The Supreme Court of South Carolina

RE: Lawyers Suspended by the South Carolina Bar

The South Carolina Bar has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(1), SCACR, since February 1, 2011. This list is being published pursuant to Rule 419(d)(1), SCACR. If these lawyers are not reinstated by the South Carolina Bar by April 1, 2011, 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)(1), SCACR.

Columbia South Carolina
March 8, 2011

Attorneys Suspended for Nonpayment of 2011 License Fees
As of March 1, 2011

Baylor B. Banks
Thompson Law, LLC.
3050 Peachtree Rd. Ste. 355
Atlanta, GA 30305

Gerald Archie Beard
Michelin North America, Inc.
P.O. Box 19001
Greenville, SC 29602

David Grant Belser
Belser & Parke, PA
17 N. Market St., Ste. 1
Asheville, NC 28801

Archie Lamont Dixon
NBA
645 Fifth Ave.
New York, NY 10022

Ryan Thomas Gardner
Locke Lord Bissell &
Liddell LLP
600 Travis St., Ste. 3400
Houston, TX 77002

Thomas M. Gremillion
Southern Environmental
Law Center
200 West Franklin St. Ste. 330
Chapel Hill, NC 27516

Gwendolyn S. Hailey
P.O. Box 3447
Durham, NC 27702

Thomas Alfred Jones III
Jones Law Firm, LLC
302 Jennings Ave.
Greenwood, SC 29649

Eric Paul Kelley
101 Saluda Pointe Dr.
Unit 718
Lexington, SC 29072

Terence E. McEnally III
15 E. Martin St.
Raleigh, NC 27601

Henry Eugene McFall
852 Gap Creek Rd.
Marietta, SC 29661

Susan T. Parke
Belser & Parke, PA
17 N. Market St., Ste. 1
Asheville, NC 28801

G. Clint Parker
109 Fairoaks Dr.
Greenville, SC 29615

Barrett Owen Poppler
Wiseman & Poppler, PA
P.O. Box 74
Concord, NC 28026

Lynn C. Potts
HEB
P.O. Box 839999
San Antonio, TX 78283

John J. Rearer
621 NW 102nd Ave.
Coral Springs, FL 33071-8800

Marc W. Richardson
EPA-CID
432 Freedom Trail
Brunswick, GA 31525

Garth D. Richmond
Harrity & Harrity, L.L.P.
11350 Random Hills, Ste.600
Fairfax, VA 22030

Linda Shields
116 W. Church St.
Edenton, NC 27932

Eugene E. Stoker
4422 Westminster Place
St. Louis, MO 63108

Lauren W. Thwaites
2175 Brewster Lane
Apt 1127
Myrtle Beach, SC 29577

Daniel John Wiley
2423 Chain Bridge Rd. NW
Washington, DC 20016

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
March 14, 2011
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Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jack Edward Earl Parker, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
John C. Few, Circuit Court Judge

Opinion No. 26940
Heard January 5, 2011 – Filed March 14, 2011

REVERSED

Chief Appellate Defender Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S.

Creighton Waters, all of Columbia; Solicitor Robert Mills Ariail, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: In this case, the Court granted Jack Edward Earl Parker's (Petitioner) request for a writ of certiorari to review the court of appeals' decision in *State v. Parker*, 381 S.C. 539, 673 S.E.2d 833 (Ct. App. 2009) affirming the trial court's decision to deny a motion to dismiss based on double jeopardy.

FACTS/PROCEDURAL HISTORY

It is undisputed that Petitioner shot and killed his sister's boyfriend, Robert Lee Stewart (Victim). In October 2003, Petitioner stood trial for murder. At trial, Petitioner claimed self-defense. The first trial ended when the judge granted Petitioner's motion for a mistrial. When Petitioner was tried again in 2005, he moved to dismiss based on double jeopardy. The circuit court judge at the second trial denied the motion and the jury convicted Petitioner of murder.

During the first trial, there was a great deal of animosity between the solicitor and defense counsel. Prior to questioning the first police witness, the solicitor explained that there was a videotape made of the crime scene that included graphic images of Victim's body. The solicitor redacted the original videotape to erase the graphic images and presented defense counsel a redacted copy on the day of trial. However, the original videotape, including the graphic images of Victim's body, was shown to the jury. Petitioner's counsel moved for a mistrial and dismissal with prejudice based on prosecutorial misconduct. Counsel for defense argued the solicitor's case was not going well and the State was now privy to his defense tactics. The solicitor claimed the tapes were switched unintentionally and inadvertently. The court found the explanation offered by the State "shocking" as to why "such a huge, substantial, material piece of evidence would be handled in such carefree fashion . . . ." The circuit court judge admonished the solicitor,

but denied the motion for a mistrial issuing a curative instruction that the jury was to disregard the fact that they viewed the body of Victim.

During the solicitor's closing argument, she accused defense counsel of unethical conduct in coaching witnesses and implied to the jury that it was their community duty to convict Petitioner of murder. After the solicitor concluded her closing argument, defense counsel again made a motion for a mistrial. Defense counsel contended a mistrial should be granted based on prosecutorial misconduct in closing argument in that the prosecution accused defense counsel of coaching witnesses, and argued facts not in evidence. Defense counsel ultimately argued that the cumulative effect of the prosecutorial misconduct warranted a mistrial. The circuit court judge charged the jury and then heard arguments on the mistrial motion. The solicitor contended her closing argument was justified by the evidence and was responsive to the defense's closing argument, thus, the mistrial motion should be denied. The jury then sent a note to the judge that it was deadlocked. The judge gave an *Allen* charge and the jury resumed deliberating. After further deliberation, the jury again reported that it was deadlocked. The judge received the note that the jury remained deadlocked as he was about to rule on the mistrial motion.

The circuit court judge noted he had reviewed the motion for a mistrial, the solicitor's closing argument, and his notes from the testimony. The judge found the statements made about Petitioner's counsel, the exhortation to the jury to convict in order to protect the community, and the introduction of the original videotape warranted a mistrial.

The circuit court judge stated, "In my readings of those opinions it's almost as if . . . this court can infer that the defendant was almost goaded into the position of asking for a mistrial. So based on the totality of the circumstances that [have] occurred in this trial . . . I will declare a mistrial . . . ." The solicitor asked if the mistrial was based specifically on prosecutorial misconduct or the comments in her closing argument. The judge responded, "The comments made in closing arguments, I would consider to be prosecutorial misconduct as well as . . . the video tape. . . . It's the cumulative

nature of everything." The State appealed the grant of a mistrial and the court of appeals dismissed the case as not immediately appealable.

Almost two years later, the State retried Petitioner. Petitioner moved to dismiss based on double jeopardy arguing the solicitor at the first trial intentionally goaded him into moving for a mistrial. The circuit court judge at the second trial denied the motion to dismiss. In denying the motion to dismiss that judge made two seemingly inconsistent findings. That judge stated:

> I am resolving this motion completely independent of whether or not the prosecutor intentionally goated [sic] the defense into making a motion for a mistrial. . . .
>
> . . . . Even if there had been prosecutorial misconduct, it was the fact that the jury was deadlocked that caused the mistrial.
>
> . . . . So regardless of my analysis of what happened in the first trial, this motion to dismiss is denied because it was the jury's being deadlocked that lead to the manifest necessity that lead [sic] to the mistrial.

Shortly after making the above finding, the circuit court judge also found the following:

> I do not find that the prosecutor specifically committed misconduct that was designed to elicit a motion for mistrial from Defendant so that the prosecutor would have another bite at the apple, another time to try the Defendant. I believe that the prosecutor was vigorously trying to win the case and not trying to throw the case in the way of a mistrial. So I am for those reasons, denying the motions [sic] to dismiss based on double jeopardy.

The second trial proceeded and the jury convicted Petitioner of murder. Petitioner appealed to the court of appeals. The court of appeals affirmed the denial of Petitioner's motion to dismiss based on double jeopardy.

ISSUE

Did the court of appeals err in affirming the circuit court judge's denial of defense counsel's motion to dismiss pursuant to the Double Jeopardy Clauses?

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citations omitted). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 6, 545 S.E.2d at 829.

LAW/ANALYSIS

Petitioner argues the solicitor who initially prosecuted Petitioner intentionally provoked defense counsel into moving for a mistrial. We agree.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect citizens from being twice placed in jeopardy of life or liberty. *See* U.S. Const. amend. V; S.C. Const. art. I, § 12; *Harden v. State*, 360 S.C. 405, 410, 602 S.E.2d 48, 50 (2004) (citation omitted). "Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." *State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005) (citation omitted).

"Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Oregon v. Kennedy*,

456 U.S. 667, 675–76, 102 S. Ct. 2083, 2089 (1982).[1] Hence, a properly granted mistrial poses no double jeopardy bar to a subsequent prosecution. "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id.* at 676, 102 S. Ct. at 2089; *see also State v. Mathis*, 359 S.C. 450, 460, 597 S.E.2d 872, 877 (Ct. App. 2004) (noting that a defendant who has moved for and been granted a mistrial may invoke the Double Jeopardy Clause to prevent a second prosecution when the prosecutor's conduct giving rise to the mistrial was intended to provoke him into moving for the mistrial). Hence, the determination of whether double jeopardy attaches depends upon whether the prosecutorial conduct was undertaken with the intent to subvert the Double Jeopardy Clause. *State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 447 (Ct. App. 2005) (citation omitted). "The trial court's finding concerning the prosecutor's intent is a factual one and will not be disturbed on appeal unless clearly erroneous." *Id.* (citation omitted).

The court of appeals held:

> At the second trial, Judge Few first denied the motion to dismiss based on the jury deadlock. We need not address this issue as we are restricted in our review of his further factual finding that the solicitor had not intentionally goaded the defense into moving for a mistrial. We find support in the record to affirm the finding that the solicitor did not intentionally goad Parker into moving for a mistrial. Accordingly, the trial court did not err in denying the motion to dismiss based on double jeopardy.

Parker, 381 S.C. at 544, 673 S.E.2d at 836. This holding is erroneous because it relies upon a letter not in the record and upon the second judge's incorrect conclusions.

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[1] "A defendant's motion for a mistrial constitutes 'a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.'" *Kennedy*, 456 U.S. at 676, 102 S. Ct. at 2089 (*quoting United States v. Scott*, 437 U.S. 82, 93, 98 S. Ct. 2187, 2195 (1978)).

"Case law . . . has consistently emphasized that application of the double jeopardy bar is dependent on a showing of the prosecutor's subjective intent to cause a mistrial in order to retry the case." *U.S. v. Williams*, 472 F.3d 81, 85–86 (3rd Cir. 2007). The intent necessary is not that "a person intends the natural and probable consequences of his or her acts if those acts are knowingly done." *Id.* at 88. If a court focuses on the natural and probable consequences of prosecutorial conduct, rather than the intent underlying that conduct, then any prosecutorial misconduct could bar retrial. *Id.* Hence, courts have to determine whether the subjective intent of the solicitor was to cause a mistrial. This is not an easy task to undertake, because it is almost unimaginable that a solicitor would admit that he or she took certain actions in an effort to cause the defendant to move for a mistrial. In our opinion, it will be rare that the solicitor actually intends to cause the defendant to move for a mistrial. However, in this case, if we do not hold the solicitor intentionally caused the defense to move for a mistrial, then it would seem the only possible way to find that a solicitor intentionally goaded the defense would be for a solicitor to admit he or she took certain actions in an effort to goad the defense.

The judge in the first trial found, "[I]t's almost as if . . . this court can infer that the defendant was almost goaded into the position of asking for a mistrial." We construe this as a holding by the first trial judge that the solicitor intentionally goaded defense counsel into moving for a mistrial. Regarding double jeopardy, the judge at the second trial held, "So I do not find that the prosecutor specifically committed misconduct that was designed to elicit a motion for mistrial from Defendant so that the prosecutor would have another bite at the apple . . . ." It was clearly erroneous for the second judge to find that the solicitor's conduct was not designed to elicit a motion for a mistrial in light of the first judge's finding that Petitioner was goaded into asking for a mistrial.[2] In cases of this type, the second trial judge makes

[2] We realize the finding by the first trial judge involved actions taken by an attorney, not witnesses. *Cf. Hill v. State*, 377 S.C. 462, 468, 661 S.E.2d 92, 95 (2008) ("[T]he circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to

a double jeopardy determination based on what the previous court actually held. The second trial judge should have determined what the first trial judge held and then determined whether that finding was supported by the facts. Thus, it was error for the second trial judge to find that the solicitor did not intentionally goad defense counsel.

The court of appeals merely mentions that it finds support in the record to affirm the second judge's finding regarding intentionally goading defense counsel, without listing any such evidence. We hold there is no evidence in the record to support the second judge's finding that the solicitor did not intend to elicit a motion for a mistrial. However, there is evidence in the record to support the first trial judge's finding that Petitioner was goaded into seeking a mistrial. The solicitor's statements about Petitioner's counsel,[3] encouraging the jury to convict in order to protect the community, and the introduction of the original videotape show that it was the solicitor's intent to cause a mistrial. Standing alone, any one of these actions might not show subjective intent on the part of the solicitor to goad the defense into seeking a mistrial. Rather, similar to what the first trial judge held, the totality of what occurred in the first trial leads to the conclusion that it was the intent of the solicitor to goad defense counsel to move for a mistrial.

The court of appeals relied in part on a letter from Judge Hayes, the judge in the first trial, to Solicitor Robert Ariail. The court of appeals noted, "We first must pay deference to Judge Hayes' [sic] letter indicating he did not rule on the jeopardy issue in granting the motion for a mistrial at the end of the first trial." *Parker*, 381 S.C. at 544, 673 S.E.2d at 836. "Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will

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their testimony."). We cite to this proposition because the judge at the first trial was not limited by a record and was in a superior position to observe and evaluate the solicitor's intent.

[3] "'It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense' or to otherwise denigrate defense counsel." *People v. Woods*, 53 Cal. Rptr. 3d 7, 14 (Cal. Ct. App. 2006) (*quoting People v. Bemore*, 996 P.2d 1152, 1175 (Cal. 2000)).

not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. The letter from Judge Hayes to Solicitor Ariail is not in the Record. Hence, it was error for the court of appeals to rely on that letter in their opinion.

Additionally, the second trial judge made the legal finding that it was the jury deadlock that caused the mistrial. The first judge, however, never made a ruling that jury deadlock caused the mistrial. Rather, the first judge specifically granted a mistrial based on prosecutorial misconduct. Because the first judge granted a mistrial based on prosecutorial misconduct, the second judge's finding that "it was the fact that the jury was deadlocked that caused the mistrial" was a legal error. We hold the finding that the solicitor did not intentionally goad the defense into moving for a mistrial was clearly erroneous.

CONCLUSION

Because the solicitor intended to goad the defendant into moving for a mistrial, the court of appeals opinion is reversed and further prosecution barred under the Double Jeopardy Clauses.

BEATTY, KITTREDGE, JJ., and Acting Justice John H. Waller, Jr., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Robert A. Boswell, Appellant.

Appeal From Lexington County
James W. Johnson, Jr., Circuit Court Judge
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26941
Heard January 19, 2011 – March 14, 2011

REVERSED AND REMANDED

David I. Bruck, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General William M. Blitch, Jr., of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE BEATTY: After a jury convicted Robert Boswell of first-degree burglary, the circuit court sentenced him to life imprisonment without the possibility of parole (LWOP).[1] Following the denial of his motions for a

[1] See S.C. Code Ann. § 16-11-311(A)(3) (2003) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a

new trial and reconsideration of his sentence, Boswell appealed his conviction and sentence on the grounds the circuit court erred in: (1) declining to suppress his confessions as they were the direct result of an unlawful arrest by officers acting outside their territorial jurisdiction; and (2) imposing an LWOP sentence as it constituted an abuse of discretion and violated state and federal protections against cruel and unusual punishment. Because we find the arrest of Boswell was unlawful, we reverse and remand.

I. Factual/Procedural Background

At approximately 6:15 p.m. on August 10, 2001, Amy Westbury left her Lexington County home to go to work. When she returned home the next morning around 11:00 a.m., Westbury discovered that someone had broken into her home through a bedroom window. Westbury's review of the home revealed that only items belonging to her and not her husband had been taken. Specifically, Westbury noticed the following items were missing: several dresses, a sequined gown, a taffeta gown, several pairs of shoes, workout leotards, undergarments, a couple of children's dresses, a bottle of perfume, makeup, jewelry, and a pillowcase from the master bedroom.

Shortly after discovering the break-in, the Westburys contacted the Lexington County Sheriff's Department. During the course of the investigation, Captain Joe Quig followed up on "a lead out of Calhoun County." According to Captain Quig, he received information that some of the stolen items may have been deposited in an abandoned house located off "a frontage road on I-26 right inside of Calhoun County, right outside of Lexington County."

On August 24, 2001, Captain Quig decided to investigate the abandoned house. Prior to entering Calhoun County, Quig contacted the Calhoun County Sheriff's Department and spoke with Sheriff Summers regarding the alleged stolen property. According to Quig, "the Sheriff said help myself, go ahead and take a look at the house; and that if I found

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crime in the dwelling, and . . . the entering or remaining occurs in the nighttime."); S.C. Code Ann. § 16-11-311(B) (2003) ("Burglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, 'life' means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen years.").

anything that didn't belong to us, he wanted me to catalog it and turn it into the Calhoun County Sheriff's Department for processing for possibly being a stolen item out of their area or their jurisdiction."

When Captain Quig and other Lexington County officers investigated the outside of the house and looked through the windows, they saw "female clothes" and "pornographic magazines on the floor and things like that." Because he believed some of the items may have belonged to Amy Westbury, Captain Quig procured a search warrant for the house.

As a result of their discovery, Captain Quig and other Lexington County officers, including Lieutenant Henry Dukes, set up surveillance of the abandoned house on August 24 and 25, 2001. Captain Quig claimed he had "cleared" the surveillance operation with Sheriff Summers. Quig testified that "[t]heir edict to us was 'Fine, have at it. We can't help you with it. If you find anything or anything comes up, call us.'"

On the second night of the surveillance operation, Lieutenant Dukes made radio contact with the Calhoun County Sheriff's Department. In response to the call, Sheriff Summers and several of his deputies came to the surveillance location. Lieutenant Dukes then discussed the operation with Sheriff Summers and requested that a Calhoun County officer remain at the location. According to Lieutenant Dukes, Sheriff Summers stated, "It looks like you are doing a fine job. You have got everything under control as far as I'm concerned." Sheriff Summers also did not believe it was necessary for a Calhoun County officer to remain with Lieutenant Dukes but assured him that he would return if assistance was needed.

At approximately 10:30 p.m. on August 25, 2001, a man drove up to the abandoned house. Lieutenant Dukes observed the man, who was later identified as Boswell, stop the vehicle and turn off all the lights except for the interior light. As Lieutenant Dukes approached the vehicle, he saw Boswell "bringing different items out of the vehicle and chunking them into the woods." When he turned his flashlight on Boswell, Lieutenant Dukes observed Boswell "with his pants down around his ankles. He had something in his hand wrapped around his penis, and he was masturbating as he was throwing things out of the vehicle into the hedgerow and also onto the

ground." After Lieutenant Dukes identified himself, he directed Boswell to stop what he was doing and put his hands where the officer could see them. Boswell ignored the command and continued to reach into the vehicle and throw out items, including a knife and a crowbar. As a result, the officers threw Boswell to the ground, handcuffed him, and placed him in investigative detention. Lieutenant Dukes then ascertained Boswell's identity, read him his Miranda[2] rights, and placed him in a Lexington County patrol car to await the arrival of Captain Quig. Lieutenant Dukes explained that Boswell was detained for "[b]eing at the location nude, masturbating, also throwing weapons, and not following law enforcement that was fully identified."

Shortly thereafter, Lieutenant Dukes contacted Sheriff Summers and Captain Quig. When Captain Quig arrived, he spoke to the Lexington County officers as well as Sheriff Summers and two Calhoun County deputies.

The officers' subsequent search of Boswell's vehicle revealed what one officer described as burglary tools, which included a pair of gloves, a hammer, a screwdriver, and a flashlight. The vehicle also contained "gym bags" that had "various clothing items."

After speaking with Sheriff Summers, Captain Quig "determined that we had more [than] probable cause to arrest [Boswell] with the burglary tools and the things that were in that field that he had thrown out on the ground." He then transported Boswell to the Lexington County Sheriff's Department.

On August 26, 2001, Boswell gave a recorded statement in which he confessed to the burglary. On August 28, 2001, Captain Quig had Boswell review the transcribed statement and check it for accuracy. That same day, Boswell agreed to give another statement. This statement, however, was given while Boswell rode with Captain Quig in a patrol vehicle. According to the text of the statement, Boswell directed Captain Quig to drive to the Westburys' home. When they arrived, Boswell again confessed to burglarizing the Westburys' home.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Subsequently, a Lexington County grand jury indicted Boswell for first-degree burglary on the ground that the entry into the Westbury home occurred in the nighttime.

Prior to trial and throughout the trial, Boswell's counsel sought to suppress Boswell's confessions to Captain Quig on the ground that they were the products of an unlawful arrest made without legal authority by Lexington County law enforcement officers acting outside their territorial jurisdiction. In response, the State offered evidence of a 1999 "multi-jurisdictional agreement" entered into between the Calhoun County and Lexington County Sheriffs' Departments that purported to confer the authority of officers to arrest in the other county's jurisdiction.

In a pre-trial ruling, the trial judge denied Boswell's counsel's motion. Specifically, he found that "the Lexington County deputies did act consistently with the standard required by the statute." Throughout the trial, the judge reiterated this ruling each time Boswell's counsel interjected an objection.

Following the denial of its motion for a directed verdict, the defense presented Boswell as its sole witness. Although Boswell admitted to committing the burglary, he testified it occurred during the daytime and not the nighttime as stated in his confessions. In explaining this discrepancy, Boswell testified that he was "confused" because he was not taking his medication for bipolar disorder and he was "coming off" the Valium that he had taken prior to his arrest. Boswell also believed he committed the burglary because he was not taking his medication for bipolar disorder. He claimed he had not taken the medication for approximately one year before the August 2001 burglary.

Ultimately, the jury convicted Boswell of first-degree burglary. The trial judge sentenced Boswell to life imprisonment without the possibility of parole. In a post-trial motion, Boswell's counsel moved for a new trial on the ground that Boswell's arrest was unlawful and any evidence obtained as the result of the arrest was inadmissible. Additionally, counsel requested the trial judge reconsider the life sentence.

By order dated May 12, 2008, Circuit Court Judge James Johnson[3] denied Boswell's motions for a new trial and reconsideration of his sentence. Subsequently, Boswell appealed his conviction and sentence to the Court of Appeals. This Court certified the appeal pursuant to Rule 204(b), SCACR.

II. Discussion

A.

Boswell contends the trial judge erred in declining to suppress his confessions to Captain Quig as they were the product of an unlawful arrest by the Lexington County officers acting outside their territorial jurisdiction. In support of this contention, Boswell asserts that neither the 1999 multi-jurisdictional agreement nor any provision of South Carolina law authorized the Lexington County deputies to arrest him in Calhoun County. Because his arrest was unlawful, Boswell argues that his confessions were inadmissible as they were the "fruit of the poisonous tree."[4]

B.

As a threshold matter, the State claims that Boswell failed to properly preserve this issue for appellate review. We disagree.

Based on our review of the record, Boswell's counsel clearly argued that Boswell's statements should have been suppressed as they were the product of Lexington County officers acting outside their territorial jurisdiction. Because counsel and the judge simply used the term "jurisdiction," the judge at times seemed to interpret this term as "subject

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[3] Due to a number of delays, the trial judge (Circuit Court Judge Marc H. Westbrook) was unable to hear the motion prior to his untimely death. On March 14, 2008, approximately 4.5 years after the trial, Circuit Court Judge James W. Johnson held a hearing on the motion.

[4] See State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by exploitation of that illegality." (citing Wong Sun v. United States, 371 U.S. 471 (1963)).

matter jurisdiction." Given that territorial jurisdiction and subject matter jurisdiction are separate and distinct concepts, there was some confusion amongst counsel and the judge as to the use of the term "jurisdiction." See Smith v. Commonwealth, 693 S.E.2d 765, 769 (Va. Ct. App. 2010) (parsing the term "jurisdiction" and recognizing that subject matter jurisdiction is the authority granted through the constitution or statute to adjudicate a class of cases or controversies and that territorial jurisdiction is the authority over persons, things or occurrences located in a defined geographical area); see also State v. Dudley, 364 S.C. 578, 614 S.E.2d 623 (2005) (recognizing that the State's extra-territorial jurisdiction is not a component of subject matter jurisdiction).

Despite the specific terminology error, the judge understood that Boswell's counsel was moving to suppress the confessions as the fruit of an unlawful arrest.[5] Moreover, in denying this motion, the judge stated that "the Lexington County deputies did act consistently with the standard required by the statute and [I] deny the motion to dismiss on lack of jurisdiction." As we interpret this ruling, the judge clearly considered and ruled on the territorial arrest powers of the Lexington County deputies in Calhoun County. Additionally, Boswell's counsel repeatedly raised this argument and interjected an objection to the admission of Boswell's statements throughout the trial.

Finally, we reject any assertion that Boswell's confessions were cumulative to Boswell's trial testimony. Because the judge had ruled against the defense motion, counsel called Boswell as a witness to explain these confessions. Thus, Boswell should not now be precluded from raising this properly preserved issue on appeal.

C.

Finding the issue preserved, the question becomes whether the Lexington County officers were authorized to arrest Boswell in Calhoun County.

[5] Notably, counsel argued that "any evidence seized in connection with the arrest, to include any statements made by the Defendant as a result of the arrest, would be unlawful and the fruit of the poisonous tree. We accordingly ask for a ruling on that point."

As an initial matter, it is undisputed that the Lexington County officers were not "in pursuit" of Boswell from Lexington County into Calhoun County; thus, section 17-13-40 of the South Carolina Code is not relevant to our determination of this issue. See S.C. Code Ann. § 17-13-40(B) (2003) ("When the police authorities of a county are in pursuit of an offender for a violation of a county ordinance or statute of this State committed within the county, the authorities may arrest the offender, with or without a warrant, at a place within the county, or at a place within an adjacent county."). Furthermore, there is no substantiated evidence that the Lexington County officers had a warrant for Boswell's arrest.[6]

Therefore, the only two grounds by which the Lexington County officers could have been authorized to arrest Boswell in Calhoun County are the 1999 multi-jurisdictional agreement or via a private citizen's arrest. In order for the 1999 agreement to confer arrest authority, we must find that the agreement was valid and that its terms covered the factual scenario presented in the instant case. Alternatively, if we find that the 1999 agreement did not authorize the arrest, we must determine whether the Lexington County officers effectuated a proper citizen's arrest.

On April 16, 1999, Lexington County Sheriff James Metts and Calhoun County Sheriff Dennis Jones signed a written agreement "for the purpose of securing to each other the benefits of mutual aid in the event of natural disaster, disorder, or other emergency situations . . . ." The terms of the agreement incorporate the text of sections 23-1-210 and 17-13-45 of the South Carolina Code, which govern agreements involving the temporary transfer of law enforcement officers.[7]

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[6] During the pre-trial hearing, Captain Quig stated "the initial arrest on [Boswell] was subsequent to a bench warrant that had been issued in 2000 for traffic violations, with the other things to be investigated, and warrants to follow in the morning for the burglary."

[7] At the time the counties entered into the agreement, section 23-1-210 provided:

> (A) Any municipal or county law enforcement officer may be transferred on a temporary basis to work in law enforcement in any other municipality or county in this State under the conditions set forth in this section, and when so transferred shall have all powers and authority of a

In 2000, the Legislature promulgated section 23-20-50 to require County approval of multi-jurisdictional agreements. This section states:

> (A) An agreement entered into pursuant to this chapter on behalf of a law enforcement authority must be approved by the appropriate state, county, or local law enforcement authority's chief executive officer. A state law enforcement authority must provide a copy of the agreement to the Governor and the Executive Director of the State Budget and Control Board no later than one business day after executing the agreement. An agreement entered into with a local law enforcement authority pursuant to this chapter must be approved by the governing body of each jurisdiction. For

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> law enforcement officer employed by the jurisdiction to which he is transferred.
>
> (B) Prior to any transfer as authorized in subsection (A), the concerned municipalities or counties shall enter into written agreements stating the conditions and terms of the temporary employment of officers to be transferred. The bond for any officer transferred shall include coverage for his activity in the municipality or county to which he is transferred in the same manner and to the same extent provided by bonds of regularly employed officers of that municipality or county.

S.C. Code Ann. § 23-1-210 (A), (B) (2007). In 2007, this code section was amended to expand the authority of multi-jurisdictional task forces. Act No. 3, 2007 S.C. Acts 4; see also S.C. Code Ann. § 23-1-210 (Supp. 2010). This amendment, however, does not affect the disposition of the instant case.

Additionally, section 17-13-45 provided:

> When a law enforcement officer responds to a distress call or a request for assistance in an adjacent jurisdiction, the authority, rights, privileges, and immunities, including coverage under the workers' compensation laws, and tort liability coverage obtained pursuant to the provisions of Chapter 78, Title 15, that are applicable to an officer within the jurisdiction in which he is employed are extended to and include the adjacent jurisdiction.

S.C. Code Ann. § 17-13-45 (2003).

agreements entered into prior to June 1, 2000, the agreement may be ratified by the governing body of each jurisdiction.

(B) The officers of the law enforcement provider have the same legal rights, powers, and duties to enforce the laws of South Carolina as the law enforcement agency contracting for the services.

S.C. Code Ann. § 23-20-50(A), (B) (2007) (emphasis added).

Given this statute was in effect at the time of Boswell's arrest, we must assess the validity of the 1999 agreement. The last sentence of subsection A states that "the agreement may be ratified by the governing bodies of each jurisdiction." The State construes the phrase "may be ratified" to mean that the governing bodies of Calhoun and Lexington counties did not have to formally approve the 1999 agreement after the 2000 amendment. We disagree.

In contrast to the State's interpretation, we construe subsection A as requiring governing bodies to formally approve a pre-existing agreement if it is to retain its validity.[8] Taking into account the significance of territorial jurisdiction, we believe a more stringent approach needs to be followed in order to confer this type of authority.

In the instant case, the General Counsel for the Lexington County Sheriff's Department admitted that the 1999 agreement had been "sent to" but not voted on by the county council. Based on the failure to satisfy the requisite statutory provisions, we find the 1999 agreement was invalid. Thus, it could not have operated to authorize the Lexington County officers to arrest Boswell in Calhoun County. Cf. Commonwealth v. Novick, 438 A.2d 974 (Pa. Super Ct. 1981), appeal dismissed as improvidently granted, 458 A.2d 1350 (Pa. 1983) (concluding that, absent a proven joint municipal contract for police protection between the jurisdictions involved, an extra-

[8] See Black's Law Dictionary 1268-69 (7th ed. 1999) (defining "ratification" as "[c]onfirmation and acceptance of a previous act, thereby making the act valid from the moment it was done"); cf. id. at 98 (defining "approve" as "[t]o give formal sanction to; confirm authoritatively").

jurisdictional arrest for burglary by local police officer without a warrant was invalid, even though made on "probable cause" to suspect the arrestee of burglary; reversing trial court's decision refusing to suppress an overwhelming quantity of evidence resulting from oral and written inculpatory statements by the arrestee following the arrest in question).

Even assuming the 1999 agreement was valid, the terms of the agreement did not cover the actions of the Lexington County officers as the employment of officers from the adjacent jurisdiction was to occur only in the event of emergency situations or when one jurisdiction specifically requested the assistance of officers from the adjacent jurisdiction.[9] Moreover, the agreement clearly intended for the Lexington County and Calhoun County officers to work simultaneously.

None of the above-outlined requirements were present in the instant case. Here, Lexington County officers "cleared" their surveillance operation with the Sheriff of Calhoun County. Although Sheriff Summers and several officers were present at the beginning of the surveillance operation, Sheriff Summers did not feel that it was necessary for his county officers to remain at the surveillance site. Furthermore, no Calhoun County officers were present at the time of Boswell's arrest. In view of the specific facts of instant case, we conclude the 1999 agreement did not authorize the Lexington County officers to arrest Boswell in Calhoun County.

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[9] Paragraph 4 A of the agreement provides:

> A request for assistance shall only be made by the senior duty officer of the law enforcement agency requiring such assistance. The request shall include a description of the situation creating the need for assistance, the number of law enforcement officers requested, the location to which personnel are to be dispatched, and the officer in charge at such location.

Furthermore, the Legislature intended for these multi-jurisdictional agreements to be in place for the purpose of emergency situations. See S.C. Code Ann. § 23-20-30 (2007) (recognizing need for the agreements for public safety functions, which include "traditional public safety activities which are performed over a specified time period for patrol services, crowd control and traffic control, and other emergency service situations").

In view of our finding that the 1999 agreement did not authorize the Lexington County officers to arrest Boswell outside of their territorial jurisdiction, the question becomes whether the officers acting as "private citizens" could have effectuated the arrest.

The key case in this determination is State v. McAteer, 340 S.C. 644, 532 S.E.2d 865 (2000). In McActeer, an off-duty (but still uniformed) municipal officer observed McAteer drive his automobile approximately 250 yards on a dirt road outside the municipality's city limits. The officer approached the car, and McAteer rolled down the window. Id. at 646, 532 S.E.2d at 865. The officer smelled alcohol and observed open alcoholic beverage containers in the car, and detained McAteer until a Highway patrolman arrived. Id. The patrolman administered several field sobriety tests to McAteer, then formally arrested him and transported him to the York County Detention Center where McAteer blew a .18 on the breathalyzer. Id.

Because the officer was outside the municipality's city limits when he first observed McAteer, this Court found that he had no police authority to detain McAteer. Id. at 646, 532 S.E.2d at 866. We, however, considered the question of whether the officer was authorized to arrest McAteer as a private citizen. Id. After conducting a thorough survey of statutory and common law, this Court ultimately held that "there is no common law right to make warrantless citizen's arrests of any kind and that such rights as exist are created by statute in South Carolina." Id. at 650, 532 S.E.2d at 868.

Our decision in McAteer clearly limited a citizen's power to arrest only in those instances involving a felony. McAteer, 340 S.C. at 646-47, 532 S.E.2d at 866 (citing section 17-13-10, which provides that a citizen may arrest upon view of felony committed, and finding inapplicable section 17-13-20, which permits other warrantless citizen's arrests for events occurring in the nighttime given McAteer's arrest occurred in the daytime and involved a misdemeanor and not a felony).

Here, Boswell's actions may have supported an arrest for indecent exposure; however, this offense is a misdemeanor.[10] Because the Lexington

[10] See S.C. Code Ann. § 16-15-130(A)(1), (B) (Supp. 2010) (providing that "[i]t is unlawful for a person to wilfully, maliciously, and indecently expose his person in a

County officers did not witness Boswell commit a felony, they could not have effectuated a citizen's arrest of Boswell under McAteer.

Thus, the question becomes whether there is any other ground to support a citizen's arrest. The only conceivable avenue would be pursuant to section 17-13-20(d) of the South Carolina Code, which provides for a citizen's arrest if the citizen witnesses another disposing of stolen items in the nighttime. See S.C. Code Ann. 17-13-20(d) (2003) ("A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person . . . has in his possession stolen property.").

We find the facts do not support a citizen's arrest under section 17-13-20(d). When Boswell arrived at the abandoned house, Lieutenant Dukes observed him throw several items out of the vehicle, including a crowbar and a knife. Although these items could have been legitimately construed as burglary tools, it would have been purely speculative for Lieutenant Dukes to identify these items as stolen. Lieutenant Dukes essentially admitted this fact when he conceded that he had no way of knowing whether any of the items came from Lexington County. Based on his observations, he could only discern that the items "were consistent with items that we were looking for from the burglary that happened in Lexington County."

Based on the foregoing, we conclude Boswell's arrest was unlawful as there was no specific statutory authorization or valid agreement between Lexington County and Calhoun County to authorize the warrantless arrest. See Russell G. Donaldson, Annotation, Validity, In State Criminal Trial, of Arrest Without Warrant By Identified Peace Officers Outside of Jurisdiction, When Not in Fresh Pursuit, 34 A.L.R.4th 328, § 4 at 337 (1984 & Supp. 2011) ("There is authority to the effect that, absent specific statutory authorization such as a 'fresh pursuit' law, or valid agreements between adjoining or neighboring governmental entities creating specific authority for extrajurisdictional, warrantless arrests by police officers, there can be no validity in such an arrest, the assertion of purported official authority therein

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public place, on property of others, or to the view of any person on a street or highway;" classifying the crime of indecent exposure as a misdemeanor).

negating any theory that the arresting officer or officers could have been acting as 'private citizens' at the time.").[11]

III. Conclusion

In conclusion, we hold the Lexington County officers were not authorized to arrest Boswell in Calhoun County as the 1999 agreement did not confer this power and there is no South Carolina statute that would support a citizen's arrest. Accordingly, we find trial judge erred in refusing to suppress Boswell's confessions as the product of the unlawful arrest.[12]

REVERSED AND REMANDED.[13]

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

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[11] Even if the arrest was unlawful, the State claims it was "remedied" by the officers' "good faith" reliance on the 1999 agreement, the permission granted by the Calhoun County Sheriff, the presence of the Calhoun County Sheriff, and the subsequent determination that Boswell had an outstanding warrant for his arrest. We find that none of the reasons posited by the State can "remedy" the unlawful arrest.

[12] In view of our ruling that Boswell's arrest was unlawful and that his confessions should not have been admitted, we decline to consider Boswell's arguments regarding his sentence of life imprisonment without the possibility of parole. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

[13] In no way should our decision be construed as minimizing Boswell's disturbing conduct for which he has been incarcerated since 2001. We cannot, however, ignore or capriciously disregard a jurisdictional defect in order to reach a more desirable result.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lawton Limehouse, Sr., Respondent,

v.

Paul H. Hulsey and The Hulsey Litigation Group, LLC, Appellants.

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

Opinion No. 4805
Heard April 13, 2010 – Filed March 10, 2011

AFFIRMED

A. Camden Lewis, Ariail E. King, of Columbia; Robert H. Hood, Deborah Harrison Sheffield, James B. Hood, and John K. Weedon, of Charleston, for Appellants.

Frank M. Cisa, of Mt. Pleasant, for Respondent.

THOMAS, J.: This is an appeal from an entry of default and the subsequent default damages trial based on a slander action against Paul Hulsey and the Hulsey Litigation Group, LLC (collectively Hulsey). Damages (actual and punitive) were found in excess of $7.3 million. Hulsey now appeals, alleging the trial court erred in (1) granting entry of default without subject matter jurisdiction, (2) failing to grant a motion to set aside the entry of default, (3) allegedly depriving Hulsey of due process in the default damages trial, and (4) allowing an award of $5 million in punitive damages. We affirm.

FACTS

In 2004, Hulsey filed a class action suit against Lawton Limehouse, Limehouse's son, and L&L Services, Inc., a staffing agency owned by the pair. The suit alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as other state and federal laws. Although the case eventually settled, during its pendency, Hulsey made allegedly slanderous statements that the "[Charleston] Post & Courier" published, including (1) Limehouse engaged in a classic racketeering scheme, (2) Limehouse's conduct set the community back 150 years, (3) Limehouse engaged in blatant indentured servitude, and (4) Limehouse created a perfect racketeering scheme just like Tony Soprano.[1]

In response, Limehouse filed suit against Hulsey on April 19, 2006. Service was perfected upon the Hulsey Litigation Group, LLC on April 20, 2006, and Paul Hulsey personally on April 21, 2006. On May 5, 2006, Hulsey filed a notice of removal to federal district court without filing an answer to the complaint. On June 2, 2006, Limehouse filed a motion to remand to state court. A federal district judge remanded the case to state court by an order dated July 19, 2006, for lack of federal subject matter jurisdiction.[2] The federal court electronically transmitted this order to counsel on July 20. The Charleston County Clerk of Court also received an

[1] Tony Soprano is a fictional television character involved in organized crime.

[2] Hulsey did not answer the complaint in federal court.

uncertified copy and filed the order on July 21. The Charleston County Clerk of Court mailed notice of the filing to all parties on July 27.

On August 21, 2006, Limehouse filed a request for entry of default. The Charleston County Clerk of Court entered default on August 21, and filed the same on August 22. Subsequently, the clerk mailed a Form 4 to all parties on August 24, 2006, noticing entry of default. On August 29, upon receipt of the Form 4, Hulsey filed an answer and motion to set aside entry of default pursuant to Rule 55(c), SCRCP.

In December, 2006, a circuit judge denied Hulsey's motion to set aside entry of default, and in February 2008, a different circuit judge presided over a jury trial on the issue of damages. On February 6, 2008, the jury returned a verdict for actual damages in the amount of $2.39 million and awarded punitive damages in the amount of $5 million. Nine days later, on February 15, 2008, Hulsey filed a motion to dismiss for lack of subject matter jurisdiction, after discovering there was no certified copy of the remand order on file with the Charleston County Clerk of Court. The trial court denied the motion, as well as the accompanying motion for a new trial. This appeal follows.

ISSUES ON APPEAL

I. Did the trial court err in exercising jurisdiction over the case after remand?

II. Did the trial court err in failing to set aside the entry of default?

III. Did the trial court err in the manner in which the default damages trial was conducted?

IV. Did the trial court err in allowing an award of punitive damages?

LAW/ANALYSIS

I. Jurisdiction

Hulsey argues the trial court was, and still is, without jurisdiction over this matter because the clerk of the federal court failed to mail a certified copy of the remand order to the Charleston County Clerk of Court. We disagree and find the mailing of the certified copy is not a jurisdictional requirement.

Upon removal, the federal court acquires jurisdiction over the case, for the limited purpose of determining jurisdiction. See Davis v. Davis, 267 S.C. 508, 511, 229 S.E.2d 847, 848 (1976). Once the federal court determines that federal jurisdiction is not appropriate, the case is remanded to state court, and the remand ends the federal court's jurisdiction. 28 U.S.C. § 1446(d) (1996).

Congress has provided for a federal court's jurisdiction in section 1446(d): "Promptly after the filing of such notice of removal . . . the defendant . . . shall give written notice thereof to . . . the clerk of such State court, which shall effect the removal and *the State court shall proceed no further unless and until the case is remanded*." (emphasis added).

In addition, 28 U.S.C. § 1447(c) (1996) provides for "Procedure[s] after removal generally," and states:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the

> State court. The State court may thereupon proceed with such case.

In interpreting section 1447(c), a majority of federal circuits take the position that the finality of the remand and the accompanying loss of federal jurisdiction requires both entry of the order with the federal clerk of court *and* a certified copy being mailed to the state court. See, e.g., Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 227 (3rd Cir. 1995); Hunt v. Acromed Corp., 961 F.2d 1079, 1081-82 (3rd Cir. 1992); Browning v. Navarro, 743 F.2d 1069, 1078-79 (5th Cir. 1984); Fed. Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979).

However, the Fourth Circuit takes a minority view, reasoning that because remands for lack of subject matter jurisdiction or defect in removal are unappealable, "the plain language of the statute[] . . . support[s] the conclusion that §1447 divests a district court of jurisdiction upon the entry of its remand order" despite the federal clerk's duty to send a certified copy. In re Lowe, 102 F.3d 731, 735 (4th Cir. 1996) (considering and declining the majority approach, holding "a federal court loses jurisdiction over [the] case as soon as its order to remand the case is entered[] . . . [f]rom that point on, it cannot reconsider its ruling even if the district court clerk fails to mail . . . a certified copy");[3] see also Bryan v. BellSouth Commc'ns, Inc., 492 F.3d 231, 235 n.1 (4th Cir. 2007) (recognizing "a remand is effective when the district court mails a certified copy . . . see [1447(c)] . . . *or* . . . if the remand is based on the lack of subject-matter jurisdiction . . . when the remand order is entered, see [Lowe]")[4] (emphasis added).

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[3] The essence of our inquiry, as opposed to the federal court, is not whether the federal scheme provides for state court jurisdiction, but rather, whether it prohibits state court jurisdiction. See *infra*. Naturally, because a federal court does not determine state court jurisdiction, this distinction allays the dissent's concern that the question confronted in Lowe is different than the one we face here.

[4] We do not rely on Bryan as dispositive of this case, nor do we find any reason to interpret this purely explanatory note – which specifically cites Lowe – to imply that Lowe does not stand for what it explicitly holds, i.e., a

Accordingly, the South Carolina Federal District Court lost jurisdiction when the order of remand was entered.[5] We believe this ends the inquiry. However, because Hulsey's assertion that the state court also lacks subject matter jurisdiction seems to leave the case caught in jurisdictional limbo, or as other courts have dubbed it, on "a jurisdictional hiatus," for lack of the mailing, State v. City of Albuquerque, 889 P.2d 204, 207 (N.M. Ct. App. 1993) aff'd 889 P.2d 185 (N.M. 1994), we therefore address whether the mailing is required for the South Carolina Circuit Court to exercise jurisdiction.

We start with the premise that our state court's jurisdiction is general, derived exclusively from article V, section 11 of the South Carolina Constitution, not from federal law. S.C. Const. art. V, § 11; see, e.g., Fairfax Countywide Citizens Ass'n v. Fairfax County, 571 F.2d 1299, 1304 (4th Cir. 1978) (indicating that unlike federal courts, state courts are courts of general jurisdiction). On the other hand, the jurisdiction of federal courts is limited to

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federal court loses jurisdiction upon entry of a remand for lack of subject matter jurisdiction.

Although the dissent agrees the note is purely dicta, to the extent it is suggested the footnote bears on this matter, we note that the dissenting opinion ignores the second clause of the note, in which the Fourth Circuit reiterates the Lowe holding; presumably because its interpretation of the first clause is irreconcilable with Lowe. Further, the interpretation of the first clause is premised on a presumption, allegedly from Bryan, that remands for reasons other than lack of subject matter jurisdiction or defect in removal are not subject to section 1447(c). However, neither the Fourth Circuit, nor any other circuit, has put forth such a ruling, and Bryan itself refutes this presumption by recognizing, in a case in which the remand was based upon a reason *other than* lack of subject matter jurisdiction or defect in removal, that the state court could continue upon receipt of the certified mailing, citing section 1447(c). See Bryan, 492 F.3d at 241.

[5] The exercise of mandamus power is, by its very nature, not an exercise of the court's jurisdiction over the case and controversy.

that expressly authorized by the United States Constitution or statute enacted by Congress pursuant thereto. Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005); Victory Carriers Inc. v. Law, 404 U.S. 202, 212 (1971) ("The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution.") (internal citation and quotation marks omitted); U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); see The Federalist No. 82, at 515-16 (Alexander Hamilton) (Wright ed., 2002) (considering the federal government has only the power exclusively delegated to it, it stands as a "rule" that "the State courts will retain . . . jurisdiction[,] . . . unless it appears to have been taken away in one of the enumerated modes"); Thus, unless otherwise prohibited by statute, a state court's jurisdiction is limited only by the federal court's proper exercise of jurisdiction over a case pursuant to Congressional act – which according to Fourth Circuit jurisprudence in Lowe, ceased upon entry of the remand order.[6]

In this regard, the distinction between the majority and minority views becomes significant. Section 1446(d) provides a prohibition on state action in that once removal is properly effectuated, "the State court *shall proceed no further unless and until* the case is remanded." (emphasis added). Section 1447(c) states: "A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court *may* thereupon proceed." (emphasis added). Naturally, if a federal court takes the majority view, making the remand dependent upon the mailing, the case is remanded and the order is mailed at the same point in time. Therefore, the mailing forecloses state court jurisdiction not because a state court should interpret section 1447(c) to provide the state may *only* proceed upon the mailing but because section 1446(d) prohibits state action until remanded. However, under the minority view, this is not the case as a remand does not require the

[6] For this reason, we disagree with the dissent's indication that we must interpret section 1447(c), as to do so in light of Lowe's interpretation of when federal jurisdiction ends under that section, we must invariably presume that our jurisdiction is derived from that federal statute rather than limited by it.

mailing. Thus, in this circuit, a state court exercising jurisdiction over a case upon entry of remand neither imposes on federal jurisdiction nor violates these federal jurisdiction provisions.

Similarly, the states that have confronted this issue recognize the significance of the distinction between the majority and minority view.

In the cases applying the majority view, the revesting of jurisdiction occurs on the mailing because the finality of the remand and accompanying loss of federal jurisdiction requires the same. See, e.g., Nixon v. Moore, 108 S.W.3d 813, 817-18 (Mo. Ct. App. 2003) (adopting the majority approach that the mailing is the operative event at which jurisdiction switches, but recognizing the minority reaches a different result); Quaestor Invs., Inc. v. State of Chiapas, 997 S.W.2d 226, 228 (Tex. 1999) (noting that "[i]n answering the question of when a jurisdictional transfer occurs between federal and state court, most courts[] . . . interpret[Section 1447(c)] . . . to mean that the federal court loses jurisdiction once the federal court clerk has mailed a certified copy" but others, particularly the Fourth Circuit in Lowe, take an opposite view). However, the same rationale compels a different result under the minority view. See Nixon, 108 S.W.3d at 817 (citing Lowe for the proposition that a "few federal [circuits] have reached [a minority approach] . . . holding that jurisdiction transfers back to the state as soon as an order of remand is entered"); Quaestor, 997 S.W.2d at 228 (stating that Lowe "hold[s] that jurisdiction returns to the state court when the district court enters the remand"). Thus, whether the mailing of the certified copy is required to revest jurisdiction is simply a product of what interpretation is employed to determine when the federal court loses jurisdiction.[7]

[7] We are aware of no jurisdiction that has taken the position that neither the state nor federal court has jurisdiction over a case. Further, it is not inconsistent with our federalist form of government to allow a state court to exercise its general jurisdiction when a federal court has finally decided its Congressionally authorized jurisdiction has ceased. See Lowe, 102 F.3d at 735 ("Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed[.]") (quoting In re La Providencia Dev. Corp., 406 F.2d 251, 252 (1st Cir. 1969).

Thus, the minority view accepts that the "require[ment that] the clerk of the district court [] mail a certified copy of the remand order to the clerk of the state court, is *not jurisdictional*." Int'l Lottery, Inc. v. Kerouac, 657 N.E.2d 820, 823 (Ohio Ct. App. 1995) (emphasis added) (citing Van Ryn v. Korean Air Line, 640 F. Supp. 284 (C.D. Cal. 1985) (standing for the proposition that entry of remand divests the federal court of jurisdiction notwithstanding the failure of the clerk to send a certified copy)); see Albuquerque, 889 P.2d at 206 (holding "the actions of a federal judge in signing and entering a remand order authorize subsequent state court actions even when the federal court clerk fails to mail the remand order to the clerk of the state court"); see also Lowe, 102 F.3d at 735 ("'Logic also indicates that it should be the action of a court (entering the order of remand) rather than the action of a clerk (mailing a certified copy) of the order that should determine *vesting* of jurisdiction'") (quoting Van Ryn, 640 F. Supp. at 285) (emphasis added). In light of the Fourth Circuit having taken the minority approach, we must agree that the duty to send the mailing is not a jurisdictional requirement but a procedural one. Therefore, we find the South Carolina Circuit Court did not act without subject matter jurisdiction.

This is bolstered by the fact that even in jurisdictions requiring the mailing for finality of the remand, the same is not necessarily required for the state to exercise jurisdiction. For instance, in Nixon the Missouri Court of Appeals recognized:

> The state court may not be immediately notified by the federal court of the order of remand. Counsel, of course, are promptly notified of the order of remand, and often counsel will, in the interest of saving time, notify the state court and proceed in the interim with the state court action. *There is nothing in the federal statutory scheme prohibiting the parties from proceeding at that point.*

Nixon, 108 S.W.3d at 817 (emphasis added).[8] Thus, although requiring the mailing to make the remand order final, the same is not an indispensible jurisdictional requirement. See Bacon v. Dir. of Revenue, State of Mo., 948 S.W.2d 266, 267 (Mo. Ct. App. 1997) ("Subject matter jurisdiction cannot be conferred by . . . consent, and the lack thereof cannot be waived."). With nothing in the federal statutory scheme to prohibit this, the same would hold true in South Carolina, supporting our disinclination to see the mailing requirement as jurisdictional. See In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 636, 686 S.E.2d 683, 686 (2009) ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties . . . .").

Because we find the mailing requirement is procedural not jurisdictional, the issue is not properly before this court as a result of Hulsey's failure to timely object. See Beaufort County v. Butler, 316 S.C. 465, 467, 451 S.E.2d 386, 387-88 (1994) (stating "a procedural right may be waived . . . [and a] party who fails to object to the trial of a case . . . cannot later assert the trial court erred in trying the case . . ."); Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) (stating that "[t]he duty is on the litigant to make a timely objection in order to preserve the right to review . . . [and] . . . [a] contemporaneous objection is required to properly preserve an error for appellate review"); In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.").[9]

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[8] This statement recognizes that a state court, as opposed to a federal court, confronts whether the exercise of jurisdiction is prohibited by federal statute, not proscribed by it. Similarly it undermines the notion that the statement in section 1447(c): that once a certified copy is mailed "[t]he State court *may* thereupon proceed," operates as an absolute prohibition on state action. (emphasis added).

[9] The dissent posits that our distinction between a jurisdictional requirement and a procedural one is irrelevant and that we erroneously suggest the issue is not preserved for appeal because it was not raised before the judgment was entered. To the contrary, it is precisely because of the rules of issue preservation that the distinction is not only relevant but imperative. The only

Further, to warrant reversal a party must demonstrate the alleged procedural failure caused him prejudice. See Chastain v. Hiltabidle, 381 S.C. 508, 519, 673 S.E.2d 826, 831 (Ct. App. 2009) (stating in order to demonstrate prejudice from procedural non-compliance, a party must establish it "would have done something different" had procedure been followed). Hulsey has failed to demonstrate that he was prejudiced by the absence of the certified copy. Here, Hulsey cannot, and does not, maintain notice was insufficient. The record makes clear that the Charleston County Clerk of Court received notice of a final and unappealable order of remand on July 21, 2006, and that on July 27, 2006, she mailed notice that she received and entered this final and unappealable order to all parties, just as she would have done had she received of a certified copy of the order.

Moreover, Husley personally received notice. The notice sent to Hulsey from the Charleston County Clerk makes no indication of whether the notice of remand it received was certified or not. Consequently, Hulsey's notice was not impacted by the fact that the Charleston County Clerk did not receive a certified copy of the order. Further, pursuant to Section 5 of the Policies and Procedures for the electronic case filing system (ECF) employed

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question we confront in this case is whether the action of the trial court is void for lack of jurisdiction, which can be raised at *any time*. However, the dissent elects not to squarely answer this question, instead finding the judgment void because the trial court lacked the "power to proceed" with the case under the federal statute. Because it is the only issue before this court, we must presume that this alleged powerlessness is due to a lack of subject matter jurisdiction. To the extent the dissent suggests the circuit court is powerless to proceed for any reason other than a lack of subject matter jurisdiction, the issue is not properly before this court. Further, the dissent's analogy to the bankruptcy code is misplaced. Notwithstanding the manifest dissimilarities between the realm of bankruptcy law and this case, the federal jurisdictional statutes at issue here do not provide for a stay. The concept is also not analogous to this case as a stay, by definition and nature, operates only as a suspension of jurisdiction, not a termination. Contra Davis, 267 S.C. at 511, 229 S.E.2d at 848 ("[O]nce removal proceedings to federal court are fulfilled and requisite notice accomplished, the State court loses all jurisdiction in the matter.").

in the federal court, by removing the case Hulsey agreed to receive notice of entry of any order or judgment through electronic transmittal. Thus, in addition to notice from the state court, Hulsey had notice from the federal court of the entry of the final and unappealable remand order and consequently was not prejudiced.

Accordingly, the South Carolina Circuit Court did not act without subject matter jurisdiction, and Hulsey was not otherwise prejudiced by the Federal Clerk's failure to send a certified copy of the order of remand.[10]

II. Entry of Default

Hulsey argues the trial court erred in failing to set aside entry of default because (a) the answer was timely or (b) good cause existed to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

As to the issue of whether the answer was timely filed, Hulsey points out this is an issue of interpretation of a rule or statute and is therefore reviewed de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court). Further, our standard of review leaves the decision to set aside an entry of default within the sound discretion of the trial court, which we will not reverse absent an abuse of discretion. Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct.

[10] Respectfully, we disagree with the dissent's "summary of the rules that apply to remand in the Fourth Circuit." We find these conclusions irreconcilable with the holding of Lowe and contrary to the expressed rational of both Lowe and Bryan. Similarly, we find these rules to be contrary to the reasoning and holdings of the state courts that have confronted the issue. Finally, from a practical perspective, we find the summary illogical as it proposes to create (1) a scenario in which a state court is permitted to resume action on a case even though the remand order is appealable and remains subject to the federal court's jurisdiction, and (2) a scenario that denies a state court jurisdiction over a matter in which federal jurisdiction has been terminated, and a final and unappealable order has been issued.

App. 2004). Such an abuse of discretion occurs when the decision is based upon an error of law or when the order is without evidentiary support. Id.

a. Timeliness of the Answer

In order to find the August 29 answer was timely Husley urges this court to adopt a rule that the thirty-day time period in which to answer starts over upon remand.[11] We are not inclined to adopt such a rule.

Rule 12(a), SCRCP, provides: "A defendant shall serve his answer within 30 days after the service of the complaint upon him[] . . . ." However, federal rules provide "[a] defendant who did not answer [in state court] before removal must answer . . . within the longest of . . . :" (A) twenty days after being served or otherwise receiving the initial pleading or (B) within five days after notice of removal is filed. Rule 81(c)(2), FRCP.

In this case, Hulsey removed fourteen days after being served. Thus, although under Rule 12(a), SCRCP, he was entitled to another sixteen days to answer, by choosing to remove the case to federal court, he willfully subjected himself to the shortened time period of Rule 81(c)(2), FRCP – providing he must answer within six days (twenty days after being served). However, in the seventy-six days between removal and the entry of remand, Husley neglected to answer.

Initially, we find no authority in this state to support the position that a removing party is entitled to a fresh thirty days to answer a complaint upon remand. Neither did the trial court. Rather, looking at both the federal rules and state rules, in the exceptionally rare circumstance in which a case would be remanded to the state court before an answer was due pursuant to Federal Rule 81(c)(2), a plain reading of South Carolina Rule 12(a) would require an answer within thirty days of service. However, seemingly giving Hulsey the benefit of the doubt, the trial court determined that because the state court is to proceed as if no removal had been attempted, removal to federal court tolls

[11] Hulsey avers jurisdiction has not yet revested in the state court and maintains this as an alternative position.

the thirty day time period and therefore, upon remand Hulsey should be allowed the remainder of any unexpired time.[12] See State v. Columbia Ry., Gas & Elec., 112 S.C. 528, 537, 100 S.E. 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted).

In this case, because Hulsey failed to answer under the plain reading of either Rule 12(a), SCRCP, or Rule 81(c)(2), FRCP; or under the more liberal approach provided by the trial court, it is of no consequence which approach we would adopt. Therefore, we are not occasioned to opine on the more acceptable method.[13] It suffices that we find no indication that a party is entitled to a fresh thirty-day period upon remand. Accordingly, we are disinclined to adopt a rule allowing the same. Such action is not the province of this court, but that of our legislature or supreme court.

b. Rule 55(c)

Hulsey next argues the trial court erred in failing to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

The issue before this court is not whether we would find good cause, but whether the decision to deny the motion to set aside default is supportable by the evidence and not controlled by an error of law. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). A motion to set aside entry of default under Rule 55(c) is addressed to the sound discretion of the trial court. Id.

Under Rule 55(c), the entry of default may be set aside for "good cause shown," which is a less stringent standard than the excusable neglect standard

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[12] This amounted to sixteen days after the remand because fourteen days had elapsed prior to removal.

[13] The inquiry of whether failure to comply with Rule 81(c)(2), FRCP, would support entry of default in state court if the case is remanded unanswered appears novel in this state. However, we need not address it.

of Rule 60(b). Sundown Operating Co. v. Intedge Indus. Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).[14] The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Id. "Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the Wham[15] factors]: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. at 607-08, 681 S.E.2d at 888. However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default. Id.

In this case, the trial court held that because "there appears . . . to be no reasonable basis for [Hulsey's] assumption that the [thirty] day time to file an answer starts completely anew upon remand[,] . . . no good cause has been demonstrated . . . ." While we appreciate the trial court did not have the benefit of the Sundown opinion, we find Sundown did nothing to abate the discretion to which a trial court is entitled in ruling on a Rule 55(c) motion. Nor did it change the standard this court applies when reviewing such a decision. What constitutes a satisfactory explanation that serves the interests of justice remains within the sound discretion of the trial court.[16]

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[14] Although the South Carolina Supreme Court decided this case during the pendency of this appeal, Hulsey notified this court via writing of the intent to rely on this authority.

[15] Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989).

[16] As our colleague in the dissent points out and the trial court's ruling indicates: in practice, both the bench and bar have been aware that the explanation for the default is significant. See New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (indicating the reason for failure to act is relevant under a Rule 55(c) analysis).

In South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default. See Vanvolkenburg, 312 S.C. at 375, 440 S.E.2d at 410 (indicating, prior to Sundown, that the imputed negligence of an attorney to a defaulting litigant is not good cause). Similarly, our supreme court has recognized subsequent to Sundown that the good cause standard of Rule 55(c), encompasses a degree of reasonableness. See Richardson v. P.V., Inc., 383 S.C. 610, 618-19, 682 S.E.2d 263, 267 (2009) (finding, after Sundown, that negligence on the part of an insurance company or attorney will be imputed to a defaulting litigant and negligence does not constitute good cause to relieve an appellant from entry of default); see also Black's Law Dictionary 1133 (9th ed. 2009) (defining negligence as the failure to act reasonably under a specific set of circumstances). It stands, therefore, that because unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice.[17]

In the case at bar, although the supreme court had not yet issued the Sundown opinion, the trial court nonetheless addressed Hulsey's explanation of default and specifically found it unreasonable. We find the record supports the finding that Husley's explanation for default is unreasonable.[18]

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[17] We recognize the dissent's position that reasonableness is not required of the excuse itself but merely a factor to be considered in a "broader inquiry" of whether the vacation serves the interests of justice. While this is certainly a mode of analysis within the trial court's discretion, in light of our standard of review, whether the trial court finds vacation does not serve an interest of justice because the excuse is unreasonable or finds the excuse is unreasonable because vacation does not serve an interest of justice, so long as supported by the evidence, is a distinction without a consequence.

[18] Notwithstanding, we respectfully disagree that good cause likely existed in this case. Hulsey's contempt for the rules of procedure both in federal court and state court, indicates this was not a "failure at an attempt" but rather a "failure to attempt" an answer. This issue would not have arisen had the rules been followed. Thus, we suggest there is ample "guidance" for Hulsey to know a party is not entitled to 130 days to answer.

Vanvolkenburg, 312 S.C. at 375, 440 S.E.2d at 409 (stating the "issue before this [c]ourt . . . is not whether we believe good cause existed . . . [but] whether the trial court's determination is supported by the evidence"). Further, we are aware of no authority either prior to or after Sundown that compels this court to find it is not within the trial court's discretion to deny a Rule 55(c) motion for an unreasonable failure to answer. Accordingly, we find the trial court did not abuse its discretion.

III. Default Damages Trial

Hulsey's allegation of error as to the damages trial is threefold. He argues (a) the process employed by South Carolina courts is unconstitutional and deprives a default defendant of due process; (b) specifically as to this case, the trial court erred in allowing introduction of new allegations during the damages hearing, in the form of testimony about a link on Hulsey's website to the slanderous article; and (c) the trial court erred by improperly commenting on the facts.

This court's standard of review for the grant or denial of a motion for a new trial extends substantial deference to the trial court. Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). The trial court's decision will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

a. South Carolina's default damages procedure

Hulsey argues the process employed by the State of South Carolina during a default damages hearing is unconstitutional. We must disagree.

During a default damages trial, the defendant's participation shall be limited to cross-examination and objection to the plaintiff's evidence. Roche v. Young Bros. of Florence, 332 S.C. 75, 81-82, 504 S.E.2d 311, 314 (1998); Howard v. Holiday Inn, Inc., 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978); Doe v. SBM, 327 S.C. 352, 356, 488, S.E.2d 878 881 (Ct. App. 1997); Ammons v. Hood, 288 S.C. 278, 282, 341 S.E.2d 816, 818 (Ct. App. 1986).

On appeal, Hulsey provides no controlling authority[19] for his position that this court can, or should, diverge from longstanding rules established by our supreme court. Accordingly, we cannot and do not find the default damages hearing to be unconstitutional.

b. Introduction of testimony about the website link

Hulsey maintains that the entry of default is tantamount to admission of the allegations of the complaint, but nothing more. See Wiggins v. Todd, 296 S.C. 432, 435, 373 S.E.2d 704, 705-06 (Ct. App. 1988) (stating that when a defendant is in default, the plaintiff's right to recover is circumscribed by the complaint drafted). Therefore, Hulsey alleges the trial court erred in allowing Limehouse to testify to new allegations outside the confines of the complaint, particularly about a link on Hulsey's website to the slanderous newspaper article. However, an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection. SBM, 327 S.C. at 356, 488 S.E.2d at 881.

Here, Hulsey failed to object to any testimony regarding the publication or link on the website. Accordingly, this allegation of error is not preserved for our review.

c. Trial court commenting on the facts

Generally a "trial [court] should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally." Sierra v. Skelton, 307 S.C. 217, 225, 414 S.E.2d 169, 174 (Ct. App. 1992).

In this case, during deliberations, the jury sent out a question inquiring whether "the link to the April 24, 2004, article [was] still on . . . Hulsey's

[19] Hulsey cites Mathews v. Eldridge, 424 U.S. 319, 333-34 (1976), for the proposition that due process requires a meaningful opportunity to be heard. Hulsey also cites to two appellate decisions from the foreign jurisdictions of Florida and North Carolina to support his argument to change the default damages procedure in South Carolina, specifically as to punitive damages.

website? [And i]f not, when was it removed?" The trial court responded by informing the jury that there was testimony that as of the Monday of trial, the link remained on the website.

Hulsey argues this "constitute[s] an improper comment on the facts." Further, Hulsey argues "even more inexplicably, Limehouse was allowed to testify that the link on the website was a violation of a court order while Hulsey was precluded from introducing the very court order . . . which indisputably evidences that there was no prohibition from mentioning the case on the firm website." Initially, Hulsey made no objection to the testimony regarding the court order, and under the default damages procedure, would have been free to cross-examine Limehouse on this matter. Furthermore, Hulsey does nothing to demonstrate how the trial court's answer to the jury's inquiry demonstrated an imparting of opinion on the facts of the case. Accordingly, we find no error.

IV. Punitive Damages

Hulsey argues the award of punitive damages was founded on trial court error and constituted a denial of due process. Hulsey presents four separate arguments on this issue: (a) due process demands a default litigant be given an opportunity to defend punitive damages, (b) the jury should have been instructed that it could return an award of no punitive damages, (c) the trial court allowed and actually invited the jury to consider matters not proper for their consideration in awarding punitive damages, and (d) the trial court erred in confirming the award.

Generally, the trial court's decision on a motion for a new trial will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

a. Due Process

Hulsey maintains employing South Carolina's procedures for a default damages hearing in a case in which punitive damages are sought amounts to a constitutional due process violation. Hulsey further argues this due process

violation was compounded by the facts that the trial court failed to exercise its obligation to independently make a threshold determination of whether the defendants' conduct rose to the level of warranting punitive damages, and that Limehouse was allowed to go into matters beyond the bounds of the complaint.

Initially, Hulsey cites no authority to support the proposition that South Carolina should employ a different default damages procedure for punitive damages than for actual damages. See Roche, 332 S.C. 75, 504 S.E.2d 311 (making no distinction on appeal between punitive damages and actual damages during a default damages trial).

As to the trial court's failure to make a threshold determination that Hulsey's conduct warranted punitive damages, this issue was specifically addressed when the trial court denied Hulsey's motion for a directed verdict on punitive damages. Although it is unclear from the briefs on appeal whether Hulsey challenges this ruling on appeal, to the extent that he may be alleging the trial court improperly denied the directed verdict on the issue of punitive damages, we briefly address the issue.

In reviewing the denial of a motion for a directed verdict, this court applies the same standard as the trial court, viewing the evidence and the inferences in the light most favorable to the non-moving party, and will not reverse the denial unless there is no evidence to support the ruling. All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C., 385 S.C. 428, 441-42, 685 S.E.2d 163, 170 (2009).

When viewed in the light most favorable to Limehouse, there exists evidence which supports submitting the issue of punitive damages to the jury for consideration, including the intentional nature of the action, Hulsey's degree of culpability, and his awareness of the conduct. Accordingly, to the extent Hulsey may be challenging this ruling, we find no error.

b. No punitive damages as an option

Hulsey next argues the trial court erred by telling the jury it was required to award punitive damages. We find no such instruction.

Punitive damages may be awarded, in the interest of society in punishing or deterring the conduct, or vindicating a private right, when the plaintiff proves entitlement to such damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence); Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004) (indicating punitive damages may be awarded for various reasons).

Generally, this court will not reverse the decision of the trial court as to a particular jury instruction absent a prejudicial abuse of discretion. Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008). A trial court abuses its discretion in this regard when the ruling is not supported by the evidence, or based on an error of law. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2009).

Hulsey argues punitive damages should not be awarded simply as a matter of right, and suggests the trial court instructed the jury it had to award punitive damages. However, Hulsey does not cite, or otherwise bring to this court's attention, any specific language used by the trial court to support this allegation.

In this case, considering the whole of the trial court's instruction, the jury was not instructed that it *had* to award punitive damages. Instead, the instructions indicated that only if the jury found Limehouse had established entitlement to punitive damages by clear and convincing evidence, should the jury then make a determination as to the amount of such damages. The trial court specifically stated: "[p]unitive damages may only be awarded where the plaintiff proves by clear and convincing evidence that the defendant's actions were willfull, wanton, and malicious . . . .[and only upon such a finding] would [it] be [the jury's] duty to include such damages in [the] verdict." Similarly, the instruction also demonstrates the trial court fully explained the verdict form to the jury. Accordingly, the trial court did not abuse its discretion.

c. Matters not appropriate for consideration of punitive damages

Next, Hulsey alleges his constitutional due process rights were violated because of the trial court's and Limehouse's repeated references to the default, arguing this referencing insinuated that the jury should punish Hulsey for his failure to follow the procedural rules. Further, Hulsey alleges this error was compounded by the trial court allowing Limehouse's wife to testify as to the link on Hulsey's website, as well as to statements about how the ordeal affected Limehouse's family. Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the RICO case, and admitting testimony as to Hulsey's net worth. We disagree.

First, Hulsey does not cite any authority to support the position that discussion of the default would support a finding that due process had been denied. Further, we find no indication on the record that the trial court suggested or otherwise implied that Hulsey's failure to answer should support the imposition of punitive damages.

Second, as to the allegations pertaining to the website link, as noted Hulsey made no objection to this during the damages trial and consequently the issue is not preserved for our review. See SBM, 327 S.C. at 356, 488 S.E.2d at 881 (indicating an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection to the same).

Third, Hulsey contends it was error to allow Limehouse's wife to mention the impact of the slander on his family because pursuant to Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007), punitive damages cannot be imposed to punish a defendant for harm visited upon others. However, at trial, this argument was specifically presented as one of relevance.

Evidence is relevant, and generally admissible, if it has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. Rules 401, 402, SCRE. The introduction of evidence is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Richardson v. Donald Hawkins Const., Inc., 381 S.C. 347, 352, 673 S.E.2d 808, 811 (2009);

Jamison v. Ford Motor Co., 373 S.C. 248, 268, 644 S.E.2d 755, 765 (Ct. App. 2007). In this case, the trial court found the testimony to be relevant because it was "within the scope of how it affected [Limehouse], and his family relationships." We agree that the impact on Limehouse's immediate family bears on the extent of the impact he suffered, and accordingly we find no abuse of discretion.

Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the prior RICO case as well as erroneous testimony that Hulsey's net worth was in excess of $81 million. Initially, contrary to Hulsey's position that Limehouse was able to paint him as a "greedy hotshot lawyer," Limehouse's own witness, John Massalon, conceded he was aware Hulsey was pro bono counsel on the previous RICO case. Furthermore, the record does not indicate any objection was made to the testimony of Bank of America employee Bernadette DeWitt when she testified as to Hulsey's net worth. The evidence bears out the financial declaration on which she relied was certified as a true, complete, and accurate statement of Hulsey's financials and as such, any misinformation presented on this issue was the result of Hulsey's own misrepresentation. Accordingly, we find no error.

d. Confirmation of punitive damages.

Finally, Hulsey argues the trial court erred in confirming the award of punitive damages. We disagree.

Our supreme court recently indicated an appellate court's scope of review to be de novo. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 185, 183 (2009).

The Fortis, court consolidated the post judgment due process analysis for punitive damages. In reviewing an award of punitive damages, we consider (1) the reprehensibility of the conduct, (2) the disparity or "ratio" between actual harm and the punitive damage award, and (3) the comparative penalties. Fortis, 385 S.C. at 587-89, 686 S.E.2d at 185-86.

1. Reprehensibility

In considering reprehensibility, a court should consider whether:

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. at 185, 686 S.E.2d at 587. This encompasses the defendant's culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct. Id. at 185, n. 7, 686 S.E.2d at 587, n. 7.

Although the harm here was not physical, and posed no threat to health or safety, the evidence indicates Hulsey, through involvement in the underlying RICO action, was aware of the nature and vulnerability of Limehouse's business. Also, although the statements were made in a single incident, because the statements were made to the press, the evidence shows that the circumstances clearly indicated that the statements would be publicly reported and widely disseminated. Finally, this conduct was not the result of accident or inadvertence. The statements were contemplated, intentionally made, and coincided precisely with a filing of a lawsuit against Limehouse. Accordingly, our review of the evidence convinces us that Hulsey's conduct was sufficiently reprehensible to support punitive damages.[20]

[20] The trial court specifically noted the statements were intentionally made, the award would deter similar conduct in the future, the award was just over twice actual damages and was thus reasonably related to the actual harm suffered. The trial court also noted Hulsey was of the rare few who can afford to pay the award, and although South Carolina's procedure did not permit Hulsey to put forth evidence, the verdict remained reasonable.

2. Ratio

The courts of this state have affirmed punitive damage awards in excess of six times actual damages. See James v. Horace Mann Ins. Co., 371 S.C. 187, 196, 638 S.E.2d 667, 672 (2006) (affirming an award of punitive damages of 6.82 times actual damages); Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 11, 466 S.E.2d 727, 733 (1996) (affirming an award of punitive damages roughly twenty-eight times actual damages). Similarly, the supreme court has modified awards to reflect a 9.2:1 ratio. See Fortis, 385 S.C. at 594, 686 S.E.2d at 188. Here, the punitive damage award was slightly above twice actual damages. Accordingly, we do not find such an award to violate due process.

3. Comparative Penalty

In looking to comparative cases, we find that in similar matters, our supreme court has upheld punitive damages which were over ten times that of actual damages. See, e.g., Weir v. Citicorp Nat'l Servs. Inc., 312, S.C. 511, 518, 435 S.E.2d 864, 869 (1993) (affirming an award of $275,000 in punitive damages, in a slander case, where actual damages were found to be $25,000). Accordingly, we find no error here.

CONCLUSION

For the reasons above, the ruling of the trial court is

AFFIRMED.

HUFF, J., concurs.

FEW, C.J., dissents.

FEW, C.J., dissenting: I disagree with the majority's analysis of Issues I and II, and therefore dissent. Because my position on either Issue I or II would resolve this appeal, I would not reach Issues III and IV.

I. Jurisdiction

Hulsey moved for a new trial and for relief from judgment on the ground that jurisdiction never re-vested in the state court after removal, and therefore federal law prohibited the state court from proceeding with the case. The plain language of 28 U.S.C. §§ 1446(d) and 1447(c) required that the motion be granted.

a. The Plain Language of Sections 1446(d) and 1447(c)

Section 1446(d) provides that after an action has been removed to federal court "the State court shall proceed no further unless and until the case is remanded." A remand order based on a lack of subject matter jurisdiction, such as the remand order in this case, is governed by section 1447(c),[21] which requires that "[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court." The next sentence of section 1447(c)—"The State court may thereupon proceed with such case"—is the key to this case. The word "thereupon" sets the point in time when the case is "remanded." Before a certified copy of the remand order is mailed, the state court may not proceed; afterwards, it may. The section 1446(d) prohibition of "shall proceed no further" remains in effect until the section 1447(c) requirement that a "certified copy of the order of remand shall be mailed" has been met. This plain language is all that is necessary to resolve this appeal. A certified copy of the order of remand was never mailed to the state court clerk. Under 28 U.S.C. §§ 1446(d) and 1447(c), therefore, the state court had no power to proceed. Because the state court acted when federal law prohibited it from doing so, the resulting judgment was void. The trial court's failure to grant relief from the judgment was error and must be reversed.

The majority takes the position that the mailing of a certified copy of the remand order does not determine the point in time when a state court may

[21] Section 1447(c) states: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

proceed after remand. Their position is based primarily on two grounds. First, the majority argues that the mailing of a certified copy of the remand order is not required in the Fourth Circuit under the authority of In re Lowe, 102 F.3d 731 (4th Cir. 1996). Second, the majority argues that to the extent the requirement is applicable, it is procedural, and the right to enforce it has been waived in this case.

b. In re Lowe

The question before the court in Lowe was different from the question we face. Thus, the rule announced there is not applicable here. The majority's argument that the mailing of a certified copy of the remand order is not required in the Fourth Circuit is based on the following passage from Lowe: "we hold that a federal court loses jurisdiction over a case as soon as its order to remand the case is entered. From that point on, it cannot reconsider its ruling even if the district court clerk fails to mail to the state court a certified copy of the remand order." 102 F.3d at 736. The majority has incorrectly framed the issue by relying on this passage.

The majority's argument begins by correctly recognizing that section 1446(d) allows the state court to proceed as soon as the case is "remanded." However, the majority incorrectly concludes that the above statement from Lowe answers the question of when that occurs. I agree that Lowe sets the point in time when the federal court may not reconsider a remand order. However, that ruling is based on the Fourth Circuit's interpretation of section 1447(d), not section 1446(d). Therefore, the majority is mistaken that Lowe sets the point in time when the case is remanded, and that it is not necessary to interpret section 1447(c) in order to determine when the state court may proceed. Rather, we are required to enforce the section 1447(c) requirement that a certified copy of the remand order be mailed before the state court may proceed.

A careful analysis of Lowe demonstrates that the question it answered was different. The plaintiff sued her employer and two of its managers in the state court of North Carolina. 102 F.3d at 732. After the defendants removed the case to federal court, the plaintiff moved to remand. Id. A federal magistrate judge granted the motion on the grounds that the federal court

lacked subject matter jurisdiction. 102 F.3d at 732-33, 736. The federal clerk mailed the order to the clerk of the state court, but the copy mailed was not certified. 102 F.3d at 733. Six months later, a different federal magistrate judge granted the defendants' motion to reconsider. Id. After the second magistrate denied two motions to remand, the plaintiff petitioned the Fourth Circuit for a writ of mandamus requiring the district court to return the case to the state court. Id. After concluding generally that remand orders issued for lack of subject matter jurisdiction are not reviewable, 102 F.3d at 733-34, the Fourth Circuit framed the specific issue before it as follows: "[t]he only question remaining, then, is to identify when a court's decision to remand becomes unreviewable." 102 F.3d at 734.

The court analyzed the question by focusing on 28 U.S.C. § 1447(d), and in particular the word "order."

> Subsection 1447(d) provides only that a remand "order" may not be reviewed; it does not condition reviewability on any other event. Thus, the plain language of subsection (d) indicates that a court may not reconsider its decision to remand, as soon as it formalizes that decision in an "order."

102 F.3d at 734. The Lowe decision thus turns on the court's interpretation of the word "order" in section 1447(d) and not, as the majority claims, on the timing of "remanded" under section 1446(d). In fact, Lowe does not even mention section 1446. The court clarifies its reliance on section 1447(d) with the language "[1447(d)] does not condition reviewability on any other event." Id. This statement makes it clear that Lowe is not based on sections 1446(d) or 1447(c), which refer respectively to the events of "remanded" and "mailed." Therefore, the majority's contention that Lowe defines "remanded" is not correct.

Moreover, Lowe contemplates that the section 1447(c) requirement of a mailing remains a part of the process of remand. Noting that it has read sections 1447(c) and (d) independently, 102 F.3d at 734 n.3, the court explains that section 1447(c) "directs the district court clerk to mail a 'copy' of the remand order to the state court, certainly implying that the order itself,

the document § 1447(d) tells us is unreviewable, is in existence before the time of the mailing." 102 F.3d at 734. If the Fourth Circuit's "minority" approach made the mailing required by section 1447(c) unnecessary, the Lowe court would have had no reason to provide this explanation that the section comes into play after the event of an "order" contemplated in section 1447(d).

The majority and I agree that the plain language "shall proceed no further" in section 1446(d) prohibits a state court from acting on a removed case until the case is "remanded." The question we face is when federal law sets that point in time, and thus removes the "shall proceed no further" prohibition. The answer to that question is not found in Lowe's interpretation of section 1447(d), but in the plain language of sections 1446(d) and 1447(c).

c. Waiver

The majority's second ground for its position is that the section 1447(c) requirement of mailing a certified copy is a procedural requirement rather than a jurisdictional one. The distinction is irrelevant in this case. Congress enacted a statute providing that when a case is removed to federal court the state court is prohibited from further action "unless and until the case is remanded." 28 U.S.C. § 1446(d). This prohibition may not be avoided by labeling the mailing requirement procedural. The prohibition is imposed by a federal statute and is likewise lifted only in accordance with federal statutes: 28 U.S.C. §§ 1446(d) and 1447(c). The question we face in this appeal requires us to interpret these statutes and apply their plain language to the facts of this case. See Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, . . . the court has no right to impose another meaning.").

The majority's ruling not only imposes another meaning on these statutes, but it also renders an entire sentence of the United States Code meaningless by eliminating the section 1447(c) requirement that the federal clerk mail a certified copy of the remand order. This court is not permitted to interpret a statute so as to render a part of it meaningless. See Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc., 102 F.3d 712, 715 (4th

Cir. 1996) ("Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vain or meaningless legislation."); Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act.").

By characterizing the mailing requirement as procedural, the majority has converted section 1447(c) to a notice statute, so that the requirement of mailing a certified copy can be ignored because, as the majority states, "Hulsey cannot, and does not, maintain notice was insufficient." I do not believe this court is free to be so loose with the requirements of federal law. If Congress intended that notice of a remand was sufficient to enable the state court to proceed, it could easily have drafted sections 1446(d) and 1447(c) accordingly.

The majority's waiver argument also suggests that the issue is not preserved for appellate review because it was not raised to the trial court before judgment was entered. The situation in which the federal removal statutes prohibit a state court from proceeding after a case is removed is analogous to the situation in which the federal bankruptcy stay prohibits a state court from taking action against a debtor who has filed a bankruptcy petition. See 11 U.S.C. § 362(a)(1) (2004 & Supp. 2010). In that instance, as in this one, the validity of a judgment entered in state court during the time in which federal law prohibits it can be raised at any time. See Ex Parte Reichlyn, 310 S.C. 495, 498-99, 427 S.E.2d 661, 663-64 (1993) (declaring a judgment void when the judgment was entered during the pendency of the bankruptcy stay).

d. Bryan v. BellSouth Communications, Inc.

In support of their respective positions, Appellants and Respondent cite different clauses in the same footnote from the Fourth Circuit's second opinion in Bryan v. BellSouth Communications, Inc., 492 F.3d 231 (4th Cir. 2007) (Bryan II).[22] As I will explain, the footnote supports the position I

[22] The first opinion was Bryan v. BellSouth Communications, Inc., 377 F.3d 424 (4th. Cir. 2004) (Bryan I).

have taken in this dissent. To understand Bryan II, however, it is important to note that the remand order was not made pursuant to section 1447(c).[23] Instead, after dismissing two federal claims on the merits, the district court determined a third claim was not federal, declined to exercise supplemental jurisdiction over it, and remanded it to state court. Bryan II, 492 F.3d at 234-35; Bryan I, 377 F.3d at 425. Because the Bryan remand was not based on the lack of subject matter jurisdiction and therefore was not made pursuant to section 1447(c), any statement in Bryan II interpreting that subsection is technically dictum. However, both parties have cited Bryan II as authoritative, as has the majority. Mindful therefore of the admonition of former Chief Judge Sanders that "those who disregard dictum, either in law or in life, do so at their peril," I will give due regard to the footnote from Bryan II. Yeager v. Murphy, 291 S.C. 485, 490 n.2, 354 S.E.2d 393, 396 n.2 (Ct. App. 1987).

The footnote states:

> A remand is effective when the district court mails a certified copy of the remand order to the state court, *see* 28 U.S.C.A. § 1447(c) (West 2006), *or*, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered . . . .

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[23] Section 1447(c) applies to remands on the basis of a lack of subject matter jurisdiction or a defect in the removal procedure. As the Fourth Circuit pointed out in Bryan I, the district court "concluded that removal was proper because Bryan presented a federal question." 377 F.3d at 427. The Fourth Circuit's decision in Bryan I demonstrates that it agreed. "On appeal, we held that the remanded claim was a federal claim . . . ." Bryan II, 492 F.3d at 234 (citing Bryan I, 377 F.3d at 432). Because the federal court had subject matter jurisdiction over the federal claims, the remand was not made pursuant to section 1447(c).

Bryan II, 492 F.3d at 235 n.1 (emphasis added). The disjunctive word "or" indicates that the purpose of the footnote is to differentiate between the two types of remand: those made pursuant to section 1447(c) and those made for some other reason. In particular, the footnote differentiates between the points in time when each is "effective" to allow the state court to proceed.[24] Citing to section 1447(c), which applies only to remand orders such as the one in this case, the first clause states the rule that the "remand is effective when the district court mails a certified copy of the remand order to the state court." The only situation in which the first clause of the footnote can be an accurate statement of law is when the statement is made to answer the precise question we face in this appeal–When does federal law remove the "shall proceed no further" prohibition so that a state court may proceed with a case after a remand made pursuant to 28 U.S.C. § 1447(c)?[25]

Finally, the text of Bryan II contains a statement that is contrary to the majority's interpretation of the footnote. Responding to a separate argument made by BellSouth, the court again described the point in time when the state court regained jurisdiction to proceed after the remand, and cited section 1447(c). In the parenthetical after the citation in which it explained the meaning of 1447(c), the court stated "providing that the state court may proceed with a case once the district court mails a certified copy of the remand order to the state court." 492 F.3d at 241. This is consistent with the plain language of the statutes and refutes the majority's interpretation of the footnote. Therefore, I interpret the footnote to include in its first clause the rule applicable to the issue we face in this appeal, and thereby to support my

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[24] The court makes this differentiation in order to explain how the remanded state court proceedings and the appeal of the remand order to the Fourth Circuit could proceed simultaneously. 492 F.3d at 235. In fact, the footnote appears at the end of this sentence in the text of the opinion: "While BellSouth's appeal was pending, Count A, which had been remanded to state court by the district court, was proceeding in state court." Id.

[25] It is not possible to interpret the clause to apply to anything other than a section 1447(c) remand, not only because the clause cites to the section, but also because the mailing referred to is not required except when the remand is made pursuant to section 1447(c).

position that the federal clerk was required to mail a certified copy of the remand order to the state court clerk before the state court had jurisdiction to proceed.

e. Conclusion as to Jurisdiction

Limehouse argues that the result of a straightforward interpretation of sections 1446(d) and 1447(c) under the circumstances of this case "makes no sense." The majority refers to it as "jurisdictional limbo" and "jurisdictional hiatus." It is true that interpreting the statutes according to their plain meaning creates a scenario in which for some period of time neither the federal court nor the state court had the power to act. In most cases, however, this period is very brief; in any case it is a situation required by the plain language of federal statutes. Whenever the period becomes lengthy, as it did here, the federal court has the power to order its clerk to comply with the statute.[26]

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[26] While the federal court's remand order becomes final and unreviewable upon its filing, that event does not deprive the federal court of the power to order its clerk to complete the ministerial task of mailing a certified copy of the order to the state court clerk. See Peacock v. Thomas, 516 U.S. 349, 354 (1996) ("[A] federal court may exercise ancillary jurisdiction . . . to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."). As a practical matter, an informal reminder to the federal clerk that a certified copy of the order had not been mailed would almost certainly have solved the problem. As a technical matter, the district court has mandamus power to compel its clerk to complete this ministerial task. This is, in fact, exactly what happened in Lowe. After the district court concluded there was no federal subject matter jurisdiction, the Fourth Circuit granted a writ of mandamus with instructions that the district court return the case to state court. 102 F.3d at 736. Given the substance of the Fourth Circuit's ruling that the district court's order remanding the case was unreviewable upon filing, the only task left to complete at that point was the ministerial task of sending a certified copy of the remand order to the state clerk.

I acknowledge that the result I propose appears at first to be harsh on the facts of this case. However, the section 1446(d) prohibition of "shall proceed no further" is absolute and contemplates no exceptions, even in the face of a harsh result. When the Legislative branch sets forth plain and unambiguous language in a statute, the Judicial branch is constrained to follow it. If the results are harsh, the Legislature may change the statute but the courts may not.[27] However, the result I would reach is not harsh, nor even unfair. Limehouse's motion to remand to state court cites 28 U.S.C. § 1447(c) in its first sentence. Presumably his lawyers read the subsection, in which the requirement of mailing a certified copy of the remand order is plainly and unambiguously stated. Having cited the subsection to his advantage, it is not at all unfair that Limehouse be bound by the subsection when its plain terms work to his disadvantage.

In summary, the following rules apply to remand in the Fourth Circuit. A remand order based on some ground other than a lack of subject matter jurisdiction or a defect in the removal procedure, such as the decision not to exercise supplemental jurisdiction in Bryan, is reviewable, but the remand is effective allowing the state court to proceed as soon as the order is entered. On the other hand, a remand order which is based on a lack of subject matter jurisdiction, such as the order in this case and in Lowe, is unreviewable as soon as it is entered. However, this type of remand is effective such that the state court may proceed only after the federal clerk has complied with 28 U.S.C. § 1447(c) by mailing a certified copy of the remand order to the state court clerk. Because the federal clerk never complied with this requirement, the case was never "remanded," the state court had no power to proceed, and the resulting judgment entered in violation of federal law is void.

[27] Neither Limehouse nor the majority contends this is a situation in which the court may ignore a statute's plain meaning because to do so would yield an absurd result. See Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009) ("One rule of statutory construction allows the Court to deviate from a statute's plain language when the result would be so patently absurd that it is clear that the Legislature could not have intended such a result.").

II. Rule 55(c)

Hulsey moved for relief from default, which the trial court denied in an order filed February 7, 2007. In the subsequent decision of Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), our supreme court explained how the reasons for the default are to be analyzed in determining the existence of "good cause" under Rule 55(c). In light of Sundown, the analysis used by the trial court was controlled by an error of law. I would remand to the circuit court to reconsider the question of good cause under the standard set forth in Sundown.

a. Good Cause under Rule 55(c) before Sundown

Our appellate courts have stated that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. See, e.g., In re Moore, 342 S.C. 1, 5 n.7, 536 S.E.2d 367, 369 n.7 (2000); Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008). In addition to this general guidance, our appellate courts have consistently listed three factors, which have become known as the Wham factors, that a trial court should consider in deciding whether good cause exists. See Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). These factors, (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted, have been cited as the only factors to be considered in almost every opinion since Wham addressing good cause under Rule 55(c). See, e.g., Richardson v. P.V., Inc., 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009) (decided after Sundown); Melton, 379 S.C. at 55, 664 S.E.2d at 492.

Neither the general guidance to liberally construe Rule 55(c) in order to promote justice and dispose of cases on the merits nor the Wham factors instruct a trial court to require, or even to consider, the reason the party went into default. Nevertheless, trial courts and practicing lawyers have been generally aware that some explanation for the default is important to the analysis of good cause under Rule 55(c). In fact, in New Hampshire Insurance Co. v. Bey Corp., 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993), this court quoted Dean Lightsey and Professor Flanagan in listing four factors

"relevant under" Rule 55(c), including "the reasons for the failure to act promptly." 312 S.C. at 50, 435 S.E.2d at 379 (quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)). Until Sundown, Bey Corp. was the only South Carolina appellate decision interpreting Rule 55(c) to have addressed the reasons for the default. However, other than to state it is a relevant factor, Bey Corp. gives no explanation as to how this fits into the analysis of good cause.

Therefore, at the time of the hearing and order on Hulsey's motion for relief from default, South Carolina law provided that the party seeking relief from the default must show good cause, and that in deciding the motion the judge should consider four relevant factors in light of the general guidance that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. The factors were (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, (3) the degree of prejudice to the plaintiff if relief is granted, and (4) the reasons for the failure to act promptly.

b. The Impact of Sundown

In Sundown, the supreme court began its analysis by discussing the reasons for the default. However, the Sundown court elevated that factor to a *requirement*, stating that the good cause standard "requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default." 383 S.C. at 607, 681 S.E.2d at 888. The court went even further and also required that the moving party "give reasons why vacation of the default entry would serve the interests of justice." Id. Thus, the standard of good cause is now interpreted in two ways that are different from the law available to the trial court. First, the reason for the default is no longer merely a factor to be considered. Rather, the party seeking relief from default is required "to provide an explanation for the default." Second, the party seeking relief must give "reasons why vacation of the default would serve the interests of justice." The circuit court must consider all of this in determining whether or not the explanation for the default is satisfactory.[28]

[28] The court went on to explain that the Wham factors come into play after the explanation is accepted by the court. "Once a party has put forth a

c. The Sundown Analysis Applied to These Facts

In this case, Hulsey has complied with the requirement of providing an explanation for the default: an attorney miscalculated the due date of the answer. The next question posed by Sundown was never considered by the trial court. Instead of considering whether vacating the default would serve the interests of justice, the trial court focused on whether the explanation was reasonable. The court found "no good reason" was presented. It also stated that there was "no reasonable basis" for the "assumption that the 30 day time to file an answer starts completely anew upon remand." (emphasis omitted). At one point the trial court called this "confusion." The reasonableness of the explanation is certainly a valid factor to consider. However, Sundown requires a broader inquiry, namely that the reasonableness of the explanation be considered as a part of the analysis of whether vacating the default would serve the interests of justice.

The facts of this case demonstrate the importance of the broader inquiry. The conduct of the lawyer in this case was not "reasonable." First, he should have filed an answer in federal court before the remand order was entered. See Rule 81(c)(2), FRCP. Second, when he learned of the remand order, he should have raced to the county courthouse to file it. A trial judge must consider the attorney's unreasonable failure to do this. However, as to the specific question of whether excusing the unreasonable failure in this case serves the interests of justice, there are additional factors that are important to consider. First, the lawyer was apparently attempting to correctly calculate the deadline for his answer. Second, South Carolina law provides no guidance as to when the answer was actually due in state court. Even the majority declines to define the due date for the answer, stating only that Hulsey failed to meet it, whatever it was.

The fact that the lawyer was trying to correctly follow the rules is particularly relevant to "the interests of justice." Many of our appellate decisions have stated the principle that a lawyer's negligence in failing to file

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satisfactory explanation for the default, the trial court must also consider [the Wham factors]." 383 S.C. at 607-08, 681 S.E.2d at 888.

an answer is imputable to the defaulting litigant, and thus weighs against granting relief from default. See generally Richardson, 383 S.C. at 618-19, 682 S.E.2d at 267. In each of the cases citing this principle, the negligence was in *failing to attempt* to answer the complaint, not in *failing at an attempt* to serve a timely answer. This distinction is important to the interests of justice. Justice should not relieve a lawyer or litigant who makes no attempt to comply with the rules, or who negligently fails to comply with a rule that is clear. However, the interests of justice should protect a lawyer who attempts to comply with the rules, particularly when the lawyer is attempting to meet a deadline which is so *un*clear that no rule or court has ever defined it.

In my opinion, applying the newly-defined standard for good cause under Sundown is likely to yield a different result. In reaching this conclusion, I am influenced by the reasoning of our supreme court in affirming the trial court's order granting relief for a late answer in Lee v. Peek, 240 S.C. 203, 125 S.E.2d 353 (1962). Though Lee is not controlling because it was decided before the Rules of Civil Procedure based on a standard other than good cause, the facts of Lee are strikingly similar to the facts presented here, and the court's analysis seems particularly relevant in light of Sundown.

Davis Lee sued the NAACP and six residents of Anderson County in the Court of Common Pleas of Abbeville County. 240 S.C. at 204, 125 S.E.2d at 353. Three of the Anderson County residents retained a lawyer, who made a motion to change venue to Anderson. 240 S.C. at 205, 125 S.E.2d at 353. Before the motion to change venue could be heard, the NAACP removed the case to federal court. Id. The three Anderson residents represented by the lawyer filed a motion to remand, which was granted. Id. The same attorney then refiled the motion to change venue. Id. During all of this time, the lawyer did not file an answer because "he was under the erroneous impression that it was not necessary for him to answer or demur in the State Court until the motion for change of venue had been decided." 240 S.C. at 205, 125 S.E.2d at 354.

The Lee attorney's failure to answer was unreasonable. The circuit judge "found as a matter of fact that counsel had misconceived the applicable

procedural law." 240 S.C. at 206, 125 S.E.2d at 354. That finding is much like that of the trial court here that "there was no good reason presented by the defendants for their failure to file a timely answer, other than attorney confusion about the deadline for when an answer was due." However, the trial judge in Lee did not focus on the reasonableness of the lawyer's action. Rather, focusing on what the Sundown court has now instructed trial courts to consider, the circuit judge in Lee held "that it was *in the furtherance of justice* that the respondents be relieved of any default." Id. (emphasis added).

d. Conclusion as to Rule 55(c)

Sundown changed the analysis of good cause by requiring for the first time that the trial court focus on "reasons why vacation of the default entry would serve the interests of justice." I believe that if the trial court had analyzed this question, rather than whether the attorney was reasonable in failing to file a timely answer, the outcome might have been different. The supreme court recognized in Lee that the decision as to what is "in the furtherance of justice" is for the circuit court. It is not the task of this court to answer the question posed by Sundown. However, it is the duty of this court to see that the question gets answered. I would reverse the judgment of the lower court, and remand the case for a determination of whether good cause exists under Sundown.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Kase, Appellant,

v.

Michael L. Ebert and DMX Transportation, Inc., of whom

DMX Transportation, Inc., is Respondent.

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

Opinion No. 4806
Submitted November 1, 2010 – Filed March 9, 2011

AFFIRMED

David Alexander, of Greenville, for Appellant.

Scott J. Bradley, of Greenville, for Respondent.

THOMAS, J.: In this personal injury action, James Kase appeals the grant of summary judgment to DMX Transportation, Inc. (DMX). We affirm.[1]

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

FACTS AND PROCEDURAL HISTORY

On May 9, 2006, Kase was sitting in his parked truck at the Pilot Truck Stop near Duncan, South Carolina.[2] He felt another vehicle bump into the rear of his vehicle and exited his truck to investigate. Although Kase was not injured from the collision and the damage to his truck was minimal, a physical altercation ensued between Kase and Michael Ebert, the driver of the other vehicle, after both had exited their respective vehicles. Ebert fled the scene, but was later arrested. Kase was injured during the fight. The injuries caused him to miss several months of work and eventually lose his job.

Ebert was employed as a driver for DMX, and the vehicle that collided with Kase's truck belonged to DMX. DMX hired Ebert in 2004 even though he accidentally damaged some equipment during his road test and allegedly disclosed that he had been convicted of assault twenty-two years ago while working as a driver in Arizona. The assault conviction arose from a fight between Ebert and a security guard who attempted to ticket him for parking in the wrong place while making a delivery. Ebert's employment at DMX continued despite numerous professional and personal difficulties, including (1) suspension of his commercial driver's license because of too many serious traffic violations within a short time, (2) a written reprimand from DMX concerning numerous accidents and complaints from customers and supervisors about his performance, (3) a second reprimand from DMX admonishing Ebert for hostile disrespect of his supervisors, (4) marital difficulties that were further compounded by DMX's withholding of his wages to pay child support, (5) a recent citation in Wisconsin for speeding and inattentive driving, and (6) a bizarre written complaint that he wrote against the officer who ticketed him in Wisconsin.

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[2] In his brief, Kase states he was employed as a tractor-trailer driver and was driving a tractor-trailer when the incident with Ebert occurred. The record, however, indicates that Kase was driving a truck and Ebert was driving a tractor-trailer at that time.

Although Ebert pled guilty to assaulting Kase, he continued to work for DMX for several months. DMX eventually dismissed Ebert for insubordination and because its insurance carrier refused to cover him because of too many speeding tickets.

In September 2007, Kase filed this action against Ebert and DMX, alleging causes of action for assault and battery against Ebert, as well as negligence and gross negligence claims against both defendants. Kase also sued DMX on claims of negligent entrustment, negligent hiring, training, supervision, and/or retention, and respondeat superior. In October 2008, DMX moved for summary judgment.

After a hearing on the motion in February 2009, the trial judge granted the motion, holding (1) Ebert was acting outside the course and scope of his employment when he assaulted Kase; therefore, DMX was not vicariously liable for his actions; and (2) Kase could not satisfy the necessary elements to proceed on his claims for negligent hiring, negligent retention, negligent supervision, or negligent entrustment. Kase then filed this appeal.

ISSUES

I. Did the trial judge err in holding that DMX, as a matter of law, could not be held vicariously liable for Ebert's assault on Kase?

II. Did the trial judge err in granting summary judgment to DMX on Kase's causes of action for negligent hiring, negligent supervision, and negligent retention?

STANDARD OF REVIEW

"Summary judgment is appropriate where there is no genuine issue of material fact, and it is clear that the moving party is entitled to judgment as a matter of law." Bank v. N.Y. v. Sumter County, 387 S.C. 147, 154-55, 691 S.E.2d 473, 477 (2010). "On review of an order granting summary judgment,

the appellate court applies the same standard as that used by the trial court." Id. at 155, 691 S.E.2d at 477. "[I]n cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). To survive a summary judgment motion by the defendant in a lawsuit, however, the plaintiff must offer some evidence that a genuine issue of material fact exists for each element of the claim at issue except for those elements that are either uncontested or agreed to by stipulation. Eadie v. Krause, 381 S.C. 55, 65, n.5, 671 S.E.2d 389, 393 n.5 (Ct. App. 2008), cert. denied (June 10, 2010) (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991)).

LAW/ANALYSIS

I. Respondeat superior claims

Kase contends the trial judge, in finding DMX could not be held vicariously liable for Ebert's actions, incorrectly ignored evidence that DMX endorsed or even encouraged its drivers to use violence to protect its property. We disagree.

"If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." Jones v. Elbert, 211 S.C. 553, 558, 34 S.E.2d 796, 798-99 (1945). "On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment." Crittenden v. Thompson-Walker Co., 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986). "If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; and this is so no matter how short the time, and the master is not liable for his acts during such time." Lane v. Modern Music, Inc., 244 S.C. 299, 305, 136 S.E.2d 713, 716 (1964) (emphasis added).

The evidence cited by Kase consisted of deposition testimony from Ebert that he had discussed with his superiors at DMX that forceful action was necessary at times to protect DMX property. It is undisputed that the altercation at issue here did not arise because Ebert was protecting either a company vehicle or the cargo he was transporting. Rather, Ebert had already exited the vehicle and was defending himself against what he perceived to be a violent attack by Kase. We therefore agree with the trial judge's findings that Ebert was acting outside the course and scope of his employment with DMX when he assaulted Kase. It follows that DMX cannot be held vicariously liable for Ebert's actions. See Armstrong v. Food Lion, 371 S.C. 271, 276, 639 S.E.2d 50, 53 (2006) (holding that because "petitioners failed to produce any evidence that the Food Lion employees were acting within the scope of their employment or in furtherance of Food Lion's business when they attacked petitioners," Food Lion could not be held liable to the plaintiffs on those claims based on the theory of respondeat superior).

II. Negligence claims

Kase further argues the trial judge, in granting summary judgment to DMX on his claims for negligent hiring, negligence, and negligent supervision, incorrectly disregarded (1) evidence that DMX had actual knowledge of Ebert's potential for violence and (2) his expert's opinion that the sum of Ebert's problems placed DMX on notice of this propensity. We disagree.

A. Negligent hiring

Regarding his claim of negligent hiring, Kase argues Ebert's prior assault conviction was sufficient evidence to withstand DMX's summary judgment motion. Quoting this court's opinion in Doe v. ATC, 367 S.C. 199, 207, 624 S.E.2d 447, 451 (Ct. App. 2005), he contends that because of the factual similarities between the events leading to the conviction and those giving rise to the present litigation, "the prior misconduct has a sufficient nexus to the ultimate harm." We disagree.

"In circumstances where an employer knew of or should have known that its employment of a specific person created an undue risk of harm to the

public, a plaintiff may claim that the employer was itself negligent in hiring . . . . the employee . . . ." James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008). Negligent hiring cases "generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties." Doe, 367 S.C. at 206, 624 S.E.2d at 450 (citing Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982)). Although foreseeability is usually an issue of fact, "the court should dispose of the matter on a dispositive motion when no reasonable factfinder could find the risk foreseeable or the employer's conduct to have fallen below the acceptable standard." Id.

We agree with the trial judge that Kase presented no evidence that Ebert's single assault conviction, which took place more than twenty years before he was hired by DMX, was reason for DMX to foresee that employing Ebert would create an undue risk of harm to the public or that DMX's decision to hire him in view of this conviction fell below any acceptable hiring standard. Although Kase's expert testified that Ebert had a poor driving record when DMX hired him and indicated an employer may be justified in refusing to hire someone with a single simple assault conviction, he also conceded that this conviction alone would not have been sufficient to place DMX on notice that Ebert would become involved in a physical altercation with a third party. Kase has not directed our attention to any other evidence that DMX knew or should have known when it hired Ebert that he had a propensity toward violent behavior; therefore, we affirm the grant of summary judgment on Kase's negligent hiring claim.

B. Negligent supervision and retention

Kase also mentioned additional circumstances that, he contends, showed DMX was on notice of Ebert's potential for violence. These include (1) Ebert's poor driving record, which included numerous moving violations; (2) Ebert's insubordinate behavior; (3) Ebert's marital difficulties and resulting financial problems; and (4) the incident in Wisconsin and Ebert's erratic behavior afterwards. It appears that because these circumstances arose during Ebert's employment with DMX, Kase has cited them to support his

claims for negligent supervision and negligent retention. We hold, however, that Kase, as a matter of law, cannot proceed on these causes of action.

In Degenhart v. Knights of Columbus, 309 S.C. 114, 116-17, 420 S.E.2d 495, 496 (1992), the South Carolina Supreme Court quoted with approval section 317 of the Restatement (Second) of Torts (1965). This section provides as follows:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

(emphases added). Here, it was undisputed that the fight between Kase and Ebert did not take place on DMX property. Furthermore, Ebert had already exited the company vehicle before the altercation started. Although the fight between Kase and Ebert immediately followed the collision between the vehicles they were driving, it did not involve Ebert's use of a DMX chattel. See id. cmt. b ("So too, [a master] is required to exercise his authority as a master to prevent [his servants] from misusing chattels which he entrusts to them for use as his servants.") (emphasis added). We therefore agree with the trial judge that DMX, as a matter of law, cannot be liable for either negligent supervision or negligent retention.

CONCLUSION

For the foregoing reasons, we affirm the grant of summary judgment to DMX on Kase's vicarious liability claim and his negligence causes of action.

AFFIRMED.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lisa Murphy, Employee, Respondent,

v.

Owens Corning, Employer, and Gallagher Bassett Services, Carrier, Appellants.

Appeal From Richland County
Appellate Panel, Workers' Compensation Commission

Opinion No. 4807
Submitted February 1, 2011 – Filed March 9, 2011

AFFIRMED AS MODIFIED

William E. Shaughnessy and Michael B. Eller, of Greenville, for Appellants.

Bryan D. Ramey, of Piedmont; and John S. Nichols, of Columbia, for Respondent.

SHORT, J.: Owens Corning, Employer, and Gallagher Bassett Services, Carrier (collectively, Appellants), appeal the Workers' Compensation Commission's order finding Lisa Murphy sustained

compensable injuries arising from repetitive trauma to her back, shoulders, hands, and arms. We affirm as modified.[1]

FACTS

Murphy is employed as a sliver handler at Owens Corning. Her job requires her to reach for hot glass pieces above her head and pull them down into strands. Murphy then looks up to inspect for leftover beads that could plug the bushings, and winds the strands onto a chopper. She testified she is taller than most of the other sliver handlers, and her height requires her to stay bent over and look up while she pulls down approximately four thousand glass pieces during her eight-hour shift. Murphy's work shifts alternated, sometimes requiring her to work seven days in a row. At the time of the hearing before the single commissioner in 2008, Murphy had been employed by Owens Corning for nineteen years, approximately five as a sliver handler at least part time, and six as a full-time sliver handler.

Between 2003 and 2005, Murphy began experiencing pain in her neck, severe headaches, and tingling in her fingers. She was treated by Dr. Stephen F. Worsham. In notes dated May 3, 2004, Worsham wrote: "[Murphy] states that the work rigors are too much for her to handle." On June 2, 2004, Worsham concluded: "[Murphy] may think about seeking for (sic) another type of employment if this is going to be a continued difficulty." In August 2007, Worsham recommended Murphy stay out of work for four weeks, and referred her to Dr. Aaron C. MacDonald of the Piedmont Neurosurgical Group, P.A.

MacDonald saw Murphy on August 29, 2007, and reported an "MRI of the cervical spine show[ed] cervical spondylosis and disc bulging at C5-6 and C6-7 causing possible neural impingement."[2] MacDonald concluded Murphy's two bulging disks probably came from the "disks irritating the nerve roots from the chronic extension that [Murphy] was in." MacDonald opined to a reasonable degree of medical certainty that Murphy's work made her symptoms worse. When asked regarding a direct causal relationship

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.
[2] Murphy stipulated she had cervical spondylosis "probably from birth."

between Murphy's job and the exacerbation of her symptoms, MacDonald stated: "[H]er symptoms were made worse by the position that she was in to do her job."

Murphy testified she felt better when she was on leave in 2007, and she did not realize her symptoms were related to her job until her visit to Worsham on September 7, 2007, after she saw MacDonald. Worsham's notes state: "[Murphy] has been seen by Dr. M[a]cDonald, who feels it is not surgical, although it is causing her some difficulty and continues to cause her difficulty with the type of repetitious over-the-head work that she does." Murphy reported her injuries to Owens Corning that day. Murphy returned to work, and remained working as of the date of the hearing before the commissioner. She did not seek temporary total disability, but sought medical care under the Workers' Compensation Act. Murphy did not recall Worsham recommending she find alternate employment in 2004.

Appellants submitted the findings of its medical expert, Dr. Glenn L. Scott. Scott reported he reviewed Murphy's medical records and inspected other employees performing the sliver handler's job at the work site. He concluded her "cervical spondylosis was not caused by her work, nor has her work caused any permanent damage, nor has it accelerated the condition itself." Scott did not examine Murphy or view her at the job site.

The single commissioner found "the preponderance of the evidence is that there is a direct causal connection between the repetitive activities of [Murphy's] job and the aggravation of her . . . condition. This finding is based on the medical records . . . ." The commissioner found: (1) Murphy sustained an injury by accident arising out of and in the course of her employment under section 42-1-160; and (2) Murphy first knew her condition was work-related on September 7, 2007, and she gave timely and proper notice.

The Commission held a hearing, sustained the commissioner's order in its entirety, and found: (1) Murphy suffered an aggravation of her underlying condition by the repetitive trauma of performing overhead work on her job; (2) the finding was based on the record as a whole, including the medical record; (3) by the preponderance of the evidence there was a direct causal

connection between the repetitive activities of Murphy's job and the aggravation of her condition; (4) Murphy sustained an injury by accident under section 42-1-160; (5) Murphy first knew her condition was work-related on September 7, 2007; and (6) Murphy gave timely and proper notice.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Commission. S.C. Code Ann. § 1-23-380 (Supp. 2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, this court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

"Statutory interpretation is a question of law." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). This court is free to decide matters of law with no particular deference to the fact finder. Pressley v. REA Constr. Co., 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct. App. 2007). "But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Hopper, 373 S.C. at 479-80, 646 S.E.2d at 165.

LAW/ANALYSIS

I. Notice of Injury and Statute of Limitations

Appellants argue the Commission erred in finding Murphy gave proper and timely notice of her injury. Appellants also argue Murphy failed to file her claim within the time required under the statute of limitations. We find no reversible error.

Section 42-15-20(C) of the South Carolina Code requires an employee alleging a repetitive trauma injury to give notice "within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable . . . ." S.C. Code

Ann. § 42-15-20(C) (Supp. 2010). Section 42-15-40 bars a claim alleging a repetitive trauma injury unless the claim is filed "within two years after the employee knew or should have known that his injury is compensable . . . ." S.C. Code Ann. § 42-15-40 (Supp. 2010). The statutory notice requirements under sections 42-15-20 and 42-15-40 should be liberally construed in favor of claimants. Etheredge v. Monsanto Co., 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002); Rogers v. Spartanburg Reg'l Med. Ctr., 328 S.C. 415, 418, 491 S.E.2d 708, 710 (Ct. App. 1997).

The Commission's findings of fact regarding notice and the statute of limitations are reviewed under the substantial evidence standard of review. See McCraw v. Mary Black Hosp., 350 S.C. 229, 235, 565 S.E.2d 286, 289 (2002) (applying the substantial evidence rule in action appealing the Commission's findings of fact regarding whether claimant timely filed a claim under the statute of limitations); Watt v. Piedmont Auto., 384 S.C. 203, 212, 681 S.E.2d 615, 620 (Ct. App. 2009) (deferring to the Commission on the issue of notice and finding the Commission determines the credibility of witnesses); Etheredge, 349 S.C. at 456, 562 S.E.2d at 682 (applying substantial evidence standard of review to Commission's finding of timely notice within ninety days as required by statute).

Murphy testified she did not realize her symptoms were related to her job until September 7, 2007, and immediately reported to Owens Corning. Although there is some evidence supporting Appellants' argument that the medical records indicate Murphy should have known of her injuries in 2004, the Commission is the fact-finder, and found she "first knew her condition was work related on September 7, 2007. This is based on [Murphy's] testimony, the medical reports with special emphasis on Dr. Worsham's note of September 7, 2007[,] . . . and the record as a whole." We find substantial evidence in the record that Murphy provided timely and proper notice and is not barred by the statute of limitations.

II. Compensability of Repetitive Trauma Injuries

Appellants argue that because Murphy's alleged injuries arise from repetitive trauma, the Commission erred in finding Murphy suffered an injury by accident arising out of and in the course of her employment under South

Carolina Code section 42-1-160. Appellants concede that repetitive trauma injuries were compensable under section 42-1-160 prior to July 1, 2007. Appellants argue, however, the enactment of section 42-1-172 in 2007 defines and sets forth new requirements for repetitive trauma injuries. According to Appellants, the Commission thus erred in finding Murphy's injuries compensable under section 42-1-160. We agree but affirm as modified.

Section 42-1-160 provides in relevant part:

> (A) "Injury" and "personal injury" mean only injury by accident arising out of and in the course of employment . . . .
>
> . . . .
>
> (F) The word "accident" as used in this title must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time. *Any injury or disease attributable to such causes must be compensable only if culminating in a compensable repetitive trauma injury pursuant to Section 42-1-172 . . . .*

S.C. Code Ann. § 42-1-160 (Supp. 2010) (emphasis added). Section 42-1-172 provides:

> (A) "Repetitive trauma injury" means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events. *Compensability of a repetitive trauma injury must be determined only under the provisions of this statute.*
>
> (B) An injury is not considered a compensable repetitive trauma injury unless a commissioner makes

> a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury.
>
> (C) As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician.
>
> (D) A "repetitive trauma injury" is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.

S.C. Code Ann. § 42-1-172 (Supp. 2010) (emphasis added).

We agree that the compensability of a repetitive trauma injury must be determined by the Commission under the provisions of section 42-1-172. We find the Commission thus erred by failing to address section 42-1-172. Despite the Commission's error, we affirm as modified because although it cited section 42-1-160, the Commission made the findings required under section 42-1-172. See Dykes v. Daniel Constr. Co., 262 S.C. 98, 109, 202 S.E.2d 646, 652 (1974) (concluding that although the Commission failed to make the specific finding in the statutory language, its substantial compliance implied such a finding, enabling the court to properly review whether there was evidence to sustain the award). Compensability under section 42-1-172 requires a specific finding of fact, by the preponderance of the evidence, of a direct causal relationship, established by medical evidence, between the repetitive act and the employment. The single commissioner found in part that "the preponderance of the evidence is that there is a direct causal connection between the repetitive activities of [Murphy's] job and the aggravation of her . . . condition. This finding is based on the medical records . . . ." The Commission sustained the commissioner's order in its

entirety, and found in part: (1) Murphy suffered an aggravation of her underlying condition by the repetitive trauma of performing overhead work on her job; (2) the finding was based on the record as a whole, including the medical record; and (3) there was a direct causal connection between the repetitive activities of Murphy's job and the aggravation of her condition. We find the Commission made the findings necessary under section 42-1-172 and, accordingly, affirm as modified. See Callahan v. Beaufort Cnty. Sch. Dist., 375 S.C. 92, 97, 651 S.E.2d 311, 314 (2007) (affirming as modified in a workers' compensation action despite a claimant's failure to strictly comply with the statute).

III. Aggravation of Pre-Existing Condition

Appellants next argue the Commission's findings of fact regarding aggravation of a pre-existing condition do not satisfy the requirements for compensability under section 42-9-35 of the South Carolina Code because Murphy did not prove a subsequent injury or a subsequent disability. We disagree.

Section 42-9-35 applies to the aggravation of a pre-existing condition and provides in relevant part:

> (A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:
>
> (1) the *subsequent injury* aggravated the preexisting condition or permanent physical impairment; or
>
> (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.
>
> (B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a *subsequent disability* from an injury arising out of and in the course of his employment for

> the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury.

S.C. Code Ann. § 42-9-35 (Supp. 2010) (emphasis added).

The claimant's right to compensation for aggravation of a pre-existing condition arises when the claimant has a dormant condition that becomes disabling because of the aggravating injury. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 493, 541 S.E.2d 526, 528 (2001). We review the Commission's factual findings of whether a claimant is entitled to compensation for aggravation of a pre-existing condition under the substantial evidence standard of review. Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 274-75, 353 S.E.2d 280, 282 (1987).

The Commission found Murphy:

> suffered an aggravation of her underlying neck condition by the repetitive trauma of performing overhead work on her job. The aggravation has manifested itself in neck pain, headaches, shoulder pain, arm pain and hand pain. This finding is based on the record as a whole, including the medical record and deposition testimony of Dr. M[a]cDonald that the job aggravated [Murphy's] condition. . . . The preponderance of the evidence is that there is a direct causal connection between the repetitive activities of [Murphy's] job and the aggravation of her underlying neck condition. This finding is based on the medical reports . . . and on Dr. M[a]cDonald's deposition . . . .

We find that although the Commission did not refer to section 42-9-35 in its order, it made the necessary findings under the statute. Accordingly, we affirm as modified.

CONCLUSION

Based on the foregoing analysis, the order on appeal is

AFFIRMED AS MODIFIED.

HUFF and PIEPER, JJ., concur.