The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF GEORGE K. LYALL, PETITIONER

On October 13, 1997, Petitioner was definitely suspended from the practice of law for nine months. See In the Matter of Lyall, 328 S.C. 121, 492 S.E.2d 99 (1997). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than May 7, 2001.

Columbia, South Carolina

March 8, 2001

The Supreme Court of South Carolina

RE: Lists of Lawyers Suspended by the South Carolina Bar and Commission on Continuing Legal Education and Specialization

The South Carolina Bar and Commission on Continuing Legal Education and Specialization have furnished the attached lists of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b), SCACR. These lists are being published pursuant to Rule 419(d), SCACR. If these lawyers are not reinstated by the Bar or Commission by April 1, 2001, 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 12, 2001

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

March 12, 2001

ADVANCE SHEET NO. 9

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

H. Daniel Folk, Jr., Respondent

v.

W. O. Thomas, Jr., as Treasurer of Charleston County, W. T. Martin, as Delinquent Tax Collector of Charleston County, Daniel M. Rundell and Rose M. Rundell,

of whom W. O. Thomas, Jr., as Treasurer of Charleston County and W. T. Martin, as Delinquent Tax Collector of Charleston County, are Respondents

and Daniel M. Rundell and Rose M. Rundell are the Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25256
Heard January 9, 2001 - Filed March 12, 2001

REVERSED

Beth Branham Davis and Brian N. Davis, both of Davis & Davis, of Charleston, for petitioners.

Joseph S. Mendelson, and LeRoy P. Hutchinson, both of Charleston, for respondent H. Daniel Folk, Jr.

Samuel W. Howell, IV, of Nexsen, Pruet, Jacobs, Pollard & Robinson, LLP, of Charleston, and Joseph Dawson, III and Bernard E. Ferrara, Jr., also of Charleston, all for respondents W. O. Thomas, Jr. and W. T. Martin.

Kelly J. Golden and Robert E. Lyon, of Columbia, for Amicus Curiae South Carolina Association of Counties.

Ronald L. Richter, Jr., of Charleston, for Amicus Curiae Ava B. Hawkins and Ava B. Hawkins Family Trust.

CHIEF JUSTICE TOAL: We granted certiorari upon petition of Daniel M. Rundell and Rose M. Rundell ("Petitioner") to review the Court of

Appeals' decision to set aside certain tax deeds. We reverse and reinstate the Master's Order upholding tax deeds.

FACTUAL/ PROCEDURAL BACKGROUND

H. Daniel Folk ("Folk") failed to pay taxes on two parcels of land, valued between $140,000 and $150,000 collectively, in 1992 and 1993.[1] Parcel A was an improved 1-acre parcel, containing a 1,700 square foot home, an aviary building, 2-car garage, shed, and leased office building. Parcel B was an unimproved 11.47-acre parcel, located next to Parcel A. Parcel B went up for sale first, only because its assigned tax map reference number was lower than Parcel A's. Petitioner purchased Parcel B for the exact amount Folk owed on the land, $1000. Parcel A went up for sale next, but did not receive a bid. The parcel was deeded to the Forfeited Land Commission. At a subsequent auction, Petitioner purchased Parcel A from the Forfeited Land Commission for $1746.98, exactly enough money to satisfy the taxes owed on it.

On January 10, 1996, Folk brought this action alleging the Delinquent Tax Collector failed to follow the statutory scheme for delinquent tax sales, to quiet title, and alleging the Petitioner held the property in constructive trust. W.O. Thomas, Jr., ("Thomas"), the Treasurer of Charleston County, and W.T. Martin ("Martin"), the Delinquent Tax Collector of Charleston County, answered claiming Charleston County followed the law concerning tax sales. Petitioner answered claiming the property was not divisible, and seeking to quiet title. On June 26, 1997, the parties entered into a Consent to Order of Reference to Master in Equity with Finality.

On September 29, 1997, a hearing was held before the Master in Equity for Charleston County. On October 23, 1997, the Master issued an order upholding the tax sale, confirming title in the Petitioner, and requiring Folk to vacate the property. Folk appealed to the Court of Appeals. The Court of

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[1]There is no dispute Folk received all the proper notices required under South Carolina law.

Appeals with one judge dissenting, reversed the order of the Master in Equity and set aside the tax deeds. *Folk v. Thomas*, 336 S.C. 466, 520 S.E.2d 327 (Ct. App. 1999). We granted certiorari to review the decision of the Court of Appeals. The issues before this Court are:

> I. Did the Court of Appeals err in holding the two tax deeds should be set aside because the Charleston County failed to ascertain whether Parcel B was divisible before the sale?
>
> II. Did the Court of Appeals err in making a determination that the property was divisible and failing to remand the case for a determination of divisibility by the Master in Equity?

LAW/ ANALYSIS

I.

An action to set aside a tax deed is in equity. *Godfrey v. Webb*, 277 S.C. 246, 285 S.E.2d 883 (1982). Therefore, this Court may take its own view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

Petitioner argues Charleston County was not required by S.C. Code Ann. § 12-51-40(d) (Supp. 1999) to partition Folk's property prior to the tax sale, and therefore the Court of Appeals erred in setting the tax deeds aside. We agree.

Section 12-51-40 (d) contains the procedure for conducting a tax sale and provides as follows:

> The property must be advertised for sale at public auction. The advertisement must be in a newspaper of general circulation within the county or municipality, if applicable, and must be entitled "Delinquent Tax Sale". It shall include the delinquent taxpayer's name and the description of the property, a reference to the county auditor's map-block-parcel

> number being sufficient for a description of realty. The advertising must be published once a week prior to the legal sales date for three consecutive weeks for the sale of real property, and two consecutive weeks for the sale of personal property. All expenses of the levy, seizure, and sale must be added and collected as additional costs, and shall include, but not be limited to, the expense of taking possession of real or personal property, advertising, storage, identifying boundaries of the property, and mailing certified notices. **When the real property is divisible, the tax assessor, county treasurer, and county auditor shall ascertain that portion of property that is sufficient to realize a sum upon sale sufficient to satisfy the payment of the taxes, assessments, penalties, and costs. In such cases, the officer shall partition the property and furnish a legal description of it.** (emphasis added).[2]

The dispute in this case is over the last two sentences of section 12-51-40(d). Specifically, when is the property divisible, and who bears the burden of raising the issue of divisibility?

A cardinal rule of statutory construction is that legislative intent prevails. *Joint Legislative Comm. v. Huff, et al.*, 320 S.C. 241, 464 S.E.2d 324 (1995); *See also Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995). "A statutory provision should be given a reasonable and practical

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[2]Section 12-51-40 (d) was recently amended to read, in part: "When the real property is divisible, the tax assessor, county treasurer, and county auditor **may** ascertain what portion of the property that is sufficient to realize a sum upon sale sufficient to satisfy the payment of the taxes, assessments, penalties, and costs. In those cases, the officer **may** partition the property and furnish a legal description of it." S.C. Code Ann. § 12-51-40 (d) (Supp. 2000) (emphasis added). However, at the time Folk's property was sold, the statute read as quoted above.

construction consistent with the purpose and policy expressed in the statute." *Hay v. South Carolina Tax Com.*, 273 S.C. 269, 273, 255 S.E.2d 837, 840 (1979). Based on a review of the statutory scheme, we believe the intent of the legislature was to fairly collect all taxes due the state.

In this case, Folk concedes that he never raised the issue of divisibility or requested a partition prior to the tax sale. Folk argues the County has a duty prior to the tax sale to determine whether each piece of tax sale property is divisible, and if divisible, exactly how much of the property needs to be sold to satisfy the taxes owed on the property. Petitioner argues under the rules of statutory construction and current South Carolina case law, failure to make a pre-sale determination of divisibility does not invalidate a tax sale. *See Wilson v. Cantrell*, 40 S.C. 114, 18 S.E. 517 (1893); *South Carolina Fed. Sav. Bank v. Atlantic Land Title Co., Inc.*, 314 S.C. 292, 442 S.E.2d 630 (Ct. App. 1994) (finding *Wilson* controlling and that "the fact that the entire tract was sold without any effort to divide it provided no basis for invalidation of the sale, in the absence of fraud or collusion").

We find the language of the section 12-51-40(d) does not place a pre-sale burden on the County or tax collector to determine divisibility.[3] We hold the property owner, or the party seeking divisibility, has the initial burden of requesting the county or its tax collector to determine divisibility prior to the sale.[4] As discussed below, interpreting the statute any differently would result in folly from a policy standpoint. Absent any direct language by the legislature, we decline to place such an onerous burden on the county to perform a divisibility study on each of the numerous pieces of property sold at tax sales each year.

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[3]Folk argues we should consider subsection (b) of section 12-51-40 as evidence the county has a pre-sale burden. However, subsection (b) deals only with general procedure and places no specific responsibility on the tax collector.

[4]In the instant case, Folk did not make a request that his property be divided pre-sale, nor did he present any evidence at his hearing before the Master in Equity that his property was legally capable of division.

Policy considerations weigh heavily in favor of finding section 12-51-40(d) does not require the county to self-start a divisibility study. As the amici argue, the divisibility of property must be determined according to many statutes and regulations. For example, such regulations as county zoning restrictions, city, town or municipality restrictions, special land use restrictions, conservation easements, development restrictions such as covenants and bylaws, ingress and egress restrictions, availability of public utilities, minimum roadway frontage requirements, and coastal and wetlands restrictions all must be taken into account before a parcel can be divided. Requiring the county to start, on its own initiative, a pre-sale determination of divisibility for every property in a delinquent tax sale would greatly increase the burden on the county,[5] as well as increasing the redemption cost to the delinquent taxpayer. Furthermore, since 87 % of the properties sold at delinquent tax sales are redeemed by the taxpayer, the increased cost is likely to: (1) have a chilling effect on bidders at tax sales; (2) decrease the likelihood all taxes are collected; and (3) amount to a waste of money and time since the taxpayer will likely redeem the property.

Therefore, we hold the defaulting taxpayer bears the initial burden of requesting a determination of divisibility before a county is required to undertake a divisibility study. As illustrated by the instant case, placing the initial burden on the taxpayer, rather than the county, is not unreasonable. It was Folk, the defaulting taxpayer, who slept on his rights, did not pay his taxes for two years, failed to respond to any of the certified notices sent by the tax collector, and failed to show up at the tax sale.

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[5]In his dissent in *Folk*, Judge Stillwell also expressed concern that "requiring a determination, in advance, of the divisibility of every piece of property sold for taxes at public auction . . . plac[es] an unreasonable burden upon various tax collectors in our state." *Folk*, 336 S.C. at 472, 520 S.E.2d at 330.

II.

In light of our holding above, there is no need to address the merits of Petitioner's second issue on certiorari.

CONCLUSION

Based on the foregoing, we **REVERSE** the Court of Appeals, and reinstate the tax deeds.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Nakia Jones, Appellant.

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

Opinion No. 25257
Heard January 11, 2001 - Filed March 12, 2001

AFFIRMED

Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Assistant Attorney General Melody J. Brown, all of Columbia, and Solicitor Warren B. Giese, of Columbia, for respondent.

JUSTICE WALLER: Jones was convicted of three counts of armed robbery, and possession of a firearm during the commission of a violent crime; he was sentenced to life imprisonment without parole pursuant to S.C. Code Ann. § 17-25-45 (Supp. 2000), commonly known as the "Two-Strikes" law.[1] We affirm.

FACTS

At 3:30 AM on the morning of June 29, 1997, the three victims in this case, Dwayne Wright, Theodore Wheeler and Ricardo Wheeler, were robbed at gunpoint by an unknown assailant.

In late July 1997, approximately three and one-half weeks after the robbery, police showed each victim, independently, a photographic line-up of six individuals; all three victims identified Jones as the person who robbed them. Jones was arrested and charged with three counts of armed robbery, possession of a firearm during commission of a violent crime, and failure to stop for a blue light. He was convicted of the armed robbery and possession of a firearm counts; he was found not guilty of failing to stop for a blue light. He was sentenced to life imprisonment without parole under S.C. Code Ann. § 17-25-45 (Supp. 2000), the Two-Strikes law, due to his prior conviction of a "most serious" offense.[2]

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[1] Under section 17-25-45 (A)(1), upon conviction for a most serious offense, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has one or more prior convictions for a most serious offense. Armed robbery is a most serious offense. S.C.Code Ann. § 17-25-45(C)(1).

[2] Jones' 1996 conviction for assault and battery with intent to kill is a "most serious" crime under the statute. His 1993 convictions for assault and battery of a high and aggravated nature and aiding an escape were not used for enhancement.

ISSUES

1. Was Jones properly tried for three counts of armed robbery?

2. Is a sentence of life imprisonment without parole after commission of one "most serious" offense constitutionally permissible?

3. Did the court err in refusing a Telfaire[3] charge?

1. THREE COUNTS OF ARMED ROBBERY

Jones was separately indicted for the armed robbery of each victim. He contends, citing State v. Waller, 280 S.C. 300, 312 S.E.2d 552 (1984), the three counts should have been "rolled into a single count" as the goods were taken from three victims simultaneously. Waller does not control the present case.

In Waller, the defendant broke into an apartment occupied by three roommates and stole property belonging to each. The solicitor decided to aggregate the value of the items taken and charge Waller with grand larceny. On appeal, Waller contended the value of property taken from more than one owner could not be aggregated so as to sustain a conviction for grand larceny. This Court affirmed Waller's conviction under prior case law which suggested a prosecutor could elect to prosecute for one larceny or several larcenies. However, the Waller Court decided to follow the majority of cases which hold the larceny of property from different owners at the same time and place constitutes one larceny. The Court held, "henceforth, the larceny of property from different owners at the same time and at the same place shall be prosecuted only as a single larceny." 280 S.C. at 301, 312 S.E.2d at 553.[4]

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[3] United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

[4] The State asserts the rationale for the holding in Waller was that the property the defendant took from any one roommate was insufficient to support a charge of grand larceny. Contrary to the State's contention, a footnote in

Waller is inapplicable here.

The rationale for the single larceny rule is that "the act of taking is one continuous act or transaction, and since the **gist of the offense is the felonious taking of property**, the legal quality of the act is not affected by the fact that the property stolen belonged to different persons." D.H. White, Single or Separate Larceny Predicated Upon Stealing Property From Different Owners at the Same Time, 37 A.L.R.3d 1407, 1410 § 2 (1971) (emphasis supplied). Larceny is the misdemeanor offense of taking or carrying away of goods valued at less than $1000.[5]

The fundamental distinction between larceny and armed robbery, in our view, lies in the fact that armed robbery is a crime of violence. See S.C. Code Ann. § 16-1-60 (Supp. 2000). Although armed robbery is contained in Chapter 11 to Title 16 (Offenses Against Property), the fact that it is a crime of violence makes it more of an offense against the person, thereby warranting its treatment as a separate offense as to each person who was threatened with bodily harm by a deadly weapon. See State v. Mahaley, 470 S.E.2d 549, 551 (N.C. App. 1996), *citing* 77 CJS Robbery § 2 (1994) (while robbery can be classified as an offense against both person and property, it is primarily an offense against the person); State v. Harris, 175 S.E.2d 334, 336 (N.C. App. 1970) (gist of armed robbery is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapon); People v. Jones, 576 N.E.2d 1138 (Ill. App. 1991), *rev'd on other grounds* 595 N.E.2d 1071(1992) (notwithstanding armed robbery is captioned as a "Crime Against Property," it is a forcible felony carried out against a person).

Waller indicates there was sufficient evidence to permit the jury to find the value of the property taken from one of the roommates exceeded $200.00. 280 S.C. at 301, 312 S.E.2d at 553, n. 1.

[5] S.C. Code Ann. § 16-13-30(A) (Supp. 2000). Grand larceny is the felonious offense of taking and carrying away of goods valued at $1000 or more. S.C. Code Ann. § 16-13-30(B) (Supp. 2000).

A case directly on point is State v. Gratz, 461 P.2d 829 (Or. 1969), in which the Oregon Supreme Court addressed a contention identical to Jones':

> The defendant relies upon State v. Clark, 46 Or. 140, 80 P. 101, wherein this court held that the stealing of several articles belonging to more than one person at the same time and place by one act constitutes but a single offense. This holding is in accord with the weight of authority and is based on the reasoning that, since there was but one overt act (the theft), a rule to the contrary would lead to incongruous and inhumane results. Anno. 28 A.L.R.2d 1187, s 3.
>
> However, in the cases dealing with armed robbery, where the gravamen of the offense is an assault upon and a theft from the person, ORS 163.280, the courts hold that each assault and theft from a different person, although occurring at the same time and place, is a separate crime. . . .
>
> With few exceptions, not here pertinent, in crimes against the person when contrasted with crimes against property there are as many offenses as individuals affected. And, while it may be said that in armed robbery a single act may put several persons in fear, yet, in order to consummate the crime, that act must be followed by the act of taking from each person money or personal goods.

461 P.2d at 830 (internal citations omitted). See also Commonwealth v. Levia, 431 N.E.2d 928 (Mass. 1982) (although successive larcenies from multiple victims must be charged and punished as a single larceny if part of a single larcenous scheme, where crimes of violence are committed against several victims, multiple charges and punishments are appropriate); Sullivan v. Commonwealth, 433 S.E.2d 508 (Va. 1993) (essential character of common-law robbery is violence against a person for purpose of theft such that appropriate unit of prosecution is determined by number of persons from whose possession property is taken by force or intimidation); Camacho v. State, 825 S.W.2d 168 (Tex. 1992) (what separates robbery from theft is the human element).

In accordance with the above-cited cases, we hold that, where there is a threat of bodily injury to each person from whom property is stolen,[6] the defendant may be charged with separate offenses. See Joseph T. Bockrath, Prosecution for Robbery of One Person As a Bar to Subsequent Prosecution for Robbery of Another Person Committed at the Same Time, 51 A.L.R.3d 693, § 2 (1973) (noting that ordinarily, where several persons are robbed at the same time, the offender may be indicted and convicted for the robbery of each person as a distinct offense). Accordingly, Jones was properly charged with three separate counts of armed robbery.

2. CONSTITUTIONALITY OF TWO-STRIKES LAW

Jones contends S.C. Code Ann. § 17-25-45 (Supp. 2000), the "Two-Strikes" law under which he was sentenced, is unconstitutional. He asserts sentencing under the statute 1) violates separation of powers,[7] 2) constitutes cruel and unusual punishment,[8] 3) results in an equal protection violation,[9] 4) shifts the burden to the defendant to prove the constitutionality of the statute, and 5) constitutes an *ex post facto* violation.[10] We disagree.

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[6] In the present case, there is evidence that the victims were separately threatened. Ricardo Wheeler and Theo Wheeler each testified that Jones had specifically held the gun to their head and or side, and Theo testified Jones threatened to shoot him if he didn't have any more money. Although there is no indication Jones specifically pointed the gun at Dwayne Wright's head or side, Wright testified Jones made him throw his shoes to the ground, and fired the gun one time when Wright and the Wheeler brothers were moving too slowly to suit him.

[7] U.S. Const. art. I, II, III; S.C. Const. art. 1, § 8.

[8] U.S. Const. amend VIII; S.C. Const. art. 1 § 15.

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

[10] U.S. Const. art. 1, § 10; S.C. Const. art. 1, § 4.

Initially, this Court held in State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999), that Section 17-25-45 does not violate the separation of powers doctrine. We stated, "[u]nder the mandatory sentencing guidelines, the prosecutor can still choose not to pursue the triggering offenses or to plea the charges down to non-triggering offenses. Choosing which crime to charge a defendant with is the essence of prosecutorial discretion, not choosing which sentence the court shall impose upon conviction." 335 S.C. at 40-41, 515 S.E.2d at 528-529. Further, we found the matter of sentencing if convicted of a triggering offense to be a matter within the province of the legislature. Id. Accordingly, under Burdette, Jones' sentences pose no separation of powers problem.

Jones next asserts his life sentence constitutes cruel and unusual punishment. We disagree.

The cruel and unusual punishment clause requires the duration of a sentence not be grossly out of proportion with the severity of the crime. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Pursuant to Solem, this Court reviews three factors in assessing proportionality: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions. State v. Kiser, 288 S.C. 441, 343 S.E.2d 292 (1986).[11]

Initially, we agree with the Court of Appeals that given the "most serious" nature of armed robbery, when coupled with a prior most serious offense, the

[11] It is questionable, in light of the United States Supreme Court's opinion in Harmelin v. Michigan, 501 U.S. 957 (1991), whether the stringent three-factor Solem inquiry remains mandated in "cruel and unusual punishment" cases. See State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct. App. 2000) (finding the 3-prong inquiry of Solem no longer applicable and requiring only a threshold comparison of the gravity of the offenses against the severity of the sentence). However, we need not decide the matter here since, in our view, even the more stringent test of Solem is met in this case.

gravity of the offense is not disproportionate to a sentence of life without parole. See also U.S. v. D'Anjou, 16 F.3d 604, 613-14 (4th Cir. 1994) (life imprisonment without parole for drug conspiracy, possession, and distribution offenses not cruel and unusual); Smallwood v. Johnson, 73 F.3d 1343, 1346-47 (5th Cir. 1996) (50 year sentence for misdemeanor theft, made felony by recidivist statute, not grossly disproportionate); U.S. v. Hill, 30 F.3d 48, 50-51 (6th Cir. 1994) (mandatory life imprisonment without parole upon third felony drug conviction not grossly disproportionate); Simmons v. Iowa, 28 F.3d 1478, 1482-83 (8th Cir. 1994) (mandatory life imprisonment without parole for aiding and abetting restraint and torture of child not grossly disproportionate).

Further, we find Jones' sentence proportionate to the sentences imposed on other criminals in this state. Jones' sentence of life without possibility of parole for his second conviction of a "most serious" offense is the same as that imposed on any other criminal with a second conviction of a "most serious" offense, such that it is not disproportionate to the sentences imposed on other South Carolinians.

Finally, as to sentencing in other jurisdictions for the same crime, life sentences for armed robbery under recidivist laws are not unique to South Carolina. See United States v. Carroll, 207 F.3d 465 (8th Cir. 2000) (defendant's sentence of life imprisonment for role in credit union robbery under three-strikes law not cruel and unusual); Young v. State, 2000 WL 1210705 (Ga. App. 2000) (imposing life without parole for armed robbery under recidivist statute, O.C.G.A. § 17-10-7); State v. Oliver, 745 A.2d 1165 (N.J. 2000) (life without parole for armed robbery under three-strikes law not cruel and unusual); People v. Ayon, 53 Cal. Rptr. 2d 853 (Cal. App. 1996) (life sentence without parole for armed robberies, with prior felony convictions, not cruel and unusual); United States v. Farmer, 73 F.3d 836 (8th Cir. 1996) (life without parole for armed robbery coupled with three prior violent felonies not cruel and unusual). See also Ortiz v. State, 266 Ga. 752, 470 S.E.2d 874, 876 (1996) (upholding Two-Strikes law imposing life without parole upon conviction of a second "most serious" offense against eighth amendment challenge). In sum, we find Jones' sentence withstands Eighth Amendment scrutiny.

As to Jones' equal protection claim, his sole allegation is that "minorities are affected most" by section 17-25-45. There is absolutely nothing in the record supporting this assertion.

When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. State v. Bouye, 325 S.C. 260, 484 S.E.2d 641 (1997). Appellants have the burden of proving the statute unconstitutional. Id. Here, given that Jones has offered no evidence in support of his claim, he has utterly failed in his burden. Accord, State v. Oliver, 745 A.2d at 1170 (defendant failed to demonstrate equal protection violation in three strikes law as there was no showing it had a disparate impact on minorities).[12]

Next, Jones claims his sentence "in effect shifted the burden to [him] to prove the unconstitutionality of the statute." We find Jones' argument is so conclusory that it has been abandoned. See Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974) (where only passage in brief relating to issue appealed was single conclusory statement which left unargued the error assigned by exception, issue was abandoned); Muir v. C.R. Bard, Inc, 336 S.C. 266, 519 S.E.2d 583 (Ct.App.1999) (issue is deemed abandoned on appeal if it is argued in a short, conclusory statement without supporting authority). Accordingly, we decline to address the merits of this issue.

Finally, Jones asserts sentencing under section 17-25-45 violates the *ex post facto* law because "it changed the punishment for a crime in a manner that said punishment did not exist previously." We disagree.

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[12] Moreover, we find no cases holding recidivist statutes or similar laws violate equal protection. See e.g. Grant v. State, 770 So.2d 655 (Fla. 2000) (Florida's recidivist statute held not to violate equal protection); State v. Thorne, 921 P.2d 514 (Wash. 1996) (Washington's Persistent Offender Accountability Act passes the rational basis test and does not violate equal protection).

Where conduct in committing offenses which trigger recidivist features of sentencing provisions occur after the sentencing provision's effective date, there is no *ex post facto* violation. State v. Dabney, 301 S.C. 271, 391 S.E.2d 563 (1990) (amendment of statute lengthening period of time previous convictions could be used to increase punishment for subsequent DUI offense did not violate *ex post facto* clause as applied to drivers who committed offenses for which they were being sentenced after effective date of statute's amendment).

Here, Jones' armed robberies occurred subsequent to passage of section 17-25-45 and, as such, there is no *ex post facto* violation. Accord Phillips v. State, 331 S.C. 482, 504 S.E.2d 111 (1998) (no *ex post facto* violation for legislature to enhance punishment for later offense based on prior conviction, even though enhancement provision was not in effect at time of prior offense).

To the extent Jones contends the Two-Strikes law changes the consequences of his 1996 plea to ABIK, he is incorrect. See Gryger v. Burke, 334 U.S. 728 (1948) (holding that sentencing as an habitual criminal is not viewed as a new jeopardy or additional penalty for an earlier crime; rather it is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one). Accord State v. Oliver, supra.

In sum, we find no constitutional violation in application of the Two-Strikes law to Jones.

3. TELFAIRE CHARGE

Finally, Jones asserts the trial court erred in refusing his requested charge on identification pursuant to United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). We disagree.

In State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975), this Court recognized that the court in Telfaire was dealing with the "**one witness**" identification rule, and the model instruction there was designed to focus the attention of the jury on the identification issue and minimize the risk of

conviction through false or mistaken identification. See also State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (in single witness identification cases, court should instruct jury burden of proving identity of defendant rests with the state). The present case does not involve a single witness identification and, given the witnesses' degree of certainty, there appears very little likelihood of mistaken identification. We find a Telfaire charge was unnecessary.

Jones' remaining issue is affirmed pursuant to Rule 220(b)(1), SCACR and the following authorities: State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980) (photographic and physical identifications reliable under totality of circumstances).

Jones' convictions and sentence are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Donny G. Brown, Appellant.

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

Opinion No. 25258
Heard January 24, 2001 - Filed March 12, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of S.C. Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken for respondent.

JUSTICE MOORE: Appellant was convicted of murder for shooting to death his twenty-five-year-old grandnephew Shane Hammond (Victim). Appellant admitted killing Victim but claimed self-defense. He appeals on the ground he was prejudiced by the improper admission of bad character evidence. We affirm.

FACTS

Victim was living in appellant's home. The State put up evidence that the day before the killing, appellant and Victim argued over rent money. Two eyewitnesses, Jack Williams and Kelly Williams, testified they saw appellant hit Victim on the head several times with a blunt tool, lacerating Victim's scalp. Appellant was holding a gun in his other hand at the time. Victim was unarmed and simply tried to fend off the attack by covering his head.

The next day, Victim returned to the house to retrieve his belongings. Appellant's wife, Erlene Brown, testified that when Victim arrived, he went into the kitchen. Mrs. Brown went down the hall to the bedroom to get Victim's things. She saw her husband in the hallway with a billy club behind his back and she said to him, "Don't do anything, don't say anything. [Victim's] just come to get his clothes, you know, and he's leaving and I'm getting his clothes for him."

As Mrs. Brown came back down the hall, she heard scuffling in the kitchen. Appellant and Victim were fighting and appellant was hitting Victim with the billy club. Mrs. Brown tried unsuccessfully to separate the two men. She and her grandson, Billy, then fled the house. They heard two shots as they were getting in the car. Before driving off, Mrs. Brown saw appellant come out of the house with a gun in his hand. She testified, "I was afraid he might shoot us, too."

Appellant testified he was in his bedroom when Victim entered the house. He went down the hall to the kitchen and told Victim to leave. When

appellant turned around, Victim "blind sided" him. Appellant testified he thought Victim was going to kill him and that he was fighting for his life.

During the fight, appellant found his gun on the kitchen floor where he claimed it had fallen from the top of the refrigerator. He shot Victim as Victim was charging into him. Victim continued attacking and, as they tussled over the gun, appellant shot again, killing Victim.

The trial judge submitted murder and voluntary manslaughter to the jury and gave a charge on self-defense. Appellant was convicted of murder and sentenced to forty years.

ISSUE

Was evidence of appellant's bad character improperly admitted? If so, was the error harmless?

DISCUSSION

Appellant contends the trial judge erroneously admitted character evidence that was unfairly prejudicial. He complains of three specific instances.

a. Evidence of appellant's violent nature

During Mrs. Brown's testimony, she was asked why she fled during the fight. She responded, "I know the moods of my husband and I knew I had to get out." The Solicitor asked what mood appellant was in that night and Mrs. Brown stated that he had become "very angry and agitated." The Solicitor then asked, "What happens when he becomes angry and agitated?" Over appellant's objection, Mrs. Brown stated, "He gets violent." Appellant contends this testimony impermissibly attacked his character. He claims he was prejudiced because the Solicitor argued this violent propensity indicated appellant was the aggressor in the fight with Victim.

Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged. State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). Rule 404(a), SCRE, states the general rule that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."

The State argues, however, that the evidence appellant reacts violently was admissible as evidence of habit under Rule 406, SCRE, which provides in pertinent part:

> Evidence of habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit. . . .

Federal courts have recognized the tension between Rule 406 (habit) and Rule 404 (character) and noted the difficulty in distinguishing between admissible evidence of habit and inadmissible character evidence.[1] As indicated in the advisory committee's note to Federal Rule of Evidence 406, which is identical to our Rule 406, the distinguishing feature of habit is its degree of specificity. Habit has been described as conduct that is "situation-specific" or "specific, particularized conduct capable of almost identical repetition." Becker v. ARCO Chem. Co., 207 F.3d 176, 204 (3d Cir. 2000);

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[1]*See, e.g.,* Simplex, Inc. v. Diversified Energy Systems, Inc., 847 F.2d 1290, 1293 (7th Cir. 1988) ("We are cautious in permitting the admission of habit or pattern-of-conduct evidence under Rule 406 because it necessarily engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character, thereby thwarting Rule 404's prohibition against the use of character evidence except for narrowly prescribed purposes."); Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519, 1523 (11th Cir. 1985) ("The difficulty in distinguishing inadmissible character evidence from admissible habit evidence is great. Often the line between the two is unclear. . . .").

Simplex, 847 F.2d at 1293. This Court has defined the term "character," on the other hand, as "a generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness." State v. Nelson, 331 S.C. at 7, 501 S.E.2d at 718.

In this case, Mrs. Brown's testimony identified no specific conduct but simply indicated appellant's general propensity to become violent. We find this evidence inadmissible as evidence of habit under Rule 406. *Cf.* Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) (evidence of specific violent incidents admissible as habit evidence where party invariably reacted with extreme violence to any contact with uniformed police officer).

Although evidence of appellant's bad character was improperly admitted, we find any error harmless. Whether an error in the admission of evidence is harmless generally depends upon its materiality in relation to the case as a whole. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). The erroneous admission of character evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record. State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996). For instance, we have found such error harmless where there is other properly admitted evidence of conduct demonstrating the particular character trait in question. *See* State v. Braxton, Op. No. 25246 (S.C. Sup. Ct. filed February 5, 2001).

In this case, appellant's use of force during his argument with Victim the previous day clearly demonstrates appellant's propensity to become violent. Evidence of this conduct, which was properly admitted,[2] reveals the same information about appellant as Mrs. Brown's testimony. Accordingly, we find any error in the admission of Mrs. Brown's testimony harmless beyond a reasonable doubt.

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[2]In homicide cases, evidence of a previous difficulty between the accused and the decedent is admissible to show the animus of the parties and who was the probable aggressor. State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998).

b. Evidence appellant carried a gun

In questioning appellant's grandson, Billy, the Solicitor asked if Billy had seen appellant with a gun on the night of the shooting. Billy answered, "I didn't see it that night but I knew [appellant] always carried it on him." When asked what he meant by that, Billy testified over appellant's objection, "He usually had [the gun] in his belt or he kept it in his right pocket or usually just somewhere near him all the time." Similarly, Mrs. Brown testified, again over appellant's objection, that she did not see the gun that night but "the gun either is in his pocket, tucked in his belt right there, or either on the bed beside him." When asked, "Does it ever leave him?" she answered, "no."

Appellant contends this testimony was erroneously admitted as habit evidence. He claims he was unfairly prejudiced by its admission because, while he admitted shooting Victim in self-defense, he denied carrying a gun down the hall into the kitchen and accosting Victim.

We find this evidence was properly admitted as habit evidence. Unlike the testimony regarding appellant's general predisposition to violence, this evidence describes a pattern of specific, particularized conduct. Under Rule 406, this evidence was properly admitted to show appellant acted in conformity with this pattern of behavior on the night in question. *See* United States v. Yazzie, 1999 WL 597246 (10th Cir. 1999) (reflexive action of placing gun in waistband admissible as habit evidence because uniformity of behavior established habitual nature).

c. Evidence of appellant's gambling

On direct examination, Mrs. Brown testified that the house she lived in with appellant was titled in her name. This testimony was part of her explanation that Victim paid the rent to her and not appellant. On cross-examination, Mrs. Brown was asked, "You and [appellant] bought the house together and put your name on the title?" Mrs. Brown responded, "No. . . . It was necessary to borrow money on the house to keep the bills going. And I

had to have the house in my name in order to do that because of his credit rating. [Appellant] was gambling a lot and I had to pay the bills."

Appellant objected but the trial judge ruled he had opened the door to this response. *See* State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (appellant cannot complain of prejudice from evidence to which he opened the door). Appellant argues Mrs. Brown's testimony was not responsive to the question and it constituted character evidence that unfairly prejudiced him.

Even if appellant is not held to have opened the door to this testimony, we find its admission was not so prejudicial as to require reversal. Whatever negative connotation appellant's gambling may have had, it was not mentioned again during the trial and did not imply any propensity on appellant's part to commit the violent crime with which he was charged. We find this evidence had minimal impact in the context of the entire record and any error in its admission was harmless beyond a reasonable doubt. State v. Forney, *supra*.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richard
A. Blackmon, Respondent.

Opinion No. 25259
Submitted February 13, 2001 - Filed March 12, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Paul L. Held, of Sumter, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. We accept the agreement and publicly reprimand respondent. The facts as set forth in the agreement are as follows.

Facts

I. Conflict of Interest

Respondent represented a client in a divorce action. Prior to the termination of the client's representation, respondent also represented the client's spouse in a criminal matter. Respondent failed to disclose this representation to the client and failed to obtain her consent. Respondent also failed to respond with candor to an inquiry by ODC regarding this matter.

II. Client Neglect

Respondent failed to communicate properly with clients on two occasions. In a criminal matter, respondent failed to respond to communications from a client, the client's family, and the assistant solicitor. In a civil matter, respondent neglected to ensure that a client received a court order in a timely fashion and failed to properly explain the order to the client.

III. Trexler Matter

Terry A. Trexler was placed on interim suspension by Order of this Court dated October 2, 1998. In re Trexler, 333 S.C. 1, 507 S.E.2d 322 (1998). Respondent contacted some of Trexler's clients, with Trexler's consent, in an attempt to associate on their cases. Respondent failed to properly communicate with Trexler's clients regarding their options for representation.

Law

Respondent admits that his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation); Rule 1.3 (failing to act with reasonable diligence and promptness while representing a client); Rule 1.4(a) (failing to keep a client reasonably informed about the status of a matter and failing to

promptly respond to reasonable requests for information); Rule 1.7(b) (representing a client whose interests conflict with those of another client without obtaining informed consent); and Rule 8.4(e) (violating the Rules of Professional Conduct).

Respondent also admits that he violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating rules regarding the professional conduct of lawyers).

Conclusion

We find that respondent's misconduct warrants a public reprimand. We therefore accept the Agreement for Discipline by Consent and publicly reprimand respondent.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Victor Evans, individually and on behalf of all others similarly situated, Appellants/Respondents,

v.

The State of South Carolina; South Carolina State Retirement System; Retirement System for Judges and Solicitors of the State of South Carolina; Retirement System for Members of the General Assembly of the State of South Carolina; South Carolina Police Officers' Retirement System; South Carolina Department of Revenue; and South Carolina Budget and Control Board, Respondents/Appellants.

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

Opinion No. 25260
Heard January 10, 2001 - Filed March 12, 2001

REVERSED AND REMANDED

John M.S. Hoefer and Paige J. Gossett, of Willoughby & Hoefer, P.A., and A. Camden Lewis, of Lewis, Babcock & Hawkins, L.L.P., of Columbia, for appellants/respondents.

Vance J. Bettis, of Gignilliat, Savitz & Bettis, L.L.P., for respondents/appellants; Joseph D. Shine, Edwin E. Evans, and Anne Macon Flynn, for Respondent/Appellant South Carolina State Budget and Control Board; Harry T. Cooper, Jr., Ronald W. Urban, and Sarah G. Major, for Respondent/Appellant South Carolina Department of Revenue; Stephen R. Van Camp for Respondents/Appellants South Carolina State Retirement System, Retirement System for Judges and Solicitors of the State of South Carolina, Retirement System for Members of the General Assembly of the State of South Carolina and the South Carolina Police Officers' Retirement System, all of Columbia.

JUSTICE BURNETT: This case presents cross-appeals from the order of the circuit court denying, in part, and granting, in part, respondents/appellants' motion to dismiss. We reverse.

FACTS

In Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989), the United States Supreme Court held the doctrine of intergovernmental immunity and 4 U.S.C. § 111 (1997) prohibit the states from taxing federal government retirees at a greater rate than state and local government retirees are taxed. Davis held states could cure the infirmity "either by extending the tax exemption to retired federal employees (or to all retired employees), or by eliminating the tax exemption for retired state and local government employees." Id. at 818.

Prior to Davis, state retirement benefits in South Carolina were fully exempt from taxation while only the first three thousand dollars of federal retirement benefits were exempt from taxation. In response to Davis, the General Assembly deleted the full tax exemption, rendering state retirement benefits in excess of three thousand dollars taxable. Act No. 189, Part II, § 39, 1989 S.C. Acts 1436 (Act 189). In addition, the General Assembly increased the pension benefits for state retirees by 7% to offset the increased tax liability resulting from the lost exemption. Act No. 189, Part II, § 60, 1989 S.C. Acts 1436.[1]

Appellants/Respondents Evans and all others similarly situated (State Retirees) brought this declaratory judgment action in circuit court against Respondents/Appellants the State of South Carolina, the various State Retirement Systems, the Department of Revenue (DOR), and the Budget and Control Board (the State) alleging a cause of action for breach of contract and

[1]Act 189 is codified in parts of the various Retirement Code provisions at South Carolina Code Ann. § 9-1-1680 (State Employees), § 9-8-190 (Judges and Solicitors), § 9-9-180 (General Assembly Members), and § 9-11-270 (Police Officers) (Supp. 2000).

causes of action challenging the constitutionality of Act 189.[2] State Retirees also seek an injunction against future imposition of state income taxes on their retirement benefits and damages in the form of an income tax refund for state income taxes paid on their retirement benefits.

The State filed a motion to dismiss. The trial judge denied the motion insofar as the State claimed the action should be dismissed because State Retirees failed to pursue their administrative remedies under the Revenue Procedures Act. S.C. Code Ann. §§ 12-60-10 to -3390 (2000). However, concluding State Retirees had no contractual or property right in a tax exemption, the trial judge granted the State's motion to dismiss for failure of the complaint to state facts sufficient to constitute a cause of action for breach of contract, contract clause impairment, and takings. The parties filed cross-appeals.

ISSUES

I. Did the trial judge err by denying the State's motion to dismiss on the ground State Retirees failed to pursue their administrative remedies in accordance with the Revenue Procedures Act?

II. Did the trial judge err by deciding a novel issue on a motion to dismiss?

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[2]Specifically, State Retirees allege a violation of United States Constitution Article I, § 10 (impairment of contract) and the Fifth and Fourteenth Amendments to the United States Constitution (taking of property without just compensation and in violation of due process). Additionally, they allege violations of South Carolina Constitution Article I, § 4 (impairment of contract), Article I, § 13 (taking of property without just compensation), Article X, § 5 (tax levied without distinctly stating object), and Article V, § 16 (diminishing compensation for judges) (1976 and Supp. 2000).

III. Did the trial judge err by ruling State Retirees have neither a contractual right nor a property interest in the full tax exemption of their retirement benefits?

DISCUSSION

I.

The State argues the trial judge erred by denying its motion to dismiss on the ground State Retirees failed to pursue their administrative remedies in accordance with the Revenue Procedures Act. We agree.

In two provisions, the South Carolina Constitution states:

> The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted.

S.C. Const. art. X, § 10; S.C. Const. art. XVII, § 2.

Section 12-60-80 of the Revenue Procedures Act provides: "[t]here is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes." It further specifies, "[i]f a taxpayer brings an action covered by this chapter in circuit court, other than an appeal of an [Administrative Law Judge] decision . . . , the circuit court shall dismiss the case without prejudice." § 12-60-3390.

The Revenue Procedures Act establishes administrative procedures for taxpayers who claim a refund of any state tax. After a claim is filed with the DOR, the appropriate DOR division determines what refund, if any, is due. § 12-60-470(A) and (D). The taxpayer may appeal the division's decision to the DOR by filing a protest. § 12-60-470(E). If the

DOR makes a determination adverse to the taxpayer, the taxpayer may request a contested case hearing before the Administrative Law Judge Division. § 12-60-470(F). If the case either raises constitutional issues or does not qualify as a "small claims case" under § 12-60-520 [cases in which no more than $10,000 is in controversy], the Administrative Law Judge Division's decision may be appealed to the circuit court. § 12-60-3380.

State Retirees argue it would have been futile to pursue the administrative remedies provided by the Revenue Procedures Act because neither the DOR nor an Administrative Law Judge (ALJ) could rule on the merits of their claims. More particularly, State Retirees assert their constitutional causes of action are challenges to the facial validity of Act 189, claims which the separation of powers doctrine precludes executive branch officers from determining, not a request for a tax refund.

This Court recently addressed a similar issue. In Ward v. State, ___ S.C. ___, 538 S.E.2d 245 (2000), federal government retirees brought a declaratory judgment action also challenging the constitutionality of Act 189. The federal retirees asserted § 60 of Act 189, which increased the state retiree benefits to offset the elimination of the full tax exemption in § 39, violated the doctrine of intergovernmental immunity.

Recognizing the separation of powers doctrine prohibits an agency and ALJ from ruling on the constitutionality of a statute, we concluded § 12-60-3390 was inapplicable "where the sole issue [was] whether a statute or other legislative action is constitutional." Id. S.C. at ___, S.E.2d at 248. See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000) (if only issue is a constitutional challenge to a statute, party should seek declaratory judgment from circuit court rather than ALJ). The Court concluded the federal retirees were not required to exhaust their administrative procedures under the Revenue Procedures Act because the issue under consideration was the facial constitutionality of Act 189. The Court noted, however, "an agency or ALJ can still rule on whether a party's constitutional rights have been violated . . .

Merely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling." Ward, ___ S.C. at ___, S.E.2d at 247.

The DOR and the ALJ division have authority to rule on State Retirees' constitutional claims. As specified in their complaint, the class of persons whom State Retirees intend to represent are those persons employed by the State, its political subdivisions, and agencies before June 8, 1989. While State Retirees assert they are challenging the facial validity of Act 189, in actuality they are only challenging Act 189 as it applies to a limited class of state employees, not the constitutionality of Act 189 as a whole. Pursuant to Ward, the DOR and ALJ Division have authority to rule on State Retirees' constitutional claims.[3]

Moreover, State Retirees' position is that they are entitled to full tax exemption of their retirement benefits and, therefore, the DOR illegally or wrongfully collected excess taxes from them. This is precisely the type of action the General Assembly mandated must be remedied by the DOR. § 12-60-80 (only remedy involving illegal or wrongful collection of taxes is under the Revenue Procedures Act).

Additionally, State Retirees contend requiring them to comply with administrative procedures would deprive them of their constitutional right to a jury trial on their breach of contract action.[4] We disagree.

In their breach of contract cause of action, State Retirees assert the various Retirement Systems breached their contracts with them by unilaterally reducing the amount of tax exemption on their retirement

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[3]The Revenue Procedures Act itself recognizes constitutional claims may be presented to the DOR and the ALJ division. See § 12-60-3380.

[4]"The right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14.

benefits.[5] *Assuming* there is a contract between the Retirement System and State Retirees and that the full tax exemption is a part of that contract, the Retirement Systems cannot be liable for the alleged breach because it was impossible for Retirement Systems to perform under the contract's terms once Act 189 became law. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997) (party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party). Since State Retirees do not have a viable breach of contract action, pursuing their action through the administrative process does not violate their right to a jury trial.

We conclude the DOR has the jurisdiction and authority to rule on State Retirees' constitutional claims. Since State Retirees failed to follow the administrative procedures established by the Revenue Procedures Act, the circuit court erred by denying the State's motion to dismiss as required by § 12-60-3390 for State Retirees' failure to exhaust their administrative remedies. Hyde v. South Carolina Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994) (where there was no excuse for failing to exhaust administrative remedies, trial judge abused his discretion in finding plaintiff did not have to exhaust his administrative remedies).

II.

State Retirees argue the trial judge erred by deciding a novel issue, whether by passing Act 189 the General Assembly impaired their contracts with the Retirement Systems or took their property without just compensation, on a Rule 12(b)(6), SCRCP, motion to dismiss. We agree.

As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCP, motion to dismiss. Instead, a

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[5]At oral argument, State Retirees' counsel conceded the breach of contract action was against the various Retirement Systems and the remaining causes of action were against the other defendants.

novel issue is best decided in light of the testimony to be adduced at trial. Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980). However, where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim. Brown v. Theos, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999).

We find the trial judge erred by dismissing State Retirees' constitutional impairment of contract and takings causes of actions on the State's Rule 12(b)(6), SCRCP, motion to dismiss. *Assuming* State Retirees have either a contract right or a property interest in the full tax exemption of their retirement benefits, had the action proceeded to trial, the circuit court could have considered whether State Retirees' contract had been substantially impaired or their property taken without just compensation in violation of the federal and state constitutions. See generally U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) (in considering contract clause claim, court must ascertain, among others, whether the State law has in fact operated as a substantial impairment of a contractual relationship); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (same); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923) ("[T]he compensation to which the owner is entitled is the full and perfect equivalent of the property taken."); South Carolina Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999) (same). Testimony may have revealed Act 189's 7% increase in retirement benefits fairly offset any financial loss to State Retirees resulting from Act 189's deletion of the full tax exemption for state retirement benefits. Consequently, we find the trial judge erred by dismissing the novel issue presented by this case on a motion to dismiss.

III.

State Retirees appeal the trial judge's decision granting the State's Rule 12(b)(6), SCRCP, motion to dismiss for failure to state a claim upon which relief can be granted. State Retirees assert the trial judge erred by ruling the Retirement Code does not constitute a contract (including a

provision for a full tax exemption) between the Retirement Systems and their members and, alternatively, that State Retirees do not have a property right in the full tax exemption which cannot be taken from them without just compensation and without due process of law.[6]

Since we have determined State Retirees' claims should have first been considered by the DOR as part of the administrative process and, further, the trial judge should not have dismissed State Retirees' complaint on a Rule 12(b)(6), SCRCP, motion to dismiss, we decline to rule on the underlying merits of State Retirees' appeal of the dismissal of their complaint. In keeping with this decision, we reverse that portion of the trial court order denying the State's motion to dismiss and vacate the remaining portion of the order which dismissed State Retirees' complaint on its merits.

The circuit court's order is **REVERSED**. This case is **REMANDED** to the circuit court to enter an order dismissing State Retirees' complaint without prejudice. § 12-60-3390.

MOORE, A.C.J., WALLER, J., and Acting Justices H. Samuel Stilwell and William L. Howard, concur.

[6]State Retirees have not appealed the trial judge's dismissal of their South Carolina Constitution Article X, § 5 and Article V, § 16 causes of action.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of Myrtle Beach, Respondent,

v.

Juel P. Corporation and
Gay Dolphin, Inc., Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 25261
Heard February 8, 2001 - Filed March 12, 2001

REVERSED

Howell V. Bellamy, Jr., and Douglas M. Zayicek, of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, of Myrtle Beach, for petitioners.

Michael W. Battle, of Battle & Vaught, of Conway,

for respondent.

JUSTICE BURNETT: This case involves the proper construction of a Myrtle Beach city ordinance concerning abandoned and obsolete signs. Myrtle Beach Code § 902.4.7. We granted certiorari to review a decision of the Court of Appeals holding petitioners' sign could be deemed abandoned regardless of petitioners' intent. City of Myrtle Beach v. Juel P. Corp. and Gay Dolphin, Inc., 337 S.C. 157, 522 S.E.2d 153 (Ct. App. 1999). We reverse.

FACTS

In the early 1970s, petitioners purchased Ed's Hobby Shop in Myrtle Beach. The shop includes a rooftop sign, which is arguably the most prominent sign location in Myrtle Beach.

In 1979, Myrtle Beach enacted a zoning ordinance which prohibited rooftop signs in certain areas of the city, including the area where petitioners' sign was located. Section 902.8.3 of the zoning ordinance provided that rooftop signs had an amortization period of three years. In 1985, after the conclusion of a lengthy legal challenge to the city's comprehensive sign ordinance, the city notified petitioners that its ordinance had been declared legal, constitutional, and enforceable, and ordered petitioners to remove the rooftop sign from Ed's Hobby Shop. Petitioners, through an agent, responded by alerting the city to former S.C. Code Ann. § 57-25-195 (Supp. 1980) (repealed in 1990), which would have required the city to pay just compensation for the sign. Rather than compensate petitioners for the sign's removal, the city chose not to enforce its 1985 letter.

In 1989, in the imminence of Hurricane Hugo, petitioners removed the sign facing to minimize damage from the storm. Shortly after the storm had passed, petitioners received a letter from the city informing them the sign was more than 50% damaged and could not be restored. Petitioners asked for repair estimates from three different sign companies, all of which agreed with petitioners' estimate that the sign was only 10%

damaged. Petitioners approached the city's Director of Construction Services with these estimates, and, when he refused to concede their damage estimate, presented the estimates to the city manager. Petitioners attempted to reach a settlement with the city manager in which petitioners would agree to remove the rooftop sign in exchange for a permit for a unipole sign.

For the next five years, the sign remained vacant. Neither petitioners nor the city pursued formal appeals or informal negotiations. During this time, however, petitioners continued to pay Highway Department fees and maintain electricity to the sign. In the fall of 1994, petitioners installed new sign facing. On November 8, 1994, the city notified petitioners that the sign violated the city zoning ordinance, § 902.4.8, which prohibits rooftop signs. When petitioners did not remove the sign, the city sought an injunction. In its second amended complaint, dated September 24, 1996, the city for the first time claimed petitioners had abandoned their sign. Section 902.4.7 of the Myrtle Beach Code provides:

> Any sign which advertises or pertains to a business, product, service, event, activity or purpose which is no longer conducted or that has not been in use for three months or which is no longer imminent, or any sign structure that no longer displays any sign copy shall be deemed to be an obsolete or abandoned sign.

The Master-in-Equity for Horry County conducted a hearing on the city's injunction action and petitioners' takings counterclaim. The Master ruled the city could not rely on its ordinance because to do so would retroactively deprive petitioners of a vested right. He further ruled intent is a necessary element of abandonment, and found petitioners "did not simply abandon the most prominent and valuable sign in Myrtle Beach." The Court of Appeals reversed, holding a property owner's intent is irrelevant when an ordinance specifies an objective time frame after which a nonconforming use shall be deemed abandoned. City of Myrtle Beach v. Juel P. Corp. and Gay Dolphin, Inc., 337 S.C. 157, 522 S.E.2d 153 (Ct. App. 1999).

DISCUSSION

Petitioners argue several issues on appeal. We decline to reach these issues because we conclude the city's ordinance does not provide an objective time frame for abandonment.

When interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used. Charleston County Parks and Rec. Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995). The determination of legislative intent is a matter of law. Id. In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 417 S.E.2d 592 (1992). "[O]rdinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose." Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953).

We read the ordinance as follows:

> Any sign
> [1] which advertises or pertains to a
> business, product, service, event, activity,
> or purpose
> [a] which is no longer conducted
> or [b] that has not been in use for three months
> or [c] which is no longer imminent
> or [2] any sign structure that no longer
> displays any sign copy
>
> shall be deemed to be an obsolete or abandoned sign.

Myrtle Beach Code § 902.4.7. The city's proposed construction, "Any sign .

. . that has not been in use for three months . . . shall be deemed to be an obsolete or abandoned sign," is a forced construction that would impermissibly expand the ordinance's operation. We cannot harmonize the city's interpretation with our obligation to construe the ordinance strictly.

While the intent of the city may well have been to provide a three-month period of abandonment for signs, that intent is not expressed in the language of the ordinance. Moreover, the portion of the ordinance which clearly applies to petitioners' sign – "any sign structure that no longer displays any sign copy" – contains no time provisions whatsoever.

Because the ordinance expresses no time frame for abandonment, we apply the common law. Under the common law:

> In order to constitute abandonment, it must appear that there was a discontinuance of the nonconforming use with the intent to relinquish the right to so use the property. The question is largely one of intention and must be determined from all of the surrounding facts and circumstances.

Conway v. City of Greenville, 254 S.C. 96, 105,173 S.E.2d 648, 652-53 (1970). We find abundant evidence in the record to support the Master's finding petitioners did not intend to abandon their sign.

CONCLUSION

Because the city's ordinance does not provide an objective time frame for abandonment of a nonconforming use, the common law of abandonment controls. The evidence supports the finding that petitioners did not intend to abandon their rooftop sign.

REVERSED.

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

The Supreme Court of South Carolina

In the Matter of Donald
Loren Smith, Respondent.

O R D E R

Petitioner has been charged with trafficking in cocaine in violation of S.C. Code Ann. § 44-53-370(e)(2)(b)(1)(Supp. 2000), trafficking in methamphetamine in violation of S.C. Code Ann. § 44-53-375 (C)(1)(a) (Supp. 2000), and possession of marijuana with intent to distribute in violation of S.C. Code Ann. § 44-53-370(b)(2)(Supp. 2000). The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, because he has been charged with a serious crime. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that William B. Darwin, Jr., Esquire, is 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. Darwin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Darwin 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 account(s) 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 William B. Darwin, Jr., 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 William B. Darwin, Jr., 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. Darwin's office.

s/Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina

March 1, 2001

The Supreme Court of South Carolina

Melody Holmes, Respondent,

v.

State of South Carolina, Petitioner.

O R D E R

Respondent was sentenced for 49 separate counts of check forgery. Respondent was sentenced to five years, suspended on five years probation, on the first indictment. On the next nine indictments, respondent was sentenced to five years, consecutive, suspended during the probation. On all remaining indictments, respondent was sentenced to five years, suspended during the probation, to be served concurrently. Respondent's probation was subsequently revoked. The State has now appealed a post-conviction relief order finding that respondent is entitled to a new probation revocation hearing.

Respondent asks this Court to remand her motion for an appeal bond to the circuit court for consideration or, alternatively, to be allowed to

file a motion asking this Court to set bail.

A PCR applicant may be admitted to bail after the service of the notice of appeal by the applicant or the State. Rule 227(j), SCACR. Where the sentence originally imposed did not exceed imprisonment for ten (10) years, the petition for bail shall be made to the lower court. In all other cases, the petition for bail shall be made to the Supreme Court. Id.

Since this is an appeal from the PCR related to respondent's probation revocation, one must look to the sentence imposed at the probation revocation hearing for the sentence "originally imposed" under Rule 227(j). The sentence imposed at the probation revocation hearing, as construed by the Department of Corrections, was ten five-year sentences to be served consecutively.

This Court has stated that consecutive sentences are frequently considered as separate sentences for certain purposes while, for others, they may be considered a single sentence. Polk v. Manning, 224 S.C. 467, 79 S.E.2d 875 (1954). In State v. Mims, 273 S.C. 740, 259 S.E.2d 602 (1979), this Court held that, for the purpose of determining parole eligibility, consecutive sentences must be aggragated.

We now hold that, solely for the purpose of determining which court has jurisdiction to grant an appeal bond under Rule 227(j), consecutive sentences should not be aggregated. When an individual has received multiple consecutive sentences, all of which are less than ten years, we believe it is more appropriate for the circuit court to conduct a hearing to determine whether an appeal bond should be granted and, if so, in what amount and under what conditions.

Therefore, this matter is remanded to the circuit court to conduct a hearing on respondent's request for an appeal bond.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
March 8, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Duke Power Company, Petitioner,

v.

Laurens Electric Cooperative, Inc., The City of Fountain Inn and Marty Seppala,
Defendants.
Of whom
Laurens Electric Cooperative, Inc., is,

Respondent.

ORDER DENYING PETITION
FOR REHEARING

PER CURIAM: After careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded and, hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied and the attached opinion substituted for the opinion filed on December 18, 2000.

Kaye G. Hearn ,C.J.

Ralph King Anderson, Jr. ,J.

H. Samuel Stilwell ,J.

Columbia, South Carolina
March 7, 2001.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Duke Power Company,

Appellant,

v.

Laurens Electric Cooperative, Inc., The City of Fountain Inn and Marty Seppala,

Defendants.

Of whom Laurens Electric Cooperative, Inc., is,

Respondent.

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

Opinion No. 3273
Heard November 6, 2000 - Filed December 18, 2000
Substituted and Refiled March 7, 2001

REVERSED & REMANDED

James W. Logan, Jr., of Logan, Jolly & Smith, of Anderson, for appellant.

Wilburn Brewer, Jr., and Richard S. Dukes, Jr., both of Nexsen, Pruet, Jacobs & Pollard, of Columbia; and James E. Bryan, Jr., of Laurens, for respondent.

HEARN, C.J.: Duke Power Company (Duke) appeals the grant of summary judgment to Laurens Electric Cooperative, Inc. (Laurens) in Duke's action to enjoin Laurens from serving customers in a newly annexed area of the city of Fountain Inn. Duke argues Laurens lacks the authority under the Rural Electric Cooperative Act[1] (Act) to serve these customers. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Duke brought this action to enjoin Laurens, a rural electric cooperative (co-op), from providing power to a newly annexed area of Fountain Inn known as Country Gardens. Duke, Laurens, and Fountain Inn stipulated to the following facts: Fountain Inn is not a rural area under the Act because its population exceeds 2,500 people; Duke is the principal supplier of electricity to Fountain Inn in terms of both revenue and number of customers; neither Laurens nor Duke served any customers in Country Gardens at the time of annexation; and Fountain Inn adopted an ordinance following annexation granting Laurens an exclusive assignment to serve Country Gardens, part of which was previously assigned to Duke by the South Carolina Public Service Commission.[2]

Both Laurens and Duke moved for summary judgment. The trial court granted summary judgment to Laurens from which Duke appeals.

STANDARD OF REVIEW

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." WDW Prop. v. City of Sumter, 342 S.C. 6, 8, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. J.K. Const., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

DISCUSSION

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[1]S.C. Code Ann. §§ 33-49-10 to 1330 (1990 & Supp. 1999).

[2] Fountain Inn agreed to the stipulation of facts but did not participate further in the action and did not appear at the hearing.

Duke argues the circuit court erred in finding Laurens could lawfully initiate service in a nonrural area absent an applicable exception under section 33-49-250. We agree.

Rural electric cooperatives are creatures of statute and only have such authority as the legislature has given them. See South Carolina Elec. & Gas Co. v. Pub. Serv. Comm'n, 275 S.C. 487, 489, 272 S.E.2d 793, 794 (1980) (recognizing that regulatory bodies as creatures of statute hold only those powers expressly granted by the legislature). The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998)). If a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and courts must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994).

Laurens was created pursuant to the Act's provision granting co-ops the authority to supply energy to rural areas while promoting and extending the use of electricity across the state. S.C. Code Ann. § 33-49-210 (1990). Because Laurens is a co-op, this court must look to the Act to see if Laurens may lawfully initiate service to Country Gardens. "Under S.C. Code Ann. § 33-49-250, a rural cooperative may provide service only in rural areas, i.e., those with a population under 2500." Carolina Power & Light Co. v. Town of Pageland, 321 S.C. 538, 542, 471 S.E.2d 137, 139 (1996). The Act defines a rural area as one "not included within the boundaries of any incorporated or unincorporated city, town, village or borough having a population in excess of twenty-five hundred persons . . . ." S.C. Code Ann. § 33-49-20(1). By stipulation of the parties, Fountain Inn is no longer a rural area for purposes of the Act. Therefore, an exception must apply for Laurens to serve Country Gardens.

The Act provides two exceptions permitting a rural co-op to serve customers within a nonrural area, the annexation exception and the principal supplier exception. These exceptions provide:

> . . . subject to the provisions of § 58-27-1360, the act of incorporating or annexing into a city or town an area in which the cooperative is serving shall constitute the consent of the governing body of such city or town for

> the cooperative to continue serving all premises then being served and to serve additional premises within such area until such time as the governing body of the city or town shall direct otherwise and such cooperative is empowered to serve, but it shall not extend service to any premises in any other part of such city or town unless the cooperative was the principal supplier of electricity in such city or town; provided, further, that the right of a cooperative to continue to serve in a city or town in which it was the principal supplier of electricity shall not be affected by the subsequent growth of such city or town beyond a population of two thousand five hundred persons . . . .

S.C. Code Ann. § 33-49-250(1). Both exceptions prevent the ouster of co-ops from areas they have historically served due to population growth or annexation. See City of Abbeville v. Aiken Elec. Coop., Inc., 287 S.C. 361, 369, 338 S.E.2d 831, 835 (1985). These exceptions contemplate the co-op's continued service in an area.

Both Duke and Laurens stipulated that Duke was the principal supplier of electricity to Fountain Inn. Therefore, the principal supplier exception does not apply by the plain language of the statute.

Laurens contends the annexation exception applies here. We disagree. In Pageland, the court held that a co-op may continue serving customers following annexation by a nonrural municipality even where the co-op is not the principal supplier of electricity for that municipality. 321 S.C. at 542-44, 471 S.E.2d at 139-40. The Pageland court found the intent of the legislature in adopting the annexation exception was to permit a co-op to continue serving existing customers once it lawfully entered the area. See also Abbeville, 287 S.C. at 369, 338 S.E.2d at 835. In Pageland, the co-op was allowed to continue serving the annexed area because it was lawfully serving the customers in question before the annexation. Here, this analysis mandates the conclusion that Laurens may not serve Country Gardens. This does not result in any ouster because Laurens was not serving the area before its annexation.

Laurens's proposed interpretation of the Act would rob section 33-49-250 of any meaning and render it superfluous.[3] When construing a statute, we must presume the legislature did not intend a futile act. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). If rural co-ops may serve any area designated by a municipality, there is no need for section 33-49-250's exceptions. Accordingly, the circuit court's grant of summary judgment to Laurens is hereby reversed and remanded for the entry of an injunction consistent with this opinion.

REVERSED AND REMANDED.

ANDERSON and STILWELL, JJ., concur.

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[3]Because we agree with Duke that the issue in this case is whether Laurens may lawfully enter a nonrural area, we do not reach Laurens's contention that Fountain Inn has a constitutional right to choose an electric supplier. Were we to reach this issue, we would find the court addressed and rejected a similar contention in Pageland. There, Pageland contended the trial court's order was contrary to the holding in Berkeley Electric Cooperative, Inc. v. South Carolina Public Service Commission, 304 S.C. 15, 402 S.E.2d 674 (1991). In Berkeley, a co-op challenged the right of the city to designate a private power supplier in a newly annexed area. The court upheld the ordinance based on the municipality's constitutional right to designate its power supplier. Laurens, like Pageland, relies on Berkeley and S.C. Constitution, Article VIII, section 15 for the proposition that a municipality has an unlimited right to choose its electric provider. However, in Berkeley the rights of a co-op to provide that power were not discussed, and Pageland suggests the municipality's right is independent of the powers of a co-op. Pageland, 321 S.C. at 540, 471 S.E.2d at 138 (". . . notwithstanding the supplier may be prohibited from providing service by its status as a rural cooperative."). Further, a municipality may not enact measures inconsistent with the general laws of the state. S.C. Code Ann. § 5-7-30 (Supp. 1999).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Farm Bureau Mutual Insurance Co.,
. . . . . Respondent,

v.

Calvin Lee Wilson, Mark Walton Davis and Carl King,
. . . . . Defendants,

of whom Mark Walton Davis is, ... Respondent,

and

Carl King is, ... Appellant.

Appeal From Horry County
J. Stanton Coss, Jr., Master-in-Equity

Opinion No. 3311
Heard February 7, 2001 - Filed March 5, 2001

AFFIRMED

Gene M. Connell, Jr., of Kelaher, Connell & Connor, of Surfside Beach; and Phillip D. Sasser, of Conway, for appellant.

D. Michael Henthorne, Robert T. Bockman, and

William W. Doar, Jr., all of the McNair Law Firm, of Georgetown; N. David DuRant, of Surfside; and William E. Lawson, of Lawson & Gwin, of Myrtle Beach, for respondent.

CURETON, J.: South Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) filed this declaratory judgment action against Calvin Lee Wilson, Mark Walton Davis, and Carl King, seeking a determination of the parties' rights under a commercial automobile policy issued by Farm Bureau to Carl King. The master-in-equity found the policy did not provide King coverage because the utility trailer pulled by his truck had a weight capacity of over 5,000 pounds. King appeals. We affirm.

Facts

King is in the business of installing mobile homes. Farm Bureau issued a commercial policy to King insuring his 1988 Ford utility vehicle. King's employee was operating the vehicle while towing a utility trailer when the trailer disengaged, crossed the center line, and struck the vehicles occupied by Wilson and Davis.

Mark Gore, Farm Bureau's adjuster, investigated the accident. Gore testified King told him the capacity of the trailer was 10,000 pounds. Gore also stated King admitted the trailer was carrying approximately two hundred cement blocks at the time of the accident. The blocks, used to set up mobile homes, weigh approximately 30 pounds each.

Robert Taylor, a mechanical engineer and accident reconstructionist, described the trailer as "in between homemade and factory made." Thus, the trailer had no manufacturer's capacity nameplate. The trailer was constructed with a steel plate on the floor and sides. The bed was approximately six foot by ten foot, with eighteen inch sides. The trailer had two axles of a type used to transport mobile homes, and four tires, each with a maximum load capacity of 2,270 pounds. Taylor testified the trailer had a capacity of 6,500 to 7,500

pounds.

Donald Poston, a self-employed welder, testified he manufactured the trailer. He had built between thirty and forty trailers, of which approximately fifteen or twenty were utility trailers. Poston testified the capacity of the trailer is limited by the tongue. The tongue on this trailer was ten-feet long, five of which extended beyond the trailer. Poston testified the trailer had a capacity of approximately 4,000 pounds.

The master concluded, inter alia, King was not covered by the commercial automobile policy because the policy limited liability coverage to utility trailers with a capacity of 5,000 pounds or less and King's utility trailer had a capacity in excess of 5,000 pounds.

Standard of Review

A declaratory judgment action is neither legal nor equitable, but is determined by the nature of the underlying issue. Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991). An action to determine coverage under an insurance policy is an action at law. See Travelers Indem. Co. v. Auto World, Inc., 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (noting that an action to determine coverage under an automobile insurance policy is an action at law). In an action at law tried without a jury, the trial court's findings will not be disturbed on appeal unless the findings are found to be without evidence reasonably supporting them. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

Law/Analysis

King argues the master erred in concluding the auto policy excluded liability coverage. We disagree.

Part I of the policy describes liability coverage stating:

I.

> We will:
>
> 1. pay for **bodily injury** and **property damage you** or any **covered persons** are legally obligated to pay caused by an accident arising out of the ownership, maintenance or use of **your auto**.

The policy continues with a section defining supplementary payments and coverage extensions. The coverage extensions section first describes the coverage for "Use of Other Autos." It next describes liability coverage for "Use of Trailers." The master relied on this language in finding King not entitled to coverage:

> **USE OF TRAILERS**
>
> **Bodily Injury** and **Property Damage** Liability Coverage applies to your use of:
>
> 1. any utility **trailer** with a capacity of 5,000 pounds or less;
> 2. any farm **trailer** with a capacity of 25,000 pounds or less; or
> 3. any other **trailer** not owned or leased by you.
>
> **Bodily Injury** and **Property Damage** Liability Coverage applies to any other owned or leased **trailers** only when listed on the **Declarations** or subsequent endorsements and the premium charge is paid . . . .

King argues because the policy does not specifically exclude utility trailers with a capacity of more than 5,000 pounds, the master erred in reading the exclusion into the policy. Insurance policies are subject to general rules of contract construction. Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315,

440 S.E.2d 367 (1994). This court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning. Id. An insurer's obligation under a policy of insurance is defined by the terms of the policy itself and cannot be enlarged by judicial construction. South Carolina Ins. Co. v. White, 301 S.C. 133, 390 S.E.2d 471 (Ct. App. 1990).

It is true that a policy clause extending coverage has to be liberally construed in favor of coverage. Torrington Co. v. Aetna Cas. and Sur. Co., 264 S.C. 636, 216 S.E.2d 547 (1975). However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties. Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993). The fact that the exclusions section of the policy does not specifically include a statement excluding utility trailers with a capacity of more than 5,000 pounds does not defeat the limitation on covered utility trailers. The clause extending coverage to "any utility trailer with a capacity of 5,000 pounds or less" is not ambiguous. We find the master correctly interpreted the clause as excluding coverage of utility trailers with a capacity of more than 5,000 pounds.

II.

King also argues that despite the clause limiting coverage to utility trailers, the liability portion of the policy provides coverage to all trailers under the definitions in the policy. We disagree.

The policy provides the following definitions:

> 4. **Auto(s)** means a self-propelled **motor vehicle**, designed primarily to be used on public roads and required to be registered under the South Carolina Motor Vehicle Registration and Licensing Act.
>
> 8. **Motor vehicle** means a self-propelled vehicle or **trailer** designed for use on public roads.

15. **Trailer(s)** means a vehicle designed to be pulled by an **auto**.

King argues the term "auto" includes a trailer designed for use on public roads. Thus, as King's trailer is clearly designed for use on public roads, it is entitled to coverage as an "auto." Farm Bureau concedes that a "trailer designed for use on public roads" is defined as a "motor vehicle." However, not all "motor vehicles" are "autos." Only "self-propelled motor vehicles" are "autos" under the policy definitions, and "trailers" are independently defined as vehicles designed to be pulled by an "auto."

The language employed in an insurance contract is to be understood in its plain, ordinary, and popular sense. Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965). Courts will not torture the meaning of a policy to extend coverage not agreed to by the parties. General Ins. Co. v. Palmetto Bank, 268 S.C. 355, 233 S.E.2d 699 (1977). Under a normal reading of the policy language, we conclude a utility trailer is not defined as an "auto" under the policy definitions.

III.

Finally, King argues even if the policy excludes coverage to utility trailers with a capacity over 5,000 pounds, the master erred in finding his trailer had a capacity of over 5,000 pounds. We disagree.

Pursuant to our standard of review, we may reverse the master's factual findings only if they are found to be without evidence reasonably supporting them. See Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). There was conflicting testimony regarding the capacity of the trailer ranging from 4,000 to 10,000 pounds. We find there is evidence to support the master's conclusion that the trailer had a capacity greater than 5,000 pounds.

For the foregoing reasons, the order on appeal is

AFFIRMED.

GOOLSBY and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peggy H. Eaddy, n/k/a Peggy H. Oliver,

Respondent,

v.

Peter G. Oliver,

Appellant.

Appeal From Lexington County
Donna S. Strom, Family Court Judge

Opinion No. 3312
Heard February 7, 2001 - Filed March 5, 2001

REVERSED AND REMANDED

Kermit S. King and Heather S. Tolar, both of King & Vernon, of Columbia, for appellant.

J. Mark Taylor and C. Vance Stricklin, Jr., both of Wilson, Moore, Taylor & Thomas, of West Columbia, for respondent.

SHULER, J.: Peter G. Oliver filed this contempt action against his

ex-wife, Peggy H. Eaddy, alleging she violated the terms of a family court visitation order. The family court found no evidence of a willful violation and declined to hold Eaddy in contempt. Oliver appeals. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Oliver and Eaddy married in 1970. On November 21, 1995, the family court granted a divorce on the ground of one year's continuous separation. The final decree gave Eaddy sole custody of the parties' minor son Fred, then eleven years old, and awarded Oliver visitation on alternating weekends and part of the Thanksgiving and Christmas holidays. The order further provided visitation as agreed upon for other holidays and extended summer visitation; if unable to agree, either party could move the court to decide the issue. Neither party appealed this order.

In June 1997 Eaddy remarried and relocated to Myrtle Beach. Following the move, Eaddy and Oliver agreed to share transportation responsibility to facilitate visitation. On June 25 Oliver's attorney wrote Eaddy requesting a two-week visitation with Fred during the summer months. The letter encouraged Eaddy to negotiate the matter to avoid a court hearing. According to Oliver, Eaddy replied in a letter dated June 29, 1997. Therein, Eaddy stated she had discussed the matter with their son, but that Fred did not want to stay with his father for a two-week period. As a result, no extended visitation occurred during the summer of 1997.

In April 1998 Oliver's counsel wrote to Eaddy expressing his belief that the 1997 visitation problems had been resolved and reaffirming Oliver's desire to reach an agreement regarding his alternating weekend and 1998 summer visitation with Fred. Eaddy refused to cooperate, and Oliver filed an ex parte motion on September 15, 1998 seeking an order and rule to show cause why Eaddy should not be held in contempt for failure to comply with the visitation provisions of the family court's prior order.

After an unsuccessful mediation attempt, the family court held a hearing in June 1999. By order filed August 17, 1999, the court declined to find Eaddy

in contempt and dismissed the rule. The court also found Eaddy was entitled to attorney's fees, but did not require Oliver to pay them due to his precarious physical and financial health. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this Court has the "authority to find facts in accordance with our own view of the preponderance of evidence." Owens v. Owens, 320 S.C. 543, 546, 466 S.E.2d 373, 375 (Ct. App. 1996). Although a determination of contempt is within the trial court's discretion, an order refusing to hold a party in contempt "should be reversed when the holding is based on a finding that is without evidentiary support or when there is . . . an abuse of discretion." Means v. Means, 277 S.C. 428, 431, 288 S.E.2d 811, 812-13 (1982).

LAW/ANALYSIS

I. Failure to Find Eaddy in Contempt

Oliver first argues the family court erred in failing to find Eaddy in contempt of the prior order regarding visitation. We agree.

"An adult who wilfully violates, neglects, or refuses to obey or perform a lawful order of the court . . . may be proceeded against for contempt of court." S.C. Code Ann. § 20-7-1350 (Supp. 2000). For purposes of contempt, "[a]n act is willful if 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Wilson v. Walker, 340 S.C. 531, 538, 532 S.E.2d 19, 22 (Ct. App. 2000) (quoting Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988)).

Before a party may be held in contempt "the record must clearly and specifically reflect the contemptuous conduct." Henderson v. Henderson, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989). Once the movant makes a prima

facie showing by pleading an order and demonstrating noncompliance, "the burden shifts to the respondent to establish his defense and inability to comply." Id.; see also Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) ("[T]he moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order.").

Oliver contends he made a prima facie case for contempt by producing the order and testifying as to Eaddy's noncompliance, and claims the burden then shifted to Eaddy to provide a defense or explanation for noncompliance. He specifically asserts Eaddy did not meet this burden because she failed to testify or present any evidence in response. We agree.

In support of his motion, Oliver testified to ongoing problems with Eaddy in arranging visitation, and stated there had been periods of several months when he did not see his son. He related that plans were made for Fred without his knowledge and that Fred went on other social outings instead of coming to visit him as provided in the order. Oliver enumerated his continuing problems scheduling visits, in particular Eaddy's refusal to cooperate or keep him informed about Fred. Oliver further testified that he had tried several times to discuss his lack of visitation with Eaddy; he claimed Eaddy responded by telling him Fred did not want to see him, hanging up the phone, and refusing to answer letters from his attorney.

In particular, Oliver asserted there were several weekends in 1998 when Fred did not come for his regular weekend visitation, including spring break, Easter, April 15-17, April 24-26, May 8-10, and May 22-24. Although Oliver admitted the problems with visitation initially were better after the mediation, he stated they worsened again when Eaddy gave Fred a pick-up truck in the spring of 1999. According to Oliver, he has not seen his son since.

We agree with Oliver that this evidence constituted a prima facie showing of contempt. Indeed, the family court stated that "it is undisputed perhaps that [Oliver] hasn't had visitation according to the order." Thus, upon presentation of his case, the burden shifted to Eaddy to produce at least some evidence tending to establish a defense or explanation for failing to comply with the

family court order. Because Eaddy chose to produce *no* evidence, including her own testimony, we find she did not meet this burden. As a result, the family court abused its discretion in refusing to hold her in contempt. We therefore remand the case to the family court for a determination on the propriety of appropriate sanctions. See Lindsay, 328 S.C. at 338, 491 S.E.2d at 588 ("Even though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court's discretion."); Sutton v. Sutton, 291 S.C. 401, 409, 353 S.E.2d 884, 888-89 (Ct. App. 1987) ("Although the Family Court is empowered to find and punish for contempt, there is no requirement that sanctions be imposed upon a finding of contempt.").

II. Failure to Order Future Compliance

Oliver next contends the family court erred in failing to direct Eaddy to comply prospectively with the court's prior order on visitation. The record reflects Oliver first raised this issue in a motion to alter or amend the judgment; it is therefore not preserved for our review. See Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial."). Moreover, although the family court denied the post-trial motion, the court's order stated: "Even though it is not incumbent upon the Court to remind parties to abide by existing court orders, both parties are admonished to uphold all prior orders as specifically set forth therein." In our view this issue is meritless, as the parties were, in fact, admonished to obey all prior orders.

III. Attorney's Fees and Costs

Finally, Oliver argues the family court erred in failing to award him attorney's fees and costs. In light of our decision to reverse the family court's finding on contempt, we similarly reverse the award of attorney's fees to Eaddy and remand the issue for reconsideration along with the determination on sanctions. See Sexton v. Sexton, 310 S.C. 501, 427 S.E.2d 665 (1993) (reversing and remanding issue of attorney's fees for reconsideration where the substantive results achieved by trial counsel were reversed on appeal).

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,

Respondent,

v.

Laquaitta Lavestine Wilson; Willie Jerome Wilson, Jr.; John Doe, whose true name is unknown; Willie Jerome Wilson, III (DOB 06-11-91); Christopher Elmansion Wilson (DOB 12-29-92); and Wilshawn Shyheim Wilson (DOB 08-30-94),

Defendants,

of which Willie Jerome Wilson, Jr. is the,

Appellant.

Appeal From Richland County
Gerald C. Smoak, Jr., Family Court Judge

Opinion No. 3313
Heard September 13, 2000 - Filed March 5, 2001

REVERSED

Warren A. Kohn, of Columbia, for appellant.

John J. Hearn, of Columbia, for respondent.

HOWARD, J.: Willie Jerome Wilson, Jr., an inmate in the South Carolina Department of Corrections, appeals the order of the family court terminating his parental rights to his minor children, Willie Jerome Wilson, III, Christopher Elmansion Wilson, and Wilshawn Shyheim Wilson. We reverse.

FACTS/PROCEDURAL HISTORY

Willie Wilson ("the father") and Laquitta Wilson ("the mother") are the parents of Willie Jerome Wilson, III, born June 11, 1991; Christopher Elmansion Wilson, born December 29, 1992; and Wilshawn Shyheim Wilson, born August 30, 1994. The father was convicted of distribution of cocaine in 1995 and sentenced to sixteen years imprisonment. He has been incarcerated continuously since 1995 and is scheduled for release on November 16, 2001.

Two years after the father was incarcerated, all three children were placed into emergency protective custody with the South Carolina Department of Social Services ("SCDSS") as a result of physical neglect by the mother. The family court thereafter reviewed this case every six months, and the father was present at these review hearings. Although he requested an opportunity to visit with his children after each review, SCDSS did not permit visitation between the father and his children. Thus, the father has not seen his children in three years. During a review held on December 18, 1997, the family court ordered the father to pay child support "as able" through the Richland County Family Court.

On January 29, 1998, SCDSS filed this action for termination of parental rights against the mother, the father, and John Doe. SCDSS alleged the father's parental rights should be terminated because he failed to visit and support the children for a six-month period immediately preceding the commencement of the action.

On April 11, 1999, the family court ordered the termination of the parental rights of all the parties for failure to visit and for failure to support the children. The father appeals this termination.

STANDARD OF REVIEW

In a termination of parental rights case, the appellate court has jurisdiction to review the entire record to determine the facts in accordance with its view of the evidence. Richland County Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 496 S.E.2d 864 (1998). This Court may review the record and make its own findings as to whether clear and convincing evidence supports termination. South Carolina Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 413 S.E.2d 835 (1992).

LAW/ANALYSIS

On appeal, the father asserts the family court erred in terminating his parental rights for failure to support or visit his children. We agree.

The termination of parental rights is governed by statute. Code section 20-7-1572 provides for termination of parental rights where one or more of the following grounds are present:

> (3) The child has lived outside the home of either parent for a period of six months, and during that time the parent has *wilfully* failed to visit the child. The court may attach little or no weight to incidental visitations, but it *must be shown that the parent was not prevented from visiting by the party having custody* or by court order. The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit;
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> (4) The child has lived outside the home of either parent for a period of six months, and during that time the parent has *wilfully* failed to support the child. Failure to support means that the parent has failed to make a material contribution to the child's care. A

> material contribution consists of either financial contributions *according to the parent's means* or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the custodian and *the ability of the parent to provide support*.

S.C. Code Ann. § 20-7-1572 (Supp. 2000) (emphasis added).

Whether a parent's failure to visit or support a child is wilful is a question of intent to be determined by the facts and circumstances of each case. Broome, 307 S.C. at 52, 413 S.E.2d at 838. Our supreme court has defined wilfulness as "[c]onduct of the parent which evinces a settled purpose to forego parental duties . . . because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." Id. at 53, 413 S.E.2d at 839. Generally, the family court is given wide discretion in making this determination. However, the element of wilfulness must be established by clear and convincing evidence. Id. at 52, 413 S.E.2d at 838.

Assuming that one or both of these requirements enumerated within section 20-7-1572 have been met, the family court must also make a finding that the termination of parental rights is in the best interest of the child. S.C. Code Ann. § 20-7-1572 ("The family court may order the termination of parental rights upon a finding of one or more of the following grounds and a finding that termination is in the best interest of the child . . . ."). Our supreme court recently emphasized that the courts of this state have for many years decided "all matters involving the custody or care of children in 'light of the fundamental principle that the controlling consideration is the best interests of the child.'" Hooper v. Rockwell, 334 S.C. 281, 295, 513 S.E.2d 358, 366 (1999) (quoting In Re Doran, 129 S.C. 26, 31, 123 S.E. 501, 503 (1924)). As the court noted, the Legislature has placed an increasing emphasis on the best interests of the child in abuse and neglect cases as well. Id. Furthermore, "[t]he public policy of this state in child custody matters is to reunite parents and children." Id. at 296, 513 S.E.2d at 366. "When reunification is not possible or appropriate and a party moves to

terminate the parents' rights, that party must prove a ground for termination of parental rights by clear and convincing evidence." Id.

Citing Hamby v. Hamby, 264 S.C. 614, 216 S.E.2d 536 (1975), SCDSS argues that the father's voluntary pursuit of lawless conduct, resulting in his incarceration, is a sufficient basis for termination because the criminal conduct was wilful and naturally leads to the inability to visit or support the child during the term of incarceration. Therefore, the failure to visit or support the child is, itself, wilful. We disagree with this interpretation of section 20-7-1572 and Hamby.

In Hamby, our supreme court affirmed the family court's findings of abandonment. 264 S.C. at 614, 216 S.E.2d at 536. While the Hamby court did recognize that the father had "voluntarily pursued a course of lawlessness which resulted in his imprisonment and inability to perform his parental duties," the court also examined the parent-child relationship and lack of contact not only during the father's incarceration, but also during the period before his incarceration and during the father's short intervening periods of freedom. Id. at 618, 216 S.E.2d at 538. The basis of the court's conclusion that the father had displayed a settled purpose to forego his parental duties was not confined to the voluntary nature of the criminal act and its natural consequences. The court's analysis included consideration of all of the surrounding circumstances reflected in the record, including the nature of the parent-child relationship during times when the father was not incarcerated. Id. at 618-19, 216 S.E.2d at 538-39; see also Dep't of Soc. Servs. v. Henry, 296 S.C. 507, 509, 374 S.E.2d 298, 299-300 (1988) (finding "voluntary pursuit of a course of lawlessness resulting in imprisonment, coupled with flagrant indifference towards the children during intervening periods of freedom, manifest[ed] abandonment of the [children]").

The father argues that the family court erred in terminating his parental rights for wilful failure to visit the children for a period of six months. We agree.

Section 20-7-1572(3) specifically provides that in order for parental rights to be terminated for failure to visit "it must be shown that the parent was not prevented from visiting by the party having custody." S.C. Code Ann. § 20-7-

1572(3) (Supp. 2000). In this case, the family court concluded that SCDSS prevented the father from visiting the children based solely upon his incarceration. We agree with this conclusion. The record contains overwhelming evidence that SCDSS not only refused to facilitate visitation, it actually took an active role in preventing the father from visiting his children. Despite the father's repeated requests, the caseworkers refused to allow visitation both at the correctional facility and after the review hearings. SCDSS now asserts that its refusal to arrange visitation was based on a therapist's recommendation, although the father was denied visitation with his children for at least six months before the therapist drafted this recommendation. Therefore, we find this reasoning to be unconvincing.

Despite the conclusion SCDSS prevented visitation, the family court nevertheless terminated the father's parental rights based upon a failure to visit because the father did not write or communicate with the children during his incarceration. We conclude this was error. Section 20-7-1572(3) specifically provides that in order for parental rights to be terminated "it must be shown that the parent was not prevented from visiting by the party having custody." S.C. Code Ann. § 20-7-1572(3). Having found that SCDSS actively prevented visitation between the father and his children, the statutory requirement of section 20-5-1572(3) has not been met.

The father next argues the family court erred in terminating his parental rights for wilful failure to support the children for a period of six months. We agree.

In the judicial review order of December 18, 1997, the family court ordered the father to "pay support as able." The uncontradicted testimony of the father was that prison policies prevent him from earning any income while incarcerated and he has no other source of income. SCDSS provided no evidence that the father had any outside means with which to support the children.

Section 20-7-1572(4) specifically states that financial contributions are required "according to the parent's means" and that, when considering whether a parent has failed to support the child, the court may consider "the ability of the

parent to provide support." S.C. Code Ann. § 20-7-1572(4) (Supp. 2000). The family court found that the father earned no wages and was unable to earn income while employed in prison. The family court further noted that no family member had made any contribution to the support of the children on the father's behalf. Without considering the father's ability to pay or whether the failure to support the children was wilful, the family court terminated the father's parental rights on this failure. We conclude this was error. To determine whether a parent's failure to support or visit during the time of incarceration evinces a settled purpose to forego parental responsibilities requires a comprehensive analysis of all of the facts and circumstances. See Hamby, 264 S.C. at 614, 216 S.E.2d at 536; Henry, 296 S.C. at 506, 374 S.E.2d at 298.

The father has been incarcerated at Evans Correctional Center since 1995, which was before the children were taken into emergency protective custody by SCDSS. There is no evidence in the record that the father failed in his parental responsibilities to support or provide the children with a stable home prior to his incarceration. The uncontradicted testimony of the father is to the contrary.

As to the parent-child relationship after the parent's incarceration, the mother brought the children to the prison during the early portion of the father's incarceration. These visitations ended when SCDSS took custody of the children. The father has repeatedly attempted to sustain his relationship through requested visitation, which SCDSS has thwarted. The father has displayed his concern and desire to plan for the children by calling SCDSS on several occasions in an attempt to facilitate placement of the children with his parents. Although there is no evidence in the record that the father sent cards, letters, or anything of value to the children, the father's undisputed testimony is that he is not permitted to receive any income from his prison employment. SCDSS did not attempt to verify or contradict this assertion. Furthermore, SCDSS has provided no evidence the father has an outside means of providing support.

We conclude the record does not support a finding by clear and convincing evidence that the failure to visit or support the children was wilful. The statutory requirements of section 20-7-1572 to permit termination of parental rights have not been met. When all of the surrounding facts and circumstances are considered, the evidence does not clearly and convincingly

prove the father has "evince[d] a settled purpose to forego [his] parental duties." Broome, 307 S.C. at 53, 413 S.E.2d at 839.

Although we conclude the underlying statutory basis for terminating the father's parental rights has not been established, we hasten to point out that, even if the basis did exist, the record is woefully lacking in evidence from which a valid conclusion could be reached as to what is in the best interests of the children.

CONCLUSION

Terminating the parental rights of an incarcerated parent requires consideration of all of the surrounding facts and circumstances in the determination of wilfulness. The voluntary pursuit of lawless behavior is one factor which may be considered, but generally is not determinative. In this case, SCDSS has failed to prove a basis under section 20-7-1572 for termination of the father's parental rights by clear and convincing evidence. Therefore, the order of the family court terminating the father's parental rights is

REVERSED.

STILWELL and SHULER, JJ., concur.