The Supreme Court of South Carolina

IN THE MATTER OF JANE McCUE JOHNSON, RESPONDENT.

ORDER

The records in the office of the Clerk of the Supreme Court show that on July 18, 1983, Jane McCue Johnson was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated December 21, 2001, Ms. Johnson submitted her resignation from the South Carolina Bar. We accept Ms. Johnson's resignation.

Ms. Johnson shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, she shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Ms. Johnson shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Jane McCue Johnson shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

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

February 25, 2002

The Supreme Court of South Carolina

RE: Lawyers Suspended by the Commission on Continuing Legal Education and Specialization

The Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. This list is being published pursuant to Rule 419(d), SCACR. If these lawyers are not reinstated by the Commission by April 1, 2002, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e), SCACR.

Columbia, South Carolina
March 4, 2002

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

March 4, 2002

ADVANCE SHEET NO. 6

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mike Brown, Howard Tharpe, Interstate Speedway, Inc., and Interstate Speedway, Appellants,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management and Lisa M. Hadstate, Respondents.

Appeal From Berkeley County
J. Derham Cole, Circuit Court Judge

Opinion No. 25420
Heard December 12, 2001 - Filed February 25, 2002

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Christopher McG. Holmes, of Charleston, for appellants.

Mary D. Shahid, of Charleston, for respondent South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management; Robert Guild, of Columbia, for respondent Lisa M. Hadstate.

James S. Chandler, Jr., of Georgetown, for Amici Curiae South Carolina Coastal Conservation League, Sierra Club, National Audubon Society, and South Carolina Wildlife Federation; Neil C. Robinson, Jr., of Nexsen, Pruet, Jacobs, Pollard & Robinson, LLC, of Charleston, for Amicus Curiae South Carolina Tourism Council, Inc.

JUSTICE BURNETT: This appeal concerns an application for a stormwater permit to construct a motor speedway. We affirm in part and reverse in part and remand this matter to the Administrative Law Judge (ALJ) for the purpose of determining whether a consistency review meeting the requirements of the Coastal Management Program had been conducted.

FACTS

In September 1995, Appellants Mike Brown and Howard Tharpe, principals of Interstate Speedway, and Interstate Speedway, Inc. (collectively referred to as "Speedway"), applied with Respondent Department of Health and Environmental Control's (DHEC's) Office of Ocean and Coastal Resource Management (OCRM) for a stormwater permit as required by the Stormwater Management and Sediment Reduction Act (Stormwater Act)[1] in

[1] See S.C. Code Ann. §§ 48-14-10 to -170 (Supp. 2001).

order to construct a motor speedway in Berkeley County. As part of this permitting process, OCRM was to ensure the proposed project, located in a coastal zone, was consistent with the policies of the Coastal Management Program managed by DHEC. See S.C. Code Ann. § 48-39-80(B)(11) (Supp. 2001). Respondent Lisa M. Hadstate (Hadstate) submitted comments opposing issuance of the stormwater permit.

On November 7, 1995, OCRM issued the stormwater permit. Hadstate appealed, seeking a contested case hearing before an ALJ.

Testimony at the ALJ hearing revealed Speedway proposed to construct a motor racetrack consisting of a one-half mile concrete oval track, grassed parking lot, and mostly grassed infield on 61 acres located near the intersection of S.C. Highway 27 and Interstate 26 in Berkeley County. The racetrack would operate on Saturday afternoons and evenings from mid-March through September.

The proposed racetrack site is located within the Four Holes Swamp drainage basin. In general, witnesses opposed to the project expressed concern that stormwater sediment discharged from the speedway, both during and after construction, would cause erosion in the Four Holes Swamp,[2] the Francis Beidler Forest located within the swamp, and in other nearby property.

The ALJ issued a Final Decision upholding OCRM's issuance of the stormwater permit. Hadstate appealed the ALJ's Final Decision to the DHEC Board.[3] The Board reversed the ALJ, thereby denying Speedway a stormwater permit.

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[2]Between 7,500 and 8,000 acres of the 45,000 acre swamp are located downstream from the proposed project site.

[3]See S.C. Code Ann. § 1-23-610 (Supp. 2001).

Speedway petitioned for judicial review of the Board's decision.[4] The circuit court affirmed. Speedway appeals.[5]

ISSUES

I. Did the circuit court err by upholding the Board's decision that the ALJ erred by approving use of the rational method model for stormwater discharge?

II. Did the circuit court err by affirming the Board's conclusion there was no evidence OCRM conducted a consistency review which met the requirements of the Coastal Management Program?

ANALYSIS

This case involves appearances before four tribunals and includes three levels of appellate review. Pursuant to provisions of the Administrative Procedures Act (APA),[6] the ALJ presided as the fact-finder in the hearing of this contested case. S.C. Code Ann. §§ 1-23-600(B) (Supp. 2001); see Jean Hoefer Toal, et al., Appellate Practice in South Carolina 49 (1999) (explaining three duties of ALJ Division - serving as fact-finder in certain cases, acting as appellate tribunal in other cases, and holding hearings on proposed regulations in other cases). Although this case reached the ALJ in the posture of an appeal, the ALJ was not sitting in an appellate capacity and was not restricted to a review of OCRM's permit decision. See Reliance Ins. Co. v. Smith, 327 S.C. 528, 489 S.E.2d 674 (Ct. App. 1997). Instead, the

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[4]See S.C. Code Ann. § 1-23-380 (Supp. 2001).

[5]DHEC and Hadstate's motion to dismiss Speedway's appeal as moot is denied.

[6]S.C. Code Ann. § 1-23-10 *et seq.* (1986 & Supp. 2001).

proceeding before the ALJ was in the nature of a de novo hearing with the presentation of evidence and testimony. Id.

The first appellate review occurred when the final decision of the ALJ was reviewed by the Board under its limited scope of review set forth in § 1-23-610(D). The second appellate review occurred when the circuit court reviewed the Board's decision to determine whether it properly applied its standard of review set forth in § 1-23-610(D). The circuit court's well-established scope of review is set forth in § 1-23-380(A)(6). Our review of the circuit court order to determine if the lower court properly applied its scope of review constitutes the third appellate review. Our scope of review is the same as that established for the circuit court. § 1-23-380(A)(6).

I. Rational Method

Speedway argues the circuit court erred by affirming the Board's decision that the ALJ erred by concluding the rational method was appropriately used to calculate stormwater runoff rates. It claims the applicable regulation provides OCRM with the flexibility to permit use of the rational method even when the project site is greater than 20 acres. Speedway further claims there is substantial evidence in the record which supports use of the rational method for its project and, therefore, OCRM properly applied its discretion to grant the permit application which used this method. We agree.

The purpose of the Stormwater Act is "to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the existing stormwater management and sediment control program." Act No. 51, 1991 Acts 167. In keeping with this purpose, unless otherwise exempted, a person who intends to engage in a land disturbing activity must first submit a stormwater management and sediment control plan to the appropriate implementing agency and obtain a permit to proceed. § 48-14-30.

South Carolina Regulation 72-307 (Supp. 2001) sets forth the

design criteria, minimum standards, and specifications for projects requiring a stormwater management and sediment control plan. Preliminarily, Regulation 72-307(C) provides as follows:

> Specific requirements for the permanent stormwater management and sediment control plan approval process include, but are not limited to, the following items. The appropriate plan approval agency may modify the following items for a specific project or type of project.

(Underline added).

Thereafter, the regulation lists twelve items as specific requirements for the permanent stormwater management portion of the plan. Item two follows:

> (2) All hydrologic computations shall be accomplished using a volume based hydrograph method acceptable to the Commission. The storm duration for computational purposes for this method shall be the 24-hour rainfall event, SCS[7] distribution with a 0.1 hour burst duration time increment. The rational and/or modified rational methods are acceptable for sizing individual culverts or stormdrains that are not part of a pipe network or system and do not have a contributing drainage area greater than 20 AC. The storm duration for computational purposes for this method shall be equal to the time of concentration of the contributing drainage area or a minimum of 0.1 hours, whichever is less.

(Underline added).[8]

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[7]SCS is the anachronym for "soil conservation service."

[8]The rational method is a mathematical equation which estimates pre and post-development peak discharge with application of runoff controls. The selection of certain variables in the equation (previous land uses, land

At the administrative hearing, Hadstate's expert witnesses testified it was inappropriate to use the rational method to calculate runoff from the 61 acre tract. The witnesses explained the rational method is only acceptable for use with small watersheds as it assumes the entire area contributes to stormwater flow, thereby losing its accuracy as areas increase in size.

Speedway's expert witnesses, including one employee of OCRM, testified the rational method was an appropriate model for the expected stormwater flow from the site. These witnesses explained the rational method suited this project because there was overall uniformity (very gentle slopes, no subwatersheds) in the watershed site. The OCRM witness testified that, on a case by case basis, OCRM permitted other applicants with a contributing drainage area greater than 20 acres to use the rational method. In permitting use of the rational method, the witness explained she relied on the "South Carolina Stormwater Management and Sediment Review" course materials which approve use of the rational method for contributing watersheds of up to 200 acres and a N.C. State publication which suggests use of the rational method for a watershed of up to 300 acres. Another OCRM expert witness testified he reviewed the rational method calculations conducted by Speedway's professional engineer and concluded they were appropriate.

The ALJ concluded the rational method model, recognized as reliable in various fields for designing storm drainage systems in excess of 20 acres, was properly utilized in Speedway's permit application. The Board, however, concluded OCRM and the ALJ "misinterpreted and misapplied" Regulation 72-307(C)(2). It held the regulation "specifically restricts the use of the rational method for hydrologic computations to sites much smaller than [Speedway's] site, and was used improperly in evaluating this application." The circuit court agreed with the Board.

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cover, and soils) are subject to expert opinion.

The scope of judicial review of agency decisions is governed by S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2001). "[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. South Carolina Bd. of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute. Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993).

The plain language of Regulation 72-307(C)(2) provides that the rational and/or modified rational methods are, without qualification, acceptable methods for sizing individual culverts or stormdrains which are not part of a pipe network or system and do not have a contributing drainage area greater than 20 acres. The regulation does *not* state the converse: that the rational and/or modified rational methods are unacceptable for sites in excess of 20 acres. Instead, the regulation provides that, where appropriate, the rational and/or modified rational methods may be utilized. The prefatory comment to Regulation 72-307(C), specifically permitting the plan approval agency to modify the hydrograph method for a particular project, is fully consistent with Regulation 72-307(C)(2).

While the Court typically defers to the Board's construction of its own regulation, where, as here, the plain language of the regulation is contrary to the Board's interpretation, the Court will reject its interpretation. Richland County School Dist. Two v. South Carolina Dept. of Educ., 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999) (court rejected agency's statutory construction where plain meaning of statute provided compelling reason to reject agency's interpretation). We conclude the Board erred by construing Regulation 72-307(C)(2) as prohibiting use of the rational method model for

calculating peak stormwater runoff for sites in excess of 20 acres.[9] Accordingly, the circuit court erred by affirming the Board's decision on this issue. See § 1-23-380(A)(6) (court may reverse decision if substantial rights of appellant have been prejudiced because agency conclusions are affected by error of law).

II. Coastal Management Program Consistency Review

Speedway contends the circuit court erred by declining to rule the Coastal Management Program was not binding because it was not promulgated as a regulation. In addition, Speedway argues the circuit court erred by affirming the Board's conclusion there was no evidence OCRM conducted a consistency review which met the requirements of the Coastal Zone Management Act.

In 1977, the General Assembly enacted the Coastal Tidelands and Wetlands Act (Coastal Zone Management Act). S.C. Code Ann. §§ 48-39-10 to -360 (Supp. 2001). Under the Coastal Zone Management Act, one of the South Carolina Coastal Council's (OCRM's predecessor) duties was to develop and administer a Coastal Management Program (CMP). § 48-39-80.[10] According to the applicable statute,

> The department shall develop a comprehensive [CMP] and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of

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[9]The Board's order does not mention the prefatory language to Regulation 72-307(C)(2). We therefore assume it did not consider whether there were any factual reasons for allowing use of the rational method here. We note there is substantial evidence in the record before the ALJ of site-specific reasons for use of the rational method as a model for Speedway's project.

[10]Through government restructuring, this duty now belongs to DHEC. See § 48-39-10(V) ("department" means DHEC).

this chapter and any rules and regulations promulgated under this chapter.

§ 48-39-80.

As part of the CMP, the Coastal Council was required to "[d]evelop a system whereby the department shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." § 48-39-80(B)(11).[11] The parties agree the Coastal Council developed a CMP which was approved by the General Assembly and Governor. The CMP was published as a special edition of the State Register, 2 State Register (No. 26, Oct. 1978), and is reflected in the "CMP document." "Refinements" to the CMP document appear in the State Register. See 17 State Register, Issue 5, Part I, pp.155-56 (May 1993); 17 State Register, Issue 6, pp.55-56 (June 1993). These refinements were approved by the General Assembly and Governor.

A. Legality of CMP

Speedway claims the Board had no authority to rely on the CMP because it was not promulgated as a regulation pursuant to the APA. This issue is not preserved for review.

After Speedway submitted its stormwater permit application, OCRM issued a public notice. In the notice, OCRM stated that, pursuant to statutory authority and the CMP, the project was seeking a determination that it was consistent with the CMP. OCRM issued the stormwater permit.

In her opening statement to the ALJ, Hadstate asserted OCRM failed to comply with the CMP as set forth in the CMP. OCRM responded that, in approving Speedway's stormwater permit, it did not violate the

[11]This process is considered the "consistency review."

policies of the CMP.

Hadstate cross-examined OCRM expert witness Barbara Neale. Neale stated, prior to issuance of Speedway's stormwater permit, she determined the proposed project was consistent with the policies of the CMP. She admitted she had no documentation, other than the stormwater permit, which confirmed her consistency review.

Thereafter, Hadstate quoted various portions of the CMP's "Guidelines for Evaluation of All Projects" and asked Neale if there were any documents which reflected her consideration of the particular objectives. Neale responded that the permit letter itself was the document which indicated Speedway's project was consistent with the various CMP policy objectives.

On re-direct, Neale testified the CMP refinements specifically address stormwater management in the coastal zone. She explained, when reviewing stormwater permit applications, she considers the refinements in order to evaluate a permit's consistency with the CMP. Neale testified she considered the refinements in reviewing Speedway's application, but the project categories in the refinements did not encompass Speedway's project.

In her Proposed Order, Hadstate stated OCRM failed in its duty to determine Speedway's permit complied with the CMP. In its Proposed Order, Speedway stated its permit was subject to the Coastal Tidelands and Wetlands Act. It stated OCRM reviewed its permit applications in accordance with "appropriate DHEC-OCRM statutes, regulations and guidelines."

In his Final Decision, the ALJ determined, because the proposed project is within a coastal zone, Speedway must meet the requirements of the CMP. He explained the CMP was refined in response to the adoption of the Stormwater Act. Without discussion of the evidence concerning the CMP consistency review, the ALJ approved OCRM's issuance of the stormwater permit.

In her Application for Board Review, Hadstate argued the ALJ erred by not concluding OCRM failed to determine Speedway's project was inconsistent with the CMP. She claimed OCRM was required to make a particularized determination that the project permit would be consistent with the CMP's policy objectives. Hadstate made a similar argument in her brief to the Board, asserting OCRM should have specifically considered several of the "Guidelines for Evaluation of All Projects" as set forth in the CMP.

In argument to the Board, Speedway asserted it obtained OCRM's consistency certification. In a lengthy discussion, OCRM stated it had conducted the consistency certification as part of "a streamlined permit process. It's implicit, it's done as a comment during the internal review, and a substantive review was performed."

In its Final Order, the Board determined the ALJ failed to consider whether OCRM conducted a consistency review. The Board determined there was no evidence to indicate OCRM conducted any review to determine if the permit was consistent with the CMP document. After citing various "Guidelines for Evaluation of All Projects" in the CMP, the Board concluded Speedway's project was inconsistent with the policies of the CMP.

In its application for judicial review, Speedway asserted the Board erred in reversing the approval of its permit on the basis that the polices set forth in the CMP document are not binding regulations. Noting this issue had been raised neither to the ALJ nor to the Board, the circuit court declined to rule on this issue.

Speedway asserts the circuit court's conclusion it could not rule on this issue is without basis because Speedway, as the prevailing party before OCRM, would not have raised the legitimacy of the CMP to the ALJ or the Board. We disagree.

In reviewing the final decision of an administrative agency, the

circuit court sits as an appellate court. See Al-Shabbaz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Consequently, issues not raised to and ruled on by the agency are not preserved for judicial consideration. Id.; Kiawah Resort Assoc. v. South Carolina Tax Comm'n, 318 S.C. 502, 458 S.E.2d 542 (1995). Likewise, issues not raised to and ruled on by the ALJ are not preserved for appellate consideration. Food Mart v. South Carolina Dep't of Health and Envtl. Control, 322 S.C. 232, 471 S.E.2d 688 (1996) (matters not argued to or ruled on by the trial court are not preserved for review).

Speedway was required to raise the issue of the legitimacy of the CMP to the ALJ and the Board. The importance of the CMP was clearly at issue throughout these proceedings. In its public notice, OCRM stated Speedway was seeking a determination its project was consistent with the CMP. Before the ALJ and the Board, Hadstate consistently claimed OCRM failed to conduct a consistency review as required by the CMP. In fact, Speedway asserted at oral argument before the Board that OCRM had complied with the CMP. Speedway was fully aware of the significance of the CMP, yet failed to argue it was not bound by the program because the CMP was not promulgated as a regulation. Because Speedway failed to timely raise this issue for appellate review, the circuit court properly determined it was not preserved for appellate review. Kiawah Resort Assoc. v. South Carolina Tax Comm'n, supra; Food Mart v. South Carolina Dep't of Health and Envtl. Control, supra.[12]

[12]Speedway asserts Hadstate failed to raise the issue to the ALJ as to whether OCRM had conducted a consistency review. This is patently without merit. At the administrative hearing, Hadstate's cross-examination of witness Neale clearly indicated she believed OCRM had not conducted a consistency review. Furthermore, in her Proposed Order, Hadstate stated OCRM failed in its duty to determine Speedway's permit would be in compliance with the CMP.

B.

Speedway argues the circuit court erred by upholding the Board's conclusion OCRM failed to conduct a consistency review. It asserts the Board acted outside its quasi-judicial authority by determining there was no evidence in the record that OCRM conducted the consistency review mandated by the Coastal Zone Management Act. We agree.

As previously noted, in environmental permitting cases, the ALJ presides as the finder of fact. § 1-23-600(B). Regarding the final decision, the Administrative Law Judge Division Rules provide, the ALJ "shall issue the decision in a written order which shall include separate findings of fact and conclusions of law." Rule 29(C), ALJDRP. Rule 29(C) is essentially identical to § 1-23-350 which provides that the final order of an agency adjudication of a contested case "shall include findings of fact and conclusions of law, separately stated."

The Board, on the other hand, sits as a quasi-judicial tribunal in reviewing the final decision of the ALJ. § 1-23-610(A). As the "reviewing tribunal," the Board is not entitled to make findings of fact but:

> may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner has been prejudiced because of [sic] the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-610(D).

Initially, we conclude the ALJ's Final Decision is insufficient for meaningful appellate consideration of the issue of consistency review. In spite of the dispute over whether a sufficient consistency review had been conducted, the Final Decision contains *no* reference to the evidence from the hearing and, more importantly, *no* factual findings concerning the consistency review process and how that process was conducted in this case. Assuming the ALJ determined Speedway's proposed project was consistent with the CMP,[13] the lack of any findings or any discussion of the law on this matter prevents a reviewing body from evaluating the decision. See Heater of Seabrook, Inc., v. Public Serv. Comm'n, 332 S.C., 20, 503 S.E.2d 739 (1998) (findings of fact must be sufficiently detailed to enable reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings); Able Communications, Inc. v. South Carolina Public Serv. Comm'n, 290 S.C. 409, 351 S.E.2d 151 (1986) (implicit findings of fact are insufficient). Accordingly, because of the insufficient nature of the ALJ's order, the Board, as the reviewing tribunal, was precluded from conducting an acceptable review of the Final Decision.

Moreover, since the ALJ is the appointed fact-finder in these matters, the Board lacked authority to make its own findings of fact concerning whether a consistency review meeting the terms of the CMP had been conducted. For these reasons, the Board exceeded the scope of its quasi-judicial authority as set forth in § 1-23-610. Rather than ruling in the first instance on this issue, the Board was required to remand this matter to the ALJ for an order clarifying whether a consistency review meeting the

[13]For purposes of this opinion, we make this assumption because the ALJ recognized the applicability of the CMP and ruled in favor of issuance of the stormwater permit. On the other hand, the ALJ may have overlooked ruling on the CMP. This conundrum illustrates the inadequacy of the ALJ's order.

requirements of the CMP had been conducted. § 1-23-610(D) (Board has authority to remand case for further proceedings). Accordingly, we conclude the circuit court erred by affirming the Board's findings of fact and conclusions of law concerning the sufficiency of OCRM's consistency review. § 1-23-380(A)(6)(b) (circuit court should reverse agency decision if . . . made in excess of statutory authority).[14]

The order of the circuit court is **AFFIRMED IN PART, REVERSED IN PART, and REMANDED** to the ALJ for further proceedings consistent with this opinion.

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

[14]To the extent they hold CMP certification pursuant to § 48-39-80 is not reviewable under provisions of the APA, League of Women Voters of Georgetown County v. Litchfield-by-the Sea, 305 S.C. 424, 409 S.E.2d 378 (1991), and Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998), are overruled.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ronald P. White, Appellant.

Appeal From Florence County
Hicks B. Harwell, Circuit Court Judge

Opinion No. 25421
Heard November 14, 2001 - Filed March 4, 2002

AFFIRMED

Jared S. Newman, of Daugs, Tedder, & Newman, of Port Royal, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia, Solicitor E. L. Clements, III, Twelfth Judicial Circuit, of Florence, for respondent.

CHIEF JUSTICE TOAL: Ronald P. White ("Appellant") appeals his conviction for violation of section 16-17-700 of the South Carolina Code, prohibiting the tattooing of another person except by a licensed physician for cosmetic or reconstructive purposes. S.C. Code Ann. § 16-17-700 (Supp. 2000). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant was indicted by the grand jury for the Court of General Sessions of Florence County for violating section 16-17-700 of the South Carolina Code. Appellant was arrested sometime after WBTW TV aired a clip of him tattooing another person in his Florence County residence as part of a series WBTW prepared on tattooing. At trial, Appellant admitted he violated the statute, but argued the statute was unconstitutional on several grounds. Appellant made a motion to quash the indictment at the beginning of trial, arguing the statute was unconstitutional because (1) it impermissibly restricted his freedom of speech in violation of the First Amendment of the United States Constitution and Article I, Section 2 of the South Carolina Constitution, (2) it restricted interstate commerce, and (3) it violated the Privileges and Immunities Clause of the United States Constitution.

The trial court found the statute constitutional. First, it found that tattooing was not speech, and, second, even if it were, prohibition of tattooing was a valid exercise of state power because of its impact on public health. The court dismissed Appellant's other constitutional claims on the same grounds, stating that the legislature may use "appropriate means" to "regulate or prohibit, if necessary" any occupation to protect public health. Finally, the court found that all contract and property rights are subject to "fair exercise of the police power to promote the general welfare." As Appellant admitted he violated the statute, he was found guilty as charged. He was sentenced to one year imprisonment and fined $2,500.00, suspended to five years of probation and a fine of $500.00.

The trial court did not hear any expert medical testimony regarding the dangers of tattooing or the risks to public health caused by the process of

tattooing. In finding tattooing posed a risk to public health, the trial court relied on Appellant's own concession that there were risks to unregulated tattooing and on the general notion that it is the legislature's responsibility to decide what is injurious to public health.

Appellant appeals the trial court's decision, raising the following issue:

> Did the trial court err in finding section 16-17-700 of the South Carolina Code[1] does not violate Appellant's freedom of speech as protected by the First Amendment of the United States Constitution[2] and Article I, Section 2 of the South Carolina Constitution[3]?

LAW/ANALYSIS

Appellant argues the trial court incorrectly upheld section 16-17-700 of the South Carolina Code, insisting the act of tattooing constitutes speech protected by the First Amendment. Appellant argues tattoos are a form of art or expression protected by the First Amendment. Assuming tattoos are protected expression, Appellant reasons those who create them should be afforded the same protection that he claims the creators of other protected expression enjoy (e.g., writers, painters, and sculptors). Appellant contends the process of tattooing cannot be separated from the display of the tattoo itself and both are protected under the First Amendment. We disagree.

The State argues that the trial court correctly upheld the statute, finding tattooing is not speech, and a rational relationship exists between the statute and public health. For support, the State cites several out of state, appellate and trial level opinions in which similar statutes have been upheld. *State v. Brady*, 492 N.E.2d 34 (Ind. App. 1986); *People v. O'Sullivan*, 409 N.Y.S.2d 332 (N.Y.

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[1]S.C. Code Ann. § 16-17-700 (Supp. 2000).

[2]U.S. Const. amend. I.

[3]S.C. Const. art. I, § 2.

App. Div. 1978); *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980). In each of these opinions, the court found tattooing did not constitute speech and then proceeded to analyze the statute applying a rational basis standard. *Id.* Each court determined (largely based on their common knowledge) that there are inherent risks to tattooing and gave the state's legislature wide latitude to determine how to best protect the general welfare of the state's inhabitants. *Id.* We agree with this position.

Our precedent establishes a general presumption of validity for legislative acts when subjected to constitutional attack, which can be overcome only by a clear showing that the act violates some provision of the Constitution. *Main v. Thomason*, 342 S.C. 79, 535 S.E.2d 918 (2000)*; State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994). This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution. If the challenging party is able to show the act is invalid, leaving "no room for reasonable doubt that it violates some provision of the Constitution," the burden shifts to the state. *Thomason*, 342 S.C. at 86, 535 S.E.2d at 921 (citing *Westvaco Corp. v. South Carolina Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995)). If the challenging party is unable to do so, however, it has not met its burden, and the challenge fails under this analysis.

Whether or not tattooing qualifies as speech, symbolic speech, or otherwise protected expression under the First Amendment is an issue of first impression in South Carolina. We look to the United States Supreme Court for guidance in analyzing this issue. According to the United States Supreme Court, the First Amendment protects speech, including conduct, if sufficiently communicative in character. *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974). The threshold question then is whether the conduct in issue is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* at 409, 94 S. Ct. at 2730, 41 L. Ed. 2d at 846. Admittedly, this test requires line drawing. The Supreme Court has acknowledged this implicitly, but held it could not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678, 20 L.

Ed. 2d 672, 679 (1968) (upholding defendant's conviction for burning his draft card on the courthouse steps against the challenge that the conduct amounted to expression protected by the First Amendment).

In determining whether certain conduct is within the boundaries of First Amendment protection, the Supreme Court has "asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 2539, 105 L. Ed. 2d 350, 353 (1989) (citing *Spence*, 418 U.S. at 410-411, 94 S. Ct. at 2730, 41 L. Ed. 2d at 846) (finding defendant's burning of the American flag during the Republican party's renomination of Ronald Reagan for President to be sufficiently imbued with elements of communication to qualify as protected conduct). In *Johnson*, the Supreme Court found the traditional use of flags for the communication of beliefs and the context in which the flag was burned to be instructive in determining the conduct was protected. *Id*. Additionally, the Supreme Court has considered relevant whether the conduct at issue would qualify as a "medium" for expression. *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S. Ct. 777, 780, 96 L. Ed. 1098, 1105 (1952) (holding film to be protected under the First Amendment after noting it was a "significant medium for the communication of ideas").

In the present case, the resolution of Appellant's claim that the process of tattooing is protected expression depends on whether the Court finds that tattooing is "sufficiently imbued with elements of communication" as required by *Spence v. Washington.* 418 U.S. at 409, 94 S. Ct. at 2730, 41 L. Ed. 2d at 846. Appellant claims the act of tattooing is artistic self-expression. However, the relevant inquiry is whether the act of tattooing is sufficiently communicative to warrant protection. Appellant has not made any showing that the *process* of tattooing is communicative enough to automatically fall within First Amendment protection. Burning of the flag, despite its potential safety risks, was protected because it conveyed an obvious political message. *Johnson*. Unlike burning the flag, the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections and outweigh the risks to public safety.

We agree with the dissent to the extent it argues content is not a justifiable reason to regulate tattooing, but find that the danger associated with the activity of tattooing, whether artwork or not, is a legitimate reason to regulate it. The dissent fails to recognize that tattooing, as opposed to painting, writing, or sculpting, is unique in that it involves invasion of human tissue and, therefore, may be subject to state regulation to which other art forms (on non-human mediums) may not be lawfully subjected.

In *O'Brien*, the Supreme Court made it clear the First Amendment does not protect all expressive conduct, even if intended to communicate. As discussed, application of the Supreme Court's test to determine what conduct is protected requires some line drawing. Based on the record before us, we find that the act of tattooing falls on the unprotected side of the line. Appellant has not met his burden to show why tattooing, an invasive procedure, with inherent health risks, would fall within the First Amendment. *State v. Brady*; *People v. O'Sullivan*; *Yurkew v. Sinclair*.

Because we find the statute does not prohibit constitutionally protected conduct under the First Amendment, we will apply the test enunciated by this Court in *Main v. Thomason,* 342 S.C. 79, 535 S.E.2d 918 (2000). In *Thomason*, we addressed the extent of the legislature's authority to legislate for the protection of public health and general welfare. This Court stated, "[c]ourts will not interfere with the enforcement of regulations designed for the protection of health, welfare, and safety of citizens unless they are determined to be unreasonable." *Id.* at 86-87, 535 S.E.2d at 921-22 (citing *Richards v. City of Columbia,* 227 S.C. 538, 88 S.E.2d 683 (1955)). "[T]he exercise of the police power is subject to judicial correction *only if* the action is arbitrary and has no reasonable relation to a lawful purpose." *Id.* at 87, 535 S.E.2d at 922 (emphasis added).

Under this analysis the challenging party again bears the initial burden, albeit a lesser one, to show the statute is arbitrary and has no reasonable relation to a lawful purpose. *Thomason*. If the challenging party makes this showing of arbitrariness, the burden shifts to the State to prove reasonableness. *City*

Council of Virginia Beach v. Harrell, III, 372 S.E.2d 139 (Va. 1988).[4] If the challenger cannot meet this threshold burden, the statute is presumed to have a rational relationship to a legitimate purpose within the authority of the legislature's police power and will be upheld.

In our opinion, Appellant, in this case, has not met this threshold burden; he has not rebutted the presumption of validity by showing the statute is arbitrary and unreasonable, with no relation to a legitimate governmental interest. *Thomason.* Appellant put forth no evidence other than his own testimony and the testimony of Mr. Black, a licensed tattoo artist in 12 states, regarding the safety or danger of tattooing. Neither Appellant nor Mr. Black has any medical training and both admitted there are risks to tattooing if the proper precautions are not taken. Although the State also failed to introduce current evidence of the risks associated with tattoos, the burden rested on Appellant to show the prohibition bears no reasonable relation to public health. The State argues tattooing can lead to hepatitis and other communicable diseases, and Appellant admitted tattooing does cause these risks if the proper sterilization measures are not taken. According to Appellant's own testimony, then, in the absence of affirmative regulation by the State, tattooing can endanger public health. With this admission, Appellant as much as conceded a rational relationship between tattooing and public health. As discussed, the legislature's exercise of police power is not subject to judicial correction unless its action is arbitrary and unreasonable. *Thomason.*

The rational basis analysis set out in our precedent to test the legislature's authority under its police power gives the statute a strong presumption of validity. Appellant has not put forth any evidence to show that S.C. Code Ann.

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[4]The Virginia Supreme Court described the analysis succinctly: "if the reasonableness of the enactment is fairly debatable, a court will not substitute its judgment for that of the legislative body. When, however, the presumption of validity is challenged by probative evidence of unreasonableness, the enactment cannot be sustained unless the legislative body meets the challenge with some evidence of reasonableness." *Id.* at 101-02.

§ 16-17-700 serves no legitimate interest in protecting public health and thus has not overcome the presumption of constitutionality.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the trial court and uphold Appellant's conviction.

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

JUSTICE WALLER: I dissent. In my opinion, tattooing is "sufficiently imbued with elements of communication" so as to fall within the scope of the First Amendment." State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

The majority recognizes that, in determining whether conduct is protected by the First Amendment, the United States Supreme Court inquires whether an "intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." Texas v. Johnson, 491 U.S. 397, 404 (1989).[5] In my view, there is no doubt that, in creating words, pictures, or images on the bodies of those who wear tattoos, White is intending to convey a message and the message is likely to be understood by those who view it.

In my opinion, White's conduct in creating tattoos is a form of art which is entitled to the same protection as any other form of art. If a painter who creates an image on a piece of canvas has created a work of "art" thereby engaging in "speech" worthy of First Amendment protection, I see no reason why a tattoo artist who creates the same image on a person's body should be entitled to less protection.[6] In my view, whether or not something is "speech" protected by the First Amendment cannot focus upon the medium chosen for its expression.[7]

Although the majority cites several cases which have held that tattooing

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[5] Johnson held burning an American flag constitutes speech worthy of First Amendment protection.

[6] As noted recently in a New York Times article, "Some people buy a van Gogh. Some people buy art by Tattoo Lou. They wear it or they hang it. But it is all art." New York Times; Long Island Weekly Desk, In this Artist's Hands, Skin is the Canvas (Sunday, July 1, 2001).

[7] Indeed, it would be ludicrous to suggest that because Michelangelo chose the ceiling of the Sistine Chapel upon which to paint, his renderings are not communicative.

is not "speech," those cases were decided in an era when tattooing was regarded as something of an anti-social sentiment.[8] As noted in a recent synopsis,

> The cultural status of tattooing has steadily evolved from that of an anti-social activity in the 1960s to that of a trendy fashion statement in the 1990s. First adopted and flaunted by influential rock stars like the Rolling Stones in the early 1970s, tattooing had, by the late 1980s, become accepted by ever broader segments of mainstream society. Today, tattoos are routinely seen on rock stars, professional sports figures, ice skating champions, fashion models, movie stars and other public figures who play a significant role in setting the culture's contemporary mores and behavior patterns. . .
>
> The market demographics for tattoo services are now skewed heavily toward mainstream customers. Tattooing today is the sixth-fastest-growing retail business in the United States. The single fastest growing demographic group seeking tattoo services is, to the surprise of many, middle-class suburban women.
>
> Tattooing is recognized by government agencies as both an art form and a profession and tattoo-related art work is the subject of museum, gallery and educational institution art shows across the United States.

"TheChangingCulturalStatusofTattooArt"(http:/www.tattooartist.com/history.html); See also Lawrence Muhammed, Tattoo You, Chicago Tribune (Nov. 4, 1997)(recognizing that tattoos have begun to appeal to people from every walk of life, and that, contrary to popular belief, there is no serious health risk involved in getting a tattoo, either. In most tattoo parlors, needles and inks are single-serve, gloves are worn and other utensils are steam/autoclave-sterilized,

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[8] Moreover, certiorari to the United States Supreme Court was not sought in any of the cited cases, and it appears that Court has never addressed this issue.

the same method used by hospitals for surgical equipment).

Consistent with the more modern trend, it is my opinion the process of tattooing is indeed a protectable form of speech.[9]

Accordingly, since tattooing may be considered speech, it is subject to a higher level of scrutiny than that imposed by the majority. As White concedes, section 16-17-700 is, in effect, a "content-neutral" regulation which is subject to an intermediate level of scrutiny, i.e., it will be sustained if it a) furthers an important governmental interest, b) that interest is unrelated to the suppression of free speech, and c) the incidental restriction on speech is no greater than essential to the furtherance of that interest.[10] See Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622 (1994). In interpreting "content-neutral" ordinances, this Court has noted that "[p]ermissible time, place, and manner restrictions are justified by a substantial governmental interest unrelated to free speech and allow[] for adequate alternative avenues of communication. . ." Harkins v. Greenville County, 340 S.C. 606, 613, 533 S.E.2d 886, 890 (2000).

Here, section 16-17-700 effectively provides no alternative avenue of communication; it makes it unlawful for a person to tattoo any part of the body of another person, but provides that [i]t is not unlawful for a licensed physician or surgeon to tattoo part of a patient's body if in his medical opinion it is necessary when performing cosmetic or reconstructive surgery." It taxes the brain to conceive of a manner in which White may practice his tattoo artistry.

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[9] The majority, by its emphasis of the word "process," appears to indicate that although the process of tattooing is not "speech," the end product thereof may be, such that the tattoo wearer may be entitled to First Amendment protection as the conveyor of a message. In my view, this is akin to saying that an author who is paid a commission to write a book by a publisher, or an artist commissioned to paint a rendering, does not engage in speech, but that the publisher, and purchaser of the painting, do engage in speech. I find such an analysis completely untenable.

[10] White concedes section 16-17-700 meets the first two prongs.

Even assuming, *arguendo*, he were to attend medical school and obtain a medical degree and license to practice medicine, he would still not be permitted to exercise his artistry for the purpose of expressing a communicative idea; the statute forbids tattooing unless it is medically necessary while performing cosmetic or reconstructive surgery. The statute is, in effect, a complete ban on any and all tattooing when done for artistic or communicative purposes. In my view, such a complete ban on the right of free speech cannot stand.

Although I agree, wholeheartedly, that the state may stringently regulate tattooing, the present record is insufficient to demonstrate that the restriction on White's speech is "no greater than essential" to the furtherance of the state's interest in protecting the health and well-being of its citizens.[11] Accordingly, I would hold section 16-17-700 violates White's First Amendment right of free speech.

[11] In fact, as noted by White in brief, some 46 states permit and regulate tattooing, and "[n]ot one reported death has been associated with tattooing in its five thousand year history."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hampton Andrew Cason, Plaintiff,

v.

Duke Energy Corporation, f/k/a Duke Power Company, Defendant.

and

Michele Davenport Eberhart and Patman S. Eberhart, Plaintiffs,

v.

Duke Energy Corporation, f/k/a Duke Power Company, Defendant.

and

Erich Scott Metler and Robin H. Metler, Plaintiffs,

v.

Duke Energy Corporation, f/k/a Duke

Power Company, Defendant.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Opinion No. 25422
Heard November 15, 2001 - Filed March 4, 2002

CERTIFIED QUESTION ANSWERED

Donald R. Moorhead, of Donald R. Moorhead, P.A., of Greenville, for plaintiffs.

Ellis M. Johnston, II, of Haynsworth, Sinkler, Boyd, P.A., of Greenville, for defendant.

Gray T. Culbreath and P. Brooks Shealy, both of Collins & Lacy, of Columbia, for amicus curiae South Carolina Defense Trial Attorneys Association.

Thomas R. Young, Jr., of James C. Anders, P.A. & Associates, of Aiken, for amicus curiae South Carolina Trial Lawyers Association.

PER CURIAM: The Court agreed to answer the following questions certified by the United States District Court for the District of South Carolina:

I. Does S.C. Code Ann. §42-5-250 (1976), permit employees injured in explosions of boilers or flywheels or other single catastrophic explosions to pursue litigation outside the exclusive remedy provisions of the S.C. Workers' Compensation Act against their employers for damages to compensate them for injuries received within the scope of their employment?

II. If §42-5-250 creates such an exception to the exclusivity provisions, does collection by an employee of Workers' Compensation benefits constitute an election of remedies?

III. If §42-5-250 creates an exception to the exclusivity provisions and if the receipt of Workers' Compensation benefits does not constitute an election of remedies, are Workers' Compensation benefits offset against an award received from the employer?

We answer the first question "No," and therefore do not reach the second and third questions certified.

FACTS

Plaintiffs Hampton Andrews Cason, Michele Davenport Eberhart, and Erich Scott Metler were employees of defendant Duke Energy (Duke) when they were severely injured at work. It is undisputed that the injuries resulted from an accidental catastrophic event,[1] and that the injuries occurred in the course and scope of employment. These three plaintiffs have received workers' compensation benefits from Duke.

These plaintiffs and the spouses of Ms. Eberhart and Mr. Metler

[1]Specifically, a "water hammer," in which the buildup of pressure caused an eighteen inch steam pipe to explode.

(collectively Plaintiffs) then brought negligence actions against Duke in state court. Duke removed the suits to the federal district court which has certified the three questions.

ISSUE

Does §42-5-250 create an exception to the exclusivity provisions of the Workers' Compensation Act?

ANALYSIS

This case requires us to construe, for the first time, a statute which has been a part of our Workers' Compensation Act since the Act's inception.

When the General Assembly enacted the original "South Carolina Workmen's Compensation Act" in 1935, it included the following provisions in a section captioned "Policy Insuring Payment of Compensation - Terms - Forms":

> (a) **Every policy for the insurance of the compensation herein provided, or against liability therefore, shall be deemed to be made subject to the provisions of this Act.** No corporation, association, or organization shall enter into any such policy of insurance unless its form shall have been approved by the Insurance Commissioner.
>
> (b) **This Act shall not apply to policies of insurance against loss from explosion of boilers or fly wheels or other similar single catastrophe hazards:** provided that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

1935 S.C. Acts & Joint Resolutions 610, §72 (p.1264)(emphasis supplied).

When the 1952 Code was published, parts (a) and (b) were separated

into two different statutes, and the word 'Act' in part (b) became "Title." Compare 1952 Code §72-406 [former (a)] with §72-426 [former (b)]. In the current Code, a slightly revised version of part (b) is found at §42-5-250:

> **§42-5-250. Title not applicable to insurance for single catastrophe hazards**.
>
> This Title shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards. But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

Plaintiffs urge this Court to read this statute to permit them to maintain a negligence action where the employer carries liability insurance covering the catastrophic event. In other words, they contend that §42-5-250 creates an exception to the "exclusivity" provisions of the Workers Compensation Act.[2] Duke contends that §42-5-250 creates an exception to the requirement that Worker's Compensation insurance coverage be coextensive with the employer's liability under the Act, by relieving the insurer of the duty to cover injuries arising from a catastrophe. Under its reading, while the employer

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[2]See S.C. Code Ann. §42-1-540 (1976) ("The rights and remedies granted by this title to an employee . . . .shall exclude all other rights and remedies of such employee . . . as against his employer, at common law or otherwise . . . ."). The only exceptions to the exclusivity provisions are: (1) where the injury results from the act of a subcontractor who is not the injured person's direct employer (§42-1-540); (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego [Dickert v. Met. Life Ins. Co., 311 S.C. 218, 428 S.E.2d 700 (1993)]; (3) where the tort is slander and the injury is to reputation [e.g., Loges v. Mack Trucks, Inc., 308 S.C. 134, 417 S.E.2d 538 (1992)]; or (4) where the Act specifically excludes certain occupations [S.C. Code Ann. §§42-1-350 through -375 (1976 and Supp. 2000)].

remains liable to the employee, the compensation insurer does not insure against this hazard. The Fourth Circuit has construed the section to relieve employers of the duty to insure against this hazard. See Simpson v. Duke Energy Corp., Op. No. 98-1906 (4th Cir. 1999). We find none of these interpretations to be correct.

In order to understand §42-5-250, it is necessary to read it as originally enacted, that is, with the original part (a) which is now codified at S.C. Code Ann. §42-5-60 (1976). When these statutes are read together, it is apparent that §42-5-250 is not concerned with the relationship between employer and employee, but with the applicability of the Act to certain types of insurance policies. Part (a) provided that all Workers' Compensation insurance policies were to be coextensive with the employer's liability under the Act. The first sentence of Part (b) was meant to ensure that catastrophic **loss** policies were not transmuted into Workers' Compensation **liability** policies. It may be inferred that in 1935, businesses insured against economic damages, bodily injury liability, and other losses resulting from these types of events. We construe this first sentence to address the insurers' concern that these existing policies not be construed as covering liability arising under the new Act. In our view, this language was inserted in the Act as a transitional provision, and has little or no present utility. The second sentence of the statute merely reaffirms the employer's liability under the Act to its employees should such a catastrophic accident occur, making it clear that the employer cannot evade its responsibility to its employee.

CONCLUSION

We hold that §42-5-250 does not permit employees injured in a catastrophic explosion to pursue litigation against their employer outside the exclusive remedy provisions of the Workers' Compensation Act. Further, we clarify that the statute neither excepts these type accidents from the scope of a workers' compensation liability policy as contended by Duke, nor does it relieve employers of the duty to insure against this hazard as the Fourth Circuit has held. Because the answer to the first certified question is "No," we do not reach the other two certified questions.

CERTIFIED QUESTION ANSWERED.

MOORE, A.C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice G. Thomas Cooper, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Linda Tyler, Appellant.

Appeal From Richland County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 25423
Heard January 23, 2002 - Filed March 4, 2002

AFFIRMED

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland and Solicitor Warren B. Giese, all of Columbia, for respondent.

JUSTICE WALLER: Appellant Linda Tyler was convicted of murder and sentenced to life imprisonment without possibility of parole. We affirm.

FACTS

On the morning of September 26, 1996, while riding as a passenger in a car driven by her husband Van, Tyler poured gasoline on her husband's head and used her cigarette lighter to "light him up." She did so because she had learned the day before that a next door neighbor was 2 weeks pregnant with his child. Van Tyler died the following day of third degree burns and inhalation injury. Tyler was found guilty but mentally ill (GBMI) of murder.

ISSUES

1. Did the trial court err in refusing to charge involuntary manslaughter?

2. Did the trial court's charge on assault and battery of a high and aggravated nature (ABHAN) constitute reversible error?

1. INVOLUNTARY MANSLAUGHTER CHARGE

Tyler contends she was entitled to an instruction upon involuntary manslaughter. We disagree.

Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999). "An unintentional killing resulting from an unlawful assault and battery, not of a character of itself to cause death, is involuntary manslaughter . . ." Id. at 152-153, 519 S.E.2d at 101 *citing* 40 C.J.S. Homicide § 40 (1991). See also People v. Johnson, 100 Ill.App.2d 13, 241 N.E.2d 584 (1968) (death resulting from blow from fist may be involuntary manslaughter because although unlawful, a blow to the face with hand is not likely to be attended with dangerous or fatal

consequences); State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936) (the great weight of authority is that an unintentional killing, resulting from an unlawful assault and battery which in and of itself is not of a character to cause death, is held to constitute involuntary manslaughter).

Tyler's conduct does not fit within either definition of involuntary manslaughter. It is patent that her conduct in pouring gasoline on her husband's head and igniting him was not a lawful activity. It is likewise patent that her conduct would naturally tend to cause death or great bodily injury. Accordingly, she was not entitled to an involuntary manslaughter charge.[1]

2. ABHAN JURY CHARGE

As part of her defense, Tyler presented evidence that her husband's death may have been caused by medical malpractice when doctors improperly treated his burn injuries. In light of this evidence, the trial court instructed the jury that, in the event it found Tyler's actions did not proximately cause her husband's death, then it could consider the offenses of assault and battery with intent to kill (ABIK) and assault and battery of a high and aggravated nature (ABHAN). Tyler asserts that, in instructing the jury on the law of ABHAN, the trial court improperly analogized ABHAN and voluntary manslaughter, thereby mandating a reversal of her conviction.

The trial court instructed the jury as follows:

> I charge you the offense of assault and battery of a high and aggravated nature is defined as an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation. The use of a deadly or dangerous weapon or the infliction of serious bodily harm are recognized as circumstances of

[1]Tyler's assertion that, due to her mental illness she was unable to form the requisite mental state for murder, is essentially an argument that the jury should have accepted her insanity defense; the jury declined to do so.

> aggravation. I charge you assault and battery of a high and aggravated nature is an assault and battery committed with a deadly weapon or dangerous instrumentality without malice but in a spirit of wantonness and with a reckless disregard for the rights and safety of others.
>
> Assault and battery of a high and aggravated nature, ladies and gentlemen, **contains all of the elements of voluntary manslaughter except the actual death of the person assaulted**. So, before a defendant could be found guilty of assault and battery of a high and aggravated nature, the jury must be satisfied beyond a reasonable doubt that if the person assaulted had died as a result of the injury inflicted upon him by the defendant, the defendant would have been guilty of voluntary manslaughter.

(Emphasis supplied).

Both this Court and the Court of Appeals have held that it is error for a trial court to give instructions which equate ABHAN with voluntary manslaughter. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000); State v. Pilgrim, 320 S.C. 409, 465 S.E.2d 108 (Ct. App. 1995)(Pilgrim I), *aff'd as modified* State v. Pilgrim, 326 S.C. 24, 482 S.E.2d 562 (1997)(Pilgrim II), *overruled on other grounds* State v. Foust, 325 S.C. 12, 479 S.E.2d 50(1996).

In Pilgrim I, the Court of Appeals noted that the difference between manslaughter and murder is the absence of malice in manslaughter and the presence of malice in murder.320 S.C. at 414-415, 465 S.E.2d at 111, *citing* William S. McAninch & W. Gaston Fairey, The Criminal Law of South Carolina 149 (2d ed. 1989). The court noted that the absence of malice is not a required element of the offense of ABHAN, and the fact that a defendant acts with malice does not preclude a finding of ABHAN. Therefore, to the extent a jury instruction equates ABHAN with manslaughter, it precludes a jury from finding ABHAN if it finds the defendant acted with malice. This Court affirmed

in Pilgrim II.[2] In Fennell, supra, we reiterated these holdings, noting that a defendant may be convicted of ABHAN regardless of whether malice is present.

Under the above authorities, it is clear the trial court's charge equating ABHAN and manslaughter was erroneous. However, we find the error harmless under the facts of this case. Immediately prior to charging the jury on ABHAN and ABIK, the trial court instructed the jury that "**if the causal link between the defendant's act and the victim's death is broken so that she may not be convicted of murder or voluntary manslaughter**," the defendant may still be convicted of ABIK or ABHAN. (Emphasis supplied). Accordingly, ABHAN and/or ABIK were possible verdicts if, and only if, the jury concluded that Tyler's actions had not proximately caused her husband's death. The jury did not find such a break in the causal chain and, instead, convicted Tyler of murder.[3]

Accordingly, we find any choice the jury had in the present case between manslaughter and ABHAN was not premised upon malice or the absence thereof, but upon whether it found Tyler's actions had proximately resulted in her husband's death. Given that the possibility of an ABHAN or ABIK verdict was not premised upon malice or a lack thereof, but upon the proximate cause of the victim's death, we find the erroneous ABHAN charge did not contribute to the jury's verdict, such that any error was harmless. See State v. Jeffries,316 S.C. 13, 446 S.E.2d 427 (1994) (erroneous jury charge which does not contribute to jury's verdict is harmless).

Tyler's remaining issues are affirmed pursuant to Rule 220(b), SCACR,

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[2] Pilgrim I was modified to the extent the Court of Appeals had held a specific intent was required for ABIK.

[3] Had the jury found a break in the causal chain, it would have been faced with two alternatives, either ABIK or ABHAN. If the jury misinterpreted the trial court's instructions as requiring an absence of malice to convict of ABHAN, and if it indeed found malice, then its verdict would have been ABIK and not murder.

and the following authorities: State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)(State must prove a voluntary waiver of the defendant's Miranda rights by a preponderance of the evidence); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999)(defendant's mental condition in and of itself does not render a statement involuntary in violation of due process; absent coercive police conduct causally related to a confession, there is no basis for finding a confession constitutionally involuntary); State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) (burden on State to prove unlawful act in which the accused was engaged was proximate cause of the homicide); State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001) (defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged); State v. Nance, 320 S.C. 501, 466 S.E.2d 349, cert. denied, 518 U.S. 1026, 116 S.Ct. 2566, 135 L.Ed.2d 1083 (1996)(trial court's determination of competency will be upheld if it has evidentiary support and is not against the preponderance of the evidence).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Amey G. Dykema, as Personal Representative of the Estate of David Bruce Dykema, — Appellant/Respondent,

v.

Carolina Emergency Physicians, P.C., Greenville Hospital System, and Companion HealthCare Corporation, — Defendants,

Of Whom Greenville Hospital System is — Respondent/Appellant,

and Companion HealthCare Corporation is — Respondent.

Appeal From Greenville County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 25424
Heard November 14, 2001 - Filed March 4, 2002

AFFIRMED IN PART; REVERSED IN PART.

D. Michael Parham and S. Blakely Smith, of Parham and Smith, of Greenville, for appellant/respondent.

G. Dewey Oxner, Jr. and Sally McMillan Purnell, of Haynsworth, Marion, McKay and Geurard, LLP, of Greenville, for respondent/appellant.

Frank H. Gibbes, III, Stephanie Holmes Burton and Matthew E. Cox, all of Gibbes Burton, LLC, of Greenville, for respondent Companion HealthCare Corporation.

Harold W. Jacobs and Susan Batten Lipscomb of Nexsen, Pruet, Jacobs and Pollard, LLP, of Columbia, for Amicus Curiae South Carolina State Budget and Control Board.

JUSTICE WALLER: This is a wrongful death action brought by Appellant/Respondent, Amey Dykema, on behalf of the estate of her deceased husband, David Dykema, who died on February 8, 1994, as a result of undiagnosed pulmonary emboli. The jury awarded Dykema $2 million actual damages against Respondent/Appellant Greenville Hospital System (GHS), and $500,000 punitive damages against Respondent Companion Health Care (Companion). The trial court granted Companion's motion for Judgment Notwithstanding the Verdict (JNOV) on the ground that the jury's failure to award actual damages against it precluded an award of punitive damages. The trial court held the statutory caps of the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 et seq., were inapplicable to this case, such that GHS

was liable for the full $2 million verdict.[1] Dykema and GHS appeal.

FACTS

In December 1993, 38-year-old David Dykema began having respiratory symptoms, cough and shortness of breath for which he was seen by his family physician, Dr. William King. After seeing Dr. King until January 1994 without improvement, he sought a second opinion from the Center for Family Medicine (Center), part of the Greenville Hospital System.[2] Mr. Dykema went to the Center on Feb. 3, 1994, with complaints of a one and one-half month history of cough, shortness of breath, and tightness in the chest. He was seen that day by a third year medical student, Terry Gemas, and an attending faculty member, Cindy Pearman, M.D. Dr. Pearman prescribed antibiotics for persistent bronchitis and told Mr. Dykema to return in one week, or sooner if his condition worsened. In the early morning hours of Sunday, Feb. 6, 1994, Amey Dykema called the Center concerning her husband's worsening condition and was advised to take him to the hospital the next day. She brought him to the hospital at approximately 1:00 PM on February 6 and was seen by Dr. Connell, a medical resident and employee of GHS who was on call at the Center. Dr. Connell diagnosed viral bronchitis and advised Mr. Dykema to continue his antibiotics and keep his follow-up appointment at the Center on Feb. 8. The next morning, Monday, Feb. 7, Amey Dykema called the Center and spoke with a receptionist; she requested her husband be seen immediately due to his worsening condition. She was told there were no earlier appointments available and that she should keep the appointment on February 8. David Dykema died on the morning of Feb. 8, prior to his scheduled appointment. The cause of death was a progressive showering of pulmonari emboli, pieces of which moved

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[1] The trial court also ruled that, in any event, GHS was liable for two "occurrences" of negligence such that Dykema was entitled to $1 million dollars for each. In light of our holding concerning the statutory caps, we need not address this ruling.

[2] In late 1993, Mr. Dykema selected Companion HealthCare for his medical provider and selected the Center as his primary care provider.

to his lungs and caused a fatal blockage.

On Dec. 20, 1995, Amy Dykema instituted this wrongful death action against GHS, and Carolina Emergency Physicians; the complaint was subsequently amended to add Companion as a defendant. Trial was held in February 1999, and the jury returned a general verdict accompanied by special interrogatories, finding both GHS and Companion negligent.[3] The jury awarded Dykema $2 million actual damages. However, it apportioned 100% of the actual damages to GHS. Nonetheless, it awarded Dykema $500,000 punitive damages against Companion.[4]

The trial court granted Companion's motion for JNOV on the ground that the jury's failure to award actual damages against it precluded an award of punitive damages; the court denied GHS's post-trial motion to reduce the $2 million verdict, holding the statutory caps of the South Carolina Tort Claims Act were inapplicable to Dykema's claims.

ISSUES

1. Did the trial court err in entering JNOV for Companion?

2. Did the court err in holding that the statutory caps of the South Carolina Tort Claims Act were inapplicable to this case?

1. JNOV

The trial court held the jury's failure to award actual damages against Companion mandated the grant of JNOV to Companion. We disagree. We find Companion's failure to object prior to discharge of the jury results in a waiver

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[3] Carolina Emergency Physicians was exonerated.

[4] The jury also sent a note to the judge requesting that South Carolina HMO's advise members and prospective members who enroll with practices involved with teaching facilities that they may be seen and treated by residents.

of the right to challenge the verdict.

Here, after the jury returned its verdict finding $500,000 punitive, and no actual, damages against Companion, all parties were given an opportunity to review the verdict forms. Companion specifically declined the trial judge's invitation to request additional findings or corrections by the jury to the verdict form. The jury was thereby discharged, and Companion filed its post-trial motion for JNOV on March 1, 1999, ten days after the verdict was returned.

The trial court correctly held punitive damages generally are not recoverable in the absence of proof of actual damages. Limehouse v. Southern Ry. Co., 216 S.C. 424, 58 S.E.2d 685 (1950). However, the trial court erred in setting aside the verdict absent a timely objection. We decline to hold that a party may allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury, in the hopes of gaining a reversal on appeal. Accordingly, we find Companion waited too late to voice its objection to the verdict.

This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence. See Deese v. Williams, 237 S.C. 560, 118 S.E.2d 330 (1961). See also Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1995)(holding that party may not wait until JNOV to object to punitive damage award as this Court does not recognize a "plain error" rule); Limehouse v. Southern Ry., 216 S.C. 424, 58 S.E.2d 685 (1950)(where verdict is objectionable as to form, party who desires to complain should call that fact to the Court's attention when the verdict is published. Otherwise, the right to do so is waived); McAlister v. Thomas and Howard Co., 116 S.C. 319, 108 S.E. 94 (1921)(defect in the form of a verdict must be presented at the time it is published, and failure to do so waives the right to raise that matter later); Bethea v. Western Union Telegraph, 97 S.C. 385, 81 S.E. 675(1914) (irregularity of jury verdict awarding punitive but no actual damages must be called to the attention of the court at the earliest opportunity; otherwise it will be deemed to have been waived; waiting until jury separates and then urging

irregularity as ground for new trial is too late).

These cases are consistent with our recent opinion in Stevens v. Allen, 342 S.C. 47, 535 S.E.2d 663 (2000), in which we held a verdict finding the defendant liable but awarding zero damages is inconsistent or incomplete and that, **when the issue is raised**, the matter should be resubmitted to the jury with instructions to either enter a verdict for the defendant or award some amount of damages. Accordingly, consistent with the wealth of authority in this state, we find Companion's failure to challenge the verdict upon being given an opportunity to do so results in a waiver.[5] Therefore, the grant of JNOV to Companion is reversed, and the $500,000 punitive damage award is reinstated.

2. APPLICABILITY OF STATUTORY CAPS

The trial court ruled the statutory caps set forth in S.C. Code Ann. § 15-78-120(a)(3)&(4) were inapplicable to this case. We agree.

At the time this action arose in February 1994, S.C. Code Ann § 15-78-120[6] limited the tort liability of state agencies and employees as follows:

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[5] GHS relies on three cases which reversed an award of punitive damages in which there was no finding of actual damages, without any indication that the issue was raised prior to the jury's discharge. See Dowling v. Homebuyers Warranty Corp., 311 S.C. 233, 428 S.E.2d 709 (1993); Cook v. Atlantic Coast Ry., 183 S.C. 279, 190 S.E. 923 (1937); Monroe v. Banker's Life and Casualty, 232 S.C. 363, 102 S.E.2d 207 (1958). However, the mere fact that we addressed an issue on the merits where no procedural defect was raised does not obviate the need for a timely objection. Cf. Breland v. Love Chevrolet, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000)(notwithstanding numerous prior opinions entertaining appeals on merits of change of venue orders, such orders are not immediately appealable).

[6] These sections have since been amended and reenacted, increasing the statutory caps. 1997 Act No. 155, Part II, § 55.

(1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding two hundred and fifty thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

(2) Except as provided in Section 15-78-120(a)(4), the total sum recovered hereunder arising out of a single occurrence shall not exceed five hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

(3) No person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

(4) The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, may not exceed one million dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

In Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 443 S.E.2d 395 (1994), we held the Legislature's adoption of the Uniform Contribution Among Joint Tortfeasor's Act[7] (Uniform Contribution Act) impliedly repealed the statutory tort claims cap set forth in section 15-78-120**(a)(1)**, which was adopted by the Legislature as part of the South Carolina

[7] The Uniform Contribution Act was enacted April 5, 1988 and subjected the state to unlimited pro rata tort liability.

Tort Claims Act in 1986.[8] Subsequent to Southeastern, the Legislature responded with 1994 Acts No. 497, Part II, Section 107, in which it held the provisions of section 15-78-120**(a)(1)** were reenacted and made retroactive to April 5, 1988, the effective date of the Uniform Contribution Act.[9]

Two years later, in Knoke v. S.C. Dep't of Parks, Recreation and Tourism, 324 S.C. 136, 478 S.E.2d 256 (1996), we held that Southeastern (and our subsequent opinion in McLain v. S.C. Dep't of Educ., 323 S.C. 132, 473 S.E.2d 799 (1996))[10] applied as well to the $500,000 per occurrence cap set forth in section 15-78-120**(a)(2)**, such that the statutory cap was inapplicable to Knoke's claim, filed before July 1, 1994.

In 1997, the Legislature enacted 1997 Act No. 155, Part II, § 55, in which it reenacted section 15-78-120, *in toto*, and established higher limits of liability. The reenactment of section 15-78-120 states that it takes effect upon approval by the Governor [June 14, 1997] and "applies to claims or actions pending on that date or thereafter filed, except where final judgment has been entered before that date." 1997 Act No. 155, Part II, § 55(F). Most recently, however, in Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999), we held that the Legislature's purported reenactment of the statutory caps in 1997 Act No. 155 could not, by the above language of subsection F, retroactively overrule this Court's interpretation of the statutes in Southeastern. Accordingly, we held the plaintiffs' recovery was not limited by

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[8] The Court also found the joint contribution act inconsistent with section 15-78-100(C) providing for special verdict forms specifying the proportional liability of each joint tortfeasor.

[9] Simultaneously, the Legislature enacted section 15-38-65 to provide that "The Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities." This Act took effect July 1, 1994.

[10] In McClain, the Court held the the implied repeal of the $250,000 cap applied to all claims filed before July 1, 1994, not only those in which both the Uniform Contribution Act and Tort Claims Act apply.

the Tort Claims Act as their case was filed prior to the Legislature's 1994 reinstatement of the statutory caps set forth in § 15-78-120**(a)(1)**(which were effective July 1, 1994, whereas plaintiffs had filed their claims in June 1994).

GHS contends the $1 million dollar caps of § 15-78-120(a)**(3)&(4)** have never been repealed and that, in any event, the caps were "impliedly reenacted" by 1994 Act No. 497, effective July 1, 1994 as to causes already filed, or that, at the latest, these caps were reinstated by 1997 Act No. 155, effective June 14, 1997 (and applying to claims or actions pending on that date). We disagree.

Initially, we agree with the trial court that under Southeastern and Knoke, the statutory caps set forth in 15-78-120(a)(3)&(4) were impliedly repealed by adoption of the Uniform Contribution Act. Given Southeastern's holding that the pro rata liability provisions of the Uniform Contribution Act are inconsistent with the liability limits in section **(a)(1)**, and Knoke's subsequent recognition that the same reasoning applies to the limits in **(a)(2)**, it is patent that the liability limits set forth in subsections **(a)(3)&(a)(4)** were likewise impliedly repealed by the Legislature's adoption of the Uniform Contribution Act in 1988. The question remains, however, whether the limits were subsequently reenacted.

GHS contends the limits in (a)(3)&(a)(4) were "impliedly" reenacted by 1994 Act. No. 497. We disagree. The 1994 Act simply reenacted the statutory caps set forth in section 15-78-120**(a)(1)**(and purported to make them retroactive to April, 1988, something this Court held the Legislature was without authority to do in Steinke); the 1994 Act did nothing to reenact the remaining subsections. Accordingly, the trial court correctly ruled the statutory caps as set forth in subsections (3)&(4) were not reenacted by the 1994 Act.

However, by 1997 Act No. 155, Part II, § 55, the Legislature reenacted all four subsections, and made the act applicable to all claims pending its effective date [June 14, 1997].[11] While this provision was sufficient to reenact the liability caps of subsections 3 & 4, the question remains whether the Legislature

[11] Dykema's action, filed December 1995, was pending in June 1997.

could make the reenactment applicable to claims then pending, such as Dykema's. Under Steinke, we hold it could not.

As noted previously, Steinke held that the Legislature could not retroactively overrule this Court's interpretation of the statutes in Southeastern, but that it could prospectively reinstate such caps. Here, had the Legislature chosen to, it could have reenacted all four subsections in 1994. However, it reenacted only 15-78-120**(a)(1)** in 1994. 1994 Act No. 497. Although this Court has not previously specifically held subsections (3)&(4) were impliedly repealed, it is patent under Southeastern and Knoke that they were in fact impliedly repealed and have been so since adoption of the Uniform Contribution Act in 1988. Although 1997 Act No. 155 was sufficient to **reenact** the remaining subsections, under Steinke,[12] such reenactment could not be made **retroactive**, and therefore took effect upon approval by the Governor on June 14, 1997. Accordingly, as Dykema's claim was filed in 1995, the trial court properly ruled the statutory caps set forth in subsection 3 & 4 do not apply in this case.

CONCLUSION

The grant of JNOV to Companion is reversed and the $500,000 punitive damage award reinstated. The trial court's ruling that the statutory caps are inapplicable to this case is affirmed.

AFFIRMED IN PART; REVERSED IN PART.

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

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[12] GHS contends Steinke is inapplicable because no prior opinion of this Court has held the caps of § 15-78-120**(a)(3) &(4)** invalid. We disagree. Southeastern and Knoke implicitly hold those sections were impliedly repealed by the Legislature's adoption of the Uniform Contribution Act in 1988.

The Supreme Court of South Carolina

In the Matter of Vannie Williams, Jr., Respondent.

O R D E R

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 John J. McCauley, 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 accounts respondent may maintain. Mr. McCauley shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of

respondent's clients. Mr. McCauley may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts 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 John J. McCauley, 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 John J. McCauley, 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. McCauley's office.

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

Columbia, South Carolina

February 27, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Sand Company,

Appellant,

v.

Colonial Pipeline Company,

Respondent.

Appeal From Laurens County
John W. Kittredge, Circuit Court Judge

Opinion No. 3454
Heard October 3, 2001 - Filed February 25, 2002

REVERSED

W. Grady Jordan, of Olson, Smith, Jordan & Cox, of Easley; and J. Kendall Few, of Few & Few, of Greenville, for appellant.

Edward Cole, of The Ward Law Firm, of Spartanburg, for respondent.

STILWELL, J: Thomas Sand sued Colonial for damages, alleging a spill from its pipeline rupture contaminated a sand deposit Thomas Sand had leased

on the Reedy River. The trial court held the failure to exhaust administrative avenues to obtain a permit was the proximate cause of its inability to mine the sand and granted Colonial summary judgment. We reverse.

FACTS

Colonial owns and operates a 36-inch pipeline extending from Houston to New York which transports petroleum products. In late June 1996, Colonial's pipeline ruptured at its junction with the Reedy River in Greenville County, spilling approximately one million gallons of diesel fuel into the river. The investigation by state and federal agencies, the extensive sampling and assessment, and the numerous lawsuits surrounding the spill, were not resolved until late 1998 or early 1999.

In May 1996, Thomas Sand had applied to the South Carolina Department of Health and Environmental Control (DHEC) for the necessary permit to mine the sand deposit. Because mining could impact U.S. navigable waters, the project was also subject to the U.S. Army Corps of Engineers (Corps) permitting requirements. Other interested state and federal agencies reviewed the application and expressed a range of concerns both related and unrelated to the spill, including adverse impact on fisheries and other natural resources, smothering of warm water fish eggs by silt-laden sediments, and stream bed and bank instability. The agencies specifically requested the permit not be issued until these concerns were addressed.

Similarly, the United States Department of the Interior (USDOI) Fish and Wildlife Service expressed concerns with the possibility of stirring up preexisting contaminants amplified by the oil pipeline rupture. It recommended that no permit be issued until the extent of the sediment contamination could be further studied. The USDOI recommended to the Corps that the permit be denied, due solely to the oil contamination. Based on available information, the Corps in turn advised Thomas Sand that, "due to the breaching of the Conestee Lake dam and the recent oil pipeline rupture, this office has reason to believe that there is a presence of contaminants that could cause or contribute to significant degradation of the waters of the United States." The Corps requested more specific information from USDOI and Thomas Sand before determining what testing would be required.

Shortly thereafter, Thomas Sand withdrew the application "rather than have the permit denied with consequent prejudice." It requested that DHEC hold the application in abeyance until evaluation of the damage caused by the oil spill was completed. DHEC agreed to do so for six months to allow Thomas Sand to complete "sufficient work" to enable DHEC to determine whether mining could be environmentally safe. Thomas Sand elected not to perform testing but rather submitted a revised application vastly reducing the size of the proposed operation. In response, concerned agencies renewed their objections based on potential damage to wetlands, wildlife, and riverbed and bank stability, as well as possible diesel contamination and the lack of requested sediment testing. USDOI specifically noted the prior application was "eventually retired at least partially due to a major oil pipeline spill. . . ." Thus, USDOI recommended the permit not be issued until "adequate sediment testing is done to be able to conclude that contaminants including heavy metals, PAH's and/or other petroleum related compounds would not be released by mining this site. . . ." While noting elevated levels of contaminants from upstream industries, DHEC specifically stated the central concern in the previous application was contamination from the Colonial pipeline spill and requested a detailed drawing comparison with the prior application and a sediment sampling plan to test for contamination. Thereafter, DHEC denied the revised application but provided it could be resubmitted and would require a sediment sampling plan for potential contaminants.

Thomas Sand did not appeal DHEC's decision but filed this action against Colonial seeking damages for economic loss due to inability to exercise its mining rights under its lease. Colonial admitted the oil spill from a rupture in its pipeline but denied any contamination of the sand deposit. Colonial moved for summary judgment on the grounds that (1) Thomas Sand failed to exhaust its administrative remedies; and (2) Thomas Sand adduced no evidence of contamination in the proposed sand mining site resulting from the Colonial spill, nor that such contamination, if present, would preclude the mining permit being issued. The trial court granted the motion, finding that Thomas Sand failed to establish the spill proximately caused its damages.

STANDARD OF REVIEW

In an action granting summary judgment, an appellate court reviews the record under the same standard applied by the trial court under Rule 56, SCRCP. Jones v. Equicredit Corp., 347 S.C. 535, ___, 556 S.E.2d 713, 715 (Ct. App. 2001); see also Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Doe ex rel. Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)).

> Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must go to the jury.

Worsley Cos. v. Town of Mount Pleasant, 339 S.C. 51, 55, 528 S.E.2d 657, 659-660 (2000) (citations omitted). Even if there is no dispute as to evidentiary facts, summary judgment is not appropriate where there is a dispute as to a conclusion to be drawn from those facts and to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

> It is the duty of the court, on a motion for summary judgment, not to try issues of fact, but only determine whether there are genuine issues of fact to be tried; and, once having found that triable issues exist, must leave those issues for determination at a trial. The problem besetting courts lies in deciding what is or what is not a 'genuine issue as to any material fact.'

Spencer v. Miller, 259 S.C. 453, 456, 192 S.E.2d 863, 864 (1972).

DISCUSSION

Thomas Sand asserts the trial court erred in finding it failed to establish Colonial's oil spill proximately caused its damages. We find the evidence raises a genuine issue of material fact on that issue.

I. Proximate Cause

The elements "of negligence are: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty by the defendant, and (3) damages proximately resulting from the breach of duty." Hubbard v. Taylor, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000); Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998). The existence of a duty is not questioned and Colonial has admitted in prior judicial proceedings that the discharge was due to its negligence. Thus, the sole issue before us is whether there is a question of fact on the issue of proximate cause.

Proximate cause requires proof of both causation in fact and legal cause. Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 804 (1993). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Id. at 379, 426 S.E.2d at 804. "Legal cause, in contrast to the 'but for' nature of causation in fact, turns on the issue of foreseeability." Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 210, 544 S.E.2d 38, 46 (Ct. App. 2001), cert. granted (Oct. 10, 2001). "[I]t is not necessary that the actor must have contemplated or could have anticipated the particular event which occurred. . . ." Young v. Tide Craft, Inc., 270 S.C. 453, 463, 242 S.E.2d 671, 675 (1978).

> He may be held liable for anything which appears to have been a natural and probable consequence of his negligence. If the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability.

Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966). "A plaintiff therefore proves legal cause by establishing the injury in

question occurred as a natural and probable consequence of the defendant's act." Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 843 (Ct. App. 1997). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." Id. at 464, 494 S.E.2d at 843. "Only when the evidence is susceptible to only one inference does it become a matter of law for the court." Oliver v. S.C. Dep't of Highways & Pub. Transp., 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992). "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." Tanner v. Florence City-County Bldg. Comm'n, 333 S.C. 549, 553, 511 S.E.2d 369, 371 (Ct. App. 1999).

"Proximate cause does not mean the sole cause. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury." Small, at 464, 494 S.E.2d at 843. The Thomas brothers have been in the sand business for forty years. Kenneth Thomas testified that the fish and sediment concerns predating the spill had been raised in other permits that were ultimately issued. Based on his observations of the spill site and his experience dealing with DHEC, he testified that he determined the permit would be difficult "to ever get it cleared up with DHEC" and would cost more than it was worth even if ultimately granted. Jack Thomas, another brother, testified similarly. In its order, the trial court clearly found that the Thomas brothers' testimony about observations of diesel fuel contamination were sufficient to withstand summary judgment on the issue of contamination alone.

In addition, Thomas Sand offered the testimony of Dr. David Hargett, a principal in Pinnacle Consulting Group, which consults on environmental and natural resource management, regulatory compliance, hazardous site reclamation, and permitting assistance, as well as being subcontracted by DHEC to study the riparian conditions of the entire Reedy River basin. Dr. Hargett is a recognized expert on the Reedy River and serves on the Reedy River Task Force citizen-based planning group, as well as other committees that regularly meet with state agencies about the Reedy River. He personally

viewed the spill by helicopter immediately following the event, and was extensively involved in monitoring and assisting in reclamation efforts.

The trial court ruled that Dr. Hargett did not have sufficient knowledge of DHEC sand mining permitting requirements and refused to qualify him as an expert or consider his testimony in ruling on the motion for summary judgment. As Dr. Hargett's testimony was the primary expert basis for establishing proximate cause between the diesel spill and denial or delay of the permit, Thomas Sand clearly suffered prejudice from its exclusion. "To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). "Qualification depends on the particular witness' reference to the subject. '[A]n expert is not limited to any class of persons acting professionally.'" Id. at 253, 487 S.E.2d 598 (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995) and quoting Botehlo v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984)). "The test for qualification is a relative one that is dependent on the particular witness's reference to the subject." Knoke v. S.C. Dep't of Parks, Recreation & Tourism, 324 S.C. 136, 142, 478 S.E.2d 256, 259 (1996).

> The term 'expert' has many lights and shadows. It can denote a man who is a recognized authority and, perhaps as accurately, a fellow who once went to the city. At what point between those two extremes he will be allowed to express an opinion on the witness stand will be for the trial judge to decide in the first instance. But whatever his status in life may be, his qualifications can not be assumed; they must be established by evidence. The quality or quantity of that evidence occasionally may require some adjustment, depending upon the exigencies of the moment, and in such circumstances, the trial judge will need to exercise the full measure of his judgment, skill, and discretion.

Hewitt v. Md. State Bd. of Censors, 221 A.2d 894, 900 (Md. Ct. App. 1966). "The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the

witness to give opinion testimony." State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993). "Defects in an expert witness' education and experience go to the weight, rather than the admissibility, of the expert's testimony." Gooding at 253, 487 S.E.2d at 598.

While it is true that the qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion, we think Dr. Hargett's qualifications to testify as an expert speak for themselves and any gap in his experience would go to the weight and credibility of his testimony, rather than to its admissibility. "Where the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value." Berkeley Elec. Coop., Inc. v. S.C. Pub. Serv. Comm'n, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991); see also Carter v. R.L. Jordan Oil Co., 294 S.C. 435, 441, 365 S.E.2d 324, 328 (Ct. App. 1988), rev'd on other grounds, 299 S.C. 439, 385 S.E.2d 820 (1989) ("An expert is given wide latitude in determining the basis of his testimony."); Duke Power Co. v. Opperman, 266 S.C. 99, 102, 221 S.E.2d 782, 783 (1976) ("He was definitely qualified to testify, and if he could give no rational basis for his testimony, as contended by the appellant, it was a matter for the jury to consider.").

Dr. Hargett opined the site in question was "extraordinarily well-suited for sand mining and . . . no other stretch of the river would be appropriate," based on the absence of bedrock, deeper deposits of sediments, unusual accessibility due to the broad flood plain and gentle slope, and low water velocities in the backwater area. According to Dr. Hargett, had there been no spill and had Thomas Sand pursued the application, he believed the permit would have been issued, and the site would continue to produce for at least ten years. However, he testified it would have been ill-advised to pursue the permit or attempt mining after the spill until federal and state agencies had resolved contamination concerns, which included extensive sampling, testing, and assessment close to the site. Specifically, the degree of contamination was less relevant than the ongoing agency investigations. Had Thomas Sand pursued the permit, he stated other parties likely would have taken action to stop their operation because it could confuse the ongoing studies. Dr. Hargett opined the environmental impacts were uncertain and

subject to ongoing investigations until the agency reports came out two to three years later.

Colonial argues Dr. Hargett is not qualified to render an expert opinion because he did not know the specific DHEC permitting standards and project parameters and had never been personally involved in obtaining a sand mining permit. Dr. Hargett clarified that any lack of specifics in his testimony did not demonstrate a lack of expertise but resulted from the limited amount of time he had spent with this specific case. Our review of his deposition indicates that Dr. Hargett, while not intimately familiar with the specifics of DHEC mining permit processes, was sufficiently familiar with them that it did not detract from his demonstrated expertise on environmental issues generally and as they relate to the Reedy River specifically. It was, therefore, an abuse of discretion not to qualify him as an expert and consider his testimony.

II. Exhaustion of Administrative Remedies

Colonial argues Thomas Sand's failure to exhaust its administrative remedies precludes tort action against a third party. If this were an appeal from the denial of the permit through the administrative process in which DHEC was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit. See Stanton v. Town of Pawleys Island, 309 S.C. 126, 420 S.E.2d 502 (1992) (plaintiff is generally required to exhaust administrative remedies before seeking relief from the courts, and dismissal for failure to do so is in the sound discretion of the trial judge); Moore v. Sumter County Council, 300 S.C. 270, 387 S.E.2d 455 (1990) (court could not adjudicate takings issue until plaintiff had exhausted administrative remedies; potential agency delay and expense did not excuse exhaustion requirement). However, in a tort action against a third party, no such exhaustion requirement exists. The question is not whether the permit would have been granted but whether Thomas Sand was damaged, either by added delay or expense in the permit process or by the eventual denial of the permit, based on Colonial's negligence. DHEC is not the appropriate fact finder to answer this question. The jury is.

The basic purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reasons for the permit denial, would not assist the court in this instance. The alleged wrong is not one which the administrative process was designed to redress. "The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." Med. Mut. Liab. Ins. Soc. of Md. v. B. Dixon Evander & Assocs., 609 A.2d 353 (Md. App. 1992). A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered." Id. at 360. The question is simply whether the diesel spill from Colonial's pipeline was a substantial contributing factor to the denial of the permit or to rendering the permitting process more time consuming or more expensive than was practicable from a rational business standpoint.

CONCLUSION

Viewing the evidence in the light most favorable to Thomas Sand, as we are required to do, there is a genuine issue of material fact on the question of the proximate cause of Thomas Sand's injuries, if any. Thus, summary judgment in favor of Colonial is

REVERSED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Southern Atlantic Financial Services, Inc.,

Respondent,

v.

Donna F. Middleton,

Appellant.

Appeal From Dorchester County
Patrick R. Watts, Jr., Master-in-Equity

Opinion No. 3455
Heard February 4, 2002 - Filed February 25, 2002

REVERSED AND REMANDED

David Popowski, of Charleston, for appellant.

Donald E. Rothwell, Scott L. Hood, and A. Todd Darwin, all of Rothwell Law Firm, of Columbia, for respondent.

ANDERSON, J.: Donna Middleton appeals an order of the master-in-equity granting judgment to Southern Atlantic Financial Services, Inc. ("Southern Atlantic"). Middleton argues the master erred because Southern Atlantic failed to give her written notice of default and right to cure before instituting its action for acceleration and foreclosure. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Donna Middleton refinanced her home with Southern Atlantic by executing a note and mortgage for $186,000 on June 25, 1996. On October 31, 1996, Middleton filed an action against Southern Atlantic and Carolina Federal Mortgage Company ("Carolina Federal"), a mortgage broker, seeking: (1) modification of the note to Southern Atlantic to reduce the interest rate; and (2) a return of $2,000 of Carolina Federal's $10,000 brokerage fee. In her complaint, Middleton admitted that she had refused to make the monthly payments prescribed by the note. The Circuit Court granted summary judgment to Southern Atlantic. This Court affirmed in an unpublished opinion (No. 99-UP-050), filed February 1, 1999. The Supreme Court denied Middleton's petition for writ of certiorari.

On December 26, 1996, Southern Atlantic brought this action seeking foreclosure of Middleton's mortgage. The suit was held in abeyance pending the outcome of Middleton's action against Southern Atlantic.

Following resolution of Middleton's suit against Southern Atlantic, the case was set for trial on May 23, 2000. On the day of the hearing, Middleton executed a fee simple deed conveying the property to a third party. Notwithstanding the conveyance, Southern Atlantic proceeded with the action, seeking acceleration of the note.

At the hearing, Middleton argued Southern Atlantic failed to provide her with written notice of default and right to cure pursuant to the language of the note. On June 7, 2000, the master granted judgment to Southern Atlantic, finding Middleton's total indebtedness to be $311,457.63. The master held Middleton had failed to make payments on the note and the terms of the note did

not require Southern Atlantic to provide written notice of default and right to cure. This appeal followed.

ISSUE

Whether the maker of the note was entitled to written notice of default and right to cure prior to payee's acceleration of the note balance?

STANDARD OF REVIEW

An action to construe a written contract is an action at law. Pruitt v. South Carolina Med. Malpractice Liability Joint Underwriting Assoc., 343 S.C. 335, 540 S.E.2d 843 (2001); State Farm Mut. Auto. Ins. Co. v. Moorer, 330 S.C. 46, 496 S.E.2d 875 (Ct. App. 1998).

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. Williams v. Teran, Inc., 266 S.C. 55, 221 S.E.2d 526 (1976); RentCo., a Div. of Fruehauf Corp. v. Tamway Corp., 283 S.C. 265, 321 S.E.2d 199 (Ct. App. 1984). The parties' intention must, in the first instance, be derived from the language of the contract. Jacobs v. Service Merchandise Co., 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988). If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. Jordan v. Security Group, Inc., 311 S.C. 227, 428 S.E.2d 705 (1993); Blakeley v. Rabon, 266 S.C. 68, 221 S.E.2d 767 (1976). Mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity. Gamble, Givens & Moody v. Moise, 288 S.C. 210, 341 S.E.2d 147 (Ct. App. 1986).

A contract is ambiguous when its terms are reasonably susceptible of more than one interpretation. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997); see also Carolina Ceramics, Inc. v. Carolina Pipeline Co., 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968) ("[A]n ambiguous contract is one capable of being understood in more senses than one,

an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.") (citation omitted).

Whether a contract's language is ambiguous is a question of law. South Carolina Dep't of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. Id.; see also Charles v. B & B Theaters, Inc., 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959) ("[W]hen the written contract is ambiguous in its terms, … parol and other extrinsic evidence will be admitted to determine the intent of the parties.") (citation omitted). The determination of the parties' intent is then a question of fact. South Carolina Dep't of Natural Resources, 345 S.C. at 623, 550 S.E.2d at 303.

LAW/ANALYSIS

Middleton argues the terms of the note required Southern Atlantic to provide her with written notice of default and right to cure before instituting its foreclosure action.

The relevant provisions of the note provide:

> **(B) Default**
>
> If I do not pay the full amount of each monthly payment on the date that it is due, I will be in default.
>
> **(C) Notice of Default**
>
> If I am in default, the Note Holder **may** send me written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.

(original emphasis in headers, emphasis in text added).

Whether the language of a promissory note entitled the maker to notice of default and right to cure has been examined by our courts on several occasions. See Allendale Furniture Company v. Carolina Commercial Bank, 284 S.C. 76, 325 S.E.2d 530 (1985) and Hendrix v. Franklin, 292 S.C. 138, 355 S.E.2d 273 (Ct. App. 1986).

In Allendale Furniture Company, Maker defaulted on a note it gave to Bank. Bank brought suit, seeking acceleration of the note and foreclosure of the mortgaged property. Maker argued Bank did not provide notice before bringing its action for acceleration and foreclosure. The note stated: "If default be made in the performance of ... this note ..., said principal sum with all accrued interest thereon shall become at once due and payable at the option of the holder **without further notice**." Id. at 77, 325 S.E.2d at 530-31 (emphasis in original). The master and circuit judge held Maker's default entitled Bank to pursue acceleration and foreclosure without further notice to Maker. The Supreme Court upheld the trial courts' determinations, ruling the phrase "without further notice" permitted Bank's election to accelerate all payments without any notice to Maker. Id. at 80, 325 S.E.2d at 532.

In Hendrix, immediately upon Maker's default, Lender brought a foreclosure action. Maker averred it was entitled to "notice of acceleration." Unlike the note in Allendale Furniture Company, there was no language in the Hendrix note stating what may occur regarding notice upon Maker's default. Upon other grounds, the trial court ruled Lender forfeited her right of foreclosure. The Court of Appeals reversed and held Lender was permitted to bring suit. Citing Goodwin v. Dawkins, 282 S.C. 40, 317 S.E.2d 449 (1984), Berry v. Caldwell, 121 S.C. 418, 114 S.E. 405 (1922), and Farmers' Bank & Trust Company v. Fudge, 113 S.C. 25, 100 S.E. 628 (1919), the Court recited the rule that where acceleration clauses do not provide for acceleration "without notice" (i.e., there is silence regarding the right to notice of default), initiation of a civil action constitutes adequate "notice of acceleration." Id. at 140, 355 S.E.2d at 274.

Though Allendale or Hendrix are edifying, the instant dispute does not fall within the ambit or aegis of either case. In both Allendale and Hendrix, the makers' rights regarding notice of default were certain, either through explicit statement or silence; however, in the case at bar, whether Middleton did or did not have the right to notice is unclear due to the injection of the word "may" in the "Notice of Default" provision.

At first blush, resolution of this dispute appears simple because a plethora of authorities state the word "may" signifies permission and means the action spoken of is optional or discretionary. See Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001); Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995); T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994). Applying this precedent, it would seem clear the language of the parties' agreement meant Southern Atlantic had no obligation to provide Middleton with written notice of default. Instead, notice by Southern Atlantic was optional. Acceleration of an installment note, however, is a harsh remedy. First Bank Investors' Trust v. Tarkio College, 129 F.3d 471 (8th Cir. 1997). Because of the severity of the circumstances, a payee's right to accelerate should therefore be **clearly and unequivocally** articulated within the agreement. Id. In the instant case, we find the note did not "clearly and unequivocally" illustrate whether Middleton was entitled to notice of default and right to cure before South Atlantic could pursue acceleration and foreclosure.

The promissory agreement between Southern Atlantic and Middleton — like many thousands executed annually in South Carolina — was a contract of adhesion filled with boilerplate language made between a sophisticated lender and an unsophisticated maker. Examining the language of the note from the perspective of an ordinary maker — typically someone who is not well versed in interpreting the meaning and operation of technical language found within financial documents[1] — the existence of several circumstances calls into

[1] See, e.g., State Farm Mut. Auto. Ins. Co. v. Moorer, 330 S.C. 46, 58, 496 S.E.2d 875, 882 (Ct. App. 1998) (supporting the proposition that

question the efficacy of the language in regard to notice of default and right to cure before Southern Atlantic proceeded with its lawsuit.

Courts in other jurisdictions have recognized a judically imposed limitation on the enforcement of adhesion contracts or provisions therein when a contract or provision does not fall within the reasonable expectations of the weaker or "adhering" party. See, e.g., Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Calif. 1981). In such a circumstance, the offending contract or provision is deemed unenforceable. Id.

Notice of default and right to cure are standard contractual rights found in many promissory agreements. Therefore, a reasonable expectation arguably exists in the minds of many, if not most, makers that they will be entitled to notice of default and right to cure should they become delinquent. This idea was augmented in the instant case by the appearance of the words "Notice of Default" written in bold type and followed by language — confused by the word "may" — that did not definitively advise Middleton whether Southern Atlantic would or would not provide notice of default and right to cure before seeking acceleration and foreclosure. Because of Southern Atlantic's lack of clarity and precision, we conclude that factual issues exist in reference to the intent of the parties.

We rule that an ambiguity was created by Southern Atlantic regarding the meaning and operation of the "Notice of Default" provision. It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion. Graham, 623 P.2d at 172, n.16 (citation omitted). Consequently, we find the master erred awarding judgment to South Atlantic following his conclusion the "Notice of Default" provision did not obligate Southern Atlantic to provide

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contractual terms should be interpreted by the courts according to "the ordinary and usual understanding of their significance to the ordinary or common man") (citation omitted).

Middleton with notice before initiating its action.

CONCLUSION

The promissory agreement between Southern Atlantic and Middleton did not "clearly and unequivocally" evince whether Southern Atlantic would give Middleton notice of default and right to cure before pursuing acceleration and foreclosure. This lack of clarity created ambiguity in the parties' agreement. Therefore, we hold the master erred in his determination that no ambiguity in the note existed and remand the case to the master for a new trial with instructions to permit the parties an opportunity to offer any relevant evidence illustrating their respective intent and understanding concerning whether Middleton had a right to notice of default and right to cure. See Carolina Ceramics, Inc. v. Carolina Pipeline Co., 251 S.C. 151, 161 S.E.2d 179 (1968) (reversing determination of trial judge in a bench trial that contract term was unambiguous and remanding for new trial to allow the parties an opportunity to offer evidence demonstrating their intent).

REVERSED AND REMANDED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No. 99-CP-40-1230

Richland County,

Appellant,

v.

Willie D. Simpkins,

Respondent.

Case No. 00-CP-40-0555

Richland County,

Appellant,

v.

Larry Miller,

Respondent.

Case No. 00-CP-40-0556

Richland County,

Appellant,

v.

Jason Brewer,

Respondent.

Case No. 00-CP-40-0557

Richland County,

Appellant,

v.

Sidney Gist,

Respondent.

Case No. 00-CP-40-1817

Richland County,

Appellant,

v.

Clint E. Starnes,

Respondent.

Case No. 99-CP-40-2342

Richland County,

Appellant,

v.

John H. Johnson, Jr.,

Respondent.

Case No. 99-CP-40-3893

Richland County,

Appellant,

v.

Michael D. Muse,

Respondent.

Case No. 99-CP-40-3894

Richland County,

Appellant,

v.

Richard R. Jordan,

Respondent.

Case No. 00-CP-40-0554

Richland County,

Appellant,

v.

Michael Johnson,

Respondent.

Appeal From Richland County,
L. Henry McKellar, Circuit Court Judge

Opinion No. 3456
Heard January 10, 2002 - Filed March 4, 2002

AFFIRMED

Larry C. Smith and Bradley T. Farrar, both of Richland County Attorney's Office, of Columbia, for appellant.

Harry T. Heizer, Jr., of Columbia, for respondent.

PER CURIAM: Numerous owners of businesses cited for violations of the Richland County Sexually Oriented Businesses Ordinance (the ordinance) forfeited their bonds, previously tendered to the magistrate's court, in lieu of appearing at their subsequent hearings. Richland County (the County) sought to try these business owners in their absence. The magistrate accepted bond forfeiture as the final disposition of the cases. The County appealed to the circuit court. The circuit court consolidated the appeals and affirmed the magistrate. The County appeals. We likewise affirm.

FACTS/PROCEDURAL BACKGROUND

The County charged Willie D. Simpkins and eight other defendants (the Respondents) for violations of the ordinance including the operation of a sexually-oriented business (SB) without a license and the operation of an SB within 1,000 feet of a residential district.[1]

The County used the Uniform Ordinance Summons for issuing the citations, as authorized by statute. See S.C. Code. Ann. § 56-7-80 (A) (Supp. 2001) ("Counties and municipalities are authorized to adopt by ordinance and use an ordinance summons . . . for the enforcement of county and municipal ordinances.") The Uniform Ordinance Summons reads as follows:

> 1. You may post bond by delivering cash to the Court shown on this summons PRIOR to the trial date.
> 2. You may mail the required bond in the form of a

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[1] By agreement of the parties, the record contains one representative copy of the subject citations, orders, and other relevant documentation.

> Cashier's Check or Money Order made payable to the Court at the address shown above. Personal Checks are NOT accepted. It is your responsibility to make sure that any bond posted by mail is RECEIVED by the Court PRIOR to your assigned trial date. For proper credit, write the Summons Number o[n] your payment.
> 3. Posting a bond prior to the trial date in no way affects your right to a trial on the charges brought against you. You may have a trial by the Judge on the assigned trial date or, if you make a WRITTEN request PRIOR to trial, by jury.
> 4. The Court may impose a fine which is higher or lower than the amount of Bond shown above. If you have posted the required bond and do not appear on the trial date, your bond may be forfeited.
>
> FAILURE TO APPEAR BEFORE THE COURT WITHOUT FIRST HAVING POSTED BOND OR WITHOUT HAVING BEEN GRANTED A CONTINUANCE BY THE COURT MAY RESULT IN A BENCH WARRANT BEING ISSUED FOR YOUR ARREST. IN ADDITION, YOU MAY BE CHARGED WITH A SEPARATE CRIMINAL OFFENSE "FAILURE TO APPEAR AS REQUIRED BY CITATION" AND UPON CONVICTION MAY BE FINED UP TO $200 PLUS COSTS OR IMPRISONED FOR UP TO 30 DAYS.

The summonses each required a $425.00 bond and all of the Respondents posted the bond amounts with the court prior to their trial dates. Additionally, each Respondent requested a jury trial.

The Respondents failed to appear at their respective trials. Their counsel, however, appeared on their behalf and requested the magistrate accept bond forfeiture in lieu of an adjudication of guilt. The County requested the

magistrate try the Respondents in their absence. The magistrate accepted forfeiture of the bond as the final disposition in each case.

In its appeal to the circuit court, the County argued bond forfeiture was not an acceptable final disposition because there was no adjudication of guilt. The circuit court affirmed the magistrate. The County appeals.

STANDARD OF REVIEW

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception. In reviewing criminal cases, this court may review errors of law only." State v. Henderson, ___ S.C. ___, ___, 553 S.E.2d 462, 463 (Ct. App. 2001) (citations omitted).

DISCUSSION

The County argues because a bond forfeiture is not an adjudication of the merits of the charges, forfeiture of a bond should not be accepted as a final disposition of a criminal prosecution under its Uniform Citation Summons. The County maintains that a bond forfeiture cannot be used for impeachment purposes or in subsequent prosecutions.[2] Furthermore, the County complains it cannot, without an adjudication of guilt, obtain injunctive relief against the Respondents. The County also argues the magistrate's decision potentially opens a Pandora's Box permitting defendants summoned under a Uniform

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[2] Generally, the fact that a person has forfeited bond cannot be received into evidence as an admission or for impeachment purposes in a subsequent civil case. Samuel v. Mouzon, 282 S.C. 616, 621, 320 S.E.2d 482, 485 (Ct. App. 1984). However, if a specific statutory provision equates a bond forfeiture to a conviction, as in traffic cases involving driving under the influence of alcohol, a bond forfeiture has the same effect as a conviction or a guilty plea. See Scott v. State, 334 S.C. 248, 254, 513 S.E.2d 100, 103 (1999) (stating that a bond forfeiture is equivalent to a conviction when the legislature so defines it).

Ordinance Summons to escape conviction by forfeiting bond.

Generally, a person indicted for a misdemeanor may voluntarily waive his right to be present at trial and may be tried in his absence upon a finding of the court that (1) such person has received notice of his right to be present, and (2) a warning has been given that the trial would proceed in his absence upon a failure to attend the court. Rule 16, SCRCrimP. See also Brown v. Malloy, 345 S.C. 113, 121, 546 S.E.2d 195, 199 (Ct. App. 2001) (citations omitted) ("Due process is flexible and calls for such procedural protections as the particular situation demands. The requirements of due process include notice . . . .").

The only notice of potential sanctions the Respondents faced in the event they failed to appear at their respective trials was in the Uniform Ordinance Summons. The Respondents do not dispute they received the summonses. Rather, they assert that bond forfeiture is a permissible resolution pursuant to the Uniform Ordinance Summons. See S.C. Code Ann. § 56-7-80(E) (Supp. 2001) ("Acceptance of an ordinance summons constitutes a person's recognizance to comply with the terms of the summons.").

The Uniform Ordinance Summons describes limited risk to its recipient after he posts the requisite bond. Option four states, "If you have posted the required bond and do not appear on the trial date, your bond *may* be forfeited." (emphasis added). The recipient is warned that failure to appear without having posted a bond may result in a bench warrant for his arrest and additional criminal charges.

However, these penalties, including the bond forfeiture itself, are within the magistrate's discretion. There is no provision in the summons or in its enabling statute forewarning of a trial in the defendant's absence for failure to appear after posting a bond.

Nevertheless, the County produced a copy of the standard Bail Proceeding Form, which specifically states that a bonded defendant who fails to appear acknowledges that trial will proceed in his absence. This form is irrelevant to the facts at hand. Here, the only document before the court is the Uniform

Ordinance Summons.

The Uniform Ordinance Summons is a County document. It informs the named defendant of the ordinance allegedly violated and the court having jurisdiction. It also notifies the defendant of his basic rights to proceed. See S.C. Code Ann. § 56-7-80(D) (Supp. 2001) ("Service of a uniform ordinance summons vests all magistrates' and municipal courts with jurisdiction to hear and dispose of the charge for which the ordinance summons was issued and served."). The summons is inadequate for the County's attempted use. There is no warning on the face of the summons advising a defendant that has posted bond that he could be tried in his absence.

Furthermore, the County is not required to use the Uniform Ordinance Summons. See S.C. Code Ann. § 56-7-80(G) (Supp. 2001) ("This statute does not prohibit a county or municipality from enforcing ordinances by means otherwise authorized by law.").[3] If the County had adequately notified the Respondents in the summonses or otherwise, our review of the magistrate's disposition most probably would have been different. However, because the Uniform Ordinance Summons grants the magistrate the discretion to accept bond forfeiture as the disposition of the case, we find no error of law. Accordingly, the orders on appeal are

AFFIRMED.

CURETON, STILWELL and SHULER, JJ., concur.

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[3] As noted by the magistrate in his return to the circuit court, we see no reason why the county could not have enforced its ordinance by issuance of an arrest warrant, which would have precluded bond forfeiture as a final disposition.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

County of Richland,

Appellant,

v.

Willie D. Simpkins, d/b/a Mr. Lucky's,

Respondent.

Appeal From Richland County
Diane S. Goodstein, Circuit Court Judge

Opinion No. 3457
Heard January 10, 2002 - Filed March 4, 2002

AFFIRMED

Bradley T. Farrar, of Richland County Attorney's Office, of Columbia, for appellant.

Harry T. Heizer, Jr., of Columbia, for respondent.

PER CURIAM: Richland County (the County) filed this action seeking preliminary and permanent injunctions against Willie D. Simpkins, doing

business as Mr. Lucky's. While the action was pending, the County moved to enjoin Simpkins from operating Mr. Lucky's until the final adjudication of the merits of the action. The trial court denied the motion for a preliminary injunction. The County appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

The County adopted the Sexually Oriented Businesses Ordinance (the ordinance) effective August 1, 1987.[1] In its complaint, the County alleged numerous violations of the ordinance occurred at Mr. Lucky's and the County thus requested injunctive relief for the abatement of the alleged unlawful land use. In its separate motion for a preliminary injunction pending the resolution of the action, the County requested an order preliminarily enjoining Simpkins from unlawful land use. The County asserted in its motion: "[Mr. Lucky's] will not be put out of business; he must merely change his business."

The County supported its pleadings with numerous affidavits and citations alleging Simpkins was unlawfully operating a sexually-oriented business (SB) in violation of the ordinance. Jack T. Bradley, Deputy Sheriff of the Richland County Sheriff's Department, provided an affidavit accompanied by copies of approximately eighteen incident reports derived from incidents which occurred in and around Mr. Lucky's between July 10, 1997, and June 25, 1998. The reported citations ranged from larceny and vandalism to sex and narcotics offenses.

In his return to the motion for preliminary injunctive relief and his answer and accompanying affidavit, Simpkins acknowledged the County may seek injunctive relief against an SB under the ordinance but specifically denied Mr. Lucky's was an SB or had ever been adjudicated an SB.

Thereafter, the County filed an amended notice and motion for a preliminary injunction. In the amended motion, the County sought much

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[1] Richland County Code §§ 26-201 to -216.

broader relief than the abatement of unlawful activity, as requested in the complaint. The County requested a preliminary injunction, pending a final hearing on the merits, restraining Simpkins from any operation of Mr. Lucky's. The amended motion included additional affidavits of investigating officers and citations for several incidents occurring between September 9, 1997, and January 31, 1998. These citations alleged Simpkins was operating an SB within 1,000 feet of a residential community and operating an SB without a license.[2]

At a hearing on the County's motion, Simpkins argued he was not operating an SB. Simpkins asserted he relied on the language in a prior consent order, entered into between the County and Vickie S. Watts, d/b/a The Trophy Room, in October 1992. This consent order detailed, with specific examples, how a business could adequately clothe its performers to avoid being classified as an SB.

The County argued that a governmental entity need not show the traditional elements for temporary injunctive relief. It requested that Mr. Lucky's be closed until the case proceeded on the merits. Simpkins acknowledged he was already enjoined from violating the ordinance but disagreed that the County could close Mr. Lucky's pending the final hearing. Simpkins argued that the intent of a preliminary injunction is to maintain the status quo, and that the continued, lawful operation of Mr. Lucky's is the status quo. Simpkins further asserted the County was prematurely attempting to enjoin Mr. Lucky's from all business based merely on allegations that had yet to be adjudicated. He argued the County must prove the alleged violations before it is entitled to seek an injunction closing the business.

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[2] Richland County Code § 26-212(c) provides: "A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within one thousand (1,000) feet of: (1) A church; (2) A public or private elementary or secondary school; (3) A boundary of any residential district; (4) A public park adjacent to any residential district; [or] (5) The property line of a lot devoted to residential use."

The trial court held a hearing on the County's motion for a preliminary injunction closing Mr. Lucky's. The court found that even if, as the County argued, it need not show irreparable harm, nor the lack of an adequate remedy at law, the County was not entitled to an order requiring Mr. Lucky's to cease doing business. The court recognized the purpose of a preliminary injunction is to preserve the status quo during the pendency of the action. The court found "the equities between the parties in this case would become drastically unbalanced if Mr. Lucky's was ordered to cease operation on a temporary basis prior to a full hearing on the merits." The court also expressed concern that the County's requested relief in its motion was broader than that requested as ultimate relief. The court recognized Simpkins' was willing to consent to an injunction against Mr. Lucky's restraining it from any further violations of the ordinance. The trial court denied the County's request for temporary injunctive relief. After hearing further argument, the court also denied the County's subsequent motion to reconsider. The County appeals.

STANDARD OF REVIEW

The decision whether to grant or deny an injunction is ordinarily left to the sound discretion of the trial court. Metts v. Wenberg, 158 S.C. 411, 417, 155 S.E. 734, 736 (1930). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976).

DISCUSSION

The County argues the trial court applied the wrong standard in analyzing its entitlement to preliminary injunctive relief and further argues even under the general standard for an injunction, it was entitled to relief. We find no reversible error.

A plaintiff's entitlement to an injunction requires the complaint to allege facts sufficient to constitute a cause of action for injunction while also showing an injunction must be reasonably necessary to protect the legal rights of the

plaintiff pending in the litigation. Transcont'l Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 480-81, 167 S.E.2d 313, 315 (1969). Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law. Roach v. Combined Util. Comm'n, 290 S.C. 437, 442, 351 S.E.2d 168, 170 (Ct. App. 1986).

In the recent decision of City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 531 S.E.2d 518 (2000), our supreme court articulated a lesser standard where the injunction sought is specifically authorized by statute and the party seeking the injunction is a governmental entity. "In order for a city to get an injunction [which is specifically authorized by statute] for a zoning violation they must show: (1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance." Pic-A-Flick, 340 S.C. at 282, 531 S.E.2d at 521 (citing 42 Am. Jur. 2d Injunctions § 38 (1969)). "In such circumstances, no showing of irreparable harm need be made by the party seeking the injunction, nor must the court consider whether the injunction is in the public interest." 42 Am. Jur. 2d Injunctions § 23, at 595 (2000). See Pic-A-Flick, 340 S.C. at 284, 531 S.E.2d at 521 (holding a municipality need not show negative secondary effects in order to enforce adult zoning provisions).

Here, the County is authorized by statute to seek an injunction:

> In case a building, structure, or land . . . is . . . used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer . . . may in addition to other remedies, institute injunction . . . or other appropriate action or proceeding to . . . abate the violation . . . .

S.C. Code Ann. § 6-29-950(A) (Supp. 2001). Likewise, the ordinance provides: "[a] person who operates or causes to be operated a sexually oriented business without a valid permit and/or license or in violation of . . . this ordinance is subject to a suit for injunction as well as prosecution for criminal violations." Richland County Code § 26-216.

In Pic-A-Flick, as in this case, the City of Columbia sought a preliminary injunction against Pic-A-Flick to enforce its sexually-oriented businesses ordinance. Pic-A-Flick, 340 S.C. at 280, 531 S.E.2d at 519. Unlike in the present action, however, the issue in Pic-A-Flick was not whether the ordinance applied; rather, it was whether the City's interpretation of its ordinance was valid. The applicable ordinance classified adult video stores by whether a "principal business purpose" of the store was the sale or rental of the specified merchandise. The video store owner in Pic-A-Flick conceded the store rented and sold videos defined as restricted material under the City ordinance. Id. at 281, 531 S.E.2d at 520. The owner denied, however, that the sale and rental of the movies was a principal business purpose of the store. Id. The term "principal business purpose" was not defined in the ordinance. Id. at 283, 531 S.E.2d at 521. The supreme court found this ambiguous phrase made it unlikely that the City would prevail in proving Pic-A-Flick violated the ordinance. Id. at 284, 531 S.E.2d at 522.

By contrast, Simpkins argues Mr. Lucky's does not operate in violation of the ordinance. He asserts the entertainers clothe enough of their anatomy to avoid violating the ordinance. Even under the Pic-A-Flick standard, the County must prove a violation to entitle them to an injunction. We find the County's proffer of violations, mere citations and accompanying affidavits, is insufficient. The citations remain unadjudicated. They are merely evidence of violations, not proof thereof. This action would be postured differently if the citations had resulted in criminal convictions prior to the County's request for an injunction.

We do not read Pic-A-Flick as changing the purpose behind injunctive relief. The trial court, without the benefit of Pic-A-Flick, was correct in considering the inherent purpose behind the equitable remedy of an injunction: to preserve the status quo. See Powell v. Immanuel Baptist Church, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973) ("[T]he sole purpose of a temporary injunction is to preserve the status quo . . . ."). "[A] temporary injunction is [used] to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation . . . ." County Council of Charleston v. Felkel, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964)

(citations omitted). "A temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined without reference to the temporary injunction." Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). Thus, we are guided by the general principles of equity:

> First, the equities of both sides are to be considered, and each case must be decided on its own particular facts. Second, the court of equity must "balance the equities" between the parties in determining what if any relief to give. The equities on both sides must be taken into account.

Foreman v. Foreman, 280 S.C. 461, 464-65, 313 S.E.2d 312, 314 (Ct. App. 1984) (citations omitted).

Here, Simpkins acknowledges that Mr. Lucky's must operate within the law. Closing Mr. Lucky's without first adjudicating the merits of the citations would not preserve the parties' positions pending the final hearing on the underlying merits of the actions.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

CURETON, STILWELL and SHULER, JJ., concur.