The Supreme Court of South Carolina

In the Matter of Jeff M. Long, Jr., Respondent.

ORDER

The records of the office of the Clerk of the Supreme Court show that on June 1, 1950, Jeff M. Long, Jr. was admitted and enrolled as a member of the Bar of this State.

By way of letter addressed to the Supreme Court of South Carolina, Mr. Long has submitted his resignation from the South Carolina Bar. We accept Mr. Long's resignation, effective July 22, 2001, as set forth by this Court in In the Matter of Long, Op. No. 25336 (S.C. Sup. Ct. filed July 30, 2001).

Mr. Long shall, within fifteen days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this

State. In addition, his name shall be removed from the roll of attorneys in this State.

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

September 12, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

September 17, 2001

ADVANCE SHEET NO. 34

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Naim Jihad, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Anderson County
Gerald C. Smoak, Sr., Circuit Court Judge

Opinion No. 25360
Heard March 21, 2001 - Filed September 17, 2001

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor George M. Ducworth,

of Anderson, for petitioner.

Kenneth W. Sheppard, of Peachtree City, Georgia; and Nancy Jo Thomason, of Anderson, for respondent.

JUSTICE MOORE: We granted a writ of certiorari in this case[1] and now address the sole issue whether driving a vehicle with a non-functioning brake light supports a traffic stop. We find it does and reverse.

FACTS

Fifteen pounds of marijuana were seized from respondent's car after a highway patrolman pulled him over for a broken brake light. Respondent was charged with trafficking in marijuana. At a pre-trial suppression hearing, the trial judge ruled the initial traffic stop was not supported by probable cause because South Carolina law requires only one brake light to be working. Accordingly, the trial judge found the initial traffic stop invalid and suppressed the evidence.

The State appealed the trial judge's ruling.[2] In a 2-1 decision, the Court of Appeals held only one working brake light is required under our statutory scheme and, since respondent had one working brake light, he was not in violation of any traffic law at the time he was stopped. The majority therefore ruled the initial stop was not supported by probable cause and affirmed the suppression of the evidence as fruit of the poisonous tree. *See*

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[1]State v. Jihad, 339 S.C. 325, 528 S.E.2d 696 (Ct. App. 2000).

[2]The State asserted on appeal that the suppression of the marijuana significantly impaired its prosecution of the case and therefore the trial judge's ruling was appealable. State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985).

Wong Sun v. United States, 371 U.S. 471 (1963).[3]

DISCUSSION

Brake lights, or "stop lamps" as they are referred to in Title 56, are governed specifically by S.C. Code Ann. §§ 56-5-4730 and -4560 (1991). Section 56-5-4730 provides in pertinent part:

> **Any motor vehicle may be equipped, and when required under this chapter shall be equipped**, with the following signal lamps and devices:
>
> > (1) **A stop lamp on the rear** which shall emit a red or yellow light and which shall be actuated upon application of the service (foot) brake and which may but need not be incorporated with a tail lamp;
> >
> > (2) A lamp or lamps or mechanical signal device capable of clearly indicating any intention to turn either to the right or to the left and which shall be visible both from the front and rear.

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[3]On appeal to this Court, the State adopts the position of the dissenter in the Court of Appeals and argues there need only be a reasonable suspicion rather than probable cause to support a valid traffic stop. *See* Illinois v. Wardlow, 528 U.S. 119 (2000) (reasonable suspicion is a less demanding standard than probable cause). "Reasonable suspicion" does not refer to an officer's speculation there may be some law prohibiting the observed conduct but goes to the sufficiency of his observation. It is uncontested in this case that respondent was actually driving with a non-functioning brake light which satisfies the higher standard of probable cause if such conduct is in fact a traffic violation. Accordingly, we need not address whether a reasonable suspicion is sufficient to support a traffic stop in this case.

> A stop lamp shall be plainly visible and understandable from a distance of one hundred feet to the rear both during normal sunlight and at nighttime and a signal lamp or lamps indicating intention to turn shall be visible and understandable during daytime and nighttime from a distance of one hundred feet both to the front and rear. **When a vehicle is equipped with a stop lamp or other signal lamps, such lamp or lamps shall at all times be maintained in good working condition.** No stop lamp or signal lamp shall project a glaring or dazzling light.

(emphasis added). Further, § 56-5-4560 makes it unlawful to drive a vehicle on the highways "unless it is equipped with a stop lamp meeting the requirements of § 56-5-4730."[4]

The trial judge and the Court of Appeals majority read these sections to require only one functioning brake light. The State argues that even though only one brake light is required, when there is more than one brake light on a vehicle, they must both be in good working condition. The State relies on the language in § 56-5-4730: **When a vehicle is equipped with a stop lamp or other signal lamps, such lamp or lamps shall at all times be maintained in good working condition.**

We agree with the State's reading of these statutes. In addition to requiring a single brake light, § 56-5-4730 also applies to discretionary equipment as indicated in the first sentence: "**Any motor vehicle may be equipped, and when required under this chapter shall be equipped**. . . ." A motor vehicle may therefore have, in addition to the required brake light, more than one brake light.

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[4]In addition to these two sections specifically regulating stop lamps, S.C. Code Ann. § 56-5-4410 (1991) provides generally that it is unlawful to drive a vehicle that "is not at all times equipped with lights, brakes, steering and other equipment in proper condition and adjustment as required in this article."

Further, § 56-5-4730 clearly evinces legislative intent that even a discretionary brake light must be in good working condition by prefacing the good-working-condition requirement with the conditional phrase "**when a vehicle is equipped with a stop lamp**. . . ." The word "when" in context here means "in the event that" or "whenever."[5] "**When a vehicle is equipped with a stop lamp**" therefore means "whenever" or "in the event that" a vehicle is equipped with a stop lamp. This phrase has meaning only if it refers to discretionary stop lamps since reference to the mandatory single stop lamp would not require this conditional phrase. *See* In re: Decker, 322 S.C. 215, 471 S.E.2d 462 (1995) (a statute should be construed so that no word, clause, provision, or part is rendered superfluous).

The Court of Appeals's interpretation of § 56-5-4730 requiring that only a single stop lamp be in good working condition overlooks the "**when a vehicle is equipped**" phrase which refers back to the first sentence of the statute providing for both mandatory and discretionary stop lamps. We hold, under a plain reading of § 56-5-4730, it is unlawful to drive with a non-functioning brake light. Accordingly, the traffic stop in this case was valid. The Court of Appeals's decision is

REVERSED.

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

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[5]Random House Dictionary of the English Language, Second Edition, Unabridged (1987).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael L. James, Respondent.

Opinion No. 25361
Submitted September 4, 2001 - Filed September 17, 2001

DEFINITE SUSPENSION

Henry B. Richardson, Jr., of Columbia, for the Office of the Disciplinary Counsel.

Michael L. James, pro se.

PER CURIAM: By way of the attached Opinion and Order of the Supreme Court of Kentucky, dated April 26, 2001, respondent was suspended from the practice of law in that state for six months.[1] On June 28,

[1]On September 3, 1998, the Supreme Court of Kentucky suspended respondent from the practice of law in Kentucky for thirty days. James v. Kentucky Bar Ass'n, 973 S.W.2d 844 (Ky. 1998). This Court imposed the same sanction in this state. In the Matter of James, 333 S.C. 59, 508 S.E.2d

2001, the Clerk of this Court sent respondent a letter via certified mail to the address listed with the South Carolina Bar and the Kentucky Bar Association notifying respondent that, pursuant to Rule 29(d), RLDE, Rule 413, SCACR, he had thirty (30) days in which to inform the Court of any claim he might have that a six month suspension in this state is not warranted and the reasons for any such claim. A copy of the letter was also sent to Timothy Denison, Esquire, counsel for respondent in the matter before the Supreme Court of Kentucky, via certified mail. See Rule 29(b), RLDE, Rule 413, SCACR. The letter to respondent was returned unclaimed. The letter to Mr. Dennison was signed for but the Court has not received a response from respondent or from Mr. Dennison on respondent's behalf.

Finding a sufficient attempt has been made to serve notice on respondent, and finding none of the factors in Rule 29(d), RLDE, Rule 413, SCACR, present in this matter, we hereby suspend respondent from the practice of law in this state for six months, retroactive to April 26, 2001, the date of the Opinion and Order of the Supreme Court of Kentucky. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

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28 (1998). The Kentucky Supreme Court suspended respondent for one year, with a concurrent sixty day suspension, on March 23, 2000. James v. Kentucky Bar Ass'n, 13 S.W.3d 925 (Ky. 2000). A reciprocal one-year suspension, retroactive to the date of the Opinion and Order of the Kentucky Supreme Court, was imposed by this Court. In the Matter of James, 342 S.C. 17, 535 S.E.2d 911 (2000).

TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 5/7/01

2001 -SC-0220-KB

MICHAEL L. JAMES MOVANT

V. IN SUPREME COURT

KENTUCKY BAR ASSOCIATION RESPONDENT

OPINION AND ORDER

Movant Michael L. James, whose last known address is 8809 Nottingham Pky., Louisville, KY 40222, desires to terminate Kentucky Bar Association (KBA) proceedings against him by consenting to a suspension from the practice of law for six months pursuant to SCR 3.480(3). The KBA has no objection to the motion for termination of proceedings. James is currently suspended from the practice of law. He was previously suspended for thirty days on September 3, 1998, James v. Kentucky Bar Association, Ky., 973 S.W.2d 844 (1998); for six months on October 21, 1999, Kentuckv Bar Association v. James, Ky., 2 S.W.3d 787 (1999); and for one year with a concurrent sixty-day suspension on March 23, 2000, James v. Kentucky Bar Association, Ky., 13 S.W.3d 925 (2000). He has not been reinstated.

On November 18, 2000, the Inquiry Commission issued a three-count charge against Movant, regarding his representation of Jennifer Owens. On June 25, 1997,

Movant filed suit on Owens's behalf for damages for injuries sustained in an automobile accident. However, James was suspended from the practice of law for thirty days on September 18, 1998. Since the KBA objected to Movant's automatic reinstatement, representation of Owens was assumed by another attorney in Movant's office. However, that attorney was convicted of a felony, terminated from his employment, and automatically suspended from the practice of law on December IO-I 1, 1998. Owens was left without an attorney and remained unaware that Movant was suspended from the practice of law.

Soon thereafter, opposing counsel noticed Movant for a scheduled deposition of Owens. Movant failed to notify Owens of this fact and she did not appear for the deposition. Opposing counsel then moved to dismiss the action. Movant received notice of the motion, but failed to inform Owens of the motion and its hearing date. No one appeared in court to contest the motion and Owens's suit was dismissed on January 26, 1999. Owens did not discover this until June 1999.

Count I alleges a violation of the attorney's duty of diligence, SCR 3.130-I .3, for failing to notify Owens of her deposition, the motion for dismissal, and the dismissal of her case. Count II alleges a violation of SCR 3.130-I .4(a), the duty to keep a client reasonably informed, for failing to notify Owens of her deposition, the motion to dismiss, and the dismissal of her case. Count III alleges a violation of SCR 3.130-I .16(d), which states "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee . . . Count III alleges that Movant violated this provision by failing to have a licensed

attorney appear at Owens's deposition or dismissal hearing, and failing to have a licensed attorney file a response to the motion to dismiss.

Movant denies Counts I and II of the charges claiming that he could not have taken the actions described in those charges without engaging in the practice of law in contravention of the terms of his suspension. Movant asks that these charges be dismissed. As to Count III, Movant admits to the violation and asks to be suspended for six months from the practice of law effective March 23, 2001. Thus, Movant will have been suspended from the practice of law for a total of three years. While we regard as dubious, at best, Movant's assertion that mere notification of his client of either pending discovery or a motion to dismiss would have violated the terms of his previous suspension, the KBA does not object to Movant's proposed disposition of the charges.

Upon the foregoing facts and charges, it is ordered that Movant's motion for termination of the proceedings against him is granted. It is further ordered that:

1. The Movant, Michael L. James, is hereby suspended from the practice of law in the Commonwealth of Kentucky for a period of six months. The period of suspension shall commence on March 23, 2001 and continue until such time as Movant is reinstated to the practice of law by order of this Court pursuant to SCR 3.510 or any controlling amendment to SCR 3.510.

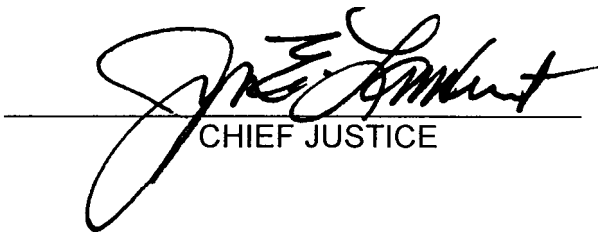
2. Counts I and II are dismissed.

3. In accordance with SCR 3.450 and SCR 3.480(3), Movant is directed to pay all costs associated with the disciplinary proceedings against him, said sum being $40.67, and for which execution may issue from this Court upon finality of this opinion and order.

4. Pursuant to SCR 3.390, Movant shall, within ten (10) days from the entry of this order, notify all clients in writing of his inability to represent them, and notify all courts in which he has matters pending of his suspension from the practice of law, and furnish copies of said letters of notice to the Director of the Kentucky Bar Association.

All concur.

ENTERED: April 26, 2001.



CHIEF JUSTICE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Lawonna Daves, Respondent.

Opinion No. 25362
Submitted August 28, 2001 - Filed September 17, 2001

DISBARRED

Henry B. Richardson, Jr. and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Lawonna Daves, pro se.

PER CURIAM: By way of the attached orders, respondent's license to practice law in Virginia was revoked. On July 10, 2001, the Clerk of this Court sent respondent a letter via certified mail to the address listed with the South Carolina Bar notifying respondent that, pursuant to Rule 29(d), RLDE, Rule 413, SCACR, she had thirty (30) days in which to inform the Court of any claim she might have that disbarment in this state is not warranted and the reasons for any such claim. The letter was returned unclaimed.

The Rules for Lawyer Disciplinary Enforcement do not provide for license revocation. However, when an attorney's license is revoked in Virginia, the attorney is not eligible for reinstatement for a period of five years from the issuance of the order of revocation and the attorney must successfully complete the Virginia State Bar Examination as a pre-condition for reinstatement. The sanction in the Rules for Lawyer Disciplinary Enforcement most similar to Virginia's revocation is disbarment. An attorney who is disbarred cannot petition for reinstatement for five years from the date of entry of the order of disbarment and the attorney must successfully complete the South Carolina Bar Examination. See Rule 33, RLDE, Rule 413, SCACR. Accordingly, we find disbarment is the appropriate sanction to impose as reciprocal discipline in this matter.

We also find a sufficient attempt has been made to serve notice on respondent, and find none of the factors in Rule 29(d), RLDE, Rule 413, SCACR, present in this matter. We therefore disbar respondent from the practice of law in this state, retroactive to March 23, 2001, the date respondent's license to practice law in Virginia was revoked by the Virginia State Bar Disciplinary Board.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
LAWONNA DAVES

VSB Docket: 98-031-3005
99-031-2839
99-031-2796

ORDER OF REVOCATION

This cause came to be heard the 23rd day of March 2001, on a Certification from the Third District Committee, Section I, before a duly convened panel of the Virginia State Bar Disciplinary Board composed of Henry P. Custis, Jr., Chair presiding, Bruce T. Clark, Chester J. Cahoon, Jr., Robert L. Freed, and Deborah A. Wilson. Charlotte P. Hodges ("Assistant Bar Counsel") appeared as Counsel to the Virginia State Bar ("VSB"). Lawonna Daves, ("Respondent") did not appear.

All legal notice of the date and place were timely sent by the Clerk of the Disciplinary System, in the manner prescribed by law.

The case was called three times; Respondent neither answered the docket call nor appeared to defend her interest. The Chair opened the hearing by polling the Board members to ascertain whether any member had a conflict of interest that would preclude him or her from serving. There were no conflicts and the hearing proceeded as scheduled.

Bar Counsel proffered the Bar's case to the Board and offered into evidence various exhibits. Virginia State Bar Exhibits Nos.1-63, docket

numbers 98-031-3005, 99-031-2796 and 99-031-2839, respectively, were admitted into evidence, without objection.

FINDINGS OF FACT APPLICABLE TO VSB DOCKET NO: 98-031-3005
(Complainant, Janet Grubbs)

Having considered the facts proffered by Assistant Bar Counsel, Charlotte P. Hodges, all exhibits introduced into evidence by Bar Counsel, without objection, as well as arguments by Bar Counsel, the Board finds by clear and convincing evidence that:

1. At all times relevant hereto the Respondent, Lawonna Daves, has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. In the matter of VSB Docket No. 98-031-3005 (Janet Grubbs), Janet Grubbs ("Complainant") hired Respondent to complete an adoption of Complainant's unborn infant.

3. Grubbs alleged that Respondent quoted a fee of $1,800-2,000, including the Guardian *ad Litem* fee. This assertion is disputed by VSB Exhibit 16, a letter dated August 15, 1997, written by Respondent and addressed to Assistant Bar Counsel, Dorothy M. Pater, wherein Respondent indicates a range of $2,000 to $2,500 for an adoption without complications, billing at an hourly rate $100.00 plus costs.

4. No written retainer agreement or contract was executed by the parties hereto.

5. The child, scheduled for adoption by Complainant, was born on March 7, 1997.

6. Complainant received a bill for services rendered May 31, 1997 in the amount of $2,397.80.

7. By letter dated August 28, 1997, Complainant terminated Respondent's services, *inter alia,* due to a fee dispute.

8. Respondent, neither acknowledged or responded to Complainant's letter terminating services, and continued to perform services on behalf of Complainant.

9. On March 23, 1998, Complainant filed, *pro se,* a Final Order of Adoption with the Prince Edward Circuit Court.

10. The Order filed, *pro se,* by Complainant was not entered by the Prince Edward Circuit Court, as Respondent was still counsel of record.

11. Complainant contacted Respondent on May 1, 1998, and requested that she formally withdraw from the case. Respondent did not file a Motion to Withdraw; instead, she sent letters to the Prince Edward Circuit Court and Henrico Juvenile & Domestic Relations District Court

stating that she was withdrawing as counsel for "nonpayment of legal fees and costs."

12. In June of 1998, Complainant was served with notice of a July 8, 1998, hearing in the Henrico County Juvenile & Domestic Relations District Court.

13. Complainant was not successful in her attempts to reach Respondent to discuss the matter and contacted a clerk in the Henrico County Juvenile Court.

14. Complainant discovered that a hearing was held on April 8, 1998, regarding the final adoption and neither Complainant nor Respondent appeared.

15. Complainant did not appear at the April 8, 1998 hearing because Respondent failed to provide her with notice of the hearing.

16. Respondent failed to attend the hearing, although she had notice.

17. At the time of the April 8, 1998 hearing, Respondent was still counsel of record; she failed to attend the hearing, continue the matter or take steps to ascertain whether new counsel had been substituted.

18. On May 20, 1998, Respondent submitted a proper Motion to Withdraw to the Prince Edward Circuit Court, after having been advised

by Complainant that her prior letter to the court was not a proper withdrawal.

19. Respondent, in her Motion to Withdraw, falsely represented to the Prince Edward Circuit Court that she was engaged in litigation against Complainant, pending in the Henrico County General District Court, for unpaid legal fees.

20. Respondent never filed a Warrant in Debt against Complainant and was not involved in any litigation at the time of her representation to the court.

NATURE OF MISCONDUCT APPLICABLE TO VSB DOCKET NO: 98-031-3005

The Board unanimously finds that Respondent violated the following Disciplinary Rules of the Virginia Code of Professional Responsibility:

DR 1-102 (A)(4)

DR 2-108 (A) (3) and (D)

DR 6-101 (B)

DR 7-102 (A)(5) & (8)

FINDINGS OF FACT APPLICABLE TO VSB DOCKET NO: 99-031-2839

(Complainant, James H. Nunnery)

21. Complainant, James H. Nunnery, contacted Respondent in the fall of 1997 to discuss pursuing a wrongful death action either on his behalf and/ or that of the decedent's sisters.

22. Complainant met with Respondent in November of 1997 and provided her with all of the decedent's medical records.

23. Although no fee agreement was signed, it was agreed that Respondent would be paid on the basis of a contingency fee.

24. Following the November, 1997 meeting it was Complainant's belief that Respondent had agreed to handle the case.

25. Between November 1997 and the spring of 1998, Complainant and Respondent spoke several times regarding the wrongful death matter. Respondent always responded that she was, "looking into it."

26. In early 1998, there was no contact between Complainant and Respondent for a period of approximately three months, notwithstanding repeated attempts by Complainant to contact Respondent.

27. In June 1998, Complainant spoke with Respondent regarding the statute of limitations in the wrongful death matter and was told that a year remained to file the action.

28. Commencing June, 1998 and continuing until on or about March or April 1999, Complainant left several telephone messages for Respondent that were unanswered and shortly thereafter received a recording stating that the phone had been disconnected.

29. On April 28, 1999, Complainant sent Respondent a certified letter that was returned, unclaimed, to him.

30. Complainant received the decedent's medical records from the Respondent, following the filing of his Complaint with the Virginia State Bar.

31. Following receipt of decedent's medical records, approximately five weeks remained before the tolling of the statute of limitations in the wrongful death action.

NATURE OF MISCONDUCT APPLICABLE TO VSB DOCKET NO: 99-031-2839
(Complainant, James H. Nunnery)

Prior to the deliberation by the Board, the Bar withdrew allegations that Respondent violated DR 7-101 (2). The Board unanimously finds that Respondent violated the following Disciplinary Rules of the Virginia Code of Professional Responsibility:

DR 2-108 (D)

DR 6-101 (B) (C) and (D)

DR 7-101 (A)(1) (3)

FINDINGS OF FACT APPLICABLE TO VSB DOCKET NO: 99-031-2796

(Complainant, Clyde E. Wilson and Arienne A. Boyer)

32. On or about March 3, 1999, Complainants, Clyde Wilson and Arienne Boyer, hired Respondent to initiate a divorce action on behalf of Complainant, Wilson, a resident of the Commonwealth of Virginia.

33. On or about March 3, 1999, Complainants paid Respondent, via money order, the sum of $600.00 to represent Wilson in this matter.

34. No written contract or fee agreement was executed by the parties.

35. The funds were deposited into an account, other than a trust account, at a time when some or all of the fee had not been earned.

36. Respondent informed Complainants that it would be necessary for her to research issues, as she had never filed a divorce in South Carolina.

37. A few weeks following Respondent's review of the facts presented to her by Complainants, Respondent contacted the client. She, apparently, determined that the appropriate jurisdiction for filing Wilson's divorce action was South Carolina and not Virginia. She advised Complainant that she was also licensed in that state and could assist in the matter. She stated that she would prepare the paper work and immediately begin the process.

38. Two weeks passed and Complainants did not hear from Respondent, despite attempts to contact her. They later learned that her business phone had been disconnected and had no way of contacting her.

39. For approximately three weeks, following Complainant's knowledge that Respondent's phone had been disconnected, they unsuccessfully attempted to contact her via telephone and mail.

40. Complainants were contacted by Respondent on or about April 19, 1999, provided with a South Carolina phone number, and informed that she was visiting in South Carolina.

41. Respondent returned a call to Complainants on April 21, 1999 and stated that she had filed a Complaint, a few days prior; she also stated that a copy had been mailed to them.

42. Complainants tried contacting Respondent, commencing April 26, 1999, through May 17, 1999, to inform her that they had not received the Complaint and summons. Complainants reached Respondent on two occasions and were told that the documents would again be mailed. On May 17, 1999, Complainant, Boyer, left a message with Respondent's mother terminating Respondent's representation in the case.

43. On May 17, 1999, Boyer contacted the Family Court in Spartanburg and was informed by Anna Lancaster, an employee in the clerk's office, that no complaint had been filed.

44. On May 19, 1999, Complainants sent a certified letter to Respondent formally terminating her representation in the case. A request was also made for return of monies paid, as Respondent had not performed the work for which she was hired.

45. On May 20, 1999, Respondent personally signed the receipt acknowledging the certified letter sent by Complainants, terminating her representation.

46. On May 21, 1999, Respondent sent Complainants copies of a Complaint, Settlement Agreement and two bills for services.

47. The summons and complaint were filed and stamped by the court on May 21, 1999 and not April 21, 1999.

48. Documents contained in Respondent's file appear to have been altered or fabricated to reflect that work had been done as represented by Respondent to Complainants.

49. Complainant Wilson's complaint was eventually dismissed and removed from the court's docket for failure to prosecute.

50. Respondent failed to cooperate with the Virginia State Bar's investigative efforts to obtain documentation relating to her trust account records in this case; the Bar was forced to seek the desired information through the assistance of the South Carolina Bar.

Upon conclusion of the Bar's proffer in VSB Docket No: 99-031-2796, Board Member, Bruce Clark, raised the issue of jurisdiction, as the action before the Board involved a divorce action that was initiated in the state of South Carolina.

The Bar argued that the Complainants lived in the Commonwealth of Virginia and hired Respondent because she was a Virginia lawyer. The fact that she was a South Carolina attorney was an added bonus and did not form the basis of the initial attorney client relationship. Moreover, the evidence proffered by the Bar established that Respondent was not confident that she would be able to initiate a divorce action in South Carolina and stated that she would have to research the issue. Complainant's formally engaged Respondent on March 3, 1999, in her Virginia office, with the understanding that she would be practicing in the Commonwealth of Virginia. It was following the establishment of the attorney client relationship in Virginia that Respondent announced that she would file the divorce action in South Carolina.

Supreme Court Rule 8:5 (a) provides in relevant part that:

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

The Board finds that Respondent, as a member of the Virginia State Bar, is properly before the Board and is subject to the disciplinary authority of this jurisdiction. The Bar has satisfactorily proven its case by clear and convincing evidence and Respondent is subject to the sanction(s) imposed by this Board, herein.

NATURE OF MISCONDUCT APPLICABLE TO VSB DOCKET NO: 99-031-2796
(Complainant, Clyde E. Wilson and Arienne A. Boyer)

The Board unanimously finds that Respondent violated the following Disciplinary Rules of the Virginia Code of Professional Responsibility:

DR 1-102 (A) (1)(3) and (4)

DR 2-105 (A)

DR 2-108 (D)

DR 6-101 (A)(1)(2); (B) (C)

DR 7-101 (A) (2)

DR 7-102(A) (5)(6)(8)

DR 9-102 (A)(2) and (B)(3)(4)

DR 9-103 (A)(1)(2)(3) and (4)

Rule 8:1 (c) and (d)

IMPOSITION OF SANCTIONS

The Board took into consideration the instant matter, as well as, Virginia State Bar Docket Nos: 98-031-3005 and 99-031-2839.

Accordingly, it is **ORDERED** that the license to practice law in the Courts of this Commonwealth heretofore issued to **LAWONNA DAVES**, Esquire, be and the same is hereby **REVOKED**, effective March 23, 2001.

IT IS FURTHER ORDERED pursuant to the provisions of Part Six, Section IV, Paragraph 13 (K)(1) of the Rules of the Supreme Court of Virginia, that Respondent shall forthwith give notice by certified mail, return receipt requested, of the revocation of her license to practice law in the Commonwealth of Virginia, to all clients for whom she is currently handling matters and to all opposing counsel and presiding judges in pending litigation in which she is involved. The Attorney shall also make appropriate arrangements for the disposition of matters then in her care conforming to the wishes of her clients. The Attorney shall give such notice within fourteen days of the effective date of the revocation order,

and shall make such arrangements as are required herein within forty-five (45) days of the effective date of the revocation order. The Attorney shall furnish proof to the bar within sixty (60) days of the effective date of the revocation order that such notices have been timely given and such arrangements for the disposition of matters made. Issues concerning the adequacy of the notice and arrangements required herein shall be determined by the Disciplinary Board, which may impose a sanction of revocation or suspension for failure to comply with the requirements of this paragraph.

FURTHER ORDERED that Respondent, Lawonna Daves, shall furnish true copies of all the notice letters sent to all persons notified of the revocation, with the original return receipts for said notice letters to the to the Clerk of the Disciplinary System, on or before May 22, 2001.

FURTHER ORDERED that the Clerk of the Disciplinary System send an attested and true copy of this Opinion Order to Respondent, Lawonna Daves, by certified mail, return receipt requested, at her address of record with the Virginia State Bar, 751 Daves Road, York, South Carolina 29745 and to Charlotte P. Hodges, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Catharina M.K. Blalock, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, was the reporter for the hearing and having been duly sworn, transcribed the proceedings.

The Clerk of the Disciplinary System shall assess costs pursuant to Part 6, § IV, ¶ 13(K)(10) of the *Rules of the Virginia Supreme Court*.

ENTER THIS ORDER THIS 17 DAY OF April, 2001

VIRGINIA STATE BAR DISCIPLINARY BOARD

By Henry P. Custis, Jr.
Chair

A COPY TESTE:
Barbara S. Lanier
BARBARA SAYERS LANIER
CLERK OF THE DISCIPLINARY SYSTEM

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

LaWonna Daves

Respondent

VSB Docket # 98-031-3005
99-031-2796
99-031-2839

O R D E R

On March 23, 2001, the above-referenced matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony and documentary evidence, it is ORDERED that Respondent's license to practice law in the Commonwealth of Virginia is

_____ Suspended for a period of _____,

✓ Revoked,

effective March 23, 2001.

The Board notes for the record in this matter that

_____ The Respondent was present in person and was advised of the imposition of the sanction and the effective date of the sanction; and

✓ The Respondent was not present in person, but the Clerk of the Disciplinary System is directed to communicate promptly to the Respondent the actions of the Board; and

that the Board shall issue a written opinion in this matter which, when issued, shall be attached hereto and incorporated herein by reference.

It is further ORDERED that pursuant to the provisions of Part Six, Section IV, Paragraph 13(K)(1) of the Rules of the Supreme Court of Virginia, that the Respondent shall forthwith give notice by certified

mail, return receipt requested, of the

_____ Suspension

__✓__ Revocation

of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Attorney shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. The Attorney shall give such notice within fourteen (14) days of the effective date of the Revocation order, and make such arrangements as are required herein within forty-five (45) days of the effective date of the Revocation order. The Attorney shall furnish proof to the bar within sixty (60) days of the effective date of the Revocation order that such notices have been timely given and such arrangement for the disposition of matters made. Issues concerning the adequacy of the notice and arrangements required herein shall be determined by the Disciplinary Board, which may impose a sanction of revocation or suspension for failure to comply with the requirements of this subparagraph.

Pursuant to Part Six, § IV, ¶ 13(K)(10) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.

It is further ORDERED that a copy teste of this Order shall be mailed by Certified Mail, Return Receipt Requested, to the Respondent, at his last address of record with the Virginia State Bar and hand-delivered to Bar Counsel.

ENTER THIS ORDER THIS 23 DAY OF March, 2001

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____, Chair

A COPY TESTE:
Barbara S. Lanier
BARBARA SAYERS LANIER
CLERK OF THE DISCIPLINARY SYSTEM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jane and John Doe,	Respondents,
v.	
Travis Queen, John Roe (Fictitious Name), and Baby Boy Tanner, a Minor under the age of Seven (7) years,	Defendants,
Of Whom Travis Queen is	Petitioner.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS

Appeal From Spartanburg County
John M. Rucker, Family Court Judge

Opinion No. 25363
Heard June 7, 2001 - Filed September 17, 2001

REVERSED

Richard H. Rhodes, of Burts, Turner, Rhodes & Thompson, and Ruth L. Cate, both of Spartanburg, for petitioner.

Desa Ballard, of West Columbia, and James Fletcher Thompson, of Thompson & Sinclair, of Spartanburg, for respondents.

Karen M. Quimby, of Spartanburg, Guardian Ad Litem, and J. Kevin Owens, of Butler, Means, Evins & Browne, PA, of Spartanburg, for Guardian Ad Litem.

JUSTICE WALLER: This is an adoption case. Respondents, the Does, sought to adopt Baby Boy Tanner contending the biological father's, Travis Queen's, consent to adoption was not required; alternatively, they sought termination of Queen's parental rights. The family court held Queen's consent to adoption was necessary and denied termination. A two-judge majority of the Court of Appeals reversed, finding Queen's consent to adoption unnecessary; Judge Howard dissented. We find the evidence in this case supports the ruling of the family court. We therefore reverse the Court of Appeals' opinion and reinstate the family court's order.

FACTS

Queen and the birth mother lived together in Kings Mountain, North Carolina from November 1997 to February 1998. In January 1998, Mother informed Queen she was pregnant and wanted an abortion; Queen objected and attempted to talk her out of it. Queen and Mother continued living together for several more weeks, but Mother left in February when the couple couldn't "get past" Mother's desire to have an abortion. Thereafter, Mother told Queen she

had already gone to Atlanta and aborted the pregnancy.[1]

In June 1998, Mother and her new boyfriend signed a criminal warrant against Queen for assault with a deadly weapon.[2] A condition of Queen's bond was that he have no contact with Mother. A consent order dated July 6, 1998, prohibited Queen from going near her for one year.

Tanner was born on September 21, 1998. Because Mother withheld Queen's address on the Consent for Adoption form, Queen was not notified of the birth until November 1998. When the Does' attorney requested Queen to sign papers consenting to the adoption, Queen responded that he needed to consult an attorney. Queen obtained an attorney, but did not file responsive pleadings until the day of the hearing.[3] In the interim between being advised of Tanner's birth and the hearing in August, Queen prepared a nursery and arranged for medical insurance. Queen also testified he had a bank account in which there were savings for Tanner, and that he had been putting money away since learning of Tanner's birth.

Simultaneously, the Does obtained an order in February 1999 preventing disclosure of their identity to either Queen or his attorney. Although Queen did not make any monetary contributions to Tanner during this period of time, he testified that he had always been willing to do so, but did not know the name or whereabouts of Tanner or the adoptive parents. He also testified he would reimburse them for their expenses.

By order dated September 15, 1999, the family court held Queen's consent

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[1] The precise date on which mother told Queen she had had an abortion is unclear from the record.

[2] Queen was found not guilty of the criminal charges.

[3] A supplemental order indicates Queen's attorney received an extension giving "an unlimited time to file responsive pleadings."

to adoption was required pursuant to S.C.Code Ann. § 20-7-1690 (Supp.1999) and Abernathy v. Baby Boy, 313 S.C. 27, 437 S.E.2d 25 (1993). He then concluded Queen's parental rights should not be terminated under S.C.Code Ann. §§ 20-7-1572(3) & (4) (Supp.1999), for failure to visit and failure to support, and ordered a gradual transfer of custody to Queen.[4]

The Court of Appeals majority reversed, finding Queen had failed to meet the literal requirements of S.C. Code Ann. § 20-7-1690(A)(5)(b)(Supp. 1999)(requiring father to pay fair and reasonable sum for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses). The Court of Appeals went on to hold that Queen's failure to support was not excusable under this Court's opinion in Abernathy v. Baby Boy, 313 S.C. 27, 437 S.E.2d 25 (1993). Judge Howard dissented, finding Queen had made a sufficient commitment to assume parental responsibility under Abernathy.

ISSUE

Did the family court properly hold Queen made sufficient prompt and good faith efforts to assume parental responsibility?

DISCUSSION

In Abernathy v. Baby Boy, 313 S.C. 27, 437 S.E.2d 25 (1993), this Court held that, in certain limited circumstances, a biological father need not comply with the literal requirements of S.C. Code Ann. § 20-7-1690(A)(5)(b)(Supp.

[4] Since that time, Queen has been permitted visitation for the duration of 4 hours every other weekend. The Does unsuccessfully sought a stay of the family court's transfer of custody, and, thereafter sought, and were denied, supersedeas from the Court of Appeals on two occasions to prevent the visitation.

2000), which requires a father provide for the support of his child before the State must seek his consent to the adoption of the child. We noted that "an unwed father may possess a relationship with his child that is entitled to constitutional protection." 313 S.C. at 31, 437 S.E.2d at 28 (citing Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)). "However, this opportunity interest is constitutionally protected only to the extent that the biological father who claims protection wants to make the commitments and perform the responsibilities that give rise to a developed relationship, because it is only the combination of biology and custodial responsibility that the Constitution ultimately protects." Id.

In Abernathy, the biological father (Father) attempted to provide monetary support to the Mother during her pregnancy, but his offers were rejected by her.[5] In addition, Father attempted to keep apprized of Mother's progress during the pregnancy, but she shielded herself from contact with him, even to the point of complaining to her superiors that Father was harassing her. From the opinion in Abernathy, it appears Father had no contact with Mother from September 1991 until the baby's birth on Jan. 25, 1992. Father did not pay the childbirth expenses as they were covered by the mother's insurance. After the birth of the child, Mother consented to adoption while Father was stationed elsewhere in the Navy. Father contested the adoption, and requested custody. This Court found Father had made sufficient good faith efforts to provide support.

Pursuant to Abernathy, we find Queen made sufficient good faith efforts to excuse him from the literal requirements of the statute.

Initially, we find Queen should not be penalized for his actions, or lack thereof, prior to Tanner's birth. Mother left their apartment when she was

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[5] Unlike the present case, the Mother in Abernathy never indicated she intended to abort the pregnancy. It appears from the transcripts in Abernathy that Mother there used only $190.00 of Father's money. Similarly, Queen here testified the biological mother took approximately $200.00 from their joint checking account.

approximately 8-10 weeks pregnant, telling Queen she intended to have an abortion. She thereafter lied, telling him she had, in fact, had an abortion in Atlanta. She then made every attempt to conceal from Queen the fact that she had not had an abortion, effectively isolating herself from him and, through court orders, ensuring that Queen could have no contact with her until well after the baby's birth.[6]

As we noted in Abernathy, "an unwed father's ability to cultivate his opportunity interest in his child can be thwarted by the refusal of the mother to accept the father's expressions of interest in and commitment to the child. . . . To mandate strict compliance with section 20-7-1690(A)(5)(b) would make an unwed father's right to withhold his consent to adoption dependent upon the whim of the unwed mother." 313 S.C. at 32-33, 437 S.E.2d at 29. This is clearly such a case Given Mother's representations that she had obtained an abortion, coupled with her extraordinary efforts to conceal her pregnancy from Queen, we find the preponderance of the evidence amply demonstrates that Queen's failure to support during the pregnancy was through no fault of his own and, accordingly, we decline to require literal compliance with the statute.

Moreover, we find Queen's actions subsequent to learning of Tanner's birth demonstrate "sufficient prompt and good faith efforts to assume parental responsibility."

The family court found Queen had made sufficient efforts in that he had "established a nursery, arranged for health insurance and began a savings account for the child." We agree. While Queen conceded he had not paid support during the ten-month period prior to the hearing, he testified he was willing to do so, and would reimburse the adoptive parents for their expenses.

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[6] The Court of Appeals insinuated Queen knew, or should have known, Mother was still pregnant. There is simply no evidence to this effect. The mere fact that Queen sat across a courtroom from Mother when she was allegedly quite far along in pregnancy is patently insufficient, without more, to charge him with such knowledge.

Further, due to a February 1999 order preventing the disclosure of the identity of the adoptive parents, Queen was unaware of the name or identity of the Does, and/or their location. Under these circumstances, we simply cannot say that Queen's failure to support or visit Tanner defeats his constitutional interest in establishing a relationship with his son.

When approached by the Doe's attorney, at which time Queen learned of Tanner's existence, Queen declined to sign a consent to adoption, instead indicating he needed to contact his attorney. For reasons unknown to this Court, his attorney sought and obtained an unlimited extension in which to file responsive pleadings such that an answer to the Doe's complaint was not filed until the day of the hearing. Although Queen testified he was willing and able to support the child, and had money in savings for Tanner, his mother testified that Queen's attorney never advised him to send any money to the Does.

Given the circumstances of this case, and the fact that the Does were unwilling to reveal their identity or whereabouts, we find Queen took the only reasonably available alternative measures, to wit, establishing a nursery, putting money in a bank account, and taking steps to provide for Tanner when he received custody. In our view, under the very limited facts of this case, we find Queen demonstrated sufficient prompt and good faith efforts to assume parental responsibility pursuant to Abernathy such that his literal compliance with section 20-7-1690 (A)(5)(b) is excused. Accordingly, we concur with the family court that the adoption was properly denied and custody of Tanner should be transferred to Queen. The Court of Appeals majority opinion is

REVERSED.

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

JUSTICE PLEICONES: Because I agree with the reasoning employed and the result reached by the Court of Appeals, I respectfully dissent. In my opinion, Queen has not met the stringent requirements necessary to excuse strict compliance with the legislative mandate articulated in S.C. Code Ann. § 20-7-1690 (A) (5) (b) (Supp. 2000), as outlined by this Court in Abernathy v. Baby Boy, 313 S.C. 27, 437 S.E.2d 25 (1993).

The majority finds the fact that Mother withdrew approximately $200 from the checking account she shared with Queen to be a significant contribution to the birth mother. However, Queen testified that both he and Mother deposited money into the account. Thus, it is speculative to assume the money withdrawn from the account by the mother had not been deposited by her.

The majority further finds that Queen opened a savings account for Tanner and deposited funds therein. The record, in my opinion, is far from clear on this point. When asked if he had a savings or checking account, Queen responded that he had close to six thousand dollars in a checking account and ten thousand dollars in a savings account. When asked if he had set funds aside for Tanner, Queen responded, "I would initially take two thousand dollars out of my savings and put into his savings account." He then said that he had been doing so since the child's birth. However, when opposing counsel attempted to clarify Queen's response, she asked, "What was the two thousand dollars? I didn't understand that. First we talked about six thousand in one and ten thousand in another one and now two thousand is going somewhere else?" Queen responded, "My oldest son[7] has an account open for him that I initially put two thousand dollars in. It's gonna grow interest, and I deposit a hundred dollars a month in it."

While the biological father in Abernathy offered to support the child, turned over his bank account and automobile to the mother during her pegnancy, and offered to take care of the child should the mother wish to pursue her education, Queen made no effort to support Tanner after learning of his birth.

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[7]Queen has another son for whom he does provide support.

He explained that he chose not to send money to the adoptive parents for Tanner's support because he did not want to give them money with which to pay their attorney. His efforts were limited to purchasing a crib, taking preliminary steps aimed at procuring health insurance for Tanner, and planning to open savings account.

I agree with the Court of Appeals' description of Queen's acts as "mere preparations for a potential change in custody," and its finding that he made "no effort to actually support Tanner pending the potential change in custody." Doe v. Queen, 324 S.C. 204, 211, 535 S.E.2d 658, 662 (Ct. App. 2000). I cannot agree that Queen's scant efforts exhibit a full commitment to the responsibilities of parenthood as required by Abernathy, and therefore would affirm the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Lazarus M. Brannon and Joe Nathan Mayberry,

Appellants.

Appeal From Cherokee County
Gary E. Clary, Circuit Court Judge

Opinion No. 3387
Heard June 4, 2001 - Filed September 10, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, of Columbia, for appellants.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Holman C. Gossett, of Spartanburg, for respondent.

HUFF, J.: Lazarus M. Brannon and Joe Nathan Mayberry appeal from their convictions for trafficking in crack cocaine. Both were sentenced to twenty-five years imprisonment and a $50,000.00 fine. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On the evening of January 15, 1999, Agent Darrell Duncan of the Cherokee County Sheriff's Department received information from a confidential reliable informant that Brannon was driving to New Jersey to pick up a quantity of crack cocaine. Duncan testified he had received information from the informant before, all information he previously received from the informant had been reliable, and he had obtained a conviction for trafficking based on the informant's information. Duncan stated he could not recall whether the confidential informant told him he received this information from Brannon or from a woman named Cat, who was unknown to Duncan.

The following night, Agent Duncan received a telephone call from a woman who identified herself only as Cat. She informed Deputy Duncan that Brannon and "Joe Cool" would be driving back to Cherokee County at approximately 9:00 that night, on highway I-85, with a quantity of cocaine in their car. Cat described the car to Deputy Duncan and gave him the tag number. She stated the cocaine was in the trunk of the car, hidden under the carpet, and she had observed them placing the drugs there. Duncan had never before received information from Cat, and he considered it to be an anonymous tip. Officer David Parker, assigned at that time to the Metro Narcotics Unit of the Gaffney Police Department, testified he knew the car in question from a previous narcotics investigation involving Brannon. Agent Duncan ran the tag number and found it was registered to Brannon.

Based on the information they received, Agent Duncan and Officer Parker estimated a time of arrival and set up surveillance in an unmarked vehicle on I-85, just inside the South Carolina border. At approximately 8:00

a.m., they made visual contact with the vehicle in which Brannon and Mayberry were riding. Officer Parker, who was driving the unmarked car, testified the vehicle sped up upon passing their car, although he did not know how fast it was going. The officers began following the car, and the driver took the first exit in South Carolina. The driver then pulled into and parked at a Wendy's restaurant parking lot.

Brannon and Mayberry got out of the vehicle and began walking toward the Wendy's restaurant. The pair were acting nervous, jumping out of the vehicle quickly and walking away at a fast pace with their heads down. When the officers asked to talk to them, Brannon and Mayberry kept walking. Because of the pair's behavior, and the fact they had information Brannon and Mayberry would possibly try to run, the officers immediately intercepted them, placed them in handcuffs and read them their Miranda rights. A few other officers arrived on the scene. Officer Parker told Brannon and Mayberry he had information they had narcotics in the vehicle, and asked Brannon for his written consent to a vehicular search. Brannon acquiesced. A search of the trunk of the vehicle revealed two soap boxes containing over five ounces of crack cocaine under the carpet.

At trial, Brannon moved to suppress all evidence seized from the vehicle and all statements made during the detention on the ground his immediate detention and handcuffing resulted in an involuntary consent to search. Mayberry specifically declined to join in the motion. The trial court denied the motion to suppress, finding Brannon's consent to search the vehicle was voluntarily given.

ISSUE

The only issue raised on appeal is whether the trial court erred in refusing to suppress the crack cocaine and statements made by Brannon and Mayberry.

LAW/ANALYSIS

I. Mayberry's Appeal

As an initial matter, we note the issue challenged on appeal is not preserved for review in regard to Mayberry. Mayberry neither raised the issue at trial nor joined in Brannon's motion to suppress. See State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (appellant may not bootstrap an issue for appeal by way of a co-defendant's objection). In fact, Mayberry conceded at trial he had no standing to contest the admission of the evidence on this basis. See State v. Benton, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (an issue conceded in the trial court cannot be argued on appeal).

II. Brannon's Appeal

On appeal, Brannon contends the trial judge erred in failing to suppress the evidence seized and subsequent statements made because "he was detained and handcuffed before ever giving 'consent' to search." We disagree.[1]

The admission of such evidence is within the sound discretion of the trial judge whose ruling will not be disturbed on appeal absent an abuse of discretion. State v. Dorce, 320 S.C. 480, 483, 465 S.E.2d 772, 773 (Ct. App. 1995). In criminal cases, this court sits to review errors of law only, and we are bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, ___, S.C. ___, ___, 545 S.E.2d 827, 829 (2001). The appellate

[1] Brannon also summarily contends on appeal that the evidence and statements should have been suppressed because they were obtained as a result of an "illegal arrest." Brannon did not raise this "illegal arrest" argument below, but only that the circumstances rendered the consent involuntary. See State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (an argument is procedurally barred when it is not raised in the lower court; a party cannot argue one ground below and then argue another ground on appeal).

court does not re-evaluate the facts, but simply determines whether the trial judge's ruling is supported by any evidence. Id.

Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. The State bears the burden of establishing voluntariness of the consent. State v. Dorce, 320 S.C. at 482, 465 S.E.2d at 773; State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). The "totality of the circumstances" test applies whether the consent was given in a noncustodial or custodial situation. Wallace, 269 S.C. at 550, 238 S.E.2d at 676. In a custodial situation, the custodial setting is a factor to be considered in determining whether consent was voluntarily given. Id. at 552, 238 S.E.2d at 677. Custody alone, however, is not enough in itself to demonstrate a coerced consent to search. See United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 828 (1976) (no involuntary consent shown where defendant was arrested and in custody, but consent was given while on a public street and not in confines of a police station, he was given his Miranda warnings, and he was cautioned the results of the search of his car could be used against him); see also Wallace, 269 S.C. at 552, 238 S.E.2d at 677 (custody itself is not enough to invalidate a consent search).

Considering the "totality of the circumstances" in this case, we find no abuse of discretion in the trial judge's finding that Brannon's consent was voluntarily given. While he was clearly in custody at the time consent was given, custody alone does not vitiate a consent for search. There is no evidence of any overt act or threat of force against Brannon, nor promises made or any other form of coercion. Further, it is undisputed Brannon was given his Miranda warnings prior to executing the written consent. We therefore find there was evidence to support the trial judge's ruling.

For the foregoing reasons, appellants' convictions are

AFFIRMED.

SHULER, J., concurs.

ANDERSON, J., concurring in result only in a separate opinion.

ANDERSON, J. (concurring in result only): I respectfully concur in result only. I disagree with the reasoning and analysis of the majority. The reliance by the majority on the consent given by Brannon is unnecessary. I do not deal with the issue of consent because the principle of "probable cause" is dispositive. This case presents the quintessential "probable cause" conundrum.

I. WARRANTLESS SEARCH

Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well recognized exceptions to the warrant requirement. Dupree, 319 S.C. at 456, 462 S.E.2d at 281; State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981). These exceptions include: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) automobile exception; (5) "plain view" doctrine; (6) consent; and (7) abandonment. Dupree, 319 S.C. at 456-57, 462 S.E.2d at 281. The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution. State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). See also Dupree, 319 S.C. at 456, 462 S.E.2d at 281 (burden is upon State to justify warrantless search).

II. AUTOMOBILE EXCEPTION TO WARRANT REQUIREMENT

A warrantless search of a vehicle may be made if (1) there is probable cause to believe the vehicle contains evidence of a crime; and (2) there are exigent circumstances arising out of the mobility of the vehicle and its consequently likely disappearance if the search is not executed immediately. This is commonly referred to as the Carroll Doctrine. See Carroll v. United States, 267 U.S. 132, 149, 45 S.Ct. 280, 283-84, 69 L.Ed. 543, 549 (1925)(holding "the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle

contains that which by law is subject to seizure and destruction, the search and seizure are valid.").

The two bases for the exception are: (1) the ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles which are subject to governmental regulation. State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986). When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes–temporary or otherwise–the two justifications for the vehicle exception come into play. California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Id. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulations inapplicable to a fixed dwelling. Id.

A. Probable Cause

Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. Wortman v. City of Spartanburg, 310 S.C. 1, 425 S.E.2d 18 (1992); State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999).

The standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant. State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978); State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). "That is, a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." Bultron, 318 S.C. at 332, 457 S.E.2d at 621. See also State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987)(determination of probable cause depends on totality of circumstances).

In State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995), our Supreme Court discussed probable cause:

> "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." "And in determining whether the officer acted reasonably . . . due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from facts in light of his experience." Mere suspicions of the officer will not support a finding of probable cause.
>
> . . . .
>
> . . . The "experience of a police officer is a factor to be considered in the determination of probable cause, . . . but the relevance of the suspect's conduct should be sufficiently articulable that its import can be understood by the average reasonably prudent person."

Dupree, 319 S.C. at 458-59, 462 S.E.2d at 282 (citations omitted).

B. Exigent Circumstances

Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). The opportunity to search an automobile is fleeting since a car is readily movable. Id. An immediate intrusion is necessary because of the nature of an automobile in transit. United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). The mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49

L.Ed.2d 1000 (1976). See also 79 C.J.S. Searches and Seizures § 84 (1995)(mobility of vehicle gives rise to exigency justifying search). The ready mobility of the vehicle is one of the principal bases of the automobile exception. California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985).

C. Probable Cause Alone is Sufficient Under Automobile Exception

The automobile exception allows law enforcement officials to conduct a search of an automobile based on probable cause alone due to the lessened expectation of privacy in motor vehicles traveling on public highways. State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986); State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). See also 68 Am. Jur. 2d Searches and Seizures § 268 (2000)(warrantless search of car is valid under Fourth Amendment, so long as search is based on probable cause). The Supreme Court, in State v. Cox, examined the principle of "probable cause" as it relates to the automobile exception:

> The [California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985)] Court makes clear that under the automobile exception, probable cause alone is sufficient to justify a warrantless search. As the Court stated, "the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches [of vehicles] without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met." That is, the inherent mobility of automobiles provides the requisite exigency.

Cox, 290 S.C. at 492, 351 S.E.2d at 571-72 (emphasis in original)(citation omitted).

Under the automobile exception, if probable cause exists to justify the warrantless search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999); Bultron, 318 S.C. at 332, 457 S.E.2d at 621.

III. AUTOMOBILE EXCEPTION APPLICABLE TO CASE AT BAR

Probable cause to search Brannon's vehicle existed under the facts of the instant case. On January 15, 1999, Agent Darrell Duncan received information from a reliable confidential informant that Brannon was driving to New Jersey to pick up a quantity of crack cocaine. Duncan had received information from the informant before. All information he previously received from the informant had been reliable. Moreover, Duncan testified the State had obtained a conviction for trafficking based on information provided by the informant.

In addition, on January 16, 1999, Duncan received an anonymous tip from a woman who identified herself as "Cat." Cat advised Duncan that Brannon and "Joe Cool" would be driving back to Cherokee County on highway I-85 at about 9:00 p.m. that night with a quantity of cocaine in the car. She supplied Duncan with vital information: the tag number and a description of the car. Cat stated the drugs were in the trunk of the car, hidden under the carpet. She had observed the men place the drugs there. Officer David Parker knew the vehicle in question from a prior narcotics investigation involving Brannon. When Agent Duncan ran the tag number, he discovered the car was registered to Brannon.

Based on the information they received, Agent Duncan and Officer Parker set up surveillance on I-85. Around 8:00 a.m., they observed the vehicle in which Brannon and Mayberry were riding. The vehicle sped up upon passing the unmarked police car. The officers followed the car, which took the first exit in South Carolina and pulled into a Wendy's parking lot. Brannon and Mayberry quickly jumped out of the vehicle and walked at a fast pace with their heads down toward the Wendy's restaurant. The men were acting nervous. When the officers asked to speak with them, Brannon and Mayberry continued walking. Due to the suspicious behavior of the pair, and the fact that the officers possessed information that Brannon and Mayberry would possibly try to run, the officers stopped them, placed them in handcuffs, and read them their rights.

The law enforcement officers had probable cause to believe Brannon and Mayberry were transporting drugs in the vehicle pursuant to the tips from the reliable confidential informant and the anonymous informant. Accordingly, the warrantless search of the vehicle was proper under the automobile exception without resort to a "consent" analysis.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lowcountry Open Land Trust,

Respondent,

v.

State of South Carolina and James A. Atkins, of Whom James A. Atkins is,

Appellant.

Appeal From Charleston County
Roger M. Young, Master-In-Equity

Opinion No. 3388
Heard March 5, 2001 - Filed September 10, 2001

AFFIRMED

Newman Jackson Smith, of Nelson, Mullins, Riley & Scarborough, of Charleston; and Kenneth P. Woodington, of Columbia, for appellant.

W. Foster Gaillard and Elizabeth Henry Warner, both of Buist, Moore, Smythe & McGee, of Charleston, for respondent.

SHULER, J.: In this quiet title action, James A. Atkins appeals the master-in-equity's ruling that Lowcountry Open Land Trust, as fee simple owner of tidelands adjoining the Ashley River, can bar Atkins from "wharfing out" over its land to obtain access to the river. We affirm.

FACTS/PROCEDURAL HISTORY

By deed dated June 7, 1991, the Legare family donated 448.40 acres of marshland on the west bank of the Ashley River to Lowcountry Open Land Trust (LOLT).[1] Two months later James Atkins purchased an adjacent upland lot. Thereafter, the South Carolina Department of Health and Environmental Control (DHEC) provisionally approved a permit authorizing Atkins to build a sixty-foot dock across LOLT's property to the Ashley River.

On June 3, 1996, LOLT filed a declaratory judgment action against the State of South Carolina pursuant to S.C. Code Ann. § 48-39-220 (1987),[2]

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[1] LOLT is a non-profit, charitable corporation formed to preserve and protect coastal areas in South Carolina by obtaining title to real property and conservation easements.

[2] This section provides for a legal action against the State to determine an interest in tidelands, defined as "all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters." S.C. Code Ann. § 48-39-220(A) (1987). As will we, the master used the technically distinct terms "tidelands" and "marshlands" interchangeably. See S.C. Code § 48-39-10(G) (1987) ("'Tidelands' means all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas . . . . Coastal wetlands include marshes, mudflats, and shallows and means those areas periodically inundated by saline waters . . . ."); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 477 n.6 (1988) (stating Court jurisprudence

seeking a declaration of fee simple title to the 448.40-acre tidelands tract. The court permitted Atkins to intervene, and referred the case to the Master-in-Equity for Charleston County on January 20, 1998.[3]

The master held a trial on May 10, 1999 on partly-stipulated facts, including the following:

> LOLT is record owner of a 448.40 acre tract of marshland ("the 448 acre tract") located on the Ashley River in Charleston County . . . . By stipulating that LOLT is the record owner of the 448 acre tract, the State of South Carolina does not concede that LOLT owns the tidelands.
>
> Purported titled to the tract derives from that certain Grant of the State of South Carolina dated March 7th, 1836, pursuant to an Act of the Legislature entitled "An Act for Establishing the Mode of Granting the Lands Now Vacant in This State, and for Allowing a Commutation to be Received for Some Lands That Have Been Granted" passed the 19th day of February, 1791, said Grant being executed by George McDuffie, Governor and Commander-in-Chief in and over the State of South Carolina, to Edward C. Peronneau, filed in the South Carolina Department of Archives and History in State Grants Volume 0-6, Page 125 (Control No. 98), together with plat showing and depicting

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employing the term "tidelands" takes its common meaning of "'land as is affected by the tide.'" (quoting Black's Law Dictionary 1329 (5th ed. 1979))).

[3] LOLT has appealed the dock construction permit and DHEC has withheld final approval pending resolution of this action.

> eleven hundred two (1,102) acres surveyed on January 14, 1836, said plat being annexed to the foregoing Grant and being filed in State Plat Volume 41(1), Pages 99-100, South Carolina Department of Archives and History.
>
> Exhibit B is a true and correct copy of that certain grant of the State of South Carolina dated March 7, 1836 . . . .
>
> Exhibit C is a true and correct copy of the plat annexed to and made a part of Exhibit B, said plat showing and depicting 1102 acres of marsh situate on the west side of the Ashley River, said plat being certified by James Kingman, Deputy Surveyor General, on February 10, 1836.
>
> The 448 acre tract is a portion of the marshlands shown on the plat attached hereto as Exhibit C.
>
> Such private title, if any, which exists in the intertidal marshes located on the 448 acre tract extends in an unbroken chain from the grant of the State of South Carolina . . . .

On September 28, 1999, the master issued an order confirming fee simple title in LOLT and finding Atkins could not build the dock without LOLT's permission. Both the State and Atkins filed motions to alter or amend the judgment; the master denied Atkins' motion, but granted the State's in part on an issue not relevant here. This appeal followed.

LAW/ANALYSIS

Standard of Review

A suit for declaratory judgment may be legal or equitable, and is characterized as such by the nature of the underlying issue outlined in the complaint. See Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991); Clark v. Hargrave, 323 S.C. 84, 473 S.E.2d 474 (Ct. App. 1996). Although an action to quiet title generally lies in equity, the main purpose of the complaint in this instance concerns the determination of title to real property.

A determination of title is legal in nature. Wigfall v. Fobbs, 295 S.C. 59, 367 S.E.2d 156 (1988); Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998). Because this is a law case tried by the master alone with direct appeal to the supreme court, our review is limited to correcting errors of law. Accordingly, we will affirm the master's factual findings if there is any evidence in the record which reasonably supports them. Eldridge, 331 S.C. at 416, 503 S.E.2d at 200; Clark, 323 S.C. at 87, 473 S.E.2d at 476.

I. Tidelands Ownership

Atkins first argues the master erred in concluding the State granted the tidelands at issue to LOLT. We find no error.

The State of South Carolina holds presumptive title to all tidelands within its borders, which are held in trust for the benefit of the public. See Coburg Dairy, Inc. v. Lesser, 318 S.C. 510, 458 S.E.2d 547 (1995); Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (1979). The State may, however, grant private individuals an ownership interest in tidelands. See Hobonny, 272 S.C. at 396, 252 S.E.2d at 136 ("Despite the special status accorded tidelands, the government, and specifically the King of England, had the power to grant, and did in fact grant, tidelands to subjects, who exercised private ownership."); State v. Holston Land Co., 272 S.C. 65, 68, 248 S.E.2d 922, 924 (1978) ("The law in South Carolina is well settled that a grant conveying 'marshland' can give rise to private ownership of property to the mean low water mark.").

Traditionally, South Carolina has granted private rights to tidelands

through acts of the Legislature. See State v. Pacific Guano Co., 22 S.C. 50, 84 (1884) ("[I]n order to give effect to an alienation which the [S]tate might undertake to make[,] it would be necessary to have a special act of the [L]egislature expressing in terms and formally such intention."). Because tidelands are held in public trust, a grant of private ownership must contain "specific language, either in the deed or on the plat, showing that [the grant] was intended to go below high water mark . . . ." Hobonny, 272 S.C. at 396, 252 S.E.2d at 135 (quoting State v. Hardee, 259 S.C. 535, 543, 193 S.E.2d 497, 500 (1972)); see State v. Yelsen Land Co., 265 S.C. 78, 82, 216 S.E.2d 876, 878 (1975) ("Under well settled rules of construction . . . boundaries [subject to the ebb and flow of the tide] will convey land only to the high water mark in the absence of specific language, either in the grant or upon a plat, showing that it was intended to convey land below the high water mark.").

Atkins claims the 1836 grant from the State of South Carolina to Edward C. Peronneau is ambiguous, and therefore lacks the specificity required to demonstrate an intentional transfer of title. We disagree.

A grant from the State purporting to vest title to tidelands in a private party is construed strictly in favor of the government and against the grantee. See Pacific Guano, 22 S.C. at 86 ("In all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor . . . ."); see also State v. Fain, 273 S.C. 748, 259 S.E.2d 606 (1979). Consequently, the party asserting a transfer of title bears the burden of proving its own good title. See Pacific Guano, 22 S.C. at 74 ("[Claimants must show] that they or those from whom they hold acquired title . . . either from the British crown before the revolution, or from the state since that time[.]"); Fain, 273 S.C. at 752, 259 S.E.2d at 608 ("[T]he State comes into court with a presumption of title, and, if an individual is to prevail, he must recover upon the strength of his own title, of which he must make proof.").

To establish fee simple ownership of the marshland tract, therefore, LOLT must show (1) its predecessors in title possessed a valid grant, and (2) the grant's language was sufficient to convey the land below the high water mark

to Peronneau. Holston, 272 S.C. at 66, 248 S.E.2d at 923. Since the parties stipulated to LOLT's unbroken chain of title flowing from the State's grant, the only question remaining is whether the grant itself adequately conveyed the tideland acreage. See id. at 67, 248 S.E.2d at 923 (stating that where the State conceded property granted by the sovereign was traceable in a complete chain, the only issue to determine was whether the grant "evidenced an intent to convey property below the high water mark"). We believe the evidence overwhelmingly supports the master's finding that it did.[4]

The grant to Peronneau describes the property transferred as:

> Eleven Hundred and Two Acres Surveyed for him this 14th day of January 1836, Situate in Charleston District, on the West side of Ashley River, Branch Waters of Charleston Harbour —

In addition, the certification of James Kingman, who surveyed the property and prepared the plat on February 10, 1836, states:

> I do hereby Certify for Edward C. Peronneau a Tract of

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[4] We note the parties' stipulation that LOLT's "448 acre tract is a portion of the *marshlands* shown on the plat," generally is sufficient to prove LOLT's good title without further inquiry. See, e.g., Conch Creek Corp. v. Guess, 263 S.C. 211, 214, 209 S.E.2d 560, 561 (1974) ("The [State's] admission in this case, that the entire area included in the grant consisted of tidelands . . . *conclusively showed* that the grant extended to the low water mark.") (emphasis added); Lane v. McEachern, 251 S.C. 272, 162 S.E.2d 174 (1968) (finding the State's stipulated admission that the tidelands in question were within the perimeter of a plat annexed to a valid grant to claimant's predecessors in interest adequately reflected an intent to convey title without resorting to construction of the grant or plat). However, since the stipulation herein expressly reserved the State's right to challenge LOLT's ownership, we proceed with an analysis of the evidence purporting to show intent.

> Marsh Land containing One Thousand One Hundred and Two Acres, Surveyed for him the 14th day of January 1836 Situate in Charleston District on the West Side of Ashley River, Branch Waters of Charleston Harbour, Bounded South Easterly by Lucas and Said Edward C. Peronneau and on all other Sides by Ashley River – And hath such form and Marks as the above Plat Represents —

Finally, the plat, incorporated into the grant, clearly depicts an area delineated as "1102 acres," bounded on one side by the land of Lucas and Edward C. Peronneau and on all other sides by the Ashley River, with "Marsh" appearing twice on its face.[5] These facts convince us the master correctly ruled the grant from the State of South Carolina intended to convey fee simple title of the tidelands to Peronneau. See, e.g., id. at 67-68, 248 S.E.2d at 923-24 (finding that when read together, a grant accompanied by a legend describing a "tract of marsh land" and a plat referencing "two hundred acres of marsh land" evinced a "clear intent to convey the disputed tidelands . . . to the usual low water mark"); see also Coburg, 318 S.C. at 513 n.3, 458 S.E.2d at 548 n.3 (stating a plat incorporated by reference into the grant can provide the requisite intent to convey tidelands).

Furthermore, expert trial testimony sustains this conclusion. Mark Busey, crew supervisor for Southeastern Surveying, testified as an expert in the field of surveying, including the preparation and interpretation of plats. Prior to trial, Busey produced a computer-generated overlay of the original survey plat by James Kingman. During his testimony Busey used the overlay in conjunction with modern-day aerial photographs and tax maps of the area. The resulting comparison enabled Busey to identify the Ashley River, inlets, creeks, islands, and marshland on both the 1836 plat and the aerial photos. Busey ultimately

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[5] Indeed, the parties stipulated the plat rendered in 1836 and annexed to Peronneau's grant depicts "1102 acres of *marsh* situate on the west side of the Ashley River."

concluded the 448-acre tract owned by LOLT is a portion of the marsh as set forth on the 1836 plat.

We therefore agree with the master, whose order stated:

> Given the limitations of surveying in 1836, the results of placing the 1836 overlay on top of the modern photo map[s] are remarkable. It is possible to identify numerous geographic features, including many inlets that still remain visible.
>
> There is simply no question the 448.40 acres in question comes out of the 1,102 acres granted by the State to Edward Peronneau in 1836.

See Hobonny, 272 S.C. at 398, 252 S.E.2d at 136 (where plats incorporated into grants showed boundaries of tracts conveyed and State conceded plats embraced tidelands, court concluded grantor intended to convey tidelands, stating "[i]t is difficult to imagine how more precisely to express intent as to the location of boundaries than to incorporate an accurate plat in the description. . . ."); see also Conch Creek Corp. v. Guess, 263 S.C. 211, 214, 209 S.E.2d 560, 561 (1974) ("No suggestion is made as to what the purpose of the grant could have been, if not to convey marshland or tideland, for that was the character or nature of the entire property included. Any other construction would completely defeat the grant.").[6]

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[6] The master found LOLT was the "sole owner in fee simple" of the 448-acre tract, "subject only to the public trust as administered by the State of South Carolina." As both parties correctly note, the public trust doctrine applies to "*all* lands beneath waters influenced by the ebb and flow of the tide." Phillips Petroleum Co. v. Miss., 484 U.S. 469, 479-80 (1988). They further recognize, again accurately, that the doctrine differentiates between private, proprietary title (*jus privatum)*, and public trust title (*jus publicum)*. However, the master's conclusion that a grant of tidelands from the State of

South Carolina can convey *only* the *jus privatum* interest is erroneous. Although some states disallow conveyance of the *jus publicum*, South Carolina does not. See, e.g., Haesloop v. City Council of Charleston, 123 S.C. 272, 282, 115 S.E. 596, 599-600 (1923) ("[T]he state, through the Legislature . . . not only vested in the city council [its] proprietary right in and dominion over this land, the jus privatum . . ., *but also released the right that the state itself possessed, the jus publicum . . . . [I]t was a grant of the fee, with unlimited power of disposal . . . .*") (emphasis added) (internal citation omitted); State v. Pacific Guano Co., 22 S.C. 50, 83-84, 86 (1884) ("The state had in the beds of these tidal channels not only title as property, the jus privatum, but something more, the jus publicum . . . . *There seems to be no doubt, however, that the state as such trustee has the power to dispose of these beds as she may think best for her citizens . . . .* [The rule that all grants from the government are construed against the grantee] applies a fortiori to a case where such grant by a government to individual proprietors *is claimed to be not merely a conveyance of title to land, but also a portion of that public domain which the government held in a fiduciary relation, for general and public use*.") (emphasis added); see also Phillips, 484 U.S. at 475 ("[I]ndividual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."); Shively v. Bowlby, 152 U.S. 1, 47 (1894) ("[T]he ownership of and dominion and sovereignty over lands covered by tide waters . . . belong to the respective States . . . with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of [C]ongress to control their navigation . . . ."); Marks v. Whitney, 491 P.2d 374, 381 (Cal. 1971) ("It is a political question, within the wisdom and power of the Legislature, acting . . . as trustee, to determine whether public trust uses should be modified or extinguished . . . .").

However, because LOLT does not appeal the master's finding in this regard, and furthermore argues that a tidelands grant from the State of South Carolina conveys only the *jus privatum* interest in such property, we decline

II. Atkins' Right to Wharf Over the Tidelands

Atkins further asserts that even if LOLT owns the tidelands in fee, he retains an upland owner's riparian right to "wharf out" over LOLT's property to access the navigable waters of the Ashley River.[7] We disagree.

We first note that because Atkins' property adjoins a saltwater marsh, he has no truly "riparian" rights at all. A riparian owner is one whose land is traversed or bounded by a natural watercourse. Black's Law Dictionary 1327 (6th ed. 1990); 78 Am. Jur. 2d *Waters* § 260 (1975). A "watercourse" is defined as running water flowing in a definite channel having a bed or banks, and includes streams, rivers, creeks, etc. Black's Law Dictionary 1592 (6th ed. 1990). Modern usage, however, occasionally expands the definition to include lakes. See Black's Law Dictionary 1328 (7th ed. 1999); 78 Am. Jur. 2d § 260 ("[C]urrent usage . . . has been said to have made the term 'riparian' an acceptable term as to land abutting upon either rivers or lakes.").

Owners of riparian land possess rights "relating to the water, its use, [and the] ownership of soil under the [water] . . . ." Black's Law Dictionary 1327 (6th ed. 1990); Horry County v. Tilghman, 283 S.C. 475, 480, 322 S.E.2d 831, 834 (Ct. App. 1984) (equating riparian rights with "access to the water"). Under the common law, in addition to those rights of the public at large, a riparian

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to address the question of whether the grant in this case conveyed solely that interest subject to the public trust. See, e.g., Charleston Lumber Co., v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) (stating that an unchallenged ruling, right or wrong, is the law of the case).

[7] An "upland" owner is one holding title to land bordering a body of water. Black's Law Dictionary 1540 (6th ed. 1990). "Wharfing out" describes the "[e]xercise of [an upland owner's] right to construct or maintain a wharf," including "a pier, a dock, or a related structure[,] to permit effective access to and from the water." Waters and Water Rights, § 6.01(a)(2) (Robert E. Beck ed., 1991).

owner possesses a property right incident to his ownership of the bank and bed to the thread of the watercourse. See Shively v. Bowlby, 152 U.S. 1 (1894). This right guarantees access from the front of the owner's land to the navigable part of the stream, and, when not forbidden by public law, may include the construction of landings, wharves or piers to facilitate such access. See United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).

Each state, however, is authorized to delineate the extent of riparian rights appurtenant to property within its borders. Id. at 418 ("It is well settled that *in the absence of a controlling local law* otherwise limiting the rights of a riparian owner . . . .") (emphasis added); Packer v. Bird, 137 U.S. 661, 669-70 (1891) ("[T]he right of the riparian owner . . . [is] limited according to the law of the state . . . ."). South Carolina follows the common law rule regarding riparian rights. See State v. Head, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1997) (stating adjacent property owners hold title from their shoreline to the center of a nontidal navigable stream bed subject to a public easement for use of the waterway). Accordingly, a riparian owner, subject to certain conditions, may wharf over a navigable river or stream. McDaniel v. Greenville-Carolina Power Co., 95 S.C. 268, 272-73, 78 S.E. 980, 981 (1913) ("'The rights of a riparian proprietor on a navigable stream are substantially the same as those attaching to riparian ownership on a nonnavigable watercourse, except that in some respects they are enlarged by the greater size and capacity of the stream and that there are some additional privileges connected with its navigable character. Such an owner has the right of access to the navigable part of the stream from the front of his lot, and provided he does not impede or obstruct navigation to build private wharves, landings, or piers, or use the water of the stream for any purposes.'") (citations omitted).

Separate and apart from riparian rights, interests attached to property abutting an ocean, sea or lake are termed "littoral." See Black's Law Dictionary 1327 (6th ed. 1990) ("[Riparian] is sometimes used as relating to the shore of the sea or other tidal water, or of a lake or other considerable body of water not having the character of a watercourse. But this is not accurate. The proper word to be employed in such connections is 'littoral.'"); 78 Am. Jur. 2d § 260

("Strictly speaking, a riparian owner is one whose land abuts upon a river and a littoral owner is one whose land abuts upon a lake or sea."). Consequently, if Atkins possesses any rights inherent in his upland property, they would be littoral rights, not riparian.

As with riparian rights, littoral rights are governed by the individual states. See Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977) ("[P]roperty ownership is not governed by a general federal law, but rather by the laws of the several States. . . . This principle applies to the banks and shores of waterways . . . .'") (internal citation omitted); Shively, 152 U.S. at 57-58 ("[T]he title and rights of . . . littoral proprietors in the soil below high water mark . . . are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution."). Prior to and at the time of the American Revolution, the British crown conveyed all lands under tide waters, along with governmental dominion over them, to the colonies and later states; each grant carried with it the attendant common law rights of a littoral landowner, except as modified by federal law or the "charters, constitutions, statutes, or usages of the several colonies and states." Id. at 14.

While the common law of England afforded an owner of land fronting a navigable tidal river *access* from his land to the water, this right was "not a title in the soil below high-water mark, *nor a right to build thereon*, but a right of access only, analogous to that of an abutter upon a highway." Id. (emphasis added). Consequently, the crown as tidelands owner was empowered to deem any structure erected without license below high-water mark a purpresture that could be destroyed or seized and rented for the crown's benefit.[8] Id. at 13. Nevertheless, in an effort to foster navigation and commerce in the nascent American economy, several colonial and state governments granted littoral owners greater rights and privileges than were found in English common law, including the right to build wharves. Id. at 18; see, e.g., Great Cove Boat Club v. Bureau of Pub. Lands, 672 A.2d 91 (Me. 1996); Wicks v. Howard, 388 A.2d

[8] A purpresture is an encroachment by private use upon public rights and easements. See Black's Law Dictionary 1236 (6th ed. 1990).

1250 (Md. Ct. Spec. App. 1978). South Carolina, however, was not among them.

The extent of littoral rights in this jurisdiction is an unanswered question.[9] Atkins presents no authority, and we are aware of none, outlining the scope of an upland owner's incidental property rights in tidelands. Accordingly, absent any showing of a legal enactment or demonstrated customary use of neighboring tidelands by littoral owners, we will apply the common law rule. See State ex rel. McLeod v. Sloan Constr. Co., Inc., 284 S.C. 491, 496, 328 S.E.2d 84, 87 (Ct. App. 1985) ("[T]he English common law ordinarily is presumed to govern if there is no South Carolina authority to the contrary."); Shively, 152 U.S. at 14 ("The common law of England upon this subject . . . is the law of this country, except so far as it has been modified . . . ."). As in historical England, therefore, we find an owner whose property abuts tidal waters possesses no littoral right to wharf out to a navigable stream, and therefore must obtain permission from the underlying landowner before erecting a dock, pier or comparable structure.[10]

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[9] Although the extent of these rights heretofore has not been defined, our state clearly treats land bordering tidal water differently from riparian land. See, e.g., State ex rel. McLeod v. Sloan Constr. Co., 284 S.C. 491, 498-99, 328 S.E.2d 84, 88 (Ct. App. 1985) ("The State's argument simply ignores the different common law rules for construing riparian grants along tidal and nontidal waters.").

[10] We further note that, even in states where the scope of littoral rights includes the prerogative to wharf out to a tidal navigable stream, the general rule is that such rights reside solely in the tidelands owner. 78 Am. Jur. 2d Waters § 277 (1975) ("When the state has conveyed or leased tidelands bordering on tidal waters, the [littoral] rights are lodged in the tidelands' owner or lessee."); see, e.g., Hoboken v. Penn. R. Co., 124 U.S. 656, 690-91 (1888) ("[T]he State [may] grant to a stranger lands constituting the shore of a navigable river under tide-water, below the high-water mark, to be occupied . . . in such a manner as to cut off the access of the riparian owner from his land to the water . . . ."), *quoted with approval in* Shively v. Bowlby,

Where wharfing out is not a littoral right and title to marshlands rests in the state, the requisite permission to erect a dock or similar structure by one not owning the underlying land usually is obtained through a regulatory licensing procedure.[11] See Shively, 152 U.S. at 41; Waters and Water Rights, § 6.01(a)(2) (Robert E. Beck ed., 1991). A public permit, however, "does not displace the need to obtain the landowner's consent to wharf on land where title is in one other than the permitting authority." Waters and Water Rights, supra, § 6.01 (a) (2). To the contrary, if ownership vests in private hands, an adjacent landowner desiring to build on tidelands must obtain the express consent of the fee simple owner. Id.; see 23A S.C. Ann. Regs. R.30-2(I)(4) (Supp. 2000) ("If the final judicial decision determines that the critical area in question is owned by the adjoining critical area landowner and that the critical area landowner has a right to exclude others as part of the title, *the permit will not be issued unless the applicant presents [DHEC] with a copy of a deed, lease, or other instrument from the adjudicated critical area landowner that would allow construction of the proposed project, or written permission from such owner . . . .*") (emphasis added).

Because we agree with the master that LOLT owns the tidelands in fee, and find that in South Carolina the owner of adjacent upland property must gain permission from the fee owner to wharf across privately-owned tidelands to a

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152 U.S. 1, 22 (1894); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 443 P.2d 205, 217 (Or. 1968); cf. Horry County v. Tilghman, 283 S.C. 475, 479, 322 S.E.2d 831, 833 (Ct. App. 1984) ("When tidelands are condemned in fee simple, the condemnor acquires all rights appurtenant to the land."). Under these authorities, LOLT, as fee simple owner of the tidelands, now holds the littoral right of access to the adjacent Ashley River.

[11] In South Carolina, regulatory authority is vested in DHEC's Office of Coastal Resource Management. See Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) ("[U]nder the South Carolina Coastal Management Act, the State through the [Office of Coastal Resource Management] maintains control over the public trust [tide]lands.").

navigable body of water, the decision of the master is

AFFIRMED.[12]

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[12] We note in passing that Atkins' argument regarding severance, and the master's reliance upon it, are misplaced. Because an upland owner possesses no littoral right to wharf out over adjacent tidelands in the first instance, any question of whether such a right was severed is irrelevant. Furthermore, although Atkins asserts, correctly, that his "riparian rights" argument is not based on the public trust doctrine, he does claim at several points in his final and reply briefs that he should be allowed to build the dock because, under the doctrine, LOLT can exclude neither the public nor him from utilizing the tidelands. This assertion, however, is erroneous.

Under the common law, the public trust doctrine secured the right of the public to navigate and fish upon otherwise private property. See Shively v. Bowlby, 152 U.S. 1, 13 (1894). Nevertheless, several states, including South Carolina, have expanded the doctrine to cover a broad range of water-based activities. See Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 127-28, 456 S.E.2d 397, 402 (1995) ("Under [the public trust doctrine], everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.") (quoting Gregg L. Spyridon & Sam A. LeBlanc, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 Tul. Envtl. L.J. 287, 291 (1993)). Regardless of the scope of the doctrine in this state, and assuming, as we must, that LOLT owns fee title to the marshland bordering Atkins' property subject to the public trust, the doctrine affords no basis to claim a right to wharf out over another's private property. See generally Munninghoff v. Wis. Conservation Comm'n, 38 N.W.2d 712, 716 (Wis. 1949) (holding muskrat trapping is not included in the public trust doctrine as it "involves the exercise of a property right in the land or the bottom" of the waterway; court distinguished the activity from those covered under the doctrine such as walking on the bottom while fishing, boating, standing on

HEARN, C.J., and CURETON, J., concur.

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the bottom while bathing, and propelling a small vessel by poling along the bottom); People v. Johnson, 166 N.Y.S.2d 732, 736-37 (1957) ("While the public character of the waters is not affected by the ownership of the underlying land, neither does privately owned land lose its character by the inflow of navigable waters, except to the extent that private rights must yield to dominant rights of the public. The source of the public rights is the navigable water, and the underlying land is open to those activities of the public that are closely connected with the water. . . . But when an activity is more closely identified with the underlying land, when it entails some physical disturbance of that land not directly connected with the enjoyment of the waters, the character of the activity as private or public should be determined by the ownership of the lands.") (footnote omitted); Sheftel v. Lebel, 689 N.E.2d 500, 505 n.9 (Mass. App. Ct. 1998) ("[T]he public's rights with respect to fishing, fowling, and navigation on and over public trust lands do not encompass the right to affix any permanent structures to the soil of the tidal flats."); State v. Longshore, 5 P.3d 1256, 1263 (Wash. 2000) (finding that because clamming "requires a digging down into the soil, a contact with and disturbance of the land itself," the public trust doctrine does not encompass the right to gather naturally occurring shellfish on private property).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pamela C. Nelson and Doug Nelson,

Appellants,

v.

John William Taylor,

Respondent.

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

Opinion No. 3389
Heard May 8, 2001 - Filed September 17, 2001

REVERSED AND REMANDED

James W. Segura, of Varner & Segura, of Greenville, for appellants.

Robert D. Moseley, Jr., of Leatherwood, Walker, Todd & Mann, of Greenville, for respondent.

CONNOR, J.: Pamela Nelson and her husband, Doug Nelson, brought this negligence action against John William Taylor[1] for personal injuries resulting from an automobile collision. At trial, Taylor admitted liability and the jury awarded $5,000 in actual damages to Pamela Nelson (Nelson) and $0 in actual damages to her husband.[2] On appeal, Nelson challenges the admission of the physical therapist's testimony concerning causation, and the trial judge's denial of her motions for a new trial nisi additur, or in the alternative, a new trial. We reverse and remand.

FACTS

On November 8, 1995, Pamela Nelson was stopped at a red light when a vehicle driven by John William Taylor collided with the rear-end of Nelson's vehicle. Nelson's vehicle was damaged and she complained of pain in her back, neck, head, and shoulder. Nelson was subsequently treated by her family physician, an orthopedic surgeon, a neurosurgeon, a shoulder specialist, a chiropractor, and a physical therapist.

As a result of her treatment, distinct and contradicting theories emerged regarding the cause of Nelson's injuries. Dr. Posta, a shoulder specialist, determined to a reasonable degree of medical certainty that Nelson's injuries were caused by the accident. In contrast, Nelson's physical therapist, Roger Bachour, concluded that Nelson's injuries stemmed from her use of the mouse at her computer workstation, resulting in rotator cuff tendinitis. Dr. Posta, however, conclusively ruled out rotator cuff tendinitis after reviewing the results of Nelson's MRI. On the other hand, Dr. Reid, an orthopedic surgeon, stated in his deposition that he did not find any evidence of shoulder

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[1] The Nelsons also brought this action against Russell Taylor, the owner of the vehicle. Prior to trial, Russell Taylor was dismissed from the case.

[2] In light of the specific issues raised by this appeal, it does not appear that Nelson's husband has appealed from this verdict.

impingement. He further found there was no objective evidence of a neurological problem.

Nelson's total medical expenses exceeded $9,900.00. Furthermore, her projected future medical expenses to alleviate the pain and impairment from her injuries totaled $3,500.00 in surgical fees and $5,800.00 in hospital fees. Nelson also sought recovery for pain and suffering, lost wages, and actual damages. Notwithstanding, the jury only awarded Nelson $5,000.00 in actual damages. Nelson moved for a new trial nisi additur, and alternatively, for a new trial. The trial judge denied both motions. Nelson appeals.

DISCUSSION

I.

Nelson argues the trial judge abused his discretion in admitting deposition testimony from the physical therapist concerning the medical cause of her injuries.

During his deposition, Bachour was qualified as an expert in the field of physical therapy. Over the objection of Nelson's counsel, Bachour opined, "[Nelson] appeared to have a [sic] rotator cuff tendinitis in the right shoulder due to the way she had her mouse set up at work and the way she was using that every day ---the way, ergonomically, her work station was set up." Bachour testified this assessment was based on what Nelson had told him and his clinical examination.

On cross-examination, Bachour admitted he was not a medical doctor, he does not make medical diagnoses, and he only has training in physical therapy. He acknowledged that his assessment should not be used to establish medical treatment. He further stated he had not examined any of the diagnostic tests that had been performed on Nelson or the records of Nelson's treating physicians.

Prior to the introduction of Bachour's deposition testimony at trial, Nelson's counsel objected to Bachour's opinion concerning causation. He characterized Bachour's diagnosis of Nelson's injuries as unreliable and irrelevant. Specifically, counsel argued Bachour impermissibly made a diagnosis given he: (1) is a physical therapist and not a medical doctor; and (2) had not reviewed Nelson's medical records or diagnostic test results. The trial judge ruled the deposition testimony was admissible and he would allow the physical therapist to "testify as to what [the physical therapist] was treating her for." The judge stated Nelson's counsel could point out to the jury that Bachour is not a medical doctor.

"To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (quoting O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995)); Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). Qualification depends on the particular witness' reference to the subject. Gooding, 326 S.C. at 253, 487 S.E.2d at 598.

The qualification of a witness as an expert and the admissibility of his or her testimony are matters left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of that discretion and prejudice to the opposing party. Payton v. Kearse, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998); Mizell v. Glover, 339 S.C. 567, 577, 529 S.E.2d 301, 306 (Ct. App. 2000). An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support. Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995).

Our courts have found in limited circumstances that witnesses other than medical doctors may testify as medical experts. However, in these cases the witnesses have had some expertise in the matter in dispute. See, e.g., Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978) (in a personal injury action, chiropractor was competent to testify as a medical expert to the extent of his knowledge and experience); Howle v. PYA/Monarch, Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) (psychologist permitted to give expert opinion concerning diagnosis, prognosis, and causation of plaintiff's mental and emotional condition).

The parameters for a physical therapist's expert testimony have not been outlined. We are, however, guided by the General Assembly's statutory scheme created to define and regulate the practice of physical therapy. S.C. Code Ann. §§ 40-45-5 to -330 (2001); see Bolton v. CNA Ins. Co., 821 S.W.2d 932 (Tenn. 1991) (reviewing the Tennessee "Occupational and Physical Therapy Practice Act" to determine that a physical therapist is not qualified to form and express an expert medical opinion as to the permanent impairment or permanent physical restrictions of an injured person in a workers' compensation case).

Although not intended to be an all-inclusive survey of these statutes, we point to several key provisions which define the practice and regulation of physical therapists. A review of these statutes reveals the General Assembly purposefully confined the scope of physical therapy.[3] Pursuant to these provisions, a physical therapist is limited in terms of methods of treatment. Equally important, a physical therapist is not authorized to practice medicine, prescribe medications, or order medical/laboratory tests. S.C. Code Ann. §§ 40-45-20(9), 40-45-310 (2001).[4] Even though the General Assembly has

[3] In an amendment which became effective on June 8, 1998, the General Assembly revised the statutory provisions relating to the licensing and regulation of physical therapists. Act No. 360, 1998 S.C. Acts 2103.

[4] S.C. Code Ann. § 40-45-20(9) (2001) provides:

(9) "The practice of physical therapy" means the evaluation and treatment of human beings to detect, assess, prevent, correct, alleviate, and limit physical disability, bodily malfunction, and pain from injury, disease, and any other bodily or mental condition and includes the administration, interpretation, documentation, and evaluation of physical therapy tests and measurements of bodily functions and structures; the establishment, administration, evaluation, and modification of a physical therapy treatment plan which includes the use of physical, chemical, or mechanical agents, activities, instruction, and devices for prevention and therapeutic purposes; and the provision of consultation and educational and other advisory services for the purpose of preventing or reducing the incidence and severity of physical disability, bodily malfunction, and pain. The use of roentgen rays and radium for diagnostic or therapeutic purposes and the use of electricity for surgical purposes, including cauterization and colonic irrigations, are not authorized under the term "physical therapy" as used in this chapter, and nothing in this chapter shall be construed to authorize a physical therapist to prescribe medications or order laboratory or other medical tests.

S.C. Code Ann. § 40-45-310 (2001) states in pertinent part:

> Nothing in this chapter may be construed as authorizing a licensed physical therapist or any other person to practice medicine, surgery, osteopathy, homeopathy, chiropractic, naturopathy, magnetic healing, or any other form, branch, or method of healing as authorized by the laws of this State.

eliminated the requirement for treatment by prescription from a physician or dentist, a physical therapist is still restricted in terms of the extent to which a patient may be treated without the referral of a licensed physician. S.C. Code Ann. § 40-45-110(A)(2), (4), (5) (2001).[5]

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[5]S.C. Code Ann. § 40-45-110(A)(2), (4), (5) (2001) provide:

> (A) In addition to other grounds provided for in Section 40-1-110, the board, after notice and hearing, may restrict or refuse to grant a license to an applicant and may refuse to renew the license of a licensed person, and may suspend, revoke, or otherwise restrict the license of a licensed person who:
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> (2) has treated or undertaken to treat human ailments otherwise than by physical therapy or has practiced physical therapy and failed to refer to a licensed medical doctor or dentist any patient whose medical condition should have been determined at the time of evaluation or treatment to be beyond the scope of practice of a physical therapist;
>
> (4) in the absence of a referral from a licensed medical doctor or dentist, provides physical therapy services beyond thirty days after the initial evaluation and/or treatment date without the referral of the patient to a licensed medical doctor or dentist;
>
> (5) changes, or in any way modifies, any specific patient care instructions or protocols established by an appropriate health care provider without prior consultation with and approval by the appropriate

In light of these statutory restrictions, we agree with Nelson that Bachour was not qualified to testify regarding causation. Bachour's training and experience qualified him to testify as an expert in the limited area of the physical therapy required to treat Nelson's injuries. Significantly, Bachour admitted he did not make medical diagnoses. Moreover, Bachour did not independently treat Nelson. Instead, Nelson was referred by three different physicians to whom Bachour reported his findings. Therefore, the trial judge abused his discretion in admitting Bachour's deposition testimony which exceeded the scope of his expertise. See State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) (holding police officer, who was qualified as an expert in crime scene processing and fingerprint identification, exceeded the scope of his expertise when he was permitted to give his opinion involving crime scene reconstruction which went to the ultimate issue of whether defendant acted in self-defense when he shot and killed the victim).

Additionally, we find our decision is consistent with several jurisdictions which have addressed a similar issue. See, e.g., Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993) (holding trial court properly prohibited physical therapist from rendering medical prognosis for which she was not qualified); Stevens v. Brown, 672 N.Y.S.2d 194 (N.Y. App. Div. 1998) (ruling trial court properly allowed physical therapist and occupational therapist to testify in personal injury case where the court limited their testimony and refused to allow them to testify as experts); Zinn v. Leach, Nos. 90-CA-03, 90-CA-08, 1990 WL 187466 (Ohio Ct. App. Nov. 29, 1990) (finding trial judge erred in permitting physical therapist to give an opinion as to medical causation in violation of statutory prohibition; however, error was harmless where evidence was cumulative to other credible evidence reaching the same conclusion); Girken v. Angel, No. 76-42, 1976 WL119 (Ark. June 21, 1976) (holding physical therapist not permitted to testify on causation and diagnosis of plaintiff's injuries where therapist never contended that he was qualified to

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health care provider.

diagnose the injury and his treatments were based on physician's orders); see also Elmore v. Travelers Ins. Co., 824 S.W.2d 541 (Tenn. 1992) (finding in worker's compensation case, physical therapist was not qualified to give expert opinion on medical causation); but see Ehlers v. Amon, No. C0-95-1914, 1996 WL 250530 (Minn. Ct. App. May 14, 1996) (finding no error to allow physical therapist to testify regarding causation where there was evidence he possessed the requisite qualifications and his opinion did not substantially influence the jury's verdict given that plaintiff's treating physician and chiropractor rendered similar opinions).

Taylor contends that even if the admission of Bachour's deposition testimony constituted error, it does not require a new trial. He asserts any improper testimony was cumulative to the testimony of Dr. Posta, the shoulder specialist who treated Nelson. We find Taylor's argument unpersuasive for several reasons. Because liability was admitted, the crucial issue was whether Nelson's injuries were proximately caused by the accident. Thus, any conflict in the evidence created by Bachour's testimony was a significant factor in the case. Moreover, Bachour's testimony was not cumulative to Dr. Posta's final diagnosis and opinion regarding causation. Although Dr. Posta initially diagnosed Nelson as having mild rotator cuff tendinitis, he ultimately opined that Nelson had a shoulder impingement which, to a reasonable degree of medical certainty, was caused by the accident. Accordingly, we reverse and remand for a new trial.

Because we find the trial judge erred in permitting Bachour to testify beyond the scope of his expertise, we need not address Nelson's remaining arguments concerning the admission of this deposition testimony.[6]

II.

[6] Nelson additionally argued: (1) the trial judge failed to properly determine the reliability of the evidence; and (2) Bachour's testimony was inadmissible because he did not testify that, taking into consideration all the data, Nelson's injuries "most probably" came from the accident.

Nelson further argues the trial judge erred in failing to grant a new trial nisi additur, or in the alternative, a new trial, because of the inadequate amount of the damages awarded. In light of our decision, we need not address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (noting that an appellate court need not address appellant's remaining issues when its determination of a prior issue is dispositive); Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (noting appellate court need not address remaining issues when determination of prior issue is dispositive).

Based upon the foregoing, the decision of the trial judge is

REVERSED AND REMANDED.

HEARN, C.J. concurs and GOOLSBY, J. dissents in separate opinion.

GOOLSBY, J. (dissenting): I respectfully dissent. I would hold the trial court did not err in admitting the testimony from the physical therapist about the cause of Nelson's rotator cuff tendinitis.

The question of the therapist's qualifications to give expert testimony in this instance was one addressed to the sound discretion of the trial court.[7] Just as an emergency room technician who had intubated more than 100 patients and who taught physicians on intubation procedures was qualified to testify as an expert witness in a medical malpractice action in which the patient claimed that an anesthesiologist's negligence in performing intubation had fractured the patient's two front teeth, I should think that a certified physical therapist who held an undergraduate degree and a three-year degree from a medical university and whose expertise as a physical therapist was conceded by the other party should be qualified to testify as an expert witness in a wreck case in which the patient claimed that an automobile accident caused a certain physical injury.[8]

I see nothing in the statutory law cited by the majority that would proscribe the admission of Bachour's statement that Nelson's rotator cuff tendinitis resulted from the setup of her work station. There was nothing in the record that would even remotely suggest that Bachour's treatment of Nelson was inconsistent with the advice of any of her treating physicians. Moreover, as the

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[7] Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596 (1997).

[8] See Gooding, 326 S.C. at 252-53, 487 S.E.2d at 598 ("To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'") (quoting O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995)); 31A Am. Jur. 2d Expert and Opinion Evidence § 55, at 61 (1989) ("Simply stated, in order to qualify as an expert, a witness must possess special knowledge of some subject on which the jury's knowledge would presumably be inadequate without expert assistance.").

majority acknowledges, the legislature no longer requires a patient to obtain a prescription from a physician before receiving treatment from a physical therapist.[9]

Bachour first treated Nelson on November 20, 1995, shortly after the accident. At that time, Nelson's primary complaints concerned pain in her cervical spine and pain towards her right shoulder. From the record, it appears Nelson was discharged from Bachour's care the following month, and it was noted she had shown good progress in physical therapy and had intended to return to work the following week. In April 1996, Nelson again sought treatment from Bachour, this time complaining mainly of right shoulder pain that occasionally radiated to her right upper extremity. It is the assessment Bachour made in his notes on April 1, 1996, several months after Nelson had initially been discharged from his care, that Nelson argues should not have been admitted at trial.

As Nelson's attorney aptly pointed out when questioning Bachour, there was no mention in the subjective portion of Bachour's notes that Nelson said anything about a mouse or a computer station; however, the notes Bachour made in April 1996, made no reference to Nelson's automobile accident either. Moreover, Bachour testified that he routinely questioned his patients about what activities gave them pain and that his assessment was based on what Nelson had told him. Given these circumstances, I would hold Bachour's deposition testimony about what his notes reflected regarding the origin of Nelson's later complaints did not exceed the domain of his expertise as a physical therapist.

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[9] S.C. Code Ann. § 40-45-20(9) (2001). In my view, this case is easily distinguishable for this very reason from Bolton v. CNA Insurance Company, 821 S.W.2d 932 (Tenn. 1991), which the majority cites as persuasive authority. In Bolton, the Supreme Court of Tennessee emphasized that, under the applicable statute, "a physical therapist is allowed to evaluate and treat an injury using only specific agents, properties and methods, but she/he may do so only by referral of a licensed doctor of medicine, osteopathy or podiatry, except for the initial evaluation."). Id. at 936.

Furthermore, Bachour's determination of the reason for Nelson's later complaints was more in the nature of a clinical, as opposed to a medical, diagnosis.[10] There was no attempt to refute Bachour's statement that, although he did not give medical diagnoses, he had training in clinical diagnosis, which, as described by none other than Nelson's attorney, entailed "making a clinical diagnosis based upon what they tell you, what the diagnostic tests tell you and based upon your observation on them."[11] With due respect to the majority, then, I attach no significance to Bachour's admission that he did not make medical diagnoses.

I would further hold Nelson's argument concerning the denial of the motion for a new trial nisi additur is manifestly without merit.[12]

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[10] See Black's Law Dictionary 464 (7th ed. 1999) (defining "clinical diagnosis" as "[a] diagnosis from a study of symptoms only").

[11] Although, as the majority notes, Bachour did not examine any of the diagnostic tests that had been performed on Nelson, I would hold this deficiency went to the weight, rather than to the admissibility, of his testimony.

[12] See McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995) ("The trial judge alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive and the denial of such a motion will not be reversed on appeal absent an abuse in the trial judge's discretion.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John E. McKeown and Quick Food, Inc, d/b/a Steak and Play,

Respondent,

v.

Charleston County Board of Zoning Appeal, and Charleston County,

Appellants.

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

Opinion No. 3390
Submitted June 4, 2001 - Filed September 17, 2001

REVERSED

County Attorney Samuel W. Howell, IV, and Deputy County Attorney Joseph Dawson, III, both of Charleston, for appellants.

James M. Griffin, of Columbia, for respondent.

CONNOR, J.: This appeal involves the enforcement of a local zoning ordinance. The Charleston County Zoning Board of Appeals (the "Board") denied a special exception request to serve alcohol by the Steak and Play restaurant. The circuit court reversed because the South Carolina Department of Revenue had already issued a beer and wine permit. The Board appeals. We reverse.

FACTS/PROCEDURAL BACKGROUND

John McKeown and Quick Foods, Inc. ("Respondents"), do business as the "Steak and Play" located at 2284 Savannah Highway, Charleston, South Carolina. On February 23, 1999, the South Carolina Department of Revenue issued the business a "retail permit to sell beer and wine for consumption on and off the premises." The County of Charleston, however, refused to issue a certificate of occupancy because Quick Foods, Inc., had not received a special exception from the Board of Zoning Appeals to sell beer and wine at this location. The County thereafter granted Respondents a certificate of occupancy provided beer and wine not be sold until such time as Respondents applied for and received a special exception from the Board.

The Respondents appealed to the Board for a special exception and a hearing was held on July 19, 1999. The Board denied the special exception request. Thereafter, by letter dated July 29, 1999, the Board explained:

> After careful review of the exhibits and testimony presented, the Board ruled to DENY your request for a Special Exception. The Board determined that the proposed use would be contrary to the neighborhood's interest and would adversely affect other property in the vicinity. It was determined that the proposed use

> would not be in harmony with existing uses in the area such as churches, one of which is located 240 feet north of the subject property, and residentially zoned property which abuts the subject parcel to the north.

The Board relied on Article 6.2.16 of the Charleston County Unified Development Ordinance for its decision. This subsection states:

> §16. RESTAURANTS, BARS AND LOUNGES SERVING ALCOHOLIC BEVERAGES
>
> All proposed bars, lounges and restaurants serving beer or alcoholic beverages located within 500 feet of the property line of a lot in a residential zoning district or a lot containing a residential use shall require review and approval in accordance with the Special Exception procedures of Art. 3.6. Proposed eating/drinking establishments located more than 500 feet from the property line of a lot in a residential zoning district or a lot containing a residential use shall be allowed by-right. Distances shall be measured from the nearest property line of the subject parcel to the nearest property line of a lot containing a residential use or located in a residential zoning district.

The Steak and Play is located in a commercial zoning district; however, the business is adjacent to vacant property zoned residential. The Board heard testimony that the residential lots were less than 300 feet away and that the building itself is located approximately 100 feet from at least one property line of a lot zoned residential. Several residents living outside the 500 foot distance referenced in the ordinance protested the special exception request. Likewise, the Pastor at the nearby Charlestowne Baptist Temple testified:

> [The church] is approximately 379 feet to the front of that building. State laws say 500 feet right there, and the last 7 or 8 years, we have kept liquor stores from going in there. . . . We don't want to see any place up there that serves liquor and beer.

Respondents appealed the Board's order. A hearing in the circuit court was held on November 29, 1999. Thereafter, on December 28, 1999, the circuit court judge filed his order vacating the Board's decision. The circuit court judge found the local ordinance criminalized an otherwise legal activity in this State and "[b]ecause there is an irreconcilable conflict between [the Board's actions and State law] the decision made by the Department of Revenue applying [S]tate law must prevail." Therefore, the judge concluded the "Charleston County Board of Zoning Appeals and Charleston County are permanently enjoined from enforcing Article 6.2.16 against the Petitioners at its business located at 2284 Savannah Highway, Charleston, South Carolina." The Board appeals.

ISSUES

1. Does Article 6.2.16 of the Charleston County Unified Development Ordinance directly conflict with the state laws applied by the South Carolina Department of Revenue for issuing the Steak and Play's alcohol permit?

2. Does Article 6.2.16 of the Charleston County Unified Development Ordinance criminalize or prohibit conduct that is specifically authorized under State law?

DISCUSSION

I.

The Board argues its ordinance is not in direct conflict with State law applied by the Department of Revenue when issuing permits.

"Determining whether a local ordinance is valid is a two-step process. The first step is to determine whether the [county] had the power to adopt the ordinance. If no power existed, the ordinance is invalid. If the [county] had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State." Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000); accord Diamonds v. Greenville County, 325 S.C. 154, 156, 480 S.E.2d 718, 719 (1997) (discussing analysis of validity of county ordinances).

Respondents have not challenged the County's power to adopt the ordinance. In any event, Charleston County is specifically authorized to regulate land uses and to promote "the public welfare in any other regard specified." S.C. Code Ann. § 6-29-710(A)(5) & (8) (Supp. 2000). Because the County had the authority to enact its ordinance, we next must examine whether the ordinance is consistent with State law.

> Where an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law. In order for there to be a conflict between a State law and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict.

Wrenn Bail Bond Serv., Inc. v. City of Hanahan, 335 S.C. 26, 29, 515 S.E.2d 521, 522 (1999) (citation omitted). "As a general rule, 'additional regulation to that of [the] State law does not constitute a conflict therewith.'" Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 553, 397 S.E.2d 662, 664 (1990) (quoting Arnold v. City of Spartanburg, 201 S.C. 523, 536, 23 S.E.2d 735, 740 (1943)); see S.C. Code Ann. § 6-29-960 (Supp. 2000) (setting forth

provisions for determining whether local zoning regulations or State law prevail when restrictions differ).

The Department of Revenue "has sole and exclusive power to issue all licenses, permits, and certificates" relating to beer and wine. S.C. Code Ann. § 61-2-70 (Supp. 2000). Before beer and wine permits are issued, several statutory requirements must be satisfied by the applicant, including the following:

> No permit authorizing the sale of beer or wine may be issued unless:
>
> (6) The location of the proposed place of business of the applicant is in the opinion of the [Department of Revenue] a proper one.
>
> (7) The [Department of Revenue] may consider, among other factors, as indications of unsuitable location, the proximity to residences, schools, playgrounds, and churches.

S.C. Code Ann. § 61-4-520 (Supp. 2000).[1]

The authority conferred on the Department of Revenue, however, is limited to the issuance and enforcement of licensing. In Town of Hilton Head Island v. Fine Liquors, Ltd., the liquor store argued a local ordinance prohibiting the use of internally illuminated signs which were visible from any public right

[1] The circuit court order and the parties' briefs refer interchangeably to Chapter 4, sections 61-4-10 to -1770 (entitled Beer, Ale, Porter, and Wine) and Chapter 6, sections 61-6-10 to -4720 (entitled Alcoholic Beverage Control Act) of Title 61. Because the permit at issue in this case is for the sale of beer and wine only, sections 61-4-500 to -620 control the application for the permit. S.C. Code Ann. §§ 61-4-500 to -620 (Supp. 2000).

of way or beach was in direct conflict with the state statutory provision empowering only the South Carolina Alcohol Beverage Control Commission to regulate the operation of all retail liquor stores in the State. However, our Supreme Court found the store's contention was without merit because the statute was silent on the issue of illumination. The Supreme Court did "not interpret the language of the statute as diminishing the power conferred upon local governments to regulate *land use*." Fine Liquors, 302 S.C. at 552, 397 S.E.2d at 663 (emphasis added). The Supreme Court explained:

> [I]n order for there to be a conflict between a state statute and a municipal ordinance "both must contain either express or implied conditions which are inconsistent or irreconcilable with each other. Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand."

Id. at 553, 397 S.E.2d at 664 (quoting McAbee v. Southern Ry., 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932).

Here, Charleston County's zoning ordinance prohibits establishments that serve beer or alcoholic beverages from locating within 500 feet of residential areas. The statutes under which the Department grants permits for the sale of beer and wine, specifically section 61-4-520, merely allows, but does not require, the consideration of "proximity to residences, schools, playgrounds, and churches." In regard to specific restrictions on distance from residential areas, the County's ordinance clearly speaks where State law is silent. The County's ordinance does not contain express conditions which are either inconsistent with or irreconcilable with State law. Because there is no conflict between State law and the County's ordinance, the ordinance is valid.

II.

Respondents argue the County ordinance criminalizes legal conduct within this State.

Local governments may not criminalize conduct that is legal under a statewide criminal law. Martin v. Condon, 324 S.C. 183, 188, 478 S.E.2d 272, 274 (1996); see Connor v. Town of Hilton Head Island, 314 S.C. 251, 254, 442 S.E.2d 608, 609 (1994) (holding a municipality may not prohibit conduct that is not unlawful under State criminal laws governing the same subject). Enforcement of the local ordinance, however, applies to land use restrictions, not licensing. We follow the reasoning of our Supreme Court in Bugsy's, Inc. v. City of Myrtle Beach, wherein it explained:

> Although [Myrtle Beach] Ordinance 96-56 provides criminal penalties for its violation, it does not criminalize the operation of video game machines. *It merely provides criminal penalties for violation of provisions of the zoning ordinance. So long as businesses comply with the requirements of the zoning ordinance, they can operate video game machines.* Accordingly, unlike Martin [v. Condon], Ordinance 96-56 does not criminalize activity which is legal statewide.

Bugsy's, 340 S.C. at 96, 530 S.E.2d at 894-95 (footnote omitted; emphasis added). In this case, the County has not criminalized a class of conduct in Charleston County; rather, through its regulation of land use, it has prohibited businesses from selling beer and alcoholic beverages within 500 feet of residential areas. Although its zoning ordinances may impact businesses desiring to sell beer and alcoholic beverages, the County has not criminalized activity which is legal statewide.

CONCLUSION

The Charleston County zoning ordinance Article 6.2.16 merely restricts land use within the municipality. It does not criminalize or directly conflict with the state licensing provisions applied by the Department of Revenue for issuing beer and wine sales permits throughout the State. Because the enforcement of its ordinance through the denial of Respondent's special exception request was properly authorized and exercised by the Board, the decision of the circuit court is

REVERSED.

HEARN, C.J. and GOOLSBY, J., concur.