The Supreme Court of South Carolina

In the Matter of
Sharon G. Marshall, Deceased.

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Ms. Marshall passed away on February 15, 2006, and requesting appointment of an attorney to protect Ms. Marshall's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Edgar H. Long, Esquire, is hereby appointed to assume responsibility for Ms. Marshall's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Ms. Marshall maintained. Mr. Long shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Ms. Marshall's clients. Mr. Long may make disbursements from Ms. Marshall's trust account(s), escrow account(s), operating

account(s), and any other law office account(s) Ms. Marshall maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as notice to the bank or other financial institution that Edgar H. Long, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Edgar H. Long, Esquire, has been duly appointed by this Court and has the authority to receive Ms. Marshall's mail and the authority to direct that Ms. Marshall's mail be delivered to Mr. Long's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
February 16, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9

February 27, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Greenville
County Magistrate
Don I. Hensley, Respondent.

Opinion No. 26117
Submitted January 31, 2006 – Filed February 27, 2006

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Robert E. Bogan, Assistant Deputy Attorney General, both of Columbia, for the Office of Disciplinary Counsel.

David L. Thomas, of Greenville, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and impose a public reprimand. The facts as set forth in the agreement are as follows.

FACTS

On June 6, 1989, respondent was appointed to serve as a Greenville County Magistrate. Dorothy Campbell Crossley served as respondent's office manager from 1996 to January 2005. On January 27, 2005, Crossley went to respondent's home before reporting to work and confessed she had been stealing money from respondent's office for five years.

Crossley provided the following explanation concerning her thefts to ODC. She reported that the banking deposit was customarily compiled between 4:30 and 5:00 p.m. and that, at this time, respondent was either not in the office or did not review the deposit. Accordingly, unless she was absent from work or busy, Crossley was left with exclusive control over the daily deposits and associated documentation. Knowing her work would not be reviewed, Crossley would occasionally take cash from the criminal deposit and reduce the amount of cash shown on the deposit ticket by the same amount, even though this left the deposit out of balance with the office's computer-generated daily deposit listing.

ODC examined financial records provided by respondent's office for the months of January, April, August, and December 2004. The examination confirmed the pattern of embezzlement described by Crossley. Using the practice described above, Crossley embezzled $8344.60 in those four months. ODC is informed that an accounting conducted by the Greenville County Finance Department indicates respondent's office is missing approximately $96,500 and it appears this amount was taken by Crossley while working under respondent's supervision.

This Court's November 9, 1999 order provides:

> While the Court recognizes that magistrates must utilize employees of their office to assist in the handling of the monies of their office, each magistrate is personally responsible for

> compliance with all procedures for the handling of the monies of their magisterial office and proper record keeping related thereto and shall regularly, but no less than monthly, review bank statements and other records to insure such compliance.

Respondent represents that he relied almost entirely on Crossley to properly document and disburse the monies in his office and that, prior to January 27, 2005, he had complete faith in Crossley and did not see the need to "go behind her" and check her work. Respondent acknowledges that his supervision of Crossley did not comply with the requirements of the Court's November 9, 1999 order and represents he has now implemented each of the oversights required by the order. Respondent disputes any contention that his adherence to the order would have prevented Crossley's embezzlement and has submitted affidavits in support of his belief that Crossley would have been successful in her embezzlement scheme even if all requirements of the November 9, 1999 order had been followed.

LAW

By his misconduct, respondent has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 2 (judge shall avoid impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity of the judiciary); Canon 3 (judge shall perform the duties of office diligently); Canon 3(C)(1) (judge shall maintain professional competence in judicial administration); and Canon 3(C)(2) (judge shall require his staff to observe the standards of fidelity and diligence that apply to the judge). In addition, respondent admits that he has violated the Court's November 9, 1999 order. Respondent admits his misconduct is grounds for discipline under Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct), Rule 7(a)(4) (it shall be ground for discipline for judge to persistently fail to perform judicial duties or persistently perform judicial duties in an incompetent or neglectful manner), and Rule 7(a)(7) (it shall be ground for discipline for judge to willfully violate a valid order issued by a

court of this state) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We note respondent did not participate in the thefts reported by this opinion. Moreover, he candidly reported the thefts and, thereby, his own misconduct, to ODC and fully cooperated with ODC in its investigation of this matter. Accordingly, we accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Capco of Summerville, Inc., Appellant,

v.

J.H. Gayle Construction Company, Inc., Respondent.

Appeal From Colleton County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 26118
Heard January 19, 2006 – Filed February 27, 2006

AFFIRMED

John H. Tiller, of Haynsworth, Sinkler Boyd, PA, of Charleston, for Appellant.

Erin DuBose Dean, of Tupper, Grimsley & Dean, PA, of Beaufort, for Respondent.

CHIEF JUSTICE TOAL: Capco of Summerville, Inc. (Capco) appeals an order of the circuit court holding its contribution action against respondent, J. H. Gayle Construction Company (Gayle), was barred by the statute of repose set forth in S.C. Code Ann. § 15-3-640(6) (1986). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Capco owns Dixie Plaza Shopping Center in Colleton County. The parking lot of the shopping center was constructed by Gayle and was substantially completed on November 1, 1986. On May 19, 1996, Pauline Conner was involved in an automobile accident with James Hogan in the parking lot of Dixie Plaza. Conner entered a settlement agreement with Hogan for $5000.00. In August 1998, Conner and her husband filed lawsuits against Capco and Gayle, alleging negligent design and construction of the parking lot. On June 13, 2003, Capco settled the Conners' claims for $500,000.00. Although Gayle did not participate in the settlement, the settlement expressly released Gayle from any liability to the Conners.

On September 22, 2003, Capco filed this contribution action against Gayle. Gayle moved for summary judgment contending Capco's claim was barred by the thirteen year statute of repose set forth in S.C. Code Ann. § 15-3-640(6) (2005), as it was commenced seventeen years after completion of the parking lot. Capco responded, contending the thirteen year statute of repose had been impliedly repealed by the Legislature's adoption of the one-year limitation period set forth in S.C. Code Ann. § 15-38-40(D) of the Uniform Contribution Among Tortfeasors Act. The trial court held § 15-3-640 (6) controlled such that Capco's contribution action was barred.

The issue presented by Capco is whether S.C. Code Ann. § 15-6-640(6) was implied repealed by the Legislature's 1988 adoption of S.C. Code Ann. § 15-38-40(D), and whether the two statutes are irreconcilably conflicting. Although we are deeply troubled by the result in this case, we are constrained to hold that the thirteen year period set forth in § 15-6-640 (D) controls, such that the trial court properly granted summary judgment to Gayle.

LAW/ANALYSIS

At the time this action was commenced, S.C. Code Ann. § 15-3-640 (1986), provided:

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of such an improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> (6) an action for contribution or indemnification for damages sustained on account of an action described in this subdivision.

However, the Uniform Contribution Among Tortfeasors Act (Contribution Act), S.C. Code Ann. § 15-38-40(D) (2005), which was enacted in 1988, provides that an action for contribution is barred unless a settling tortfeasor has "agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution."

In this case, Capco settled the pending case with the Conners on June 13, 2003, discharging the liability of both itself and Gayle, and brought this contribution suit three months later, well within the one year time period provided by § 15-38-40(D). However, although the contribution action was commenced within the one-year period set forth in the Contribution Act, it was not brought within 13 years of the substantial completion of the parking lot, as required by § 15-3-640(6). The circuit court, relying upon the Court of Appeals' opinion in *Florence County School District No. 2 v. Interkal, Inc.*, 348 S.C. 446, 559 S.E.2d 866 (Ct. App. 2002), held § 15-3-640(6) controlled such that Capco's contribution action was barred. We agree.

In *Interkal*, a school bleacher collapsed in February 1991, injuring a student. The bleachers had been installed in 1969 and 1971. The student sued the school district and Interkal, the manufacturer of the bleachers. The school district settled with the student, then sought contribution from Interkal under S.C. Code Ann. § 15-38-10 et. seq. (the Contribution Act). The Court of Appeals held that "[t]he Statute of Repose bars actions for contribution under the Uniform Contribution Among Tortfeasors Act brought more than

thirteen years after the completion of an improvement to real property." 348 S.C. at 453, 559 S.E.2d at 869. We find *Interkal* is clearly dispositive of the issue; accordingly, the trial court properly held the statute of repose applied to bar Capco's action.

Notwithstanding the Court of Appeals' opinion in *Interkal*, Capco asserts the two statutes are irreconcilably conflicting. It contends the statute of repose was repealed by implication by adoption of the one-year period in the Contribution Act. We disagree.

Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement. *Mims v. Alston*, 312 S.C. 311, 440 S.E.2d 357 (1994). Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them. *City of Rock Hill v. South Carolina DHEC*, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990). Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. *Wilder v. South Carolina Hwy. Dep't*, 228 S.C. 448, 90 S.E.2d 635 (1955). *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) (a 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).

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

defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1451 (8th Ed. 2004). "Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." *Camachco v. Todd and Leiser Homes*, 706 N.W.2d 49, 54, n. 6 (Minn. 2005) *citing* W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* § 30, p. 168 (5th ed.1984). As noted by the Virginia Supreme Court, "[a] statute of repose differs from a statute of limitations. . . . [T]he expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." *School Bd. of the City of Norfolk v. U.S. Gypsum*, 360 S.E.2d 325, 327-328 (VA. 1987).

The statutes at issue do not irreconcilably conflict. Section 15-3-640(6) is a statute of repose setting forth the outside time period in which an action arising out of the defective condition of an improvement to real property must be brought, which date begins to run from completion of the project. Section 15-38-40(D), on the other hand, is a statute of limitations which governs contribution actions, and begins to run from the date of settling a common liability. We find neither an irreconcilable conflict, nor an implied repeal of section 15-3-640(6).[1]

Moreover, section 15-3-640 (6) specifically applies to "an action for contribution or indemnification for damages sustained on account of an action" arising out of the defective or unsafe condition of an improvement to real property. Section 15-38-40(D), on the other hand, applies generally to all contribution actions. Given that section 15-3-640(6) applies not simply to contribution actions, but to this specific class of contribution actions, we find it is the more specific statute and therefore controls. *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

[1] We note that Section 15-3-640 was amended in 2005 and now contains an outside limitation of eight years in which to file suit. Notably, the 2005 amendment did not delete or otherwise amend subsection (6), clearly indicating the legislature did not intend to repeal this subsection. 2005 Act No. 27, § 2, eff. July 1, 2005.

a specific statute prevails over a more general one). *See also State v. Life Ins. Co. of Georgia*, 254 S.C. 286, 175 S.E.2d 203 (1970) (court will apply a more specific statute of limitations instead of a general one).[2]

CONCLUSION

We find Capco's action is time-barred by the thirteen year time-period set forth in § 15-3-640 (6). However, we are troubled by the harsh result in the case. As Capco correctly points out, where a lawsuit is filed on the eve of the running of the statute of repose, but is not resolved until after the statute has run, the contribution action will be barred before the right has even accrued, placing an undue burden on a single tortfeasor. This is clearly contrary to the purposes of the Contribution Act, which was to "ameliorate the unfairness vested on all joint tortfeasors by the common law's prohibition against contribution." *Southeastern*, 331 S.C. at 470, 443 S.E.2d at 397. However, although we are troubled by this result, we are not at liberty to rewrite the statutes, and any amendment must come from the Legislature. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). The trial court's order granting summary judgment to Gayle is affirmed.

AFFIRMED.

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[2] Capco asserts this case is analogous to *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 443 S.E.2d 395 (1994), superseded by statute as stated in *Steinke v. S.C. Dep't of Labor, Licensing and Reg.*, 336 S.C. 373, 520 S.E.2d 142 (1999). In *Southeastern*, we held the Contribution Act, to the extent it provided unlimited pro rata liability for joint tortfeasors, was inconsistent with, and had effectively repealed those portions of the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-100(c) and 15-78 120 (a)(1), which required apportioned liability and a limitation on damages against state agencies. *Southeastern* is inapposite. There, the limits on liability in the Tort Claims Act were inconsistent with unlimited pro rata liability. Here, the statutes simply set forth time periods to establish when a claim is barred.

MOORE, BURNETT, PLEICONES, JJ., and Acting Justice Clyde N. Davis, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services, Respondent,

v.

Angelica Seegars, John Doe, and L.J. Parker, Defendants,

of whom Angelica Seegars is Appellant.

IN RE: Brionica Ja'zyra Seegars, 10-06-99; Javarus Kaleel Seegars, 07-11-02; Children under the age of eighteen.

Appeal From Lancaster County
Brooks P. Goldsmith, Family Court Judge

Opinion No. 26119
Heard February 2, 2006 – Filed February 27, 2006

AFFIRMED AS MODIFIED

William P. Davis, of Baker, Ravanel & Bender, L.L.P., of Columbia, for Appellant.

Deborah Murdock, of Greenville, for Respondent.

Marion H. (Mark) Grier, Jr., of Lancaster, for Guardian Ad Litem.

JUSTICE BURNETT: Angelica Seegars (Appellant) appeals the family court's termination of her parental rights to Brionica Ja'zyra Seegars and Javarus Kaleel Seegars (Children). We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

On October 22, 2002, the South Carolina Department of Social Services (DSS) took Children into emergency protective custody because Javarus had been hospitalized for severe injuries from a nonaccidental trauma. On October 16, 2003, in a formal order of removal, the family court found injuries to Javarus's brain, toes, neck, and leg occurred while in the care of another but under the direction of approval of Appellant and found injuries to Javarus's arm and ribs occurred while in Appellant's direct care and control. The family court further found Brionica was at a substantial risk of abuse because of the severity of Javarus's physical abuse by Appellant. The family court also ordered Appellant to pay monthly child support for Children in the amount of $248.00 with court costs of five percent.[1]

On April 9, 2004, DSS commenced this action for termination of parental rights (TPR) against Appellant, John Doe, and L.J. Parker. DSS sought termination of Appellant's parental rights pursuant to S.C. Code Ann. § 20-7-1572 (1), (2), (4), (6), and (8) (1976 & Supp. 2005) and termination of parental rights of Parker and Doe pursuant to S.C. Code Ann. § 20-7-1572(3), (4), (7), and (8).

[1] In addition to the child support, the family court ordered Appellant to undergo a psychological evaluation and follow any recommendations made as a result of the evaluation; to complete additional parenting classes specific to nutrition and care of small children; to participate in individual counseling; to demonstrate suitable and stable housing for herself and Children prior to their return to her care; to demonstrate stable employment for a period of six months prior to the return of Children. The family court further ordered that Appellant could attend any and all of Javarus's medical and therapy appointments and educate herself on the details of Javarus's ongoing care.

At the TPR hearing, Dr. William Lehman, an orthopedic surgeon, testified he treated Javarus on September 25, 2002, for a fracture of the upper arm bone. On October 8, 2002, Lehman treated Javarus for skull and rib fractures. He testified the skull injury led to significant and permanent brain damage, and he concluded Javarus's injuries were not accidental. He further testified Javarus was two years old at the time of hearing, but functioning, intellectually and physically, at a six month level.

Carol Tiedeman, Javarus's physical therapist, testified she began his therapy on January 7, 2003. According to Tiedeman, Javarus had neurological damage and vision and hearing impairments and had been diagnosed with battered child syndrome and shaken baby syndrome. She testified that Javarus's foster mother brought him to the appointments and did home therapy with Javarus. She stated she had never met or talked to Appellant.

Chrys Tuttle, a foster care case worker for DSS, was assigned to Children's case. According to Tuttle's records, Appellant alleged she had five places of employment since Children had been in foster care, but Tuttle was unable to verify Appellant's employment history. She opined Appellant had not demonstrated stable employment for a period of six months because she had not had any one job for a six month period. Tuttle testified her records indicated eight residences for Appellant since Children had been in foster care, including a one bedroom apartment in Charlotte, North Carolina where Appellant had been living since February 28, 2004.

Tuttle testified Appellant attended four of twenty scheduled medical appointments for Javarus, none of Javarus's twenty-three emergency medical appointments, and none of Javarus's one hundred, at least, physical, speech, and occupational appointments. She also testified there were prospective adoptive placements available for Children and in her opinion termination of Appellant's parental rights was in the best interests of Children.

According to family court records, Appellant's child support began on October 17, 2003. Appellant paid $20.00 on October 17, 2003, and

$50.00 on October 31, 2003. The deputy clerk of the family court testified Appellant was in arrears $3,054.80 as of the date of the TPR hearing.

Appellant testified to four places of employment and four to five residences since the formal removal order. She testified she would begin working at Mercy Hospital in Charlotte, North Carolina, the week following the hearing and she had been working at Presbyterian Hospital in Charlotte since June 2004. She testified she worked at Burger King Corporation in Charlotte from February to June 2004, and she worked at Goodwill Industries from September 2003 to November 2003.[2]

Appellant testified she gave Children toys, money, and gifts during visits and for their birthdays and Christmas. She also asserted she had insufficient funds to pay the court-ordered child support because her employment with Goodwill ended in November 2003. She further testified she wrote "a letter to Columbia to let them know what my status was with child support and to be patient with me and I would try to clear it up as soon as I could." Appellant testified the family court records were incorrect because she had made more than two payments.

By agreement, a written evaluation from Dr. Lisa Jackel, a licensed clinical psychologist who conducted a psychological evaluation of Appellant, was admitted in lieu of her live testimony. She diagnosed Appellant with schizotypal personality disorder and alleged physical and sexual abuse. Dr. Jackel concluded that Appellant "is not currently or likely ever capable of appropriately caring for her children, financially, emotionally, or intellectually."

[2] Based on check stubs presented into evidence, Appellant received compensation from Presbyterian Hospital for the pay periods ending July 24, 2004, and September 18, 2004; from Burger King for March 24, 2004 to July 15, 2004, and from Goodwill Industries for August 19, 2003 to November 26, 2003.

By agreement, a letter from Dr. Russell Hancock, Appellant's current psychologist, was admitted in lieu of his live testimony. He diagnosed Appellant with adjustment disorder and schizotypal personality disorder. He explained the difference between a personality disorder and a psychotic disorder.

The guardian ad litem recommended termination of parental rights and found termination was in Children's best interests.

On November 15, 2005, the family court judge entered a Final Order for Termination of Parental Rights, terminating Appellant's parental rights based on S.C. Code Ann. § 20-7-1572(4), (6), and (8). The family court also terminated the alleged fathers' parental rights on the grounds of S.C. Code Ann. § 20-7-1572 (3), (4), (7), and (8).[3] The family court denied Appellant's motion to alter or amend the judgment and for reconsideration, or, in the alternative, for a new trial. Appellant appeals and we certified this case for review from the Court of Appeals under Rule 204(b), SCACR.

ISSUES

I. Did the family court err in terminating Appellant's parental rights because she willfully failed to support the children for a period in excess of six months, S.C. Code Ann. § 20-7-1572(4), or because she had a diagnosable condition that is unlikely to change within a reasonable time and made it unlikely that she could provide minimally acceptable care for the children, S.C. Code Ann. § 20-7-1572(6)?

II. Does the termination of Appellant's parental rights based on S.C. Code Ann. § 20-7- 1572(8) violate her due process rights?

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[3] Those terminations have not been appealed and are the law of the case. Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (unappealed ruling is the law of the case). Parker also executed a voluntary relinquishment of parental rights as to Javarus, which was filed on April 30, 2004, and took a paternity test which indicated he was not Javarus's biological father.

STANDARD OF REVIEW

The family court will terminate parental rights and free a child up for adoption if it finds that one of the nine statutory grounds for termination has been met and that "termination is in the best interest of the child." S.C. Code Ann. § 20-7-1572. The family court judge terminated Appellant's parental rights pursuant to three statutory grounds. *Id.* § 20-7-1572(4), (6), & (8). DSS must prove these grounds by clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); Richland County Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 496 S.E.2d 864 (1998). When reviewing the family court decision, this Court may make its own conclusion as to whether DSS proved by clear and convincing evidence that parental rights should be terminated. S.C. Dep't of Soc. Servs. v. Cochran, 356 S.C. 413, 589 S.E.2d 753 (2003). The reviewing court, however, is not required "to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999).

LAW/ANALYSIS

I. Termination of Parental Rights

A. Willful Failure to Support

Appellant argues the family court erred in terminating her parental rights on the ground she failed to support Children or make any material contribution to their care for a period in excess of six months. We disagree.

Under S.C. Code Ann. § 20-7-1572(4) the family court may order termination of parental rights if:

> The child has lived outside the home of either parent for a period of six months, and during that time the parent has wil[l]fully failed to support the child. Failure to support means that the

> parent has failed to make a material contribution to the child's care. . . .The court may consider all relevant circumstances in determining whether or not the parent has wil[l]fully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

Whether a parent's failure to support a child is "willful" within the meaning of the statute is a question of intent to be determined in each case from all the facts and circumstances. S.C. Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 52, 413 S.E.2d 835, 838 (1992). Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as "willful" because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent. *Id.* at 53, 413 S.E.2d at 839.

First, Appellant argues we should reverse the family court's termination of her parental rights because the family court did not find her failure to support Children was willful. Regardless of the family court's findings, we may make our own conclusions as to whether DSS proved by clear and convincing evidence that parental rights should be terminated. Cochran, 356 S.C. at 417, 589 S.E.2d at 755.

Second, Appellant argues the family court erred because she made material contributions in accordance with her means. Appellant asserts the two partial payments toward child support and her testimony that she gave Children toys, gifts, and money are evidence of material contribution.

"Material contribution" is defined as "either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means." S.C. Code Ann. § 20-7-1572(4). Toys are not included in this definition and will not be considered by us in concluding whether Appellant made a material contribution to Children.

Children were taken into emergency protective custody on October 22, 2002 and were formally removed from Appellant's care on

October 16, 2003 by order of the family court. In eleven months, Appellant made two partial child support payments totaling $70.00, and she owed $3,054.80 in child support on the date of the TPR hearing. If Appellant had insufficient funds to make child support payments, she could have petitioned the family court to reduce child support. Appellant's failure to pay court-ordered child support or give a reasonable excuse for her failure to pay manifests a conscious indifference to the rights of Children to receive support, and is therefore a willful failure to support. See S.C. Dep't of Soc. Servs. v. Headden, 354 S.C. 602, 582 S.E.2d 419 (2003) (affirming family court's finding of willful failure to support where mother made some payments after being ordered by the court, then inexplicably stopped for 16 months, and although mother had caught up with her support payments by the time of the TPR hearing, the family court was able to look beyond the months immediately preceding the TPR action at the mother's overall conduct.); S.C. Dep't of Soc. Servs. v. Cummings, 345 S.C. 288, 547 S.E.2d 506 (Ct. App. 2001) (affirming family court's finding mother's failure to support was willful when mother made only one child support payment of $15 during 14 months and owed $490 in child support on the day of the TPR hearing even though she paid $457 to the court that day).

The guardian ad litem and DSS case worker both testified termination would be in the best interests of Children. Also, Dr. Jackel testified Appellant was not currently or would likely ever be capable of caring for Children. Based on the above facts, we conclude there is clear and convincing evidence that Children have lived outside Appellant's home for a period of at least six months and during that time Appellant has willfully failed to support the Children, and we conclude termination of Appellant's parental rights is in the best interests of Children.

B. Diagnosable Condition

Appellant argues the family court erred in terminating her parental rights because she has a diagnosable condition unlikely to change within a reasonable time and which makes her unlikely to provide minimally acceptable care of Children. We disagree.

Appellant argues DSS failed to present clear and convincing evidence that her personality disorder makes her unlikely to provide minimally acceptable care of Children. She also argues the family court erroneously relied on Dr. Jackel's evaluation because the evaluation is too vague, uncertain, and empty of evidence to support its conclusions and thus has no probative value.

Under S.C. Code Ann. § 20-7-1572(6), the family court may order termination of parental rights if:

> The parent has a diagnosable condition unlikely to change within a reasonable time including, but not limited to, alcohol or drug addiction, mental deficiency, mental illness, or extreme physical incapacity, and the condition makes the parent unlikely to provide minimally acceptable care of the child.

The family court terminated Appellant's parental rights, in part, because she has a diagnosable condition of schizotypal personality disorder. Dr. Jackel described schizotypal personality disorder as "includ[ing] odd thinking and beliefs, suspiciousness due to paranoid ideation, inappropriate affect, odd/eccentric behavior, lack of close friendships and social anxiety due to paranoid fears, and unusual perceptual experiences." From Appellant's personality test results, Dr. Jackel surmised Appellant "may be more imaginative and her defense mechanism may be reliance on fantasy, neglecting practical matters, which may contribute to her denial of her son's medical condition and permanent disabilities."

In light of her findings, Dr. Jackel concluded:

> [Appellant] is not currently or likely ever capable of appropriately caring for her children, financially, emotionally, or intellectually. She can not care for her son's medical problems if she does not admit he has any problems. She did not verbalize any medical problems, need for therapies, or special medical care he requires. . . . [Appellant's] personality profile suggests that she is likely to be disorganized and she may feel ineffective in her

> ability to cope with life. She may be more imaginative and not pay attention to practical matters. She can not be trusted to follow through on what she says she will do. She also has personality traits which may cause her to be prone to developing an addiction. . . . It appears that [Appellant] is unable to take care of herself never mind her children as she has not maintained steady employment or housing since her children have been in [foster] care. "

At the TPR hearing, Appellant described Javarus's medical problems and stated he required around the clock care and was fed through a feeding tube. Yet, the guardian ad litem's report supports Dr. Jackel's conclusions.[4]

We conclude there is clear and convincing evidence that Appellant has a diagnosable condition—schizotypal personality disorder—which is unlikely to change within a reasonable time, and this condition makes Appellant unlikely to provide minimally acceptable care of Children. The evidence shows Appellant denied the severity of Javarus's condition, had difficulty dealing with practical matters, failed to maintain steady employment, failed to maintain a stable home, and failed to establish she had reliable transportation. See Orangeburg County Dep't of Soc. Servs. v. Harley, 302 S.C. 64, 393 S.E.2d 597 (Ct. App. 1990) (affirming family court's termination of mother's parental rights, in part, under § 20-7-1572(6) where mother had a low mental status which was unlikely to improve in the future, difficulty in caring for herself, poor impulse control, low frustration level, and difficulty responding to simple statements and directions and where mother had failed to maintain a stable residence--twelve homes in a little over two years--and could not manage her own finances). Further, termination of Appellant's parental rights is in the best interests of Children.

[4] The guardian ad litem found, "If [Javarus] is returned to [Appellant], she would not be able to care for him and be able to take him at a moment's notice to a hospital if needed since transportation has sometimes become an issue during scheduled visitation. . . .She is unable to explain the severity of his injuries nor the requirements needed to feed him, medicate him, [and] provide therapy for him or his day-to-day care in general."

II. Due Process Rights

Appellant argues the family court erred in terminating her parental rights under S.C. Code Ann. § 20-7-1572(8) because this subsection violates her due process rights.

Because we affirm the family court's termination of Appellant's parental rights under S.C. Code Ann. § 20-7-1572(4) and (6), we decline to address Appellant's constitutional issue. See Fairway Ford, Inc. v. County of Greenville, 324 S.C. 84, 86, 476 S.E.2d 490, 491 (1996) ("[I]t is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required."); see also Headden, 354 S.C. at 613, 582 S.E.2d at 425 (declining to address the issue of whether a mother's due process rights were violated because the family court terminated her parental rights under § 20-7-1572(8) when this Court found clear and convincing evidence existed to affirm TPR based on willful failure to visit and support); Cochran, 356 S.C. at 420, 589 S.E.2d at 756 (same).

CONCLUSION

For the foregoing reasons, we affirm as modified the family court's termination of Appellant's parental rights based on S.C. Code Ann. § 20-7-1572(4) and (6) and decline to address termination under § 20-7-1572(8).

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, PLEICONES, JJ., and Acting Justice James W. Johnson, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Curtis Earl,	Claimant,
v.	
HTH Associates, Inc./Ace USA-Insurance Company of North America,	Employer/Carrier,
And Advance Auto Parts/Royal Insurance Company of America,	Statutory Employer/Carrier,
And The SC Uninsured Employers' Fund,	Defendants,
Of whom Ace USA-Insurance Company of North America is the	Appellant.
And Curtis Earl, Advance Auto Parts, Royal Insurance Company of America, and HTH Associates, Inc. are the	Respondents.

Appeal from Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 4086
Heard January 10, 2006 – Filed February 27, 2006

AFFIRMED

Walter Hilton Barefoot, of Florence, for Appellant.

John S. Nichols, of Columbia, Kenneth W. Harrell, of North Charleston, and Stephen L. Brown and Wallace G. Holland, both of Charleston, for Respondents.

PER CURIAM: In this workers' compensation action, Ace USA Insurance Company of North America (INA) appeals the South Carolina Workers' Compensation Commission's order, affirmed by the circuit court, finding insurance coverage for HTH Associates, Inc. under an INA policy. We affirm.

FACTS

In 1992, HTH purchased a one-year workers' compensation insurance policy from INA. On April 5, 1992, pursuant to regulatory requirements, INA electronically submitted the policy C35274522 to the National Council on Compensation Insurance (NCCI). INA then mailed a hard copy of the policy to NCCI. The hard copy identified the policy as number WOCC35274522. The only difference between the two filings was the prefix "WOC" in the policy number of the hard copy. NCCI's computer system registered HTH as having two separate active policies.

In 1993, HTH learned it was not required to provide workers' compensation coverage and decided not to renew the INA policy. However, because HTH had initially elected coverage, Regulation 67-404 required HTH to file a Form 38 Notice of Withdrawal. S.C. Code Ann. Regs. 67-404 (1990). The failure to submit a Form 38 results in a company still operating

under the Workers' Compensation Act and subjects the company to possible sanctions. Id. HTH never filed a Form 38.

When HTH failed to renew the INA policy, INA, pursuant to Regulation 67-406, filed a notice of termination directly with the NCCI. S.C. Code Ann. Regs. 67-406 (Supp. 2005). INA correctly canceled policy number C35274522, and the termination became effective May 11, 1993. INA believed it had canceled HTH's sole policy. However, according to the NCCI computer system, the WOCC35274522 policy was still in effect.

In 2000, Curtis Earl, an employee of HTH, was in a work-related automobile accident.[1] At the time, HTH was engaged in the business of setting up new stores for Advance Auto Parts all over the southeastern United States. Gary Smith, the Director of Coverage and Compliance at the Workers' Compensation Commission, investigated coverage. On the initial hearing notice, Smith indicated HTH had no coverage. Upon further investigation, Smith concluded HTH had coverage under the policy identified in the records of the NCCI as WOCC35274522.

Earl filed this action against HTH, Advance and its insurer, Royal Insurance Company of America, and the South Carolina Uninsured Employers' Fund. Earl alleged HTH was his employer and was subject to the Act, the INA policy provided HTH with coverage, and the Royal Insurance policy also provided coverage based on Earl's statutory employment with Advance.

The single commissioner found, inter alia, HTH was subject to the Act and Earl was HTH's employee. The commissioner also found INA failed to properly cancel policy WOCC35274522, and therefore, the policy was still in effect. The commissioner found INA liable for all payments related to Earl's injuries. The full commission affirmed, adopting the commissioner's findings in full. However, the commission made the additional finding that Advance was Earl's statutory employer and Royal Insurance would cover

[1] In 2002, Earl died as a result of injuries sustained in the accident.

Earl's injuries if, on appeal, the court found no coverage under any INA policy. The circuit court affirmed. INA appeals.

STANDARD OF REVIEW

In reviewing which of two carriers provided insurance in a worker's compensation action, our supreme court applied the following standard of review:

> Review of a decision of the workers' compensation commission is governed by the Administrative Procedures Act. Although this Court may not substitute its judgment for that of the full commission as to the weight of the evidence on questions of fact, it may reverse where the decision is affected by an error of law. Review is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law.

Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (internal citations omitted).

LAW/ANALYSIS

INA contends it properly canceled HTH's sole policy and thus INA provided no coverage at the time of Earl's accident. We disagree. Pursuant to Regulation 67-406(A), the NCCI is the commission's "authorized agent" for filing a report of coverage and notice of termination. S.C. Code Ann. Regs. 67-406(A) (Supp. 2005). Notice of termination of a policy must be filed as specified in the regulations. S.C. Code Ann. Regs. 67-406(E) (Supp. 2005). Regulation 67-406 provides:

> B. The insurance carrier shall file a report of coverage and notice of termination directly with the

> NCCI. The date of receipt by the NCCI is deemed the date of filing with the Commission.
>
> F. To cancel workers' compensation insurance coverage, not to renew workers' compensation insurance coverage, or to reinstate a workers' compensation insurance policy, the insurance carrier shall file with the NCCI an NCCI Form WC 89 06 09 A.
>
> > (1) The insurance carrier may file this notice with the NCCI thirty or more days before the effective date.
> >
> > (2) Insurance expiration, termination or cancellation shall not be effective until after thirty days from the date of receipt by NCCI of the NCCI Form WC 89 06 09 A.

S.C. Code Ann. Regs. 67-406 (Supp. 2005). An insurance policy is deemed continuous until a notice of cancellation is filed. S.C. Code Ann. Regs. 67-406 (E) (Supp. 2005).

Several rules of statutory construction compel us to affirm the circuit court. First, workers' compensation statutes and regulations are to be construed liberally in favor of coverage. See Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992). Second, because workers' compensation is a creature of statute, "we are bound to strictly construe the terms of the statute . . . ." Brown v. Bi-Lo, Inc., 354 S.C. 436, 441, 581 S.E.2d 836, 838 (2003). Finally, the decision of an administrative agency interpreting its own regulations is given great deference. Goodman v. City of Columbia, 318 S.C. 488, 491, 458 S.E.2d 531, 532 (1995). Under a strict interpretation of the regulations, construing them in favor of coverage, and reviewing the commission's own interpretation of the regulations, we find INA failed to notify the NCCI of the cancellation of the policy identified by INA as WOCC35274522. Gary Smith, the Director of the Coverage and

Compliance Department of the commission, testified that if policy WOCC35274522 had been canceled in the NCCI records, his department would have initiated a non-compliance investigation due to HTH's failure to file a Form 38. Smith admitted this case presented an anomaly, and it was his personal opinion the two policy numbers referred to the same policy. Smith further acknowledged INA would not have known that two different policies had been set up unless it requested a listing of all its open policies. Smith concluded, however, that there is no regulatory provision requiring an employer actually pay premiums and no provision protecting a carrier in the event of a clerical error. Smith ultimately concluded on behalf of the commission that the WOC policy was not canceled pursuant to the regulations.

We find other support for our decision. For instance, in Larson's Workers' Compensation Law, the authors conclude the requirements for canceling a workers' compensation insurance policy are exacting and strictly construed because of the "essential role of insurance in the compensation process, and the serious potential effects of noninsurance on both employer and employee . . . ." 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 150.03 (2005). An insurer's failure to strictly comply with the regulations renders a termination ineffective. Id.

Likewise, the District of Columbia Court of Appeals addressed a nearly identical issue under the Longshoremen and Harbor Worker's Act in Scott v. Hoage, 73 F.2d 114 (D.C. App. 1934), and found coverage. In Scott, the insurance carrier misstated the policy number in its notice of cancellation. Scott, 73 F.2d at 115. The recipient clerk filed the cancellation notice, assuming a same-numbered policy was forthcoming. A policy with the erroneous number never arrived, and the original policy was never canceled. Finding the policy still in effect the court stated:

> It is probable that the mistake in numbers was the result of clerical error only. Nevertheless we think that misdescription of the policy number in the notice vitiates it. The duty rests upon the company to send a correct notice, and inasmuch as it failed to do so in

> this case, it did not accomplish the purpose for which it was sent.

Id. at 117. We likewise find INA's notice failed to cancel policy WOCC35274522.

Finally, we find the most equitable result in this case is to charge the party responsible for the mistake, INA. INA's hard copy notification designating coverage under policy WOCC35274522, after its electronic notification of policy number C35274522, caused the error. Smith testified the commission uses the NCCI computer system as authority for determining whether a policy exists or whether it has been canceled. If the NCCI computer had not shown coverage under policy WOCC35274522, the commission would have filed noncompliance proceedings against HTH for failure to file a Form 38. However, because the NCCI computer listed HTH as covered under the WOCC35274522 policy, no proceedings were initiated. In short, INA created the problem by submitting the same policy twice, identified by two different numbers.[2]

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

STILWELL, KITTREDGE, and WILLIAMS, JJ., concur.

[2] Although insurers do not usually request all their open policies from the NCCI, Smith testified that had INA made the request it would have known the policy for HTH was still in effect.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Brian Flynn, II #1, Appellant.

Appeal From Charleston County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4087
Submitted January 1, 2006 – Filed February 27, 2006

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, Office of the Attorney General, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

WILLIAMS, J.: Michael Brian Flynn appeals following convictions for burglary in the first degree, two counts of armed robbery, and possession of a firearm during the commission of a violent crime. Specifically, Flynn argues the trial court erred in failing to find that the State violated Batson v. Kentucky[1] by using five peremptory strikes to remove black females from his jury.

FACTS

After the jury was qualified, Flynn's counsel raised a Batson challenge based on the fact that the State used all its strikes to remove black females from the jury.[2] The trial court then advised the State that it had the burden of presenting a racially neutral explanation for the strikes. The following explanations were presented:

> Your Honor, as it relates to [Juror] 124, she had a violation of [a] check law. In addition, she was young . . . The next person, [Juror 76], was a person who works at Food Lion as a customer service representative . . . In her employment, she deals with complaints day in and day out, about bickering and things of that nature, and I thought that because there would be some of that in this case that I wouldn't want somebody in that kind of job who is dealing always with conflicts and hassles in her job . . . [Juror] 21 . . . is a Head Start director. I view that as a very liberal job and that's the reason why I struck her . . . [Juror 91] works at Baptist Hill High School, . . . as a secretary, and I thought she might have sympathy for young people . . . [Juror 154] also has a fraud check. She's young, and she had - - she was a cook or worked in the cafeteria at the College of

[1] 476 U.S. 79, 106 S. Ct. 1712 (1986).

[2] Flynn was 18 at the time of trial and is a white male.

> Charleston. Between all three of those things, I moved to strike her. **(emphasis added).**

Defense counsel took exception to the State's reasons for striking Juror 21, the Head Start Director. Counsel argued that being liberal is not an appropriate reason for being stricken from a jury. The State then expounded on its reasons for striking her: "Your Honor, I believe that is a social welfare kind of program, and as director she is liberal in nature. It's a liberal type of attitude and job, and that is why I struck her."

The trial court ruled that given the nature of the case and progress of the trial to that point, it would be possible to consider a Head Start director as an improper juror. The court then stated: "I'm going to conclude that it's race neutral, particularly in view of the fact that the Defendant is a young white Caucasian. That particular juror is female, African-American. I conclude that's race neutral." This appeal followed.

LAW / ANALYSIS

On appeal, Flynn argues that the trial court erred in not finding the State violated Batson in regard to its treatment of Juror 21. We disagree.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). The purposes of Batson are to "'protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venire person's right not to be excluded from jury service for discriminatory reasons, and preserve confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process.'" State v. Rayfield, 357 S.C. 497, 501, 593 S.E.2d 486, 488 (Ct. App. 2004) (quoting State v. Haigler, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999)).

Our supreme court established the procedure for a Batson hearing in State v. Adams, 322 S.C. 114, 123-24, 470 S.E.2d 366, 371-72 (1996). Once a party requests a hearing, the burden shifts to the proponent of the strike who must present a racially neutral reason or explanation. Id. At this point, the burden shifts back to the party challenging the strike to show the explanation is merely pretextual. Id. This is generally accomplished by showing that similarly situated people of another race were placed on the jury. Id. It is important to note that the "proponent of the peremptory challenges will not have any burden of presenting reasonably specific, legitimate explanations for the strikes. Instead, [he or she] need only present racially neutral explanations." Id.

In the current case, Flynn argues the State "advanced a racial stereotype" to justify striking Juror 21. We disagree. As noted previously, the State asserted that due to her employment, it believed Juror 21 was "liberal." As Flynn has offered no evidence other than a conclusory assertion of racial motivation, we find the trial court did not err in failing to find a Batson violation.

AFFIRMED.[3]

STILWELL and KITTREDGE, JJ., concur.

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The South Carolina Municipal Insurance and Risk Fund, Appellant,

v.

The City of Myrtle Beach and James E. Daniels, individually and as class representative, Respondents.

Appeal From Horry County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 4088
Heard January 10, 2006 – Filed February 27, 2006

REVERSED

J.R. Murphy, Adam J. Neil, and Tony Catone, all of Columbia, for Appellant.

Charles Bernhart Jordan, of Myrtle Beach; Gene McCain Connell, Jr., of Surfside Beach; for Respondents.

GOOLSBY, J.: In this declaratory judgment action, the South Carolina Municipal Insurance and Risk Fund (SCMIRF) appeals a summary judgment order requiring it to indemnify the City of Myrtle Beach (the City) for refunds of monies collected pursuant to a city ordinance that had been declared unconstitutional. We reverse.

FACTS

In February 1996, James Daniels filed a class action lawsuit against the City, challenging Myrtle Beach City Code section 21-7(g) and the City's implementation of that section. The ordinance stated the following:

> Any outstanding charges associated with rental or leased properties or accounts which are not covered by the tenant's deposit shall be the responsibility of the property owner.

The effect of the ordinance was that landlords became secondarily liable for their tenants' water bills. In implementing the ordinance, the City would refuse to provide water service to leased property with outstanding water bills. As a result of this refusal, landlords and new tenants could be required to pay water charges incurred by prior tenants.

On December 28, 2001, the master-in-equity for Horry County granted judgment to the class, holding the ordinance and implementing policies violated federal statutory law and the constitutional guarantees of substantive due process, procedural due process, equal protection, and just compensation. The master further ordered that each member of the class was entitled to a refund of any monies paid for another's water bill.

During the time of some of the allegations in the class action complaint, the City was insured under a general liability insurance policy issued by SCMIRF. The pertinent section of the policy read as follows:

> SCMIRF agrees, subject to limitations, terms, and conditions stated in the General Provisions, Section I and Hereunder mentioned:
>
> 1. To indemnify the Member and Covered Person(s) for all sums which the Member or Covered Person(s) shall be obligated to pay by reason of the liability imposed upon the covered Person(s) by law for damages on account of . . . damage to or destruction of property or the loss of use thereof arising out of any Occurrence.

The policy also listed certain actions as exclusions to coverage, noting in particular that "this coverage under this section does not apply: . . . to inverse condemnation, condemnation, temporary taking, permanent taking, or any claim arising out of or in any way connected with the operation of the principles of eminent domain, adverse possession or dedication by adverse use."

On February 25, 2003, SCMIRF filed the present action in the Horry County Court of Common Pleas requesting declarations that this policy did not cover any of the claims or damages asserted by the class against the City and that SCMIRF was not required to provide a defense to the City in the underlying class action. The City answered with a general denial and various affirmative defenses on March 13, 2003. On September 4, 2003, SCMIRF filed a motion for summary judgment. A hearing on the motion took place November 1, 2004. With the request and consent of the parties, the trial court converted the motion into cross-motions for summary judgment. On December 10, 2004, the trial court filed an order denying summary judgment to SCMIRF and granting summary judgment to the City.

The trial court concluded the refunds constituted "damages" under the insuring policy. The trial court also concluded the wrongful collection of money was "property damage" and the City's action pursuant to its ordinance was an unintended "occurrence." Finally, the trial court concluded the

inverse condemnation exclusion did not preclude coverage. This appeal followed.

LAW/ANALYSIS

We address only SCMIRF's contention that the policy expressly excluded coverage for claims based on a taking. We hold this argument is a sufficient basis on which to reverse the appealed order.

Regarding insurance policies, the supreme court has noted that "rules of construction requires clauses of exclusion to be narrowly interpreted and clauses of inclusion to be broadly construed."[1] "This rule of construction inures to the benefit of the insured."[2] Nevertheless, "[w]hen the contract language is clear and unambiguous, the language alone determines the contract's force, and terms must be construed to give effect to their 'plain, ordinary, and popular meaning.'"[3] "Courts may not torture the ordinary meaning of language to extend coverage expressly excluded by the terms of a policy."[4]

Citing this court's decision in Isle of Palms Pest Control v. Monticello Insurance Co.,[5] the trial court held that, because inverse condemnation was

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[1] McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 319, 426 S.E.2d 770-71 (1993).

[2] Id.

[3] Dorman v. Allstate Ins. Co., 332 S.C. 176, 178, 504 S.E.2d 127, 129 (Ct. App. 1998) (quoting Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 650, 491 S.E.2d 272, 274 (Ct. App. 1997)).

[4] Falkosky v. Allstate Ins. Co., 311 S.C. 369, 371, 429 S.E.2d 194, 196 (Ct. App.), aff'd as modified, 312 S.C. 210, 439 S.E.2d 836 (1993).

[5] 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1994), aff'd, 321 S.C. 310, 468 S.E.2d 304 (1996).

only one of several grounds upon which the master assessed liability against the City and because the exclusion did not apply to the other grounds for the master's ruling, namely due process and equal protection, the inverse condemnation exclusion did not operate to preclude coverage. We disagree with these holdings.

First, the portion of Isle of Palms on which the trial court relied in reaching this conclusion concerned only a duty to defend, not a duty to pay.[6] In contrast, the focus of this appeal is not on SCMIRF's duty to defend but rather on whether the policy it issued to the City required it to cover damages and attorney fees assessed against the City in the underlying suit. Although an insurer may have an initial obligation to provide a defense to a claim because "the underlying complaint creates a possibility of coverage under an insurance policy,"[7] this obligation is distinct from the insurer's responsibility to cover the claim.[8]

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[6] The section cited by the trial court reads as follows: "While the [third-party] complaint also includes allegations of intentional conduct which would not be covered by the policy, the inclusion of some non-covered claims does not abrogate an insurer's duty to defend when a complaint raises claims covered by the policy." Id. at 15, 459 S.E.2d at 319 (emphasis added).

[7] Id.

[8] See Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) (stating that, although the duty to defend and the obligation to pay a judgment against an insured "are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the judgment, the duty to defend exists regardless of the insurer's ultimate liability to the insured"); cf. Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887-88 (Minn. 1978) ("[A]lthough the liability insurer generally must undertake the defense of its insured based upon the allegations in the third-party complaint, the allegations of negligence in [the third-party] complaint can impose no continuing obligation where coverage has been declared excluded in separate judicial proceedings.").

Second, we disagree with the conclusion in the appealed order that, because the master also cited the grounds of due process and equal protection to support his finding that Myrtle Beach City Code section 21-7(g) was invalid, the inverse condemnation exclusion did not operate to preclude coverage.

As stated earlier, the policy expressly provided that liability coverage would not apply "to inverse condemnation, condemnation, temporary taking, permanent taking, or any claim arising out of or in any way connected with the operation of the principles of eminent domain, adverse possession or dedication by adverse use." In granting judgment to the plaintiffs in the class action and ordering the City to make refunds to the class members, the master concluded that requiring one person to pay another's water bill to obtain service amounted to a "taking of property which violates the United States and the South Carolina Constitutions." Although, as the trial court correctly observed, the master also cited due process and equal protection as reasons to require the City to pay refunds to the plaintiffs in the class action, the heart of the controversy in that lawsuit was the taking by the City of the class members' money without just compensation. As SCMIRF argued in its brief, the violation of the class members' rights to due process and equal protection would not have occurred but for the wrongful exercise by the City of its eminent domain power.[9] Because the claim at issue in this appeal fell within

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[9] See Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 399 (1894) ("The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public."); cf. T.E. Wannamaker, Inc. v. City of Orangeburg, 278 S.C. 637, 639, 300 S.E.2d 729, 730 (1983) (recognizing equal protection and due process as "constitutional requirements" in a condemnation proceeding).

a policy exclusion, SCMIRF should not be required to indemnify the City for its loss.[10]

REVERSED.

ANDERSON and SHORT, JJ., concur.

[10] Cf. McPherson, 310 S.C. at 320, 426 S.E.2d at 772 (upholding this court's determination that the policy at issue excluded coverage for the plaintiff's injuries "regardless of the legal theory by which they are claimed") (aff'g as modified 306 S.C. 456, 412 S.E.2d 445 (Ct. App. 1993)); B.L.G. Enters. v. First Fin. Ins. Co., 328 S.C. 374, 377, 491 S.E.2d 695, 697 (Ct. App. 1997) ("[I]nsurers have no duty to defend the insured where damages are caused by a reason clearly excluded under the policy."), aff'd, 334 S.C. 529, 514 S.E.2d 327 (1999).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Suchart Taylor, Respondent,

v.

South Carolina Department of Motor Vehicles, Appellant.

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

Opinion No. 4089
Formerly Unpublished Opinion No. 2006-UP-051
Submitted January 1, 2006 – Filed January 20, 2006
Refiled February 27, 2006

REVERSED

Frank L. Valenta, Jr., and Kelli Gregg Maddox, of Blythewood, for Appellant.

Michael Sean O'Neal, of North Charleston, for Respondent.

PER CURIAM: The South Carolina Department of Motor Vehicles (the Department) appeals the trial court's order reversing the administrative hearing officer's order sustaining the suspension of Suchart Taylor's driver's license. We reverse.

FACTS

On September 1, 2004, Officer Hamm of the South Carolina Highway Patrol responded to a report of a vehicle accident on Interstate 26 in Berkley County. When Officer Hamm arrived at the scene of the accident, paramedics were treating Taylor for his injuries. During a break in the treatment, Officer Hamm approached Taylor's vehicle. As he approached, he smelled an odor of beer emanating from the area around Taylor. Officer Hamm arrested Taylor for driving under the influence of alcohol (DUI). Due to the extent of Taylor's injuries, Taylor was transported to the hospital.

At the hospital, Officer Hamm determined Taylor could not take a breath test due to the heavy mouth injuries he sustained from the accident. Officer Hamm requested a blood sample from Taylor. Taylor refused to provide a blood sample, and refused to sign the implied consent form. Because Taylor refused to sign the form, Officer Hamm read it out loud, but did not provide Taylor a tangible copy. Thus, Taylor heard his implied consent rights but neither read nor signed the implied consent form.

Because Taylor refused chemical testing, Officer Hamm issued him a notice of suspension of his driver's license. Shortly thereafter, Taylor requested a hearing to challenge the suspension of his license. On October 13, 2004, the hearing officer sustained the suspension of Taylor's license. Taylor then petitioned the trial court to review the administrative hearing officer's order. The trial court heard Taylor's petition and reversed the hearing officer's order. The Department now appeals the trial court's order.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard of review for an appeal from an order of an administrative agency. Section 1-23-380(A)(6) of the South Carolina Code (2005) provides:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions. . . .

"The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005). "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." Id. "In reviewing a final decision of an administrative agency, the circuit court essentially sits as an appellate court to review alleged errors committed by the agency." Id.

DISCUSSION

The Department argues the trial court erred in reversing the order of the administrative hearing officer. We agree.

In South Carolina, operating a motor vehicle is a privilege of the State, not a right of the individual.

> The license to operate a motor vehicle upon the public highways of this state is not a property right, but is a mere privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare. Such privilege is always subject to revocation or suspension for any cause relating to public safety. However, the privilege cannot be revoked arbitrarily or capriciously.

Sponar v. S.C. Dep't of Pub. Safety, 361 S.C. 35, 39, 603 S.E.2d 412, 415 (Ct. App. 2004). As part of this privilege, individuals operating motor vehicles implicitly consent to chemical tests of their breath, blood, or urine to determine whether they are driving while under the influence of drugs or alcohol. S.C. Code Ann. § 56-5-2950 (Supp. 2004).

The implied consent laws of this State attempt to balance the interest of the State in maintaining safe highways with the interest of the individual in maintaining personal autonomy free from arbitrary or overbearing State action. The South Carolina Supreme Court articulated this policy in S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 521, 613 S.E.2d 544, 548 (2005), when the court stated:

> The implied consent laws are driven by public policy considerations. The State has a strong interest in maintaining safe highways and roads. One way to accomplish this goal is to enact laws directed at minimizing drunk driving.

Section 56-5-2950 of the South Carolina Code provides:

> No tests may be administered or samples obtained unless the person has been informed in writing that:
>
> (1) he does not have to take the test or give the samples, but that his privilege to drive must be

> suspended or denied for at least ninety days if he refuses to submit to the tests and that his refusal may be used against him in court;
>
> (2) his privilege to drive must be suspended for at least thirty days if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
>
> (3) he has the right to have a qualified person of his own choosing conduct addition independent tests at his expense;
>
> (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
>
> (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

The aforementioned administrative hearing must be held within thirty days after request for the hearing is received. S.C. Code Ann. § 56-5-2951(F) (Supp. 2004). By statute, the "scope of the hearing must be limited to whether the person: (1) was lawfully arrested or detained; (2) was advised in writing of the rights enumerated in Section 56-5-2950; [or] (3) refused to submit to a test pursuant to Section 56-5-2950 . . . ." S.C. Code Ann. § 56-5-2951(F).

The Department argues the trial court erred in reversing the administrative hearing officer's order because Taylor did not demonstrate how he was prejudiced by the fact that he did not receive a copy of the implied consent form from Officer Hamm. We agree.

In State v. Huntley, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002), the South Carolina Supreme Court reversed the trial court and held that the results of a breathalyzer test should not have been suppressed for a violation of section 56-5-2950 because the defendant was not prejudiced by the violation. The trial court suppressed the breathalyzer test results because the breathalyzer operator tested the breathalyzer machine with a simulator test solution containing an alcohol level of .10 percent rather than the .08 percent mandated by statute. The supreme court reasoned that because the test merely determined the reliability of the breathalyzer machine's results it was "irrelevant whether the simulator test [was operated] using an alcohol level of .10 or .08 percent." Id. The supreme court concluded, "Even if the breathalyzer operator did not use the simulator test solution at the alcohol concentration required by [section 56-5-2950], [the defendant] was not prejudiced." Id. Thus, the supreme court reversed the suppression of the breathalyzer test results because the defendant was not prejudiced by the statutory violation committed by the breathalyzer operator. Consequently, the Huntley decision dictates that a violation of section 56-5-2950 without resulting prejudice will not lead to a suppression of the evidence obtained pursuant to this section.

Taylor argues he was not informed of the implied consent rights in writing as provided by section 56-5-2950. Taylor does not argue that he did not receive the implied consent rights, or that he would have provided a blood test if he had received the implied consent rights in writing. Therefore, Taylor was not prejudiced by the fact that Officer Hamm read the implied consent rights out loud. Because Taylor was not prejudiced, the trial court erred in reversing the administrative hearing officer's order.

Accordingly, the order of the trial court is

REVERSED.

KITTREDGE, WILLIAMS, JJ., AND CURETON, A.J., CONCUR.