The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF KENNETH L. EDWARDS, PETITIONER

Kenneth L. Edwards, who was definitely suspended from the practice of law for a period of eighteen months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, January 17, 2003, beginning at 12:30 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

D. Cravens Ravenel, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
December 5, 2002

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER Of HENRY H. CABANISS, PETITIONER

Henry H. Cabaniss, who was definitely suspended from the practice of law for a period of two years, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, January 17, 2003, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

D. Cravens Ravenel, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
December 5, 2002

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER Of GEORGE EUGENE LAFAYE, IV, PETITIONER

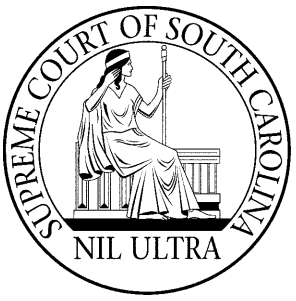
George Eugene Lafaye, IV, who was definitely suspended from the practice of law for a period of one year, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, January 17, 2003, beginning at 11:00 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

D. Cravens Ravenel, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
December 5, 2002



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

December 9, 2002

ADVANCE SHEET NO. 40

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

2002-MO-074 - Charles A. Jackson v. State	Pending
25535 - State v. Johnny Harold Harris	Denied 12/03/02
25540 - Tracy O. Trousdell v. Al Cannon, Jr., etc.	Denied 12/03/02
25542 - Johnny Lee Lucas v. State	Denied 12/03/02
25551 - Wendell Dawson v. State	Pending
25556 - In the Matter of Hal J. Warlick	Pending
25558 - State v. Larry Dean Dawkins	Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2002-UP-738 - The State v. Randy Williams
(Richland, Judge J. Ernest Kinard, Jr.)

2002-UP-739 - Jane & John Doe v. SCDSS
(Spartanburg, Judge Billy A. Tunstall)

2002-UP-740 - The State v. Alvin White
(Aiken, Judge James C. Williams, Jr.)

2002-UP- 741 - The State v. Gibreel H. Nichols
(Clarendon, Judge Kenneth G. Goode)

2002-UP-742 - The State v. John Fitzgerald Johnson
(Spartanburg, Judge J. Derham Cole)

2002-UP-743 - The State v. Prentis C. Reaves
(Horry, Judge John M. Milling)

2002-UP-744 - Gwendolyn G. Martin v. Leisure Connections
(Greenville, Judge Henry F. Floyd)

2002-UP-745 - The State v. Horace Carter
(Aiken, Judge Thomas W. Cooper, Jr.)

2002-UP-746 - Liston Floyd v. Pilliod Furniture
(Marion, Judge L. Casey Manning)

2002-UP-747 - The City of Rock Hill v. Eric Lawrence
(York, Judge John C. Hayes, III)

2002-UP-748 - Peter Miller v. Mikel Deleon
(Charleston, Judge Gerald C. Smoak and Judge Diane Schafer Goodstein)

2002-UP-749 - The State v. Curly Keenon
(Spartanburg, Judge J. Derham Cole)

2002-UP-750 - The State v. Richardo Johnson # 2
(Orangeburg, Judge Luke N. Brown, Jr.)

2002-UP-751 - The State v. Manuel Mensias Acosta
(Florence, Judge Paul M. Burch)

2002-UP-752 - Harriet Addison v. Trident Technical College
(Charleston, Judge Jackson V. Gregory)

2002-UP-753 - Reginald Hubbard v. William Pearson
(Clarendon, Ralph F. Cothran, Master In Equity)

2002-UP-754 - Juanita Barron v. James Barron
(Richland, Judge James A. Spruill, III)

2002-UP-755 - Maverick Momentum v. M.S.S. Supply
(Richland, Judge G. Thomas Cooper, Jr.)

PETITIONS FOR REHEARING

3533 - Food Lion v. United Food	Pending
3545 - Black v. Patel	Denied 11/20/02
3547 - Mathis v. Hair	Pending
3552 - Bergstrom v. Palmetto Health Alliance	Pending
3558 - Binkley v. Burry	Pending
3559 - The State v. Dale Follin	Pending
3561 - Baril v. Aiken Regional Medical Center	Pending
3562 - Heyward v. Christmas	Pending
2001-UP-522 - Kenney v. Kenney	Held in Abeyance
2002-UP-611 - Allgood, V., et al. v. GE Capital	Pending
2002-UP-615 - The State v. Kintrell Floyd	Pending
2002-UP-623 - The State v. Chris Ford	Pending
2002-UP-628 - Thomas v. Cal-Maine	Pending

2002-UP-640 - Elliott v. Elliott	Pending
2002-UP-646 - Hill v. Norman	Pending
2002-UP-656 - SCDOT V. DDD #2	Pending
2002-UP-657 - SCDOT V. DDD	Pending
2002-UP-662 - The State v. Jermiah Morgan	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3314 - The State v. Woody, Minyard	Pending
3404 - State v. Charles M. Stuckey, Jr.	Denied 11/21/02
3476 - State v. Terry Grace	Denied 11/21/02
3486 - Hansen v. United Service	Pending
3488 - State Auto v. Raynolds	Granted 12/4/02
3489 - State v. Sharron Blasky Jarrell	Pending
3494 - Lee v. Harborside Café	Denied 11/21/02
3495 – Ferrell Cothran v. Alvin Brown	Pending
3497 - Paresha Shah v. Richland Memorial	Denied 11/7/02
3500 - The State v. Reyes Cabrera-Pena	Pending
3501 - The State v. Demarco Johnson	Pending
3504 - Wilson v. Rivers	Pending
3505 - L-J v. Bituminous	Pending
3511 - Maxwell v. Genez	Pending
3512 - Cheap O's v. Cloyd	Pending

3515 - State v. Robert Garrett	Pending
3516 - Antley v. Nobel	Pending
3518 - Chambers v. Pingree	Pending
3520 - Alice Pilgrim v. Yvonne Miller	Pending
3521 - Pond Place v. Poole	Pending
3523 - State v. Eddie Lee Arnold	Pending
3525 - Arscott v. Bacon	Pending
3527 - Griffin v. Jordan	Pending
3535 - State v. Ricky Ledford	Pending
3540 - Greene v. Greene	Pending
3541 - Satcher v. Satcher	Pending
3544 - Gilliland v. Doe	Pending
3548 - Mullis v. Trident	Pending
3549 - The State v. Bonnie Nelson Brown	Pending
2001-UP-324- The State v. John Williams, III	Granted 11/7/02
2001-UP-461 - Storage Trailer v. Proctor	Remanded and Dismissed
2001-UP-476 - The State v. Jeffery Walls	Denied 11/21/02
2001-UP-477 - The State v. Alfonso Staton	Denied 11/21/02
2001-UP-478 - The State v. Leroy Staton	Denied 11/21/02
2002-UP-220 - The State v. Earl Davis Hallums	Pending
2002-UP- 241 - The State v. Glenn Rouse	Pending

2002-UP-256 - Insurit v. Insurit	Pending
2002-UP-266 - The Town of Mt. Pleasant v. John Lipsky	Pending
2002-UP-281- The State v. Henry James McGill	Denied 11/25/02
2002-UP-319 - The State v. Jeff McAlister	Denied 12/5/02
2002-UP-326 - The State v. Lorne Anthony George	Denied 12/5/02
2002-UP-329 - Ligon v. Norris	Pending
2002-UP-363 - Curtis Gibbs v. SCDOP	Pending
2002-UP-368 - Roy Moran v. Werber Co.	Pending
2002-UP-374 - The State v. Gregory Craft	Pending
2002-UP-381 - Rembert v. Unison	Pending
2002-UP-393 - Wright v. Nichols	Pending
2002-UP-395 - The State v. Tommy Hutto	Pending
2002-UP-401 - State v. Robert Warren	Pending
2002-UP-411 - The State v. Leroy Roumillat	Pending
2002-UP-412 - Hawk v. C&H Roofing	Pending
2002-UP-448 - The State v. Isaac Goodman	Pending
2002-UP-477 - Gene Reed v. Farmer	Denied 12/5/02
2002-UP-480 - The State v. Samuel Parker	Pending
2002-UP-485 - Price v. Tarrant	Pending
2002-UP-489 - Fickling v. Taylor	Pending
2002-UP-498 - Singleton v. Stokes Motors	Pending

2002-UP-504 - Thorne v. SCE&G	Pending
2002-UP-509 - Baldwin Const v. Graham, Barry	Pending
2002-UP-513 - Frazier, E'Van v. Badger	Pending
2002-UP-516 - The State v. Angelo Parks	Pending
2002-UP-547 - Stewart v. Harper	Pending
2002-UP-549 - Davis v. Greenville Hospital	Pending
0000-00-000 - Dreher v. Dreher	Pending
0000-00-000 - Hattie Elam v. SCDOT	Pending
0000-00-000 - Main Corporation v. Thomas Black	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Denene, Inc., d/b/a Trio Club,
L.C. Entertainments, LLC., d/b/a
Club Tango, and Let's Eat, Inc.,
d/b/a Port Side Cafe Uptown, Respondents,

v.

The City of Charleston, Appellant.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 25563
Heard October 23, 2002 - Filed December 2, 2002

REVERSED

William B. Regan and Frances I. Cantwell, of Regan and Cantwell, LLC, of Charleston, for appellant.

John F. Martin, of Martin Law Firm, of Charleston, for respondents.

JUSTICE BURNETT: Respondents Denene, Inc., d/b/a Trio Club, L.C. Entertainments, LLC., d/b/a Club Tango, and Let's Eat, Inc., d/b/a

Port Side Cafe Uptown (Businesses) brought this action challenging Appellant The City of Charleston's (the City's) Municipal Code Section 3-2 (the Ordinance). Among other claims, Businesses asserted state law, particularly South Carolina Code Ann. § 61-2-80 (Supp. 2001), preempted the Ordinance. The trial judge granted Businesses summary judgment on their preemption claim and enjoined the City from enforcing the Ordinance. We reverse.

ISSUES

I. Did the General Assembly intend to preempt the regulation of hours of operation of retailers of beer, ale, porter and/or wine by enacting South Carolina Code Ann. § 61-2-80 (Supp. 2001)?

II. Is the Ordinance inconsistent with South Carolina Code Ann. § 61-4-120 (Supp. 2001)?

DISCUSSION

Determining whether a local ordinance is valid is a two-step process. Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000). The Court first considers whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality is without power to regulate the field. Id. If the municipality had the power to enact the ordinance, the Court then determines whether the ordinance is consistent with the Constitution and general law of the State. Id.

I.

The City argues the trial judge erred by holding the Ordinance is preempted by state law. We agree.

The Ordinance provides:

> Commercial establishments which allow for the on-premises consumption of beer, ale, porter and/or wine shall be prohibited from operating between the hours of 2 A.M. and 6 A.M. on Mondays through Saturdays.[1]

Section 61-2-80 provides:

> The department [Department of Revenue (DOR)] is the sole and exclusive authority empowered to regulate the operation of all retail locations authorized to sell beer, wine, or alcoholic liquors and is authorized to establish conditions or restrictions which the department considers necessary before issuing or renewing a license or permit. . . .

In construing statutory language, the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998). The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something. Id.

"[I]n order to pre-empt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 552, 397 S.E.2d 662, 663 (1990).[2] In Fine Liquors, the Court concluded the

---

[1] The Ordinance was ratified on July 18, 2000, and took effect 180 days later.

[2] Since Fine Liquors, the Court has held the legislature intended to preempt the entire field of bail bondsman regulation through a statute providing "[no] license may be issued to a professional bondsman or runner except as provided in this chapter." Wrenn Bail Bond Service, Inc., v. City of Hanahan, 335 S.C. 26, 515 S.E.2d 521 (1999). We have also determined a statute manifested a clear legislative intent for the State to preempt the regulation of watercraft on navigable waters where the statute specified any

predecessor to § 61-2-80 did *not* indicate "the legislature intended to pre-empt the field, thereby precluding municipalities from passing any ordinance which affected the operation of liquor stores."[3] Id. Accordingly, the Court has already ruled on the issue presented by this appeal. Id.

Furthermore, § 61-2-80 was re-enacted after the issuance of Fine Liquors. Act No. 415 § 1, 1996 S.C. Acts 2459. Had the General Assembly disagreed with our decision in Fine Liquors, it would have clearly stated its position that the DOR occupies the entire field of beer and wine regulation as it did in enacting § 61-6-4490 (Supp. 2001) ("Ordinances of political subdivisions of this State prohibiting the acts prohibited by the provisions of this article. . . are hereby suspended, it being declared that the State has occupied the field of the subject covered thereby.") (Underline added).

Finally, § 61-4-120 generally prohibits Sunday sales of beer and wine and provides "[m]unicipal ordinances in conflict with this section are unenforceable."[4] By passing § 61-4-120 with § 61-2-80, the General Assembly recognized that municipalities have authority to regulate the hours of operation of retailers of beer and wine. It would have been unnecessary for the legislature to refer to municipalities' authority to regulate the hours of operation of retail sales of beer and wine if the General Assembly intended to occupy the entire field. See AmVets Post 100 v. Richland County Council,

---

local laws must be identical to the state provisions. Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 511 S.E.2d 361 (1999).

[3] Section § 61-2-80 and its predecessor, § 61-5-190 (1990), are essentially the same except that the earlier statute empowered the South Carolina Alcoholic Beverage Control Commission, rather than the DOR, with authority to regulate the operation of retail liquor stores.

[4] As addressed below, this Section does not impliedly permit beer and wine retailers to operate at all times other than those prohibited by statute, but rather precludes municipalities from permitting beer and wine retailers to operate on Sunday.

280 S.C. 317, 313 S.E.2d 293 (1984) (state statute contemplated further regulation of bingo by counties as it referred to licensing by counties).

II.

The City argues the Ordinance is consistent with the Constitution and general law of the State. We agree.

In relevant part, § 61-4-120 provides:

> It is unlawful for a person to sell or offer for sale wine or beer in this State between the hours of twelve o'clock Saturday night and sunrise Monday morning. . . . Municipal ordinances in conflict with this section are unenforceable.

As a general rule, "additional regulation to that of State law does not constitute a conflict therewith." Town of Hilton Head Island v. Fine Liquors, Ltd., supra 302 S.C. at 553, 397 S.E.2d at 664 quoting Arnold v. City of Spartanburg, 201 S.C. 523, 536, 23 S.E.2d 735, 740 (1943).

Further,

> [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.'

Fine Liquors, supra, quoting McAbee v. Southern Ry. Co., 166 S.C. 166, 169-70. 164 S.E. 444, 445 (1932).

In City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963), the Court determined a city ordinance which prohibited businesses from on premises service or consumption of any wines or malt liquors between 1:30 a.m. and 7:30 a.m. did not conflict with a state statute making it unlawful to sell wine or beer between midnight Saturday and sunrise Monday. Noting the ordinance merely imposed additional requirements on commercial establishments in the city, the Court concluded the ordinance was neither inconsistent nor irreconcilable with the State statute and its passage was a proper and valid exercise of the city's police power.

Jenkins controls our decision on this issue. While the Ordinance differs in scope from § 61-4-120 (the ordinance prohibits operation from 2:00 a.m. to 6:00 a.m. on Mondays through Saturdays while the statute prohibits sales from midnight on Saturday through sunrise on Monday), the two are neither inconsistent nor irreconcilable.

Furthermore, § 61-4-120 does not impliedly provide Businesses with a "right" to sell beer and wine at all times other than at those hours prohibited by the statute. As noted in Jenkins, the commercial establishments did not have the right to sell beer and wine at all hours other than those specifically prohibited by the state statute.

Finally, we note that if an ordinance unreasonably prohibits the sale of beer and wine, in effect banning a business which the State has deemed legal, the ordinance would exceed the police power of the municipality and be unenforceable.[5] Id. The Ordinance presently before the Court does not exceed the City's authority.

The decision of the trial judge is **REVERSED**.

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

[5] See S.C. Code Ann. § 5-7-30 (Supp. 2001).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Gregory R. Blurton, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 25564
Heard September 18, 2002 - Filed December 2, 2002

REVERSED

Tara Dawn Shurling, of Columbia, for Petitioner.

Attorney General Charles M. Condon; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Charles H. Richardson; Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and, Walter M. Bailey, Jr., of Summerville, for Respondent.

JUSTICE PLEICONES: Petitioner was convicted of two counts of armed robbery, and one count each of kidnapping, grand larceny of a motor vehicle, and failure to stop for a blue light. The trial judge sentenced Petitioner to three life sentences for the kidnapping and armed robbery convictions, ten years for grand larceny, and three years for failing to stop for a blue light, with all sentences to run concurrently.

On appeal, Petitioner contested certain evidentiary rulings as well as a jury charge. The Court of Appeals reversed and remanded for a new trial because of evidentiary errors, but held the jury charge that "orders of another" is no defense to a crime was proper in this case. State v. Blurton, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000). We denied the state's petition for certiorari to review the Court of Appeals' reversal of evidentiary rulings. We granted Petitioner's petition for writ of certiorari to review the propriety of the jury charge. We reverse because we find the charge was not warranted by the facts adduced at trial.

FACTS

Petitioner worked at a Wal-Mart in Orangeburg as a construction worker during the expansion of the building. Petitioner's wife managed the toy section of the same Wal-Mart, and her daytime manager was James Mayfield.

There was evidence that James Mayfield convinced Petitioner that Mayfield was a former Navy SEAL, and was currently working for the Central Intelligence Agency ("CIA"). Mayfield told Petitioner that the CIA was interested in recruiting Petitioner as an agent. Petitioner maintained at trial that he believed he was involved in a complicated CIA operation called "Double White" which required Petitioner to stage a robbery in order to establish his outlaw status so that he could more easily infiltrate a drug cartel. Petitioner testified that Mayfield told Petitioner that the sheriff's department in Orangeburg was involved with the drug cartel, and the staged robbery must look real so that the sheriff's department would report the robbery back to the cartel.

Petitioner testified that the plan was to seek out Roger, another employee of the Wal-Mart, who knew of the plan, and that Roger would lead Petitioner to the "cash room." Petitioner maintained at trial that Mayfield told Petitioner not to wear a mask or gloves, and to make sure the cameras in the store caught the robbery on tape so the drug cartel would know that Petitioner robbed the store. Petitioner testified that he believed the money taken from Wal-Mart would be recovered and returned immediately to the store. He testified, "it wasn't a robbery. I never believed it was a robbery. If I would have believed it was a robbery I wouldn't have went in there…it was just to appear to be a robbery, but they weren't going to let me keep the money." Petitioner testified that Mayfield told Petitioner to go to a motel in town after the staged robbery, and Mayfield would meet Petitioner there, recover the money, and the CIA would return the money to Wal-Mart.

Petitioner admits that he went into the Orangeburg Wal-Mart, where both he and his wife worked, armed with a handgun. Roger, his contact, was not working that day, so Petitioner met Brandon, another manager, whom Mayfield said also knew about the plan. Petitioner testified he pointed the gun at Brandon and ordered him into the cash room, making sure the cameras could see the gun. Once Petitioner entered the cash room, he was supposed to take all of the money in the room, which was over one hundred thousand dollars. However, Petitioner testified that once he entered the room, he realized his wife's best friend, Brenda, was counting the money. At this point, Petitioner "deviated" from the plan. Petitioner testified that instead of taking all of the money, which he easily could have, he took only the one dollar bills which were stacked on a table in the cash room, totaling eight thousand five hundred dollars and five cents. This is the basis of the first armed robbery count.

Petitioner further admits that he forced Brandon to walk outside the store and into the parking lot after the money was taken. However, Petitioner testified that "Brandon was supposed to come with me, to walk outside the store. This was part of the plan…because they have a girl that stands there. When you walk out of Wal-Mart she checks your bags. I had a big bag of money. If I'm not walking with the manager out the door, she's going to

check the bag, and it's going to create confusion…" This act is the basis of the kidnapping charge.

Once out of the store, Petitioner testified he believed someone from the CIA was going to pick him up, because he did not have a car. A white Mercedes pulled up and parked right next to Petitioner, and Petitioner testified "[he] thought [his] ride was here." A woman got out of the car, began screaming, and threw her purse and keys at Petitioner. This is the basis of the second armed robbery charge. Petitioner testified, "I figured it was for show…."

Petitioner took the car, and proceeded to evade the police. Petitioner testified that Mayfield told him a CIA agent would intercept the local police so that Petitioner would not get caught. This is the basis for the grand larceny of a motor vehicle charge, and the failure to stop for a blue light charge.

Petitioner admitted to all of these facts, but maintained that he thought he was working for the CIA, and therefore did not have the requisite *mens rea* to commit any crime.

ISSUE

Did the Court of Appeals err in holding the trial court properly instructed the jury that it is no defense to a crime if it was done under the instructions of another?

DISCUSSION

The trial judge instructed the jury on the requisite *mens rea*, and then added, "if one committed a criminal act it is no defense to show that it was done under the instructions or orders from another. Likewise, it is no defense to a criminal act if it be shown that it was done in partnership or cooperation with another person."

Petitioner argued at trial that he lacked the *mens rea* necessary to complete the crime. "Criminal liability is normally based upon the

concurrence of two factors, 'an evil meaning mind [and] an evil doing hand.'" State v. Jeffries, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994) (internal citations omitted). Petitioner did not argue that Mayfield instructed him to commit a crime, but rather that because Petitioner thought the entire event was a staged CIA operation, it was not a criminal act as he lacked the 'evil meaning mind'. Because the jury instruction given was not implicated by the facts in this case, we hold it was error to charge the jury the "orders of another" instruction.

The evidence presented at trial determines the charged jury instruction. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). The purpose of a jury instruction is "to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury. State v. Lee, Id.; State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944). Only law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury. State v. Lee, Id.; State v. Fair, 209 S.C. 439, 40 S.E.2d 634 (1946); State v. Rivers, 186 S.C. 221, 196 S.E. 6 (1938). We hold based upon the evidence introduced in this case, that the Court of Appeals erred in affirming the "orders of another" instruction.[1]

CONCLUSION

We reverse the decision of the Court of Appeals holding that the "orders of another" charge was proper under the evidence adduced. On retrial we are confident that the trial court will appropriately instruct the jury based upon the evidence presented.

REVERSED.

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

[1] The "orders of another" jury charge, is a correct proposition of law. See, e.g. Brown v. Bailey, 215 S.C. 175, 54 S.E.2d 769 (1949).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Consumer Affairs, Petitioner,

v.

Rent-A-Center, Inc., a/k/a Thorn Americas, Inc., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 25565
Heard November 20, 2002 - Filed December 9, 2002

DISMISSED AS IMPROVIDENTLY GRANTED

Helen Fennell and Danny R. Collins, of South Carolina Department of Consumer Affairs, of Columbia, for Petitioner.

Thomas H. Pope, III, of Pope and Hudgens, P.A., of Newberry, for Respondent.

PER CURIAM: This Court granted the petition for a writ of certiorari to review the Court of Appeals' opinion in South Carolina Dep't of Consumer Affairs v. Rent-A-Center, Inc., 345 S.C. 251, 547 S.E.2d 881 (Ct. App. 2001). After careful consideration, we now dismiss certiorari as improvidently granted.

DISMISSED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., and Acting Justice Henry F. Floyd concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Fraternal Order of Police, Charleston Lodge #3, Pet Helpers, Inc. d/b/a Shipwatch Bingo, Army Navy Union Garrison #2020, Faith Temple Full Gospel Fellowship Church, A. Terre Des Hommes USA, Inc., Cherokee Suicide Intervention Center, Inc., Army Navy Garrison #2165, Lexington Voiture 1211 La Societe Des 40 & 8 d/b/a Sunset Bingo, United Veteran Association, Inc., Roadrunners Softball Association, Inc., United Society of the Blind of Greenwood, The Good Samaritan Mission Center d/b/a Beacon Bingo, Fraternal Order of the Elks (BPOE), Greenville Lodge No. 858, Piedmont Historical Society d/b/a Great American Bingo, Pilgrim's Inn, Inc., West

Main Community Club, Ms. Wheelchair South Carolina, Inc., Citizens for Advancement of the Physically Handicapped, Post 174 American Legion-Ladies Auxiliary, HF Help Corporation, Army Navy Garrison #2154, AMVETS Post 80, Army Navy Garrison #1994, Army Navy Garrison #2154, Cherokee Gaffney Sertoma Club 10752, South Carolina Dairy Goat Association, Grand Strand Optimist Club d/b/a Galaxy Bingo, Miss Dillon County Beauty Pageant, Inc., Church in the Lord Jesus Christ of the Apostolic Faith, Inc. - Lake City, Church in the Lord Jesus Christ of the Apostolic Faith, Inc. - Darlington, Church of the Lord Jesus Christ of the Apostolic Faith, Inc. - Lynchburg, Dovesville Rural Fire Department, Union Baptist Church, VFW #3181, Appellants,

v.

South Carolina
Department of Revenue, Respondent.

Appeal From Charleston County
H. Dean Hall, Circuit Court Judge

Opinion No. 25566
Heard October 8, 2002 - Filed December 9, 2002

AFFIRMED

Joseph Alton Bivens and Gerald M. Finkel, both of Finkel & Altman, L.L.C., of Columbia, for appellants.

Harry T. Cooper, Jr., Ronald W. Urban and Sarah G. Major, all of South Carolina Department of Revenue, of Columbia, for respondent.

CHIEF JUSTICE TOAL: Fraternal Order of Police et. al. ("Taxpayers") challenge the constitutionality of the Bingo Act of 1989 ("1989 Act"),[1] and two additional bingo statutes enacted after the 1989 Act, S.C. Code Ann. §§ 12-21-3441 and 12-21-3610 (Supp. 1995).[2] Taxpayers brought their challenge in an effort to recover taxes paid to the South Carolina Department of Revenue ("the Department") pursuant to these statutes between July 1, 1992, and October 1, 1997.

[1] S.C. Code § 12-21-3310 et seq. (Supp. 1994).

[2] The contested provisions were repealed by the Bingo Tax Act of 1996, S.C. Code Ann. § 12-21-3910 (Supp. 1997).

FACTUAL / PROCEDURAL BACKGROUND

The parties have stipulated to the relevant facts. The Taxpayers first filed an action in 1993 challenging the 1989 Act on both constitutional and non-constitutional grounds. The Taxpayers did not exhaust their administrative remedies by filing a claim for a refund for taxes paid, and the case was dismissed in 1994 with leave to restore. Taxpayers filed a refund claim in 1995, and raised all of the non-constitutional claims from the 1993 action. The Department denied the refund claim, and the Taxpayers appealed all the way to this Court. This Court affirmed on two of the three non-constitutional issues, and reversed on a third. *Fraternal Order of Police v. South Carolina Dept. of Rev.,* 332 S.C. 496, 506 S.E.2d 495 (1998) ("*FOP I*").[3]

In 1997, the Taxpayers filed a motion to have their 1993 claim reinstated in order to move forward on the *constitutional* causes of action not addressed in *FOP I*. The motion was granted, and this Court denied the Department's appeal as interlocutory. The Taxpayers' original 1993 complaint was reinstated, but the parties stipulated that they were only raising the constitutional challenges to equal protection and due process within the

[3] In *FOP I*, the Court addressed three issues: (1) whether bingo taxes collected pursuant to S.C. Code Ann. §§ 12-21-3440(B) and 12-21-3441 (Supp. 1997) must be counted as gross proceeds, and consequently subject to the sales and use taxes imposed by S.C. Code Ann. § 12-21-3610 (Supp. 1997); (2) whether gross proceeds includes monies bingo operators are statutorily required to pay out as prize money under § 12-21-3420(12) (Supp. 1997); and (3) whether the operators are entitled to a refund on the sales taxes paid on their retail purchases of bingo cards, which they then resold to the players. The Court reversed the trial court on the first issue, holding that the bingo tax is not a component of gross proceeds, and accordingly is not subject to the sales and use taxes. The Court answered the remaining issues in the negative, and affirmed the lower court's denial of the Taxpayers' refund.

original complaint.[4]

In addition to the 1989 Act, the Taxpayers are challenging the constitutionality of South Carolina Code sections 12-21-3441 and 12-21-3610, enacted after the 1989 Act, in 1991 and 1992 respectively. With the exception of section 12-21-3440, the 1989 Act is regulatory in nature. It establishes various rules relating to record keeping, regulation of promoters, location of games, and size of payouts. Section 12-21-3440 both regulates and taxes bingo. Section 12-21-3440(A) creates various classes of bingo license holders and specifies certain rules as to each class, including assessing differing license taxes for the individual classes. Section 12-21-3440(B), strictly a revenue statute, assesses a bingo tax on the various classes of bingo license holders.

The Taxpayers were all licensed bingo operators under the 1989 Act, holding either Class AA or Class B licenses. Under the 1989 Act, Class AA operators were allowed to conduct one bingo session per month with a minimum prize payment of $50,000 and a maximum of $250,000. S.C. Code Ann. § 12-21-3440(A)(1) (Supp. 1994). The Taxpayers holding a Class B license were allowed to conduct three bingo games per week, but were limited to a maximum payout of $8,000 per session. S.C. Code Ann. § 12-21-3440(A)(2) (Supp. 1994).

The additional statutes challenged, sections 12-21-3441 and 12-21-3610, are both revenue provisions. Section 12-21-3441 assesses an additional bingo tax on holders of Class AA and Class B licenses. Section 12-21-3610 assesses a sales tax on the gross proceeds derived from bingo.

The Taxpayers and the Department presented arguments before the circuit court on the constitutional claims on February 7, 2000. The parties did not call any witnesses. On April 6, 2000, the circuit court ruled in favor

[4] Rather than amending their original complaint, which contained both causes of action that had already been addressed in *FOP I* and listed plaintiffs that were no longer parties, the Taxpayers and the Department stipulated that the first, second, and third causes of action had been resolved.

of the Department on all issues and dismissed the Taxpayers' claims with prejudice. The following issues are raised on appeal:

I. Did the Circuit Court err in failing to find that Article XVII, § 7 of the South Carolina Constitution made bingo a non-lottery game, and, consequently, conferred a constitutional right upon Taxpayers to conduct bingo?

II. Did the Circuit Court err in failing to find the 1989 Act and S.C. Code Ann. §§ 12-21-3441 and 12-21-3610 (Supp. 1994) violated Taxpayers' rights to Equal Protection, Due Process, and Free Speech?

III. Did the Circuit Court err in failing to find that Article XVII, § 7 of the South Carolina Constitution impliedly exempts Taxpayers from taxation under the 1989 Act and S.C. Code Ann. §§ 12-21-3441 and 12-21-3610?

IV. Are the Taxpayers claims barred by *res judicata*?

Law Analysis

I. Right to Conduct Bingo

The Taxpayers argue that the 1974 amendment to Article XVII, § 7 of the South Carolina Constitution made bingo a non-lottery game, and consequently conferred upon them a right to conduct bingo. We disagree.

Article XVII, § 7 of the South Carolina Constitution provides,

> No lottery shall ever be allowed or be advertised by newspapers, or otherwise, or its tickets be sold in this State. The *game of bingo*, when conducted by charitable, religious or fraternal organizations exempt from federal income taxation or when conducted at recognized annual State or county fairs, *shall not be deemed a lottery* ***prohibited by this section.***

S.C. Const. art. XVII, § 7 (1976) (emphasis added).[5] When construing the constitution, the Court applies rules similar to those relating to the construction of statutes. *Davis v. County of Greenville,* 313 S.C. 459, 443 S.E.2d 383 (1994). In interpreting statutes, the Court must give statutory language its plain and ordinary meaning. *FOP I,* 332 S.C. at 499, 506 S.E.2d at 496 (citations omitted).

This Court addressed bingo's status as a lottery in *Army Navy Bingo, Garrison No. 2196 v. Plowden*, 281 S.C. 226, 314 S.E.2d 339 (1984). In *Army Navy Bingo,* bingo operators challenged the constitutionality of the prize limitations and the residence requirement in S.C. Code Ann. § 12-21-2590, arguing that the provisions violated the Fourteenth Amendment due process clause. In denying any due process violation, the Court held, "[s]ection 7 is not a self-executing constitutional grant of power to conduct bingo. On the contrary, [it] indicates that bingo is no longer constitutionally prohibited." *Army Navy Bingo*, 281 S.C. at 228, 314 S.E.2d at 340. The Court then concluded,

> Bingo is a lottery, and it is gambling. There is no right to conduct bingo under the State Constitution.
>
> Nor is there a fundamental right to gamble protected by the Federal Constitution. In fact, the State's power to suppress gambling is practically unrestrained.

Id. (citations omitted).

---

[5] Prior to 1975, the South Carolina Constitution contained a general prohibition against lotteries, and did not exempt bingo from the prohibition against lotteries. S.C. Const. art. XIV, § 2 (1868); S.C. Const. art. XVII, § 7 (1898). Until the amendment to the Constitution in 1974 that exempted bingo from the prohibition against lotteries, bingo was illegal in South Carolina. This section was amended again in 2001 to allow the State to conduct a lottery, but the exemption allowing charitable organizations to conduct bingo was not altered. S.C. Const. art. XVII, § 7 (Supp. 2001).

The Taxpayers concede that finding that bingo is not a lottery, and, therefore, is not gambling, is central to their argument that the 1989 Act violates their constitutional rights to due process and equal protection. The Taxpayers attempt to circumvent the seemingly clear language to the contrary in *Army Navy Bingo* by arguing that this Court was not talking about traditional bingo when it said "[b]ingo is a lottery, and it is gambling." 281 S.C. at 228, 314 S.E.2d at 340. The Taxpayers base this contention solely on *Army Navy Bingo's* citation to *Bingo Bank, Inc. v. J. P. Strom,* 268 S.C. 498, 234 S.E.2d 881 (1977).

In *Bingo Bank,* the Court addressed whether the game being played qualified as the bingo permitted under the Constitution. The Court found that the game being played in *Bingo Bank* was not, in fact, the traditional game of bingo contemplated by the Constitution. 268 S.C. at 503, 234 S.E.2d at 883. Taxpayers argue, then, that the Court's citation to *Bingo Bank* in *Army Navy Bingo* for the proposition that bingo is a lottery and is gambling is misplaced in the context of the traditional bingo contemplated in and permitted by the Constitution.

In our opinion, Taxpayers' argument is unconvincing. The Court's statement in *Army Navy Bingo* is not a quote from *Bingo Bank*. Although *Bingo Bank* involved a game that is not encompassed in the Constitution's definition of bingo, the game in *Army Navy Bingo* was traditional bingo. Further, the Court repeated this interpretation in *Johnson v. Collins Entertainment, Co.,* 332 S.C. 96, 508 S.E.2d 575 (1998). In *Johnson*, decided long after the 1974 amendment and *Army Navy Bingo*, the Court noted that bingo is commonly defined and understood to be a lottery. *Johnson,* 332 S.C. 96, 508 S.E.2d 575 (citing Encarta 97 Encyclopedia (Microsoft deluxe ed. 1996); 2 The New Encyclopedia Brittanica 218 (15th ed. 1997)). In his dissent, Justice Burnett expounded, "[i]n fact, with the passage of the constitutional amendment in 1974, the citizens of this State specifically recognized that the game of bingo is a lottery prohibited by Article XVII, § 7. By adopting the amendment, the citizens of South Carolina legalized the playing of bingo in certain limited circumstances." *Id.* at 107, 508 S.E.2d at 581 (Burnett, J., dissenting).

We believe this Court carefully considered its statement in *Army Navy Bingo*, a case involving traditional bingo, when it declared, in no uncertain terms, that "[b]ingo is a lottery, and it is gambling." The 1974 amendment to Article XVII simply makes a limited exception for bingo, *as a lottery*, from this State's constitutional prohibition against lotteries. The plain meaning of the portion of Article XVII, § 7 that reads, "bingo . . . shall not be deemed a lottery prohibited by this section" is that bingo remains a lottery, but is a lottery that is not prohibited by the Constitution.

The Taxpayers' argument that they have a constitutional right to conduct bingo flows from the principle that conducting bingo is a privilege granted by the Constitution. This premise is flawed. As discussed, in *Army Navy Bingo*, this Court held that bingo is a lottery and is gambling; that there is no right to gamble under the State Constitution; that there is no "fundamental right to gamble" under the Federal Constitution; and that "the State's power to suppress gambling is practically unrestrained." *Army Navy Bingo*, 281 S.C. at 228, 314 S.E.2d at 340 (citing *Lewis v. United States,* 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed.2d 475 (1955); *Sin v. Wittman,* 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142 (1905)). The Taxpayers do not address this direct precedent, and concede that finding bingo is *not* a lottery, and, therefore, is *not* gambling is central to their case.

In our opinion, there is no support for the Taxpayers argument against the precedent set in *Army Navy Bingo* and in *Johnson v. Collins.*

II. Violation of Constitutional Rights

The Taxpayers argue the 1989 Act and S.C. Code Ann. §§ 12-21-3441 and 12-21-3610 violate their constitutional rights to equal protection, due process, and free speech.

A. Equal Protection

The Taxpayers contend that the circuit court erred in failing to find the

statutes at issue violated equal protection.[6] We disagree.

This Court recognizes that "the determination of whether a classification is reasonable is initially one for the legislature and will not be set aside by the courts unless it is plainly arbitrary." *Gary Concrete Products, Inc. v. Riley*, 285 S.C. 498, 504, 331 S.E.2d 335, 338 (1985). The requirements of equal protection are satisfied as long as (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *Id.* According to the United States Supreme Court,

> [u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

City of New Orleans v. Dukes, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511, 517 (1976).

The Taxpayers allege classifying them as bingo charities, and placing additional regulations and taxes on them as bingo charities violates equal protection. Applying the rational basis standard, the circuit court found Taxpayers were not treated differently as they received the same property tax exemptions as other charities and received identical tax treatment when engaged in the same activities as other charities. The circuit court found the fundraising activity of playing bingo was what was treated differently, and that all charities that conducted bingo were treated alike. The circuit court held that the legislature's stated purpose in enacting the statutes at issue, regulation and taxation of bingo, was a legitimate legislative purpose, and that the statutes were rationally related to achieving the stated purpose.[7]

---

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

[7] *See* the 1989 Acts title, "Regulation of Bingo," and introductory statement:

Taxpayers argue that regulation of bingo is not a legitimate purpose because the statutes designed to regulate bingo interfere with the Taxpayers right to play bingo. Assuming *arguendo* the 1989 Act did have a proper purpose, Taxpayers contend it is not rationally related to achieving that objective. We disagree. Applying the rational basis test to both the regulatory and revenue provisions of the 1989 Act and sections 12-21-3441 and 12-21-3610, the requirements of equal protection are satisfied. In our opinion, the regulation of bingo is a legitimate state purpose, the regulations within the 1989 Acts are rationally related to that purpose, and all charities that conduct bingo are treated alike under the statute.

First, the Tax Commission's 1992 Bingo Task Force Report, "Bingo in South Carolina: Who Really Benefits?"[8] (admitted without objection), makes clear that bingo can invite criminal activity and fraud, including organized crime, as it involves large sums of cash, and, therefore, that it justifies state regulation. The Task Force found that bingo required "aggressive enforcement" to avoid criminal activity and even recommended additional regulation of the industry for the same reason.[9] Second, the regulations are rationally related to regulating bingo to prevent the proliferation of crime. Requiring charities that wish to conduct bingo to file an application for a license, for example, helps the state monitor what groups are playing bingo and at what level. Third, all charities that conduct bingo are subjected to the same regulations, and so are treated similarly for purposes of equal protection. Although Class AA and Class B license holders pay higher taxes, and pay a sales tax on their gross proceeds that Class E holders are not required to pay, these distinctions are justified because Class AA and Class B

"An act to amend the Code of Laws of South Carolina, 1976 by adding Article 23, Chapter 21, Title 12, so as to provide for the regulation of the game of bingo by the Tax Commission." Act No. 188, 1989 S.C. Acts, Section 1.

[8] R. 311-356.

[9] Bingo Task Force Report, R. 311-356.

holders receive advantages that the other classes do not. Class AA and Class B holders can give much larger prize payouts, attract more players, and, in turn, raise more revenue.[10]

The justification for the challenged revenue statutes is much the same, but the burden of proving tax classifications unconstitutional is even more difficult for the Taxpayer to meet. For tax statutes, "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L. Ed. 590 (1940). The purpose of the tax statutes is to raise revenue. If the Court finds regulating bingo is legitimate, it follows that taxing bingo to raise revenue is legitimate as such revenue is needed to cover the costs of the state's regulation. As the Supreme Court noted in *Madden*, "[t]raditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden." *Id.* Under this theory, the taxing statutes at issue are rationally related to raising revenue, as are the classifications within them that distinguish between the different classes of licensees, because they raise revenue according to how much money each class of license holders is likely to make.

Additionally, Taxpayers contend that the circuit court erred in applying the rational basis standard, and should have applied some form of heightened scrutiny. We disagree.

As discussed, strict scrutiny is indicated when "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage." *City of New Orleans v. Dukes,* 427 U.S. at 303, 96 S.Ct. at 2516, 49 L.Ed.2d at 517. Taxpayers cite no authority for the proposition that conducting bingo is a fundamental right, and it is difficult to conceive how conducting bingo could be considered a *personal* right, on the same level as the right to freedom of religion, for example. Regardless, this is not a novel issue. As discussed, this Court has

[10] Bingo Task Force Report, R. 321-22.

held that bingo is still gambling, that there is no fundamental right to gamble under the South Carolina Constitution or the Federal Constitution, and that "the State's power to suppress gambling is practically unrestrained." *Army Navy Bingo,* 281 S.C. at 228, 314 S.E.2d at 340. Under this precedent, heightened scrutiny is not justified.

B. Due Process

Taxpayers argue that the 1989 Act and sections 12-21-3441 and 12-21-3610 violate their rights to due process of law by effectively depriving them of the right to conduct bingo.[11] We disagree.

In *R.L. Jordan, Inc. v. Boardman Petroleum, Inc.,* this Court adopted the modern test for substantive due process challenges to social and economic welfare legislation. 338 S.C. 475, 527 S.E.2d 763 (2000). Noting that modern rules give great deference to legislative judgment to promote public welfare, this Court adopted the modern standard for reviewing all substantive due process challenges to state statutes. *Id.* Under *R.L. Jordan*, "legislation is not overturned unless the law has no rational relationship to any legitimate interest of government." *Id.* at 477-78, 527 S.E.2d at 765.

For the same reasons that regulating and taxing bingo are legitimate objectives for purposes of equal protection, we find they are legitimate for purposes of due process. The Taxpayers' due process challenge is based on the faulty premise that bingo is not a lottery, and cannot be regulated as such, and that Article XVII, § 7 of our Constitution created a fundamental *right* to play bingo. As discussed at length, this Court has already decided that there is no right to play bingo. *Army Navy Bingo.* This Court tried to put this question to rest in *Army Navy Bingo,* by stating that bingo can only be conducted by license, and that the license confers no property right. 218 S.C. at 229, 314 S.E.2d at 340. The Court also held that "[b]ingo may only be conducted in accordance with the restrictions imposed by the legislature." *Id.*

In any case, the regulatory and revenue provisions were enacted to

[11] S.C. Const. art. 1, § 3; U.S. Const. amend. XIV.

further a legitimate governmental interest: regulation of bingo to prevent the proliferation of crime.[12] The Taxpayers bear a particularly onerous burden in attempting to prove the tax statutes violate due process. In *Army Navy Bingo,* this Court recognized that the old bingo licensing scheme at issue was part of the State's tax law. Further, this Court found that "a tax does not violate the Fourteenth Amendment due process clause when its enforcement may result in destroying a particular business." *Army Navy Bingo*, 281 S.C. at 229, 314 S.E.2d at 340. In light of this Court's previous recognition of the legislature's power to regulate and tax bingo, and of the state's legitimate interest in doing so, it is clear that Taxpayers have not proven a violation of due process.

C. Free Speech

The Taxpayers argue that the challenged statutes violate their right to freedom of speech. This argument is not preserved for review by this Court.

Taxpayers did not allege a violation of free speech in their complaint. After the 1996 action, the only causes of action remaining were Taxpayers' equal protection and due process claims. At the hearing before the circuit court, Taxpayers' counsel stated, "so we are here today basically on the re-filed complaint, when the action was restored solely on the due process and equal protection claims." Although counsel later referred to some Supreme Court cases involving First Amendment challenges, it never presented a direct argument that the statutes in question violated the First Amendment. The circuit court did not address a First Amendment challenge in its order either.

Generally, claims or defenses not presented in the pleadings will not be considered on appeal. Toal, Vafai, and Muckenfuss, *Appellate Practice in South Carolina* (2d Ed. 2002) (citing *McNeely v. South Carolina Farm Bureau Mut. Ins. Co.*, 259 S.C. 39, 190 S.E.2d 499 (1972)). This rule is consistent with the concept that one cannot present one theory at trial, lose, and then attack the decision below on another theory not argued at trial. *Id.*

[12] *See* Act No. 188, 1989 S.C. Acts, 1; Bingo Task Force Report, R. 311-357.

Although some issues not raised in the pleadings may become part of the case by implied consent of the parties, this is not such a case. Rule 15(b), SCRCP. In order to be tried by implied consent, the issue must have been discussed extensively at trial. *See Andrews v. Von Elten & Walker, Inc.*, 315 S.C. 199, 432 S.E.2d 500 (Ct. App. 1993). As the First Amendment challenge was not pleaded, discussed extensively at trial, or ruled upon by the trial judge, it is not preserved for review.

III. Implied Exemption from Taxation

Taxpayers argue Article XVII, § 7 creates an implied exemption from taxation for charities that conduct bingo. We disagree.

Once again, Taxpayers' argument is based on the flawed reasoning that the constitutional amendment created a right to play bingo comparable to the right of free speech or the freedom of religion. Taxpayers as charities are not inherently exempt from taxation; charities are tax exempt only by operation of specific statutory or constitutional provisions. *See* 71 Am. Jur. 2d 362 (1972). Although legislatures have historically provided tax relief for charities, such tax relief has not become a constitutional right. *Id.*

Article XVII, § 7 does not create an express tax exemption for charities conducting bingo. In order to prove such charities are impliedly exempt, the implication must be "plain." *Ellerbe v. David*, 193 S.C. 332, 8 S.E.2d 518 (1940). Statutory language alleged to create "exemptions from taxation will *not* be strained or liberally construed in favor of the taxpayer claiming the exemption." *York County Fair Assoc. v. South Carolina Tax Comm.,* 249 S.C. 337, 341, 154 S.E.2d 361, 363 (1967) (emphasis added).

In our opinion, Taxpayers' argument that an implied exemption arises out of the state's historical tax treatment of charities is insufficient to show an implied exemption. Rather, their argument is a reflection of the inflated stature Taxpayers have given to the constitutional amendment's exemption of bingo from the prohibition against lotteries. As this Court commented,

> [t]he exemption for charitable bingo operators in the

> general prohibition of gambling has been taken far beyond its intended purpose of giving South Carolina charities a means of additional revenue. Certainly, the operation of bingo should not be the primary purpose for the existence of the exempted groups in South Carolina.

Army Navy Bingo, 281 S.C. at 230, 314 S.E.2d at 341.

IV. *Res Judicata*

The Department argues that Taxpayers' constitutional claims should have been brought simultaneously with their non-constitutional claims in *FOP I*, and, as a result, are now barred by the doctrine of *res judicata.* We disagree.

In *Ward v. State,* this Court held that administrative law judges cannot rule on the constitutionality of a statute. 343 S.C. 14, 538 S.E.2d 245 (2000). According to *Ward*, in cases raising solely constitutional issues, "a court may decide the case without waiting for an administrative ruling." *Id.* at 19, 538 S.E.2d at 247. In *Ward,* federal retirees brought a declaratory judgment to challenge the constitutionality of a statute, and the Court held bringing a declaratory action in the circuit court was the only appropriate remedy because the ALJ could not rule on the constitutionality issue.

Taxpayers raised all of the non-constitutional issues from the 1993 original complaint in *FOP I* to the ALJD. On appeal, the circuit court judge claimed the constitutional issues could not be raised because they were not ruled upon by the ALJ below. Based on this Court's ruling in *Ward,* Taxpayers were not required to raise them to the ALJ in *FOP I,* and were justified in raising their remaining constitutional issues in a declaratory judgment action directly to the circuit court.

CONCLUSION

The success of Taxpayers' constitutional challenges to the 1989 Act and to sections 12-21-3441 and 12-21-3610 depends entirely on finding that

the 1974 constitutional amendment to Article XVII, § 7 created a right to play bingo. This Court's opinion in *Army Navy Bingo* answers this question in the negative. We have found no reason why *Army Navy Bingo* should be overruled. For the foregoing reasons, we **AFFIRM** the circuit court on all issues and deny the Department's claim that Taxpayers' case is barred by the doctrine of *res judicata.*

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

The Supreme Court of South Carolina

In the Matter of Gene C. Wilkes, Jr., Respondent.

ORDER

By order dated September 19, 2002, this Court found respondent in criminal contempt and sentenced him to six months in jail. Respondent is currently incarcerated at the J. Reuben Long Detention Center.

The Director of Detention at J. Reuben Long Detention Center has inquired as to whether respondent is eligible for good time and earned work credits pursuant to S.C. Code Ann. § 24-13-210(C) and § 24-13-230(E). The Court asked the parties to brief this novel issue.

Both respondent and the Detention Center filed briefs arguing respondent should be eligible for credits. The Office of Disciplinary Counsel filed a brief in opposition to credits.

We hold that while good time and earned work credits shall normally apply to sentences for criminal contempt,[1] they shall not apply to sentences for criminal contempt imposed by this Court for violation of its orders. See In re Crumpacker, 431 N.E.2d 91 (Ind. 1982).

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Moore, J., not participating

Columbia, South Carolina

November 25, 2002

[1] See In re Marriage of Helmich, 937 P.2d 897 (Colo. 1997); Holloway v. Franklin, 652 So.2d 1217 (Fla. App. 1995); People v. Russell, 604 N.E.2d 420 (Ill. App. 1992); State v. Payne, 612 So.2d 153 (La. App. 1992); Ex parte Suter, 920 S.W.2d 685 (Tex. App. 1995).

The Supreme Court of South Carolina

In the Matter of C. T. Wolf, Respondent.

ORDER

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

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

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

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Gregory Scott Bellamy, Esquire, has been duly appointed by this Court.

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

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

James E. Moore A.C.J.

FOR THE COURT

Columbia, South Carolina
November 27, 2002

The Supreme Court of South Carolina

RE: Enactment of Rule on Continuing Legal Education For Magistrates And Municipal Judges, Rule 510, SCACR.

O R D E R

By Order dated May 3, 1994, and effective January 1, 1995, this Court set continuing legal education requirements for magistrates and municipal judges. Since that time, the General Assembly has substantially altered the requirements for certification and training of magistrates. In addition to the mandatory orientation program for magistrates and municipal judges, this Court continues to believe it is important that magistrates and municipal judges engage in continuing legal education throughout their tenure. To clarify the requirements for continuing legal education for magistrates and municipal judges, to modify the date and manner for filing reports, and to set standards for certification of continuing legal education courses, the May 3, 1994, Order is rescinded and, pursuant to Art. V, § 4, of the South Carolina Constitution, the attached Rule 510, SCACR, Continuing

Legal Education For Magistrates And Municipal Judges, is adopted effective March 1, 2003.

Magistrates and municipal judges shall not be required to file a report with the Office of Court Administration by January 10, 2003. However, to ensure that magistrates and municipal judges receive the required amount of continuing legal education credits prior to the new reporting date contained in Rule 510, SCACR, magistrates shall be required to complete and report twenty-four hours of approved continuing legal education credit, and municipal judges shall be required to complete and report eighteen hours of approved continuing legal education credit, for the reporting period beginning January 1, 2002, and ending June 30, 2003.

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

December 5, 2002

RULE 510
CONTINUING LEGAL EDUCATION FOR MAGISTRATES AND MUNICIPAL JUDGES

(a) Purpose. Being mindful of the improvements in the administration of justice that have resulted from our mandatory continuing legal education requirements for judges and active members of the South Carolina Bar (see Rules 408 and 504, SCACR), this Rule establishes minimum requirements for continuing legal education (CLE) for magistrates and municipal judges and the means by which those requirements shall be enforced. Nothing in this Rule shall be construed as preventing the Supreme Court from requiring mandatory attendance of magistrates and municipal judges at designated continuing legal education programs.

(b) Continuing Legal Education Requirements.

(1) Magistrates. During each reporting year, which begins on July 1 and ends on June 30, all magistrates are required to attend at least 18 hours of accredited CLE. At least 6 of the 18 hours shall be devoted to civil law issues and at least 6 of the 18 hours shall be devoted to criminal law issues and at least 2 of the 18 hours shall be devoted to ethical issues. To obtain credit for an accredited educational activity which has a testing component, the testing component must be completed satisfactorily.

(2) Municipal Judges. During each reporting year, which begins on July 1 and ends on June 30, all municipal judges shall be required to attend at least 12 hours of accredited continuing legal education pertaining to criminal law issues, ethics, or practice and procedure in municipal courts. To obtain credit for an accredited educational activity which has a testing component, the testing component must be completed satisfactorily.

(3) Newly Appointed Magistrates and Municipal Judges. For the year in which a magistrate or municipal judge is appointed to office, the required initial training shall satisfy the requirements of this Rule. If a magistrate or municipal judge is appointed in one reporting year and

completes the required training at the next scheduled training session, which is in the succeeding reporting year, the requirements of this Rule shall be satisfied for both reporting years.

4) Carry Forward Credit. A magistrate who completes more than 18 hours of CLE credit in any reporting year may carry a maximum of 12 hours of the excess credit forward to the next reporting year. A municipal judge who completes more than 12 hours of CLE credit in any reporting year may carry a maximum of 6 hours of the excess credit forward to the next reporting year.

(c) Accreditation of Courses for Magistrates and Municipal Judges. The Board of Magistrate and Municipal Court Certification (Board) shall determine whether a course is appropriate for credit pursuant to this Rule and if so, the credit it should be assigned. Course outlines and materials shall be submitted to the Board no later than fifteen days prior to the date the course is scheduled to be held. The Board is authorized to designate certain sponsors as accredited sponsors, who shall not be required to comply with the requirements of this section of this Rule. Accredited sponsor status may be withdrawn by the Board for cause after 60 days notice to the sponsor.

For the purpose of determining credit to be assigned to a course, an instructional hour means 60 minutes of instruction as a teacher or student. Only courses accredited by the Board may be applied to satisfy the CLE requirements established by this Rule. In determining whether a course should be accredited, the Board will be guided by the following standards:

(1) Courses should have significant intellectual or practical content;

(2) The subject matter should deal with legal theory or practical aspects of proceedings in magistrate or municipal courts;

(3) Faculty members must be qualified by practical or academic experience to teach the subject;

(4) High quality written materials should be distributed to participants;

(5) Suitable classroom or other setting should be provided for participants;

(6) Ethical and professional considerations pertaining to the subject matter should be included in the program; and

(7) Programs should encourage magistrates and municipal judges to develop contacts and resources of information in conjunction with their instructors and fellow magistrates or municipal judges.

The Board shall promptly provide the Commission on Continuing Legal Education and Specialization (Commission) with information concerning the courses it accredits pursuant to this Rule. Information provided should include program title and sponsor, date(s) and place(s) program will be presented, credit assigned to the program, and whether any portion of the program is devoted to civil or criminal issues.

(d) Duties of Sponsors of Accredited Courses. To assist in verifying course attendance, sponsors of courses accredited by the Board shall prepare a list of course attendees and retain that list for a minimum of 2 years. Within 30 days after a program is completed, sponsors will provide the Commission with a list of attendees, with SC Bar numbers, if available, which indicates the credit each attendee has earned.

(e) Reports and Fees.

(1) On forms prepared by the Commission and available through its offices, each magistrate and municipal judge shall, not later than July 15, file with the Commission a sworn annual report of compliance for the previous reporting year. The compliance reporting form will be accompanied by filing fees as prescribed by Regulation VI(B) of the Commission's *Regulations for Mandatory Continuing Legal Education for Judges and Active Members of the South Carolina Bar*

(2) Magistrates and municipal judges who are active members of the South Carolina Bar and required to satisfy the requirements of the Commission's *Regulations for Mandatory Continuing Legal Education for Judges and Active Members of the South Carolina Bar,* may satisfy the requirements specified in those Regulations by showing compliance with the CLE and fee requirements in this Rule. However, active members of the Bar are still required to complete the 2 hours of Ethics

CLE required by Rule 408(a), SCACR.

(f) **Non-Compliance.** If it appears to the Commission that a magistrate or municipal judge has failed to comply with the requirements of this Rule, the Commission shall notify the judge in writing by certified mail, addressed to the judge's last known address. The judge shall then have 30 days after the mailing of the notice to file an affidavit in response. The response may include documents demonstrating that the judge has cured the perceived deficiency. If after receiving the response, the Commission believes the judge has failed to comply with this Rule, the Commission will report the matter to the Supreme Court. Upon finding the judge has failed to comply with this Rule, the Supreme Court may suspend the judge, find the judge in contempt of court, or take any other action it deems appropriate.

(g) **Waivers.** For good cause shown, the Commission may, in individual cases involving extraordinary hardship or extenuating circumstances, waive or modify the requirements of subparagraphs (b)(1)&(2) and (e)(1). When appropriate, and as a condition for any waiver or modification, the Commission may proportionally increase CLE requirements for the succeeding reporting year.

The Supreme Court of South Carolina

In the Matter of Brian Dumas, Petitioner.

ORDER

By Opinion dated July 20, 1992, petitioner was disbarred from the practice of law in South Carolina. In the Matter of Dumas, 309 S.C. 5, 419 S.E.2d 791 (1992). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommended that the petition be denied. We disagree with the recommendation of the Committee on Character and Fitness and hereby reinstate petitioner to the practice of law 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
December 6, 2002

The Supreme Court of South Carolina

In the Matter of Mark R. Calhoun, Petitioner.

ORDER

On December 3, 2001, petitioner was suspended from the practice of law in South Carolina for eighteen months, retroactive to December 7, 2000. In the Matter of Calhoun, 347 S.C. 444, 556 S.E.2d 392 (2001). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends that the petition be granted. We agree and hereby reinstate petitioner to the practice of law in this state.

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
December 6, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregg M. Gallagher, as Personal Representative of the Estate of Eleanor L. Evert, Appellant,

v.

Robert C. Evert, as Personal Representative of the Estate of George C. Evert, Respondent.

Appeal From Horry County
Howard P. King, Circuit Court Judge

Opinion No. 3573
Heard October 10, 2002 – Filed November 25, 2002

REVERSED and REMANDED IN PART
& VACATED IN PART

Fredrick Scott Pfeiffer, of Greenville; and William A. Bryan, of Surfside Beach, for Appellant.

David J. Gundling, and H. Randolph Haldi, both of Pawleys Island, for Respondent.

HEARN, C.J.: The central issue in this case is whether the

estate of a surviving spouse who had filed her elective share claim may receive that share when the surviving spouse dies before the determination of her elective share. We hold that the estate is entitled to the share.

FACTS

Husband and Wife married in April of 1993. Husband died testate on January 5, 1998, survived by Wife and a son, Robert Evert, from a previous marriage. Husband's will dated June 26, 1990, which was admitted to probate on February 23, 1998, named his son as personal representative and sole heir. On May 1, 1998, Wife filed an Election by Surviving Spouse to take an elective share of Husband's estate. Wife died on May 18, 1999, and her son from a previous marriage, Gregg Gallagher, was appointed personal representative of her estate. Gallagher brought this action in probate court in his capacity as personal representative of her estate to recover Wife's elective share.[1]

The probate court denied the elective share to Wife's estate, holding that the elective share was intended to provide for the surviving spouse during the remainder of her lifetime "so as to prevent the surviving spouse from becoming a ward of the state." It further found that the elective share "was not intended to be employed so as to augment an estate for the benefit of heirs." Finally, the probate court held that any claim for an elective share was fully satisfied by non-probate assets. However, the probate court ordered Husband's estate to pay Wife's estate $8,000 as reimbursement for a previous estate debt paid by Wife and also ordered Husband's estate to pay attorney's fees to Wife's estate. Both parties appealed to the circuit court.

On May 26, 2000, the circuit court issued an order affirming the probate court's denial of the elective share, reversing the probate court's

[1]Wife's claim as an omitted spouse was denied by the probate court, which found that Husband adequately provided for her outside of the will, leaving her with $219,351.99 in non-probate assets. Gallagher does not appeal the denial of the omitted spouse claim.

grant of attorney's fees to Wife's estate, and reversing the probate court's decision to reimburse Wife's estate with $8,000. While the circuit court found the probate court erred in concluding the right to an elective share does not survive the death of a surviving spouse, it affirmed the denial of the elective share finding "it would be absurd to hold that the heirs of Mrs. Evert's estate should be entitled to the benefits of an elective share simply because the surviving spouse made the election during her lifetime." The circuit court found the result unjust, as well as absurd, and placed particular significance on the fact that Wife received over $219,000 in non-probate assets.

Gallagher served a motion to alter or amend the circuit court's order pursuant to Rule 59(e), SCRCP. The circuit court denied the motion and Gallagher now appeals from the circuit court's finding that Wife's estate was not entitled to her elective share of Husband's estate, that it was not entitled to an $8,000 loan repayment from Husband's estate, and that it was not entitled to attorney's fees.

DISCUSSION

I. Timeliness of Gallagher's appeal to Circuit Court

As an initial matter, we address Evert's argument that Gallagher failed to timely appeal the decision of the circuit court by failing to provide the circuit court proper notice of his motion to alter or amend judgment as required by Rule 59(g), SCRCP. Evert contends that because a copy of the Rule 59(e) motion was not provided to the circuit court within ten days of the filing of the motion, the time for appeal was not stayed, and thus this appeal is untimely under Rule 203, SCACR. We disagree.[2]

---

[2]Initially, we questioned whether Evert preserved this issue for our review because he never made a motion to dismiss to the circuit court for failure to comply with Rule 59(g) See Holy Loch Distrib., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000) (stating in order to preserve issue for appellate review issue must have been raised to and ruled upon by the trial judge). However, because the issue goes to the circuit court's subject matter

Although the circuit court acknowledged that it never received a copy of the motion until December 12, 2000, and "on this ground alone" it could deny the motion, the circuit court went forward and considered the matters presented in Gallagher's memorandum in support of the motion. Because the circuit court found it appropriate to hear the matter, we find no error in the circuit court's decision to decide the motion despite Gallagher's failure to comply with Rule 59(g), SCRCP. The notes to Rule 59, SCRCP, indicate that subsection (g) was added "to help insure the judge is promptly notified that the motion has been filed." There is no indication that the failure to transmit a copy of the motion to the circuit court affects the tolling provision of Rule 203(b)(1), SCACR. Therefore, the time for filing the notice of appeal did not begin to run until after the circuit court denied the motion on December 27, 2000. After the circuit court denied the motion, only twenty days passed before Gallagher filed his notice of appeal on January 16, 2001, thus Gallagher complied with Rule 203(b), SCACR.

II. Elective Share

Gallagher argues the circuit court erred in refusing to allow Wife's estate to recover her elective share of Husband's estate. We agree.

The issue of whether the heirs of a surviving spouse are entitled to the surviving spouse's elective share where the spouse applies for the share, but dies prior to its determination, is an issue of first impression in this state. We begin our analysis by considering the language of the statute governing the elective share. Section 62-2-201 provides that "if a married person domiciled in this State dies, the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate." S.C. Code Ann. § 62-2-201(a) (Supp. 2001). Additionally, Section

---

jurisdiction to hear the motion, we address the merits of Evert's argument. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001) (stating issues raising questions of subject matter jurisdiction may be raised for the first time on appeal).

62-2-203 provides that "the right of election of the surviving spouse may be exercised only during his lifetime by him or by his duly appointed attorney in fact."[3] S.C. Code Ann. § 62-2-203 (Supp. 2001).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "Unless there is something in a statute requiring a different interpretation, the words used in the statute must be given their ordinary meaning." Mullinax v. J.M. Brown Amusement, Co., 326 S.C. 453, 458, 485 S.E.2d 103, 106 (Ct. App. 1997). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994). "On the other hand, where a statute is ambiguous, the Court must construe the terms of the statute." Lester v. South Carolina Workers' Compensation Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752-53 (1999).

When confronted with this question, other jurisdictions with similar elective share statutes have determined that when a surviving spouse has validly exercised her right to the elective share, her personal representative may file a petition for the elective share determination for the benefit of the surviving spouse's estate. In Smail v. Hutchins, 491 So.2d 301, 302 (Fla. App. 1986), the court found that "the right to share in the decedent's estate is not lost if the surviving spouse dies after the election but before the court determines the amount of the elective share." The Florida court rejected the argument that the heirs and not the surviving spouse would benefit:

---

[3]We foreclose any question that Wife was not a surviving spouse as contemplated by the statute as she did not fall within any of the categories that defines who is not to be considered a surviving spouse under S.C. Code Ann. § 62-2-802(b) (Supp. 2001).

> While this argument has been recognized to prevent a personal representative from exercising a deceased "surviving" spouse's election, the reasoning is unavailing here. That heirs of a surviving spouse may benefit from an election is not determinative. **What is determinative is whether the surviving spouse validly exercised the election**. Merely because a surviving spouse's heirs may benefit from an election is no reason to deny the surviving spouse's statutory right to choose the elective share. If a surviving spouse dies shortly after receiving the elective share the heirs will most certainly be the primary beneficiaries of the election.

Id. at 303 (emphasis added) (internal citations omitted).

Pennsylvania addressed a similar situation in Trezak v. Jierski, 661 A.2d 412 (Pa. Super. Ct. 1995), and determined that a surviving spouse's heirs could pursue her elected but undetermined share. The Pennsylvania Superior Court found "there was no reason in law or equity why the claims of a surviving spouse, now deceased, being pursued by her heirs, should be weakened by death." Id. at 413.

Similarly, the Nebraska Supreme Court has held that once a surviving spouse petitions for her elective share that right becomes vested.

> When a surviving spouse has petitioned for an elective share, the right to pursue an elective share is no longer a surviving spouse's potential personal right subject to abatement, but has become a right vested in the surviving spouse. Therefore, if a surviving spouse dies after filing a petition for an elective share . . . , the proceeding to enforce the spouse's election as a vested right may be revived by

> the personal representative of the estate of the spouse who has made the election but who has died before distribution of property pursuant to the elective share.

In re Estate of Stephenson, 503 N.W.2d 540, 545 (Neb. 1993).

Significantly, Pennsylvania, Florida, and Nebraska's elective share statutes are similar to our elective share statute in that the right of election may be exercised only during the lifetime of the surviving spouse. Furthermore, none of these states' statutes indicates an intent to provide for the needs of the surviving spouse only during her lifetime.[4] See Fla. Stat. Ann. §§ 732.201, 732.2125 (Supp. 2001); Neb. Rev. State. §30-2137 (Supp. 2001); Pa. Stat. Ann. §§2206, 2203 (Supp. 2001).

When the elective share statute was enacted in 1987, South Carolina's common law did not require a spouse to devise any of her property to a surviving spouse. Thus, S.C. Code Ann. § 62-2-205 "is a statute of creation, and strict compliance with its terms is mandatory in order to exercise the right to an elective share." Simpson v. Sanders, 314 S.C. 413, 415, 445 S.E.2d 93, 94 (1994). We decline to construe the elective share statute to imply anything other than the plain language it employs. Our statute provides that the "election" of the share must be made during the surviving spouse's lifetime; thus, once the spouse survives his or her spouse's death and makes the election, that requirement is met.

---

[4] Only one state, New Jersey, holds a contrary view. Unlike South Carolina and other states, the New Jersey elective share statute is a "need based" statute, "which differs significantly from the Uniform Probate Code from which the elective share is derived." In the Matter of the Estate of Bilse, 746 A.2d 1068, 1092-93 (N.J. Super. Ct. App. Div. 2000). New Jersey courts have interpreted the "primary purpose of the statute may not be simply to provide an inheritance to the survivor's heirs." Id. at 1092. Because New Jersey uses an augmented estate method in determining the amount of the elective share, the effect is to "grant a share [to the surviving spouse] only to the extent that is required for support." Id.

Moreover, we are inclined to agree with those jurisdictions which hold that once a valid election is made, that right becomes vested in the surviving spouse and would pass to her estate at her death. In the absence of any language in the statute to the contrary, we find that the type of interest embraced by the elective share is a fee simple estate. We find no support in the statute or the case law for characterization of the elective share as a life estate. Accordingly, we hold a surviving spouse's estate may recover the elective share when the surviving spouse dies after making the election but before the probate court determines the share.

Because Wife's estate was entitled to recover her elective share, we find the circuit court erred in denying recovery of the share. The circuit court held that a recovery would be an absurd and unjust result due to the significant amount of non-probate assets Wife's estate received after Husband's death. However, we can envision numerous situations in which an absurd result would occur if the elective share were denied to a surviving spouse's estate even when a valid election has been made during the life of the surviving spouse. For example, it would be absurd to deny Wife's estate the right to recovery here, but allow it if the Wife had died the day after the hearing determining her share, but prior to the issuance of the final order.

Our legislature has mandated that a surviving spouse is entitled to recover an elective share unless the spouse has made a valid waiver in writing. See S.C. Code § 62-2-204 (Supp. 2001). "Thus, the legislature has indicated that the right to receive the elective share is a substantial one." Seifert v. Southern Nat'l Bank of South Carolina, 305 S.C. 353, 357, 409 S.E.2d 337, 339 (1991). Any benefits the surviving spouse may obtain through non-probate assets of the deceased spouse's estate are immaterial to the surviving spouse's right to seek an elective share of the estate. Therefore, it was improper for the circuit court to consider the non-probate assets.

III. Attorney's Fees and Debt Repayment

Gallagher next argues the circuit court erred in reversing the probate court's award of attorney's fees and the $8,000 debt repayment.

Specifically, he argues the circuit court lacked jurisdiction to decide these issues. We agree.

South Carolina Code Ann. §62-1-308(a) (Supp. 2001) requires that notice of an intent to appeal from the probate court to the circuit court must be filed and served within ten days after receipt of the probate court's written order. The statute further requires that the grounds for appeal must be filed and served within forty-five days after receipt of the written order. Evert received the probate court's final order on September 7, 1999, but did not file his notice of intent to appeal the award of attorney's fees and debt repayment until October 4, 1999. Furthermore, Evert did not file and serve his grounds for appeal until November 2, 1999. Because he did not timely appeal from the probate court, the circuit court lacked subject matter jurisdiction to address these issues. Accordingly, we reinstate the probate court's order awarding the $8,000 debt repayment and attorney's fees to Wife's estate.[5] See Witzig v. Witzig, 325 S.C. 363, 366-67, 479 S.E.2d 297, 298 (Ct. App. 1996) (finding respondent's appeal from the probate court to the circuit court not timely filed, thus, reinstatement of the probate court's order was required).

CONCLUSION

We find the circuit court erred in determining that Wife's estate was not entitled to pursue her elective share from Husband's estate and

[5] We note that the probate court erred in awarding attorney's fees to Wife's estate. As a general rule, "attorney's fees are not recoverable unless authorized by contract or statute." Dowaliby v. Chambless, 344 S.C. 558, 561, 544 S.E.2d 646, 647-48 (Ct. App. 2001). There is no statutory provision that allows for the recovery of attorney's fees for elective share proceedings. See S.C. Code Ann. § 62-1-302 (Supp. 2001). However, as Evert failed to appeal the propriety of the award, this is now the law of the case. See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (stating an unchallenged ruling, "right or wrong, is the law of the case and requires affirmance").

remand to the probate court for a determination of the elective share. Additionally, we vacate the circuit court's ruling with respect to attorney's fees and debt repayment and reinstate the probate court's award of the fees and $8,000 to Wife's estate.

REVERSED and REMANDED IN PART, and VACATED IN PART.

GOOLSBY and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Billy Risinger, Respondent,

v.

Knight Textiles, Appellant.

Appeal From Saluda County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 3574
Submitted November 4, 2002 – Filed December 9, 2002

AFFIRMED

Darryl D. Smalls, of Columbia, for appellant.

S. Kirkpatrick Morgan, Jr. of Lexington, for respondent.

HEARN, C.J.: Knight Textiles appeals an order of the circuit court requiring it to provide certain medical treatment recommended by Billy Risinger's physician for work-related injuries. Knight argues the commission erred in finding that S.C. Code Ann. § 42-15-80 does not allow an employer to request an independent medical examination of an injured employee when

a final order of the commission has been issued and the employer is paying benefits pursuant to the final order. We affirm.[1]

FACTS

Risinger sustained a severe injury to his lower back and spine when he slipped and fell off a dock area and landed on a metal ramp while working for Knight. Risinger was referred to Dr. Talley Parrott, an orthopedic surgeon, in January 1998 for treatment. Dr. Parrott recommended surgical intervention for Risinger's right radicular pain and right disc herniation. Knight, however, requested a second opinion from a neurosurgeon, Dr. Franklin Epstein. Dr. Epstein opined that Risinger's pain was "incapacitating" and recommended a disc excision "in association with an interbody fusion." Dr. Epstein performed surgery in April 1998.

In August 1999, the single commissioner determined that Risinger was totally and permanently disabled. The commissioner's order required that Knight be "financially responsible for . . . lifetime medical benefits for [Risinger's] compensable injury components per South Carolina Code Ann. § 42-15-60." At the time the order was issued, Dr. Epstein was Risinger's authorized treating physician. Subsequent to the order, Dr. Epstein prescribed certain medications and referred Risinger to Dr. David Steiner for chronic pain and depression. Knight, however, refused to provide the medical treatment as recommended by Dr. Epstein and Dr. Steiner.

In February 2000, Risinger filed a Form 50 requesting payment for the additional medical treatment. Knight filed a Form 51 denying the additional treatment and requesting an independent medical evaluation. The single commissioner found Knight was financially responsible for the medical treatment recommended by Dr. Epstein and Dr. Steiner. The commissioner also found S.C. Code Ann. § 42-15-80 inapplicable when a final order of the commission has been issued and the carrier is paying benefits pursuant to that order. The full commission affirmed the single

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

commissioner. Knight then appealed to the circuit court, which affirmed the full commission.

STANDARD OF REVIEW

"Judicial review of a Workers' Compensation decision is governed by the substantial evidence rule of the Administrative Procedures Act." Lake v. Reeder Constr. Co., 330 S.C. 242, 246, 498 S.E.2d 650, 653 (Ct. App. 1998) (citing Wilson v. Georgetown County, 316 S.C. 92, 447 S.E.2d 841 (1994)). "We may not substitute our judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse if the decision is affected by an error of law." Brown v. Bi-Lo, Inc., 341 S.C. 611, 614, 535 S.E.2d 445, 447 (Ct. App. 2000) (*cert. granted* May 23, 2001)(citation omitted). "We may reverse or modify a decision if the findings and conclusions of the agency are affected by error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Id. (citation omitted).

DISCUSSION

Knight first contends the circuit court erred in finding that it was not entitled to an independent medical evaluation of Risinger. Specifically, Knight argues that the circuit court and the workers' compensation commission erred in finding that S.C. Code Ann. § 42-15-80[2] does not

[2] Section 42-15-80 states, in pertinent part, as follows:

> After an injury and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Commission, shall submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Commission. The employee shall have the right to

provide for an independent medical evaluation when a final order has been issued and the employer/carrier is paying benefits pursuant to a final order of the commission. We disagree.

In this case, the workers' compensation commission affirmed the single commissioner's finding that section 42-15-80 does not apply when a final order has been issued and the carrier is paying benefits pursuant to a final order. In this state, "[t]he construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason." Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000) (citations omitted). We do not find that this case presents a compelling reason to ignore the commission's interpretation of the statute. Moreover, Knight chose Dr. Epstein to provide a second opinion concerning Risinger's condition. Knight now refuses to pay for Dr. Epstein's treatment and referral treatment arguing it is entitled to yet another "second" opinion. Because we believe Knight has already received the very relief it seeks, *i.e.,* a second opinion regarding Risinger's treatment, we find no merit to the argument that it is entitled to what would effectively be a third opinion.

Finally, we believe Knight's interpretation of section 42-15-80 would lead to an absurd result. See Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000) ("[H]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.") (citation omitted). Under Knight's interpretation of the statute, the employer/carrier would be able to continue to seek a new doctor's opinion each time it did not like the opinion of the claimant's doctor. This would allow the

---

> have present at such examination any duly qualified physician or surgeon provided and paid by him.

S.C. Code Ann. § 42-15-80 (1985).

employer/carrier to "shop around" indefinitely until it found a favorable opinion, often sacrificing much needed treatment. We do not believe this result was intended by the legislature. See id.

Knight also argues the circuit court erred in finding it was no longer entitled to control Risinger's medical treatment pursuant to S.C. Code Ann. § 42-15-60 (1985). We disagree.

Knight argues that S.C. Code Ann. § 42-15-60 obligates Risinger to accept treatment from a treating physician of its choice. Section 42-15-60 states in part:

> In cases in which total and permanent disability results, reasonable and necessary nursing services, medicines, prosthetic devices, sick travel, medical, hospital and other treatment or care shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit.

S.C. Code Ann. § 42-15-60 (1985).

Initially, we note that Dr. Epstein's first examination of Risinger was an independent evaluation performed at Knight's request. Because Risinger is receiving treatment from the physician chosen by Knight; this argument is without merit. Furthermore, the language of S.C. Code Ann. § 42-15-60 does not allow an employer to dictate the medical treatment of injured employees. Our reading of the statute reveals that it requires only that the employer/carrier pay for treatment during the life of the injured employee.

Accordingly, based on the foregoing reasons, the decision of the circuit court is

AFFIRMED.
CURETON and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Burroughs & Chapin Company, Inc., f/k/a Burroughs and Collins Co., Respondent,

v.

South Carolina Department of Transportation, Appellant.

In re:

South Carolina Department of Transportation, Condemnor,

v.

Burroughs & Chapin Company, Inc., f/k/a Burroughs and Collins Co., Landowner.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 3575
Heard October 11, 2002 – Filed December 9, 2002

AFFIRMED IN PART & REVERSED and REMANDED

B. Michael Brackett, of Columbia; for Appellant.

Michael H. Quinn, of Columbia; for Respondent.

HEARN, C.J.: South Carolina Department of Transportation (SCDOT) condemned property owned by Burroughs & Chapin Company (B&C) in Horry County. A jury trial was held to determine the amount of just compensation owed to B&C for the property taken as well as for any diminution of value in the remaining property. SCDOT appeals the jury's verdict of $87,510.63, arguing the trial judge erred in the admission of expert witness testimony and in charging the jury in violation of the "unit rule." Because we find the trial judge erred in charging the jury, we reverse and remand for a new trial.

FACTS

SCDOT condemned property owned by B&C to complete the construction of the Conway Bypass pursuant to its power of eminent domain under the South Carolina Eminent Domain Procedure Act. S.C. Code Ann. § 28-2-10, et seq. (Supp. 2001). SCDOT calculated just compensation for the property at $15,975.00. The condemnation resulted in an acquisition of 10.8 acres; however, another 6.9 acres of B&C's property were left landlocked. Both tracts were heavily timbered.

At trial, B&C presented two expert witnesses whose testimony was used as evidence of the value of the property. Tracey Knight, a registered forester, testified as an expert in the field of timber appraisal. He stated that his appraisals are often used for the purpose of valuing property to be sold. He also stated that his appraisal was the "market" value of the timber as of September 1998. He testified that the condemned land had 7.8 acres of merchantable timber valued at $30,281.00 and the landlocked portion of the remaining property had timber valued at $28,993.00. Knight testified, however, that it would not be economically feasible to harvest the timber from the landlocked tract of land.

SCDOT moved[1] to strike Knight's testimony on the grounds that it violated the unit rule,[2] failed to relate the value of the timber to the value of the property, and was based on lost gross revenue or gross profits. The trial judge denied the motion.

After Knight's testimony, the trial judge gave a cautionary instruction to the jury regarding the value of the timber on B&C's property. The trial judge defined the term "fair market value" and stated that the value of the timber was one component of the property which the jury could use in determining the fair market value of the property. However, he further instructed the jury that:

> . . . if you feel that it is fair and just under the circumstances of this case to add the specific value of a component part of a property, or a portion of that value, such as the timber, you may do so in your calculations, or you may consider the timber value generally in reaching a fair market value determination of the property. This ultimately is your decision to make . . . .

SCDOT objected to the cautionary instruction on the basis that it allowed the jury to "add these components together."

---

[1]Prior to trial, SCDOT filed a motion in limine to exclude the testimony of B&C's expert witnesses claiming both experts' testimony violated the unit rule. SCDOT also sought to exclude Knight's testimony because it was a calculation of lost gross profits and unrelated to the market value of the land. The trial judge denied SCDOT's motions.

[2]The unit rule prohibits an award of compensation by assigning separate values to component parts of the property and then adding them together to reach the value of the whole property. See 4 Julius Sackman, Nichols on Eminent Domain § 13.09[5] (Rev. 3d ed. 1997); 26 Am. Jur. 2d Eminent Domain § 338 (1996).

Next, Joe Rosen, a real estate appraiser, testified that the market value of B&C's land prior to condemnation was $222,050.00, and after condemnation the value of the remaining property was $99,850.00. He testified that just compensation to B&C would be $122,200.00.

In explaining his methodology for the appraisal, Rosen testified that he valued the land as if it had no timber and then added the appraised value of the timber as calculated by Knight. He stated that he found comparable pieces of property, made customary adjustments for the location, size, utilities, land type, etc., and then adjusted each piece by deducting any value of timber on the property. He used the same methodology for appraising the before-condemnation and after-condemnation values of the property. SCDOT moved to strike Rosen's testimony as violating the unit rule. The trial judge denied the motion.

SCDOT's expert appraised the land at $16,000.00. He testified that he compared the per acre values of several other tracts and made adjustments prior to arriving at that figure. He further stated that he did not do "before and after" valuations of B&C's property because the valuation arrived at for the condemned piece was less than $30,000.00. He stated that he did not value the timber separately because the comparable sales all had timber which was considered as part of the value of the property.

The trial judge gave a jury charge very similar to his prior cautionary instruction. He explained the general definition of fair market value and also told the jury on several occasions that it was valuing the property as a whole. However, he again indicated that the jury was free to add the value of the timber to the value of the land to arrive at its decision on just compensation. He also explained that the jury was free to consider the testimony presented, but did not have to rely upon it for making a determination. SCDOT's objection to the charge was overruled. The jury returned a verdict in favor of B&C in the amount of $87,510.63.

DISCUSSION

Admission of Evidence

SCDOT contends the trial judge erred in admitting the testimony of Knight and Rosen. SCDOT asserts the testimony violated the unit rule and that Knight's testimony made no attempt to equate the value of the timber with the value of the property as a whole. We disagree.

The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. Payton v. Kearse, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998). Absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal. Hofer v. St. Clair, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989).

The unit rule states that an award of just compensation may not be reached by assigning separate values to component parts of the property, including separating timber from the land, and requires that improved property be valued as a whole. See 4 Julius Sackman, Nichols on Eminent Domain § 13.09[5] (Rev. 3d ed. 1997); 26 Am. Jur. 2d Eminent Domain § 338 (1996). The trial judge relied on the case of City of Hillsborough v. Hughes, 538 S.E.2d 586 (N.C. App. 2001), in determining that the admission of B&C's experts' testimony was proper. In Hughes, the North Carolina Court of Appeals found that testimony of the value of timber on condemned property was proper evidence for consideration by the jury. Id. at 589. The court opined that the average person would consider the value of the timber in reaching a decision regarding the value of the property, and, therefore, the value was an appropriate consideration for the jury in determining just compensation for the condemned property. Id. at 588-89.

The Hughes court also cited Cade v. United States, 213 F.2d 138 (4th Cir. 1954), in which the Fourth Circuit Court of Appeals addressed the issue of assigning separate valuations. The court in Cade refused to prohibit testimony as to the separate valuation of enhancing components of the land. The Cade court upheld the expert's method of valuation. The court reasoned:

> The trial judge was correct in thinking that the property should be valued as a whole for the purpose of assessing compensation for the taking; but this does not preclude the admission of testimony showing particular elements of value for consideration by the jury in arriving at the overall value which they are required to find as the basis for compensation.

Id. at 142. While South Carolina has never expressly adopted the unit rule, our supreme court has addressed the admission of testimony regarding the value of mineral deposits on condemned land. In Seaboard Coast Line R.R. v. Harrelson, 262 S.C. 38, 42, 202 S.E.2d 1, 3 (1974), the court stated:

> The existence of valuable mineral deposits is a proper consideration in ascertaining the value of land taken in an eminent domain proceeding insofar as it influences the market value of the land. This rule, expressed in a great number of decisions and recognized by all the leading textwriters on this subject, has been applied indiscriminately to all forms of mineral deposits, including sand and gravel and limestone.

We see no reason why the same logic would not apply to the admission of evidence of the value of timber in this case. Although SCDOT argues the evidence is barred by the unit rule, we believe the better solution is to allow the presentation to the jury of all evidence that bears upon its ultimate responsibility in deciding the fair market value of the property. See S.C. Code Ann. §28-2-340 (Rev. 1991) (stating evidence which is relevant, material, and competent may be admitted as evidence and considered by the judge or the jury for the purpose of determining the value of the land sought to be condemned and fixing just compensation); Cade, 213 F.2d at 142. While the unit rule precludes the jury from valuing the property as separate units, the value of those units may enhance the fair market value of the property as a whole. Thus, while the property is to be valued as a whole, we

do not find that this precludes the admission of testimony showing the separate value of individual elements for consideration by the jury in arriving at the overall value, which is the basis for compensation.

SCDOT further argues the valuation was based on lost gross profits from B&C's business operations, without accounting for the expenses required to cultivate and harvest the timber. After reviewing the record, we agree that Knight's testimony failed to account for any expenses associated with planting or cutting the timber. However, this same argument was made in Seaboard and in that case the supreme court noted: "While this contention is not without some appeal, we think the same is addressed to the weight of the evidence, which was a jury matter, and not to its admissibility." 262 S.C. at 41-42, 202 S.E.2d at 3. We agree that the evidence in this case was for the jury to consider. Accordingly, we find the evidence was properly admitted.

Jury Charge

SCDOT next argues the jury charge was erroneous because it allowed the jury the opportunity to add the value of the timber to the value of the underlying land to reach its decision as to the value of the property as a whole. We agree.

A trial court must charge the current and correct law. McCourt ex rel. McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (quoting Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 546, 462 S.E.2d 321, 330 (Ct. App. 1995)); see also Waldrup v. Metropolitan Life Ins. Co., 274 S.C. 344, 346, 263 S.E.2d 652, 654 (1980) (stating an appellate court must view the jury charge as a whole before assigning prejudicial error to a discrete portion of the charge).

Here, the trial judge began his charge by defining just compensation and fair market value. He also stated that the jury was not to consider speculative damages, but must "confine your consideration only to those elements which actually affect the property's market value." The trial judge then explained two methods for computing just compensation; first, by "adding to the fair market value of the condemned property . . . an amount which represents the decrease in value of the remaining land," and second, to determine "the fair market value of the landowner's entire property before the condemnation and subtracting from this amount the fair market value of the property which remained after the taking."

The trial judge again explained the definition of fair market value and the fact that compensation to the landowner was the fair market value of the land taken plus any decrease in the value of the land remaining. The trial judge instructed the jury that any damages arising to the remaining land as a result of the condemnation were to be considered in determining just compensation.

Finally, the trial judge again gave an instruction relating to Knight's and Rosen's testimony:

> Yesterday, you heard testimony about one component of that property, the timber value. I tell you that this information is given to you for your consideration in determining fair market value and you may give it such weight and effect as you, the jury, deem appropriate.
>
> . . . .
>
> In valuing a piece of property, and this is the example I gave you this morning, if I was selling my home, I would not calculate the value by taking a figure that the property is worth and then add to it certain components, such as the fig tree in the back yard,

> corn which may be in my garden, or a collection of stones which may be in the yard.
>
> These factors may be generally considered in determining a value, but are not usually added one by one. **However, if you feel that it is fair and just under the circumstances of this case to add the specific value of a component part of the property, such as the timber, you may do so in your calculations, in whole or in part**, or you may consider the timber value generally in reaching a fair market value of the property. This is your decision.

(emphasis added).

We have found the North Carolina opinion in City of Hillsborough instructive regarding the application of the unit rule. The Hillsborough court concluded that it was proper to allow the jury to consider the value of the timber in reaching its decision regarding the fair market value of the property for just compensation. City of Hillsborough v. Hughes, 538 S.E.2d 586 (N.C. App. 2001). However, the court made it clear that the separate value of the timber was not to be added to the value of the property. Id. The trial judge expressly prohibited the jury from adding the value of the timber which may have been removed from the property. The North Carolina Court of Appeals stated the timber was one "factor" to consider in determining the fair market value. See Hughes, 538 S.E.2d at 589.

We agree that the jury is allowed to consider the value of the timber in reaching its decision regarding fair market value of the property. According to section 28-2-370, the jury is to value just compensation as the value of the property taken and the diminution in value of the remaining property. S.C. Code Ann. § 28-2-370 (Supp. 2001). The trial judge's charge was correct to the extent that it stated the jury must find the fair market value of the property, which is what a willing buyer will pay a willing seller. The trial judge was also correct in allowing the jury to consider the testimony regarding the value of the timber. However, in this case, the trial judge's

charge went beyond the charge affirmed in the Hughes decision. The trial judge erred by specifically stating the jury may add the value of the timber to the value of the land if it so chose. This is not the proper method for reaching a decision regarding just compensation under section 28-2-370. While it is clear that the jury did not add the full value of the timber to the land value as testified to by Rosen, we cannot say that the erroneous charge did not affect the amount of the verdict.

CONCLUSION

We find Rosen's and Knight's testimony was probative and relevant to the jury's ultimate purpose of determining the market value of the property as a whole. However, it was improper to charge the jury that values of the separate elements of the property can be added together to determine the value of the property as a whole. Accordingly, the judgment is

AFFIRMED IN PART & REVERSED AND REMANDED.

GOOLSBY and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Yolanda Burroughs, individually, and as Personal Representative of the Estate of James Burroughs, deceased,

Respondent,

v.

John W. Worsham, M.D.; Terrell T. Leeke, M.D.; and Fairview Family Practice,

Defendants,

Of whom John W. Worsham, M.D. and Fairview Family Practice are

Appellants.

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

Opinion No. 3576
Heard November 5, 2002 – Filed December 9, 2002

AFFIRMED

John Hamilton Smith, of Charleston; Ruskin C. Foster and John C. Bradley, Jr., both of Columbia, for Appellants.

Susan C. Rosen and Richard S. Rosen, both of Charleston; Jeffrey J. Kroll and Isobel S. Thomas, both of Chicago, for Respondent.

ANDERSON, J.: Yolanda Burroughs, individually and as personal representative for James Burroughs' (Burroughs) estate, brought suit against Dr. John W. Worsham and Fairview Family Practice (collectively referred to as "Appellants") for medical malpractice. She alleged causes of action for wrongful death, survival, and loss of consortium. The jury awarded $3,500,000 each for the survival and wrongful death actions. The jury determined the decedent and Appellants were each fifty percent at fault. The jury found for Appellants on the loss of consortium claim. We affirm.

FACTS/PROCEDURAL BACKGROUND

Burroughs received a bachelor's degree, master's degree, and doctorate in theology. While serving as a missionary in Mexico, Burroughs met Yolanda, whom he married in 1984. They later had two children. After marrying, the couple moved back to the United States, and eventually settled in Greenville to be close to Burroughs' ill father.

Burroughs began working for the Hyatt Corporation as a night audit supervisor for $6.50 an hour. He was subsequently promoted to income auditor, to paymaster, to general cashier, to systems administrator, to systems specialist, and then to systems analyst. Burroughs was promoted in 1996 to Management Information Systems Manager. Finally, in May 1997, he was transferred to the corporate headquarters in Chicago, where he became an analyst on special programs and applications making $38,000.00 per year.

While residing in Greenville, Burroughs was a patient at Fairview Family Practice, which was owned by Dr. Worsham and Dr. Terrell T. Leeke. In 1990, Burroughs went to Dr. Leeke, who referred him to a gastroenterologist. Burroughs was diagnosed with a bleeding ulcer. Burroughs' first visit to Dr. Worsham was in 1992 for treatment of poison ivy. In 1993, Burroughs went back to the gastroenterologist and was

diagnosed as having a propensity for ulcers and suffering from gastritis and duodenitis.

Burroughs was next seen by Dr. Worsham on April 12, 1995, to determine the cause of his lower abdominal pain. A hemoglobin test was performed and it indicated that Burroughs had a low hemoglobin count. Dr. Worsham prescribed ulcer medication, but provided no further treatment nor did he follow up on the hemoglobin count.

In August 1995, Burroughs returned to Fairview with abdominal pain. He was examined by Dr. Worsham and was diagnosed with acute bacterial prostatitis, for which an antibiotic was prescribed. Burroughs failed to follow-up for re-examination.

Dr. Worsham gave Burroughs a physical examination in February 1996. Burroughs continued having abdominal pain. Dr. Worsham informed Burroughs that he did not have any significant medical problems, but was anemic. Burroughs was prescribed iron and Citrucel. Dr. Worsham instructed Burroughs to return for a complete blood count in four weeks. According to Dr. Worsham, Burroughs did not go back for the four-week follow-up appointment.

Five months later, Burroughs returned with severe abdominal pain. Dr. Worsham did another blood test and again diagnosed Burroughs as having acute bacterial prostatitis. In his medical note, Dr. Worsham wrote: "[Burroughs] has a deep seeded [sic] fear of either prostate or stomach cancer . . . ." Dr. Worsham additionally diagnosed Burroughs with "cancer phobia." Dr. Worsham directed Burroughs to call the next day for his lab results and to make an appointment to see Dr. Worsham in two weeks. Neither Dr. Worsham nor Burroughs followed up on the lab results.

Burroughs subsequently saw Dr. Worsham in October 1996. He complained of right side abdominal pain, dizziness, and weakness. Dr. Worsham believed Burroughs had a kidney stone and tests were performed which came back normal. Burroughs returned the following day with continued pain. Dr. Worsham felt a bulge in Burroughs' lower right

abdomen. He concluded Burroughs had an incisional hernia over an old appendectomy scar.

Burroughs was referred to Dr. Joseph C. McAlhany, a general surgeon, for evaluation of his condition. Dr. McAlhany noted the pain was "just some strain secondary to the previous appendectomy scar." He prescribed anti-inflammatory agents and heat. Further, he instructed Burroughs to return for a recheck in two to three weeks. Burroughs failed to show up for the follow-up office appointment with Dr. McAlhany.

In April 1997, Burroughs returned to Fairview with abdominal pain. Because Dr. Worsham was no longer with the practice, Dr. Leeke treated Burroughs. Dr. Leeke determined Burroughs was suffering from abdominal pain and chronic anemia. He prescribed Burroughs' usual ulcer medications.

Approximately two weeks later, Burroughs moved to Chicago for his promotion with Hyatt Hotels Corporation. On November 3, 1997, Burroughs sought treatment in the emergency room of Edward Hospital for severe lower abdominal pain, dizziness, and diarrhea. He was admitted to the hospital. A CT scan showed a mass in the lower abdomen. Burroughs was diagnosed as having colon cancer.

Several surgeries were performed in an attempt to remove much of the cancer. However, by the time it was diagnosed, the cancer had spread throughout the abdomen. Burroughs' cancer was incurable. He and his family returned to Ware Shoals, where Burroughs received treatment and hospice care. Burroughs died in May 1999.

Yolanda originally brought this action against Fairview, Dr. Worsham, and Dr. Leeke. Dr. Leeke was dismissed by a directed verdict, and the initial trial ended in a mistrial. The case was retried against Appellants. The jury determined Appellants and Burroughs were each fifty percent liable. The jury awarded $3,500,000 on both the survival and wrongful death actions. The jury found for Appellants on the loss of consortium claim. Appellants' motions for judgment notwithstanding the verdict and a new trial absolute were denied.

ISSUES

I. Did the trial judge err in admitting Dr. Bart Green's testimony over Worsham's objection because South Carolina does not recognize the "loss of chance of survival" doctrine?

II. Did the trial court err in admitting testimony from Burroughs' employer regarding possible future promotions and salary ranges, and in allowing testimony by an economist, who relied on these figures for calculation of future damages?

III. Did the trial court err in refusing to allow Worsham, as referring doctor, to testify as to what he expected Dr. McAlhany to do in evaluating and diagnosing Burroughs' condition pursuant to the referral?

IV. Did the trial court err in refusing to permit Worsham to testify that his review of Dr. McAlhany's chart showed no entry indicating Burroughs returned for a follow-up visit?

V. Did the trial court err in failing to properly charge the jury regarding the standard of care to which Worsham should be held?

VI. Were the jury verdicts in this case inconsistent, where the jury found damages for wrongful death but no damages for loss of consortium?

STANDARD OF REVIEW

I. Admission of Expert Testimony

The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998); Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001). A trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion. Mizell v. Glover,

___S.C.__, 570 S.E.2d 176 (2002); Means, 348 S.C. at 166, 558 S.E.2d at 923; see also Lee v. Seuss, 318 S.C. 283, 457 S.E.2d 344 (1995) (admission of expert testimony is within sound discretion of trial judge and will not be overruled absent finding of abuse of discretion and prejudice to complaining party). An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).

II. Exclusion of Testimony

It is well settled that the admission and rejection of testimony are matters largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion. Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000); Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 556 S.E.2d 718 (Ct. App. 2001); see also Gamble v. International Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996) (admission or exclusion of evidence is matter within sound discretion of trial court and, absent clear abuse, will not be disturbed on appeal). To warrant reversal, the appellant "must show both the error of the ruling and resulting prejudice." Recco Tape and Label Co. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994); see also Carlyle v. Tuomey Hosp., 305 S.C. 187, 407 S.E.2d 630 (1991) (proof that an error caused the appellant prejudice is a prerequisite to reversal based on error where the trial court's discretion is involved). In order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown. Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997); Commerce Ctr., 347 S.C. at 559, 556 S.E.2d at 726; see also Potomac Leasing Co. v. Bone, 294 S.C. 494, 497, 366 S.E.2d 26, 28 (Ct. App. 1988) ("Before the Court of Appeals will reverse a judgment for an alleged error in the exclusion of evidence, the appellant must show prejudice.").

III. Jury Charge

It is not error for the trial judge to refuse a specific request to charge when the substance of the request is included in the general instructions. Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711

(1986); Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001). In reviewing a jury charge for alleged error, this Court must consider the charge as a whole, in light of the evidence and issues presented at trial. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999).

A trial court must charge the current and correct law. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); see also Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997) (trial judge is required to charge current and correct law applicable to issues presented). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. Keaton, 334 S.C. at 495-96, 514 S.E.2d at 574. The substance of the law is what must be instructed to the jury, not any particular verbiage. Id. at 496, 514 S.E.2d at 574. A jury charge which is substantially correct and covers the law does not require reversal. Id. To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial. Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 61 S.E.2d 165 (1950).

LAW/ANALYSIS

I. ADMISSION OF EXPERT TESTIMONY

A. "Loss of Chance of Survival"

Worsham contends the admission of Dr. Bart Green's testimony was improper because it did not meet the "most probable" standard for recovery and the testimony merely presented a "loss of chance of survival," which is not recognized in South Carolina. We find the trial judge properly admitted the testimony.

In his deposition, Dr. Green testified:

> Q: Doctor, do you have an opinion, based upon a reasonable degree of certainty, as to whether or not Mr. Burroughs['] chances of cure and survivability would have been greater had they been detected, colon cancer, in February of '96?

. . . .

[A]: Yes.

Q: And what is that opinion?

A: Colon cancer in general, if diagnosed earlier, at an earlier stage, has a much higher survivability than--than late stage as it was when I was involved in his care.

. . . .

Q: Do you have an opinion, Doctor, based upon a reasonable degree of certainty, as to whether or not it is most probably true that Jim Burroughs, his chance for cure and survival, would have been greater if the colon cancer was detected in July of '96?

A: Yes.

. . . .

Q: And what is your opinion?

A: My opinion is if it would have been detected at that time, it would have been in an earlier stage and been more curable.

Q: And does that opinion hold true for October of '96 and April of '97 as well?

A: Yes.

The specific testimony of Dr. Green to which Worsham objects is merely a portion of his overall testimony regarding whether Worsham should have diagnosed and treated the colon cancer and, if found earlier, whether Burroughs would have survived. The testimony is certainly relevant to the nature and character of the injuries, which were the natural and proximate consequences of Worsham's failure to diagnose in this case.

While the portion of testimony taken in isolation may not have met the "most probably" standard of proof required to demonstrate probable cause, we find it was relevant and properly admitted. See Martin v. Mobley, 253 S.C. 103, 109, 169 S.E.2d 278, 281 (1969) ("The fact that the doctor had not had opportunity to consider whether the plaintiff's permanent disability was more or less than that which generally followed such a condition and operation affected, we think, only the weight and not the admissibility of the proffered evidence."). Additionally, there was sufficient evidence to support the jury's verdict that Burroughs' death was "most probably" the result of the failure to diagnose his cancer earlier and not merely a "loss of chance of survival."

Our Supreme Court specifically rejected the "loss of chance" doctrine in Jones v. Owings, 318 S.C. 72, 456 S.E.2d 371 (1995). The Jones Court concluded:

> After a thorough review of the "loss of chance" doctrine, we decline to adopt the doctrine and maintain our traditional approach. We are persuaded that "the loss of chance doctrine is fundamentally at odds with the requisite degree of medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician." Legal responsibility in this approach is in reality assigned based on the mere *possibility* that a tortfeasor's negligence was a cause of the ultimate harm. This formula is contrary to the most basic standards of proof which undergird the tort system.

Id. at 77, 456 S.E.2d at 374 (citations omitted) (emphasis in original).

The "loss of chance" doctrine, in the context of medical malpractice, "permits a recovery when the delay in proper diagnosis or treatment of a medical condition results in the patient being deprived of a less [than] even chance of surviving or recovering." Id. at 75, 456 S.E.2d at 373. The Court noted that the decedent's chance of survival was never above fifty percent, even if his lung cancer had been diagnosed earlier. Id. at 74, 456 S.E.2d at 372. The Court maintained South Carolina's traditional approach that, in

order to recover based on medical malpractice, the plaintiff must show the negligence of the physician "most probably" caused the injury or death. Id. (citing Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986)).

In Haselden v. Davis, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000), cert. granted (January 11, 2001), this Court had the opportunity to determine whether evidence which demonstrates the negligence of a physician in failing to diagnose the decedent, who would have had a greater than fifty percent chance of survival except for the negligence of the doctor, satisfies the "most probable" standard. We concluded that, when an individual would have had a greater than fifty percent chance of survival if the physician had properly advised the decedent at an earlier time, evidence of the failure to do so satisfies the "most probably" requirement for causation. Id. at 495, 534 S.E.2d at 300.

In the instant case, Dr. Randolph Baily testified regarding Burroughs' chance of survival had the cancer been diagnosed earlier. The following colloquy is demonstrative of his opinions:

> Q. Doctor, in February of 1996, when he had that physical exam, do you have an opinion, based upon a reasonable degree of certainty, as to whether or not Jim Burroughs would have survived if he was diagnosed and properly treated on that date?
>
> A. Yes, sir, I believe he would have.
>
> . . . .
>
> Q. Doctor, do you have an opinion if that was diagnosed, the colon cancer, in February of 1996, if Jim Burroughs would have had a normal life expectancy?
>
> A. I believe he would have. Had the tumor been removed, then he could have had a normal life expectancy, yes.

Dr. Baily was asked the question regarding whether Burroughs would have survived and had a normal life expectancy if the cancer had been diagnosed

in July of 1996, and October of 1996. In both cases, he responded that Burroughs would have likely survived and would have enjoyed a normal life expectancy.

During redirect examination, the following exchange took place:

> Q. Is it your opinion that in February, July and October, Mr. Burroughs' condition was more likely than not curable?
>
> A. Absolutely.
>
> Q. And Doctor, do you have an opinion during those relevant time periods if it was diagnosed and treated would he have survived and lived a normal life?
>
> A. I believe it's more likely than not that he would have, yes, sir.

The above testimony demonstrates that Burroughs would have had a greater than fifty percent chance of survival if the colon cancer had been diagnosed in February 1996, July 1996, or October 1996. Therefore, the evidence supports the inference that the failure by Dr. Worsham to diagnose Burroughs' condition "most probably" resulted in his death and not merely in a "loss of chance of survival."

We note the trial judge properly charged the jury regarding the appropriate standard of proof that must be met by Burroughs in order for the jury to award damages. The trial judge instructed:

> Now, ladies and gentlemen, when the opinions of a medical expert are relied upon to establish a causal connection between negligence and an injury, the expert must state with reasonable certainty that in his professional opinion the injuries most probably resulted, or the death most probably resulted from the alleged negligence of the defendant. Or that expert must use words that would mean to you the same thing, that the death most probably resulted as the alleged negligence of the defendant.

The trial judge properly admitted the testimony of Dr. Green. Concomitantly, there was sufficient evidence to support the jury's determination that Worsham's diagnosis was "most probably" the proximate cause of Burroughs' death.

B. Future Damages/Future Salary

Worsham argues the trial court erred in admitting testimony of Burroughs' possible future salary, which included several promotions and salary increases, as being too speculative. We find the testimony was properly admitted for consideration by the jury.

"Under current South Carolina law, the standard of admissibility for evidence of future damages is 'any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts . . . if otherwise competent.'" Pearson v. Bridges, 344 S.C. 366, 372, 544 S.E.2d 617, 620 (2001) (quoting Martin v. Mobley, 253 S.C. 103, 109, 169 S.E.2d 278, 281-82 (1969)). The "most probable" standard required to prove causation is not the standard to be applied in determining the admissibility of evidence of future damages. Id. at 371, 544 S.E.2d at 619. Furthermore, "whether future medical expenses are 'reasonably certain' to occur is also the incorrect standard to use in determining admissibility." Id. "Whether future damages are 'reasonably certain' to occur is the *standard of proof* for future damages, not the *standard of admissibility*." Id. at 371-72, 544 S.E.2d at 619 (italics in original).

In Pearson, the medical expert testified that four possible scenarios could result from the alleged malpractice. For each scenario, he presented a declining statistical chance of occurrence and the possible damages which could result. The Supreme Court explained:

> The evidence of the medical expenses of scenarios two, three, and four was admissible. These scenarios tended to establish the extent of Pearson's injuries. The fact that Pearson's experts testified that the possibilities of scenarios two, three, and four occurring were 30 percent or less went to the weight of the

> evidence not its admissibility. Whether Pearson proved the expenses were "reasonably certain" to occur so she would be entitled to an award of future damages was a question for the jury to determine.

Pearson, 344 S.C. at 373, 544 S.E.2d at 620 (internal citations omitted).

In the instant case, the testimony provided a possible scenario for future advancement and income for Burroughs. James Barnish, the Assistant Vice-President of hotel accounting for the Hyatt, chronicled the possible path of advancement within Hyatt. He stated:

> James had a good career up to the time that he moved to the – to the corporate office, and what I personally had thought would be his next logical step would be to work for me in one of my other areas of responsibility for the IT department in the corporate office, and James had – I knew James had a real interest in the IT side, or the computer side of the business, and he preferred to go that route than the hotel accounting route, and it's difficult to hang onto people in that area, and I would have seen him progressing within the organization as long as he wanted to stay with the company, that he would have made it to a manger [sic], director and eventually an officer type level position, because he had the years of service, and Hyatt is very, very big on promoting from within.

Barnish was asked: "Were the promotions outlined with what you believed most probably would have happened for James Burroughs had he not left?" Barnish answered, "Yes." Barnish declared that the positions and salaries presented to Burroughs' economist for use in determining lost future wages were correct. Dr. Charles Alford, an economist, opined that, given the promotion track provided by Barnish, the present value of Burroughs' future wages was $1,558,749.

As in Pearson, whether the future damages in the case sub judice were established with "reasonable certainty" was a decision for the jury and did not impact the admissibility of the evidence. We iterate for the edification of

the Bench and Bar that the standard for the admission of evidence is different from the standard of proof to be used by the jury in determining whether to assess damages. The question in this case, as in Pearson, is whether the evidence was properly admitted, not whether the evidence was sufficient to support a verdict including future damages. We conclude the evidence was properly admitted, and whether the damages were "reasonably certain" to occur was a decision for the jury.

II. FAILURE TO ALLOW WORSHAM'S TESTIMONY

A. Expectations Regarding Referral

Dr. Worsham claims the trial judge erred by refusing to allow him to testify as to what he expected Dr. McAlhany to do in evaluating and diagnosing Burroughs pursuant to Worsham's referral. We find no prejudicial error by the trial judge.

Worsham sought to introduce testimony regarding his expectations of what Dr. McAlhany would do to diagnose Burroughs' condition after Worsham's referral. The testimony excluded was never proffered to the court. As there was no proffer, Worsham cannot demonstrate how he was prejudiced by its exclusion. See Baber v. Greenville County, 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997) ("Absent a proffer, it is impossible for this Court to determine the effect of the excluded testimony.").

Moreover, on direct examination during the plaintiff's case-in-chief, Dr. Worsham testified:

> A: I did not remember James Burroughs until I saw his deposition and I recognized his face, but as far as remembering him specifically, had we run into each other somewhere, no, I can't say that I truly remembered him.
>
> Q: And just so we're clear, you were his main treating doctor, correct?
>
> A: That's correct.

Q: You did not remember him?

A. I did not remember him specifically, no.

This testimony demonstrates with remarkable clarity the inability of Dr. Worsham to testify personally about his expectations in regard to the referral of Burroughs to Dr. McAlhany.

In an action for medical malpractice, the fact that a family practitioner referred the patient to a specialist does not, in and of itself, establish due care. See Marchese v. Monaco, 145 A.2d 809 (N.J. Super. Ct. App. Div. 1958). In spite of referral, a family practitioner still owes the patient the duty to exercise that degree of knowledge, care, skill, and learning possessed and exercised under the same or similar circumstances by a competent family practitioner. Id.

The mere fact that a family practitioner acts on the advice of another physician, even though a specialist, does not constitute a defense to an action based on unskilled treatment. Id. This record is replete with testimony emanating from various physicians concluding that Dr. Worsham, in diagnosing and treating the medical condition of Burroughs, failed to exercise that degree of knowledge, care, skill, and learning possessed and exercised by an ordinary, careful, and prudent family practitioner under the same or similar circumstances.

On the merits, the testimony elicited from Dr. McAlhany demonstrated that Burroughs was referred to him for treatment of an incisional hernia, and that he examined Burroughs consistent with that referral. Dr. McAlhany testified he would do further testing in the event the reason for the referral was not proper or if he was asked. He professed that he was not informed of the patient's history of abdominal pain nor was he informed of Burroughs' anemia at the time of the referral.

Dr. Worsham had ample opportunity to cross-examine Dr. McAlhany regarding whether he did further examination and whether it was something he was expected to do when a patient was referred to him. Based on the testimony presented, we find Worsham was not prejudiced by the exclusion

of testimony regarding his expectations as to Dr. McAlhany. See Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001) ("Before the Court of Appeals will reverse a judgment for an alleged error in the exclusion of evidence, the appellant must show prejudice."). The trial court did not abuse its discretion in excluding Worsham's testimony regarding his expectations of Dr. McAlhany's examination.

B. Burroughs' Failure to Follow-Up

Worsham maintains the judge erred in refusing to allow him to testify that his review of Dr. McAlhany's chart indicated Burroughs never returned for a follow-up visit. We determine the exclusion of this testimony was harmless as it would have been cumulative to other testimony in the record.

Worsham sought to testify, based on his reading of Dr. McAlhany's report, that Burroughs never returned for a follow-up visit. The trial court refused to allow Worsham to interpret Dr. McAlhany's records when Dr. McAlhany had already testified.

When Dr. McAlhany was asked whether Burroughs returned for a follow-up visit, he testified that Burroughs never returned. This point was brought out several times by Worsham's counsel during cross-examination. Therefore, the excluded testimony would have been merely cumulative to testimony already in the record. "Generally, there is no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury." Commerce Center of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001); see also Ott v. Pittman, 320 S.C. 72, 463 S.E.2d 101 (Ct. App. 1995) (upholding trial judge's decision to exclude particular witness's testimony, which the Court of Appeals characterized as "cumulative to that of other witnesses").

The trial court did not abuse its discretion in excluding Worsham's testimony that Burroughs missed his follow-up appointment with Dr. McAlhany.

III. JURY CHARGE

Worsham asserts the trial court erred in failing to specifically charge that the standard of care his actions must be measured against was that of an ordinary, careful, and prudent physician "in his specialty" under the same or similar circumstances. We find that when the jury charges, including the two clarifying charges, are read as a whole, the trial judge properly enounced the standard of review by which Worsham's actions should be measured.

The trial judge originally charged the jury regarding the standard of care as follows:

> Now, in this case I will charge you that the law in regard to diagnosing a patient is that the degree of skill and care a physician must use in diagnosing a condition is that which would be exercised by a competent practitioner in the defendant doctor's field of medicine. And I will charge you that in this case the question is whether Dr. Worsham, in making a diagnosis, deviated from the applicable standard of care, either by not employing a particular procedure or by not ordering a particular test. And that is to be determined by what an ordinary, careful, and prudent physician would have done under the same or similar circumstances in this case.
>
> . . . What the law does require of a physician is this, that in the practice of -- he shall exercise that degree of knowledge, care and skill ordinarily possessed by members of his profession in good standing under the same or similar circumstances.

(emphasis added). Appellants did not object to the charge as given.

The jury submitted a question to the judge which read: "We are confused about what the law states the M.D. must do, as a minimum, to meet the standards of care." Appellants' attorneys then requested a charge to the jury "add[ing] the defendant doctor's field of medicine." The trial judge gave the following clarifying charge:

> In this case, the law in South Carolina is, the question of whether a physician in making a diagnosis deviated from the applicable standard of care, either by not employing a particular procedure or by not administering a particular test, is to be determined by what an ordinary, careful and prudent physician would have done under the same or similar circumstances.

The jury submitted a second question requesting further clarification of the standard of care and its application in this case. The judge charged the jury:

> Now, doctors must do what an ordinary, reasonable, prudent doctor would do under the same or similar circumstances. If a doctor does something or fails to do something that an ordinary, reasonable doctor should have done under the -- under those circumstances then it would be negligence. Okay.
>
> As a general rule, you and I do not know what the standards of care are. Therefore we have to learn or hear what the standards of care are through expert witnesses, or expert testimony what are generally recognized and accepted practices and procedures which should be followed by the average, competent doctor in the defendant's profession, under the same or similar circumstances.

(emphasis added). Appellants did not object to this charge as given.

In King v. Williams, 276 S.C. 478, 482, 279 S.E.2d 618, 620 (1981), the Supreme Court held: "The degree of care which must be observed is, of course, that of an average, competent practitioner acting in the same or similar circumstances." Since the King decision, this Court has defined medical malpractice as "the failure of a physician to exercise that degree of care and skill which is ordinarily employed by the profession generally, under similar conditions and in like surrounding circumstances." Jernigan v. King, 312 S.C. 331, 333, 440 S.E.2d 379, 381 (Ct. App. 1993). "The standard for recovery has been summarized, 'To recover for medical malpractice, a plaintiff must show failure by a physician to exercise that

degree of care and skill which is ordinarily employed by the profession under similar conditions and in like circumstances.'" Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 496, 514 S.E.2d 570, 574 (1999) (quoting Bonaparte v. Floyd, 291 S.C. 427, 434, 354 S.E.2d 40, 45 (Ct. App. 1987)) (emphasis in original).

While the first clarifying charge fails to specifically state that the standard of care is based on a doctor in the same field of medicine, both the main charge and the second clarifying charge elucidate the jury as to the requirement that Worsham's actions are to be juxtaposed to those of a doctor in the same field of medicine. In looking at the charges given as a whole, we find no prejudicial error in the clarifying charge's failure to indicate that the standard of care is compared to doctors in the same field of medicine. See Keaton, 334 S.C. at 497, 514 S.E.2d at 575.

Worsham complains that the testimony establishing the standard of care was not by a medical professional in the area of family medicine, but was explained by an internal medicine specialist and a surgeon. We rule the experts who testified properly detailed the standard of care for a family practitioner based on their knowledge and experiences.

Dr. Daniel Derman is board certified in internal medicine. He testified the standard of care for a family practitioner diagnosing and treating a patient with symptoms of colon cancer is the same as the standard in internal medicine. Specifically, he stated: "[F]or primary care in terms of being the first one on the front line, so to speak, who might see a colon cancer, it would not only be the same for family practice as internal medicine, but it's going to be the same all over the country as well."

Dr. Randolph Baily, a colorectal surgeon, detailed his background and how he was qualified to establish the standard of care for family practitioners. He testified that he has taught diagnosis and treatment of colon cancer to students and residents in family practice at Baylor College of Medicine and the University of Texas Medical School in Houston. In addition, he declared that diagnosing colon cancer is something taught in medical school to all students regardless of their specialties. According to Dr. Baily, Worsham's

actions failed to meet the appropriate standard of care for diagnosing and treating colon cancer.

Finally, Dr. Meher Medavaram, Burroughs' family practice doctor in Chicago, testified that the standard of care for family practitioners was consistent throughout the United States. She asserted Worsham failed to properly perform tests to determine the cause of Burroughs' anemia. She professed the standard of care required the performance of additional tests to rule out colon cancer.

The testimony presented by Burroughs' expert witnesses established the standard of care for a doctor in family practice. The experts were each qualified to detail the standard of care in family practice. Thus, the testimony was properly admitted. See Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001) (admission or exclusion of expert testimony is matter within sound discretion of trial court, whose decision will not be disturbed on appeal absent abuse of discretion).

We find no error in the jury charge or the testimony by Burroughs' experts used to establish and clarify the standard of care.

IV. INCONSISTENT VERDICTS

Appellants allege the jury's verdicts finding them liable for the wrongful death cause of action, but finding no liability for loss of consortium were inconsistent, and, therefore, a new trial should have been ordered. We find the argument raised is not properly preserved. Moreover, the assertion fails on the merits, as the causes of action are separate and distinct, and the verdicts were entirely consistent.

The reading of the verdict by the trial judge and any subsequent objections are not included in the Record on Appeal. It is impossible for us to determine whether Appellants raised timely objections to the issue of the inconsistent verdicts. As such, the issue is not properly preserved for review on appeal. See Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (noting appellate court could not consider propriety of jury's verdict which found neighbor liable for nuisance but awarded no damages, where there was

no objection at trial by neighbor or landowner which brought nuisance action, and neither party raised issue on appeal); Stevens v. Allen, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999), aff'd, 342 S.C. 47, 536 S.E.2d 663 (2000) (holding there is no duty imposed on trial judge to question jury's verdict of liability, but no damages, unless requested to by a party).

The order denying Appellants' motions for judgment notwithstanding the verdict and for a new trial absolute is in the Record on Appeal. However, the motions themselves are not. The order incorporates by reference the post-trial motions made during the hearing. Yet, the portion of the hearing in which the motions were made is not included in the Record on Appeal. The order finds the motions not preserved. The only possible reference to this issue is where the judge notes: "[T]he Defendants failed to make a timely objection to the form of the jury verdict thereby waiving same." The Record on Appeal does not allow us to determine whether a proper objection or motion for a new trial was made based on this specific issue. Appellants had the burden to furnish a sufficient record from which an intelligent review could be conducted. See D & D Leasing Co. v. Gentry, 298 S.C. 342, 380 S.E.2d 823 (1989) (emphasizing that burden is on appellant to furnish a sufficient record from which an intelligent review can be conducted and finding that appellant did not meet this burden; thus, the appellate court properly dismissed the appeal).

In addition, Appellants' claims fail on the merits. Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative. Preer v. Mims, 323 S.C. 516, 476 S.E.2d 472 (1996); Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000). "Although loss of consortium is an independent action, case law has held the right of action does not accrue until the loss of the services, society and companionship of the spouse has actually occurred, which has been defined as the point when the spouse sustained the injuries." Stewart, 341 S.C. at 156, 533 S.E.2d at 604. "Loss of consortium arises out of the special relationship between a husband and wife." Id. "Any person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse." S.C. Code Ann. § 15-75-20 (1977).

According to the Wrongful Death Act: "Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages." S.C. Code Ann. § 15-51-10 (1977). "Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death shall have been so caused." S.C. Code Ann. § 15-51-20 (Supp. 2001).

This Court has identified factors to be considered in assessing damages under the Wrongful Death Act. "The general elements of damages recoverable are: (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries." Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989).

While the factors to consider for damages in a wrongful death action include loss of consortium, we find this is not sufficient to say that a plaintiff's verdict on wrongful death and a defense verdict on loss of consortium are inconsistent. First, the parties benefiting from the actions may be separate and distinct. Only the spouse may bring a loss of consortium claim. However, the spouse, children, parents, or other heirs may be the beneficiaries of the wrongful death award.

Additionally, the statute establishes that the claim for loss of consortium is to compensate the spouse for "tortious violation of the right to the companionship, aid, society and services of his or her spouse." § 15-75-20. In contrast, a wrongful death claim is to compensate the heirs of a decedent, who, if he had survived, could have brought a personal injury action. § 15-51-10. This Court, as well as the South Carolina Supreme Court, has ruled claims for personal injury and loss of consortium are

separate and distinct claims, and a ruling on one does not bar, nor entitle, recovery on the other claim. See, e.g., Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984); Page v. Crisp, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990).

We find that, as a wrongful death claim is premised on the decedent's ability to have brought a personal injury claim if he had survived, the rulings in the cases of Graham and Page are apposite and analogous to the present case. Verdicts awarding damages for wrongful death, but finding for the defense on loss of consortium, are not inconsistent. We hold the two claims are separate and distinct, and, as pronounced in Page, "[e]ach litigant was entitled to a verdict based on the law and the evidence." Page, 303 S.C. at 119, 399 S.E.2d at 162.

CONCLUSION

We rule the testimony of Dr. Green was properly admitted because it did not violate the "loss of chance of survival" doctrine. We find that the testimony regarding Burroughs' future promotion opportunities and possible salaries was admissible as it explained the extent and nature of Burroughs' injuries. We further remind the Bench and Bar that the standard of admissibility is different from the standard of proof for evidence of future damages. We hold the trial judge did not err in excluding Worsham's testimony regarding his expectations of Dr. McAlhany's care or Burroughs' failure to follow up with Dr. McAlhany. Testimony was already in the record, making Worsham's testimony cumulative and unnecessary. The trial judge's charges, when viewed as a whole, were proper and adequate statements of the law of South Carolina regarding the standard of care for a family practitioner. We determine the claims of wrongful death and loss of consortium are separate and distinct causes of action. Apodictically, we conclude the jury's verdicts, one awarding damages for wrongful death and the other denying damages for loss of consortium, were not inconsistent. Accordingly, the judgment of the Circuit Court is

AFFIRMED.

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