The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

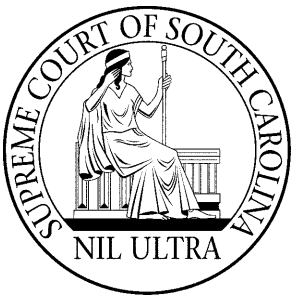
S.C. Code Ann. § 34-31-20 (B) (Supp. 2010) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 3, 2012, the first edition after January 1, 2012, listed the prime rate as 3.25%. Therefore, for the period January 15, 2012, through January 14, 2013, the legal rate of interest for judgments and money decrees is 7.25% compounded annually.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina
January 4, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 9, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phillip D. Grimsley, Sr., and Roger M. Jowers, on behalf of themselves and others similarly situated, Appellants,

v.

South Carolina Law Enforcement Division and the State of South Carolina, Defendants,

of which the State of South Carolina is the Respondent.

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27085
Heard November 16, 2011 – Filed January 3, 2012

REVERSED AND REMANDED

A. Camden Lewis and W. Jonathan Harling, both of Lewis & Babcock, John A. O'Leary and James Walter Fayssoux, Jr., both of O'Leary Associates, and Richard A. Harpootlian, all of Columbia, for Appellants.

Attorney General Alan Wilson, Assistant Deputy Attorney General J. Emory Smith, Jr., of Columbia, for Respondent.

JUSTICE KITTREDGE: This is an appeal from the trial court's order granting the State's motion to dismiss. We reverse and remand.

Appellants are rehired employees of the South Carolina Law Enforcement Division (SLED). Appellants' claims arise from the contention that SLED has imposed a requirement in a statutorily authorized retirement program that is contrary to law. The trial court dismissed the complaint for failure to exhaust administrative remedies under the South Carolina Retirement Contribution Procedures Act (Retirement Act), which Appellants challenge on appeal. Appellants additionally appeal the trial court's alternative ruling dismissing their unlawful takings claim. We agree with Appellants and find the trial court erred in dismissing their complaint.

I.

Appellants are former employees of SLED who have retired and returned to work. As employees of SLED, they were members of the Police Officers Retirement System. While still employed, Appellants were offered the opportunity to participate in an optional retirement program. Pursuant to S.C. Code Ann. section 9-11-90 (Supp. 2010), the program required Appellants to retire from SLED and to separate from employment for a period of time. Appellants then had to request to be rehired by SLED. Upon SLED's approval, Appellants were rehired for a period not to exceed forty-eight months. As part of the rehire process SLED required Appellants to sign a form, which provided that Appellants "will have a reduction of 13.6% in [their] salary to cover the amount it will cost SLED to pay the employer portion of retirement." According to Appellants, this provision is contrary to state law, which assigns the responsibility for the employer portion of retirement to the employer.

On behalf of themselves and others similarly situated, Appellants brought suit against SLED and the State, seeking a declaratory judgment and

asserting causes of action for a violation of S.C. Code Ann. section 9-11-90 and unlawful takings.[1] The complaint contends that SLED's retirement program violates section 9-11-90(4)(b), which states in relevant part:

> (b) An employer shall pay to the system the employer contribution for active members prescribed by law with respect to any retired member engaged to perform services for the employer, regardless of whether the retired member is a full-time or part-time employee or a temporary or permanent employee.

In response, the State filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.[2] The trial court granted the motion to dismiss,[3] holding that Appellants were required to exhaust the administrative remedies prescribed in the South Carolina Retirement Contribution Procedures Act, S.C. Code Ann. § 9-21-10, *et seq.* (Supp. 2010).[4]

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[1] In addition to claiming that the deduction in Appellants' salaries was an unlawful taking, Appellants alleged the deduction was an unconstitutional tax. However, at oral argument, Appellants withdrew their unconstitutional taxation argument.

[2] For reasons unknown to us, SLED participated in neither the motion nor this appeal. The State's motion sought dismissal of the case, not merely the claims against the State.

[3] The State's motion to dismiss was filed pursuant to both Rules 12(b)(6) and 12(b)(1), and the trial court's order does not explicitly state upon which it is based. However, the issue does not involve subject matter jurisdiction and Rule 12(b)(1) should not have been a basis for the dismissal. See Ward v. State, 343 S.C. 14, 17, 538 S.E.2d 245, 246 n.5 (2000) ("The doctrine of exhaustion of remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional . . . . [It] goes to the prematurity of a case, not subject matter jurisdiction."); see also S.C. Const. art. V, § 11 ("The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.").

[4] At oral argument, the State requested to be dismissed as a party because Appellants failed to allege facts sufficient to state a cause of action against the State. We deny the State's request. Additionally, the State asserted in its brief that other alternative sustaining grounds would allow this Court to dismiss the State from this lawsuit. We believe a ruling on these issues would be premature, and we decline to address the additional sustaining grounds. See I'on, LLC v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

The trial court held Appellants' takings claim should also be dismissed because Appellants did not have a property interest rooted in state law upon which the claim could be based. Specifically, the trial court adopted the manner in which the State framed the issue—that an employee does not have a property interest in a particular salary amount. Appellants contend the trial court erred in granting the State's motion to dismiss. We agree.

II.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Id. If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

III.

The trial court erred in finding Appellants were required to exhaust their administrative remedies under the Retirement Act before proceeding to circuit court.

We are guided by rules of statutory construction and conclude the legislature did not intend for the Retirement Act to apply to this controversy. The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "As such, a court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (internal citations omitted). But "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory

interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The Retirement Act states in relevant part:

> [The Retirement Act] applies to a *controversy or dispute between a member or a member's designated beneficiary and the retirement systems* which arises pursuant to or by virtue of any of the provisions of this title. The procedures set forth in this chapter constitute the exclusive remedy for a dispute or controversy between the retirement systems and a member or a member's designated beneficiary arising pursuant to or by virtue of Title 9 of the Code of Laws of South Carolina, 1976. A claim presenting a dispute or controversy arising pursuant to or by virtue of this title must be resolved in accordance with the procedures and provisions provided in this chapter.

S.C. Code Ann. § 9-21-30 (Supp. 2010) (emphasis added). The legislature's stated purpose in enacting the Retirement Act was "to provide the remedies available in a dispute or controversy between the South Carolina retirement systems and a member . . . of any of the retirement systems established in Title 9." Act of July 1, 2003, No. 12, § 1 (2003).

The trial court held Appellants were required to exhaust their administrative remedies under the Retirement Act. This was error. By its plain language, section 9-21-30 applies to a controversy or dispute between a member or member's beneficiary and the retirement systems.[5] Given the Act's stated purpose, it is clear the legislature intended for the Retirement Act to apply to disputes between the enumerated retirement systems and their respective members.

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[5] "'South Carolina Retirement Systems' or 'retirement systems' means the division of the board administering the South Carolina Retirement System, the South Carolina Police Officers System, the Retirement System for Members of the General Assembly, the Retirement System for Judges and Solicitors, the State Optional Retirement Program, or the National Guard Retirement System." S.C. Code Ann. § 9-21-20(8) (Supp. 2010).

The administrative process prescribed in the Retirement Act provides additional support for the conclusion that it is not applicable to the present dispute. Section 9-21-50(A) states:

> A member or the member's designated beneficiary *shall file a claim concerning an administrative decision by the retirement systems* arising pursuant to or by virtue of this title that adversely affects the personal interest of the member or the member's designated beneficiary by the filing of a written claim with the director within one year of the decision by the retirement systems.

S.C. Code Ann. § 9-21-50(A) (emphasis added). The administrative remedies the State seeks to impose require an administrative decision by the *retirement systems*. Appellants' complaint involves neither the retirement systems in general nor any administrative decision by the retirement systems. Thus, Appellants have no grievance with any of the retirement systems, nor is there a decision from a retirement system to trigger the grievance process delineated in the Retirement Act. The underlying dispute is between SLED and its employees centered upon SLED's internal retirement program. Because there is no controversy involving the "retirement systems," the Retirement Act's administrative remedies are in no manner implicated by Appellants' claims. Accordingly, there is no requirement that Appellants exhaust the Retirement Act's administrative remedies. We hold it was an error of law to dismiss the complaint based on a failure to exhaust administrative remedies.

IV.

Appellants also assert the trial court erred in dismissing the unlawful takings claim because they do not have a constitutionally protected property interest. Specifically, Appellants contend the trial court erred because the court misconstrued the property interest asserted. We agree.

The Takings Clause provides that private property shall not be taken for public use without just compensation. Rick's Amusement, Inc. v. State, 351 S.C. 352, 357, 570 S.E.2d 155, 157 (2001). Similarly, to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Worsley Co. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). Thus, parties claiming such violations must first show they have a legitimate property interest.

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Snipes v. McAndrew, 280 S.C. 320, 324, 313 S.E.2d 294, 297 (1984) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972)). To determine if the expectation of entitlement is sufficient "will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [agency] . . . ." Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980); see also Bowles v. Tennant, 613 F.2d 776, 778 (9th Cir. 1980) (noting that an important factor in the determination of a property interest is the presence or absence of mandatory language in the statute); TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 n.3 (1998) (finding the use of the word "shall" in a statute ordinarily means the action referred to is mandatory).

In their complaint, Appellants assert a violation of S.C. Code Ann. section 9-11-90. The pertinent portion of the statute states:

> (b) An employer *shall* pay to the system the employer contribution for active members prescribed by law with respect to any retired member engaged to perform services for the employer, regardless of whether the retired member is a full-time or part-time employee or a temporary or permanent employee.

S.C. Code Ann. § 9-11-90(4)(b) (emphasis added).

The State misconstrues Appellants' claim. Contrary to the State's interpretation, Appellants do not claim they are entitled to a particular salary level. Rather, Appellants contend that they have a cognizable property interest in the percentage of their salary that was deducted in violation of section 9-11-90, regardless of any particular salary level. See Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 342 (Harlan, J., concurring) ("The property of which petitioner has been deprived is the use of the garnished *portion* of her wages during the interim period between the garnishment and the culmination of the main suit." (emphasis added)).

Properly construing Appellants' claim, we hold section 9-11-90 provides a basis to assert a property interest. Specifically, Appellants' takings claim is predicated on their entitlement to retain the percentage of their salary—13.6%—that was used to pay the employer portion of the retirement contributions. It follows that Appellants are able to point to a property interest rooted in state law. See Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006) (holding that in order to prove a denial of due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law); see also Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978) (stating that because property interests are creatures of state law, one is required to demonstrate the alleged deprivation is a property interest recognized by state law in order to invoke due process protection); Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) (declaring that the starting point for a due process inquiry is to determine whether state or local law afforded plaintiff a protected property interest sufficient to trigger due process guarantees); cf. Hamilton v. Bd. of Trs. of Oconee County Sch. Dist., 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984) (finding plaintiff failed to establish a property interest in a teaching contract within the meaning of due process because she pointed to no state law or regulation that would require her employment contract to be renewed).

We conclude, therefore, that Appellants have asserted a cognizable property interest rooted in state law sufficient to survive the motion to dismiss. See Rydde, 381 S.C. at 646, 675 S.E.2d at 433 ("The Court [is

required] to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiffs to relief on any theory of the case."). In so finding, we also hold the trial court erred in dismissing Appellants' unlawful takings claim.

V.

We reverse the trial court's order granting the motion to dismiss and remand the matter to the trial court.

REVERSED AND REMANDED.

TOAL, C.J., BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of Kay F. Paschal, Respondent.

ORDER

Respondent was arrested and charged with Forgery (value $10,000 or more) and Breach of Trust (value more than $2,000, but less than $10,000). The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR. The petition is granted.

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

IT IS FURTHER ORDERED that respondent is hereby enjoined from access to any trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain.

s/ Costa M. Pleicones A.C.J.

FOR THE COURT

Toal, C.J., not participating

Columbia, South Carolina

January 3, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch, Appellants,

v.

Jacqueline F. Busbee, individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch, Respondents.

In the Matter of:

The Estate of Clara Gordon Burch

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880
Heard March 8, 2011 – Filed August 31, 2011
Withdrawn, Substituted and Refiled January 4, 2012

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Adele J. Pope, of Columbia, and Thomas H. Pope, of Newberry, for Appellants.

B. Michael Brackett, of Columbia, for Respondent Jacqueline F. Busbee, as Personal Representative of the Estate of George E. Burch; Warren C. Powell and Willima D. Britt, Jr., of Columbia, for Respondent Jacqueline F. Busbee, individually; and Carlos W. Gibbons, Jr., of Columbia, for Respondents, Dennis E. Burch and Laurie E. Burch.

KONDUROS, J.: Charles and Barbara Gordon appeal the circuit court's denial of their motions for directed verdict and the grant of directed verdict to the defendants on various causes of action. They further appeal various matters related to jury instructions as well as the circuit court's refusal to grant equitable relief. We affirm in part, reverse in part and remand.

FACTS

Clara Gordon Burch and her fourth husband, George E. Burch, were married in 1984. Clara was 75 at the time of their marriage and George was almost 70. Clara had no children, while George had two, Dennis E. Burch and Laurie E. Burch. Clara's will, executed in 1985, left a life estate in her home to George, but ceded her remaining assets to her Gordon family members, including her nephew, Charles, and other nieces and nephews. In October 1994, Clara entered a nursing home and was experiencing "cognitive defects." She had amassed a sizable estate composed primarily of bonds, certificates of deposit, and other funds received incident to her previous marriages. In February of 1995, Clara executed a power of attorney (POA) in George's favor. The POA did not contain a gifting provision. George's attorney, Jacqueline Busbee, prepared the POA, although she did not meet or

confer with Clara before doing so. Thereafter, George removed funds in CDs or accounts owned by Clara or from their joint account totaling approximately $400,000. Clara passed away in April of 2000, and, per the provisions in her will, George was named personal representative (PR) of her estate. Busbee began advising George in his capacity as PR. George died on January 18, 2003, and, per the provisions of his will, Busbee was named PR of his estate. Charles was appointed successor PR of Clara's estate on February 27, 2003. Charles filed this lawsuit in April 2005.[1]

At trial before the circuit court, Charles's wife, Barbara, and George's daughter, Laurie, testified George mentioned an arrangement between Clara and him to handle their estate finances. Laurie also testified George gave her a loan in the amount of $170,000 that was to be considered an advance against her inheritance if it was not repaid at the time of his death.

The Gordons presented expert accounting evidence through Agnes Asman, a certified public accountant. She testified she had examined all the records available to her and created a chart that represented transfers made from Clara's funds into accounts or CDs held solely in George's name or in their joint account that had been used to pay for Clara's nursing home care. In her estimation, George had misappropriated approximately $450,000 exclusive of interest. On cross-examination, Asman conceded the examination she had conducted was not a forensic accounting that would demonstrate the source of the funds into the accounts and specifically trace the funds to their final destination. She further admitted she had not examined the signature cards for the various accounts but had relied on the Internal Revenue Service form 1099s to determine who had ownership of various accounts and assets. In at least one instance when Asman's chart showed ownership of an account by Clara, George was also a signator on the account. Additionally, Asman testified she had not considered George's contribution to the parties' joint bank account when determining that he had withdrawn money that belonged to Clara.

[1] The matter was dismissed on a procedural ground but remanded for trial on appeal. Gordon v. Busbee, 367 S.C. 116, 623 S.E.2d 857 (Ct. App. 2005).

With respect to Busbee, the Gordons alleged she had operated as George's attorney in his capacity as PR and as attorney for Clara's estate. They claimed Busbee failed to check the status of Clara's estate at the time of her death by failing to inventory Clara's safety deposit box and by neglecting to obtain Clara's last bank statements prior to the death. They also argued Busbee's filing of the inventory of assets in Clara's and George's estates was inaccurate and/or fraudulent. They contended Dennis and Laurie knew of George's transfer of funds from Clara's accounts and estate and received the benefit of those transfers either directly or as his devisees.

At the close of the Gordons' case, the circuit court granted Dennis Burch's directed verdict motion as to all claims against him. With respect to Laurie, the court granted a directed verdict in her favor as to all claims with the caveat that she may be called upon to repay the loans from George to his estate. The circuit court granted a directed verdict in favor of Busbee on all claims against her individually with the exception of the causes of action for legal malpractice and breach of fiduciary duty. It also allowed the conversion claim against her as PR of the estate to remain but only insofar as she was the representative of George's estate in the action, not based on her actions in converting any assets.

At the close of all evidence, the Gordons moved for directed verdict against George's estate, arguing the money transferred by George should be returned to Clara's estate because he had transferred the funds without Clara's permission. That motion was denied, apparently based on the argument that George and Clara had made an oral contractual arrangement for the execution of these transfers.

After closing arguments, court was dismissed for the day. The following morning, the Gordons submitted additional jury charge requests relating to the proportional ownership of joint bank accounts with right of survivorship and other matters. The circuit court refused the charges, determining the request was untimely pursuant to Rule 51, SCRCP. After the jury was charged, the Gordons took exception to the charge on conversion. They argued the circuit court had placed the burden of persuasion on the

plaintiff when the burden should have been shifted to the defendant to prove the transfers were valid in the absence of authorization to make them. The circuit court stood by its original charge.

The jury found in favor of Busbee and George's estate on the remaining causes of action. The Gordons then sought equitable relief from the circuit court including (1) the removal of Busbee as PR of George's estate; (2) a declaration that the bank accounts and loan to Laurie were receivable assets of Clara's estate; (3) the appointment of a special administrator to account to Clara's estate; and (4) the imposition of a constructive trust on all liquid assets of George's estate to the extent of the transfers with interest. The circuit court denied this motion and all post-trial motions. This appeal followed.

LAW/ANALYSIS

I. Denial of Directed Verdict (George's Estate)

The Gordons contend the circuit court erred in failing to direct a verdict in their favor concerning the transfers George made after Clara's undisputed incompetence in the summer of 1995. We agree in part.[2]

[2] Respondents argue because the Gordons painted George as a "crook" and the jury did not agree with that proposition, the Gordons cannot now claim any error in the jury's verdict under the invited error doctrine. This is a misapplication of the doctrine. An appellant cannot cause or invite the trial court to err and then complain about the court's actions on appeal. See 5 C.J.S Appeal and Error § 872 ("One may not complain on review of errors below for which he or she is responsible, or which he or she has invited or induced the trial court to commit."). That is not the case presented here. In this case, the Gordons simply took a trial strategy that did not convince the jury. That does not touch upon an error by the court and is without the bounds of the invited error doctrine.

In reviewing the denial of a directed verdict motion, this court employs the same standard as the trial court—we view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299-300, 536 S.E.2d 408, 418 (Ct. App. 2000).

At the close of evidence, the Gordons moved for a directed verdict "as to all transfers of the assets of Clara Burch by George Burch from and after June 30 of [1995]." On appeal, George's estate argues this motion was not sufficiently specific as required by Rule 50(a), SCRCP, which states "[a] motion for a directed verdict shall state the specific grounds therefor." We disagree.

The Gordons relied upon Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985), in making their motion. In Fender, the attorney in fact for the decedent transferred to himself 37.4 acres of land, a car, and the proceeds of two bank accounts prior to the decedent's death. Id. at 262, 329 S.E.2d at 431. The POA did not contain a gift-giving provision and the South Carolina Supreme Court adopted a bright-line rule in this area. Id. "[I]n order to avoid fraud and abuse, we adopt a rule barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing." Id. (emphasis added). Fender's mandate is designed to protect the vulnerable from improper conduct by those in whom they place the greatest trust. Accordingly, the Gordons' directed verdict motion to disallow the transfers under Fender was sufficiently specific to operate as a directed verdict motion for breach of fiduciary duty.

In this case, no one disputes Clara's POA did not contain a gift-giving provision and the record contains no written evidence of her authorization for George to make the transfers he did. The circuit court based its decision on the existence of evidence, however slight, showing an arrangement between Clara and George to allow him to make transfers to avoid estate taxes. However, under Fender, the existence of such an oral agreement is insufficient to authorize the transfers. Any transactions involving George taking funds that were undisputedly Clara's and transferring them into a fund solely owned by him would fit within the construct of Fender. Therefore, the

circuit court erred in failing to grant the Gordons' directed verdict motion as to those transactions.

The transactions made during April 2000 and listed in the record as Plaintiff's Exhibit 6, with the exception of the $70,000 withdrawal made from George and Clara's joint account, fall within this category. With respect to these transactions all evidence indicates George took funds belonging solely to Clara and opened CDs for those amounts exclusively in his name. Likewise, the evidence demonstrates George closed a Wachovia CD belonging to Clara in his capacity as PR and opened a CD in his name the same day in the same amount.[3] Even if these transfers were made in furtherance of some oral agreement between George and Clara, they are exactly the types of transactions prohibited by Fender as a matter of law.[4] Our supreme court has drawn a bright line in such situations so as to avoid the defrauding of vulnerable adults by fiduciaries.

Because the evidence relating to each transaction in this case is not identical, the transactions should be considered individually. Some of the transactions involve facts that arguably bring them outside the clear scope of

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[3] With respect to the Wachovia CD, Jeremy Hall, a financial specialist with Wachovia, testified there was a denotation in the bank's system indicating the CD might be connected to an individual retirement account (IRA). If it was connected, the surviving spouse would be the beneficiary of the CD upon the decedent's death unless another beneficiary was named. Hall was recalled later in the trial and testified that after checking additional records from Wachovia's main office, the CD was not connected to an IRA.

[4] When asked a hypothetical at trial, Steve Johnson, a defense expert, opined if the transfers were made pursuant to a contract between Clara and George, George could have made the transfers under the POA's authority to execute and carry out contracts on Clara's behalf. However, the purpose of the contractual power is to benefit Clara. Here, even if the arrangement was her desire, the transfers benefited George, not her, and such an interpretation would effectively eliminate the prohibition expressly stated in Fender.

Fender. For example, one transaction at issue involved George closing a CD and depositing the funds into the joint account that was used to pay for Clara's care while in the nursing home. Another transaction involved the removal of $70,000 from the joint account and conversion into a $50,000 CD for George and a $20,000 deposit into his own bank account.[5] Yet another transaction involved the removal of funds from a joint account, although it is disputed when the account was made joint. In each of these instances, George at least arguably had an initial claim to the funds as proceeds in a joint account or he put Clara's funds into a joint account that paid for her care, an act that would arguably be for her benefit. With respect to some of the transactions, how the funds were expended is unclear. In those cases, determining whether George had breached a fiduciary duty was within the jury's province.

In sum, Fender mandated a grant of directed verdict on transactions in which the evidenced demonstrated Clara's solely-owned assets were transferred by George for his sole benefit. Therefore, the following funds taken from Clara's estate pursuant to the transactions listed on Plaintiff's Exhibit 6 should be returned to the plaintiffs: (1) $79,495.11 and $4,778.46 withdrawn from two of Clara's accounts at Security Federal on April 13, 2000; (2) $20,026.41 received upon the closing of one of Clara's accounts at Security Federal on April 17, 2000; (3) $39,552.98, $6,235.99, and $9,904.21 withdrawn from three of Clara's accounts at Community Bank[6] on April 17, 2000. Additionally, $33,309.87, received by George upon the closing of Wachovia CD Account #117232 in September of 2000, constitutes an improper transfer. We remand this matter to the circuit court for a determination of whether and in what amount interest will be due to the plaintiffs on these sums. The issue of the propriety of the remaining

[5] We recognize Asman testified the funds contributed to the joint account were primarily Clara's and that would render the joint account funds her property until the time of her death as discussed in Section III.A. However, the cross-examination of Asman revealed enough uncertainty in her testimony to make the question of ownership of the joint account funds a jury issue.

[6] According to the record Community Bank is now Capital Bank.

transactions was properly submitted to the jury because they involved questions of disputed fact.

II. Grant of Directed Verdict

A. Aiding and Abetting a Breach of Fiduciary Duty (Busbee – Individually and as PR)

The Gordons contend Busbee knew or should have known of George's activities and she was therefore guilty of aiding and abetting his conduct. We disagree.

When deciding a motion for a directed verdict, the trial court "must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Anderson v. Augusta Chronicle, 355 S.C. 461, 470, 585 S.E.2d 506, 511 (Ct. App. 2003). "If the evidence presented yields only one inference such that the trial court may decide the issue as a matter of law, the decision to grant the motion is proper." Id.

"The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." Future Group, II v. NationsBank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996).

The Gordons presented no evidence Busbee had actual knowledge of the transfers George made prior to his making them or at the time he made them. George acted as attorney-in-fact for Clara prior to her death and as PR for her estate until his own death in 2003. Busbee testified George wanted to handle his responsibilities as PR on his own as much as possible and she "took him at his word." Even if Busbee should have conducted additional investigation into the assets of Clara's estate, that does not constitute evidence

of actual knowledge of improper activity on George's part. Therefore, the circuit court did not err in granting a directed verdict in Busbee's favor.

B. Fraud/Fraud Benefit under Section 62-1-106 (Busbee – Individually and as PR; Dennis and Laurie Burch)

The Gordons contend the circuit court erred in granting a directed verdict in Busbee's favor, individually and as PR, and in favor of Dennis and Laurie Burch as to this cause of action. We disagree.

Section 62-1-106 of the South Carolina Code (2009) provides:

> Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Here, the circuit court determined no evidence was presented that Dennis had committed any sort of fraud in connection with this matter and he had yet to receive any of the funds transferred from Clara's estate to George's estate. Therefore, he had not committed fraud or benefited from any other party's fraud. We agree with the circuit court. Evidence showed the only participation Dennis had was evaluating the contents of George's safety

deposit box after his death, and a bank employee testified the examination was conducted properly.

With respect to Laurie, the record contains no evidence that she herself committed fraud. Although she received a benefit from George's conduct in the form of the loan from her father, the circuit court indicated those funds might be owed to Clara's estate pending the resolution by the jury of the remaining claims against George's estate. Therefore, we find the circuit court did not err in granting directed verdict on this claim.

As to Busbee, individually and as PR, she did not benefit from the alleged fraud. Therefore, the only question is whether she perpetrated fraud by filing the inventory of assets of George's estate that listed the transfers as part of his estate. The record contains no evidence Busbee knew any representations she made in those filings were false at the time they were made. Consequently, the circuit court did not err in granting a directed verdict in Busbee's favor.

C. Conversion (Busbee – Individually and as PR)

The Gordons argue Busbee continued George's conversion of Clara's assets by including them in George's estate's inventory of assets. We disagree.

"Conversion is the 'unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights.'" Bank of New York v. Sumter Cnty., 387 S.C. 147, 158, 691 S.E.2d 473, 479 (2010) (quoting Moore v. Weinberg, 383 S.C. 583, 589, 681 S.E.2d 875, 878 (2009)). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003).

Nothing in the record demonstrates Busbee assumed the control of any funds without authorization. At the time she became PR, the assets were in

accounts held by George and she properly exercised control over them as the PR of his estate. The individual claim of conversion fails because she exercised no control over the assets in her individual capacity. Therefore, we affirm the circuit court's grant of directed verdict.

D. Civil Conspiracy (Busbee – Individually and as PR; Dennis and Laurie Burch)

The Gordons maintain the circuit court erred in granting a directed verdict in favor of Busbee, individually and as PR, and Dennis and Laurie Burch with respect to their civil conspiracy claim. We disagree.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). "The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design." Cricket Cove Ventures, LLC v. Gilliand, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010).

The record contains no evidence, only speculation, that any of the parties conspired with each other for the purpose of harming Clara or her estate. Furthermore, civil conspiracy requires that the plaintiff claim special damages. In this case, the Gordons' amended complaint fails to allege any special damages incurred as a result of any conspiracy. They allege the same damages as they do under the other causes of action. This is insufficient to establish special damages. See Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed."). Accordingly, we conclude the circuit did not err in granting a directed verdict.

III. Jury Charges

A. Joint Bank Accounts

The Gordons argue the circuit court erred in failing to give the following jury charge: "Funds placed in a joint account with right of survivorship remain property of the contributing party until that party's death, unless there is clear and convincing evidence of a different intent." We disagree.

The principal embodied in this charge emanates from the case of Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001). In Vaughn, the decedent opened several joint bank accounts with her nephew, and the decedent was the sole contributor to those accounts. Id. at 197, 547 S.E.2d at 869. The nephew withdrew the funds a week prior to the decedent's death and deposited the monies in an account titled solely in his name. Id. The court determined the statute governing such accounts was unambiguous and required a holding that funds withdrawn from such an account prior to a decedent's death were no longer presumed to belong to the survivor but became assets of the decedent's estate. Id. at 199, 547 S.E.2d at 870. A survivor would have to establish entitlement to the funds by "other evidence of intent" without the presumption of right of survivorship. Id. at 200, 547 S.E.2d at 871.

The circuit court disallowed the jury charge on the procedural grounds in Rule 51, SCRCP, which states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the

> arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

This charge was requested after closing arguments, but before the circuit court charged the jury. While Rule 51 makes clear that it is preferable to have all requested charges submitted prior to closing arguments, it is not an absolute rule. In Dalon v. Golden Lanes, Inc., 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996), this court discussed the discretion vested in the trial court with respect to the allowance of late instructions. "[T]he trial court's discretion to refuse a charge because it is not timely requested should be sparingly and cautiously exercised." Id. at 541, 466 S.E.2d at 372. "While Rule 51 contains permissive language with respect to the timing of the filing of a request to charge, [it] does not specifically bar a request to charge that is made after the jury is charged . . . ." Id.

Of the transactions remaining at issue, some could be impacted by the failure to give the requested instruction. For example, a check for $70,000 was drawn on Clara and George's joint account in the week prior to her death. George subsequently opened a $50,000 CD in his own name and deposited $20,000 in his own account. These facts fit squarely within the situation presented in Vaughn. Furthermore, the defense was not prejudiced by the fact that the instruction was requested after closing arguments. The defense strategy as to George's estate was that he and Clara had an arrangement and he would have been entitled to these joint account funds upon Clara's death. That argument was made to the jury.

However, to warrant a new trial, the failure to give the requested instruction must have been prejudicial. See Dalon, 320 S.C. at 540, 466 S.E.2d at 372 ("In order to warrant reversal for failure to give a requested charge, the refusal must be both erroneous and prejudicial."). In this case, the

proportion of contribution to the joint accounts was a disputed factual point. Furthermore, the jury's verdict makes clear that it adopted the version of events presented by George's estate. Evidence of the financial "arrangement" between George and Clara is at least some other evidence of her intent that he have the monies in the joint account. The jury clearly believed the defense in the case, because it did not find against the estate as to any transfer or cause of action. Therefore, we conclude the failure to give the requested instruction was not prejudicial to the Gordons and did not constitute reversible error. See Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 484, 18 S.E.2d 331, 335 (1942) (holding the giving of erroneous charge was harmless error when it could not have affected the action of the jury).

B. Conversion

The Gordons contend the trial court's instruction regarding the burden of persuasion in a conversion claim was confusing and prejudicial warranting a mistrial. We disagree.

At the beginning of his jury charge, the circuit court instructed the jury as follows:

> There is one exception to [the general rule that plaintiff bears the burden of proof], and that is because of the confidential relationship between Mr. Burch and his wife. The estate of Mr. Burch has the burden to prove that all transfers to himself under the power of attorney and all transfers, assets from the name of Clara Burch or her estate are valid. He has to prove that by the preponderance or greater weight of the evidence. He also has the burden or preponderance of greater weight of the evidence to show that all transfers by Mr. Burch to himself or to any third party from Clara's funds are valid by the greater weight or preponderance of the evidence. So, it shifts to him on that issue, but everything else the

> plaintiff is – has their burden except for the transfers, and that is on Mr. Burch and his estate.

Later, when addressing the specific causes of action, the circuit court instructed:

> In order to prove conversion, the plaintiff must (1) prove by the preponderance or greater weight of the evidence first that the plaintiff owned or had a right to possess a certain piece of personal property.
>
> In other words, they must prove either title to or a right to possess the personal property. That would include, money, bank accounts at the time of conversion. Ordinarily, an immediate right to possession at the time of conversion is all that is required in the way of title or possession to enable the plaintiff to maintain his action.
>
> Next, the plaintiff must (2) show by the preponderance or greater weight of the evidence that the defendant gained control and possession of the property or prevented the plaintiff from using the property. The wrongful detention of another person's property may give rise to an action for conversion, and, finally, the plaintiff must show (3) by the preponderance or greater weight of the evidence that the defendant did this without the plaintiff's permission. If the plaintiff expressly or impliedly agreed to or approved the defendant's taking, use, retention, or disposition of the property, the plaintiff cannot recover for conversion of the property. . . .
>
> If you find that a conversion did take place, you should return a verdict for the plaintiff for the value

> of the property taken with interest. Of course, the plaintiff has to prove all of that by the greater weight or preponderance of the evidence.

The Gordons objected to the charge arguing it was inconsistent and could be construed by the jury as not requiring George's estate to prove the validity of the transfers in question. The circuit court declined to make any changes or additions to its original charge.

While the jury charge on conversion may have been somewhat confusing, it does not constitute prejudicial error. No South Carolina case discusses the burden-shifting scheme in a conversion claim against a power of attorney or PR. However, in Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005), this court discussed the burden-shifting scheme as between will or deed contestants and fiduciaries.

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.

Id. at 288, 613 S.E.2d at 68 (quoting Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003)).

The court went on to interpret the Restatement as it pertains to cases in South Carolina.

> We interpret the foregoing to mean that if the contestants of a duly executed will provide evidence that a confidential/fiduciary relationship existed sufficient to raise the presumption, the proponents of the will must offer evidence in rebuttal. We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will.

Id. at 288, 613 S.E.2d at 68-69.

While Howard is not directly on point, it illustrates the unusual nature of the burden-shifting scheme in cases involving decedents and their fiduciaries. While the fiduciary may have the burden to offer some evidence to establish a lack of undue influence, or in this case the validity of the transfers, the ultimate burden of proof remains with the complaining party unless the fiduciary offers no evidence to rebut the relevant presumption. In this case, the circuit court's instruction indicated the ultimate burden of proof was on the Gordons and also indicated that George's estate, as his representative, was required to offer a valid explanation for the transfers he made. These statements appear to accurately represent the burden-shifting scheme that should be employed. Therefore, the instruction was not erroneous and did not constitute reversible error.

IV. Equitable Relief

Finally, the Gordons argue the trial court erred in failing to grant the equitable relief requested. We disagree.

"A constructive trust results when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to

make restitution." Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) (internal quotation marks omitted).

> In general, a constructive trust may be imposed when a party obtains a benefit which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.

Straight v. Goss, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct. App. 2009) (internal quotation marks omitted).

In this case, evidence was presented that George was an attentive and loving husband to Clara and at least some evidence showed that the two of them had arranged a plan for him to transfer funds for his benefit. Furthermore, a large portion of the transfers did not occur until the end of Clara's life was near and she would no longer need them for her own benefit. Furthermore, under the statutory law of the state, George was entitled at least to his elective share of Clara's estate. Based on the record as a whole, the circuit court did not err in declining to create a constructive trust in favor of Clara's estate.

The Gordons also sought an accounting, requested the removal of Busbee as PR of George's estate, and raised the Statute of Elizabeth. However, they fail to advance any argument as to why the circuit court's ruling as to these specific equitable matters was error. Therefore, we deem these issues abandoned. See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (holding that an issue is abandoned if the appellant's brief treats it in a conclusory manner).

CONCLUSION

We find the circuit court erred in denying the Gordons' directed verdict motion as to the transfers listed on Plaintiff's Exhibit 6 excluding the first-listed transaction in which George withdrew monies from his and Clara's joint account and as to the transfer of money from Clara's Wachovia CD. We remand this matter to the circuit court for a determination as to interest due Plaintiffs on these sums. However, we find the circuit court did not err in granting a directed verdict in Busbee's and Dennis and Laurie Burch's favor as to the claims for aiding and abetting a breach of fiduciary duty, fraud, conversion, and civil conspiracy. As to the jury charges, we conclude the failure to give the requested instruction on joint bank accounts did not constitute prejudicial error and the failure to modify the instruction on the conversion claim was not erroneous. Finally, we affirm the circuit court's decision not to impose a constructive trust on the disputed funds in favor of Clara's estate, and we conclude the remainder of the Gordons' equitable claims have been abandoned on appeal. Consequently, the ruling of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Henry Dinkins, Appellant,

v.

Lowe's Home Centers, Inc. – Sumter, SC and Specialty Risk Services, LLC, Respondent.

Appeal from Sumter County
George C. James, Jr., Circuit Court Judge

Opinion No. 4926
Heard October 5, 2011 – Filed January 4, 2012

AFFIRMED

Stephen Benjamin Samuels, of Columbia, for Appellant.

Weston Adams, III, Helen F. Hiser, C. Edward Rawl, Jr., and M. McMullen Taylor, all of Columbia, for Respondents.

LOCKEMY, J.: In this worker's compensation action, Henry Dinkins appeals the circuit court's decision that there is substantial evidence in the record to support the Appellate Panel of the Worker's Compensation Commission's (Appellate Panel) finding he is not entitled to total disability pursuant to section 42-9-10 of the South Carolina Code (1985). Specifically, Dinkins contends the Appellate Panel erred in (1) finding section 42-9-400 of the South Carolina Code (1985 & Supp. 2005) inapplicable; (2) finding Dinkins is only entitled to compensation under section 42-9-30 of the South Carolina Code (1985); and (3) failing to rule on whether Dinkins' proof of diligent efforts to secure employment establishes a total loss of earnings under section 42-9-10. Dinkins also argues the circuit court erred in failing to remand the case with instructions to make specific findings of fact and conclusions of law affirmatively addressing total disability proven by unsuccessful "diligent efforts to secure employment." We affirm.

FACTS

Dinkins began working for Lowe's Home Centers, Inc. (Lowe's) on April 17, 1999, as a Customer Service Representative and was eventually promoted to Paint and Home Décor Department Manager. On May 1, 2001, Dinkins suffered the first of three injuries at Lowe's when he injured his left ankle. The commissioner found Dinkins sustained a 40% permanent partial disability to the left leg. Dinkins then injured his right knee at Lowe's on June 22, 2002, and the commissioner found Dinkins sustained a 30% permanent partial disability to the right leg. Following the two incidents, Lowe's reassigned Dinkins to a customer service position to accommodate his physical injuries.

Dinkins injured his back on April 20, 2005, and reported his injury to Lowe's. After receiving treatment from Dr. Stacey, an orthopedic surgeon, Dinkins was diagnosed with "L4 radiculopathy." On December 5, 2005, Lowe's released Dinkins from work after Dr. Armsey (Dr. Stacey's partner) reported Dinkins was restricted from lifting items exceeding 20 pounds. Dinkins has not been employed since that time. Dr. Johnson reported Dinkins at maximum medical improvement on March 9, 2007, and stated Dinkins was a good candidate for "long-term anti-inflammatory medications" and was unlikely to need surgery in the future. However, Dr. Johnson also

recommended Dinkins be placed on sedentary to light work with a lifting restriction of 10 pounds on an occasional basis. Dr. Johnson suggested avoiding repetitive bending and twisting if possible, because if Dinkins did not, his condition would be exacerbated. After examining Dinkins on June 2, 2006, Dr. Timothy Zgleszewski, stated "I believe that the lower back injury is a separate injury [from Dinkins' previous ankle and knee injury] . . . . "

Dinkins met with two vocational experts, Adger Brown and Glen Adams. Brown stated Dinkins was permanently and totally disabled because of Dinkins' physical limitations combined with his age and lack of transferable skills. Brown also stated that "being sixty-three years old, [Dinkins] is already at an incredible deficit for anyone hiring him into any type of meaningful sustained employment." In contrast, Adams, after meeting with Dinkins, created a report that detailed all the jobs and fields Dinkins is fit to work with his restrictions. Adams stated:

> A labor market survey was conducted based on the factors outlined in this report in order to identify actual jobs for which Mr. Dinkins qualifies. A stable labor market was found to exist in his local labor market in the banking, financial and retail industries. Based on the strength of his prior work history in management positions, as well as the other factors outlined in this report, he is currently employable in his labor market.

Prior to working for Lowe's, Dinkins was employed in the banking industry, and he stated he could return to work in that industry. Dinkins conducted a job search in Columbia, Florence, Camden, and Sumter over the course of about three months. After sending out between twenty-five to thirty applications, he was either refused the job or had not heard back from the employer. Dinkins admitted he is not applying to any jobs that he could not do.

On January 23, 2008, the single commissioner found Dinkins' compensable injury was confined to his back; thus, he was limited to the scheduled disability compensation under section 42-9-30. Further, the

commissioner found Ellison v. Frigidaire Home Prods., 360 S.C. 236, 600 S.E.2d 120 (Ct. App. 2004) (Ellison I) was not applicable because Dinkins' pre-existing ankle and knee injuries did not combine to cause a greater disability. The commissioner also found even if Ellison I were applicable, Dinkins did not meet his burden of proving a total loss of earning capacity due to his work related injuries. She awarded Dinkins a 12% permanent partial disability to his back under section 42-9-30. Dinkins appealed the commissioner's decision to the Appellate Panel, and the Appellate Panel affirmed the commissioner's findings, and also found Ellison v. Frigidaire Home Prods., 371 S.C. 159, 638 S.E.2d 664 (2006) (Ellison II) was not applicable. Dinkins then appealed to the court of common pleas, and the court of common pleas affirmed the Appellate Panel's decision.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of workers' compensation decisions. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, this court can reverse or modify the decision of the Appellate Panel if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1–23–380(5)(d),(e) (Supp. 2010); Transp. Ins. Co. v. South Carolina Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010).

The Appellate Panel is the ultimate fact-finder in workers' compensation cases. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009); Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, this court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence. Pierre, 386 S.C. at 540, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the

[Appellate Panel's] finding from being supported by substantial evidence." Id.

LAW/ANALYSIS

I. Greater disability pursuant to section 42-9-400

Dinkins contends substantial evidence in the record supports his argument that his back injury in combination with his previous knee and ankle injuries resulted in a greater disability than the back injury alone, pursuant to section 42-9-400. Specifically, Dinkins argues the Appellate Panel erred in basing its findings on Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003), and contends Ellison II is controlling. We disagree.

In Wigfall, the claimant's sole physical injury was a broken left femur stemming from a work-related accident. Wigfall, 354 S.C. at 102, 580 S.E.2d at 101. The single commissioner found that while Wigfall's injury, employment history, age, and educational attainment rendered him totally disabled, the supreme court's ruling in Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960) limited him to an award under the scheduled member statute. Id. at 102-03, 580 S.E.2d at 101; see Singleton, 236 S.C. at 471, 114 S.E.2d at 845 ("Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation, even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity."). On appeal, the supreme court reaffirmed its ruling in Singleton that an injury to a scheduled member which is the sole cause of the claimant's disability may be compensated only under the scheduled injury statute. Wigfall, 354 S.C. at 106-07, 580 S.E.2d at 103.

In Ellison, the claimant was given a 20% permanent impairment rating to his leg after injuring it on the job. Ellison II, 371 S.C. 159, 161, 638 S.E.2d 664, 665 (2006). Ellison also had pre-existing physical conditions including hypertension, sleep apnea, prostate cancer, diabetes, and congestive cardiac disease, which, in combination with his workplace injury, rendered

him physically unable to return to work after his accident. Id. Applying section 42-9-400, the commissioner concluded Ellison was totally disabled from the combined effect of his pre-existing conditions and his workplace injury to his leg. Id. at 162, 638 S.E.2d at 665. Section 42-9-400 provided in pertinent part:

> (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund . . . .
>
> . . . .
>
> (d) As used in this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed.[1]

[1] Section 42-9-400(a) was later amended to refer to a "disability that is substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone," and it has omitted the "combined effects" language. Act No. 111, Pt. II, § 3, 2007 S.C. Acts 599 (emphasis added). However, this change is applicable only to injuries that occur on or after July 1, 2007.

S.C. Code Ann. § 42-9-400 (1985 & Supp. 2005). On appeal, this court found section 42-9-400 merely entitled an employer's insurance carrier to be reimbursed by the Second Injury Fund; thus, Singleton should have been applied to the facts. Ellison II, 371 S.C. at 164, 638 S.E.2d at 666. Our supreme court reversed this court's decision, holding Singleton was inapplicable. Id. at 162-64, 638 S.E.2d at 665-66 (stating Singleton "stands simply for the proposition that impairment involving only a scheduled member is compensated under the scheduled injury statute and not the general disability statute"). It held that in contrast to Singleton, Ellison claimed total disability from the combined effect of his workplace injury and his pre-existing physical deficiencies. Id. at 162-63, 638 S.E.2d at 665-66. The supreme court found "[t]he language of § 42-9-400(a) and (d) indicates the legislature clearly envisioned that a claimant may recover for greater disability than that incurred from a single injury to a particular body part if the combination with any pre-existing condition hinders employment." Id. at 164, 638 S.E.2d at 666.

While distinguishable from the current appeal, the recent decision in Bartley v. Allendale Cnty. Sch. Dist., 392 S.C. 300, 709 S.E.2d 619 (2011) is also relevant to our analysis. In Bartley, our supreme court determined this court arguably did some improper fact finding to make its ruling that the injury at issue did not cause or aggravate Bartley's other conditions, and therefore, Bartley was not entitled to compensation under section 42-9-400.[2] Bartley, 392 S.C. at 310-11, 709 S.E.2d at 623-24. The supreme court then stated, "[I]t appears the Court of Appeals focused on whether Bartley's 2002 accident caused her other medical conditions or whether it aggravated her pre-existing conditions." Id. at 309, 709 S.E.2d at 623. However, "[t]here is no requirement that the pre-existing condition aggravated the work injury or that the work injury aggravated the pre-existing condition; rather, the question to be considered was whether the combined effects of the condition and the workplace injury resulted in a greater disability than would otherwise

[2] The Appellate Panel found it could not "stack" Bartley's previous injuries with her current injuries; thus, it did not make any findings of fact in regards to her previous injuries. Therefore, our supreme court found this court may have made its own findings of fact in regard to those previous injuries in order to come to its decision.

have existed." Id. at 308, 709 S.E.2d at 623 (citing Ellison II, 371 S.C. at 164, 638 S.E.2d at 666). The case was remanded to the Appellate Panel because "had [the Appellate Panel] considered the application of the law in Ellison II, [it] would have made additional findings of fact pertinent to this analysis that are missing from the record." Id. at 310, 709 S.E.2d at 624; see Ellison II, 371 S.C. 159, 638 S.E.2d 664 (2006).

Here, the commissioner erred in citing Ellison I, 360 S.C. 236, 600 S.E.2d 120 (Ct. App. 2004), which was overturned. However, the Appellate Panel cited to the controlling case law in Ellison II, 371 S.C. 159, 638 S.E.2d 664 (2006). The Appellate Panel analyzed the facts in light of Ellison II, and determined that upon the evidence, Ellison II did not apply. Specifically, the Appellate Panel found:

> Based on the testimony and evidence presented, Claimant's current inability to work, **if any**, is secondary solely to his back injury. The knee and ankle injuries he sustained in his previous work-related accidents do not contribute to his disability as defined by § 42-1-10 [sic] in any way; therefore, Claimant's reliance on Ellison and § 42-1-400(a) [sic] is misplaced.

(citations omitted). Unlike the Appellate Panel in Bartley, the Appellate Panel here made findings of fact about Dinkins' previous injuries. In addition, the order cites a doctor's report which states the back injury is a "separate and distinct" injury from Dinkins' ankle and knee injury. The Appellate Panel found Dinkins' knee and ankle injuries did not combine with his current back injury to create a greater disability, and therefore he could not establish total disability based upon section 42-9-400. While the Appellate Panel did not use the preferable language, "combined effects to cause a greater disability,"[3] it did cite the proper case law. We believe it viewed the facts appropriately in light of Ellison II, and substantial evidence in the record supports the Appellate Panel's decision that Dinkins did not have a greater disability as a result of the combined effects of his previous

[3] The Appellate Panel specifically stated "do not contribute to his disability."

injuries and his current injury. Accordingly, we affirm the Appellate Panel's finding.

In view of our determination that Dinkins has not proven he has a greater disability as a result of the combined effects of his injuries, we need not reach the remaining issues relating to loss of earning capacity. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Based on the foregoing reasons, the trial court is

AFFIRMED.

HUFF and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

John Porter Johnson, Respondent.

Appeal From Cherokee County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4927
Heard November 3, 2011 – Filed January 4, 2012

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, all of Columbia; and Solicitor Barry J. Barnette, of Spartanburg, for Appellant.

Ralph Keith Kelly, of Spartanburg, for Respondent.

HUFF, J.: The State appeals an order of the circuit court reversing John Porter Johnson's conviction of driving under the influence (DUI) on the basis of an alleged insufficiency in the number of potential jurors from which to draw a jury for Johnson's trial in magistrate court. We reverse the circuit court order and reinstate Johnson's conviction.

FACTUAL/PROCEDURAL BACKGROUND

The facts of this case are undisputed. Johnson was arrested on August 24, 2008, and charged with DUI. His case was called to trial on February 22, 2010, and was the first case on the docket for that week. Prior to the term of court, pursuant to section 22-2-90 of the South Carolina Code, the magistrate drew seventy-five names for jury service, and issued a writ of venire facias requiring the jurors' attendance on February 22, 2010, for a one week term of court. On the morning of February 22, 2010, thirty-nine of the seventy-five summoned jurors appeared. During jury qualifications, the magistrate excused six of those thirty-nine, leaving thirty-three jurors from which to select the petit jury for Johnson's trial. Johnson objected to being required to select from a jury pool of less than forty jurors, asserting a failure of the court to comply with code section 22-2-90(B), and sought a continuance. The magistrate overruled the objection and denied the motion for continuance. A six-member jury was drawn, and neither Johnson nor the State extinguished the list of remaining jurors in seating the jury. The case proceeded to trial, and Johnson was convicted.

Johnson filed a notice of appeal to the circuit court asserting the magistrate erred in overruling his objection to going forward with an insufficient number of jurors available, because section 22-2-90 required a minimum of forty jurors. Johnson maintained the magistrate should have granted him a continuance until a sufficient number of jurors could be assembled in accordance with section 22-2-120 of the South Carolina Code. In his argument before the circuit court, Johnson asserted that the legislature provided that a specific number of jurors are required to be present in magistrate court. He argued that the practice being followed in other jurisdictions in the state was to cancel a jury term where "there were

insufficient number being less than 40(forty)." Johnson insisted that he should have had forty jurors to choose from for his jury, and the magistrate erred in making him go forward when there were only thirty-three available. The State, on the other hand, argued that section 22-2-90 required only that the magistrate draw at least forty and not more than one hundred jurors, and there is a distinction between the number of jurors drawn and the number of jurors selected. It argued there were more than sufficient jurors to meet subsection (B) of 22-2-90, as seventy-five were drawn where the statute only required that forty be drawn. Additionally, the State asserted there were sufficient jurors available to ensure that each side would receive its maximum strikes and still have enough jurors available to seat a six-member jury.

The circuit court took the matter under advisement and later issued an informal order reversing Johnson's conviction, but indicated a more formal order would be prepared that would become the final order of the court. The court subsequently issued a written order reversing Johnson's conviction. It concluded, after reviewing sections 22-2-20 through 22-2-150 of the South Carolina Code, and applying basic rules of statutory construction to determine legislative intent, the number of jurors available for jury selection fell below the statutory minimum number required. The circuit court found the random selection method intended by the legislature would not be accomplished when, in advance of the random selection, there is an insufficient number from which to choose. Accordingly, the circuit court concluded the magistrate erred as a matter of law in overruling Johnson's objection, denying his motion for continuance, and requiring the parties to proceed to jury selection and trial. This appeal followed.

ISSUE

Whether the circuit court erred in reversing Johnson's conviction based on an alleged insufficiency in the number of potential jurors present for selection where the magistrate properly drew the names of seventy-five jurors in compliance with section 22-2-90 of the South Carolina Code, a qualified jury panel was selected from the available jury pool, and Johnson suffered no prejudice from the jury selection process as conducted.

STANDARD OF REVIEW

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception." State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001). In criminal cases, the appellate court reviews errors of law only. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). Accordingly, this court's scope of review is limited to correcting the circuit court's order for errors of law. Id.

LAW/ANALYSIS

The State contends the circuit court erred in reversing Johnson's conviction, as a qualified jury was properly empaneled and the magistrate properly exercised his discretion in denying Johnson's motion for continuance. We agree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). If it can be reasonably discovered in the language used, legislative intent must prevail. Id. The language of a statute must be construed in light of the intended purpose of the statute, and whenever possible, legislative intent should be found in the plain language of the statute itself. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). Additionally, statutes which are part of the same legislative scheme should be construed together. Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 383, 556 S.E.2d 357, 360 (2001). In interpreting a statute, the court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation, and the language of the statute should be "read in a sense which harmonizes with its subject matter and accords with its general purpose." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). A court must take the statute as it finds it, giving effect to the legislative intent as expressed in the language of

the statute, and cannot, under its power of construction, supply an omission in a statute. State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999).

A review of Chapter 2 of Title 22 reveals the following pertinent code sections in this matter concerning the selection of juries in magistrate court:

> In October of each year, the State Election Commission must provide to the chief magistrate for administration of each county, at no cost, a jury list compiled in accordance with the provisions of Section 14-7-130. The chief magistrate for administration of the county must use these lists in preparing, for each jury area, a list of the qualified electors in these jury areas, and must forward these lists to the respective magistrates.

S.C. Code Ann. § 22-2-50 (2007).

> A constable or other person appointed by a magistrate shall, during the first thirty days of each calendar year, prepare a jury box for use in the magistrate's court which shall be provided by the governing body of the county. Each box shall contain two compartments designated as A and B respectively. The person charged with the preparation of the box shall, within the specified period, place in Compartment A of the box the individual names of all qualified electors in the Jury Area. After Compartment A has been filled with names, the box shall be locked and kept in the magistrate's custody.

S.C. Code Ann. § 22-2-60 (2007).

> (A) In all cases except as provided in Section 22-2-90 in a magistrates court in which a jury is required, a jury list must be selected in the following manner:
>
> A person appointed by the magistrate who is not connected with the trial of the case for either party must draw out of Compartment "A" of the jury box at least thirty but not more than one hundred names, and this list of names must be delivered to each party or to the attorney for each party.
>
> (B) If a court has experienced difficulty in drawing a sufficient number of jurors from the qualified electors of the area, and, before implementing a process pursuant to this subsection, seeks and receives the approval of South Carolina Court Administration, the person selected by the presiding magistrate may draw at least one hundred names but not more than a number determined sufficient by court administration for the jury list, and must deliver this list to each party or the attorney for each party.

S.C. Code Ann. § 22-2-80 (2007).

> (A) In addition to the procedure for drawing a jury list as provided for in Section 22-2-80, in a magistrates court which schedules terms for jury trials, the magistrate may select a jury list in the manner provided by this section.
>
> (B) At least ten but not more than forty-five days before a scheduled term of jury trials, a person selected by the presiding magistrate must draw at least forty but not more than one hundred jurors to serve one week only.

> (C) If a court has experienced difficulty in drawing a sufficient number of jurors from the qualified electors of the area, and, before implementing a process pursuant to this subsection, seeks and receives the approval of South Carolina Court Administration, the person selected by the presiding magistrate may draw at least one hundred names but not more than a number determined sufficient by court administration to serve one week only.
>
> (D) Immediately after the jurors are drawn, the magistrate must issue a writ of venire facias for the jurors requiring their attendance on the first day of the week for which they have been drawn. This writ must be delivered to the magistrate's constable or the sheriff of the county concerned.

S.C. Code Ann. § 22-2-90 (2007).

> The names drawn pursuant to either Section 22-2-80 or Section 22-2-90 must be placed in a box or hat and individual names randomly drawn out one at a time until six jurors and four alternates are selected. Each party has a maximum of six peremptory challenges as to primary jurors and four peremptory challenges as to alternate jurors and any other challenges for cause the court permits. If for any reason it is impossible to select sufficient jurors and alternates from the names drawn, names must be drawn randomly from Compartment "A" until sufficient jurors and alternates are selected.

S.C. Code Ann. § 22-2-100 (2007).

> If at the time set for the trial there are not sufficient jurors to proceed because one or more have failed to attend, have not been summoned, or have been excused or disqualified by the court, additional jurors must be selected from the remaining names or in the manner provided in Section 22-2-80 or Section 22-2-100.

S.C. Code Ann. § 22-2-120 (2007).

In summary, our statutes require a constable or other person appointed by a magistrate to prepare a jury box for use in the magistrate court, which contains two compartments, designated as A and B, and to place in Compartment "A" of the box the individual names of all qualified electors in the Jury Area. S.C. Code Ann. § 22-2-60 (2007). Except where jurors are drawn for a weeklong term of court under section 22-2-90, the person appointed by the magistrate must draw out of Compartment "A" of the jury box at least thirty but not more than one hundred names, with this list then delivered to each party or to the parties' attorneys. S.C. Code Ann. § 22-2-80(A) (2007). Where a magistrate court schedules terms for jury trials, the procedure to follow is similar to that of section 22-2-80, but requires that the person selected by the presiding magistrate draw at least forty, but not more than one hundred, jurors to serve a one week term. S.C. Code Ann. § 22-2-90(B) (2007). Like section 22-2-80, section 22-2-90 includes a provision that if the court has experienced difficulty in drawing a sufficient number of jurors from the qualified electors of the area, it may seek the approval of South Carolina Court Administration to allow the person selected by the presiding magistrate to draw a minimum of one hundred names to serve. S.C. Code Ann. §§ 22-2-80 (B) (2007); 22-2-90(C) (2007). Whether drawing names pursuant to section 22-2-80 or, as in this case, for a weeklong term of court pursuant to section 22-2-90, the individual names must be randomly drawn out, one at a time, until six jurors and four alternates are selected, and each party is allowed a maximum of six peremptory challenges as to primary jurors and four peremptory challenges as to alternate jurors. S.C. Code Ann. § 22-2-100 (2007). If it is not possible "to select sufficient jurors and

alternates from the names drawn, names then must be drawn randomly from Compartment 'A' until sufficient jurors and alternates are selected." Id. "If at the time set for the trial there are not sufficient jurors to proceed because one or more have failed to attend, have not been summoned, or have been excused or disqualified by the court, additional jurors must be selected from the remaining names or in the manner provided in Section 22-2-80 or Section 22-2-100." S.C. Code Ann. § 22-2-120 (2007).

We agree with the State that there is no provision in Chapter 2 of Title 22 specifically establishing a minimum number of jurors required to be present in the jury pool before jury selection can proceed. The plain wording of section 22-2-90 requires only that a person selected by the presiding magistrate draw a minimum of forty jurors to serve for a one week term. It does not require that forty jurors be present and available in the jury pool before jury selection can proceed for a trial.

Further, section 22-2-100 mandates the individual names be randomly drawn until six jurors and four alternates are selected, with each party being allowed a maximum of six peremptory challenges as to primary jurors and four peremptory challenges as to alternate jurors. Thus, as noted by the State, allowing for the maximum number of primary (six) and alternate (four) jurors along with the maximum number of combined peremptory challenges (twenty), thirty jurors would be sufficient to meet such needs. Although it could possibly take every single one of the individual jurors to ultimately seat a jury, the names would still be drawn in random order, with different decisions regarding the parties' choices on whether or not to use their peremptory challenges affecting the ultimate make-up, and therefore allowing for the randomness of the jury.

Additionally, we note that in those cases where the jury is not being selected for a weeklong term of court, section 22-2-80(A) allows the person appointed by the magistrate to draw a minimum of thirty names for a jury trial in magistrate court. If the drawing of only thirty names is sufficient under section 22-2-80, thus allowing for a maximum of thirty potential jurors to present themselves for jury selection in those cases, such a number should

likewise be sufficient from which to select a jury under section 22-2-90, as there is no difference in the number of primary and alternate jurors and the number of peremptory strikes available to each party whether drawing names pursuant to section 22-2-80 or pursuant to section 22-2-90. Therefore, construing these statutes, which are part of the same legislative scheme, together, and reading the language of these statutes in a sense which harmonizes with the subject matter and accords with its general purpose, we find the presence of thirty-three jurors in this case was sufficient to select a qualified jury panel from the jury pool.

Johnson and the circuit court effectively read section 22-2-90 as requiring that a minimum of forty individuals appear and be available for jury selection, while the plain terms of the statute require only that forty individual names be drawn and ordered to appear. Indeed, section 22-2-120 seems to recognize that some of the summoned jurors may fail to appear. However, it is only when "it is impossible to select sufficient jurors and alternates from the names drawn" and "there are not sufficient jurors to proceed because one or more have failed to attend, have not been summoned, or have been excused or disqualified by the court" that steps must be taken to remedy an insufficient jury pool. S.C. Code Ann. §§ 22-2-100; 22-2-120. The legislature has set forth no specified number of jurors required to be present and available in the jury pool before jury selection can proceed. As noted, a court cannot, under its power of construction, supply an omission in a statute. White, 338 S.C. at 58, 525 S.E.2d at 263. By asserting a mandatory minimum of forty jurors are required to be present and available for selection in a magistrate court jury trial, Johnson and the circuit court seek to supply an omission in the statute and expand the statute's operation. Further, we find such an interpretation to be inconsistent with the legislative intent in enacting these statutory provisions. Here, there were sufficient jurors available to ensure that each side would receive its maximum strikes and still have enough to seat a jury. Accordingly, we conclude that the circuit court erred in finding the thirty-three jurors available for jury selection fell below the statutory minimum number required.

In light of our holding in this case, we find it unnecessary to address the State's alternate assertion that, even assuming the magistrate erred in his interpretation of the statutory provisions, the statutory provisions are merely directory and Johnson suffered no prejudice. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

For the foregoing reasons, we reverse and reinstate Johnson's conviction.

REVERSED.

PIEPER and LOCKEMY, JJ., concur.