 2009 alleging the following misconduct:

> i. Respondent engaged in, or attempted to engage in, direct, in-person solicitation of prospective clients in violation of Rule 7.3(a) by delivering coupons to realtors and lenders with the expectation that they would be passed on to persons known to be in need of legal services.
>
> ii. Respondent published a website on the Internet promoting his legal services using forms of the words "expert" and "specialist" in violation of Rule 7.4(b).

Hearing Panel. The Hearing Panel conducted a hearing regarding the two allegations, where they considered the following evidence.

First Allegation: Distribution of Discount Coupons.

At the hearing, Respondent testified that he began distributing discount coupons in 2005. The coupons provided discounts of $100 off for his legal services for those buying or refinancing property, or $50 off for those selling property. The regular charges for this work before the application of any discounts were also specified on the coupons. According to Respondent, he initially put the coupon only on his website, but realtors and lenders who were printing them out to give to clients started asking him for printed versions, so he printed them up as a paper coupon.

Respondent put the printed coupons into plastic display cases to give to realtors who wanted them, with the hope that they would put them in their office lobbies, and the majority of them did so. Respondent also put the display cases and coupons in various locations around the area so that people could pick them up, and he included them in newspaper advertisements, as well as made them available for download from his website. Respondent also occasionally incorporated the coupon into his brochures.

Respondent also mailed coupons directly to realtors and lenders with a cover letter. Respondent stated the realtors and lenders who received the coupons were not on his payroll and they were not under his supervision. He did not keep records of the number of coupons that he gave to each realtor and track their return, and he did not attempt to manage or control to whom the coupons were distributed. Respondent estimated that approximately one-half of one percent of the coupons printed were redeemed.

ODC asserted there was nothing wrong per se with issuing coupons; rather, ODC took exception to the method of delivery of the coupons and the intended recipients. ODC stated distributing a coupon through the internet or in a newspaper or some other manner of general distribution "is perfectly acceptable." ODC maintained that "Welcome Wagon" or "ValPak" distributions, which give out information from a variety of businesses, are

also acceptable because the intended recipients were not selected based on "the fact that they are known to be in need of legal services."

In contrast, ODC argued, "[d]istribution of the coupon through realtors and lenders [was] done with the intent of reaching people who are known to be in need of legal services, people buying and selling homes." ODC further argued "that the intent of [Respondent] in sending the coupons to realtors and lenders was to have them personally deliver those coupons to the clients." ODC alleged this conduct violated Rule 7.3(a) of the RPC, which generally prohibits an attorney from making a direct, in-person solicitation for professional employment with a prospective client.

Respondent contended the coupons were simply advertising that was governed by the requirements of Rule 7.2 of the RPC as he had no control over what happened to the coupons once they were given to the realtors and lenders, and he did not violate Rule 7.3(a) as alleged by ODC.

Second Allegation: Use of Forms of "Expert" & "Specialist."

ODC's second allegation was that Respondent had used forms of the words "expert" and "specialist" to describe himself and two other attorneys in the biographical portion of his law firm's website when neither he nor his associates were certified as specialists by this Court. ODC asserted this conduct violated Rule 7.4(b), RPC, governing the Court's certification of specialists.

At the hearing, Respondent acknowledged that neither he nor the other two attorneys were specialists in any field certified by this Court. He further acknowledged that there is currently no certification available for the particular fields mentioned on his website.

After this allegation came up, Respondent immediately changed the disputed language to refer to his "experience" rather than his "expertise," and he also changed the wording of his associate's biographies to refer to their

"concentration" or "emphasis" in certain fields of law, rather than their "specialization" in certain fields.

LAW/ANALYSIS

ODC takes exception to the Hearing Panel's recommendation of dismissal of the allegation concerning Respondent's distribution of a discount coupon. Respondent maintains he committed no misconduct in this regard. He does not challenge the finding of minor misconduct and the issuance of a Letter of Caution for the allegation concerning his website.

"The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court." In re Tullis, 375 S.C. 190, 191, 652 S.E.2d 395, 395 (2007). The Court "has the sole authority . . . to decide the appropriate sanction after a thorough review of the record." In re Thompson, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." In re Hazzard, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008).

A disciplinary violation must be proven by clear and convincing evidence. In re Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see also Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

(1) Discount Coupon & Rule 7.3(a).

ODC contends Respondent's distribution of the discount coupons to realtors and lenders violated Rule 7.3(a) of the RPC, Rule 407, SCACR, which provides in relevant part as follows:

> A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's

> doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

ODC asserts Respondent's purpose in sending the discount coupons to lenders and realtors was to target customers who were in need of legal services by using the third-parties to make direct contact with the clients, which he is prohibited from doing under Rule 7.3(a).

Respondent testified that before using the coupons he spoke to several attorneys that he knew, and they suggested that he review the Ethics Advisory Opinions, so he did and found what he referred to as "the Welcome Wagon opinions." Specifically, Respondent reviewed and relied upon Ethics Advisory Opinions 93-08 and 96-27, and he testified that he thought what he was doing was the same as in those cases.

In Ethics Advisory Opinion 93-08, issued in 1993, an attorney was approached by a corporation about becoming one of the sponsors included in a "Welcome Wagon" program. Essentially, a hostess would make appointments with people who had just moved to the area to greet them and make them aware of services from businesses in the area by presenting gifts, brochures, etc. The hostess was paid a nominal fee of $2.00 per sponsor for each presentation. The Ethics Advisory Committee concluded an attorney may advertise through a Welcome Wagon program without violating the RPC. The Committee commented that this did constitute advertising that would be subject to the restrictions of Rule 7.2, and "since some of the contacts involve solicitation, Rule 7.3 would apply in those cases." The Committee further commented that "[a]ny written materials would consequently have to satisfy the requirements of Rules 7.1, 7.2 and 7.3."

Ethics Advisory Opinion 96-27, issued in 1996, additionally addressed whether an attorney could include a discount coupon for his or her professional services as part of the Welcome Wagon presentation. The Committee concluded, "A discount coupon or an offer of a special discounted fee for a new client, while perhaps undignified, may not be a substantive

violation of the rules of Professional Conduct, so long as it is not false or misleading," citing Rule 7.1. However, attorneys should not follow up with persons who did not respond to the attorney's advertising material because that has the potential to violate Rule 7.3(b).

In 2007, sometime after Respondent had already been distributing his coupons, Ethics Advisory Opinion 07-09 came out, which addressed an attorney's proposal to issue discount coupons to prospective clients by providing them to mortgage loan originators and real estate agents.[1] In that scenario, the mortgage loan originators and the real estate agents were going to personally give the coupons to homebuyers at the time the homebuyers were asked to choose a lawyer to close the real estate transactions. The Committee stated, "The difference in this case is that the lawyer here knows that each prospective client will be in need of legal services in a particular matter, whereas the lawyer in [Ethics Advisory Opinion] 96-27 was giving a coupon to all new homeowners in case any of them might need legal services in the future."

The Committee stated disclaimer language would have to be included, which could be impractical for coupons: "Rule 7.3(d) also requires extensive specific language to be contained in '[e]very writing directed to someone known to be in need of legal services on a particular matter.' Unless the coupon contains all the language required by subparts 1 through 3 of Rule 7.3(d), which does not seem practicable on a coupon, the coupons will violate this rule." (Alteration in original.)

Respondent testified Opinion 07-09 did not come out until after the Commission's investigation of him began in 2006, and he thought this decision "seemed to be so inconsistent with the [Welcome Wagon] cases." We agree and find that Opinion 07-09 does not present a correct interpretation of Rule 7.3(a).

The Supreme Court of the United States has concluded that a state may not categorically prohibit attorneys from soliciting clients for pecuniary gain

[1] Respondent stated he was not the person who requested this opinion.

by sending truthful and non-misleading communications to those known to be in need of legal services:

> [M]erely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. See *In re R.M.J.*, 455 U.S. [191], at 203, 102 S.Ct. [929], at 937 [(1982)]. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, *id.*, at 206, 102 S.Ct., at 939, giving the State ample opportunity to supervise mailings and penalize actual abuses.

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476 (1988).

In the current case, ODC made no allegation that Respondent's coupons were misleading or otherwise improper. Respondent indicated both the amount of the discount and the amount of the regular charges on his coupons, and he testified that he did, in fact, give the appropriate discounted rates to those who presented the coupons. Although Respondent attempted to send his coupons to a targeted audience of persons interested in real estate, not all of the persons who received his coupons were in need of legal services. However, whether or not the intended recipients were in need of legal services is irrelevant.

We agree with the Hearing Panel's findings that "[t]he coupons . . . were distributed randomly by real estate agents and lenders, similar in fashion to the common practice of leaving business cards for distribution." Furthermore, "[b]ecause the lawyer is not physically present . . . , there is no insistence upon immediate retention or 'importuning of the trained advocate.'" As Respondent testified, the realtors and lenders were not under his control and could have thrown away the coupons or let people take them like other business cards that were available for the public. Thus, there was no insistence upon immediate action thrust upon the recipients and we agree

with the Hearing Panel that Respondent committed no misconduct in this regard and dismissal of the charge is proper.

(2) Use of Forms of "Expert" & "Specialist" & Rule 7.4(b).

Rule 7.4(b) limits an attorney's use of any form of the words "expert" and "specialist" to avoid confusion with this Court's program for certifying specialists. The rule provides as follows:

> A lawyer who is not certified as a specialist but who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may so advertise or publicly state in any manner otherwise permitted by these rules. To avoid confusing or misleading the public and to protect the objectives of the South Carolina certified specialization program, any such advertisement or statements shall be strictly factual and shall not contain any form of the words "certified," "specialist," "expert," or "authority" except as permitted by Rule 7.4(d) [regarding admiralty practice].

Rule 7.4(b), RPC, Rule 407, SCACR (emphasis added).

At the panel hearing, Respondent's counsel argued that Respondent's use of forms of the words "expert" and "specialist" were meant to refer to Respondent's extensive experience in the real estate field before becoming an attorney, and to refer to the previous experience of two of his associates. Counsel argued Respondent did not mean to imply they were certified specialists and that the way the "words were used on the website was not written in such a way as it could possibly have been misconstrued or confused with the Bar's certified specialist program[.]"

Respondent's use of the words, as outlined in the report of the Hearing Panel, clearly violated Rule 7.4(b), which expressly prohibits use of "any form" of the words "expert" and "specialist." However, in mitigation, we note that Respondent immediately removed the disputed words from his

website when they were challenged, and there is no evidence that anyone was actually misled or harmed by Respondent's use of the words on his website. Neither Respondent nor ODC has raised any challenges to the Hearing Panel's findings and conclusion with regard to this particular allegation. We agree with the Hearing Panel that Respondent violated Rule 7.4(b) and committed minor misconduct by using these terms improperly and hereby issue this Letter of Caution to Respondent to observe the provisions of Rule 7.4(b).

CONCLUSION

It is clear from the transcript of the hearing in this matter that Respondent researched the Ethics Advisory Opinions, that he was very cooperative with ODC, and that he made immediate efforts to make changes in his conduct when this disciplinary action arose. We agree with the Hearing Panel that dismissal of the allegation regarding distribution of the discount coupons is appropriate, and we issue this Letter of Caution, with a finding of minor misconduct, for Respondent's violation of Rule 7.4(b) for his inappropriate use of forms of the words "expert" and "specialist" on his website.

DISMISSAL AND LETTER OF CAUTION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

LaSalle Bank National Association, as Trustee for Certificateholders of Bear Stearns Asset Backed Securities Trust 2006-1, Asset Backed Certificates, Series 2006-1, Respondent,

v.

Edward M. Davidson, aka Ed Davidson; Sheryl L. Peterson-Davidson, aka Sheryl Davidson; WCRSI, LLC; and The Farm at Wescott Homeowners Association, Inc., Appellants.

Appeal from Dorchester County
Patrick R. Watts, Master-in-Equity

Opinion No. 26753
Heard October 6, 2009 – Filed December 21, 2009

VACATED AND REMANDED

Merrill A. Cox, of Cox Law Firm, of Goose Creek, for Appellants.

D. Randolph Whitt, of Fleming & Whitt, of Columbia, for Respondent.

JUSTICE KITTREDGE: This is an appeal from a judgment in a mortgage foreclosure proceeding. The question before the Court is whether the failure of the judge to attend the final court hearing violated Appellants' constitutional guarantee to procedural due process. We answer in the affirmative and hold that an attempt to conduct a hearing without a judge violates due process and is a nullity. We vacate the judgment of the trial court and remand for a hearing.

I.

In September 2004, in two transactions, DHI Mortgage Company ("DHI") loaned Appellants Edward and Sheryl Davidson $42,386 and $169,542 to purchase a home in Summerville, South Carolina. Both loans were secured by recorded mortgages. The Davidsons defaulted on their May 2006 mortgage payment—one month after the interest rate increased from 6.625 percent to 11.375 percent. Upon default, the outstanding balance on the larger loan was $166,694.35.

On December 19, 2006, DHI assigned the smaller mortgage to WCRSI, LLC. On October 12, 2007, DHI assigned the larger mortgage to Respondent LaSalle Bank National Association ("LaSalle").[1] LaSalle initiated a mortgage foreclosure action shortly after the assignment and notified the Davidsons they then owed $198,766.75. In its complaint, LaSalle asked the court to: "Declare [its] [m]ortgage a purchase money first mortgage lien on the subject property, and render judgment and foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with reasonable attorney's fees, and for the

[1] LaSalle is trustee for certificate holders of Bear Sterns asset-backed-securities.

costs of this action." The complaint additionally alleged that all other liens on the Davidsons' property were "junior or subsequent to" LaSalle's mortgage. After the Davidsons and the other lien holders failed to respond to the complaint, LaSalle filed an affidavit of default. The Dorchester County Clerk of Court referred the case to the Master-in-Equity and notified the parties that a final hearing would be held on March 6, 2008. The Order of Reference stated the Master would take testimony, enter a final judgment, and "hear all matters arising from or reasonably related to" the case.

On March 6, 2008, LaSalle's attorney[2] appeared in court for the hearing. Sheryl Davidson appeared *pro se* for the hearing. The Master, however, failed to attend and no court reporter was present. In the Master's absence, LaSalle's counsel attempted to proceed with a hearing against the *pro se* defendant. LaSalle's counsel then presented a proposed order, which the Master signed and filed on March 18, 2008. In the final order, "Judgment of Foreclosure and Sale," the Master referenced the March 6 hearing and made findings based on the phantom testimony and evidence presented. The order found the Davidsons' secured debt was $212,034.16, which included attorneys' fees of $4,500.

Also on March 18, 2008, a Record of Hearing[3] was filed with the court. This Record stated a hearing in the Davidsons' case was held before the Master on March 6, 2008. The Record indicated that the only party attending the hearing was LaSalle's attorney; however, as noted, Sheryl Davidson also was present. Moreover, the Record states that LaSalle's attorney was duly sworn, testimony was given, and documents were placed into evidence.

The Davidsons filed a notice of appeal from the March 18, 2008 order. On appeal, the Davidsons argue the Master's order, which followed a final hearing conducted without a presiding judge, violated their constitutional guarantees to procedural due process, substantive due process, and equal

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[2] The attorney representing LaSalle on appeal did not represent LaSalle at the foreclosure hearing.

[3] The Record on Appeal does not indicate who prepared or filed the Record of Hearing.

protection. After jurisdiction over the case had vested in the appellate court, the Master attempted to vacate the order by filing an order on May 15, 2008. The May 15 order, entitled "Sua Sponte Order Vacating Judgment," stated: "[D]ue to unavoidable circumstances, I was not present at the hearing." The Supreme Court certified the case pursuant to South Carolina Appellate Court Rule 204(b).

II.

For purposes of the narrow issue presented, "[d]ue process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property." *State v. Brown*, 178 S.C. 294, 300, 182 S.E. 838, 841 (1935). The Davidsons contend their rights to procedural due process were violated when the Master issued an order of mortgage foreclosure and sale following a judicial proceeding he failed to attend. We agree.

While LaSalle acknowledges the judge's absence from the hearing "may well have been an error," it contends we should view the absence of the judge from the hearing as simply the failure to conform to an "empty ritual." We do not view the presence of the judge in the courtroom as an "empty ritual." We similarly do not adopt LaSalle's assertion that the error here is not reversible because the outcome to the Davidsons would have been the same with, or without, a judge in the courtroom. LaSalle contends:

> Appellants' default as to the allegations of the foreclosure [c]omplaint sealed their fate as to the outcome of a judgment of foreclosure being issued. Appellants have failed to show how any changes in the quality or extent of the hearing in this matter would have produced a different result.

We categorically reject LaSalle's contention that the absence of the judge at the hearing was a harmless error. The law recognizes two kinds of errors: trial errors and structural defects. The former are subject to "harmless

error" analysis while the latter are not. In *State v. Mouzon*, this Court quoted a leading United States Supreme Court case, *Arizona v. Fulminante*, 499 U.S. 279 (1991), in explaining that "trial errors [] are subject to harmless error analysis"; however, "structural defects in the constitution of the trial mechanism [] defy analysis by harmless error standards." 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997).

> [Trial errors] occur during the presentation of the case to the jury, and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. Structural defects affect the entire conduct of the trial from beginning to end.

Id. at 204, 485 S.E.2d at 921 (quoting *Fulminante*, 499 U.S. at 308-09) (internal citations and quotation marks omitted). *See also Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993) (explaining deprivation of the criminal defendant's right to a jury trial, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error'").

We hold that the absence of a judge at a court hearing is a structural defect. The Court is troubled by LaSalle's trial counsel's efforts to proceed without a presiding judicial officer as well as the submission of the erroneous proposed order to the judge. The purported hearing was a nullity, and the resulting order must be vacated. The judge's absence from the hearing deprived the Davidsons of the opportunity to be heard and, thus violated their constitutional guarantee of procedural due process.

The final matter we address is the Davidsons' request that we remand the case to a different judge. We decline this request. While the execution of LaSalle's counsel’s proposed order was unfortunate, we discern nothing in the record warranting mandatory disqualification of this Master. Moreover, had the Davidsons filed a motion asking the Master to reconsider his order, we believe the Master would have vacated the order and conducted a proper hearing, as he attempted to do after jurisdiction had transferred to the

appellate court. While it may be difficult to understand how an order was issued from a hearing that never happened, we put the matter into context by recognizing the enormous caseloads handled by our state's excellent Masters, especially with respect to mortgage foreclosures.

III.

In sum, we vacate the March 18, 2008 Order of Foreclosure and Sale and remand for a *de novo* hearing on the merits. We need not reach the remaining assignments of error raised by Appellants.

VACATED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jeffrey M. Sapp, Jr., Appellant,

v.

Ford Motor Company, Respondent.

Appeal from Jasper County
John C. Few, Circuit Court Judge

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and

Bryan D. Smith, Appellant,

v.

Ford Motor Company, Respondent.

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

Opinion No. 26754
Heard April 21, 2009 – Filed December 21, 2009

AFFIRMED IN RESULT

Karl S. Brehmer and L. Darby Plexico, III, both of Brown & Brehmer, Columbia, for Appellants Jeffrey M. Sapp, Jr. and Bryan D. Smith.

Curtis Lyman Ott and Carmelo B. Sammataro, both of Turner Padget Graham & Laney, of Columbia, for Respondent.

Ryan A. Earhart, Erin E. Richardson, and Patrick C. Wooten, all of Nelson, Mullins, Riley & Scarborough, of Charleston, for *amicus curiae* South Carolina Defense Trial Attorneys' Association.

CHIEF JUSTICE TOAL: In these consolidated appeals, the trial courts found the economic loss rule precluded Appellants' tort claims and granted judgment in favor of Respondent Ford Motor Company. We affirm the dismissal, and overrule *Colleton Preparatory Academy, Inc. v. Hoover Universal Inc.*, 379 S.C. 181, 666 S.E.2d 247 (2008) to the extent it expands the narrow exception to the economic loss rule articulated in *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989).

FACTUAL/PROCEDURAL BACKGROUND

I. *Sapp* Appeal

In 2004, Appellant Jeffrey M. Sapp purchased a 2000 Ford F-150 truck from Atlantic Coast Construction for $5,000. The truck had 190,000 miles on it at the time of sale and Sapp bought it "as is." On May 16, 2005, while Sapp was driving the truck, the cruise control stopped working, and the truck caught fire shortly after Sapp parked.

The fire did not injure Sapp or damage any property other than the vehicle itself. He filed a claim with his insurance company, and approximately three months later, the truck was repaired and returned to him. The repair costs were approximately $7,000.

Sapp filed suit against Ford alleging causes of action for negligence, strict liability, breach of warranty, and fraud/misrepresentation. Sapp alleged Ford knew of a design defect in the cruise control switch, which would short circuit and cause a fire in the engine compartment. The trial court granted summary judgment as to all causes of action and specifically found that the economic loss rule precluded the tort claims.

II. *Smith* Appeal

On January 31, 2006, Appellant Bryan D. Smith's 2000 Ford F-150 truck caught fire and was completely destroyed. Smith filed suit against Ford alleging causes of action for negligence, strict liability, breach of warranty, and negligent misrepresentation. Smith alleged Ford knew of the same design defect alleged in Sapp's complaint. The master-in-equity dismissed Smith's tort claims pursuant to the economic loss rule.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP. A judgment on the pleadings is proper where there is no issue of

fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor. *Russell v. City of Columbia,* 302 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

LAW/ANALYSIS

Appellants argue the trial courts erred in granting summary judgment based on the economic loss rule. We disagree.

The economic loss rule is a creation of the modern law of products liability. Under the rule, there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself. *Kennedy v. Columbia Lumber & Mfg. Co.,* 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989). In other words, tort liability only lies where there is damage done to other property or personal injury. *Id.*

The purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property. In the context of products liability law, when a defective product only damages itself, the only concrete and measurable damages are the diminution in the value of the product, cost of repair, and consequential damages resulting from the product's failure. Stated differently, the consumer has only suffered an economic loss. The consumer has purchased an inferior product, his expectations have not been met, and he has lost the benefit of the bargain. In this instance, however, the risk of product failure has already been allocated pursuant to the terms of the agreement between the parties. On the other hand, the parties have not bargained for the situation in which a defective product creates an unreasonable risk of harm and causes personal injury or property damage. Accordingly, where a product damages only itself, tort law provides no remedy and the action lies in contract; but when personal injury or other property damage occurs, a tort remedy may be appropriate.

In *Kennedy*, we held the economic loss rule does not preclude a homebuyer from recovering in tort against the developer or builder where the builder violates an applicable building code, deviates from industry standards, or constructs a house that he knows or should know will pose a serious risk of physical harm. Such an exception was and still remains necessary to protect homeowners. As explained in *Kennedy*, the mechanics of home purchasing have evolved and drastically changed over the past two hundred years and, accordingly, courts have shifted from following the doctrine of *caveat emptor* ("let the buyer beware") to the doctrine of *caveat venditor* ("let the seller beware").[1] A home is typically an individual's single largest investment and is a completely different type of manufactured good than any other type of product that a consumer will buy. Moreover, courts have recognized that the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power between the parties. For these reasons, we created this narrow exception to the economic loss rule to apply solely in the residential home context.

The rule announced in *Kennedy* followed a long line of South Carolina cases directed toward protecting consumers only in the residential home building context,[2] and we noted that this holding followed cases from around

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[1] A more complete history of the evolution of the law in this area, along with several additional useful sources, can be found at *Kennedy*, 299 S.C. at 342-44, 384 S.E.2d at 735-36.

[2] *See Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984) (holding that where the lender undertook to repair defects in the housing units in order to facilitate further sales, the lender could be held liable in tort for negligent repairs); *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980) (holding that a subsequent purchaser of a home may pursue a cause of action in contract or tort against a developer); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976) (holding that when a new building is sold, there is an implied warranty of fitness for its intended use which springs from the sale itself); *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970) (recognizing that a builder-vendor of a new home gives its purchasers an implied warranty of fitness); *Rogers v. Scyphers*, 251

the country expanding protections afforded to homebuyers and imposing tort liability on residential homebuilders.[3]

In *Colleton Preparatory Academy, Inc. v. Hoover Universal Inc.*, 379 S.C. 181, 666 S.E.2d 247 (2008), this Court was faced with the issue of whether to expand the *Kennedy* exception to the economic loss rule beyond the residential home building context to all manufacturers. The majority held that the economic loss rule will not preclude a plaintiff from filing a products liability suit in tort where only the product itself is injured when the plaintiff alleges breach of duty accompanied by a clear, serious, and unreasonable risk of bodily injury or death. The dissent argued that this decision not only broadly expanded the exception to the economic loss rule, but also completely altered the law on products liability in South Carolina. In our view, the traditional economic loss rule provides a more stable framework and results in a more just and predictable outcome in products liability cases. Accordingly, we overrule *Colleton Prep* to the extent it expands the narrow exception to the economic loss rule beyond the residential builder context.

Furthermore, like the dissent in *Colleton Prep*, we, too, are cautious in permitting negligence actions where there is neither personal injury nor property damage. Imposing liability merely for the creation of risk when there are no actual damages drastically changes the fundamental elements of a tort action, makes any amount of damages entirely speculative, and holds

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S.C. 128, 161 S.E.2d 81 (1968) (recognizing a builder's duty to refrain from constructing housing it knows or should know will pose a serious risk of physical harm).

[3] *See Huang v. Garner,* 203 Cal. Rptr. 800 (Cal. App. 1984); *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619 (Ind. 1976); *Village Cross Keys Inc. v. The United States Gypsum Co.*, 556 A.2d 1126 (Md. 1989); *Oates v. JAG, Inc.*, 333 S.E.2d 222 (N.C. 1985); *New Mea Construction Corp. v. Harper*, 497 A.2d 534 (N.J. 1985); *Sewell v. Gregory,* 371 S.E.2d 82 (W. Va. 1988).

the manufacturer as an insurer against all possible risk of harm. *Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 87, 374 S.E.2d 897, 905 (Ct. App. 1988).

The *Kennedy* opinion did not signal a watershed moment in products liability law in South Carolina, nor did it alter the application of the economic loss rule in products liability cases. The *Kennedy* court specifically noted that "[t]he 'economic loss rule' will still apply where duties are created *solely* by contract. In that situation, no cause of action in negligence will lie." *Kennedy*, 299 S.C. at 347, 384 S.E.2d at 737. Several opinions from the federal courts that were issued prior to *Kennedy* found South Carolina's economic loss rule precluded a negligence action against a manufacturer,[4] and subsequent cases found that, in light of and notwithstanding *Kennedy*, the economic loss rule prohibited negligence actions against a manufacturer where duties were created solely by contract and where the product only injured itself or where the damage was contemplated by the parties' contract.[5]

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[4] *See Laurens Electric Cooperative v. Altec Industries*, 889 F.2d 1323 (4th Cir. 1989) (prohibiting a products liability claim where the only injury sustained was to the product itself); *2000 Watermark Ass'n v. Celotex Corp.*, 784 F.2d 1183 (4th Cir. 1986) (prohibiting a tort claim against a defendant who negligently installed defective shingles pursuant to our economic loss rule); *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217 (4th Cir. 1982) (holding under South Carolina's economic loss rule, a tobacco farmer could not maintain an action against a barn manufacturer because his only injury was an economic loss to his tobacco crop and the barn itself).

[5] *See Palmetto Linen Service, Inc. v. U.N.X., Inc.*, 205 F.3d 126 (4th Cir. 2000) (upholding the dismissal of plaintiff's negligence claim pursuant to South Carolina's economic loss rule where defendant's chemical dispensing system harmed only plaintiff's linens because the destruction of the linens was a "natural and foreseeable result of a malfunction" and the parties contemplated this allocation of risk in their contract); *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027 (D.S.C. 1993), *aff'd*, 46 F.3d 1125 (4th Cir. 1995) (dismissing plaintiff's tort claim where defendant's product, an air eliminator, ruptured causing an oil spill because plaintiff's loss

We conclude the federal courts were correct in this regard.

At the time of our decision in *Kennedy*, we had no intention of the exception extending beyond residential real estate construction and into commercial real estate construction. Such a progression was in error and we now correct that expansion. Much less did we intend the exception to the economic loss rule to be applied well beyond the scope of real estate construction in an ordinary products liability claim. We emphasize the exception announced in *Kennedy* is a very narrow one, applicable only in the residential real estate construction context.

Turning to the merits of the instant appeals, we hold the trial courts properly granted judgment in favor of Ford on Appellants' tort claims. The only damage caused by the defect in the trucks was damage to the trucks themselves – purely an economic loss to Appellants. Therefore, the economic loss rule precludes Appellants' recovery in tort.

CONCLUSION

For the above reasons, we affirm the ruling of the trial courts.

PLEICONES and KITTREDGE, JJ., concur. WALLER, J., concurring in result only. BEATTY, J., concurring in result only in a separate opinion.

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was only to the defective air eliminator since plaintiff did not own the property which the defective air eliminator damaged).

JUSTICE BEATTY (concurring in result): I concur but write separately. This Court heralded a change in its view of the economic loss rule in Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989). The Court gave no indication that its new analytical framework was limited to residential housing construction. In proclaiming its new framework, the Court set about a review of the Court of Appeals' economic loss analysis in Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc., 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988). In rejecting the opinion of the Court of Appeals, this Court concluded that the traditional analysis of the economic loss rule was problematical. The Court, referring to the analysis of the Court of Appeals, stated:

> Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses. Conversely, where a purchaser buys a product which is defective and physically harms him, his remedy is in either tort or contract. This is so, the analysis provides, because his losses are more than merely "economic."
>
> **We find that this legal framework generates difficulties. This is so because the framework's focus is on consequence, not action.** Builder "A" and Builder "B" can be equally blameworthy, and build equally shoddy housing, but because Builder "A"'s negligence happened to be discovered early enough, no one was harmed. It hardly seems fair that Builder "A" should profit from a diligent buyer's discovery, or because he was fortunate.
>
> **The framework we adopt focuses on activity, not consequence.** If a builder performs construction in such a way that he violates a contractual duty *only*,

> then his liability is only contractual. If he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort.
>
> . . .
>
> A builder is no less blameworthy in such a case where lady luck has smiled upon him and no physical harm has yet occurred. **We discounted the necessity of showing physical harm in Terlinde**, 275 S.C. 395, 271 S.E.2d 768 (1980), in which we considered and declined to adopt arguments asserting the "economic loss" rule contained in the Terlinde briefs.

Kennedy, 299 S.C. at 345-46, 384 S.E.2d at 736-37 (emphasis added).

Today, this Court would overrule Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 379 S.C. 181, 666 S.E.2d 247 (2008).[i] Colleton adheres to the Kennedy analysis framework. If it is wrongly decided, then Kennedy should be overruled as well and this Court should simply say that the economic loss rule is not applicable to residential home building. Of course, this would not explain the negative treatment of the rule in other areas such as professional services. See Tommy L. Griffin Plumbing & Heating v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 88-89 (1995) (finding design professionals, including engineers, may have a duty separate and distinct from contractual duties such that the economic loss doctrine would not prohibit a tort action); Beachwalk Villas Condo. Ass'n v. Martin, 305 S.C. 144, 146-47, 406 S.E.2d 372, 374 (1991) (finding a special duty for architects); Lloyd v. Walters, 276 S.C. 223, 226, 277 S.E.2d 888, 889 (1981) (finding an attorney liable for economic loss to a corporate shareholder when attorney breached a duty to the corporation); but see McCullough v. Goodrich & Pennington Mortgage Fund, Inc., 373 S.C. 43, 53, 644 S.E.2d 43, 49 (2007) (rejecting the notion of a special duty in the secured transactions arena).

The inconsistent treatment of the doctrine, by use of varying analytical frameworks, does not provide the bench and bar guidance in the proper application of the doctrine. The Court should simply pronounce a list of areas to which public policy prohibits the application of the economic loss doctrine and forego any legal analysis.

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[i] Colleton Preparatory Academy, Inc. limited recovery to the cost of repair suffered by the plaintiff even in a tort action when there is no bodily injury. However, it did not require the plaintiff to wait until injury occurred to bring an action in tort.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gina L. Dervin, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARO

Appeal From Kershaw County
L. Casey Manning, Circuit Court Judge

Opinion No. 26755
Submitted November 18, 2009 – Filed December 21, 2009

REVERSED AND REMANDED

Appellate Defender Kathrine H. Hudgins, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Brian T. Petrano, all of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to perform an Austin v. State review of the denial of Petitioner Gina Dervin's application for post conviction relief (PCR). We reverse and remand for resentencing.

FACTS

Dervin was indicted for trafficking cocaine. The indictment alleged she had trafficked between 200-400 grams of cocaine. During her trial, the court twice instructed the jury that Dervin could be convicted of trafficking if she was in actual or constructive possession of ten grams or more of cocaine. The jury found her guilty.

At sentencing, Dervin requested the judge sentence her to the minimum possible sentence, to which the court responded:

> Trafficking in cocaine -- and in this case trafficking in cocaine in a substantial amount -- the amount in this case is from 200 grams – more than 200 grams but less than 400 grams. And that I will tell you is the second highest category or volume of traffic of cocaine provided for in the trafficking statute. . . .
>
> Our Legislature has mandated a sentence in a trafficking case, and that is a mandatory 25-year sentence and a mandatory $100,000 fine. So I have no choice other than to impose the sentence required by law.

Accordingly, Dervin was sentenced to twenty-five years and a $100,000 fine for trafficking. The Court of Appeals affirmed her convictions and sentences on direct appeal. State v. Dervin, Op. No. 2003-UP-484 (S.C. Ct. App. filed August 20, 2003).

Dervin's first PCR application was denied, and no appeal was filed. Dervin filed this subsequent PCR application in May 2007, alleging PCR counsel was ineffective in failing to appeal the denial of the first PCR application. The court held Dervin was entitled to a belated review of the

denial of her first application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), and we granted certiorari.

ISSUE

Was trial counsel ineffective in failing to object to Dervin's twenty-five year sentence for trafficking more than 200 grams of cocaine when the trial judge only charged the jury to consider whether petitioner was guilty of trafficking ten or more grams of cocaine?

DISCUSSION

Dervin contends trial counsel was ineffective in failing to object to imposition of a twenty-five year sentence for trafficking between 200-400 grams of cocaine, because the jury was only required to determine she trafficked ten or more grams of cocaine, but that it did not necessarily determine she possessed over 200 grams. Dervin contends the United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004) require the amount of drugs to be submitted to the jury to be proven beyond a reasonable doubt. We agree.

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000), the United State Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." See also Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (court explained that "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant).

The state asserts there is no Apprendi violation because the twenty-five year sentence imposed here is within the statutory maximum. While the state

is correct in asserting that S.C. Code Ann. § 44-53-370**(e)(2)(e)** permits up to a thirty year sentence and a $200,000 fine for trafficking over 400 grams of cocaine, the only amount actually charged to the jury here was that it could convict Dervin if it found she possessed "more than 10 grams." There is no indication in the jury's verdict that it found anything more than this amount. Accordingly, given the trial court's instruction, the applicable sentence for possession of ten grams falls under § 44-53-370**(e)(2)(a)(1)** and is a maximum of ten years and a $25,000 fine. Accord United States v. Booker, 543 U.S. 220 (2005) (statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant).

Due process requires the State to prove every element of a criminal offense beyond a reasonable doubt. State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004) (*citing* In re Winship, 397 U.S. 358 (1970)). A defendant, therefore, cannot "be exposed to a greater punishment than that authorized by the jury's guilty verdict." United States v. Page, 232 F.3d 536, 543 (6th Cir. 2000).

In Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Supreme Court reiterated its holding in Apprendi that, under the Sixth Amendment, all facts used to increase a defendant's sentence beyond the statutory maximum must be charged and proven to a jury. 542 U.S. at ----, 124 S.Ct. at 2536. The relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. Simpson v. United States, 376 F.3d 679 (7th Cir. 2004). See also United States v. Booker, 375 F.3d 508 (7th Cir. 2004). Under Blakely, the relevant statutory maximum "is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303-304, 124 S.Ct. at 2537.

We find the maximum permissible sentence here, pursuant to Apprendi and Blakely, is controlled by the amount which was specifically submitted to the jury, i.e., that it could convict Dervin of trafficking if it believed she

possessed ten or more grams of cocaine. Accordingly, the maximum sentence in the present case should have been that for trafficking between 10-28 grams, which is 3-10 years, and a $25,000 fine. Therefore, the trial court's imposition of a twenty-five year sentence for trafficking between 200-400 grams of cocaine violated Apprendi because the jury did not find beyond a reasonable doubt that Dervin possessed that amount of cocaine. Further, we find counsel was ineffective in failing to object to impostion of a 25 year sentence. We reverse the denial of PCR and remand for resentencing.[1]

REVERSED AND REMANDED FOR RESENTENCING.

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

[1] Although an Apprendi error may be deemed harmless, Washington v. Recuenco, 548 U.S. 212 (2006), we do not find the error harmless in the present case.

The Supreme Court of South Carolina

In re: Amendments to Rule 412, South Carolina Appellate Court Rules

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O R D E R

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The South Carolina Bar Foundation has proposed amending Rule 412, SCACR, which governs Interest on Lawyer Trust Accounts (IOLTA), to establish a more specific comparable interest rate rule for trust accounts governed by Rule 412. Following a public hearing, the Bar Foundation and the South Carolina Bankers Association agreed to a number of amendments, including a benchmark rate within Rule 412(c)(2)(B). The parties also agreed to a six month implementation period, so that financial institutions who choose to participate in IOLTA have sufficient time to implement changes to accounts and upgrade automated systems.

We grant the Bar Foundation's request to amend Rule 412, SCACR, as set forth in the attachment to this Order. The amendments shall be effective June 15, 2010.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

December 17, 2009

RULE 412
INTEREST ON LAWYER TRUST ACCOUNTS (IOLTA)

(a) Definitions. As used herein, the term:

(1) "Nominal or short-term" describes funds of a client or third person that, pursuant to section (d) below, the lawyer has determined cannot provide a positive net return to the client or third person;

(2) "Foundation" means the South Carolina Bar Foundation, Inc.;

(3) "IOLTA account" means a trust account benefiting the South Carolina Bar Foundation established in an eligible institution for the deposit of pooled nominal or short-term funds of clients or third persons. The account product may be an interest-bearing checking account; a money market account with or tied to check-writing; a sweep account which is a government money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by United States government securities; or an open-end money market fund solely invested in or fully collateralized by United States government securities.

(A) "Open-end money market fund" is a fund holding itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940 and, at the time of the investment, having total assets of at least $250,000,000.

(B) "United States government securities" are United States treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof, including obligations of Government Sponsored Enterprises.

(4) "Eligible Institution" means any bank or savings and loan association authorized by federal or state laws to do business in South

Carolina and insured by the Federal Deposit Insurance Corporation or any successor insurance corporation(s) established by federal or state laws.

(5) "Reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, Federal deposit insurance fees, sweep fees and a reasonable IOLTA account administrative fee.

(b) Attorney Participation.

(1) All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of the South Carolina Bar practicing law from an office or other business location within the state of South Carolina shall be deposited into one or more IOLTA accounts, except as provided in Rule 1.15 of Rule 407, South Carolina Appellate Court Rules, with respect to funds maintained other than in a bank account and as provided in section (i) below.

(2) A law firm of which the lawyer is a member may maintain the account on behalf of any or all lawyers in the firm.

(c) Depository Procedures.

(1) The IOLTA account shall be established with an eligible institution that voluntarily chooses to participate. Funds deposited in each IOLTA account shall be subject to withdrawal upon request and without delay, subject only to any notice period which the institution is required or permitted to reserve by law or regulation and as provided in Rule 1.15 regarding safekeeping of client property.

(2) The rate of interest or dividends payable on any IOLTA trust account shall be no less than:

(A) the highest interest rate or dividend generally available from the institution to its non-IOLTA customers for each IOLTA account that meets the same minimum balance or other eligibility

qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, the institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers if such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and these factors do not include that the account is an IOLTA account. The institution also shall consider all product option types noted at (a)(3) for an IOLTA account offered by the financial institution to its non-IOLTA customers by either establishing the applicable product as an IOLTA account or paying the comparable interest rate or dividend on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product; or

(B) an eligible institution may choose to pay a rate equal to the greater of 0.65% or 65% (the "index") of the Federal Funds Target Rate (the "benchmark") as of the first business day of the IOLTA remitting period, which rate is deemed to be net of reasonable fees, on an IOLTA checking account. The index and benchmark are determined periodically, but not more frequently than every six months, by the Foundation to reflect an overall comparable rate for the South Carolina Bar Foundation. When applicable, the Foundation will express its benchmark in relation to the Federal Funds Target Rate.

(3) Eligible institutions may choose to pay rates higher than comparable rates described at (c)(2) above.

(d) Determination of Nominal or Short-Term Funds.

(1) The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short-term. Client or third person funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can earn income for the client in excess of the costs incurred to secure such income.

In the exercise of this good faith judgment and determining whether a client's funds can earn income in excess of costs of securing that income for the benefit of the client or third person, and thus provide a positive net return to the client or third person, the lawyer or law firm shall consider the following factors:

(A) the amount of funds to be deposited;

(B) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(C) the rates of interest or yield at financial institutions where the funds are to be deposited;

(D) the cost of establishing and administering non-IOLTA accounts for the benefit of the client or third person, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the benefit of the client or third person;

(E) the capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients or third persons; and

(F) any other circumstances that affect the ability of the client's or third persons' funds to earn a net return for the client or third person.

The lawyer or law firm shall review its IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

(2) The determination of whether a client's or third person's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with ethical impropriety based on the exercise of such good faith judgment.

(3) Notification to the client is not required nor shall the client or third person have the power to elect whether nominal or short-term funds shall be placed in the IOLTA account.

(4) The provisions of section (c) shall not relieve a lawyer or law firm from an obligation imposed by Rule 1.15 of the Rules of Professional Conduct with respect to safekeeping of client property.

(e) IOLTA Refund Procedures. The Foundation shall establish procedures for the processing of refund requests for such instances as bank or lawyer error.

(f) Notice to Foundation. Lawyers or law firms shall advise the Foundation, at Post Office Box 608, Columbia, SC 29202-0608, by facsimile at (803) 779-6126, or in such other manner as the Foundation publishes in its materials is acceptable, of the establishment and closing of an IOLTA account for funds covered by this rule. Such notice shall include: the name of the institution where the IOLTA account is established; the IOLTA account number as assigned by the institution; the institution address; and the name and South Carolina Bar attorney number of the lawyer, or of each member of the South Carolina Bar in a law firm, practicing from an office or other business location within the state of South Carolina that has established the IOLTA account.

(g) Certification. Each member shall certify annually on the member's license fee statement submitted pursuant to Rule 410, South Carolina Appellate Court Rules, that the member is in compliance with the provisions of this rule or, pursuant to section (i) below, has been approved by the Foundation as exempt from the provisions of this rule.

(h) Remittance and Reporting Instructions. A lawyer or law firm depositing client funds in an IOLTA account shall direct the depository institution to:

(1) calculate and remit interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the

account or as otherwise computed in accordance with the institution's standard accounting practice, monthly to the Foundation, which shall be the sole beneficial owner of the interest or dividends generated by the accounts;

(2) transmit monthly to the Foundation a report, listing by account the name of the lawyer or law firm for whom each remittance is made, the lawyer's or law firm's IOLTA account number as assigned by the institution, the rate and type of interest or dividend applied, the average account balance for the reporting period or the other amount from which interest or dividends are determined, the amount of each remittance, and the amount and type of any service charges or fees assessed during the remittance period, and the net amount of interest remitted for the period;

(3) transmit at least quarterly to the depositing lawyer or law firm, a report or statement in accordance with normal procedures for reporting to its depositors.

"Reasonable fees" as defined in (a)(5) may be deducted from interest or dividends on an IOLTA account provided that such charges or fees shall be calculated in accordance with an eligible institution's standard practice for non-IOLTA customers. No other fees or charges shall be assessed against the interest on an IOLTA account, but rather shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. Fees or charges in excess of the interest or dividend earned on the account for any month shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account. Eligible institutions may elect to waive any or all fees on IOLTA accounts.

(i) Exempt Accounts. The Foundation will establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short-term when the lawyer's or law firm's account cannot reasonably be expected to produce or has not produced over time an interest income net of reasonable service charges or fees.

(j) Program Administration. The Foundation shall, in accordance with its charter and by-laws, receive, administer, invest, disburse and separately account for all funds remitted to it through this program.
Last amended by Order dated December 17, 2009, and effective June 15, 2010.

The Supreme Court of South Carolina

In re: Amendments to Rule 608, South Carolina Appellate Court Rules

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ORDER

In 2009, the South Carolina Bar submitted proposed amendments to Rule 608, SCACR. The Court declined to amend the rule as requested by the Bar; however, the Court requested the South Carolina Access to Justice Commission study Rule 608 and determine whether amendments to the rule were necessary.

The Access to Justice Commission formed a study group,[1] which made numerous recommendations concerning amendments to Rule 608. The Commission believes its proposed amendments will create a more equitable system of

[1] The Court would like to express its gratitude to the members of the study group, who expended a great deal of time and effort in studying Rule 608 and making recommendations to the Court.

appointments. After review, the Court has elected to adopt a number of the recommended amendments. Specifically, the Court has redrawn the regional list from which attorneys may be selected to assist in handling appointments in other counties; reduced the number of appointments an attorney may be required to handle in an appointment year; raised the age exemption for attorneys to increase the pool of available lawyers; permitted lawyers to attend certain hearings by telephone or videoconference; and amended Rule 608(i) to require more detailed and specific reporting of the numbers and types of appointments by clerks of court to the Bar.

The Court is mindful of the burden placed on some attorneys where appointments are required. Therefore, the Court will continue to analyze and scrutinize appointments in the trial courts to determine whether further changes to the rule are necessary. The Court believes strongly that the amendments

to Rule 608(i), which require more detailed statistics concerning appointments, will aid the Court in determining whether further changes are necessary.

Rule 608, SCACR, is amended as set forth in the attachment to this Order. The changes are effective July 1, 2010, the start of the next reporting year.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
December 17, 2009

RULE 608
APPOINTMENT OF LAWYERS FOR INDIGENTS

(a) Purpose. This rule provides a uniform method of managing the appointment of lawyers to serve as counsel for indigent persons in the circuit and family courts pursuant to statutory and constitutional mandates.

(b) Terminology. The following terminology is used in this rule:

(1) Active Member: Any active member of the South Carolina Bar as defined by the Bylaws of the Bar. For the purpose of this rule, a person holding a limited certificate to practice law in South Carolina shall not be considered an active member.

(2) Appointment Year: The period from July 1 to June 30.

(3) Supreme Court: The Supreme Court of South Carolina.

(4) Indigent: Any person who is financially unable to employ counsel. In making a determination of indigency, all factors concerning the person's financial condition should be considered including income, debts, assets, and family situation. A presumption that the person is indigent shall be created if the person's net family income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions required by law.

(5) Death Penalty Case: Any criminal case in which the solicitor has given notice of the intent to seek the death penalty and any post-conviction relief action challenging a proceeding in which a death sentence was imposed.

(6) Family Member: A spouse, child, grandchild, parent, grandparent, or other person with which the member maintains a close familial relationship.

(c) Lists.

(1) For each appointment year, the South Carolina Bar shall prepare two lists for each county:

(A) Criminal List. A list of all active members who have been certified by the Supreme Court to serve as lead counsel in death penalty cases (see Rule 421, SCACR) who are eligible for appointment in the county, and all other active members who normally represent at least three (3) clients before the court of general sessions during a calendar year and are eligible for appointment in the county. The list shall indicate which members are death penalty certified as lead counsel, the date on which each member was admitted to practice law in South Carolina, and whether the member has completed or is exempt from the trial experiences required by Rule 403, SCACR. This list shall be used to appoint counsel for indigents in death penalty cases [see (b)(5) above] and criminal cases, including juvenile delinquency matters.

(B) Civil List. A list of all other active members eligible for appointment in the county. This list shall indicate the date on which each member was admitted to practice law in South Carolina, and whether the member has completed or is exempt from the trial experiences required by Rule 403, SCACR. This list shall be used for the appointment of counsel for indigents in all cases other than those specified in (A) above, including post-conviction relief matters that are not death penalty cases.

These lists shall be arranged alphabetically and shall be provided to the county clerks of court at least thirty (30) days prior to the beginning of the appointment year. In compiling the lists, the South Carolina Bar shall place each lawyer's name on a list in the county designated in (c)(2)(A). The lawyer's name shall also be placed on a list in one of the counties designated in (c)(2)(B), in the

discretion of the South Carolina Bar, to meet the needs of counties which require additional lawyers for appointment.

(2) Active members shall, at the time of payment of annual license fees to the South Carolina Bar, provide the following information to the Bar:

(A) the county in which they primarily practice in South Carolina or, if they do not practice law in South Carolina, the county in which they reside in South Carolina;

(B) all counties in which they maintain an office, provide a significant amount of legal services, or disseminate advertisements via television, radio, billboards, newspapers, magazines, or telephone directories;

(C) whether they are certified by the Supreme Court to serve as lead counsel in a death penalty case;

(D) if they are not death penalty certified as lead counsel, whether their names should be placed on the criminal or civil list based on the criteria given in (c)(1) above;

(E) if admitted after March 1, 1979, whether they have completed the trial experiences required by Rule 403, SCACR; and

(F) the number of appointments they received in the reporting year, the number of appointments still pending at the close of the reporting year, and the total number of hours expended on appointments in the reporting year.

(3) Active members shall notify the South Carolina Bar within thirty (30) days of any changes in the county in which they reside, primarily practice, maintain an office, provide a significant amount of legal services, or advertise as defined in (2)(B). Active members who wish to provide service to indigents in additional counties shall notify the Bar with the name of the additional county at the time of payment of annual license fees.

The Bar shall transfer the names of those members to the appropriate list(s) and notify the appropriate clerk(s) of court.

(4) If a member ceases to be an active member, the Bar shall delete that member's name from the list(s) and notify the appropriate clerk(s) of court.

(5) If a member becomes certified to serve as lead counsel in a death penalty case, the member shall, within thirty (30) days of the date of the certification, notify the South Carolina Bar. If not already on the criminal list(s), the Bar shall transfer the member's name to the criminal list(s). The Bar shall notify the appropriate clerk(s) of court of the certification and any transfer.

(6) If a member would, due to conflicts of interest, be prevented from accepting cases in a county in which the member would be subjected to appointment under (c)(2), the member will designate a county in which the conflicts will not arise.

(d) Active Members Who Are Exempt from Appointment.

(1) The following active members shall be exempt from appointment:

(A) Members who are prohibited by federal or state law from taking such appointments. While not intended to be an exclusive list, this includes:

(i) Law Clerks and Staff Attorneys for the Judicial Department under Canon 5(D), Rule 506, SCACR.

(ii) Public Defenders who are prohibited from engaging in any private practice of law under S.C. Code Ann. § 17-3-580(A).

(iii) Appellate Defenders who are prohibited from engaging in the private practice of law by S.C. Code Ann. §§ 17-4-40 and -50.

(B) Members who are solicitors or assistant solicitors for a judicial circuit if those members do not engage in the private practice of law.

(C) Members who are employed by the Office of the South Carolina Attorney General or by the United States Attorney if those members do not engage in the private practice of law.

(D) Members who are employed by any court of this state or by any Federal Court if those members do not engage in the private practice of law.

(E) Members who are employed by the South Carolina Administrative Law Court or by any Federal Administrative Law Judge if those members do not engage in the private practice of law.

(F) Members who are engaged in providing legal assistance supported in whole or in part by the Legal Services Corporation established under 42 U.S.C. § 2996a if those members do not engage in the private practice of law outside that program.

(G) Members who have been admitted to practice law in this State or another jurisdiction for thirty-five (35) years or have attained sixty-five (65) years of age.

(H) Members who have neither an office nor a principal residence in this State, and who do not engage in the private practice of law in this State.

(I) Members who are full time employees of the United States to include members employed by the armed forces of the United States. To be exempt, these members may not engage in the private practice of law in this State.

(J) Members who are full time employees of the State of South Carolina, or a political subdivision of the State, to

include counties, school districts, municipalities, and public service districts. To be exempt, these members may not engage in the private practice of law in this State.

(K) Members who are full time care givers for a family member and do not derive any income from the practice of law in this State.

(L) Members who have been designated pursuant to S.C. Code Ann. § 63-11-500 to represent guardians ad litem in Department of Social Services cases. Each qualifying program may designate up to two members in each county and these members are expected to provide representation in all such cases unless there is a conflict or other good cause for not providing the representation.

(M) Members who are serving as members or associate members of the Board of Law Examiners.

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

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

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

(2) For the purpose of determining if a member is exempt, members shall not be considered to have engaged in the private practice of law by volunteering for an appointment under section (h)(1), by representing an indigent as part of the pro bono program of the South Carolina Bar, or by providing legal services for themselves or a family member as long as the services are provided without compensation.

(3) Active members shall claim an exemption at the time they file with the Bar under section (c)(2) above. The claim for exemption must be accompanied by sufficient information to

confirm that the lawyer is in fact eligible for exemption. The Bar shall determine if the member is exempt or non-exempt.

(4) A member who is denied an exemption by the Bar may seek review of that determination by filing a petition with the Supreme Court within ten (10) days of receiving notice of the Bar's determination. The petition shall comply with the requirements of Rule 240, SCACR, including the filing fee required by that rule.

(5) If an active member is non-exempt and becomes exempt, or is exempt and becomes non-exempt, the member shall notify the Bar of this change in status within thirty (30) days of the change. Any member claiming to have become exempt shall provide the Bar with sufficient information to confirm that the member is in fact eligible for exemption. The Bar shall add to, or delete from, the appropriate list the name of the member and notify the appropriate clerks of court of any additions or deletions.

(e) Active Members Who Have Not Completed the Trial Experiences Required by Rule 403, SCACR. An active member who has not completed the trial experiences required by Rule 403, SCACR, but has been admitted to practice law in South Carolina for six months or more, shall be fully eligible for appointment under this rule, and, at his or her expense, will be expected to associate another lawyer if necessary to carry out the appointment.

(f) Appointments, Process of Appointments, and Relief from Appointments.

(1) Appointments

(A) Lead Counsel in Death Penalty Cases. The appointment of a lead counsel to represent an indigent defendant in a death penalty case shall be made from the list of members specified in (c)(1)(A) above who have been death penalty certified as lead counsel by the Supreme Court; provided, however, that lawyers who are not

certified may be appointed as lead counsel in a post-conviction relief action for a death-sentenced inmate if they have previously represented a death-sentenced inmate in a state or federal post-conviction relief proceeding as provided by S.C. Code Ann. § 17-27-160.

(B) Other Criminal Cases. The appointment of counsel in all other criminal cases, including juvenile delinquency matters, shall be made from the criminal list specified in (c)(1)(A) above. A member who is death penalty certified may be appointed to a non-death penalty case.

(C) All Other Cases. The appointment of members as counsel in all other cases, including post-conviction relief matters that are not death penalty cases, shall be made from the civil list specified in (c)(1)(B).

(2) Appointment Process

(A) Sequence of Appointments. Appointments shall be made beginning with the name of the member whose name would follow that of the last person appointed alphabetically on the list for the preceding year and shall thereafter proceed alphabetically down the list unless there is good reason, as determined by the clerk of court or the judge, to alter the sequence. A good reason for altering the sequence may include, but is not limited to, the necessity to obtain a lawyer with sufficient experience to serve as second counsel in a capital case, when a reason for disqualification is known at the time the appointment is being made, or when a deviation is necessary to insure that counsel is competent to handle the matter. Once the end of the list is reached, appointments will be made from the beginning of the list.

(B) Notification of Appointment. Once appointments have been made, the clerk of court shall mail a copy of the

order of appointment to the attorney within two business days and notify the attorney electronically where feasible.

(C) Documenting Appointments. Upon making an appointment, the clerk of court shall:

(i) promptly mark the names of those members who have received appointments; and

(ii) promptly record the total number of appointments the member has received in the county during the appointment year.

(3) Relief from Appointments. If a member is unable to serve for any reason, the member shall, within five (5) days of the date of receipt of the order of appointment, file a motion to be relieved with the clerk of court. A member who becomes aware of a reason for being relieved after the expiration of the five (5) day period shall promptly file a motion to be relieved with the clerk of court.

The Chief Judge for Administrative Purposes of the court before which the matter is pending shall then consider the request to be relieved and may relieve the member if the judge finds good cause to do so.

If relieved, the member shall not receive credit for the appointment unless the order relieving the member affirmatively finds that the member has substantially performed the responsibilities of the appointment prior to being relieved.

(4) Limitations on Numbers of Appointments

(A) Number of Appointments in a County per Month. A member will not receive more than one (1) appointment in any county during a calendar month. Once all of the members on a list have received one (1) appointment in a calendar month, the county clerk of court will contact the

clerk in the Lead Regional County identified in the table below. The clerk from the Lead Regional County will provide the next names available for appointment from the list in that county and note that those members have received appointments from other Counties in the Region. The clerk will provide sufficient names to cover the pending appointments.

(B) Death Penalty Cases. A member who receives an appointment as lead or second counsel in a death penalty case shall be exempt from being appointed to another death penalty case until six (6) months after the date of sentencing or, if the matter does not result in a sentence, the date when the case ends. When a member is appointed as lead or second counsel in a death penalty case, the clerk shall mark the list to reflect the period of exemption. Although a member may be temporarily exempt from further death penalty appointments, nothing shall prevent the member from volunteering for an appointment under (h)(1) below.

(C) A member who receives an appointment as an attorney to protect under Rule 31, Rules for Lawyer Disciplinary Enforcement, contained in Rule 413, SCACR, or receives an assignment to investigate a matter as an attorney to assist disciplinary counsel under Rule 5(c), Rules for Lawyer Disciplinary Enforcement, shall receive credit for the appointment under this rule. The Office of Disciplinary Counsel shall notify the appropriate clerk of court of the appointment, and the clerk shall mark the list to reflect the appointment. If the member is relieved of this appointment before it is substantially completed, the Supreme Court or the Office of Disciplinary Counsel shall notify the clerk so that the credit may be withdrawn.

(5) Number of Appointments per Year. A member will be subject to no more than seven (7) appointments during an

appointment year. After each member on the list has received seven (7) appointments, the county clerk of court will contact the clerk in the Lead Regional County identified at the end of this section. The clerk from the Lead Regional County will provide the next names available for appointment from the list in that county and note that those members have received appointments from other counties in the Region. The clerk will provide sufficient names to cover the pending appointments. After members in the Lead Regional County have received seven (7) appointments, members in the other counties in that Region shall receive appointments until all members in the Region have received seven (7) appointments. If further appointments in a Region are needed, other Lead Regional Counties should be contacted to provide names for appointments, beginning with the next closest Lead Regional County.

County Designations

Region	Lead Regional County	Other Counties in the Region
1	Beaufort	Allendale, Bamberg, Barnwell, Hampton, Jasper
2	Charleston	Berkeley, Clarendon, Colleton, Dorchester, Orangeburg, Williamsburg
3	Greenville	Abbeville, Anderson, Cherokee, Greenwood, Laurens, Oconee, Pickens, Spartanburg, Union
4	Lexington	Aiken, Edgefield, McCormick, Saluda
5	Richland	Calhoun, Chester, Chesterfield, Darlington, Fairfield, Kershaw, Lancaster, Lee, Marlboro, Newberry, Sumter, York

6	Horry* (Florence and Horry Counties will split appointments in Dillon County. From January 1 through June 30, Florence County will supply overflow attorneys to Dillon County. From July 1 through December 31, Horry County will supply overflow attorneys to Dillon County.	Dillon, Florence*, Georgetown, Marion

(6) A member who has received an appointment in a county other than the county in which the attorney primarily practices or resides may receive authorization to be present by telephone or, where available, by videoconference for hearings. This provision does not apply to evidentiary hearings.

(g) Minimizing Appointments.

(1) The unnecessary appointment of lawyers to serve as counsel places an undue burden on the lawyers of this State. Before making an appointment, a circuit or family court judge must insure that the person on whose behalf the appointment is being made is in fact indigent. Further, a lawyer should not be appointed as counsel for an indigent unless the indigent has a right to appointed counsel under the state or federal constitution, a statute, a court rule, or the case law of this State.

(2) A lawyer should only be appointed as counsel under this rule when counsel is not available from some other source. For example, an appointment under the rule for a criminal defendant should not be made when there is a public defender available to take the appointment.

(h) Volunteers and Substitute Counsel.

(1) Nothing in this rule shall prohibit a circuit or family court judge from appointing an active member or any other category of member of the South Carolina Bar who may lawfully provide the representation if the member volunteers to represent an indigent. A lawyer may volunteer for an appointment at any time regardless of whether the lawyer has completed the maximum number of appointments provided by (f)(4) or (f)(5) above.

(2) Nothing in this rule shall prevent an appointed lawyer from obtaining a substitute counsel to take the appointment as long as the substitute counsel is eligible to take the appointment and the substitution is approved by the circuit or family court. If the substitution is approved, only the member who originally received the appointment shall receive credit for the appointment.

(i) Records. Any records maintained by the South Carolina Bar, the circuit court, the family court, or a clerk of court relating to appointments under this rule shall be made available for review by any active member upon written request of that member. The clerk of court in each county shall, quarterly, furnish the South Carolina Bar with a list setting forth the total number of appointments and the type of each appointment made by the clerk of court in that quarter. Specifically, the clerk of court of each county shall report, on a form prepared by the South Carolina Bar:

(1) the total number of lawyers appointed, transferred to, or received from other counties pursuant to (f)(5).

(2) the type of appointments made, including the total number of appointments in:

(A) death penalty matters in the court of general sessions;
(**B)** general criminal matters in the court of general sessions;
(**C)** post-conviction relief matters in the court of common pleas;

(**D)** sexually violent predator matters in the court of commons pleas;
(**E)** juvenile delinquency matters in the family court;
(**F)** family court matters, to include whether the member was appointed as counsel for a parent, child, or guardian ad litem;
(G) any other type of appointment.

Last amended by Order dated December 17, 2009, and effective July 1, 2010.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lee B. Jeffrey, Sr., Amicus Curiae,

v.

Sunshine Recycling, Employer, and Capital City Insurance, Alleged Carrier, and South Carolina Uninsured Employers' Fund, Defendants,

of whom Sunshine Recycling and South Carolina Uninsured Employers' Fund are the Appellants,

and Capital City Insurance, Alleged Carrier is the Respondent.

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

Opinion No. 4626
Heard September 2, 2009 – Filed October 28, 2009
Withdrawn, Substituted and Refiled December 18, 2009

REVERSED

Robert Merrell Cook, II, of Batesburg-Leesville, for Appellants.

Grady L. Beard and Daniel W. Hayes, both of Columbia, for Respondent.

Preston McDaniel, of Columbia, for Amicus Curiae.

LOCKEMY, J.: Sunshine Recycling (Sunshine) and the South Carolina Uninsured Employers' Fund (UEF) appeal the circuit court's reversal of the Appellate Panel of the South Carolina Workers' Compensation Commission's (Appellate Panel) finding that Capital City Insurance (Capital City) was the workers' compensation insurance carrier for Sunshine when Lee B. Jeffrey, Sr. was injured. Specifically, Sunshine and UEF argue the circuit court erred in (1) incorrectly applying the substantial evidence rule; (2) failing to give proper deference to the Appellate Panel's coverage determination when that determination is exclusively within the purview of the Appellate Panel per Labouser v. Harleysville Mutual Ins. Co., 302 S.C. 540, 397 S.E.2d 526 (1990); and (3) failing to find as an additional sustaining ground for upholding the Appellate Panel's coverage determination that Capital City was estopped to deny coverage. We reverse the circuit court's determination that the Appellate Panel lacked substantial evidence in finding Capital City reinstated Sunshine's insurance policy without a lapse in coverage.

FACTS

Sunshine was insured by Capital City under a policy of workers' compensation coverage. The effective dates of coverage for Sunshine's policy were April 2, 2002 to April 2, 2003. On August 2, 2002, Capital City issued a policy termination notice to Sunshine, which cancelled Sunshine's policy due to nonpayment of premium effective September 6, 2002. Sunshine subsequently paid the premium due and on September 26, 2002, Capital City issued a reinstatement notice to Sunshine stating that its policy was reinstated effective September 25, 2002. In December 2002, Jeffrey

filed an amended Form 50 with the Commission reporting an injury he sustained while employed by Sunshine on September 11, 2002 and requesting a hearing. Jeffrey listed Capital City as the workers' compensation insurance carrier for Sunshine at the time of his injury.

In January 2003, Capital City filed a motion to add UEF as a party to this action. Capital City argued Sunshine's policy was cancelled due to nonpayment of premiums effective September 6, 2002 and it was not the insurance provider for Sunshine on September 11, 2002. In making its cancellation argument, Capital City relied upon the South Carolina Workers' Compensation Assigned Risk Plan Operating Rules and Procedures (Assigned Risk Plan) promulgated by the National Council on Compensation Insurance. The single commissioner ordered UEF added as a party, finding that due to a lapse in coverage, Capital City was not the insurance provider for Sunshine on September 11, 2002. Following the single commissioner's ruling, the parties entered into a consent order and agreed to vacate the single commissioner's order and add UEF as a party. Additionally, Sunshine and UEF withdrew their appeals to the Appellate Panel.

In January 2004, a different single commissioner held the underlying hearing in this matter. The single commissioner found Jeffrey sustained a compensable injury by accident to his back on September 11, 2002, while employed with Sunshine. The single commissioner further determined that although Capital City had properly cancelled the insurance policy of Sunshine due to nonpayment of premiums, the policy was reinstated with no lapse in coverage. The single commissioner found the reinstatement notice lacked clear and unambiguous language indicating the precise dates during which a lapse occurred. Furthermore, the single commissioner specifically noted that the reinstatement notice made no reference to the policy being reinstated with a lapse in coverage. Capital City appealed the single commissioner's order to the Appellate Panel. The Appellate Panel affirmed the single commissioner's determination that coverage applied with no lapse under the reinstated Capital City policy. However, the Appellate Panel reversed the single commissioner's award with regard to Jeffrey's entitlement to compensation. The Appellate Panel determined the settlement of Jeffrey's prior back claim had the same effect as an order, decision, or award, and therefore, Jeffrey was not entitled to additional compensation.

Jeffrey and Capital City appealed the Appellate Panel's order to the circuit court. The circuit court reversed the Appellate Panel's determination regarding coverage, holding Capital City was not the insurance carrier for Sunshine on September 11, 2002. Additionally, the circuit court remanded the case to the Appellate Panel to determine whether Jeffrey sustained a compensable injury by accident. Sunshine and UEF appealed.

STANDARD OF REVIEW

The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a workers' compensation decision. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005). "In an appeal from the [Appellate Panel], neither this court nor the circuit court may substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). "Any review of the [Appellate Panel's] factual findings is governed by the substantial evidence standard." Id. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Liberty Mut. Ins., 363 S.C. at 620, 611 S.E.2d at 300. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Id.

LAW/ANALYSIS

I. Substantial Evidence Rule

Sunshine and UEF argue the circuit court erred in its application of the substantial evidence rule. Specifically, Sunshine and UEF contend the record contained substantial evidence to support the Appellate Panel's finding that Sunshine's insurance policy with Capital City was reinstated without a lapse in coverage. We agree.

The circuit court found the Appellate Panel lacked substantial evidence in finding Capital City provided workers' compensation coverage to Sunshine at the time of Jeffrey's injury. Citing Section II.D.5 of the Assigned Risk Plan, the circuit court found the Assigned Risk Plan did not require the specific dates of the lapse be included in the reinstatement notice. The circuit court found the reinstatement notice only had to note that a lapse had occurred. The circuit court concluded Capital City advised Sunshine coverage had lapsed because the reinstatement notice stated that its policy would be reinstated effective September 25, 2002.

Sunshine and UEF contend the reinstatement notice failed to specifically identify any lapse in coverage. According to Section II.D.5 of the Assigned Risk Plan, "if a reinstatement notice is issued, any lapse in coverage must be clearly stated on the notice." The reinstatement notice issued to Sunshine stated Capital City reinstated its policy effective September 25, 2002. Sunshine and UEF contend the notice is void of any reference to any period during which a lapse in coverage occurred. They argue that while the circuit court asserted the Appellate Panel lacked substantial evidence in finding coverage had not lapsed, the circuit court failed to provide any reasoning for its finding. Sunshine and UEF contend the circuit court did not find the Appellate Panel made a specific error. Rather, they argue the circuit court merely had a different interpretation of the reinstatement notice. They assert the substantial evidence rule requires the circuit court to accept the Appellate Panel's findings if substantial evidence supported them.

Applying the rules set forth in the Assigned Risk Plan, Capital City contends the policy did not cover Sunshine at the time of Jeffrey's accident because Sunshine failed to pay its premium until after the date of cancellation, resulting in a lapse in coverage. According to Section II.D.5 of the Assigned Risk Plan, "if an item correcting a fault which resulted in cancellation is received on or within sixty (60) days after the effective date of cancellation, the carrier shall reinstate insurance with a lapse in coverage." Furthermore, Capital City contends the Appellate Panel's decision appears to be based on the testimony of Gary Smith, the director of the Commission's Coverage and Compliance Division. Smith testified that while coverage had

lapsed, he believed coverage would have still been in effect under Capital City's policy because "for years what we have done is we have treated reinstatement as a restoration of an insurance policy, a complete restoration of an insurance policy, without a lapse in coverage." Capital City argues the Appellate Panel relied on Smith's testimony and failed to take judicial notice of the Assigned Risk Plan. Capital City cites Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005), and Avant v. Willowglen Academy, 367 S.C. 315, 626 S.E.2d 797 (2006), to support its assertion that the Assigned Risk Plan governs the issue of whether a lapse in coverage occurred.

While Capital City contends the Appellate Panel failed to acknowledge the applicability of the Assigned Risk Plan, evidence in the record suggests otherwise. The single commissioner applied the language of the Assigned Risk Plan in finding the reinstatement notice did not clearly state the policy had lapsed and the Appellate Panel affirmed this decision. Furthermore, nothing in the Appellate Panel's order indicates its decision was based on Smith's testimony or that it did not apply the Assigned Risk Plan.

Substantial evidence in the record supported the Appellate Panel's finding that the reinstatement notice did not clearly state coverage had lapsed. While Section II.D.5 of the Assigned Risk Plan states a carrier shall reinstate coverage with a lapse when an item correcting a fault that resulted in cancellation is received within sixty days after cancellation, Section II.D.5 further states that any reinstatement notice issued must clearly state any lapse in coverage. As the single commissioner noted, the reinstatement notice did not include clear and unambiguous language indicating the policy was reinstated with a lapse. The Assigned Risk Plan requires any lapse be clearly stated "on the notice." The reinstatement notice stated that the policy effective dates were "4/02/02" through "4/02/03"; however, the notice did not mention a lapse from September 6, 2002 to September 25, 2002, during which Jeffrey's injury occurred. The reinstatement notice did not even mention the September 6 cancellation date.

Moreover, witness testimony indicates the reinstatement notice did not clearly indicate coverage had lapsed. Gary Smith testified that a reasonable person could not tell from looking at the reinstatement notice whether coverage had lapsed. While the circuit court had a different interpretation of

the reinstatement notice, the possibility of drawing two different conclusions from the evidence does not prevent the Appellate Panel's findings from being supported by substantial evidence. See Liberty Mut. Ins., 363 S.C. at 620, 611 S.E.2d at 301. Furthermore, workers' compensation statutes and regulations should be liberally construed in favor of finding coverage and the Appellate Panel should be given great deference in determining coverage. Earl v. HTH Assoc., Inc./Ace Usa Insurance Co. of N. Am., 368 S.C. 76, 81, 627 S.E.2d 760, 762 (Ct. App. 2006). Therefore, the record contains substantial evidence to support the Appellate Panel's finding coverage had not lapsed. Accordingly, we reverse the circuit court's finding that Capital City was not the insurance provider for Sunshine at the time of Jeffrey's injury.

II. Remaining Issues

Sunshine and UEF also argue the trial court erred in (1) failing to give proper deference to the Appellate Panel's coverage determination when that determination was exclusively within the purview of the Appellate Panel per Labouser v. Harleysville Mutual Ins. Co., and (2) failing to find as an additional sustaining ground for upholding the Appellate Panel's coverage determination that Capital City was estopped to deny coverage. Based upon our determination substantial evidence supported the Appellate Panel's finding on coverage, we don't address these issues. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

The circuit court erred in determining the Appellate Panel lacked substantial evidence in making its finding that Capital City was Sunshine's workers' compensation insurance provider on September 11, 2002. Accordingly, the circuit court's determination that Capital City was not the workers' compensation insurance provider for Sunshine at the time of Jeffrey's injury is

REVERSED.[1]

HEARN, C.J., and KONDUROS, J., concur.

[1] Per the circuit court's order, the issue of whether Jeffrey sustained a compensable injury is remanded to the Appellate Panel, as this issue was not presented to us on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Plantation A.D., LLC,	Appellant,
v.	
Gerald Builders of Conway, Inc., and Jimmy Gerald, Individually, and as President of Gerald Builders of Conway, Inc.,	Respondents,
of whom Gerald Builders of Conway, Inc., is	Third-Party Plaintiff,
v.	
Scott Pyle, ABD Development Inc. and Wachovia Securities, Inc.,	Third-Party Defendants.

Appeal From Horry County
Paul M. Burch, Circuit Court Judge

Opinion No. 4632
Heard September 1, 2009 – Filed November 10, 2009
Withdrawn, Substituted and Refiled December 18, 2009

REVERSED AND REMANDED

Natale Fata, of Surfside Beach, for Appellant.

Desa Ballard and Stephanie Weissenstein, of West Columbia, J. Jackson Thomas, of Myrtle Beach, for Respondents.

HUFF, J.: Plantation A.D., LLC appeals the trial court's grant of summary judgment in favor of Gerald Builders and Jimmy Gerald (collectively Respondents). We reverse and remand.

FACTS/PROCEDURAL HISTORY

In October of 2003, Jimmy Gerald, as President of Gerald Builders, entered into a Purchase Agreement to purchase 45 acres in the International Club PUD from Plantation A.D. (the Property). At the time the Purchase Agreement was executed, SouthTrust Bank had foreclosed on the Property. Gerald claimed he did not know about the foreclosure proceedings at the time he executed the Purchase Agreement. Soon after entering into the Purchase Agreement, Gerald Builders' attorney discovered the foreclosure action. However, Gerald continued negotiating with Scott Pyle of Plantation A.D. concerning a development deal for the Property.

Gerald Builders' attorney drafted a Memorandum of Understanding, which provided for a 50/50 profit participation between Gerald Builders and Plantation A.D. The Memorandum required Gerald Builders to fully satisfy the SouthTrust Bank first mortgage and repay a $950,000.00 loan to Ralph Jones and Charlie Floyd as the lots in the development were sold with the interest deducted from Plantation A.D.'s share of the profits. The Memorandum also provided: "Plantation A.D., LLC will cooperate fully with Jimmy Gerald in the closing of [the Property] on or before December 31, 2003 upon this signed understanding." Although the parties were listed

as Jimmy Gerald of Gerald Builders as the Buyer and Scott Pyle of Plantation A.D. as the Seller, the Memorandum stated, "This memorandum shall not be deemed as a contract for the sale of Real Estate."

Gerald signed the Memorandum on November 3, 2003. According to Gerald, Pyle refused to accept the Memorandum and threatened to file for bankruptcy. Gerald authorized his attorney to offer the Memorandum to Pyle again two days later at the upset bid sale. Gerald claimed Pyle again rejected the Memorandum. Pyle, however, claimed that Plantation A.D. accepted the terms of the Memorandum and he signed the Memorandum when it was faxed to him on November 3.

Gerald Builders purchased the Property at the upset bid sale for $2,327,500.00. It borrowed $2,517,500.00 from Wachovia Bank to pay for the purchase. Gerald Builders began developing the property for a single family subdivision. In March of 2005, Pyle contacted Gerald and informed him that he knew of potential purchasers for the property. Gerald Builders agreed to the sale. On September 26, 2005, Gerald Builders sold the property to Signature Homes for $6,870,000.00. Gerald Builders' distribution from the sale was $1,510,222.23. It did not share the profit with Plantation A.D.

Plantation A.D. brought this action against Respondents asserting claims for breach of contract, breach of contract with fraudulent intent, fraud, unfair trade practices, unjust enrichment, constructive trust, and conversion. Respondents asseverated in their answer that Gerald's signature had been forged on the draft of the Memorandum and also asserted counterclaims and third party claims against Pyle and ADB Development due to the sale of the Property to Signature Homes. Plantation A.D., ADB Development, and Pyle denied Respondents' claims and asserted defenses including statute of limitations and unclean hands. In addition, Pyle asserted a claim for defamation.

While discovery motions and Plantation A.D.'s motions to amend its complaint and answer to Respondents' counterclaim and third-party claim were pending, the trial court granted summary judgment in favor of

Respondents on Plantation A.D.'s claims in an order filed July 5, 2007. The trial court found the Memorandum was a complete, unambiguous agreement and therefore parol evidence was not admissible. It held the Memorandum lacked consideration and was unenforceable. The court also found the Memorandum contained two conditions precedent: 1) Gerald Builders had to purchase the property from Plantation A.D. (and not from the master-in-equity or some other party); and 2) Gerald Builders had to develop the property and not simply resell it. The court held as these conditions precedent did not occur, the Memorandum was void. In addition, the court ruled there was no evidence of individual liability of Gerald. Plantation A.D. filed a Rule 59, SCRCP, motion asking the court to alter or amend the judgment. It subsequently amended its motion and included excerpts from depositions taken after the order granting summary judgment.

While the Rule 59 motion was pending, the court ruled on other pending motions. The court denied Plantation A.D.'s motion to amend the complaint as summary judgment had already been granted, but allowed Plantation A.D. leave to amend its answer to the third-party complaint and counterclaim. It also ruled on discovery motions. On November 7, 2007, Plantation A.D. filed a motion pursuant to Rule 60, SCRCP, asserting in their Second Amended Answer and Counterclaim, Respondents made allegations contrary to the arguments they had made previously to the court.

The trial court denied the Rule 59 motion in an order filed December 10, 2007. The court provided all other pending motions would be heard before a judge with proper jurisdiction. It did not address Plantation A.D.'s Rule 60, SCRCP, motion. This appeal followed.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP Nexsen v. Haddock, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct. App. 2002). Summary judgment should be granted when "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Brockbank v. Best Capital Corp., 341 S.C. 372, 378-79, 534 S.E.2d 688, 692 (2000). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "However, in cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." Id. at 330-31, 673 S.E.2d at 803.

LAW/ANALYSIS

I. Consideration

Plantation A.D. argues the trial court erred in holding as a matter of law the Memorandum was void for lack of consideration. We agree.

"It is a question of law for the court whether the language of a contract is ambiguous." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner. Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); see Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App.

1997) ("A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business.") (internal citation and quotation omitted).

Construction of an ambiguous contract is a question of fact. Skull Creek Club Ltd. P'ship v. Cook & Book, Inc., 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). When an agreement is ambiguous, the court should seek to determine the parties' intent. Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). Any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the ambiguous language. Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct. App. 2003). However, if a contract is ambiguous, parol evidence is admissible to ascertain the true meaning of the contract and the intent of the parties. Klutts Resort Realty, 268 S.C. at 89, 232 S.E.2d at 25.

"The necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998). "A forbearance to exercise a legal right is valuable consideration." Id.

Plantation A.D. asserts the Memorandum does state consideration. Item 3 of the Memorandum provides: "Plantation A.D., LLC will cooperate fully with Jimmy Gerald in the closing of the 45 acres on or before December

31, 2003 upon this signed understanding." As this provision is indefinite, we hold the trial court erred in ruling the Memorandum was unambiguous and in refusing to consider parol evidence. A fact finder may view the "cooperation" listed in Item 3 as a responsibility undertaken by Plantation A.D. In his affidavit, Pyle explained Plantation A.D. cooperated by ceasing negotiations with other prospective buyers and refraining from filing bankruptcy, thus allowing the upset bid sale to Gerald Builders to go forward. Therefore, Plantation A.D. produced more than a "scintilla of evidence" that the Memorandum was supported by valuable consideration.

We find the trial court erred in holding as a matter of law the contract was not supported by valuable consideration.

II. Conditions precedent

Plantation A.D. argues the trial court should not have found conditions precedent at the summary judgment stage. We agree.

Respondents assert this argument is not preserved because Plantation A.D. failed to make it when Respondents raised the issue at the summary judgment hearing. Plantation A.D. did not address the issue of conditions precedent at the hearing but did fully address the issue in its Rule 59 motion. The Respondents had the burden of proof on this issue. See Youmans v. S.C. Dep't of Transp., 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008) (stating defendant asserting an affirmative defense bears the burden of its proof), cert. granted (July 9, 2009); Floyd v. St. Paul Fire & Marine Ins. Co., 285 S.C. 148, 150, 328 S.E.2d 132, 132 (Ct. App. 1985) (noting defendant asserted as an affirmative defense plaintiff had not complied with condition precedent). Plantation A.D. is not attempting to raise a new theory of law but rather simply asserts that there is a genuine issue of material fact as to whether the agreement between the parties actually includes the conditions precedent as found by the trial court. As the issue of whether the Memorandum included the conditions precedent was raised to and ruled on by the trial court, we find the issue properly before this court. See Wilder

Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

The trial court found the Memorandum contained the following two conditions precedent: 1) Gerald Builders had to purchase the property from Plantation A.D. (and not from the master-in-equity or some other party); and 2) Gerald Builders had to develop the property and not simply resell it.

> A condition precedent entails something that is essential to a right of action, as opposed to a condition subsequent, which is something relied upon to modify or defeat the action. In contract law, the term connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises. The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ.

Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994) (internal citations and quotation marks omitted). Generally, "a condition precedent may not be implied when it might have been provided for by the express agreement." Id. at 210, 452 S.E.2d at 625.

The Memorandum does not expressly set forth the conditions precedent as found by the trial court. The Respondents assert the condition that Gerald Builders purchase the property from Plantation A.D. can be implied from the designation of the parties as "Seller" and "Buyer" although the Memorandum clearly states it "shall not be deemed as a contract for the sale of Real Estate." Respondents also claim the development condition is implied from Paragraph 2, which provides for the repayment of a loan to Ralph Jones and Charlie Floyd on a per lot basis. The profit participation provision, however, does

not include similar language concerning payment on a per lot basis. We find the conditions cannot as a matter of law be implied from the Memorandum. Accordingly, we hold the trial court erred on this issue.

III. Individual liability of Gerald

Plantation A.D. argues the trial court erred in granting summary judgment as to Gerald individually. We agree.

Section 33-6-220(b) of the South Carolina Code (2006) states: "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." (Emphasis added). This court recognized:

> A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated in the wrong. Accordingly, directors not parties to a wrongful act on the part of other directors are not liable therefor. If, however, a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort . . . .

BPS, Inc. v. Worthy, 362 S.C. 319, 327, 608 S.E.2d 155, 160 (Ct. App. 2005) (quoting 19 Am.Jur.2d Corporations, § 1382 (2004)). Thus, the court held the president of a corporation was not shielded from direct liability in tort for his own actions and was personally liable for any tortuous acts he participated in or directed. Id. at 328, 608 S.E.2d at 160.

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." Ellis v. Davidson, 358 S.C. 509, 527, 595 S.E.2d 817, 826 (Ct. App. 2004).

The trial court held Gerald was not individually liable for Plantation A.D.'s claims. However, as stated above, Gerald's status as an officer or a shareholder of the corporation does not automatically shield him from liability. After the sale of the Property to Signature Homes, Gerald Builders deposited the profit from the sale into its checking account. Since then, Gerald has made disbursements from the account, thus assuming ownership of funds allegedly belonging to Plantation A.D. In addition, Gerald made representations to Plantation A.D. regarding the Memorandum and plans for the property. We find Plantation A.D. has presented evidence sufficient to overcome summary judgment that Gerald committed or participated in the commission of conversion and fraud. Accordingly, we find the trial court erred in granting summary judgment to Gerald individually.

CONCLUSION

For the above stated reasons, the trial court's order granting summary judgment to Gerald Builders and Gerald individually is REVERSED and the matter REMANDED to the trial court.

REVERSED AND REMANDED.

THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Interest of Walter M.,
a minor under the age of
seventeen, Appellant.

Appeal From Georgetown County
H. E. Bonnoitt, Jr., Family Court Judge

Opinion No. 4639
Submitted May 1, 2009 – Filed December 17, 2009

AFFIRMED

Acting 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, and Assistant Attorney General J. Anthony Mabry, of Columbia; and Solicitor John G. Hembree, of Conway, for Respondent.

THOMAS, J.: Walter M. (Appellant) appeals his conviction for the murder of Zachary H. (Victim). Appellant alleges that the family court erred in (1) denying a directed verdict on the charge of murder because the State presented no evidence of malice aforethought and (2) finding Appellant guilty of murder because the State presented no evidence proving malice aforethought. We affirm.

FACTS

On the afternoon of July 7, 2006, Appellant, Victim, and another friend,[1] were playing video games at Appellant's home. Victim went to the freezer to get a popsicle without Appellant's permission. When Victim refused to return the popsicle to the freezer, Appellant chased him around the living room eventually retrieving the popsicle. As Appellant put the popsicle back in the freezer, Victim ran outside. Appellant locked the front door after Victim ran out.

Victim banged on the door and rang the doorbell in an effort to get back inside. Meanwhile, Appellant retrieved his brother's loaded .22 caliber rifle from a bedroom closet, walked to another room, opened the window, and pointed the gun at Victim, ordering him to stop banging on the door. Victim replied "are you really going to shoot me?" Appellant responded "[n]o" and the boys apparently began laughing. Moments later, Appellant fired two shots: one into the ground near Victim, and a second, fatal shot, into Victim's chest. Appellant maintains the rifle accidentally discharged as he attempted to pull it back in the window. A South Carolina Law Enforcement Division (SLED) forensic firearms expert testified it required six pounds of pressure on the trigger to discharge the first shot, and the same six pounds to discharge the second. This expert also testified that the recoil on the particular firearm was negligible.

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[1] At the time of the incident, Appellant was twelve years old, stood five feet six inches tall, and weighed over two hundred pounds. Victim was ten years old.

After firing the two shots, Appellant called 911, then ran next door and told the neighbor he had accidentally shot Victim. Although a bystander was able to administer CPR, Victim died within minutes of being shot.

Officer Eric Dean was the first law enforcement officer to arrive on the scene and noticed Appellant holding Victim's hand as an unknown good Samaritan attempted CPR. Dean testified that Appellant stated, "I asked [Victim] to leave me alone and he wouldn't so I shot to scare him." Appellant denied making this statement. Dean further testified Appellant never said anything about the shooting being an accident and denied Appellant's claim that he intimidated Appellant by saying "looks like you'll be going up the road for this one."

Appellant unsuccessfully moved the family court for a directed verdict, arguing the State failed to present evidence of malice aforethought. The family court found Appellant guilty of murder and sentenced him to confinement in a juvenile facility for an indeterminate amount of time not to exceed his twenty first birthday. This appeal follows.

ISSUES

I. Did the family court err in failing to direct a verdict in favor of Appellant?

II. Did the family court err in finding the Appellant guilty of murder?

STANDARD OF REVIEW

In criminal cases, the 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

Here, Appellant alleges the family court erred in failing to grant him a directed verdict because the State presented no evidence of malice aforethought. We disagree.

When reviewing the denial of a directed verdict, this court must view all evidence in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). This court will reverse the trial court's denial of a directed verdict only if no evidence supports the ruling. State v. Lee-Grigg, 374 S.C. 388, 399, 649 S.E.2d 41, 47 (Ct. App. 2007). We will affirm the family court's denial of a directed verdict in a juvenile delinquency matter if it is supported by any evidence. In re Doe, 318 S.C. 527, 534, 458 S.E.2d 556, 561 (Ct. App. 1995); In re Bruce O., 311 S.C. 514, 515, 429 S.E.2d 858, 859 (Ct. App. 1993); but see State v. Irvin, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (stating that the trial court should direct a verdict for a defendant when the evidence only raises a mere suspicion of guilt).

"Murder is the killing of any person with malice aforethought, whether expressed or implied." S.C. Code Ann. § 16-3-10 (2006). Malice can be either expressed or implied. State v. Portee, 122 S.C. 298, 301, 115 S.E. 238, 239-40 (1922). Accordingly, in order for this court to reverse the trial court's denial of the directed verdict, we must find no evidence to support the trial court's ruling on the issue of malice. See Lee-Grigg, 374 S.C. at 399, 649 S.E.2d at 47.

In this case, applying the any evidence standard and viewing the evidence in the light most favorable to the State, we find sufficient evidence supports the family court's denial of Appellant's motion for a directed verdict. Evidence in the record demonstrates Appellant retrieved a deadly weapon

from his brother's closet, walked to another room, opened a window, and pointed the gun. Moreover, the record indicates it required six pounds of pressure to fire the gun and the recoil on the specific firearm in question was "negligible," inferring accidental discharge of the second shot was unlikely. Because the family court could infer malice from a defendant's use of a deadly weapon[2] or from the evidence that the discharge of the weapon was likely not accidental, this evidence was sufficient to overcome Appellant's motion for a directed verdict. See, e.g., Sellers v. State, 362 S.C. 182, 189, 607 S.E.2d 82, 85 (1981) (recognizing malice may be implied from the use of a deadly weapon). Accordingly, we find no error.[3]

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[2] The South Carolina Supreme Court recently addressed and overruled a long line of case law pertaining to jury instructions regarding the permissive inference of malice from the use of a deadly weapon in State v. Belcher, Op. No. 26729 (S.C. Sup. Ct. filed Oct. 12, 2009) (Shearouse Adv. Sh. No. 44 at 14). After careful review of the Belcher opinion, we do not find it controlling of this matter.

[3] Generally, the common law imposes a rebuttable presumption that a child between seven and fourteen years of age does not have the mental capacity to commit a crime. State v. Pittman, 373 S.C. 527, 546, 647 S.E.2d 144, 153-54 (2007); see State v. Blanden, 177 S.C. 1, 21, 180 S.E. 681, 689-90 (1935) (noting with approval the trial court's instruction to the jury on the presumption of incapacity). The State cites In Re Skinner for the proposition that the common-law presumption of the incapacity of a minor is inapplicable in family court proceedings because the statutory scheme provides for criminal convictions in the family court. 272 S.C. 135, 137, 249 S.E.2d 746, 747 (1978). While the Skinner court's reliance on the since repealed section 14-21-510(A)(1)(c) of the South Carolina Code (1976) causes this court sincere reservation as to whether such a rule remains under the jurisprudence of this state, Appellant neither made this an issue at trial, nor preserved it for appellate review. Although this court has advocated the setting aside of preservation requirements in the context of juvenile criminal matters, our supreme court has elected not to address whether such is a recognized exception to this state's issue preservation requirements. See In re Arisha K.S., 331 S.C. 288, 296, 501 S.E.2d 128, 133 (Ct. App. 1998) (inviting the

II. Family Court's Finding of Guilty

Appellant next argues the family court erred in finding him delinquent because the State failed to prove beyond a reasonable doubt he killed Victim with malice aforethought. We find this argument is not preserved for our review on appeal.

Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Arguments raised for the first time on appeal are not preserved for our review. Knight v. Waggoner, 359 S.C. 492, 496, 597 S.E.2d 894, 896 (Ct. App. 2004). In this case, Appellant made no objection to the final verdict of the family court and made no motion for a new trial. Although this court has advocated excepting juvenile criminal matters from the strict rules of issue preservation, the supreme court has declined to address whether such an exception should be recognized. See In re Arisha K.S., 331 S.C. 288, 296, 501 S.E.2d 128, 133 (Ct. App. 1998) (inviting the supreme court to address the setting aside of the rules of issue preservation in the context of juvenile criminal matters). Thus, this court remains bound by this state's long-standing rules of issue preservation, and we must therefore hold Appellant's argument is not properly before this court.

CONCLUSION

For the foregoing reasons, the ruling of the family court is

AFFIRMED.

HEARN, C.J., and KONDUROS J., concur.

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supreme court to address the setting aside of the rules of issue preservation in the context of juvenile criminal matters). We therefore remain bound by the rules of preservation in the current matter, precluding this court from addressing the rebuttable presumption of incapacity.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Normandy Corporation, Respondent,

v.

South Carolina Department of Transportation, Appellant.

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

Opinion No. 4640
Heard October 13, 2009 – Filed December 17, 2009

AFFIRMED

Clifford O. Koon, Jr., Paul D. de Holczer, and Robert L. Brown, all of Columbia, for Appellant.

Howell V. Bellamy, Jr., and Robert S. Shelton, both of Myrtle Beach, for Respondent.

GEATHERS, J.: This declaratory judgment action stems from a condemnation action instituted by the South Carolina Department of Transportation (Department) to acquire approximately six acres of land from the Normandy Corporation (Normandy) for the construction of the Carolina

Bays Parkway in Horry County. After concluding that the Department was undervaluing the condemned property on the basis that the property was located on a parcel containing wetlands, Normandy sought an order declaring whether any of the wetlands on the parcel fell within the jurisdiction of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA), and the impact, if any, of the CWA on the parcel as of October 13, 2000, the date the condemnation action was filed. The master-in-equity ruled that, as of October 13, 2000, none of the wetlands on the parcel fell within the jurisdiction of the CWA and that the wetlands could legally be drained. The Department now seeks review of the master's order. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The parcel of property at issue in this case is located in Horry County near the intersection of Highway 9 and Highway 57. It consists of approximately 88.59 acres. Normandy acquired the parcel in 1996 in a bankruptcy proceeding.

In 1997, Loris Hospital expressed some interest in purchasing a portion of the parcel from Normandy. In connection with the proposed sale, Normandy hired Dr. Paul Booth to perform a wetlands delineation. Dr. Booth delineated seventy-two acres of the parcel and concluded that approximately forty-six of those acres were wetlands. According to Marguerite McClam, a licensed civil engineer who was hired by the Department in connection with the Carolina Bays Parkway project, the United States Army Corps of Engineers (Corps) subsequently "certified" Dr. Booth's delineation and the certification was valid for five years.

At the time that Dr. Booth performed his delineation, Normandy had done nothing significant to the parcel. Ditches around the perimeter of the parcel existed, but they had not been maintained and their flow was blocked by beaver dams.

Ultimately, the proposed sale to Loris Hospital was not completed, and, sometime after Dr. Booth's delineation, Normandy cut the timber on the parcel, raked the parcel, "cleared it up," and planted a pine plantation thereon.

Additionally, in 1998, Normandy installed Christmas tree ditches on the parcel. Normandy then began the process of having the parcel rezoned from mobile home residential to planned unit development for commercial purposes. A redelineation was not required, and was not performed, in connection with that process, which was completed in April 2000.

On October 13, 2000, the Department filed a Condemnation Notice with respect to Normandy's parcel. According to Normandy's declaratory judgment complaint, the Department sought to acquire approximately six acres of the parcel.[1] The portion of the parcel condemned by the Department provided all of the parcel's frontage and access to Highway 9.[2]

In connection with the condemnation action, the Department retained Gordon Murphy of the LPA Group to prepare a "wetland delineation package request" for the Corps. Murphy visited the site in 2001. Murphy's delineation was limited to the "study corridor," which consisted of 2.7 acres.

Sometime in 2001, the Department submitted an offer to Normandy for the portion of the parcel subject to the condemnation action. The offer was based upon the Department's appraisal, which estimated that 50% to 75% of the parcel was comprised of wetlands. After receiving the Department's appraisal, Normandy asked Norman Boatwright to perform a study to determine the amount of wetlands existing on the parcel. Boatwright's study was completed in 2001.

Normandy subsequently asked Craig Turner to perform a more comprehensive wetlands study. Turner installed eight groundwater monitoring wells across the parcel to document water levels and rates of drainage. The wells were automated to read water levels once daily. Turner's study, which began in December 2003 and lasted until October 2004, found that in addition to the approximately 26 acres that had been delineated uplands by Dr. Booth, another 47.46 acres of the parcel had been converted to uplands as a result of "the drainage system installed in 1998." Thus,

[1] The Condemnation Notice is not included in the record.

[2] The condemnation action did not affect the parcel's access to Highway 57.

Turner's study concluded that roughly 73.5 acres of the 88.59 acres he delineated were uplands (approximately 83%). According to Michael Todd Smith, a partial owner of Normandy, Turner's study was "almost identical" to Boatwright's.

In December 2003, Normandy filed its declaratory judgment action in circuit court. In its complaint, Normandy argued that the Department was undervaluing the condemned portion of the parcel based upon its erroneous assumption that 50% to 75% of the parcel was comprised of wetlands falling within the jurisdiction of the CWA. Specifically, Normandy contended that "the prior accumulation of water" relied upon by the Department in making its appraisal was largely corrected when the parcel was timbered and drainage ditches were installed thereon. Normandy therefore sought a declaration by the court as to whether any wetlands existing on the parcel were jurisdictional (i.e., within the jurisdiction of the CWA) and the impact, if any, of the CWA on the parcel as of October 13, 2000, the condemnation date.

In February 2004, the Department filed a motion to dismiss pursuant to Rule 12(b)(7), SCRCP, seeking dismissal of the declaratory judgment action on the grounds that Normandy had failed to join the South Carolina Department of Health and Environmental Control (DHEC) and the Corps as parties to the action.[3] After conducting a hearing on the matter, Judge B. Hicks Harwell denied the Department's motion in an order issued October 27, 2004. Judge Harwell concluded that the circuit court did not have jurisdiction over DHEC or the Corps because neither entity had taken any type of final agency action with respect to the parcel. Moreover, with regard to DHEC, Judge Harwell ruled that "[b]asically, the only ability DHEC has to regulate wetlands derives from its review power of a Federal permit application under the CWA."

[3] Rule 12(b)(7), SCRCP, provides that "[e]very defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (7) failure to join a party under Rule 19."

On January 25, 2006, by mutual agreement of the parties, the declaratory judgment action was stricken from the circuit court's docket with leave to restore pursuant to Rule 40(j), SCRCP. That very same day, the matter was restored and referred to the master pursuant to a Consent Order to Restore and Refer (Order of Reference) issued by the circuit court. A trial was subsequently held before the master on August 27, 2007.

At trial, Normandy introduced the results of Turner's wetlands study. Additionally, Turner, who was qualified as an expert in the fields of soil science and wetland delineation, testified that it was "reasonable and probable" that his study accurately reflected the wetlands status of the parcel as of the condemnation date. He explained that the Christmas tree ditches, which were installed prior to the condemnation date, were "very effective" at pulling water out of wetlands. Turner further testified that the approximately fifteen acres of wetlands remaining on the parcel were not, in his opinion, jurisdictional.

In an order dated November 27, 2007, the master found that Turner's study correctly stated the status of the property as of October 13, 2000. He further held that, as of October 13, 2000, the parcel "contained 73.5 acres of uplands; contained no wetlands within the jurisdiction of the Clean Water Act; and contained 15 acres of wetlands that could be legally drained." The Department subsequently filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. The master denied the motion, and this appeal followed.

ISSUES ON APPEAL

1. Did the master lack subject matter jurisdiction to determine the amount of jurisdictional wetlands existing on the parcel?

2. Did the master err by concluding that the parcel contained no wetlands within the jurisdiction of the CWA?

3. Did the master err by concluding that the parcel contained fifteen acres of wetlands that could legally be drained?

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (quoting Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). Condemnation actions are actions at law. S.C. Pub. Serv. Auth. v. Arnold, 287 S.C. 584, 586, 340 S.E.2d 535, 537 (1986). Actions involving the interpretation of statutes, such as the CWA, are also actions at law. See Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 606-07, 663 S.E.2d 484, 487 (2008) ("[B]ecause this action involves the interpretation of a contract and statutes, it is an action at law."); In re Estate of Timmerman, 331 S.C. 455, 458-59, 502 S.E.2d 920, 921 (Ct. App. 1998) (holding that an action concerning the application of the omitted spouse statute was an action at law). In an action at law tried without a jury, the trial court's findings will not be disturbed on appeal unless they are found to be without evidence reasonably supporting them. Stanley v. Atlantic Title Ins. Co., 377 S.C. 405, 409, 661 S.E.2d 62, 64 (2008).

LAW/ANALYSIS

I. Subject Matter Jurisdiction

The Department contends that the master lacked subject matter jurisdiction to issue a ruling as to the amount of jurisdictional wetlands existing on the parcel as of the condemnation date. We disagree.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Dema v. Tenet Physician Services-Hilton Head, Inc., 383 S.C. 115, 120, 678 S.E.2d 430, 433 (2009). The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution and the laws of the state. Duckett v. Goforth, 374 S.C. 446, 456, 649 S.E.2d 72, 77 (Ct. App. 2007). Issues involving subject matter jurisdiction may be raised at any time, including on appeal. Arnal v. Fraser, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421 n.2 (2007).

A. Master's Authority to Issue Ruling

Under the Eminent Domain Procedure Act, S.C. Code Ann. §§ 28-2-10 to 28-2-510 (2007), a circuit court has the power to hear a condemnation action. See, e.g., S.C. Code Ann. § 28-2-30(8) (2007) (defining "court" as "a circuit court of this State"). Additionally, pursuant to the Uniform Declaratory Judgments Act, a circuit court has the authority to preside over a declaratory judgment action. See S.C. Code Ann. § 15-53-20 (2005) ("Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."). Equity courts are considered divisions of the circuit court. S.C. Code Ann. § 14-11-15 (Supp. 2008). The circuit court may, upon application of any party or upon its own motion, "direct a reference" of some or all of the causes of action in a case to a master-in-equity. Rule 53(b), SCRCP. When a reference is made, the master must enter final judgment as to the causes of action referred. S.C. Code Ann. § 14-11-85 (Supp. 2008). Once an action is referred, the master possesses all power and authority that a circuit judge sitting without a jury would have in a similar matter. Rule 53(c), SCRCP.

Here, the present case is a declaratory judgment action that was commenced in connection with a condemnation action.[4] In its complaint for declaratory judgment, Normandy sought a declaration regarding, *inter alia*, "whether the wetlands, if any, are jurisdictional or nonjurisdictional as of the date of the filing of the condemnation action." The Order of Reference did not limit the issues to be addressed by the master; rather, it referred "the case" to him. Moreover, the Order of Reference authorized the master to "take such testimony and make such findings [of] fact and conclusion[s] of law" as he deemed appropriate and to "enter a final judgment."

Based on the foregoing, we conclude that the issue of the amount of jurisdictional wetlands existing on the parcel as of the condemnation date was properly before the master. The issue was plainly pled by Normandy in its

[4] The underlying condemnation action is currently pending in Horry County.

declaratory judgment complaint. Additionally, the circuit court, acting within its statutory authority, referred the entire declaratory judgment action to the master without any limitations.

Furthermore, we find that the master was authorized to make a ruling regarding the amount of jurisdictional wetlands existing on the parcel as of the condemnation date. Under South Carolina's Constitution, private property shall not be taken for public use without "just compensation" first being made for the property. S.C. Const. art. I, § 13. For the purpose of fixing just compensation, evidence which is relevant, material and competent may be considered. S.C. Code Ann. § 28-2-340(A) (2007). In addition to the value of the property to be taken, any diminution in the value of the landowner's remaining property and any benefits derived from the proposed project may be taken into account in determining just compensation. S.C. Code Ann. § 28-2-370 (2007).

Also, "[i]t is well settled that compensation is not limited to the value of the property as used by the owner at the time of condemnation." City of North Charleston v. Claxton, 315 S.C. 56, 60-61, 431 S.E.2d 610, 613 (Ct. App. 1993). "Rather, the owner is entitled to the value of the property under its most advantageous or profitable use, including any use reasonably anticipated in the near future." Id. at 61, 431 S.E.2d at 613. Thus, the potential of property may be considered as an element affecting value, so long as the potential is "reasonably probable." Carolina Power & Light Co. v. Copeland, 258 S.C. 206, 215, 188 S.E.2d 188, 192 (1972).

Importantly, the value of real property is "commonly limited both by physical factors and by legal or governmentally imposed restrictions." 19 Am. Jur. Proof of Facts 3d 613 § 1 (1993). "Legal or governmentally imposed restrictions include covenants, easements, zoning restrictions, environmental regulations, subdivision ordinances, licenses and permits, floodplain restrictions, coastal and *wetland restrictions*, and other laws, statutes, and ordinances." Id. (emphasis added).

Without a doubt, the amount of jurisdictional wetlands existing on a parcel of property can have a considerable impact on the value of that parcel.

See id. at § 5 (stating that the impact of wetlands on land valuation is "significant").[5] If a wetland is jurisdictional and thus subject to the CWA, then the property owner is required to obtain a permit from the Corps in order to take certain actions, such as placing fill material into the wetland. See 33 U.S.C. § 1344(a) (2000). Obtaining a permit from the Corps is no small matter. As Justice Scalia has explained:

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. . . . The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 - not counting costs of mitigation or design changes. . . . These costs cannot be avoided, because the Clean Water Act "impose[s] criminal liability," as well as steep civil fines, "on a broad range of ordinary industrial and commercial activities."

Rapanos v. United States, 547 U.S. 715, 721 (2006) (internal citations omitted).

Therefore, because the amount of jurisdictional wetlands existing on a tract of land has a significant impact on the value of that tract, evidence regarding jurisdictional wetland amounts is relevant and material to fixing just compensation. Accordingly, we conclude that the master was authorized to make a ruling as to the amount of jurisdictional wetlands existing on the parcel as of the condemnation date so that the just compensation owed to Normandy could ultimately be determined. Cf. State v. St. Charles Airline Lands, Inc., 871 So.2d 674 (La. Ct. App. 2004) (holding that the trial court was allowed to consider, for the purpose of determining just compensation in a condemnation action, expert testimony regarding whether the owner of the

[5] Although the appraisal is not in the record, in the present case, the Department does not dispute Normandy's claim that the Department appraised the parcel at a lower value based upon its conclusion that 50% to 75% of the parcel consisted of jurisdictional wetlands.

condemned property would have received permits to develop wetlands existing on the property).

B. Corps' Authority to Make Jurisdictional Determinations

The Department, however, argues that because federal law vests the Corps with the authority to determine whether land consists of jurisdictional wetlands, the master lacked subject matter jurisdiction to determine the amount of jurisdictional wetlands existing on the parcel. We disagree.

The Department misconstrues the scope of the master's decision. The master's decision, which was precipitated by a condemnation action, was made for the limited purpose of resolving issues that bore on the value of the condemned property as of the condemnation date. Although the Corps has the authority to make jurisdictional wetlands determinations with respect to issuing permits and approved jurisdictional determinations (JDs) under federal law,[6] the master's decision does not purport to grant a permit or an approved JD to Normandy. Therefore, the master's decision does not improperly infringe upon the jurisdiction of the Corps. To hold otherwise would necessitate the Corps' involvement in every condemnation action in which the amount of jurisdictional wetlands on the condemned property was in dispute.

The Department further contends that an approved JD issued by the Corps with respect to Dr. Booth's 1997 delineation was "the final word" regarding the amount of jurisdictional wetlands existing on the parcel and that Normandy's failure to adhere to the appeals process set forth in 33 C.F.R. §§ 331.1 to 331.12 precludes it from now utilizing the state court system to "overrule" the Corps determination.

For several reasons, the Department's argument is unpersuasive. First, the Department's argument is at odds with section 28-2-440 of the Eminent

[6] The term "approved jurisdictional determination" means "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel." 33 C.F.R. § 331.2 (2000).

Domain Procedure Act, which provides that "*[i]n all condemnation actions*, the date of valuation is the date of the filing of the Condemnation Notice." S.C. Code Ann. § 28-2-440 (2007) (emphasis added). Here, Normandy presented evidence showing that, between the time of Dr. Booth's delineation and the filing of the Condemnation Notice, Normandy installed Christmas tree ditches on the parcel that reduced the amount of wetlands existing thereon.[7] To simply disregard that evidence, as the Department urges, would be inconsistent with section 28-2-440.

Second, the record provided by the Department does not demonstrate what the Corps' conclusions were with regard to the amount of *jurisdictional* wetlands existing on the parcel. The approved JD is not in the record. Moreover, while McClam testified that the Corps "certified" Dr. Booth's delineation, Dr. Booth's delineation is not in the record either. Furthermore, although there is evidence that Dr. Booth determined that approximately forty-six acres of the parcel were wetlands, the record does not indicate how many of those acres he found to be jurisdictional under the CWA. Thus, the Department has failed to meet its burden of providing this Court with a sufficient record upon which to make its decision. See Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005) (appellant has burden of providing sufficient record).

Third, to the extent that the Department is arguing that the doctrine of res judicata or collateral estoppel barred the master from making a jurisdictional determination as to the parcel's wetlands, the Court notes that "the application of res judicata and collateral estoppel principles are not matters of subject matter jurisdiction." Mr. T v. Ms. T, 378 S.C. 127, 133,

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[7] In his order, the master ruled that the ditching was "indisputably legal." Although the Department has challenged that ruling in its reply brief, this Court will not address the issue of the legality of the ditching given that it was not set forth in the statement of issues on appeal in the Department's initial brief. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); see also Glasscock, Inc. v. U.S. Fid. and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (issue cannot be raised for the first time in a reply brief).

662 S.E.2d 413, 416 (Ct. App. 2008). Rather, "[t]he defense of preclusion by a former judgment is an affirmative defense which ordinarily must be specially pleaded." Wagner v. Wagner, 286 S.C. 489, 491, 335 S.E.2d 246, 247 (Ct. App. 1985). Here, the Department did not specifically raise the issue of the preclusive effect of the approved JD, and the master did not rule on the issue. Therefore, the issue cannot be raised on appeal. See Duckett, 374 S.C. at 465, 649 S.E.2d at 82 (party cannot raise defense of collateral estoppel for the first time on appeal); S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (to be preserved for appellate review, issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity).

Finally, the above-referenced federal regulations cited by the Department did not become effective until March 28, 2000. See Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16486 (March 28, 2000).[8] Moreover, the regulations expressly state that "[a]ffected parties . . . may not appeal approved JDs dated on or before March 28, 2000." 33 C.F.R. § 331.6(e) (2000). Although there is nothing in the record that shows when the Corps certified Dr. Booth's delineation, as noted above, Dr. Booth's delineation was completed in 1997. Thus, it is questionable whether the regulations were in effect at the time that Dr. Booth's delineation was certified.[9]

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[8] Although a previous version of the regulations was in effect prior to March 28, 2000, it did not apply to approved JDs. See 33 C.F.R. §§ 331.1 to 331.12 (1999).

[9] In fact, even if the regulations were in effect, the preamble to the regulations states that it is the position of the federal government that "jurisdictional determinations are not ripe for [judicial] review until a landowner who disagrees with a JD has gone through the permitting process." Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. at 16488. Additionally, the preamble notes that, because physical circumstances can change over time, "JDs are not necessarily 'final' even as an administrative matter." Id. Based on the foregoing, it seems rather doubtful that the Corps' decision to certify Dr.

C. Federal preemption

The Department also argues that the CWA preempted the master from making a determination regarding the amount of jurisdictional wetlands existing on the parcel as of the condemnation date. We disagree.

Courts should not lightly infer preemption. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 491 (1987). Federal law may preempt state law in three ways: (1) Congress may expressly define the extent to which it preempts state law; (2) Congress may occupy a field of regulation, "impliedly" preempting state law; or (3) a state law may be preempted to the extent it "conflicts" with federal law. Prof'l Samplers, Inc. v. S.C. Employment Sec. Comm'n, 334 S.C. 392, 397, 513 S.E.2d 374, 377 (Ct. App. 1999). As to the third method, "conflict arises when either compliance with both laws is impossible or when the state law frustrates the federal purpose and creates an obstacle to the fulfillment of federal objectives." Id.

Here, the Department has not pointed to any provision of the CWA that expressly prohibits state courts from making wetlands jurisdictional determinations for the purpose of valuing a property in a condemnation action. Moreover, the Department has not cited, and we have not found, any cases that hold that the CWA "impliedly" precludes state courts from making such determinations. Although courts have held that the CWA preempts state regulation of certain environmental matters,[10] the master's decision does not regulate conduct; rather, it merely rules on the status of the parcel as of the condemnation date. Likewise, while courts have held that the CWA

Booth's delineation constituted a final determination entitled to preclusive effect. See Zurcher v. Bilton, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008) (issue preclusion applies when an issue has been "actually litigated and determined by a valid and *final* judgment") (emphasis added).

[10] See Chasm Hydro, Inc. v. N.Y. State Dep't of Envtl. Conservation, 58 A.D.3d 1100 (N.Y. 2009) (holding that Federal Power Act and CWA largely preempted the field of regulating hydroelectric facilities).

preempts state nuisance law in certain instances,[11] the present case does not involve a nuisance action.

Furthermore, the Department has failed to establish that the master's decision "conflicts" with the CWA. The Department has not contended that compliance with both the master's order and the CWA is impossible. Moreover, the master's decision would not be binding on the Corps in any future permitting matter given that it ruled on the wetlands status of the parcel as of October 13, 2000 (over 9 years ago) and that the Corps was neither a party to the declaratory judgment action nor in privity with any party.[12] Thus, the master's decision does not frustrate a federal purpose or create an obstacle to the fulfillment of federal objectives.

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[11] See Ouellette, 479 U.S. 481 (holding that CWA preempted Vermont nuisance law to extent that Vermont law sought to impose liability on New York point source).

[12] "Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 495-96, 450 S.E.2d 616, 619 (Ct. App. 1994). "The term 'privy,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." Id. at 496; 450 S.E.2d at 619. Here, the Department is a state agency whose "functions and purposes" are the "the systematic planning, construction, maintenance, and operation of the state highway system and the development of a statewide mass transit system that is consistent with the needs and desires of the public." S.C. Code Ann. § 57-1-30(A) (Supp. 2008). The Department's primary concern in this case was to pay a fair price for the parcel. In our opinion, the Department was not in privity with the Corps, a federal agency charged specifically with the duties of environmental regulation under the CWA. See 33 U.S.C. §§ 1319(g)(1)(B), 1344 (2000).

For these reasons, we conclude that the CWA did not preempt the master from making a determination as the amount of jurisdictional wetlands existing on the parcel as of the condemnation date.

II. Jurisdiction of CWA over Wetlands on Parcel

Next, the Department contends that the master erred by concluding that the parcel consisted of no wetlands within the jurisdiction of the CWA. We disagree.

Section 404(a) of the CWA regulates the discharge of dredged or fill material into "navigable waters." 33 U.S.C. § 1344(a) (2000). Under the CWA, the term "navigable waters" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2000). In its regulations, the Corps has defined the phrase "waters of the United States" to include, among other things, waters susceptible to use in interstate commerce, tributaries thereto, and wetlands that are "adjacent to" such waters and tributaries. See 33 C.F.R. § 328.3(a) (2000).

Numerous cases have addressed the meaning of the phrase "waters of the United States" and the validity of the Corps' regulatory definition of that term. The U.S. Supreme Court first tackled these issues in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), a case involving wetlands that abutted a navigable waterway. In that case, the Court upheld the Corps' construction of Section 404 as extending federal jurisdiction to wetlands adjacent to the "waters of the United States." Noting that choosing where "water ends and land begins" was "no easy task,"[13] the Court concluded that it was "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." Id. at 133. In making its ruling, the Court did not express any opinion on "the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." Id. at 131 n.8.

[13] Id. at 132.

Since Riverside Bayview, the U.S. Supreme Court has issued two major decisions construing the phrase "navigable waters," both of which were decided after the Department filed its Condemnation Notice in October of 2000: Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC) and Rapanos v. United States, 547 U.S. 715 (2006).

A. SWANCC

In SWANCC, the U.S. Supreme Court considered the issue of whether wholly *intrastate* ponds are subject to federal jurisdiction under Section 404(a) of the CWA based upon the presence of migratory birds. In that case, the owners of the property containing the ponds contacted the Corps to determine if a federal landfill permit under Section 404(a) of the CWA was required for their proposed use of the property as a disposal site for nonhazardous solid waste. Upon being informed that a number of migratory bird species had been observed at the site, the Corps asserted jurisdiction over the site pursuant to 33 C.F.R. § 328.3(a)(3) (1999) and its "Migratory Bird Rule."[14] Although the petitioner made several proposals to mitigate the likely displacement of the migratory birds, the Corps refused to issue a § 404(a) permit. On appeal of the matter, the U.S. Supreme Court concluded that the "Migratory Bird Rule" was not fairly supported by the CWA and that federal jurisdiction did not extend to "nonnavigable, isolated, intrastate waters." SWANCC, 531 U.S. at 167, 170-72.

B. Rapanos

Rapanos was a consolidation of two Sixth Circuit cases: Rapanos v. United States and Carabell v. United States. In Rapanos, the Supreme Court addressed whether four Michigan wetlands, which were located near ditches or man-made drains that eventually "empt[ied] into" navigable waters, constituted "waters of the United States" within the meaning of the CWA.

[14] The "Migratory Bird Rule" is set forth in the Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (November 13, 1986).

Rapanos, 547 U.S. at 729. The Court was unable to reach a consensus in the case; the decision was 4-1-4 and included a plurality opinion by Justice Scalia, a concurring opinion by Justice Kennedy, and a dissenting opinion by Justice Stevens. As noted below, because the plurality's opinion and Justice Kennedy's concurrence each set forth a different test for determining CWA jurisdiction, courts interpreting the Rapanos decision have disagreed as to how to apply it.

1. Plurality's Opinion

The plurality concluded that two findings were required to establish that the wetlands at issue were covered under the CWA. First, it was necessary to find that the channel adjacent to the wetland was a "wate[r] of the United States," which the plurality construed as "a relatively permanent body of water connected to traditional interstate navigable waters." Rapanos, 547 U.S. at 742.[15] According to the plurality, the phrase "waters of the United States" did not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Id. at 739.

Second, it was essential to find that the wetland had a "continuous surface connection" with the adjacent channel, "making it difficult to determine where the 'water' ends and the 'wetland' begins." Id. at 742. The plurality explained that "[a]n intermittent, physically remote hydrologic connection" would be inadequate to meet this prong of its test. See id.

2. Justice Kennedy's Concurrence

Justice Kennedy set forth a different test for analyzing whether the wetlands at issue in Rapanos fell under the jurisdiction of the CWA. Seizing

[15] As the plurality noted, the traditional definition of the term "navigable waters" required that the waters be navigable in fact or capable of being rendered so. Rapanos, 547 U.S. at 730 (citing The Daniel Ball, 77 U.S. 557, 563 (1870)).

upon language contained in SWANCC,[16] he stated that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in a traditional sense." Id. at 779. He further explained that:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Id. at 780.

There has been disagreement among courts as to how to apply the fragmented Rapanos decision. Compare N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007), cert. denied, 128 S. Ct. 1225 (2008) (holding that Justice Kennedy's test provides the controlling rule for determining jurisdiction) with U.S. v. Johnson, 467 F.3d 56, 60-66 (1st Cir. 2006), cert denied, 128 S. Ct. 375 (2007) (holding that jurisdiction exists if either the plurality's test or Kennedy's test is met). In the present case, it is unnecessary for us to take a position on this issue because we conclude that, under either the plurality's test or Justice Kennedy's test, the wetlands on the parcel are nonjurisdictional.

[16] In SWANCC, the Court explained its decision in Riverside Bayview by stating that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes." SWANCC, 531 U.S. at 167.

C. Evidence Presented at Trial

1. Normandy

At trial, Normandy introduced the results of Turner's study, which found that roughly fifteen acres of the 88.59-acre parcel consisted of wetlands (approximately 17%). The study also concluded that those fifteen acres of wetlands could be converted to uplands through the installation of additional ditching. Although Turner did not begin his study until 2003, he testified that it was "reasonable and probable" that his study accurately reflected the wetlands status of the parcel as of October 13, 2000, the condemnation date. Turner's testimony was buttressed by that of Normandy's owner, Smith, who testified that the findings in Turner's study were "almost identical" to those contained in the study conducted by Boatwright in 2001.

As to whether the wetlands on the parcel were jurisdictional, Turner testified that, in his opinion, none of the wetlands were jurisdictional. As support for his opinion, Turner testified that the closest traditional navigable water to the parcel was the Waccamaw River, which he estimated was five to six miles away. He also testified that the Christmas tree ditches installed on the parcel "dry up quite radically" and that, even in abnormally heavy periods of rainfall, they did not have significant flow for a continuous three-month period but rather were "bone dry." Finally, Turner testified that, in his opinion, neither any of the ditches nor any of the areas that still met the wetlands criteria had a significant nexus with a traditional navigable water.

2. The Department

The Department relied primarily upon the testimony of McClam, who was qualified as an expert in civil engineering and hydrology. In contrast to the evidence presented by Normandy, McClam testified that approximately 56% of the parcel was wetlands. However, she acknowledged that her opinion was based upon Murphy's delineation, which covered only 2.7 acres of the parcel, and Dr. Booth's delineation, which was conducted before Normandy installed the Christmas tree ditches. Moreover, on cross-

examination, McClam admitted that she did not personally conduct any tests on the parcel, and that, while others working on the Carolina Bays Parkway project did do some soil borings, their work was limited to the study corridor.

McClam also testified that it was her opinion that the wetlands portion of the parcel was jurisdictional "based upon its connection to canals and tributaries." However, McClam never specifically testified that the wetlands on the parcel had a "continuous surface connection" with any of the canals or tributaries she mentioned. Nor did McClam expressly testify that a "significant nexus" existed between the wetlands on the parcel and a traditional navigable water. Furthermore, while McClam testified that she visited the parcel, she did not testify that she inspected the entire parcel, even when asked by Normandy's counsel.

McClam further testified that "the nearest water course" to the parcel was Bellamy Branch and that Bellamy Branch ultimately led to the Waccamaw River. However, McClam failed to provide specific testimony as to the proximity of Bellamy Branch to the parcel.

D. Analysis

Where an expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value. Small v. Pioneer Machinery, Inc., 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997). "This Court cannot judge the credibility or weight of the testimony on appeal." Id.

Here, the evidence in the record adequately supports the master's conclusion that, as of October 13, 2000, the parcel contained no wetlands within the jurisdiction of the CWA. Turner's testimony demonstrated that the wetlands did not have a "continuous surface connection" with any "relatively permanent" body of water and that the Rapanos plurality's test for jurisdiction was therefore not met. Turner's testimony also showed that there was not a significant nexus between the wetlands and a traditional navigable water and that Justice Kennedy's jurisdictional test was not met either. Although McClam's testimony contradicted some of the testimony presented by Turner,

she did not investigate the parcel as thoroughly as Turner did. Therefore, it was reasonable for the master to rely on Turner's testimony rather than McClam's.

The Department nonetheless contends that Turner's testimony failed to sufficiently establish that the wetlands were nonjurisdictional. Specifically, the Department points to Turner's testimony during cross-examination in which Turner admitted that he did not know whether a certain canal on the parcel connected to the Waccamaw River. The Department claims that this information was crucial to determining whether the wetlands were covered under the CWA.

However, there is no clear evidence in the truncated record that the canal in question had any connection to the wetlands portion of the parcel.[17] Indeed, if anything, the record appears to show that the canal was not connected to the parcel's wetlands. For instance, during direct examination, Turner testified that there was a canal located in the uplands area of the parcel. He also testified that the only ditch on the parcel that kept a substantial nexus with the canal was a ditch coming off the Carolina Bays Parkway (Highway 31) into which the Department had placed water from the Parkway. Turner further testified that none of the areas that still met the wetland criteria were adjacent to that ditch. Thus, even if the canal could be construed as a tributary to the Waccamaw River, Turner's testimony seems to support the conclusion that the canal did not have any sort of connection or nexus to the wetlands on the parcel.

The Department also contends that Turner acknowledged that, on the date of condemnation, the parcel's wetlands *may* have been connected to tidal

[17] Among many other pages, the first few pages of Turner's cross-examination are missing from the trial transcript. As a result, the Court is unable to determine the precise location of the canal.

waters downstream.[18] Specifically, the Department points to the following exchange between Normandy's counsel and Turner:

> Q: And based on that, are any of the areas that still meet the wetland criteria shown on Exhibit 4, in your expert opinion, under the jurisdiction of the federal government?
>
> A: No sir, they're not because I don't believe that any of these have a significant nexus to the tidal waters downstream, so none of them, these areas may meet the criteria right now. *They may have met the criteria on the date of the take*, but the way the law, case law reads now, you can argue that none of these wetlands have a significant nexus, and are therefore non-jurisdictional.

We disagree with the Department's interpretation of this testimony. In our view, Turner was not conceding that the wetlands may have been connected to tidal waters downstream on the condemnation date. Rather, he was simply acknowledging that, *under the case law that existed on the condemnation date*, the wetlands might have been considered jurisdictional.[19] Importantly, the Department does not contend that SWANCC and Rapanos, both of which were issued after the condemnation date, are inapplicable to this case.

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[18] The Corps' regulatory definition of "waters of the United States" expressly includes "waters which are subject to the ebb and flow of the tide." See 33 C.F.R. § 328.3(a)(1) (2000).

[19] For instance, prior to SWANCC, the Corps relied upon the mere presence of migratory birds to establish federal jurisdiction over wetlands. Moreover, as noted by Justice Scalia in Rapanos, even after SWANCC, courts continued to uphold broad assertions of jurisdiction by the Corps. See Rapanos, 547 U.S. at 726-727 and the cases cited therein.

III. Legality of Wetlands Drainage

Finally, the Department contends that the master erred by concluding that, as of the condemnation date, the parcel contained fifteen acres of wetlands that could legally be drained. Specifically, the Department argues that even if the parcel is not subject to regulation under the CWA, it is subject to state regulation by the Office of Ocean and Coastal Resource Management (OCRM) as an isolated wetland.

We find no reversible error here. In his order, the master held that the issue of "DHEC's alleged jurisdiction" over the wetlands was no longer before the court because it had previously been decided by Judge Harwell in his October 2004 order. The Department has not challenged the master's ruling. Therefore, it is the law of the case, regardless of its correctness. See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (holding that an unappealed ruling, right or wrong, is the law of the case). Accordingly, because OCRM is a part of DHEC,[20] we conclude that the master did not err by failing to consider whether the parcel is subject to state regulation by OCRM as an isolated wetland.

CONCLUSION

For the foregoing reasons, the master's decision is

AFFIRMED.

SHORT, J., and WILLIAMS, J., concur.

[20] See, e.g., S.C. Code Ann. §§ 48-40-20(2), 48-40-40(B) (2008).