Judicial Merit Selection Commission

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

M E D I A R E L E A S E

January 31, 2013

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below:

A vacancy will exist in the office currently held by the Honorable Brooks P. Goldsmith, Judge of the Circuit Court for the Sixth Judicial Circuit, Seat 1, upon Judge Goldsmith's retirement on or before June 30, 2013. The successor will fill the unexpired term of that office which will expire June 30, 2016.

A vacancy will exist in the office currently held by the Honorable Maité Murphy, Master-in-Equity of Dorchester County, due to her election to the Circuit Court, At-Large, Seat 15. The successor will fill the unexpired term that will expire on June 30, 2016.

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

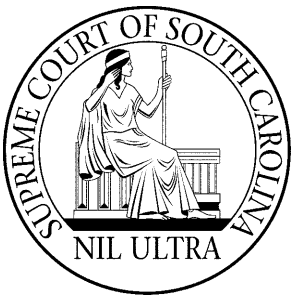
Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (M-Th).

Or

Jaynie Jordan, JMSC Administrative Assistant at (803)-212-6623

The Commission will not accept applications after 12:00 noon on Monday, March 4, 2013.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6
February 6, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITION FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

2012-UP-526-State v. Christopher Ryan Whitehead	Pending
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-609-Coghlan v. Coghlan	Pending
2012-UP-614 - Charles Griggs v. Ashleytowne Development	Pending
2012-UP-623-L. Paul Trask v. S.C. Department of Public Safety et al.	Pending
2012-UP-626-Maurice Morant v. SCDC	Pending
2012-UP-627-Mack v. American Spiral Weld	Pending
2012-UP-628-State v. Norman Stoudenmire	Pending
2012-UP-632-State v. Stevie Lamont Aiken	Pending
2012-UP-670-Burgess v. Burgess	Pending
2012-UP-674-SCDSS v. Devin B, Brian G., and Sue G.	Pending
2012-UP-676-G. Gottschlich v. D. McNeil	Pending
2012-UP-678-State v. Darrin D. Holston	Pending
2012-UP-688-L. Brown v. Dick Smith Nissan	Pending
2013-UP-001-R. Coleman v. State	Pending
2013-UP-007-Hoang Berry v. Stokes Import Collision	Pending
2013-UP-010-N. Mitchell v. Juan P. Marruffo et al.	Pending
2013-UP-014-D. Keller v. ING Financial Partners et al.	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-020-State v. Jason Ray Franks	Pending
2013-UP-034-Clark D. Thomas v. Bolus & Bolus	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette	Pending
4750-Cullen v. McNeal	Pending
4764-Walterboro Hospital v. Meacher	Pending
4779-AJG Holdings v. Dunn	Pending
4819-Columbia/CSA v. SC Medical	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4859-State v. B. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. Jonathan Hill	Pending
4872-State v. Kenneth Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Stephen Wise v. Richard Wise	Pending
4880-Gordon v. Busbee	Pending
4887-Rebecca West v. Todd Morehead	Pending
4888-Pope v. Heritage Communities	Pending

4890-Potter v. Spartanburg School	Pending
4892-Katie Green Buist v. Michael Scott Buist	Pending
4894-State v. Andre Jackson	Pending
4895-King v. International Knife	Pending
4897-David Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Patricia Lewin v. Albert Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree Electrical	Pending
4924-State v. Bradley Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4927-State v. John Porter Johnson	Pending
4932-Margie Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending

4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4954-North Point Dev. Group v. SCDOT	Pending
4956-State v. Diamon D. Fripp	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4964-State v. Alfred Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4983-State v. James Ervin Ramsey	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
4997-Allegro v. Emmett J. Scully	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending

5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5017-State v. Christopher Manning	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
5044-State v. Gene Howard Vinson	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-038-Dunson v, Alex Lee, Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-127-State v. Beulah Butler	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-343-State v. Eric Dantzler	Pending

2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. Lloyd Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Harris	Denied 01/24/13
2011-UP-385-State v. Anthony Wilder	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-456-Thomas Heaton v. State	Pending
2011-UP-463-State v. Rebekah Rogers	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. Terrell McCoy	Pending
2011-UP-475-State v. James Austin	Pending
2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-516-Vaughn Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-522-State v. Michael D. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending

2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-565-Griggs v. Ashley Towne Village	Denied 01/24/13
2011-UP-572-State v. Reico Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. David Lee Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-A. Leon Ravenell v. Nancy Meyer	Pending
2012-UP-010-State v. Norman Mitchell	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending

2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-330-State v. Doyle Marion Garrett	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending

2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-371-State v. Thomas Smart	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-471-SCDSS v. Kelcie C. et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending
2012-UP-559-NAFH National Bank v. Israel Romero	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Curtis McCoy, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-178927

ON WRIT OF CERTIORARI

Appeal from Spartanburg County
J. Derham Cole, Post-Conviction Relief Judge

Opinion No. 27214
Submitted November 1, 2012 – Filed February 6, 2013

REVERSED AND REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Suzanne H. White, all of Columbia, for the State.

JUSTICE KITTREDGE: Petitioner John Curtis McCoy appeals the summary dismissal of his second post-conviction relief (PCR) application, which alleged recently discovered juror misconduct, on the grounds it was successive, untimely, and failed to prove a newly discovered evidence claim. We reverse and remand this matter for an evidentiary hearing. Further, for the benefit of the bench and the bar, we clarify the proper legal standard for claims involving juror misconduct.

I.

Petitioner was indicted for first-degree burglary and assault and battery with intent to kill. Petitioner's case was called to trial on June 14, 2005. During *voir dire*, at defense counsel's request, the trial judge asked the potential jurors if they were related by blood or marriage to any person employed in the Seventh Circuit Solicitor's office. Seven potential jurors responded affirmatively; however, Juror 84, who ultimately served on the final jury panel, did not respond or disclose that her cousin was married to the Seventh Circuit Solicitor. The defense exercised only four of its ten peremptory strikes during the jury selection process. At the conclusion of his trial, Petitioner was convicted of both offenses.

Following the dismissal of his direct appeal and first PCR application, Petitioner reviewed a fellow inmate's case in November 2009 and discovered the inmate's trial took place the day after Petitioner's. The inmate's trial was before a different trial judge but in the same courthouse. During voir dire for the inmate's trial, Juror 84—the same juror who served on the final panel in Petitioner's trial—advised the court that her cousin was married to the Seventh Circuit Solicitor.

A few days after making this discovery, Petitioner filed his second PCR application, arguing he was denied his Sixth Amendment right to a trial by an impartial and objective jury. In support of his claim, Petitioner submitted an excerpt of the voir dire transcript wherein Juror 84 revealed her relationship to the Solicitor and a copy of defense counsel's requested *voir dire* from his own trial, which included the specific question to which Juror 84 failed to respond. Petitioner argued that Juror 84's concealment deprived him of information material to his intelligent use of peremptory challenges, which, in turn, deprived him of his constitutional right to trial by an impartial jury. Petitioner averred that, if he had been aware of the juror's relationship to the Solicitor at trial, his use of peremptory challenges would have been different. Petitioner further argued he could not have previously raised this issue because the juror's concealment of her relationship to

the Solicitor, in and of itself, rendered the information unavailable to him until four years after trial when he discovered the information in a fellow inmate's case file. As noted, this occurred after both his direct appeal and first PCR application were dismissed. Petitioner further contended his claim fell within the "discovery rule" exception to the one-year limitation period and was therefore timely.

The State filed a motion to dismiss Petitioner's PCR application, arguing it was successive and barred by the statute of limitations. Regarding successiveness, the State claimed Petitioner failed to present sufficient reason why he could not have raised the current allegations in his previous PCR application. Further, the State contended the application was untimely because it was not filed within the one-year limitation period applicable to PCR actions. The State also contended Petitioner's claim "that he has discovered evidence that he was not tried by a fair and impartial jury lack[ed] merit" because Petitioner failed to provide any corroborating information or demonstrate how his allegations satisfied the five-pronged test for newly discovered evidence.[1]

The PCR judge granted the State's motion for summary dismissal, finding Petitioner's claim was untimely because it was not filed within one year of trial. The PCR judge also found Petitioner's claim was successive because it could have been raised in his first PCR application and failed to prove a claim based on newly discovered evidence. Specifically, the PCR judge found that, because Petitioner failed to "offer any detail as to how this information would have affected his trial had it been known at that time, or how and when it was discovered," Petitioner

---

[1] *See*, *e.g.*, *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993). *Clark* provides:

> To obtain a new trial based on after discovered evidence, the party must show that the evidence:
> (1) would probably change the result if a new trial is had;
> (2) has been discovered since trial;
> (3) could not have been discovered before trial;
> (4) is material to the issue of guilt or innocence; and
> (5) is not merely cumulative or impeaching.

Id. at 387-88, 434 S.E.2d at 267 (citing *Hayden v. State*, 278 S.C. 610, 299 S.E.2d 854 (1983)).

failed to establish "sufficient reason" why the current allegations could not have been raised in his previous PCR application. We granted certiorari to review the PCR judge's summary dismissal of Petitioner's claim.

II.

A.

Petitioner argues his second PCR application should not have been summarily dismissed and asks this Court to reverse and remand this matter for a hearing. We find summary dismissal was error because genuine issues of material fact exist as to whether Petitioner's claim is successive or barred by the statute of limitations.

A PCR application ordinarily must be filed within one year after a conviction or, if a direct appeal is taken, one year after the remittitur is sent to the trial court. S.C. Code Ann. § 17-27-45(A) (2003). However, section 17-27-45(C) provides that if a PCR applicant discovers "material facts not previously presented and heard that require[] vacation of [his] conviction or sentence," he may file a PCR application "within one year after the date of actual discovery . . . or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

A PCR applicant must allege all available grounds for relief in his original application; any ground not raised in the original application may not be the basis for subsequent applications unless the court finds a ground for relief asserted which, for sufficient reason, was not raised in the original application. S.C. Code Ann. § 17-27-90.

"The [PCR] court may grant a motion by either party for summary disposition of the [PCR] application when . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." S.C. Code Ann. § 17-27-70(c). When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (citing S.C. Code Ann. § 17-27-80). Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive

PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing. *Cf. Delaney v. State*, 269 S.C. 555, 556, 238 S.E.2d 679, 679 (1977).

As to the timeliness issue, we conclude the PCR judge misconstrued section 17-27-45(A) in finding Petitioner was required to file his claim within one year after his trial, rather than one year after the remittitur was sent from his direct appeal. The time limitation in § 17-27-45(A) provides that, where a defendant appeals his conviction (as Petitioner did), the one-year period begins the date the remittitur is sent by the appellate court—not the date of conviction. Further, the PCR judge apparently overlooked the discovery rule in section 17-27-45(C), which allows one year after the discovery of "material facts not previously presented and heard that require[] vacation of the conviction or sentence" to file a PCR application. Petitioner argued he did not discover the juror's misconduct until November 2009, and he promptly filed his second PCR application after making that discovery. Because Petitioner's claim that he is entitled to the benefit of the discovery rule is not conclusively refuted by the record, the PCR judge erred by summarily dismissing Petitioner's claim.

We also find a genuine issue of fact exists as to whether Petitioner's claim is successive under section 17-27-90, which permits an applicant to file a subsequent PCR application only if the applicant demonstrates a sufficient reason why the claims asserted therein were not asserted previously. Petitioner avers he has demonstrated sufficient reason why his claim was not included in his first PCR application in that the juror's misconduct was not discovered until after his first PCR application was dismissed. However, the State contends the juror's misconduct could have been discovered earlier through the exercise of due diligence and, therefore, Petitioner has failed to state a "sufficient reason." Based on this factual dispute, a hearing is necessary to resolve this critical issue.

Although Petitioner's PCR claim may ultimately prove to be untimely, successive, or perhaps unsuccessful on the merits, the PCR judge erred in granting the State's motion for summary dismissal because genuine issues of material fact exist as to whether Petitioner's PCR claim is successive or untimely. *See Leamon*, 363 S.C. at 434, 611 S.E.2d at 495 (citing S.C. Code Ann. § 17-27-70(b)-(c)) (noting summary dismissal of a PCR application without a hearing is appropriate only when it is apparent on the face of the application that (1) there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief).

B.

For the benefit of the bench and bar, we address the frequent but erroneous application of the standard newly discovered evidence framework in summarily dismissing PCR claims involving juror misconduct. Where a PCR applicant alleges juror misconduct, we reject application of the *Clark* five-pronged newly discovered evidence standard, as it does not lend itself to properly evaluating a claim of juror misconduct. In addition, the *Clark* framework is not conducive for determining whether a PCR applicant is entitled to a hearing where intentional juror concealment is alleged.

The standard test governing newly discovered evidence is properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or innocence. *See*, *e.g.*, *State v. South*, 310 S.C. 504, 507, 427 S.E.2d 666, 668 (1993) (noting that to obtain a new trial based on newly discovered evidence, the evidence must be material to the issue of guilt or innocence). However, juror misconduct discovered post-trial is not properly considered "newly discovered evidence"; rather, it is a separate basis for a new trial. *See*, *e.g.*, *State v. Sheppard*, 582 A.2d 116, 118 (Vt. 1990) (noting evidence of juror misconduct is not properly considered newly discovered evidence because it has no bearing on the issue of innocence or guilt and does not concern the substance of the State's case or an accused's defense).

Because juror misconduct is a separate basis for a new trial, it is governed by a separate standard. Provided a claim is timely raised, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. *See State v. Woods*, 345 S.C. 583, 587-89, 550 S.E.2d 282, 284 (2001) (finding that a juror's intentional failure to disclose a relationship gives rise to an inference of bias and rejecting the State's argument that a new trial should be warranted only where an individual shows he was prejudiced by the juror's failure to disclose information); *State v. Kelly*, 331 S.C. 132, 145-46, 502 S.E.2d 99, 106-07 (1998) (recognizing that trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information and finding that the first inquiry in the juror disqualification analysis is whether the juror intentionally concealed information during *voir dire*). Further, evaluating the merits of a juror

misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing. *See State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) ("Whether a juror's failure to respond [during *voir dire*] is intentional is a fact intensive determination that must be made on a case-by-case basis.").

Therefore, in the context of PCR allegations involving juror misconduct, the standard five-pronged newly discovered evidence test, as set forth in *Clark*, has no application and should not be used as the basis for summary dismissal. Rather, juror concealment claims are governed by the analysis set forth in *Woods*, and such case-by-case determinations are most appropriately made after a hearing, which allows the factual circumstances to be more fully developed.

III.

For the reasons stated above, we find the PCR judge erred in summarily dismissing Petitioner's application because genuine issues of material fact exist as to whether his claim is successive or time-barred. Thus, we reverse the dismissal of Petitioner's second PCR application and remand the matter for a hearing. If, upon remand, the court determines Petitioner's claim is not untimely or successive, the court shall consider the merits of the second PCR application.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hampton Friends of the Arts, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2011-190669

Appeal from the Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 27215
Heard December 5, 2012 – Filed February 6, 2013

AFFIRMED

Marion C. Fairey, Jr., of Hampton, for Appellant.

Milton G. Kimpson, Harry T. Cooper, Jr., and Sean G. Ryan, all of Columbia, for Respondent.

Kenneth N. Shaw, Seth Swan and Benton D. Williamson, all of Haynsworth Sinkler Boyd, PA, for Amicus Curiae Girl Scouts of South Carolina - Mountains to Midlands, Inc.

JUSTICE KITTREDGE: This direct appeal presents the question of when tax liability for property is determined. Appellant Hampton Friends of the Arts is a non-profit eleemosynary corporation whose main purpose is to promote the arts in

Hampton County, South Carolina. Appellant challenges the Administrative Law Court's (ALC) finding that real property it acquired in March 2008 was subject to 2008 property taxes because the property was subject to taxes on December 31, 2007. Appellant contends that, as a non-profit corporation, it was entitled to a property tax exemption for the 2008 tax year. We disagree and affirm the ALC.

I.

In March 2008, Appellant purchased real property in Hampton County. It is undisputed that prior to Appellant's purchase, the property was subject to property taxes on December 31, 2007.

The seller, which owned the property on December 31, 2007, paid only a pro-rata portion of the 2008 property taxes, although it was statutorily responsible for all of the 2008 taxes. Appellant received a letter from the Hampton County Administrator in June 2009 which erroneously informed Appellant that it was responsible for the 2008 property taxes. Appellant, believing it was responsible for a portion of the 2008 taxes, sought an exemption as a non-profit corporation.[1] The Department of Revenue (DOR) denied an exemption for the 2008 property taxes, but approved an exemption for the 2009 property taxes and subsequent years. At some point in the process, Appellant tendered to Hampton County under protest what it believed was its pro-rata share of the property taxes and penalties for the 2008 tax year.

In response to Appellant's protest, DOR issued a final agency determination finding that the property was not exempt from ad valorem property taxes for the 2008 tax year. DOR explained that the tax status of property is determined by the status of the owner of record as of December 31st of the preceding year. Because the property was owned by a non-exempt entity and therefore was subject to taxation on December 31, 2007, DOR determined the property was not exempt from the 2008 property taxes.

[1] Section 12-37-220(A)(4) of the South Carolina Code states that "all property of all charitable trusts and foundations used exclusively for charitable and public purposes" is exempt from ad valorem taxation.

Appellant appealed DOR's determination to the ALC.[2] The ALC affirmed DOR's determination that Appellant was not entitled to an exemption for its portion of the 2008 property taxes. The ALC concluded the pertinent date for determining whether a property may be taxed is December 31st of the previous year. Additionally, the ALC held that the owner of the property as of December 31, 2007, was statutorily liable for the ad valorem property taxes for the 2008 year. Thus, the ALC held Appellant was not statutorily liable for the 2008 property taxes.

This appeal is now before this Court. A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. S.C. Code Ann. § 1-23-610(B)(a), (d) (Supp. 2011).

II.

Appellant contends that if property is acquired by a non-profit corporation prior to ad valorem taxes actually being levied, the property is exempt from that tax year. Thus, Appellant avers that, because it acquired the property prior to the tax levy for the 2008 tax year, the property became exempt and no tax is owed. We disagree, for the law is clear that property tax liability is determined as of December 31st of the preceding year, regardless of a subsequent transfer to an exempt corporation or when the tax was actually levied.

The South Carolina statutory scheme generally determines tax liability on property owned as of December 31st of the preceding year. *See* S.C. Code Ann. § 12-37-610 (2000) (stating each person is liable to pay taxes and assessments on real property that he owns as of December 31st of the year preceding the tax year); S.C. Code Ann. § 12-37-900 (requiring taxpayers to deliver to the county a statement of all real estate possessed or controlled on December 31st of the previous year); S.C. Code Ann. § 12-49-20 (providing a lien shall attach to real property on December 31st of the previous year for taxes to be paid during the ensuing year); *see also Lindsey v. S.C. Tax Comm'n*, 302 S.C. 274, 275, 395 S.E.2d 184, 186 n.1 (1990) ("The pertinent date to determine the value of property for a given tax year is December 31st of the preceding year."). Thus, we find the statute's plain language ends the inquiry. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581

[2] Hampton County was not made a party to this action.

(2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

Appellant's reliance on *Town of Myrtle Beach v. Holliday* is misplaced. 203 S.C. 25, 26 S.E.2d 12 (1943). In *Holliday*, the Horry County tax collector unsuccessfully sought to assess property taxes against real and personal property acquired by the town of Myrtle Beach. *Holliday* is limited to governmental acquisitions. *Id.* at 14 (holding that taxes assessed against property for the year in which it is acquired by a political subdivision of the state and being used for public purposes cease to be collectible). Furthermore, we reject any suggestion that *Holliday*'s reach extends beyond government entities to include private, non-profit corporations. *See id.* (noting exemptions of the property of municipal corporations are liberally construed because it has never been the policy of this state to tax its own agencies and instrumentalities of government).

We further note that in 1999, the legislature amended section 12-37-220 to add subsection (D), which mandates that when a church acquires property, such property immediately becomes exempt from taxation. Thus, subsection (D) grants churches the very exemption Appellant now seeks. If *Holliday* had the expansive reach Appellant urges, then there would have been no need for the legislature to enact subsection (D). Thus, we reject Appellant's expansive interpretation of *Holliday*. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (stating "[t]he canon of construction 'expressio unius est exclusion alterius' or 'inclusio unius est exclusion alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative[]'" (quoting Black's Law Dictionary 602 (7th ed. 1999))).

Pursuant to settled law, the 2008 tax status of the Hampton County property was determined on December 31, 2007. Because the property was subject to property taxes as of December 31, 2007, the property is subject to 2008 property taxes. We therefore affirm the ALC.[3]

---

[3] Appellant alternatively seeks a refund of the 2008 taxes it paid to Hampton County because it was not the owner of the property as of December 31, 2007. Although the ALC correctly held, and the parties have stipulated, that Appellant was not statutorily responsible for the 2008 property taxes, Appellant's basis for protesting its tax liability was an exemption as a non-profit, not an assertion regarding lack of ownership as of December 31, 2007. Thus, we find the issue of

AFFIRMED.

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

Appellant's entitlement to a refund based upon lack of ownership is not preserved for appellate review. *See Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (noting an appellate court may not consider issues not raised to and ruled upon by the ALC). Accordingly, we do not reach this issue. We emphasize, however, that our refusal to address the refund issue is without prejudice to whatever rights Appellant may have, if any, to seek relief in connection with the 2008 taxes paid to Hampton County.

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2012-213642

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Court-Annexed Alternative Dispute Resolution Rules are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2013

**Rule 4(d)(1), South Carolina Court-Annexed
Alternative Dispute Resolution Rules, is amended to provide as follows:**

(1) If there are unresolved issues of custody or visitation, the court may in its discretion order an early mediation of those issues upon motion of a party or upon the court's own motion.

**The first sentence of Rule 4(d)(2), South Carolina Court-Annexed
Alternative Dispute Resolution Rules, is amended to provide as follows:**

(2) If issues are in dispute and no Proof of ADR has been filed certifying that the issues have been mediated, the parties must mediate those issues prior to the scheduling of a hearing on the merits; provided, however, the parties may submit the issues of property and alimony to binding arbitration in accordance with subparagraph (5).

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Criminal Procedure

Appellate Case No. 2012-212106

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Rules of Criminal Procedure are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2013

The South Carolina Rules of Criminal Procedure are amended by adding the following Rule:

RULE 35
TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

Note:

Rule 35 is the language of Rule 6(a), SCRCP.

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Rules of Civil Procedure and the South Carolina Rules of Magistrates Court

Appellate Case No. 2012-212128

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 4 of the South Carolina Rules of Civil Procedure (SCRCP) and Rule 6 of the South Carolina Rules of Magistrates Court (SCRMC) are amended as shown in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2013

Rule 4(d), SCRCP, is amended to add paragraph (d)(9) as follows:

(d)(9) Service by Commercial Delivery Service. Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c) by a commercial delivery service which meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. § 7502(f)(2). Service is effective upon the date of delivery as shown in the delivery record of the commercial delivery service. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a delivery record showing the acceptance by the defendant which includes an original signature or electronic image of the signature of the person served. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the delivery receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

The following Note is added to Rule 4(d), SCRCP:

Note to 2013 Amendment:

Rule 4(d)(9) authorizes service of process to be made by a qualifying commercial delivery service and is similar to service by registered or certified mail.

Rule 4(g), SCRCP, is amended to provide as follows:

(g) Proof and Return. The person serving the process shall make proof of service thereof promptly and deliver it to the officer or person who issued same. If served by the sheriff or his deputy, he shall make proof of service by his certificate. If served by any other person, he shall make affidavit thereof. If served by publication, the printer or publisher shall make an affidavit thereof, and an affidavit of mailing shall be made by the party or his attorney if mailing of process is permitted or required by law. Failure to make proof of service does not affect the validity of the service. The proof of service shall state the date, time and place of such service and, if known, the name and address of the person actually served

at the address of such person, and if not known, then the date, time and place of service and a description of the person actually served. If service was by mail, the person serving process shall show in his proof of service the date and place of mailing, and attach a copy of the return receipt or returned envelope when received by him showing whether the mailing was accepted, refused, or otherwise returned. If the mailing was refused, the return shall also make proof of any further service on the defendant pursuant to paragraph (8) of subdivision (d) of this rule. The return along with the receipt or envelope and any other proof shall be promptly filed by the clerk with the pleadings and become a part of the record. If service was by commercial delivery service, the person initiating the service of process shall make an affidavit identifying the process or other documents served and shall attach to the affidavit a delivery record of the commercial delivery service which shall contain the date, time, and place of delivery, the name of the person served, and include an original signature or electronic image of the signature of the person served. The affidavit and delivery record and any other proof shall be promptly filed by the clerk with the pleadings and become a part of the record.

The following Note is added to Rule 4(g), SCRCP:

Note to 2013 Amendment:

This amendment to Rule 4(g) details the proof required when a party serves process utilizing a commercial delivery service.

Rule 6(d), SCRMC, is amended to add paragraph (d)(7) as follows:

(7) Service by Commercial Delivery Service. Service of a summons, complaint, and any appropriate attachments upon a defendant of any class referred to in paragraph (d)(1) or (d)(3) of this subdivision of this rule may be made by a commercial delivery service which meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. § 7502(f)(2). Service is effective upon the date of delivery as shown in the delivery record of the commercial delivery service. Service pursuant to this paragraph shall not be the basis for the entry of a default judgment unless the record contains a delivery record showing the acceptance by the defendant, which includes an original signature or electronic image of the signature of the person served. Any default judgment shall be set aside pursuant to Rule 12 if the defendant demonstrates to the court that the delivery record was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Rule 6(g), SCRMC, is amended to provide as follows:

(g) Proof and Return. The person serving the process shall promptly make proof of service and deliver it to the court. If served by the sheriff, the sheriff's deputy, or a magistrate's constable, proof of service shall be made by certificate. If served by any other person, the person shall make an affidavit of service. If served by publication, the printer or publisher shall make an affidavit of publication, and an affidavit of mailing shall be made to the party or the party's attorney if mailing of process is permitted or required by law. Failure to make proof of service does not affect the validity of service. The proof of service shall state the date, time, and place of service and a description of the person actually served. If service was by mail, the person serving process shall show in the proof of service the date and place of mailing, and attach a copy of the return receipt or the returned envelope showing whether the mailing was accepted, refused, or otherwise returned. If the mailing was refused, the return shall also show proof of any further service on the defendant pursuant to paragraph (d)(6) of this rule. The return along with the receipt or envelope and any other proof shall be promptly filed with the court with the pleadings and become a part of the record. If service was by commercial delivery service, the person initiating the service of process shall make an affidavit identifying the process or other documents served and shall attach to the affidavit a delivery record of the commercial delivery service which shall contain the date,

time, and place of delivery, the name of the person served, and include an original signature or electronic image of the signature of the person served. The affidavit and delivery record and any other proof shall be promptly filed with the court with the pleadings and become a part of the record.

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Magistrates Court

Appellate Case No. 2012-212112

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the South Carolina Rules of Magistrates Court are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2013

Rule 16(b) of the South Carolina Rules of Magistrates Court is amended to provide as follows:

> **(b)** If, at the close of all the evidence, a directed verdict is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised during the trial of the case if the case is being tried before a jury. If a jury verdict is returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if a directed verdict had been granted. A motion for a new trial may be joined with a motion for a judgment notwithstanding the verdict, or a new trial may be prayed for in the alternative. A jury verdict is final if no motion for a new trial or judgment notwithstanding the verdict is filed with the court within ten (10) days of the rendering of the jury verdict and the court has not on its own motion ordered a new trial or directed a verdict notwithstanding the jury verdict.

Paragraphs (b), (c), and (d) of Rule 19 of the South Carolina Rules of Magistrates Court are amended to provide as follows:

> **(b)** The motion for a new trial shall be made in writing and filed with the court no later than ten (10) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.
>
> **(c)** Not later than ten (10) days after entry of judgment, the court, on its own initiative, may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds for granting a new trial.
>
> **(d)** A motion to alter or amend the judgment shall be filed no later than ten (10) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark Bevivino, Alan C. Lincoln, Rhonda S. Lincoln, Karl D. Buckman, Joyce A. Buckman, Charles T. Hallman, Jr., David Freeman, and Patricia Freeman, Appellants,

v.

Town of Mount Pleasant Board of Zoning Appeals, Kent Prause, in his Capacity as Zoning Administrator for the Town of Mount Pleasant, and South Carolina Electric & Gas Co./SCANA Communications, Inc., Respondents.

Appellate Case No. 2010-179648

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5080
Heard September 12, 2012 – Filed February 6, 2013

AFFIRMED

Melinda Adelle Lucka of Finkel Law Firm LLC, of Charleston, for Appellants.

Gary Cleveland Pennington, Kelli Hudson Graham, and Jessica Clancy Crowson, all of Pennington Law Firm LLC, of Columbia for Respondent South Carolina Electric and Gas Co./SCANA; Frances Isaac Cantwell of Regan and Cantwell, of Charleston, for Respondents

Town of Mt. Pleasant Board of Zoning Appeals and Kent Prause, in his capacity as Zoning Administrator for the Town of Mount Pleasant.

THOMAS, J.: Appellants Mark Bevivino, Alan C. Lincoln, Rhonda S. Lincoln, Karl D. Buckman, Joyce Buckman, Charles T. Hallman, Jr., David Freeman, and Patricia Freeman challenge a circuit court order that upheld a decision of the Town of Mount Pleasant Board of Zoning Appeals (BZA) to allow Respondents South Carolina Electric and Gas Co./SCANA Communications, Inc. (respectively SCE&G and SCANA) to construct a telecommunications tower. We affirm.

FACTS AND PROCEDURAL HISTORY

937 Whipple Road is owned by SCE&G and leased to SCANA. It is located in the Town of Mount Pleasant (Town) and adjoins Candlewood, a residential subdivision.

In 2006, property adjacent to the Candlewood subdivision was re-zoned from R-1 to Economic Development (ED). In an ED zoning district, a telecommunications tower is allowed as a "conditional use." Such a use comes with certain conditions that must be met before the Town Zoning Administrator can approve it. Approval of conditional uses are staff level decisions and do not require notification.

In January 2009, SCANA representatives began discussions with the planning staff of the Town of Mount Pleasant (Town) regarding the installation of a telecommunications tower at 937 Whipple Road. Over the next few months, a series of meetings and correspondence exchanges took place between SCANA and the Town Zoning Administrator. Subsequently, SCANA applied for a conditional use permit to construct a tower at the site and later supplemented its application with additional information. By letter dated May 27, 2009, Kent Prause, the Town Zoning Administrator, approved SCANA's application, but with a condition that a "fall zone" plan be prepared by a licensed professional engineer and approved before any required building permits were issued. Prause also stated in his letter that the documents SCANA submitted with its application satisfied other required terms and conditions for telecommunications towers, including health, safety, and aesthetic considerations, as well as attempts either to co-locate on existing towers or to build upon existing buildings and structures. In addition, SCANA, as required by the State Historic Preservation Office, published in the *Post and*

Courier, a newspaper of general circulation where the tower was to be located, to solicit comments from interested persons. No comments were received, and the State Historic Preservation Office approved the project.

In June 2009, Prause contacted property owners in Candlewood whose properties abutted the Whipple Road site, as well as to another Candlewood resident who had been involved in prior rezoning issues regarding the site. Prause advised these individuals that a permit for a 195-foot tall telecommunications tower had been approved. In addition to noting the information was provided "as a courtesy because of your proximity to the site," Prause advised the recipients of their right to contest the decision by appealing to the BZA. No one who received Prause's communication responded.[1]

In July 2009, SCANA filed the required "fall zone" certificate, which verified the wind load capacity of the tower and the radius of its fall in the event of a structural failure. It bore the signature and seal of a professional engineer licensed in South Carolina. A building permit was then issued in October 2009, and construction of the tower took place. Construction of the tower began on October 6, 2009, and was completed on October 20, 2009.

On November 6, 2009, Appellants Alan C. and Rhonda S. Lincoln appealed Prause's authorization of the tower to the BZA. On the same day, Appellant Mark Bevivino also filed an appeal of the decision. All three individuals live in the Candlewood subdivision. In their respective appeals, the Lincolns and Bevivino alleged that (1) the tower was a safety hazard and (2) it detracted from the aesthetics and character of the neighborhood. On November 30, 2009, the BZA held a full evidentiary hearing on the appeals filed by the Lincolns and Bevivino. At the hearing, the remaining Appellants appeared and voiced their concerns; however, none of them were made parties to either of the appeals. By a 4-2 vote, the BZA affirmed Prause's decision. The BZA issued written orders on January 4, 2010.

On February 3, 2010, the Lincolns, Bevivino, and the remaining Appellants filed a petition for judicial review of the BZA orders. The Charleston County Court of Common Pleas held a hearing in the matter on September 13, 2010. By written order dated October 22, 2010, and filed October 26, 2010, the Court of Common

[1] The record indicates that Karl D. Buckman and Joyce A. Buckman were the only recipients of Prause's letter who are also parties to this appeal.

Pleas affirmed the BZA decision. In the appealed order, the court found (1) Appellants failed to present evidence that the BZA decision was an error of law regarding safety or aesthetic considerations, (2) Appellants were precluded from raising concerns about co-location, (3) the record had ample evidence to support all pertinent considerations regarding the BZA's decision to allow the tower, (4) Bevivino and the Lincolns had standing to pursue their appeal because of the close proximity of their homes to the tower site, (5) the remaining Appellants' attempt to appeal were barred by the doctrine of law of the case, and (6) none of the Appellants could maintain this action under the "public importance" exception to standing. This appeal followed.

ISSUES

I. Do Appellants have standing to seek redress in the circuit court regarding their opposition to the tower or, in the alternative, can they maintain this action under the public interest exception to standing?

II. Did the BZA commit procedural and substantive errors in allowing SCANA to construct the tower?

III. Are the notice provisions of the applicable Town ordinances against public policy?

STANDARD OF REVIEW

"The findings of fact by the board of [zoning] appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A) (Supp. 2012). In determining the questions on appeal, both the circuit court and the appellate court "must determine only whether the decision of the board is correct as a matter of law." *Id.* "A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007). "However, a decision of a city zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.*

LAW/ANALYSIS

I. Standing

We first address Respondents' argument that, except for Bevivino and the Lincolns, Appellants lack standing to pursue this appeal. The circuit court held that these Appellants ("additional Appellants") lacked standing to bring this action in the circuit court because they did not appeal the staff decision approving the conditional use to the BZA. Reasoning that the additional Appellants failed to avail themselves of their right to appeal to the BZA, as provided in section 6-29-800(B) of the South Carolina Code (Supp. 2012), the circuit court held they were bound by Prause's decision, and their attempts to appeal to the circuit court were barred by the doctrine of the law of the case.[2] Based on a decision issued by this court after the briefs in this case were filed, we hold the additional Appellants' failure to join in the appeal to the BZA does not preclude them from participating in the judicial review proceedings in the circuit court or to maintain an appeal in this court.

In *Newton v. Zoning Board of Appeals for Beaufort County*, 396 S.C. 112, 719 S.E.2d 282 (Ct. App. 2011), the Newtons appealed the county zoning board's issuance of a special use permit to the circuit court, which affirmed the board's decision, and then appealed to this court. As a threshold issue, the zoning board contended the Newtons' arguments were unpreserved because they failed to raise them to the board during the administrative process. Noting, however, that section 6-29-820(A) of the South Carolina Code (Supp. 2012) allows any "person who may have a substantial interest in any decision" by the zoning board to appeal the decision to the circuit court and "does not require an appellant to attend a public hearing on the Board's decision *or even to communicate his concerns to the Board prior to filing his petition with the circuit court*," this court held "the sole preservation requirement for a first-level appeal of a zoning board's decision is that

---

[2] Under section 6-29-800(B), appeals to a local zoning board "may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county" "within a reasonable time, as provided by the zoning ordinance or rules of the board, or both" or, "[i]f no time limit is provided, . . . within thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken." This version of the statute took effect on June 2, 2003.

an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires." *Id.* at 117, 719 S.E.2d at 284 (emphasis added). Here, there was no dispute that the additional Appellants satisfied this requirement. Furthermore, section 6-29-820(A) allows an appeal to the circuit court by "any person who *may* have a substantial interest" in a zoning board decision. (emphasis added). All Appellants, having satisfied the prerequisites for statutory standing, were entitled to maintain this action in the circuit court. *See Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012) ("The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute.").

Respondents have also argued the additional Appellants lack constitutional standing and cannot invoke the public importance exception to the standing requirement. Because we hold that the additional Appellants had statutory standing and did not have to appeal the Town's staff decision to the BZA to maintain their appeal in the circuit court, it is unnecessary to address these arguments. *See id.; ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) ("Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' *or* (3) under the 'public importance' exception.") (emphasis added).

II. Review of the BZA Decision

Appellants contend the BZA committed the following errors of law as to the lack of compliance with code requirements to have the tower approved:

(1) although the applicable ordinance required a showing that "the proposed structure will not endanger the health and safety of residents," the only evidence that this condition was satisfied was an engineer's letter stating only general expectations about the performance of the structure and what was likely to happen in the event of a structural failure.

(2) as to aesthetic considerations and concerns about the impact of the tower on neighborhood character and the use of neighboring properties, most of the visual evidence only showed the tower in relation to Whipple Road and did not depict the tower from the vantage point of Candlewood subdivision residents.

(3) SCANA did not proffer any evidence regarding attempts to co-locate the tower with an existing tower or to place it on an existing structure.

We hold these arguments fail.

As to the first issue, based on the standard of review for both the circuit court and this court, we affirm the circuit court's finding that the BZA's decision was supported by competent evidence that the tower would not endanger the health and safety of nearby residents and other individuals. The manufacturer and an engineer licensed in South Carolina stated that the tower would withstand a wind gust of 130 miles per hour and was designed to fall on itself within a radius of seventy feet of its base in the event of a collapse. These statements were further supported by construction drawings. As further noted by the circuit court, the project underwent scrutiny from the Town building inspector, the Federal Aviation Administration, the Federal Communications Commission, and the Office of Ocean and Coastal Resource Management.

As to the aesthetic concerns, the tower is located in an area encompassing diverse property uses, including not only single-family residences such as those in Candlewood, but also utility and industrial uses, overhead electrical easements, institutional uses, lighted ball fields, and multi-family residential complexes. Appellants offered at best only speculative evidence that the tower would detract from their property values.

Finally, as to Appellants' claim that SCANA failed to present evidence that it attempted to locate the tower either with other telecommunications facilities or on existing structures, the record includes evidence that SCANA had considered sites where its tower would be co-located with other towers but later determined these other sites were not feasible because SCANA had specific needs that could not be accommodated by the transmission poles already in place, either because the poles were not tall enough or because the coverage objectives of prospective tenants of the tower would necessitate unacceptable interruptions in electrical service during the installation process.

III. Notice Provisions

SCANA has presented an additional argument in its brief that the notice provisions in the applicable Town ordinances are against public policy because they render an unclear and ambiguous result that prevents orderly economic development. Specifically, SCANA complains that Appellants were allowed to challenge the tower after SCANA had gone to great lengths to obtain approval for it from the Town based on their claim that they first received "actual notice" of the Town's

approval of the tower when they saw the completed structure. Given our disposition of the issues raised by Appellants, it is unnecessary for us to address the question of whether the notice provisions in the zoning ordinances at issue here are against public policy. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its disposition of a prior issue is dispositive).

CONCLUSION

We hold all Appellants had standing to pursue judicial review of the BZA's decision and to appeal the circuit court's decision to this court. As to the merits of the appeal, we hold Appellants have not shown that the BZA abused its discretion or that the BZA's decision to allow the tower was arbitrary, capricious, or without reasonable relation to a lawful purpose. We decline to address SCANA's arguments that the notice provisions under which Appellants were allowed to challenge the Town's decision are against public policy.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Spriggs Group, P.C., Respondent,

v.

Gene R. Slivka, Appellant.

Appellate Case No. 2011-204366

Appeal From Colleton County
William H. Seals, Jr., Circuit Court Judge

Published Opinion No. 5081
Heard January 10, 2013 – Filed February 6, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Robert T. Lyles, Jr., of Lyles & Lyles, LLC, of Charleston, for Appellant.

A. Bright Ariail and James Atkinson Bruorton, IV, both of Rosen Rosen & Hagood, LLC, of Charleston, for Respondent.

LOCKEMY, J.: In this action for foreclosure of a mechanic's lien and breach of contract, Gene Slivka argues the circuit court erred in (1) submitting a question involving the interpretation of section 29-5-10(a) of the South Carolina Code (2007) to the jury; (2) failing to direct a verdict; and (3) awarding The Spriggs Group, P.C. (Spriggs) attorney's fees, costs, and interest. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

This case arises from a dispute between Slivka and Spriggs regarding Spriggs' provision of architectural services for Slivka's home. Spriggs designed all of the buildings on Slivka's Colleton County plantation (the property), including the main house, two detached garages with apartments, potting shed, conservatory, stable, and grotto. Pursuant to a November 17, 2006 written proposal (the Agreement), Spriggs was to receive a fixed fee of $161,500 for its architectural and engineering design services, and hourly fees for any additional services. The fixed fee was subsequently reduced to $152,402. Slivka paid half of the fee at the start of the design process and agreed to pay the remainder upon completion of the project.

According to Slivka, he terminated Spriggs on December 12, 2008. Slivka contends he picked up the remaining drawings from Spriggs' office and told Spriggs he did not want any more drawings. Spriggs, however, continued to perform its services under the Agreement. According to Ken Spriggs, principal of Spriggs, he was unaware Slivka had allegedly terminated Spriggs. In February 2009, Spriggs submitted four invoices totaling $198,834.53 to Slivka for payment in accordance with the terms of the Agreement. Slivka admitted he owed Spriggs $76,201, the balance of the Agreement price, but disputed the additional charges and refused to pay Spriggs. Spriggs provided services to Slivka pursuant to the Agreement through May 2009.

As a result of Slivka's failure to pay Spriggs in accordance with the terms of the Agreement, Spriggs filed a mechanic's lien against the property on April 13, 2009. Slivka continued to refuse to pay Spriggs and posted a $265,112.71 cash bond to remove the lien from the property. Thereafter, on July 8, 2009, Spriggs commenced a foreclosure action on the lien. In an amended complaint filed in May 2010, Spriggs asserted claims for foreclosure of mechanic's lien, breach of contract, breach of contract accompanied by a fraudulent act, quantum meruit, and failure to comply with section 27-1-15 of the South Carolina Code (2007). Slivka counterclaimed for slander of title, violation of the Frivolous Claims Sanctions Act, tortious interference with contractual relationships with third parties dependent upon performance by Spriggs, and tortious interference with contractual relationships with third parties resulting from defective notice of mechanic's lien.

On June 30, 2011, Slivka offered to settle the case for $100,000, but Spriggs did not accept the offer. Prior to trial, Spriggs filed a motion to strike Slivka's affirmative defenses and counterclaims. Thereafter, Slivka filed a motion for summary judgment as to all of Spriggs' causes of action. Spriggs countered with

its own motion for summary judgment. At the motions hearing, Slivka agreed to withdraw certain counterclaims, and the circuit court denied both motions for summary judgment.

The parties proceeded to trial on all of Spriggs' causes of action and on Slivka's counterclaims for slander of title, tortious interference with contractual relationships with third parties dependent upon performance by Spriggs, and tortious interference with contractual relationships with third parties resulting from defective notice of mechanic's lien. At trial, Spriggs asserted the additional charges in its invoices were a result of Slivka's demands and changes, and they were billed pursuant to the Agreement. Slivka maintained the additional charges were not contemplated when the Agreement was made and Spriggs had a duty to advise him before performing and charging for additional work.

At the conclusion of Spriggs' case, the circuit court denied Slivka's directed verdict motions as to Spriggs' causes of action for foreclosure of mechanic's lien, breach of contract, and failure to comply with section 27-1-15. The circuit court also denied Spriggs' motion for a directed verdict as to the section 27-1-15 claim. Spriggs withdrew its claims for breach of contract accompanied by a fraudulent act and quantum meruit. Following Slivka's case, the circuit court denied Spriggs' motion for a directed verdict as to Slivka's slander of title claim. Slivka also renewed his directed verdict motions as to Spriggs' causes of action for foreclosure of mechanic's lien and failure to comply with section 27-1-15. The circuit court ruled both causes of action would be submitted to the jury.

Spriggs' foreclosure of mechanic's lien, breach of contract, and failure to comply with section 27-1-15 claims were submitted to the jury, along with Slivka's slander of title claim.[1] Following deliberations, the jury returned a verdict in favor of Spriggs on all three of its causes of action and on Slivka's slander of title cause of action. The jury awarded Spriggs $173,990.53 in actual damages. Slivka made a post-trial motion seeking a judgment notwithstanding the verdict (JNOV) and/or a new trial on Spriggs' foreclosure of mechanic's lien and failure to comply with section 27-1-15 claims.[2] The circuit court denied Slivka's JNOV motion and his subsequent Rule 59(e), SCRCP, motion to alter or amend. Spriggs made a post-trial motion seeking attorney's fees, costs, and interest. The circuit court granted the motion and awarded Spriggs $235,030.31 in attorney's fees and costs and

[1] Slivka withdrew both of his tortious interference with contractual relationships claims.

[2] Slivka did not appeal the jury's verdict on Spriggs' breach of contract claim.

$37,413.92 in prejudgment interest. Thereafter, the circuit court denied Slivka's Rule 59(e) motion to alter or amend. This appeal followed.

LAW/ANALYSIS

I. Statutory Interpretation

Slivka argues the circuit court erred in submitting the question of whether the services provided by Spriggs in January 2009 fell within the definition of "labor" contained in section 29-5-10(a) of the South Carolina Code (2007) to the jury. We agree but find no reversible error.

Pursuant to section 29-5-90 of the South Carolina Code (2007), a mechanic's lien

> shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner . . . a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien. . . .

Section 29-5-10(a) states:

> [L]abor performed or furnished in the erection, alteration, or repair of any building or structure upon any real estate includes the preparation of plans, specifications, and design drawings and the work of making the real estate suitable as a site for the building or structure. The work is considered to include, but not be limited to, the grading, bulldozing, leveling, excavating, and filling of land (including the furnishing of fill soil), the grading and paving of curbs and sidewalks and all asphalt paving, the construction of ditches and other drainage facilities, and the laying of pipes and conduits for water, gas, electric, sewage, and drainage purposes, and the disposal of any construction and demolition debris, as defined in Section 44-96-40(6), including final disposal by a construction and demolition landfill. Any private security guard services provided by any person at the site of the building

> or structure during its erection, alteration, or repair is considered to be labor performed or furnished within the meaning of this section. . . .

For its lien to be timely, Spriggs must have performed labor, within the definition contained in section 29-5-10(a), on or after January 13, 2009. According to Andy Bozeman, a Spriggs employee, Spriggs addressed a plumbing subcontractor's request to substitute the size of plumbing lines used on the project on January 13, 2009. Bozeman also communicated with a mechanical engineer and answered questions regarding the plumbing line substitution.

At trial, Slivka argued that while the timeliness of the lien was a question of fact for the jury to decide, whether the construction administration services performed by Spriggs on January 13, 2009, fell within the statutory definition of labor was a question of statutory interpretation for the court. In response, Spriggs argued the question before the jury was one of timeliness, and the services it provided on January 13, 2009, were clearly within the definition of labor. The circuit court decided,

> as to the mechanic's lien itself, I'm just going to submit it to the jury. I'm going to read them the statute. I'm going to give them the charge . . . . It's kind of long and redundant but y'all can argue whether that is service that falls within the mechanic's lien statute. And of course you can argue the timeliness and all of that kind of stuff.

Slivka contends the question of whether Spriggs' work fell within the purview of the mechanic's lien statute was erroneously submitted to the jury. Spriggs maintains the jury was properly instructed to determine whether its lien was valid and timely. Spriggs also notes the circuit court ruled post-trial it was "implausible that construction administration services would be excluded from the description of labor performed or furnished in the erection, alteration, or repair of any building."

We find the circuit court erred in submitting the question of whether Spriggs' work fell within the purview of the mechanic's lien statute to the jury. *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (holding the issue of interpretation of a statute is a question of law for the court). However, this error was harmless because, as discussed below, we find the

construction administration services proved by Spriggs fell within the definition of labor contained in 29-5-10(a).

II. Timeliness of the Lien

Slivka argues the circuit court erred in denying his motion for directed verdict because Spriggs' lien was not timely. We disagree.

"When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the [circuit] court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). "The [circuit] court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* at 300, 536 S.E.2d at 418. "This Court will reverse the [circuit] court only when there is no evidence to support the ruling below." *Id*. "When considering directed verdict and JNOV motions, neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* at 300, 536 S.E.2d at 419.

First, Slivka contends the work performed by Spriggs on January 13, 2009, does not fall within the definition of labor contained in section 29-5-10(a) because none of Spriggs' work involved "the preparation of plans, specifications, and design drawings." Slivka maintains none of the work performed by Bozeman occurred on site, and the work only amounted to construction administration services. Slivka argues the circuit court erred in relying on *Williamson v. Hotel Melrose*, 110 S.C. 1, 96 S.E. 407 (1918), in finding construction administration services are a type of labor for which a mechanic's lien may be filed under the mechanic's lien statute. In *Williamson*, our supreme court determined an architect who furnished plans and specifications and "superintended" the construction of a project had performed labor within the meaning of the mechanic's lien statute. 110 S.C. at 1, 96 S.E. at 411. At the time, the mechanic's lien statute did not include the definition of labor contained in the current statute. The statute at the time afforded a lien to "any person to whom a debt is due for labor performed or furnished." *Id.*

Slivka maintains *Williamson* is not applicable because the current version of the mechanic's lien statute, section 29-5-10(a), contains specific activities determined by the legislature to be "labor" and does not include construction administration services. Slivka argues the legislature could have included off-site construction administration services of a design professional in its definition of labor but it chose not to. Furthermore, Slivka maintains Spriggs was not on-site directing the

work on the property like the architect in *Williamson*. Ken Spriggs testified he was not directing any work or supervising the construction.

We find the construction administration services provided by Spriggs are labor pursuant to the definition of labor in section 29-5-10(a). While the statute provides labor "includes the preparation of plans, specifications, and design drawings," it also states labor includes "the work of making the real estate suitable as a site for the building or structure." Here, Spriggs' discussions with the plumber and engineer in January 2009 were part of its architectural services overseeing the proper construction of the property.

Slivka also contends the circuit court erred in finding work performed by Spriggs in May 2009 supported the timeliness of the lien filed on April 13, 2009. At trial, Bozeman testified he provided design sketches for an appraisal of the property in May 2009. Slivka argues this work could not support the timeliness of Spriggs' lien because it was allegedly performed after the lien was filed. We find the circuit court did not err because the court's order does not explicitly say, as alleged by Slivka, that the May 2009 services were performed within ninety days of April 13, 2009. While the circuit court order mentions the May 2009 services, it notes these services were performed after the lien was filed. The court also specifically notes the lien was filed within ninety days of January 13, 2009. Accordingly, we affirm the circuit court's denial of Slivka's motion for a directed verdict on Spriggs' mechanic's lien claim.

III. Attorney's Fees, Costs, and Interest

"A party cannot recover attorney's fees unless authorized by contract or statute." *Cullen v. McNeal*, 390 S.C. 470, 491, 702 S.E.2d 378, 389 (Ct. App. 2010). Here, sections 27-1-5 and 29-5-10 of the South Carolina Code (2007) both authorize an award of attorney's fees to Spriggs. Pursuant to section 27-1-15,

> [w]henever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or

> whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

Additionally, pursuant to section 29-5-10(a), "[t]he costs which may arise in enforcing or defending against the lien. . . , including a reasonable attorney's fee, may be recovered by the prevailing party." "The fee must be determined by the court in which the action is brought but the fee and court costs may not exceed the amount of the lien." *Id.*

The following six factors should be considered when determining reasonable attorney's fees: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). "The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). "An abuse of discretion occurs when the conclusions of the [circuit] court are either controlled by an error of law or are based on unsupported factual conclusions." *Id.* "Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id.*

A. Section 27-1-15

Slivka argues the circuit court erred in denying his motion for a directed verdict on Spriggs' failure to comply with the section 27-1-15 claim. We disagree.

Slivka contends Spriggs failed to present any evidence Slivka did not perform a fair and reasonable investigation because at the time Spriggs made its demand under the statute the parties were involved in litigation initiated by Spriggs. We find whether a fair and reasonable investigation of Spriggs' claim has been made and whether a valid portion of the claim was paid in a timely manner are questions of fact for the jury. *See Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 374 S.C. 216, 229, 647 S.E.2d 488, 495 (Ct. App. 2007) (holding whether a party

made a fair and reasonable investigation of the merits of a claim is a question of fact).

Additionally, Slivka argues at the time the demand was made it was impossible to determine the "valid" amount due because of the parties' pending claims against each other for damages. Finally, Slivka maintains his failure to make a payment at the time of the demand was not unreasonable because he had already paid the court a cash bond exceeding the amount of Spriggs' claim. Slivka fails to cite any legal precedent to support these arguments. Accordingly, we find these arguments are abandoned on appeal. *See Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal).

B. Amount of Attorney's Fees and Costs

Slivka argues the circuit court erred in awarding Spriggs $235,030.31 in attorney's fees and costs. We agree.

The circuit court determined Spriggs was entitled to $235,030.31 in attorney's fees and costs pursuant to sections 29-5-10 and 27-1-15. The court further found the fees and costs awarded were reasonable based upon the six criteria established by the supreme court. The circuit court noted, "[Spriggs] was required to expend considerably more time and effort on this case due to specific actions of [Slivka] who created unnecessary delays, filed meritless motions, and forced [Spriggs] to incur additional attorney's fees and costs above and beyond what would otherwise have been incurred."

First, Slivka argues Spriggs was not entitled to recover $28,619.25 in staff member fees as part of its attorney's fees award. We find the circuit court did not abuse its discretion in including staff member fees in its award of attorney's fees. We note Slivka fails to cite any legal precedent to support this argument. Additionally, this court has upheld attorney's fees awards which included paralegal fees. *See McElveen v. McElveen*, 332 S.C. 583, 602, 506 S.E.2d 1, 11 (Ct. App. 1998); *Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 484, 458 S.E.2d 431, 439 (Ct. App. 1995).

Next, Slivka contends Spriggs' total recovery is limited to the amount of the cash bond he posted with the clerk of court. Slivka argues that pursuant to section 29-5-110 of the South Carolina Code (2007), the total payment to Spriggs is limited to

$266,012.71, the amount of the cash bond he paid to the clerk of court. Therefore, Slivka maintains because Spriggs' verdict was $173,990.53, any award of attorney's fees under the mechanic's lien statute is limited to a maximum of $92,022.18. We disagree. Section 29-5-110 relates to the amount of the judgment and makes no mention of attorney's fees. Attorney's fees are specifically addressed in section 29-5-10, which provides that the costs and fees incurred in enforcing or defending against the lien may be recoverable by the prevailing party up to the amount of the lien. *See* § 29-5-10(a).

Finally, Slivka argues the attorney's fees awarded by the circuit court are not reasonable and the circuit court order fails to specify which fees were awarded pursuant to which statute. Although the amount of attorney's fees awarded in this case, compared to the jury award, may not shock the conscience of this court, the needle is definitely moving on the seismograph. The circuit court order is unclear as to which fees were awarded under which statutory authority. We note the court's award exceeds the amount permitted under the mechanic's lien statute. Further, although theoretically possible, it is improbable an attorney's fee of almost $250,000 would be awarded for a net recovery of approximately $75,000 above the $100,000 settlement offered by Slivka under section 27-1-15. The circuit court may have combined the two statutes to reach the figure, although the legality of that procedure is not addressed in this decision. Moreover, the trial court surely did not award fees for the two causes of action it dismissed or for the breach of contract claim. Thus, because we find the circuit court's order is unclear, we reverse the court's award of $235,030.31 in attorney's fees to Spriggs and remand the issue of attorney's fees to the circuit court for reconsideration. We order the circuit court to clearly identify the statutory authority for its award and the fees incurred under each statute.

C. Prejudgment Interest

Slivka argues the circuit court's award of $37,413.92 in prejudgment interest to Spriggs was not supported by statute. We disagree.

The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law. *Butler Contr., Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006). Generally, prejudgment interest may not be recovered on an unliquidated claim in the absence of agreement or statute. *Id.* The fact that the amount due is disputed does not render the claim unliquidated for purposes of

awarding prejudgment interest. *Id.* Rather, the proper test is "whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Id.* "The award of prejudgment interest will not be disturbed on appeal unless the [circuit] court committed an abuse of discretion." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457-58 (2009).

We find the circuit court did not err in awarding Spriggs prejudgment interest. We note the court's award of prejudgment interest was not limited to Spriggs' cause of action for failure to comply with section 27-1-15. The court also awarded interest on Spriggs' breach of contract claim, which was not appealed and is the law of the case. Accordingly, we affirm the circuit court's award of prejudgment interest.

CONCLUSION

We find the construction administration services provided by Spriggs fell within the definition of labor contained in section 29-5-10(a). Additionally, we affirm the circuit court's award of prejudgment interest and denial of Slivka's directed verdict motions as to Spriggs' section 27-1-15 and mechanic's lien claims. We reverse the circuit court's award of attorney's fees and remand for reconsideration.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and KONDUROS, JJ., concur.