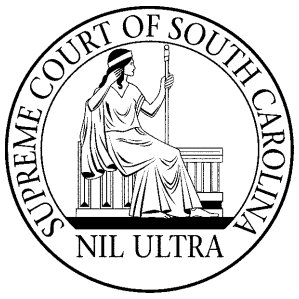

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

July 22, 2002

ADVANCE SHEET NO. 25

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

F & D Electrical Contractors, Inc. — Petitioner,

v.

Powder Coaters, Inc. and BG Holding Co. f/k/a Colite Industries, Inc. — Defendants,

Of Whom BG Holding Co. f/k/a Colite Industries, Inc., is — Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 25498
Heard April 17, 2002 - Filed July 22, 2002

AFFIRMED AS MODIFIED

E. Wade Mullins, III, of Bruner, Powell, Robbins, Wall & Mullins, of Columbia, for petitioner.

Theodore D. Willard, Jr., of Montgomery, Patterson, Potts & Willard, of Columbia, for respondent.

CHIEF JUSTICE TOAL: This Court granted certiorari to review the Court of Appeals' decision in *F & D Elec. Contractors, Inc. v. Powder Coaters, Inc.*, 342 S.C. 443, 537 S.E.2d 285 (Ct. App. 2000). The Court of Appeals held the materialman was not entitled to a mechanic's lien since the owner of the property did not give proper consent, as is required by the Mechanic's Lien Statute, S.C. Code Ann. § 29-5-10 *et. seq*. (1991). We affirm, as modified.

FACTUAL/ PROCEDURAL BACKGROUND

BG Holding f/k/a Colite Industries, Inc. ("BG Holding") is a one-third owner of about thirty acres of real estate in West Columbia, South Carolina. A warehouse facility is located on the property. In September 1996, Powder Coaters, Inc. ("Powder Coaters") agreed to lease a portion of the warehouse to operate its business. Powder Coaters was engaged in the business of electrostatically painting machinery parts and equipment and then placing them in an oven to cure. A signed lease was executed between Powder Coaters and BG Holding. Prior to signing the lease, Powder Coaters negotiated the terms with Mark Taylor, ("Taylor") who was the property manager for the warehouse facility and an agent of BG Holding.

The warehouse facility did not have a sufficient power supply to support Powder Coaters' machinery. Therefore, Powder Coaters contracted with F&D Electrical ("F&D") to perform electrical work which included installing two eight foot strip light fixtures and a two hundred amp load center. Powder Coaters never paid F&D for the services. Powder Coaters was also unable to pay rent to BG Holding and was evicted in February 1997. Powder Coaters is no longer a viable company.

In January 1997, F&D filed a Notice and Certificate of Mechanic's Lien and Affidavit of Mechanic's Lien. In February 1997, F&D filed this action against BG Holding foreclosing on its mechanic's lien pursuant to S.C. Code Ann. § 29-5-10 *et. seq*. (1991). F&D also asserted a cause of action against Powder Coaters for breach of contract and *quantum meruit*. BG Holding counterclaimed against F&D for slander of title. Powder Coaters did not answer, and a default judgment was entered against them.

A jury trial was held on September 2nd and 3rd, 1998. At the close of F&D's evidence, and at the close of all evidence, BG Holding made motions for directed verdicts, which were denied. The jury returned a verdict for F&D in the amount of $8,264.00. The court also awarded F&D attorneys' fees and cost in the amount of $8,264.00, for a total award of $16,528.00.

BG Holding appealed. The Court of Appeals, in a two to one decision, reversed the trial court, holding a directed verdict should have been granted to BG Holding on the grounds BG Holding did not consent to the electrical upgrade, as is required by the Mechanic's Lien Statute. This Court granted F&D's petition for certiorari, and the issue before this Court is:

> Did the trial court err in denying BG Holding's motion for directed verdict because the record was devoid of any evidence of owner's consent to materialman's performance of work on its property as required by S.C. Code Ann. § 29-5-10?[1]

[1]Both parties' briefs present three issues on appeal. However, they all concern whether or not the trial court correctly denied BG Holding's motions for directed verdicts which were based on their assertion that F&D presented no evidence of consent, as is required by the mechanic's lien statute. Therefore, we have combined all three issues into one general issue.

LAW/ ANALYSIS

F&D argues the majority of the Court of Appeals erred in holding the facts of the case failed to establish that BG Holding *consented* to the work performed by F&D, as is required the Mechanic's Lien Statute, S.C. Code Ann. § 29-5-10. We agree.

When ruling on a motion for directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 479, 514 S.E.2d 126 (1999). Where the evidence yields only one inference, a directed verdict for the moving party is proper. *Id.*

South Carolina's Mechanic's Lien Statute provides:

> A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building . . . by virtue of an agreement with, or ***by consent of, the owner of the building or structure, or a person having authority from, or rightfully acting for, the owner*** in procuring or furnishing the labor or materials shall have a lien upon the building or structure and upon the interest of the owner of the building or structure . . . to secure the payment of the debt due.

S.C. Code Ann. § 29-5-10 (emphasis added). Both parties in this case concede there was no express "agreement" between F&D and BG Holding. Therefore, the issue in this appeal turns on the meaning of the word "consent" in the statute, as applied in the landlord-tenant context. This is a novel issue in South Carolina.

This Court must decide who must give the consent, who must receive consent, and what type of consent (general, specific, oral, written) must be given in order to satisfy the statute. Finally, the Court must decide whether the evidence in this case shows BG Holding gave the requisite consent.

A. Who Must Receive the Consent.

The Court of Appeals' opinion in this case contemplates the consent must be between the materialman (lien claimant) and the landlord (owner). "It is only logical . . . that consent under section 29-5-10 must . . . be between the owner and the entity seeking the lien. . ." *F&D Elec.*, 342 S.C. at 449, 537 S.E.2d at 288. As stated previously, applying the Mechanic's Lien Statute in the landlord-tenant context presents a novel issue. We find the consent required by the statute does not have to be between the landlord/owner and the materialman, as the Court of Appeals' opinion indicates. A determination that the required consent must come from the owner to the materialman means the materialman can only succeed if he can prove an agreement with the owner. Such an interpretation would render meaningless the language of the statute that provides: ". . .by virtue of an agreement with, ***or by consent*** of the owner . . . ." S.C. Code Ann. § 29-5-10 (emphasis added).

Therefore, it is sufficient for the landlord/owner or his agent to give consent to his tenant. The landlord/owner should be able to delegate to his tenant the responsibility for making the requested improvements. The landlord/owner may not want to have direct involvement with the materialman or sub-contractors, but instead may wish to allow the tenant to handle any improvements or upgrades himself. In addition, the landlord/owner may be located far away and may own many properties, making it impractical for him to have direct involvement with the materialman. We find the landlord/owner or his agent is free to enter into a lease or agreement with a tenant which allows the tenant to direct the modifications to the property which have been *specifically consented* to by the landlord/owner or his agent.

We hold a landlord/owner or his agent can give his consent to the lessee/tenant, as well as directly to the lien claimant, to make modifications to the leased premises.

B. What kind of consent is necessary.

This Court has already clearly held the consent required by section 29-5-

10 is "something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has a right to forbid." *Geddes v. Bowden*, 19 S.C. 1, 7 (1883); *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 545, 431 S.E.2d 565, 566 (1993); *C & B Co. v. Collins*, 269 S.C. 688, 690, 239 S.E.2d 725, 726 (1977); *Guignard Brick Works v. Gantt*, 251 S.C. 29, 32, 159 S.E.2d 850, 851 (1968); *Metz v. Critcher*, 86 S.C. 348, 350, 68 S.E. 627, 628 (1910). However, our Mechanics Lien Statute has never been applied in the landlord-tenant context where a third party is involved.

Other jurisdictions have addressed this issue. The Court of Appeals cited *St. Catherine's Church Corp. of Riverside v. Technical Planning Assocs.*, 520 A.2d 1298 (Conn. Ct. App. 1987) in support of its holding. We agree with the Court of Appeals that the Connecticut court's reasoning is persuasive, especially since Connecticut has a similar mechanics lien statute.

Conn. General Statutes § 49-33(a) provides in pertinent part:

> If any person has a claim for more than ten dollars for . . . services rendered . . . in the improvement of any lot or in the site development or subdivision of any plot of land, and the claim is by virtue of an agreement with or by consent of the owner . . . or of some person having authority from or rightfully acting for the owner . . . then the plot of land, is subject to the payment of the claims.

The Connecticut courts have stated "the consent required from the owner or one acting under the owner's authority is more than the mere granting of permission for work to be conducted on one's property; or the mere knowledge that work was being performed on one's land." *St. Catherine's Church*, 520 A.2d at 1300 (internal citations and quotations omitted). Furthermore, although the Connecticut courts have stated the statute does not require an express contract, the courts have required "consent that indicates an agreement that the owner of . . . the land shall be, or may be, liable for the materials or labor." *Id.*

Although the other jurisdictions which have addressed this issue do not have mechanic's lien statutes as similar to South Carolina's statute as Connecticut's, we find their reasoning persuasive.

Georgia and North Carolina courts have applied their mechanic's lien statutes in the landlord-tenant context in a way similar to Connecticut. The Georgia Court of Appeals has stated, "A contract for improvements between a lessee and a materialman does not subject the interest of the lessor to a lien unless a contractual relationship exists between the lessor and the materialman as well. . . . Mere knowledge by the lessor of the improvements does not give rise to the lien." *Nunley Contracting Co., Inc. v. Four Taylors, Inc.*, 384 S.E.2d 216, 217 (Ga. App. 1989) (internal citations and quotations omitted). Although Georgia requires a "contractual relationship," an express agreement is not required. *Accurate Construction Co., Inc. v. Dobbs Houses, Inc.*, 269 S.E.2d 494, 495 (Ga. App. 1980) (indicating the consent may be express or implied).

North Carolina has used similar language when discussing mechanic's liens in the landlord-tenant context. "Mere knowledge that work is being done or material furnished on one's property does not enable the person furnishing the labor or material to obtain a lien." *Brown v. Ward*, 20 S.E.2d 324, 326 (N.C. 1942). The Court went on to state, "Unless the lessors were originally liable by reason of a contract of some sort, [they] cannot be made so because of their having resumed possession of the premises, with its improvements, upon surrender of their tenant." *Id.* (internal quotations and citations omitted). We find the following language from the North Carolina Court to be especially enlightening in the instant case,

> [Materialman] did the work under contract with [Lessee] with the understanding that it was to be charged to him. If they were unwilling to do the work and furnish the material upon his credit and intended to look to the security provided by statute, ordinary prudence required that they exercise that degree of diligence which would enable them to ascertain the status of the title to the land upon which the building was to be erected and to obtain the approval or procurement of the

owners. Their loss must be attributed to their failure to do so.

Id. at 326-327.

The reasoning of North Carolina, Connecticut, and Georgia is persuasive. F&D's brief appears to argue that mere knowledge by the landowner that the work needed to be done, coupled with the landlord's general "permission" to perform the work, is enough to establish consent under the statute. Under this interpretation, a landlord who knew a tenant needed to improve, upgrade, or add to the leased premises would be liable to any contractor and/or subcontractor who performed work on his land. Under F&D's interpretation the landlord would not be required to know the scope, cost, etc. of the work, but would only need to give the tenant general permission to perform upgrades or improvements.

Clearly, if the landlord/owner or his agent gives consent directly to the materialman, a lien can be established. Consent can also be given to the tenant, but the consent needs to be specific. The landlord/owner or his agent must know the scope of the project (for instance, as the lease provided in the instant case, the landlord could approve written plans submitted by the tenant). The consent needs to be more than "mere knowledge" that the tenant will perform work on the property. There must be some kind of express or implied agreement that the landlord may be held liable for the work or material. The landlord/owner or his agent may delegate the project or work to his tenant, but there must be an express or implied agreement about the specific work to be done. A general provision in a lease which allows tenant to make repairs or improvements is not enough.

C. Evidence of Consent in this Case

In the instant case, there is some evidence of consent. However, it does not rise to the level required under the statute.

Evidence There Was No Consent

1. The record is clear that no contract, express or implied, existed between BG Holding and F&G. BG Holding had no knowledge F&G would be performing the work.

2. F&G's supervisor, David Weatherington and Ray Dutton, the owner of F&D, both testified they never had a conversation with anyone from BG Holding. In fact, until Powder Coaters failed to pay under the contract, F&D did not know BG Holding was the owner of the building.

3. Mark Taylor, BG Holding's agent, testified he never authorized any work by F&D, nor did he see any work being performed by them on the site.

4. The lease specifically provided that all work on the property was to be approved in writing by BG Holding.

5. David Weatherington of F&D testified he was looking to Powder Coaters, not BG Holding, for payment.

6. Powder Coaters acknowledged it was not authorized to bind BG Holding to pay for the modifications.

7. The lease states, "[i]f the Lessee should make any [alterations, modification, additions, or installations], the Lessee hereby agrees to indemnify, defend, and save harmless the Lessor from any liability..."

Evidence BG Holding "Consented" to the Work.

1. Bruce Houston, owner of Powder Coaters testified that during the lease negotiations, he informed Mark Taylor, BG Holding's property manager and agent, that electrical and gas upgrading

would be necessary for Powder Coaters to perform their work.

2. Houston testified Mark Taylor was present at the warehouse while F&D performed their work. [However, Taylor testified he did not see F&D performing any work on the premises].

3. Houston testified he would not have entered into the lease if he was not authorized to upgrade the electrical since the existing power source was insufficient to run the machinery needed for Powder Coaters to operate.

4. Houston testified Mark Taylor, BG Holding's agent, showed him the power source for the building so Taylor could understand the extent of the work that was going to be required.

5. Houston testified Paragraph 5 of the addendum to the lease was specifically negotiated. He testified the following language granted him the authority to perform the electrical upfit, so that he was not required to submit the plans to BG Holding as required by a provision in the lease: "Lessor shall allow Lessee to put Office Trailer in Building. *All Utilities necessary to handle Lessee's equipment shall be paid for by the Lessee including, but not limited to electricity, water, sewer, and gas.*" (emphasis added).[2]

6. Powder Coaters no longer occupies the property, and BG Holding possibly benefits from the work done.

Viewing the evidence in the light most favorable to F&D, whether BG Holding gave their consent is a close question. However, we agree with the Court of Appeals, that F&D has not presented enough evidence to show: (1) BG Holding gave anything more than general consent to make improvements (as the

[2]We note that BG Holding denies this interpretation, but insists it just requires the Lessee to pay for all utility bills.

lease could be interpreted to allow); or (2) BG Holding had anything more that "mere knowledge" that the work was to be done. Powder Coaters asserted the lease's addendum evidenced BG Holding's consent to perform the modifications; however, there is no evidence BG Holding expressly or implicitly agreed that it might be liable for the work. In fact, the lease between Powder Coaters and BG Holding expressly provided Powder Coaters was responsible for any alterations made to the property. Even Powder Coaters acknowledged it was not authorized to bind BG Holding. In addition, the addendum provisions are specific with respect to the partition and a rollup door. Therefore, it is impossible to see how the very general provision requiring Powder Coaters to pay for water, sewer, and gas can be interpreted to authorize Powder Coaters to perform an electrical upgrade. Furthermore, we agree with the Court of Appeals that the mere presence of BG Holding's agent at the work site is not enough to establish consent.

CONCLUSION

We hold consent, as required by the Mechanic's Lien Statute, is something more than mere knowledge work will be or could be done on the property. The landlord/owner must do more than grant the tenant general permission to make repairs or improvements to the leased premises. The landlord/owner or his agent must give either his tenant or the materialman express or implied consent acknowledging he may be held liable for the work.

The Court of Appeals' opinion is **AFFIRM AS MODIFIED**.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Douglas J. Hill, Respondent,

v.

State of South Carolina, Petitioner.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 25499
Submitted April 17, 2002 - Filed July 22, 2002

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., Assistant Attorney General William Bryan Dukes, all of Columbia, for petitioner.

Assistant Appellate Defender Tara S. Taggart of South Carolina Office of Appellate Defense, of Columbia, for respondent.

CHIEF JUSTICE TOAL: Douglas J. Hill ("Hill") filed a petition for post-conviction relief ("PCR") from his conviction for assault and battery with intent to kill ("ABIK"). The PCR court granted his petition for relief, and the State appeals.

FACTUAL/PROCEDURAL BACKGROUND

Hill was indicted for ABIK on November 28, 1995, for attacking his pregnant girlfriend, Sheila Ann Gilliam ("victim"). The victim was stabbed 12 to 14 times in different places all over her body. The treating surgeon testified at trial that the victim lost between 1,000 and 2,000 cubic centimeters of blood from the lacerations, and that her condition was life-threatening when he first examined her at the hospital. The victim was in surgery for several hours to have all of the wounds irrigated and repaired.

The victim testified an altercation began after she told Hill their relationship was over. According to her testimony, Hill told her, "[w]ell, since we [sic] through then I might as well kill you." Several witnesses to the attack also testified at trial. One pair of witnesses reported seeing Hill and the victim in a heated verbal argument outside of a convenience store in Fountain Inn, South Carolina that turned physical when Hill began hitting the victim in the face and elsewhere on her body. The same witness testified that the victim eventually fell down, and Hill sat on top of her to pin her to the ground and then began stabbing her with a small knife.

The attack continued until another witness, after calling the police, intervened, first, by yelling at the attacker to put the knife down and, then, when he did not comply, by kicking him in the head, apparently knocking him unconscious. A police officer testified that Hill was lying unconscious in the parking lot of the convenience store when he arrived at the scene. Hill testified that he did not remember fighting with the victim or stabbing her, but remembered someone hitting him in the head and waking up later in the hospital.

Hill was tried and convicted of ABIK and sentenced to life imprisonment without possibility of parole pursuant to S.C. Code Ann. § 17-25-45(a)(1), based on a prior rape conviction and a prior conviction for aggravated assault and battery.[1] Hill appealed his conviction and the Court of Appeals affirmed the conviction and sentence. *State v. Hill*, Op. No. 98-UP-009 (Ct. App. filed January 8, 1998). Hill filed an application for PCR and an evidentiary hearing was held on December 14, 1999. At the hearing, Hill amended his PCR application to include an allegation of ineffective assistance of counsel based on his trial counsel's failure to object to the jury charge given by the trial judge on assault and battery of a high and aggravated nature ("ABHAN"), a lesser included offense of ABIK. The PCR court found the ABHAN jury instruction was erroneous and that Hill's counsel was ineffective for failing to object to it. The PCR court granted Hill's petition for relief on that basis.

The State appeals the following issue:

> Did Hill's trial counsel render ineffective assistance by failing to object to the ABHAN jury instruction and, if so, was Hill prejudiced by his counsel's ineffective assistance?

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[1]S.C. Code Ann. § 17-25-45 (Supp. 1995) provides:

> any person who has three convictions under the laws of this State, any other state, or the United States, for a violent crime as defined in § 16-1-60 except a crime for which a sentence of death has been imposed shall, upon the third conviction in this State for such crime, be sentenced to life imprisonment without parole.

This statute was amended in 1995, but the amendment applied prospectively to crimes committed on or after the amendment's effective date of January 1, 1996, and so does not apply in this case. 1995 Act No. 83, by § 62.

LAW/ANALYSIS

The State argues the PCR court erred by holding Hill's trial counsel was ineffective for failing to object to the trial judge's ABHAN jury instruction. We disagree.

For a petitioner to be granted PCR as a result of ineffective assistance of counsel, he must show (1) counsel's representation fell below an objective standard of reasonableness, and (2) he was prejudiced by that ineffective assistance, meaning, but for counsel's errors there is a reasonable probability the result at trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This Court will uphold the findings of the PCR court if they are supported by any evidence. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

A. Objective Standard of Reasonableness

At trial, the trial judge charged the jury on ABHAN as a lesser included offense of ABIK, in part, as follows:

> Ladies and Gentlemen, assault and battery of a high and aggravated nature is attended by aggravating circumstances such as the use of a deadly weapon, the infliction of serious bodily harm or a great disparity between the ages or physical condition of the parties involved. Now I told you earlier, this is a degree higher than simple assault. It usually occurs by the use of some weapon. An assault and battery, however, might be so aggravated where no weapon is used as to amount to aggravated assault and battery. If a person seriously or violently injures another *without malice or legal excuse but in sudden heat and [sic] passion with sufficient legal provocation* that would constitute assault and battery of a high and aggravated nature . . ..

Hill argues this charge erroneously instructed the jury that the absence of malice (or, conversely, the presence of sufficient provocation) was an element of

ABHAN. We agree the charge was erroneous.

Four months before Hill's trial, the Court of Appeals held that absence of malice was not an element of ABHAN, and found a charge including absence of malice as an element of ABHAN to be erroneous. *State v. Pilgrim*, 320 S.C. 409, 465 S.E.2d 108 (Ct. App. 1995) ("Pilgrim I"). After Hill's trial and ABIK conviction, this Court granted certiorari to review *Pilgrim I.* This Court affirmed the Court of Appeals, stating explicitly that absence of malice is not an element of ABHAN. *State v. Pilgrim*, 326 S.C. 24, 482 S.E.2d 562 (1997) ("Pilgrim II").[2] In *Pilgrim II*, this Court explained, "In this case, under the trial judge's instruction, the jury could not have returned with an ABHAN conviction

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[2]In *Pilgrim*, the trial court charged the jury on ABIK and ABHAN by analogizing those offenses to murder and voluntary manslaughter respectively. The defendant objected that defining ABHAN as voluntary manslaughter when the victim does not die, "adds the element of sudden heat of passion upon sufficient legal provocation (i.e., absence of malice)." *Pilgrim II*, at 27, 482 S.E.2d at 563. The *Pilgrim* trial court gave the following charge, in pertinent part:

> Voluntary manslaughter is defined as the killing of a human being *in sudden heat of passion upon sufficient legal provocation* as would be calculated to sway the reason of an ordinary person causing him to become enraged and act upon an impulse rather than cool reflection, *thus eliminating the element of actual malice.* Now, before the defendant could be found guilty of assault and battery of a high and aggravated nature, the jury must be satisfied beyond a reasonable doubt that if the person assaulted died as a result of the injury sustained the defendant would have been guilty of manslaughter as I defined it for you.

Pilgrim I, 320 S.C. at 414, 465 S.E.2d at 111 (Ct. App. 1995). As discussed, both the Court of Appeals and this Court agreed the charge was erroneous, and held absence of malice is not an element of ABHAN.

because there was no evidence of provocation, or stated another way there was no evidence of absence of malice. Absence of malice is not an element of ABHAN." *Id.* at 27, 482 S.E.2d at 563.

There is no question that an ABHAN charge, like the one given in this case, including absence of malice or legal provocation as an element would be erroneous if given after this Court's decision in *Pilgrim II*. The State argues, however, that the Court of Appeals' *Pilgrim I* decision was not final because it was still subject to further appeal to this Court at the time of Hill's trial. The State claims Hill's trial counsel would not have been on notice that the charge given was erroneous until this Court published its *Pilgrim II* decision, almost a year after Hill's conviction. For support, the State cites the proposition that no attorney is required to anticipate or discover changes in the law or facts which did not exist at the time of trial. *See Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding counsel not ineffective for encouraging defendant to plead guilty although counsel never interviewed the victim (because he had her written statement against defendant), even though victim changed her mind by the time of the PCR hearing and testified for defendant); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992) (finding counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial).

In our opinion, the cases cited by the State are inapplicable in this situation. Hill was not required to *anticipate* any change in the law in order to object to the ABHAN charge given at trial; the Court of Appeals' *Pilgrim I* decision was published and readily available to trial counsel before Hill's trial began. Rule 226(c), SCACR, states that a Court of Appeals' decision is not final until the petition for rehearing has been acted upon by the Court of Appeals. The Court of Appeals denied the petition for rehearing of *Pilgrim I* on December 21, 1995, and Hill's trial did not begin until March 19, 1996. The *Pilgrim I* decision was final almost three months before Hill's trial and was binding on the trial court at the time of Hill's trial. Accordingly, the failure of Hill's counsel to object to the erroneous ABHAN jury instruction constituted representation below an objective standard of reasonableness.

B. Prejudice

To warrant reversal and granting of a new trial under *Strickland v. Washington*, however, Hill must also show he was prejudiced by counsel's faulty representation. Hill argues that he was prejudiced by the erroneous charge because the definition of ABHAN was central to the jury's verdict, as Hill's trial strategy was based on the hope that the jury would find him guilty of ABHAN instead of the greater offense, ABIK. We disagree.

In our opinion, Hill was not prejudiced by the erroneous ABHAN charge. In light of the overwhelming evidence presented, including (1) the eyewitness accounts naming Hill as the sole aggressor, (2) the victim's testimony, (3) the number and severity of the victim's injuries, and (4) the victim's physical state (she was seven months pregnant), we find the erroneous ABHAN charge constituted harmless error. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

ABHAN is an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation. *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000). ABIK is an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied.[3] *Id.* Although the absence of malice is not an element of ABHAN, the presence of malice is a required element of ABIK. Malice is defined as a "formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." *Fennell*, 340 S.C. at 278, 531 S.E2d at 518.

In this case, the victim testified that Hill told her he was going to kill her. All eyewitnesses testified that Hill pinned the victim on the ground and

[3]As noted in *Pilgrim II*, specific intent to kill is not an element of ABIK.

repeatedly stabbed her despite her profuse bleeding, her cries for help, her attempts to get away from him, and the presence of numerous witnesses. Hill ceased attacking her only when he was knocked unconscious by an eyewitness. There is no evidence to indicate Hill intended anything but to kill the victim, or that he had any legal excuse to do so. In light of the evidence presented, there is no reasonable probability that the jury would have convicted Hill of ABHAN, a lesser included offense of ABIK (for which Hill was indicted), even if the judge had given the correct ABHAN charge. Hill's guilt of ABIK was so conclusively proven at trial that there is no reasonable probability that the trial judge's faulty ABHAN instruction would have affected the result. As such, counsel's failure to object to the erroneous instruction does not warrant a new trial. *See State v. Bailey*.

Under these circumstances, Hill has not met his burden of proving prejudice, as required by *Strickland v. Washington*. Accordingly, the PCR court erred by granting Hill's application for PCR.

CONCLUSION

For the foregoing reasons, we **REVERSE** the PCR court's order granting Hill a new trial.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lt. J. A. Fleming, Jr. Respondent,

v.

Boykin Rose and James Caulder,

Defendants,

of whom Boykin Rose is,

Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25500
Heard April 3, 2002 - Filed July 22, 2002

REVERSED

James A. Stuckey and Alexia Pittas-Giroux, both of Stuckey Law Offices, of Charleston, for petitioner.

John A. O'Leary, of O'Leary Associates, of Columbia, and John S. Nichols, of Bluestein & Nichols, of Columbia, for respondent.

Jay Bender, of Baker, Ravenel & Bender, of Columbia, for amici curiae South Carolina Broadcasters Association and South Carolina Press Association.

CHIEF JUSTICE TOAL: This Court granted Boykin Rose's ("Rose") petition for certiorari to review the Court of Appeals' opinion in *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000). Rose argues the Court of Appeals erred in reversing the trial court's grant of summary judgment on the cause of action for libel.

FACTUAL/ PROCEDURAL BACKGROUND

This case arose from the investigation of a December 19, 1991, traffic accident. In the early morning hours of December 19, a car struck a van carrying four troopers and their wives home from a holiday party. Several of the troopers and their wives were injured. An investigation was ordered. However, the investigation was handled very poorly, a possible cover-up ensued, and the incident resulted in a public relations debacle for the South Carolina Department of Public Safety ("SCDPS").[1] A second investigation was conducted by Internal

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[1]From the record, it appears the main problem with the investigation involved the speed of the troopers' vehicle. Immediately after the accident, the driver of the van stated that although he was traveling at 70 miles per hour prior to the accident, at the time of the accident, he was driving 45 mph (the speed limit at the scene was 45). Apparently, the other troopers in the van confirmed

Affairs, SLED, solicitor Ralph Wilson, and special prosecutors Donnie Myers and Dick Harpootlian. The troopers in the van and some others involved in the cover-up were indicted,[2] and SCDPS was sued by the other driver involved in the accident. The other driver, who was a civilian, was charged with felony DUI, but the charges were later dropped.

In July 1993, Rose became director of SCDPS. Rose ordered a third investigation of the alleged cover-up and appointed Robert Ivey ("Ivey") and John Murphy ("Murphy') to head the inquiry. Ivey and Murphy interviewed 100-125 people over the approximate five month investigation. During the investigation, the investigators determined that Respondent, Lt. James Fleming ("Fleming") had been contacted by one of the troopers involved in the accident, Jerry Cobb ("Cobb"). Cobb radioed Fleming, who was his supervisor, and asked him to meet him in Georgetown. According to Fleming, the meeting began with a discussion of golf and social matters. In addition, Cobb expressed his anger that Trooper Cottingham, who was also involved in the accident, was going to receive most of the insurance money and that the people in Georgetown had collected money for the Cottinghams but not for Cobb and his wife. Cobb indicated he and his attorney were going to get his original statement concerning the accident back from SLED because it was false. Furthermore, Fleming testified Cobb complained that "all his supervisors in every place he had been were always bringing him to Florence over things he had done wrong and he was tired of it" and "the s--- was about to hit the fan." According to Fleming's testimony, his conversation with Cobb took place on a Saturday, and on Monday, Fleming relayed the conversation to his supervisor, James Caulder ("Caulder").

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the story at first. The initial accident report indicates the troopers' van was traveling 45 mph. However, the skid marks left at the scene, which were not examined until much later, indicated the van was traveling about 67 mph. Furthermore, at least one occupant of the van later changed his story to indicate the van was traveling around 70 mph. There was also some question as to whether the troopers had open containers of alcohol in the van.

[2]These indictments were later dismissed.

The main debate concerns whether Cobb told Fleming: (1) that the van was speeding at the time of the accident; and (2) that he had lied about the speed to the initial investigating officers. This was considered vital because if Fleming had passed this information on to Caulder, the investigation could have been concluded more quickly. Ivey testified that in his interview, Fleming indicated Cobb had told him the van was speeding at the time of the accident. The interview report form indicates Fleming recalled Cobb talking about the speed of the van. Fleming testified he could not recall Cobb mentioning a specific speed, but that he could have mentioned the van was speeding. However, Fleming stated he absolutely relayed the entire conversation to his supervisor Caulder the next work day. [3]

At the close of the investigation, Ivey and Murphy issued a report to Rose. They recommended Fleming receive a five-day suspension for failing to carry out his duties as a lieutenant by not reporting the entire contents of his conversation with Cobb to his supervisor. However, this discipline was reduced to a written reprimand.[4]

After the investigation was concluded, Rose and the SCDPS issued a press release. Many articles were published by various newspapers around the state based on this release. It is this release Fleming alleges is defamatory. The release provides, in relevant part: "Lt. James Fleming learned key details about the accident from . . . Jerry Cobb within a few months of the accident, including the approximate speed of the van. Fleming did not report this information to his superiors."

On January 22, 1996, Fleming filed a cause of action against Rose and Caulder for libel, intentional infliction of emotional distress, and due process

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[3]Fleming has been adamant throughout that he never lied or misled Caulder or anyone else. He offered to take a lie detector test or truth serum, neither of which were ever administered.

[4]Fleming repeatedly tried to contest the reprimand, but under SCDPS' policies, a written reprimand is not grievable.

violations. Rose and Caulder moved for summary judgment. On September 11, 1998, the circuit judge granted summary judgment and dismissed the action, ruling that Fleming was a public official and the publication had been limited to fair comment without actual malice. Fleming and Caulder appealed. The Court of Appeals affirmed the grant of summary judgment to Caulder but reversed the grant to Rose, holding there was evidence in the record from which the jury could infer Rose acted with actual malice. *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732 (2000). Rose petitioned this Court for certiorari. The sole issue now before this Court is:

> Did the Court of Appeals err in reversing the trial court's grant of summary judgment to Rose, and holding the record contained sufficient evidence to send the question of whether Rose acted with actual malice to the jury?

LAW/ ANALYSIS

Rose argues the Court of Appeals erred in reversing the trial court's grant of summary judgment as to the cause of action for libel. We agree.

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997).

In order to prove defamation, the complaining party must show: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement

caused special harm.[5] *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 506 S.E.2d 497 (1998) (Toal, J. concurring in result in a separate opinion) (*Holtzscheiter II*). The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Id.*

A. Fault of the Publisher

Fleming, at all times at issue in this case, was a lieutenant serving as a highway patrol officer in the SCDPS. Therefore, he is a "public figure" for the purposes of defamation law. *State v. Bridgers*, 329 S.C. 11, 16, 495 S.E.2d 196, 198 (1997) ("Highway Patrol officers are 'public officials.' "). When a public figure seeks to recover damages for a defamatory falsehood relating to his official conduct, the "fault" he must prove is that the statement was made with "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964); *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000). Actual malice means the publisher of the statement had knowledge the statement was false or acted with reckless disregard as to whether or not it was false. *Id.* In addition, the public figure must demonstrate actual malice by "clear and convincing proof." *Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1506 (D.S.C. 1989) (citing *New York Times v. Sulllivan*); *Miller v. City of W. Columbia*, 322 S.C. 224, 228, 471 S.E.2d 683, 685 (1996) ("To recover on a claim for defamation, the constitutional actual malice standard requires a public figure to prove by clear and convincing evidence that the defamatory falsehood was made with [actual malice]"); *Botchie v. O'Dowd*, 315 S.C. 126, 432 S.E.2d 458 (1993). [6]

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[5]As discussed below, Fleming was a public figure. Since the statement was a written defamation (libel) and concerned a public figure, Fleming is not required to show special harm or damages. *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 506 S.E.2d 497 (1998).

[6]Fleming, in his brief to this Court, argues that at the summary judgment stage of the proceedings, it is only necessary for the non-moving party to submit

Recently, in *Elder v. Gaffney Ledger*, this Court discussed the constitutional actual malice standard.[7]

> The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard for the truth, however, requires more than a departure from reasonable prudent conduct." There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication. There must be evidence the defendant had a "high degree of awareness of . . . probable falsity."

Elder, 341 S.C. at 114, 533 S.E.2d at 902 (emphasis added by the Court) (citations omitted). Fleming has not provided clear and convincing proof that Rose "in fact entertained serious doubt as to the truth of the publication" or that Rose had a "high degree of awareness" that the press release was false.

The Court of Appeals found there was evidence in the record to indicate Rose acted with reckless disregard of the falsity of the press release. The opinion focused on two factors or "groups" of evidence to support their conclusion: (1) the testimony of Louis Fontana and Alton Morris who stated the

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a "scintilla of evidence warranting a determination by a jury." (citing *Hill v. York County Sheriff's Dep't*, 313 S.C. 303, 437 S.E.2d 179 (Ct. App. 1993) for support). In light of the federal and state cases on causes of action for libel brought by a public figure requiring "clear and convincing proof," we disagree with Fleming's characterization that he needs only to produce a scintilla of evidence that Rose acted with actual malice in order to defeat Rose's motion for summary judgment.

[7]This case was decided after the Court of Appeals issued its opinion in the instant case. However, it did not announce a new standard of proof. See *Miller v. City of West Columbia, supra.*

normal policy was not to release the names of police officers involved in disciplinary proceedings; and (2) the fact that the investigation did not involve Fleming's direct supervisor, Caulder, and Caulder was not asked about whether Fleming passed on the information he received during his conversation with Cobb. *Fleming*, *supra*.

In regard to the first factor, the Court of Appeals should not have given such great weight to the fact that the names were not normally released. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989), the United States Supreme Court held that a court could consider evidence that a newspaper departed from professional standards when deciding if the newspaper acted with actual malice. However, the Court clarified the statement by saying, ". . . courts must be careful not to place too much reliance on such factors. . . ." *Id.* at 668, 109 S. Ct. at 2686. Furthermore, *Harte-Hanks* involved the media publishers' investigation and their failure to follow accepted media industry standards for investigating information provided by informants. The instant case involves a police investigation, and there is no evidence that the investigation conducted by Murphy and Ivey did not conform with police investigatory standards. Finally, although the names of officers involved in disciplinary action were normally not released, we cannot hold this constituted a violation of a "professional standard."

In regard to the second factor relied on by the Court of Appeals, we find the conclusion is not supported by the record. Caulder stated in his deposition that he was interviewed by Ivey. He stated that although he could not recall Ivey questioning him about the information Fleming conveyed to him about his conversation with Cobb, he could not say for certain Ivey had not asked him about the meeting. Ivey testified he interviewed Caulder, and Ivey's report to Rose contained a portion of the interview. Ivey stated Caulder told him Fleming reported Cobb was angry about the insurance money distributed after the accident and upset about the amount of community support another couple injured in the accident had received. Ivey also testified Caulder told him Fleming had not reported that Cobb had lied about the speed of the van.

We find the facts relied on by the Court of Appeals' do not amount to "clear and convincing" proof that Rose acted with actual malice. The evidence shows Rose relied on the results and conclusions of an investigation conducted by two highly respected investigators. Rose testified he had no reason to doubt the investigation was not thorough, solid, correct, and truthful. Others involved in the press release testified "there was obviously a strong feeling that the information was correct." The evidence shows Rose relied completely on the investigation by Ivey and Murphy and had full faith in the veracity of their report. There is no evidence, much less clear and convincing evidence, that Rose had knowledge that the statement setting forth the findings of the investigation with regard to Fleming was false, if it was indeed false, or that he had serious doubts as to the truth of the report. Moreover, actual malice cannot be shown from Rose's failure to perform his own investigation because there were no obvious reasons to doubt the veracity of Ivey's report and no evidence that Rose was purposefully avoiding the truth.

B. Falsity and Publication

Because Fleming cannot show by clear and convincing proof that Rose acted with actual malice, there is no need for this Court to address the other elements of defamation.

CONCLUSION

Based on the above evidence, we hold the Court of Appeals erred in finding there was "clear and convincing" evidence in the record to support Fleming's claim that Rose acted with actual malice. Therefore, we **REVERSE** the decision of the Court of Appeals with respect to Rose, and reinstate the trial court's grant of summary judgment.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lester W. Norton, Respondent,

v.

Norfolk Southern Railway Company, Petitioner

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25501
Heard April 16, 2002 - Filed July 22, 2002

REVERSED

Keith D. Munson, of Womble, Carlyle, Sandridge & Rice, PLLC, of Greenville, for petitioner.

David S. Schnitzer, of Bondurant & Appleton, P.C., of Portsmouth, Virginia, and John David

Whisenhunt, Jr., of Florence, for respondent.

CHIEF JUSTICE TOAL: Norfolk Southern Railway Company ("Norfolk") appeals the trial court's order granting Lester W. Norton ("Mr. Norton") a new trial after the jury returned a verdict for Norfolk.

FACTUAL/PROCEDURAL BACKGROUND

Mr. Norton brought this action pursuant to the Federal Employers' Liability Act[1] ("FELA") seeking to recover damages for alleged injury to his knee caused by Norfolk's negligence. The jury returned a verdict for Norfolk, finding no negligence on the part of Norfolk. After the verdict, Mr. Norton moved for a new trial based on South Carolina's thirteenth juror doctrine.[2] The trial court granted Mr. Norton's Motion for New Trial.

FELA is a federal statute which provides the framework for handling the injury claims of federal railroad workers. State courts have concurrent jurisdiction to hear FELA claims. 45 U.S.C. § 56. A FELA action brought in state court is controlled by federal substantive law and state procedural law. However, a form of practice may not defeat a federal right. *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949). It is firmly established that questions of sufficiency of evidence for the jury in cases arising under FELA in state courts are to be determined by federal rules. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239 (1943).

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[1] 45 U.S.C. § 51 et seq.

[2] Mr. Norton's Motion for New Trial and Memorandum in Support are part of the record, and contain his argument for application of the thirteenth juror standard. Norfolk's Motion in Opposition to the Motion for New Trial is not in the record on appeal, but is referred to in the Court of Appeals' decision. *Norton v. Norfolk Southern Railway Company*, 341 S.C. 165, 533 S.E.2d 608 (Ct. App. 2000).

A motion for a new trial involves analysis of the sufficiency of evidence, to be determined by federal, not state, rules in FELA actions. In his motion for a new trial, Mr. Norton urged the trial judge to apply the state-law standard for granting a new trial, the thirteenth juror doctrine. The parties now recognize the Motion for New Trial was governed by federal law, and that the trial judge was obligated to apply the federal standard in considering the new trial motion.[3] The Court of Appeals affirmed the grant of a new trial on grounds that the state and federal new trial standards are not distinguishable, and that the new trial motion was properly granted under both the state-law thirteenth juror doctrine and the federal standard.

Norfolk raises the following issues on appeal:

I. Did the Court of Appeals err in holding that there is "no significant difference" between the state-law thirteenth juror doctrine and the federal standard for a new trial, thereby implying that the state and federal standards for a new trial are interchangeable?

II. Did the trial court apply the state-law thirteenth juror doctrine or the appropriate federal standard in granting Mr. Norton's Motion for New Trial?

LAW/ANALYSIS

I. State and Federal Standards

Norton argues that the Court of Appeals correctly held that the state-law thirteenth juror doctrine and the federal standard governing the grant of a new trial are substantially similar. We disagree.

[3] In its opinion, the Court of Appeals noted that the parties stipulated at oral argument that federal law governed the issues presented. *Norton.*

South Carolina's thirteenth juror doctrine is well established as the standard for granting a new trial in state law actions. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996). Similarly, the federal standard for granting a new trial has been set forth clearly by the Fourth Circuit. *Connor v. Schraeder-Bridgeport Int'l, Inc.*, 227 F.3d 179 (4th Cir. 2000); *Atlas Food Systems and Services, Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587 (4th Cir. 1996). Although the state and federal standards use some similar language, we do not believe the standards, compared on the whole, are "substantially similar," or similar enough to be used interchangeably.[4]

This Court has reviewed the thirteenth juror doctrine on several occasions and has refused to abolish it or to require trial judges to provide reasons for their decisions. *Folkens*, 300 S.C. 251, 387 S.E.2d 265. South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds "the evidence does not justify the verdict," and then to grant a new trial based solely "upon the facts." *Id.* at 254, 387 S.E.2d at 267 (citing *South Carolina State Highway Dep't v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975)). As the "thirteenth juror," the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Id.* As this Court explained in *Folkens*,

> The effect is the same as if the jury failed to reach a verdict . . . . When a jury fails to reach a verdict, a new

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[4] Rule 59 of the South Carolina Rules of Civil Procedure ("SCRCP") and Rule 59 of the Federal Rules of Civil Procedure ("FRCP") set the general standard for new trials. Both the SCRCP and the FRCP rely on prior precedent for granting new trials from the state and federal jurisdictions respectively. Under the SCRCP, a "new trial may be granted . . . (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted, in the courts of the State." The FRCP contains identical language except it relies on the precedent set "in the courts of the United States" rather than the courts of "the State."

> trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Id.

Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is "wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." *Folkens*, 300 S.C. at 254-55, 387 S.E.2d at 267 (citing *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976)). This Court's "review is limited to consideration of whether evidence exists to support the trial court's order." *Id.* at 255, 387 S.E.2d at 267. As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed. *Id.*

The federal standard, on the other hand, is more narrowly tailored. Upon a Rule 59, FRCP, motion,

> a new trial is warranted when (1) the verdict is ***against the clear weight of the evidence***; (2) the verdict is based upon evidence which is false; or (3) the verdict will result in a miscarriage of justice. In considering a new trial motion, the district court may weigh the evidence and consider the credibility of the witnesses.

Connor, 227 F.3d at 200 (emphasis added) (citing *Atlas*, 99 F.3d 587, 594 (4th Cir. 1996); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980)). The Fourth Circuit permits the trial judge to grant a new trial in these three situations "even though there may be substantial evidence which would prevent direction of a verdict." *Atlas*, 99 F.3d at 594.

Under the federal standard, appellate courts review a district court's grant

or denial of a new trial for abuse of discretion only. *Connor; Atlas.* Absent a clear abuse of discretion, the trial judge's decision will not be disturbed, as the trial court is in a position to view the evidence "from a perspective that an appellate court can never match." *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 186 (4th Cir. 1994) (citations omitted). Despite this broad deference, the Fourth Circuit has held that a material legal error, by definition, constitutes an abuse of discretion. *Connor.*

Although the thirteenth juror standard and the federal new trial standard could be applied in some cases to the same result, we believe the thirteenth juror standard empowers a South Carolina trial judge to grant a new trial on a lesser showing than the federal standard. The Fourth Circuit consistently requires the verdict to be against the "clear weight of the evidence." *Connor; Atlas.* In contrast, the thirteenth juror doctrine has been interpreted consistently by this Court, albeit in varying language, as requiring something less.

For instance, this Court has held, "there can be no doubt that a trial judge has the discretionary power to grant a new trial absolute or Nisi in a law case *upon his disapproval of the verdict on factual grounds*, and in this role he has been recognized and designated as the thirteenth juror." *South Carolina State Highway Dep't v. Townsend*, 265 S.C. 253, 258, 217 S.E.2d 778, 781 (1975) (emphasis added) (citing *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 195 S.E.2d 638 (1938)). In *Worrell*, this Court went so far as to describe the trial judge, when acting as thirteenth juror, as "possessing the veto power to the Nth degree," and held "it must be *presumed* . . . [that the trial judge] recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality." *Worrell*, 186 S.C. at 313-14, 195 S.E.2d at 641 (emphasis added).

Although application of the two standards could conceivably lead to the same result, we find that the thirteenth juror standard is broader and would permit granting of new trials where the federal standard would not. Accordingly, we reverse the Court of Appeals to the extent that it held the two

standards to be substantially similar.[5]

II. Standard Applied in this Case

In this case, the parties now recognize that the federal standard for granting a new trial should apply because the action was brought under the federal FELA statute. *See Brady v. Southern Ry. Co.* At trial, however, Mr. Norton based his motion for a new trial on the state-law thirteenth juror doctrine and urged the trial judge to apply that standard in granting a new trial. According to the Court of Appeals' decision, Norfolk argued that the federal standard should apply and the trial judge should deny the Motion for New Trial under that standard. Unfortunately, however, neither Norfolk's Motion in Opposition nor the transcript of the argument of the Motion for New Trial were made part of the record on appeal. The trial court granted the Motion for New Trial, but did not indicate explicitly which standard he was applying in granting the motion. The trial court ruled as follows:

> The Court finds as a matter of fact that the verdict returned herein is contrary to the fair preponderance of

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[5] In support of its decision that the federal and state standards for new trials are similar, the Court of Appeals found that a relaxed standard of negligence applies in FELA actions. *Norton.* The Court of Appeals cited an opinion from the Second Circuit in support of this proposition. *Ulfik v. Metro-North Commuter R. R.,* 77 F.3d 54 (2d Cir. 1996). Norfolk points out, however, that the Fourth Circuit has not adopted this proposition and, to the contrary, has held "the Supreme Court has cautioned that the FELA . . . is not to be interpreted as a workers' compensation statute and that the *unmodified* negligence principles are to be applied as informed by common law." *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436-37 (4th Cir. 1999) (emphasis added) (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 396, 129 L. Ed 2d. 427 (1994). Considering this precedent, the Court of Appeals created a relaxed standard of negligence in federal law where there is not one, at least not in the Fourth Circuit.

> the evidence presented at trial. The verdict indicates the jury failed to properly consider and follow the instructions of the court in its deliberations. Accordingly, the Court concludes that the exercise of judicial discretion and the awarding of a new trial for the plaintiff is appropriate and should be granted.

In Mr. Norton's Memorandum in Support of the Motion for New Trial, he argued,

> [t]he verdict returned herein is contrary to the preponderance of the evidence and is not supported by the factual testimony of the parties at trial. The verdict indicates the jury failed to properly consider and follow the instructions of the court in its deliberations. Accordingly, the exercise of judicial discretion and the awarding of a new trial to the plaintiff is appropriate.

The words used in trial judge's order granting the Motion and in Mr. Norton's Memorandum are nearly identical. Both state that the verdict is contradictory to the "preponderance of the evidence" (not that the verdict is against the *clear weight* of the evidence). Further, in support of his argument, Mr. Norton cited *Folkens* and other South Carolina cases enunciating the thirteenth juror doctrine. Mr. Norton did discuss the applicability of federal law to substantive matters, such as negligence, in this case, but appears to have considered the granting of a new trial a purely procedural matter, governed by state law, as he did not cite to any cases illustrating the federal standard for a new trial. Mr. Norton's Motion for New Trial specifically requests a new trial "according to the doctrine of the thirteenth juror," and he never used the "against the clear weight of the evidence" language employed by the federal courts.

Considering the record before the Court, we believe the trial judge applied the state-law thirteenth juror doctrine, not the federal standard. All parties now agree the appropriate standard for a new trial in this FELA action is the federal standard, but Mr. Norton argues the grant of a new trial should be

upheld because the standards are substantially similar. As we concluded that the state and federal standards are not substantially similar, the grant of a new trial cannot be upheld on that ground.

The trial judge should have applied the federal "against the clear weight of the evidence" standard. Instead, he granted Mr. Norton a new trial based on the state-law thirteenth juror doctrine. By doing so, he committed an error of law, which, by definition, constitutes an abuse of discretion under the federal standard. *See Connor*. We reverse the Court of Appeals on the ground that the trial judge abused his discretion under the applicable federal standard.

Furthermore, if we analyze the Motion for New Trial on the merits under the federal standard (as the trial judge should have done), we reach the same result. Although *some* conflicting evidence was presented in this case, it is more than evident that the jury's verdict was not "against the clear weight of the evidence."[6] Admittedly, there may have been sufficient evidence of negligence to uphold the grant of a new trial under the thirteenth juror "preponderance" standard,[7] but, the federal *against clear weight* standard requires something more than a preponderance to grant a new trial. The record here simply does not

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[6] Mr. Norton alleges he twisted his knee on the job by stepping into an empty cardboard box on the floor that was partially hidden from view by the bottom shelf of a bookcase. He did not report any injury until he twisted his knee again two weeks later. Mr. Norton had surgery to correct a torn miniscus and can no longer perform his job at Norfolk. At trial, the only evidence of Norfolk's negligence presented was the existence of an informal practice by the employees of keeping empty boxes around the workplace to be used to carry various things (nuts and bolts, etc.) from the shop out to the tracks to perform repairs. To the contrary, other evidence established that Norfolk's formal policy required the employees to keep the workspace clean. There was a very visible sign in the shop where Mr. Norton was injured stating it was the responsibility of the employees to keep the workplace clean and tidy.

[7] *See Folkens* (upholding a trial judge's grant of a new trial when there is conflicting evidence unless there is an error of law).

reveal anything more than a very small amount of evidence that Norfolk was negligent.

In our opinion, this case illustrates the difference between the state and federal new trial standards, as it is one of the cases where a new trial could be granted under the state-law thirteenth juror doctrine, but not under the federal standard. Mr. Norton is not entitled to a new trial under the applicable federal standard, and the circuit court's grant of a new trial is reversed.

CONCLUSION

For the foregoing reasons, we **REVERSE** the Court of Appeals and reinstate the jury's verdict.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

R&G Construction, Inc., Respondent,

v.

Lowcountry Regional Transportation Authority, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25502
Heard June 26, 2002 - Filed July 22, 2002

DISMISSED

H. Fred Kuhn, Jr., of Moss & Kuhn, of Beaufort, for petitioner.

William B. Harvey, III, of Harvey & Battey, of Beaufort, for respondent.

PER CURIAM: We granted a writ of certiorari to review the decision of the Court of Appeals in R&G Constr., Inc., v. Lowcountry Regional Transp. Authority, 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000). We dismiss certiorari as improvidently granted.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the
Treatment and Care of
Clair Luckabaugh, Respondent.

Appeal From Charleston County
Daniel E. Martin, Sr., Circuit Court Judge

Opinion No. 25503
Heard January 8, 2002 - Filed July 22, 2002

VACATED, REVERSED, AND REMANDED

Attorney General Charles M. Condon, Deputy Attorney General Treva Ashworth, Senior Assistant Attorney General Kenneth P. Woodington and Assistant Attorney General Steven G. Heckler, all of Columbia, for appellant.

Andrew J. Savage, III, of Savage & Savage, of Charleston; and Cain Denny, of Charleston, for respondent.

JUSTICE BURNETT: The State appeals a lower court's order releasing Clair Luckabaugh ("Luckabaugh") from custody and finding the

Sexually Violent Predator Act (the "Act") unconstitutional.[1] For reasons set forth below we vacate, reverse and remand the case for further proceedings consistent with this opinion.

FACTUAL/PROCEDURAL HISTORY

Luckabaugh was sentenced to prison in 1996 for Assault with Intent to Commit Criminal Sexual Conduct in the Third Degree of a comatose patient in his care. His conviction was affirmed on appeal. See State v. Luckabaugh, 327 S.C. 495, 489 S.E.2d 657 (Ct. App. 1997). Subsequent to his scheduled release he came under review as a sexually violent predator.

Judge Daniel E. Martin, Sr., convened a commitment hearing after Luckabaugh's scheduled release. Two experts testified for the State: Doctor Brad Clayton ("Dr. Clayton") and Doctor Donna Schwartz-Watts ("Dr. Schwartz-Watts"). Dr. Randolph Waid ("Dr. Waid") testified for Luckabaugh.

Dr. Schwartz-Watts and Dr. Clayton conducted a clinical evaluation of Luckabaugh. Both concluded Luckabaugh suffers from sexual sadism, a major mental abnormality, characterized by "preoccupation with and intrusive problems with thoughts, feelings, fantasies, urges, and behaviors that focus around behavior or thoughts of behavior, about causing harm to others, humiliating, [and] torturing [them]." Sadism is treatable but not curable.

Dr. Schwartz-Watts' report suggests Luckabaugh's disease dates to 1967 when he began struggling with obsessive thoughts of torturing

[1] See generally, S.C. Code Ann. §§ 44-48-10 to 44-48-170 (Supp. 2000) (Sexually Violent Predator Act, hereinafter the "Act").

others.[2] Dr. Schwartz-Watts testified Luckabaugh wrote numerous, graphic stories involving themes of kidnaping, torture and murder.[3] She found the themes consistent with sadism, particularly his obsession with having sex with unconscious individuals. Further, the results of Luckabaugh's penile plethysmography[4] indicated he was aroused by images of coercive sexual acts.

Dr. Schwartz-Watts opined Luckabaugh was a high risk to re-offend and needed extensive inpatient treatment. Additionally, she stated her belief that Luckabaugh was the most dangerous person she had evaluated under the Act.

Dr. Waid, testifying for Luckabaugh, stated his diagnosis was essentially the same as Dr. Schwartz-Watts'. Specifically, Dr. Waid believed Luckabaugh was a sexual sadist, with at least a moderate risk for "re-event," and in need of aggressive therapy. Dr. Waid differed with Dr. Schwartz-Watts' opinion by concluding Luckabaugh could obtain outpatient treatment.

Luckabaugh, testifying at the hearing, refused to accept the

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[2] Luckabaugh was incarcerated at 14 years old for attempting to rape a neighbor at gunpoint. While on furlough from a juvenile facility, Luckabaugh stole female undergarments. Luckabaugh was incarcerated again after stealing female undergarments for a second time. At age 19, Luckabaugh was committed to a state mental hospital for "an impulse to cut someone and torture them."

[3] Dr. Schwartz-Watts noted the writings grew progressively more graphic and detailed including drawings "of a slaughterhouse where each of the various races would be housed...[b]reeding pens, shower areas, target ranges, whorehouse, gas chambers, chopping blocks, racks; and... a detailed kind of sketch of how such a facility or compound would be laid out."

[4] A penile plethysmography tests arousal by measuring blood flow to the penis when the subject is exposed to visual images.

diagnosis of sexual sadism. He admitted attempting to publish his writings but stated he did not because: "at some point they got too violent and gross, even for me." However, he felt he would not re-offend after growing spiritually in prison and building a mentor relationship with church members.

ISSUES

I. Did the lower court err in concluding the State failed to meet its burden proving Luckabaugh was a sexually violent predator?

II. Did the lower court err in concluding the Sexually Violent Predator Act violated the *ex post facto* provision of the South Carolina Constitution?

III. Is the Sexually Violent Predator Act unconstitutional on other grounds raised by Luckabaugh?

A. Does the Sexually Violent Predator Act violate the substantive due process clause of the United States and South Carolina Constitutions?

B. Does the Sexually Violent Predator Act violate the procedural due process clause of the United States and South Carolina Constitutions?

C. Does the Sexually Violent Predator Act violate the equal protection clause of the United States and South Carolina Constitutions?

DISCUSSION

I

Burden of Proof

Initially, the State argues the effect of the order below is to grant a directed verdict. We disagree. The record establishes the court below issued its order as a hearing court conducting an action at law, sitting without a jury pursuant to South Carolina Code Ann. § 44-48-100 (Supp. 2000).

The State next contends the lower court erred because it failed to substantially comply with Rule 52(a), SCRCP. When reviewing an action at law, on appeal of a case tried without a jury, this Court will not disturb the judge's findings of fact "unless found to be without evidence which reasonably supports the judge's findings." Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The South Carolina Rules of Civil Procedure require "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. The rule is directorial in nature so "where a trial court **substantially complies with Rule 52(a) and adequately states the basis for the result it reaches**, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding." Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991)(emphasis added).

The court below, in deciding that Luckabaugh was not a sexually violent predator, wrote:

> Upon hearing the evidence I find that the State failed to prove beyond a reasonable doubt that the Defendant meets the definition of a 'sexually violent predator'...[e]ven if Defendant suffers from the personality disorder known as sexual sadism, the State failed to show this condition makes it likely that the Defendant will engage in future acts of sexual violence if not

> confined in a secure facility for longer term control, care and treatment.

The order did not find any facts to support its legal conclusion that the State failed to carry its burden of proof.

This Court has had the opportunity to review the adequacy of similar orders, particularly in family court and administrative law decisions. See, e.g., State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000); Kiawah Property Owners Group v. Public Serv. Com'n of South Carolina, 338 S.C. 92, 525 S.E.2d 863 (1999) (administrative law decision); Holcombe v. Hardee, 304 S.C. 522, 405 S.E.2d 821 (1991) (family court order).

Appellants in State v. 192 Coin-Operated Video Game Machines, supra, argued the magistrate's order and returns were invalid under Rule 52(a), SCRCP. The relevant part of the return stated:

> After carefully reviewing these machines, I find them to be slot machines. These machines register varying amounts of winnings depending upon which combination of various symbols are displayed after a coin is inserted and a button is pushed. They require no skill to play. I have considered the Court's reasoning in State v. Four Video Slot Machines, 317 S.C. 397, 453 S.E.2d 896 (1995) and State v. One Coin-Operated Video Game Machine, 321 S.C. 176, 467 S.E.2d 443 (1996), as well as the 1993 amendments to Title 1-2 of the South Carolina Code concerning video games. I find and conclude that the defendant machines are in violation of [South Carolina law].

Id. at 198, 525 S.E.2d at 884.

We found the magistrate's order "clearly set out what statute was violated and how the machines violated it." Id. Therefore, we found the order substantially complied with Rule 52(a), SCRCP.

Trial courts, sitting without juries in an action at law, write their findings specially and separately:

> to allow a reviewing court to determine from the record whether the judgment--and the legal conclusions which underlie it--represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (N.C. 1980) (internal citations omitted) (applying North Carolina's equivalent of our Rule 52(a), SCRCP); see also United States v. Birnbach, 400 F.2d 378 (8th Cir. 1968). Compliance with the rule also allows the trial judge to satisfy the interest of judicial economy by dealing fully and properly with all issues before the court. See In re Las Colinas, Inc., 426 F.2d 1005 (1st Cir. 1970)(construing Fed. R. Civ. P. Rule 52 on which our rule is based).

We do not require a lower court to set out findings on all the myriad factual questions arising in a particular case. See Golf City, Inc. v. Wilson Sporting Goods, Co., Inc., 555 F.2d 426 (5th Cir. 1977). But the findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below. The absence of factual findings makes our task of reviewing the court order impossible because "the reasons underlying the decision [are] left to speculation." Kiawah Property Owners Group v. Public Serv. Com'n of South Carolina, 338 S.C. at 96, 525 S.E.2d at 866 (quoting Able Communications, Inc. v. S.C. Public Serv. Comm'n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986)). To leave the chore of sorting through the record to review contradictory testimony taxes the judicial system and is unfair to the litigants as well as the lower court to whose factual determinations we give deference. See Welsh Co. of California v. Strolee of California, Inc., 290 F.2d 509 (9th Cir. 1961).

The order now before us fails to substantially comply with Rule

52(a), SCRCP, thus failing to accomplish these purposes. Our review of the record cannot save the order from its deficiencies due to the contradictory testimony presented below. All three medical experts agreed Luckabaugh suffers from sexual sadism, that he is a risk to re-offend, and that he needs aggressive medical treatment. Luckabaugh disagreed with this diagnosis. Dr. Waid, Luckabaugh's medical expert, differed with the State in whether Luckabaugh could successfully complete treatment on an outpatient basis.

The testimony leads us to speculate if the court below reached its conclusion because it believed Luckabaugh's self-diagnosis over the diagnosis of three medical experts. If the State failed to prove a dangerous mental condition, the lower court order would be correct in its ultimate conclusion. See S.C. Code Ann. § 44-48-30(1)(b) (Supp. 2000)(sexual violent predator is someone who, in part, "suffers from a mental abnormality...that makes the person likely to engage in acts of sexual violence...."). Alternatively, the court below may have concluded Dr. Waid's opinion was more credible than Dr. Schwartz-Watts' opinion on whether Luckabaugh needed in-patient treatment. The order's ultimate conclusion would be correct if the State failed to prove Luckabaugh's mental condition required his confinement. See id.

The order below provides no findings of fact to support its ultimate legal conclusion. Without findings of fact, we are forced to wade through the record and speculate how the lower court viewed the ultimate facts when confronted with contradictory evidence.

As such, we vacate the order in this case and remand it to the circuit court for a new hearing.[5] At the conclusion, the judge shall issue an

[5] Generally, we would be inclined to vacate the order and remand it to the presiding judge below to issue an order that complies with Rule 52(a), SCRCP. Cf. 5A J. MOORE AND J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.06[2] (1989) ("Where the trial court fails ... to find on a material issue and an appeal is taken, the appellate court will normally vacate

order that substantially complies with Rule 52(a), SCRCP.

II

Ex Post Facto Violation

The court below, aside from finding the State failed to meet its burden, also found the Act unconstitutional. Specifically, the trial court found the Act violated the *ex post facto* clause of the South Carolina Constitution. S.C. Const. art. I, § 4.

This Court is reluctant to find a statute unconstitutional. Every presumption is made in favor of a statute's constitutionality. Gold v. South Carolina Bd. of Chiropractic Exam'rs, 271 S.C. 74, 245 S.E.2d 117 (1978). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Joytime Distribs. and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Luckabaugh bears the burden of proving the statute unconstitutional. See Home Health Serv., Inc. v. South Carolina Tax Comm'n, 312 S.C. 324, 440 S.E.2d 375 (1994).

For a law to fall within *ex post facto* prohibitions it must first retroactively apply to events occurring before its enactment. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). Second, the law must disadvantage the offender affected by it. See id.; see also Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000)(an *ex post facto* law occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime). A statute must be criminal or penal in purpose or nature to offend the *ex post facto* clause. State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990)(citing Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d

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the judgment and remand the action for appropriate findings to be made."). However, because Judge Martin has retired, we remand the case to the Chief Judge for the Ninth Judicial Circuit to assign a new judge to the case.

1435 (1960)).

The Act meets the first prong by applying retroactively to events occurring before its enactment. In particular, the Act applies to Luckabaugh whose offense triggering the Act was committed prior to its enactment.

Regarding the second prong, this Court recently held the Act is a civil, non-punitive scheme. See In re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001) (Act does not violate Double Jeopardy clause of the Federal or South Carolina constitutions because it does not constitute punishment). As we noted in Matthews, South Carolina's Act is modeled on Kansas' Sexually Violent Predator Act, which the United States Supreme Court determined did not violate the *ex post facto* clause of the United States Constitution. See Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). In a separate case, In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001), we concluded: "a side by side comparison of our SVP Act and the Kansas Act does not reveal any substantial differences." Id. at 91, 551 S.E.2d at 238. Appellant has the burden of overcoming this presumption by "the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the [Legislature's] intention" that the Act is civil. In re Matthews, supra, (citing Seling v. Young, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001)).

Luckabaugh provides three reasons supporting his assertion that the Act is penal in purpose or nature. They are: 1) the nature of the confinement due to the inter-agency agreement between the Department of Mental Health ("DMH") and the South Carolina Department of Corrections ("SCDC"); 2) individuals committed under the act are not entitled to rights of other patients in the care of the DMH; and 3) the Act requires a previous criminal conviction.

A. Inter-agency Agreement

Luckabaugh contends the presence of an inter-agency agreement between the DMH and SCDC for the housing of those committed under the

Act evidences its penal purpose and nature. Luckabaugh differentiates the Act from the Kansas statute by noting individuals committed under the Kansas statute experience the same conditions as many involuntarily committed patients in the state mental hospital. The South Carolina Act allows for an inter-agency agreement between the DMH and SCDC which "authorizes the transfer of control, care and treatment [between the two agencies] without any limitation on time or conditions of confinement, other than precatory segregation."

Luckabaugh believes such treatment evidences the Act's penal purpose or nature. We disagree.

The DMH and SCDC have entered into an inter-agency agreement which provides the Edisto Unit of the Broad River Correctional Institution will be used to house sexually violent predators. Under the agreement, DMH retains all control, care and treatment aspects inside the Edisto Unit, including internal guards, routine maintenance and sanitation. DMH arranges for medical care of committed persons. SCDC provides outside security, meals, laundry services and chaplain services. In sum, while the SCDC provides a secured environment to house the sexually violent predators, the DMH provides the care and treatment.

We addressed this issue in In re Matthews, supra. Matthews argued the Act unconstitutionally subjected him to conditions placed on state prisoners, hindering his receipt of treatment. We rejected his contention, ruling:

> The conditions of confinement are not prescribed by the Act, but result from administrative decisions. Therefore, the conditions of confinement cannot be used to determine legislative intent.... Furthermore, the Act expressly provides, "The involuntary detention or commitment of a person pursuant to this chapter shall conform to constitutional requirements for care and treatment." S.C. Code Ann. § 44-48-170.

Id. at 650-51, 550 S.E.2d at 317.

The United States Supreme Court dealt with a similar argument in Allen v. Illinois, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986). In Allen, individuals committed under an Illinois law for sexually dangerous persons were placed in a psychiatric center housed within a maximum-security prison. The Department of Corrections operated the prison. See id. at 372, 106 S.Ct. at 2993, 92 L.Ed.2d at 306. Additionally, the psychiatric center provided mental health treatment to inmates who were not committed under the sexually dangerous persons law. See id. However, the Supreme Court held the law did not violate the United States Constitution because those facts did "not transform the State's intent to treat into an intent to punish." Id. at 373, 106 S.Ct. at 2994, 92 L.Ed.2d at 307. We agree with the Court's rationale.

Allowing two state entities to make administrative decisions, providing protection to the public at-large from sexually violent predators who remain under the treatment and control of the DMH, is not sufficient evidence to overcome Luckabaugh's heavy burden of proof. Luckabaugh, like Matthews before him, has failed to prove the living conditions provided for by the inter-agency agreement is so punitive in effect as to negate the Legislature's intent to create a civil statute. See In re Matthews, supra, (citing Seling v. Young, supra).

B. Treated Differently Than Other Involuntarily Committed Persons

Luckabaugh contends the Act is punitive because it treats persons involuntarily committed under the Act differently from other involuntarily committed mental patients. We disagree.

The Legislature created a variety of rights for mental patients undergoing treatment in the Department of Mental Health. See S.C. Code Ann. §§ 44-22-10, et seq. (1976). However, the Legislature specifically exempted sexually violent predators from those rights. See S.C. Code Ann. § 44-22-10(11) (Supp. 2001).

This is an issue of first impressions in South Carolina, but not unique in terms of litigation over sexually violent predator acts across the nation. An individual committed under Iowa's sexually violent predator act asserted a similar argument in attacking the constitutionality of the statute on *ex post facto* grounds. See In re the Detention of Garren, 620 N.W.2d 275, 281 (Iowa 2000).

The Iowa Supreme Court held Garren "failed to elucidate any supportive reasoning as to why, if such privileges are not accorded under [Iowa's Sexually Violent Predator Act], this fact indicates the punitive nature of the statute." Id. The court noted: "The Constitution does not require [a state] to write all of its civil commitment rules in a single statute or forbid it to write two separate statutes each covering somewhat different classes of committable individuals." Id. (quoting Hendricks, 521 U.S. at 377, 117 S.Ct. at 2089, 138 L.Ed.2d at 524 (Breyer, J., dissenting)).

A statute creating two types of civil commitment is not *per se* punitive in violation of the *ex post facto* clause. Luckabaugh fails to provide any evidence that the creation of two types of civil commitment is so punitive in effect as to negate the Legislature's intent to create a civil statute. See In re Matthews, supra, (citing Seling v. Young, supra).

C. Previous Conviction Requirement

Luckabaugh's third attempt at presenting evidence of the Act's penal nature is its requirement of a "criminal conviction" which differentiates the Act from the Hendricks Act. We disagree.

We addressed the prior conviction requirement in In the Care and Treatment of Matthews, supra. In our treatment of the issue we noted the use of the word "conviction" was misleading. To the extent our Act differs from the Hendricks statute it is "a distinction without a difference" since the use of the word "conviction" included "persons charged but found incompetent to stand trial, those found not guilty by reason of insanity, and those found

guilty but mentally ill." Id. at 649-50, 550 S.E.2d at 316; see S.C. Code Ann. §§ 44-48-30(6)(c)-(e) (Supp. 2000).

Our conclusion is bolstered by the United States Supreme Court decision in Hendricks which noted the act "permits involuntary confinement based upon a determination that the person **currently** both suffers from a 'mental abnormality' . . . and is likely to pose a future danger to the public . . . [t]o the extent that past behavior is taken into account, it is used . . . solely for evidentiary purposes." Hendricks, 521 U.S. at 370-71, 117 S.Ct. At 2086, 138 L.Ed.2 at 520-21 (emphasis in original). The conviction requirement is used only for evidentiary purposes to show the existence of a past mental abnormality and dangerousness that is likely to recur if left untreated.

Luckabaugh fails to show the prior conviction requirement violates the *ex post facto* prohibition where it serves as evidence of past dangerous conduct or the presence of a mental abnormality. Accordingly, Luckabaugh's argument is without merit.

III

Additional Grounds

Luckabaugh raises additional constitutional grounds to support the judgment below. He raised each argument below and both parties have fully briefed each issue. In light of the time concerns involved and the consequences of a commitment hearing under the Act, we address each issue in the interest of judicial economy.

A. Substantive Due Process

Luckabaugh claims the Act unconstitutionally violates his substantive due process rights under the United States and South Carolina

Constitutions.[6] "The substantive due process guarantee ensures that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary or overly vague." 19 S.C. Juris. *Constitutional Law* § 71 (1993). The guarantee allows a court to examine the constitutionality of the underlying statute as opposed to merely the process by which it is applied to each individual. See id. The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts "regardless of the fairness of the procedures used to implement them." Zinerman v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100, 113 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, 668 (1986)).

When an act is challenged under the due process clause, this "Court only requires the act to be reasonably designed to accomplish its purposes, unless some fundamental right or suspect class is implicated." State v. Hornsby, 326 S.C. 121, 125-26, 484 S.E.2d 869, 872 (1997). Legislation restricting or impairing a fundamental right "is subject to 'strict scrutiny' in determining its constitutionality." Hamilton v. Board of Trustees, 282 S.C. 519, 523, 319 S.E.2d 717, 720 (Ct. App. 1984). Legislation that does not infringe on fundamental rights is subject only to a rational basis test. 19 S.C. Juris. *Constitutional Law* § 74 (1993). Under either type of analysis, the one who attacks the law bears the burden of showing it is unconstitutional. See State v. Hornsby, supra.

Luckabaugh urges us to apply the strict scrutiny test in our analysis. In deciding which test to utilize it is necessary that we first ask whether the Act impairs a fundamental right.

Luckabaugh asserts the Act impairs his fundamental right to liberty, free from bodily restraint by the government. A person's interest in

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[6] The due process clause provides no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV; S.C. Const. art. I, § 3.

freedom from bodily restraint is "at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437, 448 (1992).

Because the statute impacts a fundamental right, we apply strict scrutiny analysis.[7] To survive strict scrutiny the Act must meet a compelling state interest and be narrowly tailored to effectuate that interest. See Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Luckabaugh concedes the Act serves a compelling state interest. The only question is whether the Legislature has narrowly tailored the Act to serve that interest while not unduly burdening Luckabaugh's rights.

Courts recognize that liberty interest from bodily restraint is not absolute. See Hendricks, 521 U.S. at 356, 117 S.Ct. at 2079, 138 L.Ed.2d at 512; see also Garren, 620 N.W.2d at 284-85 (discussing constitutionality of Iowa sexually violent predator law on substantive due process grounds). The United States Supreme Court has recognized:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

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[7] We are mindful when reviewing a challenge to a state statute under the South Carolina Constitution we apply the rational basis test. See R.L. Jordan Company, Inc. v. Boardman Petroleum, Inc., 338 S.C. 475, 527 S.E.2d 763 (2000). However, we do not separately address the constitutionality of the Act under that standard because we find it is constitutional under the more stringent strict scrutiny analysis required by the United States Constitution.

Jacobson v. Massachusetts, 197 U.S. 11, 26, 25 S.Ct. 358, 361, 49 L.Ed. 643, 649-50 (1905).

The balance between liberty and security is particularly difficult when detaining a subclass of individuals who are likely to cause future harm to the public. While sexually violent predator laws are relatively new,[8] their purpose is similar to other involuntary commitment statutes which the United States Supreme Court has consistently upheld as long as they are applied to individuals with mental health problems making them unable to control behavior which poses a danger to public safety. See Foucha, supra; Addington v. Texas, 441 U.S. 418, 426-27, 99 S.Ct. 1804, 1809-10, 60 L.Ed.2d 323, 331 (1979). Therefore, it cannot be said "the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." Hendricks, 521 U.S. at 357, 117 S.Ct. at 2080, 138 L.Ed.2d at 512.

The Act is narrowly tailored to serve a compelling state interest if aimed at involuntarily committing individuals for mental health care after a finding of dangerousness coupled with "some additional factor, such as a 'mental illness' or 'mental abnormality.'" Id. at 358, 117 S.Ct. at 2080, 138 L.Ed.2d at 512-13.

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[8] Currently, sixteen states have involuntary commitment statutes for violent sexual offenders: Arizona (Ariz. Rev. Stat. § 36-3701); California (Cal. Wel. & Inst. Code § 6600); Florida (Fla. Stat. § 394.910); Illinois (75 Ill. Comp. Stat. 207/1); Iowa (Iowa Code § 229A.1); Kansas (Kan. Stat. Ann. § 5929a01); Massachusetts (Mass. Gen. Laws Ann. ch. 123A, § 1); Minnesota (Minn. Stat. § 253B.185); Missouri (Mo. Rev. Stat. § 632.480); New Jersey (N.J. Stat. Ann. § 30:4-27.25); North Dakota (N.D. Cent. Code § 25-03.3-01); South Carolina (S.C. Code Ann. § 44-48-10, et seq.); Texas (Tex. Health & Safety Code Ann. § 841.081); Virginia (Va. Code Ann. § 37.1-70.6); Washington (Wash. Rev. Code § 71.09.010); and Wisconsin (Wis. Stat. § 980.01).

Under that standard, the United States Supreme Court upheld the constitutionality of the Kansas sexual predator act from a substantive due process challenge. See id. We have previously held the Kansas statute is virtually indistinguishable from South Carolina's Act. See In the Care and Treatment of Matthews, supra. In particular, the Act, like the Kansas statute, requires a finding of dangerousness evidenced by "past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated." Hendricks, 521 U.S. at 357, 117 S.Ct. at 2080, 138 L.Ed.2d at 512. See S.C. Code Ann. § 44-48-30(1)(a)-(b) (Supp. 2000).

Luckabaugh asserts the Act is unconstitutional based on the holding of the United States Supreme Court in Kansas v. Crane, __ U.S. __, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). Crane held substantive due process requires a court to make a lack of control determination before involuntarily committing someone under these types of statutes.

The Crane Court failed to provide an exact threshold between where control ends and where a lack of control begins. The term carries with it no "particularly narrow or technical meaning." Id. at __, 122 S.Ct. at 870, 151 L.Ed.2d at 862. Instead of a bright-line test, the Court held "it is enough to say that there must be proof of serious difficulty in controlling behavior." Id. at __, 122 S.Ct. at 870, 151 L.Ed.2d at 862.

Crane does not mandate a court must separately and specially make a lack of control determination, only that a court must determine the individual lacks control while looking at the totality of the evidence. See id. at __, 122 S.Ct. at 870, 151 L.Ed.2d at 862 ("We do not agree with the State, however, insofar as it seeks to claim that the Constitution permits commitment...without any lack-of-control determination."). To read Crane as requiring a special finding would be to suggest the United States Supreme Court mandated at least sixteen states to hold new commitment hearings for over 1,200 individuals committed under their state's sexually violent predator acts. See *Amicus Curiae* Brief in Kansas v. Crane, supra, 2001 WL 694594,

at *9 (filed by Illinois, et al., on behalf of Kansas).[9] We believe the Court's ruling would have been more explicit if it intended such consequences. Instead, we believe Crane holds the substantive due process clause requires a court to determine an individual suffers from a mental illness which makes it seriously difficult, though not impossible, for that person to control his dangerous propensities.

The South Carolina Act requires commitment of sexually violent predators. A sexually violent predator is defined as a person who:

> (a) has been convicted of a sexually violent offense; and
> (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

S.C. Code Ann. § 44-48-30(1)(a)-(b) (Supp. 2000).

The Act defines "[l]ikely to engage in acts of sexual violence" to mean "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9) (Supp. 2000). Inherent within the mental abnormality prong of the Act is a lack of control determination, i.e. the individual can only be committed if he suffers from a mental illness which he cannot

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[9] As of the Crane decision, thirteen states provided statistics regarding current commitments under their sexually violent predator acts. They were Arizona (71 individuals); California (270 individuals); Florida (33 individuals); Illinois (78 individuals); Iowa (17 individuals); Kansas (65 individuals); Minnesota (182 individuals); Missouri (15 individuals); New Jersey (136 individuals); North Dakota (9 individuals); **South Carolina (38 individuals)**; Washington (84 individuals); and Wisconsin (213 individuals). See *Amicus Curiae* Brief in Kansas v. Crane, supra, 2001 WL 694594, at *9, n. 5 (filed by Illinois, et al., on behalf of Kansas).

sufficiently control **without** the structure and care provided by a mental health facility, rendering him likely to commit a dangerous act.

The Act's requirements are the functional equivalent of the requirement in Crane. The purpose of each is to ensure involuntary commitment procedures are only used to control a "limited subclass of dangerous persons" and not to broadly subject any dangerous person to what may be indefinite terms. The former is best served by a civil commitment scheme which may treat and monitor an individual's progress, while the later is more amenable to the "mechanism[s] for retribution or general deterrence" of criminal law. Crane, __ U.S. at __, 122 S.Ct. at 870, 151 L.Ed.2d at 862. It is enough to say that the evidence presented at the hearing must show the individual has "serious difficulty in controlling behavior." Id., __ U.S. at __, 121 S.Ct. at 870, 151 L.Ed.2d at 862.

For these reasons, we hold the Act complies with the United States Supreme Court's Crane decision.

Luckabaugh also argues the Act violates his substantive due process rights because it allows forcible detention by the State beyond his underlying sentence pending a commitment hearing. We disagree.

Generally, an individual will typically be detained awaiting a commitment hearing sixty days beyond his release date.[10] We note, however,

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[10] The Act requires the agency with jurisdiction to give written notice to the multi-disciplinary team and the Attorney General at least ninety days before the individual's scheduled release. S.C. Code Ann. § 44-48-40 (A)(1) (Supp. 2000). Within thirty days of receiving that notice the multi-disciplinary team must determine whether a person meets the definition of a sexually violent predator and forward a copy of its report to a prosecutor's review committee. S.C. Code Ann. § 44-48-50 (Supp. 2000). The prosecutor's review committee must determine whether probable cause exists within thirty days of receiving the multi-disciplinary team's recommendation.

the State may only detain an individual for this length of time after a probable cause hearing. See S.C. Code Ann. § 44-48-80 (B) (Supp. 2000).

Luckabaugh fails to cite any authority holding the detention of an individual awaiting a civil commitment hearing is unconstitutional. But cf. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (a state may detain an individual prior to trial after a judicial determination of probable cause). Instead, Luckabaugh's position rests only on the belief that holding a commitment hearing earlier in his sentence is preferable to the scheme created by the Legislature. We are unpersuaded by his argument.

If Luckabaugh were to prevail, subsequent individuals may claim the opposite: holding a commitment hearing early in their sentence deprives them of the ability to voluntarily receive treatment and rehabilitation which would negate their being labeled as a sexually violent predator. Aside from any social stigma created by the label, a sexually violent predator faces the life-long requirement of registering as a sex offender even after being released. See S.C. Code Ann. § 44-48-170 (Supp. 2000); State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002)(upholding the state law requirement for convicted sex offenders to register with local officials).

Moving the determination to the beginning of an individual's prison sentence would undoubtedly result in more individuals being

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S.C. Code Ann. § 44-48-60 (Supp. 2000).

The review committee must file a petition requesting a probable cause hearing with the Circuit Court within thirty days of reaching its own decision that probable cause exists. S.C. Code Ann. § 44-48-70 (Supp. 2000). The court must hold the probable cause hearing within seventy-two hours after the individual is taken into custody. S.C. Code Ann. § 44-48-80(B) (Supp. 2000). A civil commitment hearing must be held within sixty days after a determination that probable cause exists. S.C. Code Ann. § 44-48-90 (Supp. 2000).

adjudicated as sexually violent predators. Since the prison system currently offers mental health treatment programs, it would be unwise as a matter of judicial policy to deprive an individual of the opportunity to seek such counseling, to progress in his treatment and to demonstrate that he is not in need of custodial treatment programs as a sexually violent predator at the conclusion of his sentence.

Additionally, we remind Luckabaugh that where the State fails to comply with the Act and detains individuals beyond their sentence, the proper procedure is to file a motion to dismiss, not to seek an invalidation of the entire Act. See Matthews, supra. This is particularly so when the Act itself provides for constitutional safeguards such as probable cause hearings to ensure individuals are not arbitrarily held beyond their release dates.

Accordingly, we find the Act complies with the requirements of the substantive due process clauses of both the United States Constitution and the South Carolina Constitution.

B. Procedural Due Process

Luckabaugh asserts the Act violates his procedural due process rights which inhere in the due process clause of the United States and South Carolina Constitutions. See United States Const. amend XIV; S.C. Const. art. I, § 3. Luckabaugh's argument concerns only the process by which an individual committed under the Act gains his release. See S.C. Code Ann. § 44-48-110 (Supp. 2000). Because this issue is not justiciable, for the reasons set out below, we decline to address the merits of his arguments.

We are obligated to inquire in every action whether a justiciable controversy exists in a matter. See Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983).

Luckabaugh asks us to declare the Act unconstitutional because of the procedure it establishes for individuals to gain release after being committed as sexually violent predators. We decline to address the issue because Luckabaugh has never been adjudicated as a sexually violent predator. While the possibility exists that a court may do so on remand, we decline to address constitutional issues unless required to do so. See In re McCracken, supra.

C. Equal Protection Clause

Luckabaugh argues the Act violates his equal protection rights[11] because individuals committed under the Act are treated differently than other DMH patients. We disagree.

The concept of equal protection is "difficult to define and not susceptible of exact delimitation." Thompson v. South Carolina Comm'n on Alcohol and Drug Abuse, 267 S.C. 463, 472, 229 S.E.2d 718, 722 (1976). We have previously written:

> [T]he constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed....The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated.

Id.

It has long been recognized that the Legislature is not barred by the Constitution from classifying persons. See McCandless v. Richmond & D.R. Co., 38 S.C. 103, 16 S.E. 429 (1892); see generally, 19 S.C. Juris.

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[11] See U.S. Const. amend. XIV; S.C. Const. art. I, § 3.

Constitutional Law §§ 83-98 (for analysis of equal protection clause in South Carolina jurisprudence); 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 18.3, at 213-26 (3d ed. 1999). If the legislation serves a public purpose and treats all similarly situated persons alike it does not violate the equal protection clause. See Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978); Ex parte Hollman, 79 S.C. 9, 60 S.E. 19 (1908). The equal protection clause only forbids "irrational and unjustified classifications." South Carolina Pub. Serv. Auth. v. Citizens & Southern Nat'l Bank, 300 S.C. 142, 164, 386 S.E.2d 775, 786 (1989).

The first step in our equal protection analysis of the Act is to determine what level of scrutiny to apply. We employ strict scrutiny analysis if a law employs a suspect classification. See Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001); Bibco Corp. v. City of Sumter, 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998); see also 19 S.C. Juris. *Constitutional Law* § 85 (1993). Otherwise we apply the rational basis test. See Curtis, supra; Bibco Corp., supra.

Courts traditionally apply strict scrutiny analysis for suspect classifications based on race, alienage, national origin, sex or illegitimacy. See, e.g., City of Richmond v. Croson, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (classification based solely on race is subject to strict scrutiny); Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1978) (applying strict scrutiny to a state statute concerning rights of illegitimate children); Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (applying strict scrutiny analysis to state restrictions on resident aliens receiving welfare assistance); Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed.2d 194 (1944) (subjecting classifications based upon race and nationality to the "most rigid scrutiny.").

Luckabaugh's argument rests on the assertion that the Legislature cannot classify by type of mental illness or abnormality. Mental illness is not a suspect classification. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445-46, 105 S.Ct. 3249, 3257, 87 L.Ed.2d 313, 324 (1985). Neither the United States Supreme Court nor state courts apply strict scrutiny

to challenges similar to Luckabaugh's. See, e.g., Heller v. Doe, 509 U.S. 312, 321-28, 113 S.Ct. 2637, 2643-47, 125 L.Ed.2d 257, 271-76 (1993) (applying rational basis test to law creating different procedures to involuntarily commit those mentally ill and those mentally retarded); Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966) (applying rational basis test to law providing different treatment between "dangerous" and "non-dangerous" mentally ill); Illinois v. Pembrock, 342 N.E.2d 28, 30 (Ill. 1976) (applying rational basis test to a law creating different procedures to commit violent predators and other mentally ill individuals); State v. Clemons, 515 P.2d 324, 327 (Ariz. 1973) (applying rational basis test to statute creating different commitment procedures for those "guilty but insane" and general civil commitment).

State courts generally apply the rationale basis test to sexually violent predator acts. See, e.g., In re Detention of Williams, 628 N.W.2d 447 (Iowa 2001); In re Detention of Samuelson, 727 N.E.2d 228 (Ill. 2000); In re Detention of Turay, 986 P.2d 790, 806 (Wash. 1999); Martin v. Reinstein, 987 P.2d 779, 796 (Ariz. Ct. App. 1999); but see, In re Hay, 953 P.2d 666, 675 (Kan. 1998) (applying strict scrutiny); In re Linehan, 557 N.W.2d 171, 186 (Minn. 1996) (applying "heightened" scrutiny).

Accordingly, we review the Act under the rational basis test for purposes of the equal protection clause. A classification does not violate the equal protection clause if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. See Curtis v. State, supra, (citing Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999)). "The determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is a reasonable hypothesis to support it." Curtis v. State, 345 S.C. at 574, 549 S.E.2d at 600.

The Iowa Supreme Court in In re Detention of Williams, supra, reviewed an equal protection challenge to Iowa's sexually violent predator

act based on differential treatment afforded to sexually ill offenders committees versus other mentally ill civil committees. The Court noted rational reasons existed to differentiate between the two classes of mentally ill committees. Chief among those reasons was the inherent differences between an individual committed under the traditional civil commitment statute and one committed as a sexually violent predator.

The Court found sexually violent predators "have antisocial personality features that are unamenable to existing mental illness treatment modalities . . . that render them likely to engage in sexually violent behavior." Id. 628 N.W.2d at 453 (quoting Iowa Code § 229A.1). Contrasted with sexually violent predators, other involuntarily committed individuals simply "'lack[ ] sufficient judgment to make responsible decisions' and are likely to physically injure themselves or others without treatment . . . . [b]ut their mental illness does not predispose them to commit sexually violent acts." Id. The Court, in upholding the law, found these "specialized treatment needs of [sexually violent predators], when compared to others who suffer from different mental abnormalities, justify the different classification and treatment chosen by the legislature." Id. 628 N.W.2d at 454. Sexually violent predators have distinct qualities which separate them as a different class apart from other mentally ill individuals.

Our Legislature, in passing the South Carolina Act, found "that a mentally abnormal and extremely dangerous group of sexually violent predators exists . . . [and the] likelihood these sexually violent predators will engage in repeat acts of sexual violence if not treated for their mental conditions is significant." S.C. Code Ann. § 44-48-20 (Supp. 2000). In wording similar to the Iowa statute, the Legislature further found:

> the existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society, the General Assembly determines that a separate, involuntary civil commitment process for the long-term control, care, and treatment of sexually violent predators is necessary. The General Assembly also determines that, because

> of the nature of the mental conditions from which sexually violent predators suffer and the dangers they present, it is necessary to house involuntarily committed sexually violent predators in secure facilities separated from persons involuntarily committed under traditional civil commitment statutes.

Id.

To require the Legislature to treat the two groups similarly would require overruling a rational determination that sexually violent predators have certain characteristics which make their treatment needs different from other involuntarily committed individuals. The potential danger to the community provides a rational reason why sexually violent predators should be treated differently than other committed patients. The classification is not plainly arbitrary, but, instead, is reasonable in light of the differences between the two groups. See Curtis v. State, supra. Further, the classification bears a reasonable relation to the legislative purpose of confining sexually violent predators separately from other involuntarily committed individuals for treatment.

Accordingly, we find the Act does not violate Luckabaugh's right to equal protection.

CONCLUSION

In conclusion, we VACATE the portion of the lower court's order finding the State did not meet its burden of proving Luckabaugh was a sexually violent predator. Further, we REVERSE the lower court's finding the Act violated the *ex post facto* clause of the South Carolina Constitution. We REMAND this case for proceedings consistent with this opinion.

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. As the majority notes, this is an action at law tried by a judge alone, and we must affirm his decision if it supported by any evidence. The majority also acknowledges the evidence was conflicting on two issues: (1) whether Respondent suffers from a dangerous mental condition; and (2) whether, assuming that he does, custodial treatment is required. In order to keep Respondent in custody, the State bore the burden of proving both issues beyond a reasonable doubt. S.C. Code Ann. §44-48-100 (2002). While I may not have reached the same conclusions as the trial judge there is evidence to support his findings, and we are therefore required to affirm.

In order to avoid this result, the majority concludes that the trial court's order is so deficient under Rule 52(a), SCRCP, that the judgment must be set aside and the matter remanded. I disagree.

To support the conclusion that the order is insufficient under Rule 52(a), the majority relies on cases involving orders issued by administrative agencies, the family court, and a magistrate's court. Each of these bodies has a specific rule or statute which mandates the contents of its orders: See Rule 26, SCRFC, (family court orders); S.C. Code Ann. §14-25-105 (Supp. 2001) (magistrate's returns); S.C. Code Ann. §1-23-350 (1985) (administrative orders). These decisions, like those from other jurisdictions, are irrelevant to the Rule 52(a) issue in this case.

Rule 52(a) incorporates the standards found in former code sections 15-35-110, 15-35-130, and 15-35-140. See note following Rule 52, SCRCP. It is well-settled under those statutes and under the current rule that if an order fails to comply with these standards, that deficiency must first be raised by a Rule 59 motion in the trial court in order to be preserved for appeal. E.g., Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (Rule 52); State v. City of Columbia, 12 S.C. 370 (1879) (former statutes). Here, the State raised no objection to the sufficiency of the order below, and accordingly the issue is not preserved for our review.

Even if the sufficiency of the order were properly before us, there is no

doubt but that the trial judge adequately expressed his view that the State failed to meet its burden of proof[12] and his conclusion that Respondent must be set free.[13] See, e.g., May v. Cavender, 29 S.C. 598, 7 S.E. 489 (1888) (where the evidence was conflicting, this Court upheld as sufficient an order stating simply, "After a careful consideration of the testimony in the case, I am satisfied that the plaintiff is not entitled to the relief demanded"); see also Pawley's Island Civic Ass'n v. Johnson, 292 S.C. 208, 355 S.E.2d 541 (Ct. App. 1986) (order sufficient finding only that plaintiff "failed to provide any evidence which substantiates any of the allegations contained in [its] petition" and "failed to produce any evidence showing that [the defendants] abused their discretion . . . .").

Assuming, however, that the order could have been drawn with more detail, the requirements of Rule 52(a) are

> directory and . . . noncompliance would not form the basis for invalidating a judgment. [citation omitted]

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[12] "Upon hearing the evidence, I find that the State failed to prove beyond a reasonable doubt that [Respondent] meets the definition of a 'sexually violent predator.' Even if [Respondent] suffers from the personality disorder known as sexual sadism, the State failed to show this condition makes it likely that [he] will engage in future acts of sexual violence if not confined in a secure facility for long term control, care and treatment."

[13] "NOW, THERFORE, IT IS ORDERED ADJUDGED AND DECREED THAT 1) The State has failed to meet its burden of proving beyond a reasonable doubt that [Respondent] is a sexually violent predator as defined by S.C. Code Ann. §44-48-30 . . . . 3) [Respondent] is to be immediately released from the Charleston County Detention Center.

> Rather, where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding.

Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991). Where the trial judge in a law case hears conflicting evidence, and explicitly finds the moving party has not met its burden of proof, it is my opinion that his order 'substantially complies' with Rule 52(a). May v. Cavender, supra; Pawley's Island Civic Ass'n v. Johnson, supra. The majority does not explain, nor can I conceive, what more a judge must say when he finds the evidence lacking.

Since I would affirm the trial court's order releasing Respondent, I would not reach the constitutional issues.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care
and Treatment of Paul
Newman Allen, Appellant.

Appeal From Greenville County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25504
Heard February 6, 2002 - Filed July 22, 2002

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Deputy Attorney General Treva Ashworth, Senior Assistant Attorney General Kenneth P. Woodington, and Assistant Attorney General Steven G. Heckler, all of Columbia, for respondent.

CHIEF JUSTICE TOAL: Paul Newman Allen ("Allen") appeals

the lower court's Order confining him to the Department of Mental Health pursuant to the South Carolina Sexually Violent Predator Act ("Act"), S.C. Code Ann. §§ 44-48-10, *et seq*.

FACTUAL/ PROCEDURAL BACKGROUND

In 1978, Allen was given a three-year probationary sentence for Assault and Battery of a High and Aggravated Nature. In 1981, he was convicted for committing a Lewd Act Upon a Minor Child. Allen received a five-year sentence, suspended on the service of five years of probation. In 1983, he was arrested for committing a Lewd Act on a Child and First Degree Criminal Sexual Conduct. He was sentenced to two years confinement and three years probation. In 1984, Allen was charged with Aggravated Assault and Battery and sentenced to three years confinement. He was also convicted of committing a Lewd Act On a Minor, and his confinement was consecutive to his other charges. In 1987, Allen was convicted for Assault with Intent to Commit First Degree Criminal Sexual Conduct. He was given a twenty-year sentence. In 1988, he pled Guilty but Mentally Ill to Assault with Intent to Commit Criminal Sexual Conduct and was given twenty years. It is unclear from the record whether the 1987 and 1988 convictions represented the same charge.[1] Allen's most recent conviction involved his attempted fondling of an eight-year-old girl at a church less than three months after he had been released from prison for his last sexual offense. In addition to the criminal charges, Allen has admitted to bestiality and cross-dressing.

On September 25, 1998, near the time Allen was scheduled to be released from prison, the State filed a Petition pursuant to the Act seeking to have him civilly committed as a Sexually Violent Predator ("SVP"). Allen appeared for initial hearings during the November and December 1998 terms of the Greenville County Court of Common Pleas. A final hearing was held in April 1999 before the Honorable John C. Hayes, III. At the hearing, Dr. Schwartz-Watts, the State's expert who examined Allen, concluded that Allen's history

[1]The record does not contain a clear description of Allen's past charges.

indicated he suffered from two sexual disorders, pedophilia and paraphilia, both of which are "chronic mental illnesses" which "do not go away." Dr. Schwartz-Watts concluded "these disorders make [Allen] likely to engage in further acts of sexual violence if not treated in a secure facility."

In an Order dated April 23, 1999, Judge Hayes found Allen was a sexually violent predator and ordered him committed to the custody of the S.C. Department of Mental Health. Allen appeals Judge Hayes' Order and the issue before this Court is:

> Does South Carolina's Sexually Violent Predator Act violate the Constitutional prohibitions on Ex Post Facto laws and Double Jeopardy?

LAW/ ANALYSIS

Allen argues the Act is not civil is nature and therefore violates the Double Jeopardy[2] and Ex Post Facto Clauses of the United States Constitution.[3] We disagree.

Allen argues the lower court erred in relying on *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)[4] to hold the Act did not violate the Constitution. He argues Kansas' Sexually Violent Predator Act is "markedly different" from this State's Act in two respects.

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[2]U.S. CONST. amend. V.

[3]U.S. CONST. Art. 1, § 10, cl. 1.

[4]In *Hendricks*, the United States Supreme Court upheld Kansas' procedure for the civil commitment of persons found to be sexual predators. The Court found Kansas' scheme was not punitive in nature and therefore not subject to attack under the Constitutional provisions intended to protect the criminally accused.

This Court has already specifically addressed this issue in *In the Matter of the Care and Treatment of Matthews*, 345 S.C. 638, 550 S.E.2d 311 (2001) and *In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001). In *Matthews*, we found the United States Supreme Court's (USSC) decision in *Kansas v. Hendricks*, to be controlling. We held our state's Act was not meaningfully distinguishable from Kansas' Act, and, therefore, the Act did not violate the Double Jeopardy Clause. *Matthews*. Furthermore, the constitutional holding of *Matthews* was summarized in *McCracken* as follows: "a side by side comparison of our SVP Act and the Kansas Act does not reveal any substantial differences." *McCracken*, 346 S.C. at 91, 551 S.E.2d at 238. Therefore, we have already directly addressed the issues raised by Allen and found them to be without merit. However, we will address Allen's specific arguments regarding the distinctions between the two Acts.

First, Allen argues that "unlike the Kansas law, criminal conviction is an absolute prerequisite to our statute's operation." This Court recently addressed this exact issue in *Matthews*. In *Matthews*, this Court recognized this factor to be the only distinction between the two Acts. *Id*. at 649-650, 550 S.E.2d at 316. However, this Court found it to be "a distinction without a difference" since the use of the word "conviction" included "persons charged but found incompetent to stand trial, those found not guilty by reason of insanity, and those found guilty but mentally ill." *Id.*

Secondly, Allen argues that "those committed under our statute are not treated as mentally ill persons, but as criminals," since those committed under the Act can be housed in ordinary jails and prisons. This argument was addressed in *McCracken*. The appellant in *McCracken* likewise argued, "the conditions of his confinement demonstrate that he is being improperly punished as a criminal." *McCracken,* 346 S.C. at 91, 551 S.E.2d at 238. This Court held that "his remedy for any such unconstitutional confinement would be by writ of habeas corpus." *Id.* (citing *Seling v. Young*, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001)). This Court held that if the statutory requirement for constitutional care and treatment is not met, "relief lies with an action brought against [the custodian] and not with a facial challenge to the statute which does not prescribe the terms of confinement." *Id.* Additionally, this Court recently

addressed this issue in *In the Matter of the Care and Treatment of Clair Luckabaugh*, Op. No. 25503 (S.C. Sup. Ct. filed July 22, 2002) (Shearouse Adv. Sh. No. 25 at 51). There, we held that housing sexually dangerous persons within a maximum-security prison did " ' not transform the State's intent to treat into an intent to punish.' " *Id.* at ___ (quoting *Allen v. Illinois*, 478 U.S. 364, 373, 106 S.Ct. 2988, 2994, 92 L. Ed. 2d 296, 307).

Allen also contends the Act is punitive because it treats a person involuntarily committed under the Act differently from other involuntarily committed mental patients. This Court recently found this issue to be without merit in *Luckabaugh*.[5] *Id.*

CONCLUSION

Based on the forgoing, we **AFFIRM** the decision of the trial court.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[5]This Court also notes *Luckabaugh* thoroughly discussed the implications of the USSC's recent ruling in *Kansas v. Crane*, __ U.S. __, 122 S.Ct. 867, 138 L. Ed. 2d 856 (2002). In *Luckabaugh*, we found South Carolina's Act complied with the holding of the USSC in *Kansas v. Crane*.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Terry A. Trexler, Respondent.

Opinion No. 25505
Heard June 13, 2002 - Filed July 22, 2002

DISBARRED

Attorney General Charles M. Condon, Senior Assistant Attorney General James G. Bogle, Jr., and Senior Assistant Attorney General Nathan Kaminski, Jr., all of Columbia, for the Office of Disciplinary Counsel.

Richard Anthony Blackmon, of Sumter, for respondent.

PER CURIAM: In this attorney disciplinary matter, a full panel of the Commission on Lawyer Conduct recommended respondent be disbarred. We agree and disbar respondent.

FACTUAL/PROCEDURAL BACKGROUND

On January 29, 2001, respondent was disbarred for misconduct in 24 client matters. *In the Matter of Trexler*, 343 S.C. 608, 541 S.E.2d 822 (2001). Following service of the formal charges alleging misconduct in those matters, it was discovered that charges alleging misconduct in two additional client matters had been omitted. Accordingly, formal charges alleging misconduct in the two additional matters were served and filed. After respondent failed to respond to the charges, the Office of Disciplinary Counsel filed an Affidavit of Default. At a hearing on the charges, the Office of Disciplinary Counsel asked that the hearing officer find respondent in default and issue an order imposing a sanction to run concurrent with respondent's disbarment and include the same provisions regarding restitution and payment of the costs of the proceeding.

Although there was some question as to whether service of the formal charges was proper, counsel for respondent informed the hearing officer that respondent did not want to contest the affidavit of default because he was not interested in pursuing a long, drawn out dispute as to the charges.

The hearing officer found respondent in default and the allegations contained in the seventh set of formal charges were deemed admitted. He recommended respondent be disbarred, the sanction to run concurrent with his earlier disbarment, and that restitution be made in both matters. He recommended respondent not be required to pay the costs of the proceedings since the charges should have been disposed of at the earlier hearing. The full panel voted to adopt the report of the hearing officer. Neither respondent nor the Office of Disciplinary Counsel filed exceptions.

LAW/ANALYSIS

Rule 2(p), RLDE, Rule 413, SCACR, defines a lawyer, in pertinent

part, as "anyone admitted to practice law in this state, including any formerly admitted lawyer with respect to acts committed prior to resignation or disbarment." Because the acts of misconduct alleged in the formal charges currently before this Court were committed prior to disbarment, we find respondent can be disciplined for the additional acts of misconduct despite the fact that he has already been disbarred.

Although we have reservations about whether the formal charges at issue were properly served on respondent, *see* Rule 14(c), RLDE (service of formal charges by mail must be made by registered or certified mail to the *lawyer's* last known address), respondent stated at the hearing before the hearing officer and at the hearing before this Court that he was not putting up a defense to the entry of default.[1] In addition, respondent did not file any exceptions to the hearing officer's finding of default.

When a respondent fails to answer and is in default, the factual allegations contained in the formal charges are deemed admitted. Rule 24, RLDE, Rule 413, SCACR. Because respondent has essentially conceded he was in default, the allegations contained in the formal charges currently before this Court are deemed admitted. We must simply determine the appropriate sanction. *In the Matter of Kitchel*, 347 S.C. 291, 554 S.E.2d 868 (2001); *In the Matter of Thornton*, 327 S.C. 193, 489 S.E.2d 198 (1997).

The following allegations were made in the formal charges and deemed admitted by the hearing officer. In the first matter, respondent was retained to represent a client. The client paid respondent $350 in legal fees. When the client received a summons from magistrate's court advising her that her case was scheduled to be heard on December 13, 1995, respondent falsely advised her she did not need to be present. Respondent also told the client that

[1]Indeed, at the hearing before this Court, respondent stated he hoped the Court would concur in the Commission's recommendation.

he did not need to be present at the hearing as her counsel. Despite respondent's advice, the client appeared in court and prevailed in her action. Respondent made no appearance on the client's behalf. He also failed to refund the fee paid by the client.

In a second matter, respondent was retained to represent a client in a divorce action. The client paid respondent $1,000 in legal fees. However, respondent failed to adequately prepare for an emergency/temporary hearing and, as a result, the client was required to make monthly payments on an automobile or return the automobile. The client was also ordered to pay approximately $540 to opposing counsel. The client gave respondent $540 to pay opposing counsel; however, when respondent issued a check for the payment, it was returned for insufficient funds. As a result, the client was held in contempt of court. Respondent failed to respond to the client's inquiries and failed to refund any portion of the $1,000 fee. He also failed to advise the client that he had been suspended from the practice of law after he was placed on interim suspension. Respondent failed to respond to inquiries from Disciplinary Counsel regarding both of these matters.

The hearing officer found respondent violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.5 (a lawyer's fee shall be reasonable); Rule 1.15 (a lawyer shall safeguard funds of a client); Rule 8.1 (a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority) and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct).

We find these allegations, when considered in the context of the allegations that led to respondent's earlier disbarment, as they should have been, warrant disbarment. *In the Matter of Craig*, 344 S.C. 646, 545 S.E.2d 823 (2001)(disbarment is the appropriate sanction for multiple acts of misconduct, including misappropriation of client funds); *See also In the Matter of Driggers*, 334 S.C. 40, 512 S.E.2d 112 (1999) (attorney consented to disbarment for misappropriating funds, failure to appear in court on clients' behalf, and other misconduct similar to that shown in this case).

CONCLUSION

For the foregoing reasons, we adopt the full panel's recommendation for disbarment. This disbarment shall run concurrent with respondent's earlier disbarment. Respondent shall make restitution to the clients addressed in this opinion according to the terms of the restitution plan entered into between the parties as a result of our earlier opinion disbarring respondent.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Matthew Edward Davis, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that W. Hugh McAngus, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. McAngus shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of

respondent's clients. Mr. McAngus may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain 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 an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that W. Hugh McAngus, 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 W. Hugh McAngus, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. McAngus's office.

Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina
July 17, 2002

The Supreme Court of South Carolina

In the Matter of Harold Mark Chandler, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

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

trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain 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 an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Frank H. DuRant, 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 Frank H. DuRant, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. DuRant's office.

Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina

July 17, 2002

The Supreme Court of South Carolina

In re Amendments to Rule 416, SCACR.

O R D E R

The South Carolina Bar has proposed amendments to Rules 14, 15, 17 and 19 of the Rules governing the Resolution of Fee Disputes Board contained in Rule 416, SCACR. Specifically, the Bar proposes the following: (1) amending Rule 14 to provide that a hearing panel should be appointed within ten days of the date a written request for a hearing is filed; (2) amending Rule 15 to give the circuit chair the authority to reassign a panel member or an entire panel if the panel or its members are delinquent in scheduling or attending a hearing; (3) amending Rule 17 to require that a copy of the panel decision be sent to the circuit chair as well as to each party; and (4) amending Rule 19 to require that copies of non-compliance orders be sent to the Bar and the Commission on Lawyer Conduct. The proposed amendments are approved. In addition, we have made several minor corrections to the rule that do not affect the substance of the rule.

Pursuant to Article V, ' 4, of the South Carolina Constitution, we hereby amend Rules 5, 14, 15, 16, and 19 of Rule 416, South Carolina Appellate Court Rules, to reflect the changes set forth above. These amendments shall be effective September 1, 2002. The amended rules are attached.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

July 18, 2002

AMENDMENTS TO RULE 416
RESOLUTION OF FEE DISPUTES BOARD

RULE 5. APPOINTMENT OF EXECUTIVE COUNCIL

From among the appointed Board members, the President shall appoint an Executive Council comprised of the following: One Executive Council member from each of the four Judicial Regions of the state and one additional member, appointed by the President, who will be chair of the Executive Council.

The chair shall have the authority to interpret these Rules until such time as the Executive Council considers the interpretation. The duties of the Executive Council will be to oversee and assist the functioning of the Board in the respective circuits of the state and to make recommendations to the Board of Governors as to procedures to be followed and rules to be amended.

Executive Council members should be experienced in the practice of law with not fewer than five (5) years active practice, and in the case of the chair, not fewer than ten (10) years active practice.

The terms of the Executive Council shall be for three (3) years. The expiration of a term will coincide with the date of expiration of the term of the incumbent President in the same year. Should the term of an Executive Council member on the Board expire and the member not be reappointed to the Board, the member's term on the Executive Council shall expire at the same time the member's term on the Board expires. In that event, the President shall appoint a replacement member to the Executive Council for the unexpired term. A member of the Executive Council may be reappointed.

The Executive Council shall meet at such times and places as may be called by the chair or by any four members thereof.

RULE 14. APPOINTMENT OF HEARING PANEL

When appropriate, a hearing panel of three (3) members shall be appointed by the circuit chair from the circuit panel in the judicial circuit where the principal place of practice of the attorney is located. A hearing panel should be appointed within ten (10) days of the date a written request for a hearing panel is filed with the circuit chair. The procedure for appointing hearing panel members shall be established by the Executive Council. One (1) member of the hearing panel shall be designated by the circuit chair as

chair of the hearing panel. Upon appointment of the hearing panel, the parties to the proceeding shall be notified in writing by the circuit chair of the appointment of the hearing panel, giving the names and addresses of the members, including the identity of the chair, and further informing the parties involved that the hearing panel will resolve the dispute. Each party may proceed without counsel or be represented by counsel of the party's choosing and at the party's own expense. The Board is not required by law to appoint an attorney to represent a party; however, upon request of a party, a member of the Board may be appointed to represent the party before the hearing panel if, in the discretion of the circuit chair, good cause is shown. Good cause may include but is not limited to (1) the income level of the party, (2) the educational level of the party, or (3) interests of parity and justice.

RULE 15. PANEL HEARINGS

The chair of the hearing panel shall convene a hearing at a place within the circuit within forty-five (45) days of assignment by the circuit chair and at least thirty (30) days after giving notice to the parties by first class mail, with proper postage affixed, unless otherwise agreed by all parties and the panel members. The notice shall inform the parties that the hearing is *de novo* and that no reports or other information from the assigned member will be considered. The notice also shall inform the parties that they may have witnesses present and may present documentary evidence and should present all evidence they expect to present at the hearing.

If the circuit chair determines that a hearing panel or panel member is delinquent in scheduling or attending a hearing, the circuit chair has the authority to reassign the whole panel or reassign one or more panel members.

If a party or a witness cannot, for any reason, be present at the hearing, a written statement shall be submitted which shall be the complete statement of the party or witness. The statement shall be considered by the hearing panel as though the party or witness testified in person. If a party fails to appear, then the hearing panel shall render its decision based on the available testimony and documentation.

Conduct of the hearings shall be pursuant to such rules and procedures as the Executive Council may prescribe. While it is not necessary to follow strictly the rules of evidence as generally applied in circuit court, hearings should be conducted in conformance generally with them.

A party to a fee dispute may, at the party's own expense, cause any hearing by the panel to be recorded and transcribed. The tape recording of the hearing shall be the

property of the Board. If a party has a hearing transcribed, the party shall, at the party's own expense, provide a copy of the transcript to the Board.

RULE 16. VOLUNTARY TERMINATION

Prior to the final decision of the Board, the party who initiated the process may terminate the process. (See Rule 16(e) for attorney-attorney disputes.) Termination of the process takes effect under the following conditions:

(A) When a hearing panel has been appointed, if the hearing panel chair is informed that an attorney-client dispute has been resolved between the parties to the dispute, the hearing panel chair shall require written acknowledgement from the initiating party.

(B) If no hearing panel has been appointed, notification that an attorney-client dispute has been resolved between the parties and written acknowledgement of this should be sent by the initiating party to the circuit chair.

(C) This written acknowledgement of withdrawal will have the effect of ending the availability of the procedure with prejudice to the initiating party as to that dispute so that a party who initially filed an application with the Board may not make a second filing on the same dispute after withdrawing the first filing. Upon notification by the initiating party of the withdrawal of the application, that party will be reminded of this. Should that party fail to make a written acknowledgement of the withdrawal, the Board shall proceed to resolve the matter without delay.

(D) Nothing herein is to be construed as limiting a party from filing an amended or supplemental form pertaining to the dispute, if requested or if needed, under such conditions as the hearing panel may provide or as may be established by the Executive Council.

(E) In disputes among attorneys, the application may be withdrawn only by mutual written consent of all parties involved.

RULE 17. HEARING PANEL

Upon conclusion of the panel hearing or hearings, the hearing panel members shall forthwith proceed to reach a decision and shall, within fifteen (15) days of the hearing, issue a written decision, including a factual statement of the controversy and the reasons

for the decision reached. A decision of the majority of the hearing panel shall constitute a final decision of the Board. The written decision shall be filed with the Bar, and a copy sent to the circuit chair and each party to the dispute by first class mail, with proper postage affixed. Service by mail is complete upon mailing.

RULE 19. COMPLIANCE

The decision of the Board shall be final and binding upon the parties and shall be enforceable in any court of competent jurisdiction. The parties shall comply with the terms of the final decision within thirty (30) days after mailing. In case of non-compliance, the circuit chair shall issue a Certificate of Non-Compliance which may be entered as a judgment pursuant to Rule 58(a), SCRCP. The circuit chair shall forward all non-compliance orders to the Bar. This order shall then be forwarded to the Commission on Lawyer Conduct under Rule 8.3 of the Rules of Professional Conduct, Rule 407, SCACR.