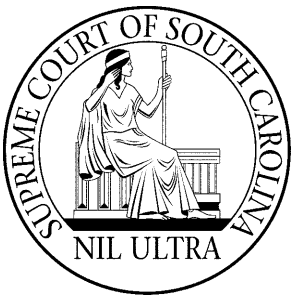


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 12**
**April 4, 2012**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

South Carolina Department of Revenue, Respondent,

v.

Blue Moon of Newberry, Inc., d/b/a Blue Moon Sports Bar, Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal from Richland County
Carolyn C. Matthews, Administrative Law Court Judge

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Opinion No. 27106
Heard February 8, 2012 – Filed April 4, 2012

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**REVERSED**

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Richard J. Breibart, The Law Firm of Richard Breibart, of Lexington, for Petitioner.

Harry A. Hancock, S.C. Dept. of Revenue, of Columbia, for Respondent.

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**JUSTICE HEARN:** The State Law Enforcement Division (SLED) conducted a sting operation on the Blue Moon Sports Bar, a private club operated by Blue Moon of Newberry, Inc. After SLED's investigation, the Department of Revenue concluded Blue Moon's guest policy violated Section 7-401.4(J) through (K) of the South Carolina Code of Regulations and revoked Blue Moon's liquor license. The Administrative Law Court (ALC) reinstated Blue Moon's license, and the court of appeals reversed. *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 387 S.C. 467, 473, 693 S.E.2d 21, 24 (Ct. App. 2010). We granted a writ of certiorari and now reverse the decision of the court of appeals.

## FACTUAL/PROCEDURAL BACKGROUND

Blue Moon is a sports bar located in Newberry, South Carolina, and it is incorporated as a nonprofit corporation. As such, it is subject to the provisions concerning the sale of alcoholic beverages by nonprofit organizations found in Regulation 7-401.4. Specifically, the regulation states that "[o]nly bona fide members and bona fide guests of members of such organizations may consume alcoholic beverages . . . upon the licensed premises." 1 S.C. Code Ann. Regs. 7-401.4(J) (2011). The regulation further provides, "Bona fide guests shall be limited to those who accompany a member onto the premises or for whom the member has made prior arrangements with the management of the organization." *Id*. § 7-401.4(K).

To test Blue Moon's compliance with these regulations, SLED conducted an operation wherein Agent Quincy Ford went undercover and attempted to gain access to Blue Moon as a guest. Agent Ford's first attempt was rebuffed by Blue Moon's bouncer when Agent Ford admitted he was not a member of the organization. However, the bouncer directed Agent Ford's attention to a sign which contained a telephone number and told Agent Ford that he would be allowed to enter if he called that number.[1]

[1] The sign read, "If You Are Not A Member Call Before You Get To The Door 276-****."

Agent Ford called the number as directed, which was the telephone number for Blue Moon. Steve Malone, who is both a member and employee of Blue Moon, answered Agent Ford's call. It is undisputed that Agent Ford did not know Malone or have any prior relationship with him whatsoever. However, Denise Polifrone, who is Blue Moon's owner and license holder, had given Malone authority to admit people who called as his guests.[2] Approximately two to three minutes after he spoke with Malone and gave Malone his name, Agent Ford returned to the door. He showed the bouncer his civilian identification and said he had called the number on the sign. The bouncer then let Agent Ford enter the bar after he paid a small cover charge.

Once inside, Agent Ford ordered an alcoholic beverage, paid for it, and consumed a small portion of it. He subsequently called in Agent James Causey, the SLED agent in charge of the operation. Agent Causey arrived and issued Polifrone a citation for permitting someone who was not a bona fide member or guest to consume alcohol on-premises. As a result, the Department revoked Blue Moon's liquor license.[3]

Blue Moon requested a contested case hearing before the ALC, and the only issue before the court was whether Agent Ford was a bona fide guest within the meaning of Regulation 7-401.4(K). In finding that he was, the ALC concluded there is no requirement that the prior arrangement with management for the admission of the guest be made any specific period of time in advance. The ALC also cited the prior administrative law case of *South Carolina Department of Revenue v. Mir, Inc.*, No. 04-ALJ-17-0409-CC (S.C. Admin. Law. Ct. May 31, 2005), for the proposition that there also need not be any pre-existing social relationship between the member and the guest. Accordingly, the ALC found Agent Ford's conversation with Malone

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[2] Polifrone testified that she discussed this set-up with individuals from SLED and the Department, all of whom said this arrangement was permissible.

[3] It appears this was Blue Moon's third offense. Blue Moon did not challenge the prior two offenses because its liquor license was not at stake and it was easier to just pay the fine.

constituted a prior arrangement with management and Agent Ford was thus a bona fide guest within the literal meaning of Regulation 7-401.4(K). The ALC therefore denied the Department's request to revoke Blue Moon's license.

On the Department's appeal to the court of appeals, a majority of the panel first distinguished *Mir, Inc.* on the ground that it concerned whether the member accompanied the guest onto the premises, not whether prior arrangements were made with management. *Blue Moon*, 387 S.C. at 472, 693 S.E.2d at 23. The court further held the ALC examined the term "prior arrangement" without regard to the regulation's purpose. *See id.* According to the court, "[t]he stated purpose of the regulation is to ensure that only bona fide members of private clubs and their bona fide guests purchase and consume alcoholic beverages at those clubs." *Id.* at 472-73, 693 S.E.2d at 24. When read in this context, the court held giving Regulation 7-401.4(K) the broad reading given to it by the ALC "would eviscerate that purpose." *Id.* at 473, 693 S.E.2d at 24. Hence, the court found the ALC erred in concluding Agent Ford was a bona fide guest and granted the Department's request to revoke Blue Moon's license. *Id.* Judge Pieper dissented, writing that the Department must abide by the plain language of the regulation it promulgated. *Id.* at 474, 693 S.E.2d at 24 (Pieper, J., dissenting).

We granted a writ certiorari to review the decision of the court of appeals.

## LAW/ANALYSIS

Blue Moon argues the court of appeals erred in holding Agent Ford did not meet the definition of a bona fide guest in Regulation 7-401.4(K). Because we believe the court of appeals erred in going beyond the regulation's plain language, we agree.

"The construction of a regulation is a question of law to be determined by the court." 2 Am. Jur. 2d *Administrative Law* § 245. We will correct the decision of the ALC if it is affected by an error of law, S.C. Code Ann. § 1-

23-380(5)(d) (Supp. 2010), and questions of law are reviewed de novo, *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Although our review of these questions is de novo, we will generally give deference to an agency's interpretation of its own regulation. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). Nevertheless, we will reject the agency's interpretation if it is contrary to the regulation's plain language. *See id.*

Regulations are construed using the same canons of construction as statutes. *S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010). Accordingly, "[t]he words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation." *Byerly v. Connor*, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992). Furthermore, the regulation must be construed as a whole rather than read in its component parts in isolation. *Spruill v. Richland Cnty. Sch. Dist. 2*, 363 S.C. 61, 64, 609 S.E.2d 524, 526 (2005). However, if applying the regulation's plain language would lead to an absurd result, we will interpret the regulation in a manner which avoids the absurdity. *See Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). "A merely conjectural absurdity is not enough; the result must be 'so patently absurd that it is clear that the [General Assembly] could not have intended such a result.'" *Id.* (quoting *Harris v. Anderson Cnty. Sheriff's Office*, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009)).

The South Carolina Constitution grants the General Assembly the power to issue alcoholic beverage licenses to two types of establishments: (1) "businesses which engage primarily and substantially in the preparation and serving of meals or furnishing of lodging," and (2) "certain nonprofit organizations with limited membership not open to the general public." S.C. Const. art. VIII-A, § 1. The General Assembly has in turn defined a nonprofit organization for these purposes as "an organization not open to the general public, but with a limited membership and established for social,

benevolent, patriotic, recreational, or fraternal purposes."[4] S.C. Code Ann. § 61-6-20(6) (2009). Similarly, the General Assembly provided that "[a] nonprofit organization which is licensed by the [D]epartment pursuant to the provisions of this article may sell alcoholic liquors by the drink. A member or guest of a member of a nonprofit organization may consume alcoholic liquors sold by the drink upon the premises . . . ." *Id.* § 61-6-1600(A).

The Department has interpreted[5] section 61-6-1600 as being evidence of the General Assembly's intent

> that a license shall not be granted to or held by an organization which is, or has been, organized and operated primarily to obtain or hold a license to sell alcoholic beverages, but only to bona fide nonprofit organization with limited membership to which the sale of alcoholic beverages is incidental to the main purpose of the organization.

1 S.C. Code Ann. Regs. 7-401.4(A) (2011).

To that end, the Department promulgated the two subsections of Regulation 7-401.4 at the heart of this case:

> J. Only bona fide members and bona fide guests of members of such organizations may consume alcoholic beverages . . . upon the licensed premises.

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[4] Before the ALC, the Department attempted to elicit testimony from Polifrone that Blue Moon was not a valid nonprofit for alcoholic beverage purposes. However, the court prevented the Department from doing so upon Blue Moon's objection that this question was not before it. The Department did not appeal this issue to the court of appeals, and therefore we must assume Blue Moon meets these requirements.

[5] Section 61-2-60 of the South Carolina Code (2009) grants the Department authority to promulgate regulations under Title 61.

> K. Bona fide guests shall be limited to those who accompany a member onto the premises or for whom the member has made prior arrangements with the management of the organization.

The question presently before us is whether Agent Ford was a bona fide guest when he was able to call a number posted near the door and obtain permission to enter from a member with whom he had no prior relationship.

Based on the plain language of Regulation 7-401.4(K), we hold Agent Ford was a bona fide guest. Subsection (K) specifically prohibits on-premises consumption of alcohol by a non-member unless he is either personally accompanied onto the premises by a member or a member has made a prior arrangement with management for him. By its own terms, Regulation 7-401.4(K) imposes no other requirements. In this case, Agent Ford was not accompanied into Blue Moon by a member. Instead, prior to entering the premises and consuming his drink, he spoke with a member who was authorized by management to permit guests to enter. Thus, Agent Ford was a bona fide guest within the letter of the regulation.

The Department does not dispute the ALC's conclusion that Agent Ford technically had a prior arrangement with management. Instead, it argues subsection (K) does not actually define who is a bona fide guest. The Department's view is that it merely limits admission to a certain subset of bona fide guests, i.e., one must be a bona fide guest *and* either be accompanied by a member or make prior arrangements with management. In our opinion, subsection (K) does no such thing but rather simply defines what constitutes a bona fide guest.

Furthermore, the regulation's plain language is wholly consistent with the definition of bona fide. Bona fide means "[m]ade in good faith" and "without fraud or deceit," or "sincere" and "genuine." Black's Law Dictionary 75 (3d pocket ed.). As the court recognized in *Mir, Inc.*, "the regulation precludes a private club from accepting the 'word' of an individual that he is a guest of a member without verification from the member, but allows the club to accept a person as a bona fide guest if his status is confirmed by the

presence or prior notification of a member." No. 04-ALJ-17-0409-CC. Thus, the requirement that a guest be bona fide is to ferret out those who might feign the approval of a member by mandating that the guest either be accompanied by a member or have the member personally make prior arrangements for him with management. If he meets either of these criteria, he is a true guest—he has his bona fides[6] by actually being invited by a member—and not someone who has faked a member's invitation.

Nevertheless, the Department contends the term bona fide implies that the guest have some degree of familiarity or camaraderie with the member, as does the dissent, or an allegiance to the organization's purpose. However, the plain language of the regulation contains no support for this, and the ordinary definition of bona fide does not require it. Thus, adopting the Department's and the dissent's view would be an improper narrowing of the regulatory definition based on some notion of what a bona fide guest *should* be, not what the regulation actually provides. *See Byerly*, 307 S.C. at 444, 415 S.E.2d at 799 (1992) ("[T]he words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation."). For us to do so therefore would require the abdication of our role as the interpreter of a regulation and the assumption of the position of a drafter.

Moreover, such a construction would prove utterly unworkable. Because Regulation 7-401.4(K) uses the term bona fide generally, we would only be able to adopt the vague standards above. Accordingly, we would be in no position to say how much of a relationship is sufficient or what quantum of adherence to the organization's mission passes muster.[7] Additionally, the oral arguments before us amply demonstrated that this interpretation would undoubtedly lead down the slippery slope of the

[6] "Vernon here's got a job. Vernon's got prospects. He's bona fide. What are you?" O Brother, Where Art Thou? (Touchstone Pictures 2000).

[7] Enforcement of this latter requirement would pose a particularly vexing challenge for organizations, as an undercover officer entering solely to investigate their guest policies, as Agent Ford did at Blue Moon, could never be a bona fide guest because he would not share in their beliefs.

Department assessing the subjective relationship between the member and his guest or the guest's adherence to the mores and values of the organization.[8] Under the Department's view, each private club's guest policy thus would be subject to the uncertain whim of the Department as to what threshold of connection is necessary. This would be of little comfort to organizations which are trying to ensure their practices comply with controlling regulations.

We therefore agree with the sentiment expressed by Judge Pieper in his dissent at the court of appeals:

> If the Department of Revenue has an issue with how the regulation itself defines "bona fide guest," then it may promulgate a new regulation as appropriate upon proper notice to the public. Until then, other businesses which follow the unambiguous language of the regulation should not be punished as a result.

*Blue Moon*, 387 S.C. at 474, 693 S.E.2d at 24 (Pieper, J., dissenting). As he correctly points out, many organizations have relied upon the plain language of Regulation 7-401.4(K) and it would be improper for us to come in now and alter its terms.

Accordingly, we hold Blue Moon has complied with the plain language of the regulation, and we are not in a position to judicially engraft the requirements sought by the Department. However, the court of appeals held that to give bona fide guest this broad reading would "eviscerate" the purpose of the regulation, which is to limit those who may consume alcohol on the premises of private clubs. *Id.* at 473, 693 S.E.2d at 24 (majority opinion). In essence, the argument is that sanctioning Blue Moon's guest policy would be an absurd result as it effectively allows a private club to be open to the public. While we are cognizant of the fact that the plain language of

[8] The dissent's contention that we need not enter this fray because Agent Ford and Malone were complete strangers presupposes some prior relationship is required under Regulation 7-401.4(K). For the reasons stated above, we disagree.

Regulation 7-401.4(K) may permit some organizations to push the envelope on what it means to be "private," we are not convinced the result is so absurd that we can ignore the regulation's plain language.

Without a doubt, the current statutory and regulatory scheme evinces a policy of restricting who can consume alcohol on the premises of a private club. *See* S.C. Code Ann. § 61-6-20(6) (defining nonprofit organization as one "not open to the general public, but with a limited membership and established for social, benevolent, patriotic, recreational, or fraternal purposes"); S.C. Code Ann. Regs. 7-401.4(A) (stating licenses shall be granted only to those nonprofit organizations "with limited membership to which the sale of alcoholic beverages is incidental to the main purpose of the organization" and not to one "which is, or has been, organized and operated primarily to obtain or hold a license to sell alcoholic beverages"). Our constitution also draws a distinction between private clubs, and restaurants and hotels serving the public. S.C. Const. art. VIII-A, § 1 ("[L]icenses may be granted to sell and consume alcoholic liquors and beverages on the premises of businesses which engage primarily and substantially in the preparation and serving of meals or furnishing of lodging *or* on the premises of certain nonprofit organizations with limited membership not open to the general public . . . ." (emphasis added)).

However, the statutes and regulations also envision guests being able to participate in the functions of a private club. *See* S.C. Code Ann. § 61-6-1600(A) ("A member or a guest of a member of a nonprofit organization may consume alcoholic liquors . . . ."); S.C. Code Ann. Regs. 7-401.4(J) ("Only bona fide members and bona fide guests of members of such organizations may consume alcoholic beverages . . . ."). Indeed, guests play an important part in any private club, not only through the possibility that they may join and increase the membership rolls but also in that they routinely participate in the organization's functions and support its missions. We also cannot lose sight of the fact that the consumption of alcohol is supposed to be incidental to the main purpose of the organization. A strict guest rule aimed solely at curbing the consumption of alcohol, a secondary objective, may prevent others from participating in the organization's activities and actually hinder

the achievement of its primary goals. We are therefore not convinced that permitting a liberal guest policy is so patently absurd that the General Assembly would not have intended it or it would run afoul of the constitution.

In conclusion, we hold the court of appeals erred in going beyond the plain language of the regulation. Based on the literal terms of Regulation 7-401.4(K), Agent Ford was a bona fide guest because a member made prior arrangements with management. Contrary to the dissent's assertion, we do not "sanction" Blue Moon's practice; we merely hold its policy comports with the plain language of the regulation. If the Department desires stricter standards, it is certainly at liberty to revise Regulation 7-401.4(K) accordingly.

## CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and find Blue Moon complied with the plain language of Regulation 7-401.4(K). Accordingly, we deny the Department's request to revoke Blue Moon's license. Because our resolution of this question is dispositive, we decline to address the other issues on which we granted certiorari.

**PLEICONES and BEATTY, JJ., concur. KITTREDGE, J., dissenting in a separate opinion in which TOAL, C.J., concurs.**

**JUSTICE KITTREDGE**: Because I believe the court of appeals correctly analyzed and decided this case, I respectfully dissent. The question presented is whether Agent Quincy Ford was a "bona fide" guest of a member of the Blue Moon Sports Bar when he gained entry to the private club. In my judgment, Agent Ford clearly was not a bona fide guest. As the majority of the court of appeals noted, construing the applicable regulation as giving Agent Ford the imprimatur of a bona fide guest "would eviscerate" its purpose. S.C. Dep't of Rev. v. Blue Moon of Newberry, Inc., 387 S.C. 467, 473, 693 S.E.2d 21, 24 (Ct. App. 2010). I agree and would affirm the court of appeals.

The facts are not in dispute. Blue Moon placed an advertisement outside its door indicating the telephone number to call for admission. Agent Ford was stopped by the doorman when he attempted to enter the bar. The doorman instructed Agent Ford to call the telephone number posted so that Agent Ford could gain permission to enter the bar. Agent Ford called the number and spoke to Steve Malone, who is a Blue Moon employee and member. Malone gave Agent Ford, a complete stranger, permission to enter the bar. The doorman allowed Agent Ford into the bar, and Agent Ford purchased and drank an alcoholic beverage.

In reversing the court of appeals, rejecting the agency's interpretation of its own regulation and holding that Agent Ford was a bona fide guest, the Court claims it is applying the plain language of the regulation. I believe the plain language and meaning of Regulation 7-401.4(K) compels a finding that Agent Ford was not a bona fide guest. Although I do not disagree with the majority regarding the potential "slippery slope of the Department assessing the subjective relationship between the member and his guest," this case is far removed from any slippery slope. The fact that applying the regulation may prove problematic in another case does not justify reversal of the court of appeals under these facts. Here, we need not struggle with notions of "subjective relationship" or otherwise, for Agent Ford and Malone had no relationship at all.

The agency's interpretation of Regulation 7-401.4(K) is not only entitled to deference, it is also in accord with common sense when applied to the undisputed facts of this case. Moreover, the agency's interpretation of the regulation is consistent with the South Carolina Constitution. See S.C. Const. art. VIII-A, § 1 ("[L]icenses may be granted to sell and consume alcoholic liquors and beverages . . . on the premises of certain nonprofit organizations with limited membership not open to the general public . . . ."). Yet today, the Court sanctions a sham practice that effectively transforms a purported private, nonprofit establishment into one open to the public.

**TOAL, C.J., concurs.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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| 16 Jade Street, LLC, | Respondent/Appellant, |
| v. | |
| R. Design Construction Co., LLC, and Carl R. Aten, Jr., Individually and in his capacity as principal and agent of R. Design Construction Co., LLC, Catterson & Sons Construction and Michael S. Catterson, Individually and in his capacity as principal and agent of Catterson & Sons Construction, | Defendants, |
| Of whom, Carl R. Aten, Jr., is | Appellant, |
| and Michael S. Catterson, Individually and in his capacity as principal and agent of Catterson & Sons Construction, is | Respondent, |
| R. Design Construction Co., LLC, | Third Party Plaintiffs, |
| v. | |

Kintz Electric, Third Party Defendant.

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Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

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Opinion No. 27107
Heard October 4, 2011 – Filed April 4, 2012

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**AFFIRMED AS MODIFIED**

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Mary Bass Lohr, Thomas A. Bendle, and William T. Young, III, all of Howell Gibson & Hughes, of Beaufort, for Appellant,

Jeffery A. Ross, of Clawson & Staubes, of Charleston, for Respondent,

E. Mitchell Griffith and Michael D. Freeman, both of Griffith, Sadler & Sharp, of Beaufort, for Respondent-Appellant.

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**JUSTICE HEARN:** This case presents the novel question of whether a member of a limited liability company can be held personally liable for torts committed while acting in furtherance of the company's business. We hold the General Assembly did not intend the LLC act to shield a member from liability for his own torts.

## FACTUAL/PROCEDURAL BACKGROUND

Carl R. Aten, Jr., and his wife are the only members of R. Design Construction Co., LLC. R. Design's primary business is building houses for spec, and Aten holds a residential home builder's license. In this particular case, R. Design selected a lot in Beaufort, South Carolina, on which it planned to build a four-unit condominium project. When Aten could not secure the necessary financing, he approached Dennis Green about entering into a contract for R. Design to construct the building. Green ultimately formed 16 Jade Street, LLC for this purpose, and R. Design entered into an agreement with Jade Street for the construction of the condominium.

As part of the deal, Aten was to receive a $150,000 fee to serve as the general contractor for the project, and he alone was in charge of choosing subcontractors. One of the subcontractors selected by R. Design was Catterson & Sons Construction. Michael Catterson is the sole shareholder of Catterson & Sons, and he is a specialty subcontractor with a special license for framing in addition to holding his general contractor's license. Catterson & Sons' scope of work accordingly was focused primarily on framing and AAC block[1] installation.

As the general contractor, it was Aten's job to supervise the project. Thus, whenever Catterson had a question about the work he was to perform or any issues that arose, he would ask Aten. Furthermore, Catterson & Sons was to implement the design standards set by Aten and R. Design. Catterson himself, however, did not actually perform any construction but served mainly as the liaison between the foreman and his own workers.

A couple months into construction, problems arose concerning the AAC block construction and the framing. Green called Kern-Coleman, the

[1] AAC block stands for aerated autoclave concrete block. These blocks are preformed concrete blocks with cavities that, when stacked, permit rebar and grouting mortar to be poured in and provide structural support.

structural engineer of record, to perform an inspection of the property. The initial inspection identified four defects, but Green pressed on following Aten's assurances that these problems would be addressed. However, the problems did not abate. Following a progress payment dispute, Catterson & Sons left the job site and did not return. In the ensuing months, Aten's relationship with Green deteriorated as Aten tarried in fixing the defects, and the construction eventually ground to a halt. R. Design subsequently left the project, never replacing Catterson & Sons nor adequately addressing the defects.

The day after R. Design left the project, Kern-Coleman conducted another inspection of the property. This time, it identified thirty-four defects in addition to the original four, which had not yet been remedied, for a total of thirty-eight. Anchor Construction was retained as the new general contractor, and its own inspection revealed sixty defects in the original construction. After Anchor began working on the project, more defects surfaced.

Jade Street subsequently sued R. Design, Aten, Catterson & Sons, and Catterson for negligence[2] and breach of implied warranties. Jade Street also filed a breach of contract claim against R. Design and Aten.[3] Following a bench trial, the circuit court found in favor of Jade Street as follows: (1) against R. Design for breach of contract, negligence, and breach of implied warranties; (2) against Catterson & Sons for negligence and breach of contract; and (3) against Aten personally for negligence. As to Aten personally, the circuit court concluded that despite the fact he was a member of an LLC, he is personally liable because he holds a residential home builder's license. In particular, the court concluded the statutes pertaining to the license create civil liability for the licensee. The court imposed no

[2] The negligence claim against Aten and R. Design was an ordinary construction defect claim coupled with negligent supervision.

[3] R. Design brought cross-claims against Catterson and Catterson & Sons for equitable indemnity and breach of contract. Aten also filed a third-party complaint against Kintz Electric, an electrical subcontractor. Issues relating to these claims are not raised on appeal.

liability against Catterson himself. The court ultimately awarded Jade Street $925,556 in damages for its claims. This appeal followed.

## ISSUES PRESENTED

I. Did the circuit court err in finding Aten can be held personally liable for negligent acts he committed while working for an LLC of which he was a member?

II. Did the circuit court err in not finding Catterson personally liable for the tort obligations incurred by Catterson & Sons?

## LAW/ANALYSIS

### I. ATEN'S PERSONAL LIABILITY

Aten argues the provisions of the Uniform Limited Liability Company Act, as enacted in South Carolina, shield him from personal liability for ordinary negligence he committed while working for R. Design. While we agree the language of the LLC act appears to insulate a member from personal liability, we hold that such a sweeping liability shield was not intended by the General Assembly.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Where the words in the statute are clear and unambiguous, we cannot give them a different meaning. *Id.* If the statute is in derogation of a common law right, it "must be strictly construed and not extended in application beyond clear legislative intent. Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004). However, the statute must also be read as a whole and in harmony with its purpose. *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). In that vein, "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose,

design, and policy of the lawmakers." *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). Similarly, we are to construe a statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). In the end, however, we will reject any interpretation which would lead to a result so absurd that the General Assembly could not have intended it. *Sweat*, 386 S.C. at 351, 688 S.E.2d at 575.

The statute at issue in this case is Section 33-44-303 of the South Carolina Code (2006), which reads as follows:

> (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.
>
> (b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.
>
> (c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:
>
> (1) a provision to that effect is contained in the articles of organization; and

(2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.[4]

The record before us does not contain the articles of organization for R. Design, so we are unable to determine whether subsection (c) would impose liability on Aten. The question thus becomes whether the General Assembly intended subsection (a) to generally shield members from personal liability for acts they commit in furtherance of the company's business.

This is a question of first impression in this State. We note that a majority of states to examine similar statutory language have concluded that a member is always liable for his own torts and cannot rely on his status as a member of an LLC as a shield.[5] *See, e.g*, *Hoang v. Arbess*, 80 P.3d 863, 867 (Colo. App. 2003); *Ventures v. Goodspeed Airport, LLC*, 881 A.2d 937, 963-64 (Conn. 2005); *Milk v. Total Pay & HR Solutions, Inc.*, 634 S.E.2d 208, 213 (Ga. Ct. App. 2006); *Allen v. Dackman*, 991 A.2d 1216, 1228-29 (Md. 2010); *Rothstein v. Equity Ventures, LLC*, 750 N.Y.S.2d 625, 627 (App. Div. 2002); *d'Elia v. Rice Dev., Inc*, 147 P.3d 515, 525 (Utah Ct. App. 2006). Additionally, many scholars opine that LLC statutes do not insulate a member from tort liability primarily due to the common law concept that one is always liable for his torts. *See* Matthew G. Doré, *What, Me Worry? Tort*

[4] Prior to the adoption of the Uniform Limited Liability Act in 1996, South Carolina had a statutory scheme governing LLCs which specifically preserved the personal liability of individual members who committed tortious conduct pursuant to a professional licensing statute. *See* S.C. Code Ann. § 33-43-304(B) (repealed 1996).

[5] Some courts which have found personal liability have done so based on substantially different language in their LLC statutes. For example, in *Estate of Countryman v. Farmers Cooperative Ass'n*, 679 N.W.2d 598 (Iowa 2004), the Supreme Court of Iowa held a member was personally liable for his torts. *Id.* at 605. However, Iowa's LLC statute at the time specifically stated, "Nothing in this section shall be construed to affect the liability of a member of a limited liability company to third parties for the member's participation in tortious conduct." Iowa Code § 490A.603(3) (2004) (repealed 2009).

*Liability Risks for Participants in LLCs*, 11 U.C. Davis Bus. L.J. 267, 271 (2011); Karin Schwindt, *Limited Liability Companies: Issues in Member Liability*, 44 UCLA L. Rev. 1541, 1548 (1997); Jeffrey K. Vandervoot, *Piercing the Veil of Limited Liability Companies: The Need for a Better Standard*, 3 DePaul Bus. & Com. L.J. 51, 56 (2004). In their view, the liability shield erected is one against vicarious liability for non-tortfeasor members, such as Aten's wife in this case. *See* Doré, *supra*, at 285-86. No party in this matter contends that section 33-44-303 does not at least provide this cover.

On the other hand, a few courts appear to have concluded that their states' LLC statutes do shield a member from personal liability for at least some of his own tortious conduct. *See, e.g.*, *Puleo v. Topel*, 856 N.E.2d 1152, 1157 (Ill. App. Ct. 2006); *Barone v. Perkins*, No. 2007-CA-000838-MR, 2008 WL 2468792, at *4 (Ky. Ct. App. 2008) (unpublished); *Curole v. Ochsner Clinic, L.L.C.*, 811 So. 2d 92, 97 (La. Ct. App. 2002); *Brew City Redev. Grp., LLC v. The Ferchill Grp.*, 714 N.W.2d 582, 590-91 (Wis. Ct. App. 2006); *see also* Jeffrey S. Quinn, Allen v. Dackman*: Doing Away with Limited Liability in Maryland*, 70 Md. L. Rev. 1171, 1210 (2011) (stating that the *Allen* court "mistakenly disregarded the economically important liability shield of an LLC by inappropriately making Dackman personally liable for what is essentially the tortious conduct of the LLC").

We begin our analysis by examining the plain language of section 33-44-303(a) and the intent of our General Assembly with respect to the common law right to sue one's tortfeasor. We acknowledge that the statute's language may be read to shield a member from personal liability for torts he commits in furtherance of the LLC's business. Although Section 33-44-201 of the South Carolina Code (2006) provides that an LLC and its members are separate entities, because an LLC is a fictional person it can only operate through its agents, who oftentimes are its members. Accordingly, any debt, obligation, or liability the LLC incurs can only arise from the actions of an agent. Using R. Design as an example, if it incurs a tort liability, it can only be through a tort committed by Aten or his wife, assuming the LLC has no other employees or agents. Section 33-44-303(a) states that a member or

manager is not personally liable for these obligations "solely by reason of being or acting as a member or manager."[6] This is the source of the protection against vicarious liability, meaning Aten's wife would not be personally liable for Aten's negligence—which is an LLC obligation—just because she happens to be a member of R. Design.

Additionally, section 33-44-303(a) provides that these obligations are "solely" those of the company. Because R. Design could only incur a tort obligation through a tort committed by Aten or his wife, this language suggests R. Design alone is responsible for torts committed by Aten in the course of the company's business.[7] *Accord* S.C. Code Ann. § 33-44-301(a)(2) ("An act of a member which is not apparently for carrying on in the ordinary course of the company's business or business of the kind carried on by the

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[6] Some of the courts espousing the majority rule with statutes similar to ours focus on this use of the word "solely" in the statute. *See, e.g., Allen*, 991 A.2d at 1229 (citing Md. Code Ann., Corps. & Ann'ns § 4A-301). Their logic is that finding a member liable for a tort he commits while working for the company is imposing liability because he was the actual tortfeasor, not *solely* because he is a member. *Id.* Were this all the statute provided, we would be inclined to agree. However, as discussed below, the statute also makes the company (and not any member) exclusively liable for certain tort obligations. Thus, the statute on its face appears to limit a member's personal liability for torts he commits.

[7] Subsection (c) provides further support for the notion that section 33-44-303's liability shield is more than just a protection against vicarious liability. In particular, it states a member obligates himself to pay for such LLC debts when there is a provision so providing in the articles of organization and the member expressly has agreed to be bound by it. S.C. Code Ann. § 33-44-303(c). Because the statute expressly provides how a member can become personally liable, it therefore stands to reason that the general rule is he is not otherwise personally liable. *See also Hodges*, 341 S.C. at 86, 533 S.E.2d at 582 ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting Black's Law Dictionary 602 (7th ed. 1999)).

company binds the company *only* if the act was authorized by the other members." (emphasis added)); *id.* § 33-44-301(b)(2) ("An act of a manager which is not apparently for carrying on in the ordinary course of the company's business or business of the kind carried on by the company binds the company *only* if the act was authorized under Section 33-44-404." (emphasis added)). Thus, section 33-44-303(a) arguably insulates a member from personal liability in these situations.

Nevertheless, the right to sue one's tortfeasor is a long-standing right in our legal system, and we will only find it abrogated by statute through "clear legislative intent." *See Doe*, 361 S.C. at 473, 605 S.E.2d at 561. Stated differently, "[s]tatutes will not be held in derogation of the common law unless the statute itself shows that such was the object and intention of the lawmakers, and the common law will not be changed by doubtful implication." 82 C.J.S. *Statutes* § 534. "Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." *Doe*, 361 S.C. at 473, 605 S.E.2d at 561. While construing section 33-44-303 to limit personal liability may be a permissible reading of the statute, we are not persuaded that this was the intent of the General Assembly. First, it is the interpretation afforded to similar language by a majority of courts and reflects the prevailing interpretation of an LLC's limitation of liability. *See Hoang*, 80 P.3d at 867; *Ventures*, 881 A.2d at 963-64; *Milk*, 634 S.E.2d at 213; *Allen*, 991 A.2d at 1228-29; *Rothstein*, 750 N.Y.S.2d at 627; *d'Elia*, 147 P.3d at 525; Doré, *supra*, at 271; Schwindt, *supra*, at 1548; Vandervoot, *supra*, at 56. Furthermore, it comports with the comments to section 33-44-303[8] and section 33-44-303's kin in the Revised Limited Liability Company Act.[9]

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[8] The comments provide, "A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in . . . tort against the member or manager if that person were acting in an individual capacity." S.C. Code Ann. § 33-44-303 cmt. We believe this is evidence of the General Assembly's intent that he should be liable for his torts.

More importantly, this also has long been the rule with respect to shareholders and officers of corporations, an organizational structure from which LLCs borrow heavily. *See* S.C. Code Ann. § 33-6-220(b) ("[A] shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct."); *see also Hoang*, 80 P.3d at 867 (stating parties did not dispute that corporate liability principles apply to LLCs); *Ventures*, 881 A.2d at 964 (holding that Connecticut's LLC statute "merely codifies" established liability principles of corporate law); *Allen*, 991 A.2d at 1228 (applying general liability rule from corporations to LLCs); *d'Elia*, 147 P.3d at 525 ("We are persuaded by those authorities that hold that both limited liability members and corporate officers should be treated in a similar manner when they are engaged in tortious conduct."). Indeed, Judge Posner once observed, "You don't buy immunity from suits for your torts by being a member of a business corporation." *Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix, & von Gontard, P.C.*, 385 F.3d 737, 744 (7th Cir. 2004). We can find no evidence the General Assembly intended to abandon this rule with respect to LLCs.

At first blush, this appears to strip away one of the main reasons why a person chooses to form an LLC. *See* Quinn, *supra*, at 1216 ("The economic justifications and, specifically, the concept of limited liability support an interpretation of the [LLC act] that protects members from personal liability when acting in good faith service of the LLC."). Our concern with

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[9] These comments similarly note that nothing in the current version of the provision under scrutiny in this case was intended to ameliorate the common law principle that a tortfeasor is always responsible for his own tortious conduct. Revised Unif. Lim. Liab. Co. Act § 304 cmt. ("This paragraph shields members and managers only against the debts, obligations and liabilities of the limited liability company and is irrelevant to claims seeking to hold a member or manager directly liable on account of the member's or manager's own conduct."). Importantly, this provision is nearly identical to section 33-44-303; the only substantive difference is that there is no equivalent to subsection (c).

concluding section 33-44-303(a) only protects against vicarious liability for torts of others becomes particularly acute with respect to single-member LLCs which have no other employees. In one of these single-member LLCs, there simply is no one to protect from vicarious liability as one cannot be vicariously liable for his own actions. However, there are myriad other benefits available to those who choose to form an LLC, and we are not persuaded that limiting the shield of section 33-44-303(a) to just vicarious liability would undermine the core of this business entity. Accordingly, we find this interpretation reasonable and no clear intent by the General Assembly to restrict the common law. While the language of the statute may be subject to other interpretations, we believe it is highly questionable whether the General Assembly intended to limit a member's personal liability for his torts. Therefore, given the principle that we strictly construe statutes in derogation of common law rights and they only do so through clear legislative intent, we hold section 33-44-303(a) does not limit the right of a plaintiff to sue his tortfeasor.

In sum, we conclude that section 33-44-303(a) only protects non-tortfeasor members from vicarious liability and does not insulate the tortfeasor himself from personal liability for his actions. We accordingly find the circuit court did not err in finding Aten personally liable for torts he committed in furtherance of R. Design's business. We note the circuit court did not reach Aten's argument that section 33-44-303(a) removed any personal liability on his part and instead found Aten's residential home builders' license rendered him personally liable. While we disagree with the circuit court's findings regarding Aten's license, the scope of section 33-44-303 was raised to the trial court and is an additional sustaining ground. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing the Record on Appeal.").

## II. CATTERSON'S PERSONAL LIABILITY

Jade Street appeals the circuit court's conclusion that Catterson himself is not personally liable for the actions of Catterson & Sons. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: S.C. Code

Ann. § 33-6-220(b) ("[A] shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his acts or conduct."); *Aaron v. Mahl*, 381 S.C. 585, 591, 674 S.E.2d 482, 485 (2009) ("In an action at law, tried by a judge without a jury, the findings of the trial court must be affirmed if there is any evidence to support them.").

## CONCLUSION

For the foregoing reasons, we affirm as modified the circuit court's holding that Aten is personally liable for his negligence. We also affirm the court's finding that Catterson is not personally liable for the acts of Catterson & Sons.

**PLEICONES and KITTREDGE, JJ., concur. BEATTY, J., concurring in part and dissenting in part in a separate opinion in which TOAL, C.J., concurs.**

**JUSTICE BEATTY:** I concur in part. I concur in that part of the majority's opinion that affirms the circuit court's conclusion that Catterson is not personally liable for the actions of Catterson & Sons. However, I am compelled to dissent in that part of the majority's opinion that concludes that Aten is personally liable for torts committed in furtherance of the business of 16 Jade Street, LLC.

The conclusion reached by the majority, though appealing, cannot be reached by use of statutory construction. As the majority recognizes, it is axiomatic that the cornerstone of statutory construction is the ascertainment of the Legislature's intent. It is also axiomatic that where the words of the statute are clear and unambiguous, the court cannot assign them a new and different meaning. Section 33-44-303 states:

> (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, **tort**, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or **acting as a member or manager.**
>
> (b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.
>
> (c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:
>
> > (1) a provision to that effect is contained in the articles of organization; and

> (2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

S.C. Code Ann. § 33-44-303 (2006) (emphasis added).

This statute is clear and unambiguous and, in my view, is not amenable to an interpretation that a member tortfeasor of an LLC is personally liable for torts committed in the furtherance of the LLC's business. Although we may find fault in the wisdom of the statute, we have no authority to re-write it. See State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) (recognizing that where a 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).

Section 33-44-303 is clear and unambiguous; the common law must yield.

**TOAL, C.J., concurs.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Benjamin P. Green, Appellant.

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

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Opinion No. 27108
Heard February 23, 2012 – Filed April 4, 2012

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**AFFIRMED**

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Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., of Columbia, Solicitor James Strom Thurmond, Jr, of Aiken, for Respondent.

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**JUSTICE BEATTY:** Benjamin P. Green appeals his convictions for criminal solicitation of a minor[1] and attempted criminal sexual conduct

[1] S.C. Code Ann. § 16-15-342 (Supp. 2011).

("CSC") with a minor in the second-degree.[2] In challenging his convictions, Green contends the trial judge erred in: (1) denying his motion to dismiss the charge of criminal solicitation of a minor on the ground the statute is unconstitutionally overbroad and vague; (2) denying his motions to dismiss and for a directed verdict on the charge of attempted CSC with a minor in the second-degree; (3) admitting certain photographs; and (4) denying his request for a jury charge on attempted assault and battery of a high and aggravated nature ("ABHAN"). We affirm.

## I. Factual/Procedural History

On October 13, 2006 at 5:38 p.m., Green entered a Yahoo! online chat room under the screen name "blak slyder" and initiated an online chat with "lilmandy14sc" ("Mandy"). On Mandy's profile page was a picture of a female sitting on a bed. Unbeknownst to Green, Mandy was actually an online persona created by Investigator Tommy Platt of the Aiken County Sheriff's Office as part of the Internet Crimes Against Children Task Force.

In response to Green's initial question, Mandy answered "i hooked up with a 16 year old." Green then asked Mandy, "how young are you?" to which Mandy stated, "14." Green countered that he was "21."[3] Immediately thereafter, the chat turned sexual in nature with Green asking Mandy whether she would have sex with him. During the chat, Green sent Mandy two pictures of his penis and stated that he could "show it to [her] in person."[4] Green then arranged to meet Mandy at 7:30 p.m. on a secluded road in Beech Island, South Carolina, which is located in Aiken County.

When Green arrived at the predetermined location, he was met by several law enforcement officers who arrested him. In response to the

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[2] S.C. Code Ann. § 16-3-655(B)(1) (Supp. 2011).

[3] At the time of the chat, Green was actually twenty-seven years old as his date of birth is December 9, 1978.

[4] The officers executed a search warrant for Green's home computer and discovered the photographs that Green sent to Mandy during the online chat.

officers' questions, Green admitted that "he was there to meet a 14-year-old girl." A search of Green's vehicle revealed a cell phone, a bottle of alcohol, two DVDs, condoms, male enhancement cream and drugs, and handwritten directions to the location.

Subsequently, Green was indicted and ultimately convicted by a jury for criminal solicitation of a minor and attempted CSC with a minor in the second-degree. Green appealed his convictions to the Court of Appeals. This Court certified the appeal from the Court of Appeals pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

## II. Discussion

### A. Constitutionality of Criminal Solicitation of a Minor Statute

In a pre-trial hearing and at the conclusion of the State's case, Green moved for the trial judge to declare unconstitutional section 16-15-342, the criminal solicitation of a minor statute, on the grounds it is overbroad and vague. Specifically, he claimed the statute is not narrowly tailored and, as a result, "chills free speech." The judge summarily denied the motion.

On appeal, Green challenges section 16-15-342 as facially overbroad because one can be found guilty under the statute "when he contacts a minor for any one of six activities under 16-15-375(5) or any one of at least twenty-nine activities under 16-1-60." Because the statute does not identify what forms of communication are prohibited, Green claims the content of any communication would "trigger a violation of the statute." Ultimately, Green claims the statute is "so overbroad that it ensnares" protected speech.

In a related argument, Green asserts this lack of specificity demonstrates that the statute is vague. Green contends the provisions of the statute are vague as to "what forms of communications and what content of such communications would be criminalized as solicitations." Because the statute is not sufficiently definite, Green avers that "[a] person of ordinary intelligence would not know what speech, expression or contact would result in a violation of the statute."

"When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." State v. Gaster, 349 S.C. 545, 549-50, 564 S.E.2d 87, 89-90 (2002). "This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution." State v. White, 348 S.C. 532, 536-37, 560 S.E.2d 420, 422 (2002).

Applying these well-established rules regarding the constitutionality of a statute, our analysis begins with a review of the text of the challenged statute. Section 16-15-342 provides in pertinent part:

> (A) A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.
>
> (B) Consent is a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.
>
> (C) Consent is not a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is under the age of sixteen.
>
> (D) It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably

> believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.

S.C. Code Ann. § 16-15-342 (Supp. 2011). Section 16-15-375 defines "sexual activity" by identifying six acts, which include "vaginal, anal, or oral intercourse" and "touching, in an act of apparent sexual stimulation or sexual abuse." S.C. Code Ann. § 16-15-375(5) (2003).

### 1. Overbroad[5]

"It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

In discussing the overbreadth doctrine, the United States Supreme Court ("USSC") has stated:

> According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate

[5] Although we have not definitively ruled on an overbreadth challenge to the statute at issue, we have implicitly rejected a First Amendment objection. See State v. Gaines, 380 S.C. 23, 28 n.1, 667 S.E.2d 728, 731 n.1 (2008) (affirming defendant's convictions for criminal solicitation of a minor and stating, "the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent").

> balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is strong medicine that is not to be casually employed.

United States v. Williams, 553 U.S. 285, 292-93 (2008) (citations omitted) (emphasis in original). "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615.

In analyzing Green's constitutional challenge to section 16-15-342, we initially note that speech used to further the sexual exploitation of children has been routinely denied constitutional protection as the State has a compelling interest in preventing the sexual abuse of children. In fact, the USSC has expressly stated that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." Williams, 553 U.S. at 297. Moreover, "[c]ourts have recognized that speech used to further the sexual exploitation of children does not enjoy constitutional protection, and while a statute may incidentally burden some protected expression in carrying out its objective, it will not be held to violate the First Amendment if it serves the compelling interest of preventing the sexual abuse of children and is no broader than necessary to achieve that purpose." Cashatt v. State, 873 So. 2d 430, 434-35 (Fla. Dist. Ct. App. 2004); see New York v. Ferber, 458 U.S. 747, 756-57 (1982) (recognizing that the prevention of sexual exploitation of children and abuse of children constitutes a government objective of surpassing importance).

In view of this compelling interest, the question becomes whether section 16-15-342 is narrowly tailored to achieve the interest for which it was intended. As will be discussed, we find the statute is narrowly drafted to prohibit criminal conduct rather than protected speech.

Significantly, the statute includes the term "knowingly." Thus, it affects only those individuals who intentionally target minors for the purpose of engaging or participating in sexual activity or a violent crime. Conversely,

it does not criminalize any inadvertent contact or communications with minors. See United State v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000) (concluding that statute proscribing knowing efforts to persuade minors to engage in illegal sexual activity did not violate First Amendment); State v. Ebert, 263 P.3d 918, 922 (N.M. Ct. App. 2011) (concluding that statute criminalizing child solicitation by electronic communication device was not constitutionally overbroad as "[t]ailoring [was] primarily accomplished through the 'knowingly' scienter requirement"; noting that "the statute does not restrict adults from communicating about sex to children, nor does it restrict adults from soliciting sex from one another over the internet," in fact, "the statute prohibits only that conduct necessary to achieve the State's interest"); State v. Snyder, 801 N.E.2d 876, 883 (Ohio Ct. App. 2003) (finding statute that prohibited adults from using telecommunications device to solicit minor for sexual activity is not "aimed at the expression of ideas or beliefs; rather, it is aimed at prohibiting adults from taking advantage of minors and the anonymity and ease of communicating through telecommunications devices, especially the Internet and instant messaging devices, by soliciting minors to engage in sexual activity").

Because the statute does not criminalize protected speech and is narrowly tailored to achieve a compelling state interest, we find the statute is not unconstitutionally overbroad as any alleged overbreadth is unsubstantial when considered in relation to "its plainly legitimate sweep."

**2. Vague**

In view of our finding, the analysis turns to a determination of whether the statute is void for vagueness.

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (quoting State v. Albert, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)). "The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies." Huber v. S.C. State Bd. of Physical Therapy Exam'rs, 316 S.C. 24, 26, 446 S.E.2d 433, 435 (1994). A law is unconstitutionally vague if it forbids or requires the doing

of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. Toussaint v. State Bd. of Med. Exam'rs, 303 S.C. 316, 400 S.E.2d 488 (1991). "[O]ne to whose conduct the law clearly applies does not have standing to challenge it for vagueness as applied to the conduct of others." In re Amir X.S., 371 S.C. 380, 391, 639 S.E.2d 144, 150 (2006) (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)).

As an initial matter, we find that Green does not have standing to assert a facial challenge for vagueness as the statute provided adequate notice that his conduct fell within that proscribed by section 16-15-342. Green, who was twenty-seven years old at the time of the offense, knowingly initiated an online chat with a female he reasonably believed to be fourteen years old. As evidenced by the text of the chat, Mandy represented her age to be 14, Green acknowledged that she was too young to drive his vehicle, and admitted to the arresting officers that he was there to meet a fourteen-year-old girl. Moreover, Green's sexually-explicit conversation was intended for no other purpose than to persuade Mandy to engage in sexual activity as defined in section 16-15-675(5).

Even assuming standing, we find that Green's challenge is without merit. We hold that section 16-15-342 is sufficiently precise to provide fair notice to those to whom the statute applies. The criminal solicitation statute specifically identifies the following distinct elements: "(1) the defendant is eighteen years of age or older; (2) he or she knowingly contacts or communicates with, or attempts to contact or communicate with; (3) a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen; (4) for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16–15–375(5) or a violent crime as defined in Section 16–1–60; or (5) with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen." State v. Reid, 383 S.C. 285, 301, 679 S.E.2d 194, 202 (Ct. App. 2009), aff'd, 393 S.C. 325, 713 S.E.2d 274 (2011).

Although each of these terms is not defined, we believe a person of common intelligence would not have to guess at what conduct is prohibited by the statute. We also find the Legislature purposefully did not define "contacts" or "communicates," as we believe it sought to encompass all methods of communications. Unlike the solicitation statutes found in other jurisdictions, the South Carolina statute does not confine the method of solicitation strictly to computers.[6] Instead, one charged with this crime could have used a letter, a telephone, a computer, or other electronic means to communicate with or contact the minor victim.

Based on the foregoing, we conclude that Green has not satisfied his burden to prove that section 16-15-342 violates the First Amendment of the Constitution.

We note that other jurisdictions, which have analyzed statutes similar to this state's, have also determined that the statutes are neither unconstitutionally overbroad nor vague. See, e.g., Cashatt v. State, 873 So. 2d 430 (Fla. Dist. Ct. App. 2004); People v. Smith, 806 N.E.2d 1262 (Ill. App. Ct. 2004); LaRose v. State, 820 N.E.2d 727 (Ind. Ct. App. 2005); State

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[6] See, e.g., La. Rev. Stat. Ann. § 14:81.3(A)(1) (West 2012) ("Computer-aided solicitation of a minor is committed when a person seventeen years of age or older knowingly contacts or communicates, through the use of electronic textual communication, with a person who has not yet attained the age of seventeen where there is an age difference of greater than two years, or a person reasonably believed to have not yet attained the age of seventeen and reasonably believed to be at least two years younger, for the purpose of or with the intent to persuade, induce, entice, or coerce the person to engage or participate in sexual conduct or a crime of violence as defined in R.S. 14:2(B), or with the intent to engage or participate in sexual conduct in the presence of the person who has not yet attained the age of seventeen, or person reasonably believed to have not yet attained the age of seventeen."); Utah Code Ann. § 76-4-401(2)(a) (Supp. 2011) ("A person commits enticement of a minor when the person knowingly uses or attempts to use the Internet or text messaging to solicit, seduce, lure, or entice a minor or another person that the actor believes to be a minor to engage in any sexual activity which is a violation of state criminal law.").

v. Penton, 998 So. 2d 184 (La. Ct. App. 2008); State v. Pribble, 285 S.W.3d 310 (Mo. 2009) (en banc); State v. Rung, 774 N.W.2d 621 (Neb. 2009); State v. Snyder, 801 N.E.2d 876 (Ohio Ct. App. 2003); Maloney v. State, 294 S.W.3d 613 (Tex. Ct. App. 2009); State v. Gallegos, 220 P.3d 136 (Utah 2009). See generally Marjorie A. Shields and Jill M. Marks, Annotation, Validity, Construction, and Application of State Statutes Prohibiting Child Luring as Applied to Cases Involving Luring of Child by Means of Electronic Communications, 33 A.L.R. 6th 373, §§ 4-10 (2008 & Supp. 2012) (analyzing state cases that have determined state child-luring statute was constitutionally valid).

Having rejected Green's constitutional challenges, the question becomes whether the trial judge erred in declining to grant Green's motions to dismiss or for a directed verdict as to the charged offenses.

**B. Motions to Dismiss and for a Directed Verdict**

Prior to trial, Green moved to dismiss the charged offenses. In support of this motion and his directed verdict motion, Green claimed it was legally impossible to "carry out the criminal sexual conduct" because the alleged victim was not a minor but, rather, a fictitious person created by Investigator Platt. During trial, Green also established that the picture on Mandy's profile page was actually that of Lynda Williamson, a twenty-four-year-old former probation officer who provided the photograph to an investigator with the Aiken County Sheriff's Office. Because the woman in the picture was "over the age of consent," Green claimed he could not be convicted of attempted CSC with minor in the second-degree.

As an additional ground, Green asserted the State failed to prove his specific intent to commit CSC with a minor in the second-degree and an overt act in furtherance of the crime. During his argument, Green pointed to the text of the online chat where he stated that he would not pressure Mandy to do anything that she did not want to do and that she could change her mind about having sex.

On appeal, Green reiterates these arguments in support of his contention that the trial judge erred in denying his motions to dismiss and for

a directed verdict. In addition, Green elaborates on his claim of legal impossibility. Citing United States v. Frazier, 560 F.2d 884 (8th Cir. 1977), Green explains that this defense applies "where the impossibility of a defendant's successfully committing a crime eliminates the culpability of his having tried to do so." According to this statement, Green claims he should not have been convicted of the charged offenses as he "could not commit criminal sexual conduct with a fictitious person."

**1. Legal Impossibility**

"[L]egal impossibility occurs when the actions that the defendant performs or sets in motion, even if fully carried out as he or she desires, would not constitute a crime, whereas factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him or her from bringing about that objective." 21 Am. Jur. 2d Criminal Law § 156 (2008). "According to some authorities, legal impossibility is a defense to a charge of attempt, but factual impossibility is not." Id. In view of this distinction and Green's arguments, we have confined our analysis of this issue to the defense of legal impossibility.

As we interpret Green's trial and appellate arguments, his claim of legal impossibility encompasses both the solicitation charge and the CSC charge. Specifically, the intent element in the solicitation statute and the necessary intent for the attempted CSC charge warrant a similar analysis with respect to Green's challenge that no actual minor was involved. Accordingly, we address Green's claims as to both charges.

Section 16-15-342(D) definitively discounts Green's arguments with respect to the solicitation charge as this provision states, "It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity." S.C. Code Ann. § 16-15-342(D) (Supp. 2011). Thus, based on the plain language of the statute, the Legislature clearly intended to eliminate the defense of impossibility as to the charge of criminal solicitation of a minor if a law enforcement officer impersonated the minor. State v. Dingle, 376 S.C. 643,

659 S.E.2d 101 (2008) (recognizing that in interpreting statutes, appellate courts look to the plain meaning of the statute and the intent of the Legislature).

Similarly, the fact that an actual minor was not the subject of Green's intent did not preclude his prosecution and conviction for attempted CSC with a minor in the second-degree.

A person is guilty of CSC with a minor in the second-degree if "the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code Ann. § 16-3-655(B)(1) (Supp. 2011). "A person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense." S.C. Code Ann. § 16-1-80 (2003). "Thus, the elements of attempted CSC with a minor in the second degree are: (1) an attempt; (2) to engage in a sexual battery; (3) with a victim; (4) who is fourteen years of age or less; (5) but who is at least eleven years of age." Reid, 383 S.C. at 292, 679 S.E.2d at 197.

In discussing attempt crimes, this Court has stated, "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense." State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). Accordingly, "[t]o prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation in furtherance of the intent." State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (emphasis in the original).

Based on the above-outlined definitions, we find Green's actions were sufficient to prove the offense of attempted CSC with a minor in the second-degree. As noted, an attempt crime does not require the completion of the object offense. Thus, Green was not required to complete the sexual battery in order to be prosecuted and convicted of the offense. Accordingly, the fact that the intended victim was not an actual minor was irrelevant as the State was only required to prove Green had the specific intent to commit a sexual battery on *a victim* between the ages of eleven and fourteen years old coupled with some overt act toward the commission of the offense. See State v.

Curtiss, 65 P.3d 207 (Idaho Ct. App. 2002) (holding that impossibility did not constitute a defense to charge of attempted lewd conduct with a minor under the age of sixteen in a case where detective posed as a fourteen-year-old girl in online chat room); Hix v. Commonwealth, 619 S.E.2d 80 (Va. 2005) (holding that the fact defendant was communicating with an adult law enforcement officer posing as a child was not a defense to the charge of attempted indecent liberties with a minor).

A decision to this effect is consistent with our state's limited jurisprudence regarding Internet sex crimes. See Reid, 383 S.C. at 300, 679 S.E.2d at 201-02 (recognizing "the policy goal of stopping dangerous persons through earlier intervention by law enforcement by punishing the attempted conduct as a crime, especially in any cybermolester type cases where the conduct also clearly manifests or strongly corroborates the intent to commit such a dangerous object crime").

Finally, other state jurisdictions have concluded that a defendant may be prosecuted for criminal solicitation of a minor, as well as attempted sexual offenses, where the online persona is an undercover officer and not an actual minor. See, e.g., Karwoski v. State, 867 So. 2d 486 (Fla. Dist. Ct. App. 2004); People v. Thousand, 631 N.W.2d 694 (Mich. 2001); State v. Coonrod, 652 N.W.2d 715 (Minn. Ct. App. 2002); Shaffer v. State, 72 So. 3d 1070 (Miss. 2011); Johnson v . State, 159 P.3d 1096 (Nev. 2007); State v. Robins, 646 N.W.2d 287 (Wis. 2002).[7]

[7] The majority of federal jurisdictions have also rejected Green's argument with respect to a similar federal statute, 18 U.S.C. § 2422(b), which prohibits a person from using the mail or interstate commerce to "knowingly persuade[ ], induce[ ], entice[ ], or coerce[ ]" someone under the age of 18 "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempt[ ] to do so." See United States v. Tykarsky, 446 F.3d 458, 466 (3d Cir. 2006) ("After examining the text of the statute, its broad purpose and its legislative history, we conclude that Congress did not intend to allow the use of an adult decoy, rather than an actual minor, to be asserted as a defense to § 2422(b)."); United States v. Hicks, 457 F.3d 838, 841 (8th Cir. 2006); ("[A] defendant may be convicted of attempting to violate § 2422(b) even if the attempt is made towards someone the defendant

## C. Sufficiency of the Evidence As to Specific Intent and Overt Act in Furtherance of Attempted CSC with a Minor

Finding that an actual minor was not required for the prosecution of the charge of attempted CSC with a minor, the question becomes whether the State proved that Green possessed the requisite intent and that he engaged in some overt act in furtherance of the charge.

Viewing the evidence in the light most favorable to the State, we conclude the trial judge properly denied Green's motion for a directed verdict as to the charge of attempted CSC with a minor in the second-degree. Green clearly expressed his specific intent to have a sexual encounter with Mandy, a fourteen-year-old female. A review of the online chat reveals that Green was not dissuaded by the fact that Mandy stated she was fourteen years old. Instead, Green continued the sexually explicit conversation and sent Mandy pictures of his genitals.

In furtherance of his specific intent, Green committed an overt act in orchestrating a meeting for the sexual encounter. Green asked Mandy whether her parents would let her out after dark and whether he could meet her at her home. Ultimately, Green arranged to meet Mandy on a secluded street that night at a specific time. Green then traveled to the predetermined location where he was arrested and found to be in possession of alcohol, condoms, and male enhancement products. Accordingly, the trial judge properly submitted the charge to the jury. See State v. Reid, 393 S.C. 325, 713 S.E.2d 274 (2011) (finding attempted second-degree CSC with a minor charge was properly submitted to the jury where appellant, who through a chat with an online persona created by a law enforcement officer, clearly communicated his desire to have a sexual encounter with a fourteen-year-old girl, arranged to meet the fictitious minor at a designated place and time, and travelled to that location); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) (recognizing that if there is any direct evidence or any

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believes is a minor but who is actually not a minor."); see also United States v. Gagliardi, 506 F.3d 140 (2d Cir. 2007); United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001); United States v. Meek, 366 F.3d 705, 717-20 (9th Cir. 2004); United States v. Sims, 428 F.3d 945 (10th Cir. 2005).

substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury).

## D. Admission of Photographs

In a pre-trial hearing and during the trial, Green objected to the admission of the two photographs of his penis. Green contended the photographs were more prejudicial than probative and, thus, should be excluded. In response, the Solicitor offered the photographs "to show the furtherance of the conduct to solicit sex from the underage child as a form of grooming, as a form of soliciting sex." The trial judge rejected Green's motion, finding the photographs were "highly relevant" and that "any prejudicial effect" was outweighed.

On appeal, Green contends the trial judge erred in allowing the jury to view these photographs as "the prejudicial value of a visual of [his] computer screen name of ["blak slyder"] through pictures of the same far outweighed its probative value." Although Green concedes the "sexual conversation" in the chat room was relevant, he contends the photographs should have been excluded as they were "inflammatory to both male and female" jurors. He characterizes the admission of these photographs as an "exceptional circumstance" that warrants reversal of his convictions as he was deprived of his constitutional right to a fair trial.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the South Carolina Rules of Evidence], or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict. Id.

We find the trial judge did not abuse his discretion in admitting the photographs. Although clearly offensive, the photographs corroborated Investigator Platt's testimony and served to establish Green's intent to solicit the minor to engage in sexual activity. Furthermore, the photographs negated Green's claim that he did not intend to have sex with a minor. After sending the photographs, Green commented that "I can show it to you in person." This comment in conjunction with the photographs provided the jury with evidence of Green's specific intent as to the charged crimes. Accordingly, we agree with the trial judge that the photographs were relevant and that their probative value outweighed any prejudicial impact. See State v. Martucci, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008) (finding no abuse of discretion where trial judge admitted photographs that were relevant and necessary and were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury; recognizing that a trial judge is not required to exclude evidence because it is unpleasant or offensive).

Moreover, even if the judge erred in admitting the photographs, we find any error to be harmless given that the text of the online chats, the testimony of the investigating officers, and the evidence found in Green's car conclusively established the elements of the crimes for which Green was charged. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (recognizing that an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached"); State v. Knight, 258 S.C. 452, 454, 189 S.E.2d 1, 2 (1972) ("[A] conviction will not be reversed for nonprejudicial error in the admission of evidence.").

## E. Request to Charge ABHAN

At the conclusion of the State's case, Green requested the judge charge the lesser-included offense of attempted ABHAN. The trial judge denied Green's request on the ground there was "no evidence [or] conduct that could have been construed as an ABHAN."

On appeal, Green asserts the trial judge erred in denying his request to charge as the evidence warranted a charge on attempted ABHAN. Because he believed Mandy was actually a woman in her twenties, based on the online profile picture, and that he did not intend to engage in sexual activity once he met Mandy,[8] Green claims he was entitled to a charge on the lesser-included offense of attempted ABHAN.

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed. State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987).

"ABHAN is a lesser included offense of ACSC, notwithstanding that technically ACSC does not contain all of the elements of ABHAN." State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 672 (Ct. App. 2006); see 3 S.C. Jur. Assault and Battery § 26 (Supp. 2012) (discussing cases involving a jury instruction for ABHAN as a lesser-included offense). "ABHAN is the unlawful act of violent injury to another accompanied by circumstances of aggravation." State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516

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[8] In support of this assertion, Green references this Court's decision in State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986), wherein this Court reversed the defendant's conviction for assault with intent to commit criminal sexual conduct in the first degree for failure to charge ABHAN based on the defendant's testimony that "he did not want to do anything" with the victim. We find Drafts to be inapposite as the defendant in that case admitted "taking indecent liberties" with the female victim, which clearly would have supported an ABHAN charge. Id. at 33-34, 340 S.E.2d at 786.

(2000). "Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority." Id. at 274, 531 S.E.2d at 516-17.[9]

As previously stated, a person is guilty of CSC with a minor in the second-degree if "the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code Ann. § 16-3-655(B)(1) (Supp. 2011).

We find the trial judge properly declined to charge attempted ABHAN. As evidenced by the text of the online chat, Green's clear intent was to engage in sexual activity with Mandy, who he believed to be fourteen years old. After Mandy responded that she was fourteen years old, the conversation turned sexual in nature with Green asking Mandy about her previous sexual experiences, whether she would have sex with him, and sending her the explicit pictures. Moreover, when Mandy asked Green, "u aint like gonna kill me or kidnap me r u?", Green responded "lol hell no." Thus, Green intended only to "engage in sexual battery with a victim who is fourteen years of age or less." Accordingly, there was no evidence demonstrating that Green was guilty of the lesser-included offense of attempted ABHAN rather than the crime of attempted CSC with a minor in the second-degree.

## III. Conclusion

In conclusion, we affirm Green's convictions for criminal solicitation of a minor and attempted CSC with a minor in the second-degree as: (1) the criminal solicitation of a minor statute is not unconstitutionally overbroad or vague; (2) the use of a law enforcement officer to impersonate a minor victim was legally permissible to support both convictions; (3) Green had the

[9] In 2010, after this matter arose, the South Carolina General Assembly codified offenses involving assault and battery and these provisions are now applicable. S.C. Code Ann. § 16-3-600 (Supp. 2011).

requisite specific intent and committed an overt act in furtherance of the CSC charge under Reid; (4) the challenged photographs were relevant and their probative value outweighed any prejudicial effect; and (5) there was no evidence to support Green's request to charge attempted ABHAN.

**AFFIRMED.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Robert M. Bayly, Respondent,

v.

State of South Carolina, Petitioner.

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**ON WRIT OF CERTIORARI**

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Appeal From Hampton County
Alexander S. Macaulay, Circuit Court Judge

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Opinion No. 27109
Submitted January 26, 2012 – Filed April 4, 2012

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**REVERSED**

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Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Matthew J. Friedman, of Columbia, for Petitioner.

David B. Tarr, of Columbia, for Respondent.

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**JUSTICE BEATTY:** In this Post-Conviction Relief (PCR) case, Robert Bayly was issued a uniform traffic ticket for simple possession of marijuana. Prior to trial, Bayly paid the required fine and did not appear in

court on the trial date. Bayly did not appeal his conviction but, instead, filed a PCR application in which he alleged the magistrate court was without subject matter jurisdiction to convict him as no arrest warrant had been issued. The PCR judge granted the petition and vacated Bayly's conviction. This Court granted the State's petition for a writ of certiorari to review the PCR judge's order. We reverse.

**I.**

Bayly, a licensed truck driver, was traveling from his home in Delaware to Florida when he was pulled over for speeding in Hampton County, South Carolina. At that time, the officer found marijuana in the glove compartment of Bayly's vehicle. As a result, the officer issued Bayly a uniform traffic ticket for simple possession of marijuana. The ticket noted that Bayly was to appear before a magistrate in Varnville, South Carolina on February 25, 2009 at 10:00 a.m. Bayly, however, mailed in the fine in the amount of $570 and did not appear for trial. The magistrate court judge convicted Bayly in his absence. Bayly did not appeal his conviction.

Two months later, Bayly received a letter from the South Carolina Department of Motor Vehicles stating his license was suspended in South Carolina for six months. Shortly thereafter, Bayly received a letter from the Delaware Division of Motor Vehicles informing him that his license was suspended in Delaware for two years.

Bayly filed a PCR application in which he primarily contended his conviction was void as the magistrate court lacked subject matter jurisdiction to hear his case. During the PCR hearing, Bayly argued that, pursuant to section 22-3-710 of the South Carolina Code,[1] all proceedings in magistrate court must be commenced under issuance of a warrant and under oath. In support of this assertion, Bayly cited Town of Honea Path v. Wright, 194 S.C. 461, 9 S.E.2d 924 (1940), wherein this Court interpreted the precursor to

[1] Section 22-3-710 states, "All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." S.C. Code Ann. § 22-3-710 (2007).

section 22-3-710. Based on Wright, Bayly claimed that any conviction without the issuance of a warrant was a nullity.

Bayly acknowledged that section 56-7-10,[2] which was enacted in 1971, listed numerous exceptions where the magistrate court is vested with jurisdiction pursuant to a uniform traffic ticket rather than a warrant. However, Bayly pointed out that simple possession of marijuana is not identified within the listed exceptions. Bayly indicated that he believed the uniform traffic ticket was sufficient for an arrest but not sufficient to confer subject matter jurisdiction on the magistrate court.

At the conclusion of the PCR hearing, the judge ruled the magistrate court lacked subject matter jurisdiction to convict Bayly of simple possession of marijuana because no arrest warrant was issued as required under section 22-3-710. The judge noted that section 56-7-10 listed exceptions to this requirement; however, because simple possession of marijuana is not listed as an exception, he found that a warrant was required. Based on Wright, the PCR judge found a proceeding in summary court is a nullity if commenced without the issuance of a warrant.

The State petitioned this Court for a writ of certiorari to review the PCR judge's order. This Court granted the State's petition.

## II.

### A.

The State argues the PCR judge's reliance on Wright was misplaced as this case was decided prior to the existence of uniform traffic tickets and before the enactment of sections 56-7-10 and 56-7-15. The State directs the Court's attention to the following provisions of section 56-7-15:

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[2] Section 56-7-10 states, "There will be a uniform traffic ticket used by all law enforcement officers in arrests for traffic offenses and for the following additional offenses: [list of offenses] . . . ." S.C. Code Ann. § 56-7-10 (Supp. 2010).

> (A) The uniform traffic ticket, established pursuant to the provisions of Section 56-7-10, may be used by law enforcement officers to arrest a person for an offense committed in the presence of a law enforcement officer if the punishment is within the jurisdiction of magistrates court and municipal court . . . .
>
> (B) An officer who effects an arrest, by use of a uniform traffic ticket, for a violation of Chapter 25, Title 16 shall complete and file an incident report immediately following the issuance of the uniform traffic ticket.

S.C. Code Ann. § 56-7-15 (Supp. 2010).

Based on the plain terms of the statute, the State avers that a literal reading of section 56-7-15 provides for the use of a uniform traffic ticket for any offense that falls within the jurisdiction of the magistrate court and is committed in the presence of a law enforcement officer.

The State further asserts that section 56-7-15(B) "broadens the range of offenses in which a uniform traffic ticket may be used in lieu of an arrest warrant." In interpreting this code section, the State contends the General Assembly "clearly anticipated that a uniform traffic ticket could be used for a violation of § 16-25-10 through § 16-25-125 (the criminal domestic violence chapter)." In view of this construction, the State claims that section 56-7-15(B) would be rendered meaningless if the uniform traffic ticket could be used only for a statute listed in section 56-7-10 because "no statute in Chapter 25 of Title 16 is listed there."

**B.**

Initially, it is instructive to consider the fundamental principles of subject matter jurisdiction. In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), this Court clarified that "subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Id. at 100, 610 S.E.2d at 498. Based on this clarification, we conclusively recognized that an indictment, which is a

notice document, does not confer subject matter jurisdiction on a circuit court. Id. at 102, 610 S.E.2d at 500. Thus, an arrest warrant, similar to an indictment,[3] does not operate to vest a magistrate or municipal court with subject matter jurisdiction. Instead, the General Assembly establishes the jurisdiction of these courts in a legislative pronouncement.

In terms of magistrate courts, our state Constitution authorizes the General Assembly to provide for their civil and criminal jurisdiction. S.C. Const. art. V, § 26. Pursuant to this authority, the General Assembly enacted Title 22 of the South Carolina Code to establish the jurisdiction of magistrate courts and the proceedings utilized to exercise this jurisdiction. S.C. Code Ann. §§ 22-1-10 to 22-8-50 (2007 & Supp. 2010).

Specifically, section 22-3-540 provides for the general jurisdiction of the magistrate court, stating:

> Magistrates shall have exclusive jurisdiction of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days, except cases in which an offense within the jurisdiction of a magistrate is included in the charge of an offense beyond his jurisdiction or when it is permissible to join a charge of an offense within his jurisdiction with one or more of which the magistrate has no jurisdiction. Magistrates shall have concurrent but not exclusive jurisdiction in the excepted cases. The provisions of this section shall not be construed so as to limit the jurisdiction of any magistrate whose jurisdiction has been extended beyond that stated above.

S.C. Code Ann. § 22-3-540 (2007). A magistrate court's jurisdiction, however, is not limited to the provisions of this code section as the last sentence indicates that the General Assembly may extend the jurisdiction of the magistrate court beyond what is set forth in section 22-3-540. See, e.g.,

[3] See 5 Am. Jur. 2d Arrest § 21 (2007) ("The purpose of stating the offense on an arrest warrant is to provide notice to the person being taken into custody of the charges alleged against him or her.").

S.C. Code Ann. § 22-3-550(A) (2007 & Supp. 2010) (providing that, in general, magistrates have criminal jurisdiction "of all offenses which may be subject to the penalties of a fine or forfeiture not exceeding five hundred dollars, or imprisonment not exceeding thirty days, or both").

We find section 56-7-10 was enacted to serve a two-fold purpose. First, this code section expands the general jurisdiction of the magistrate court by identifying certain offenses beyond the statutory limits of section 22-3-540. Secondly, section 56-7-10 eliminates the need for an arrest warrant and authorizes the use of a uniform traffic ticket to notify an accused and commence judicial proceedings in the magistrate court. We find that it is not the service of the uniform traffic ticket that confers subject matter jurisdiction to the magistrate but, rather, the General Assembly's purposeful identification of certain offenses for which the magistrate is authorized to hear.

Thus, in accord with our pronouncement in Gentry, we find that neither a uniform traffic ticket nor an arrest warrant operates to confer subject matter jurisdiction on the magistrate court. Conversely, the absence of a uniform traffic ticket or arrest warrant does not render a magistrate's court conviction a nullity.

Based on the foregoing, we disagree with the PCR judge's reliance on Wright as the lack of a warrant under section 22-3-710 does not negate the jurisdiction of the magistrate court.[4] As will be discussed, we find the reasoning in Wright is flawed and has been implicitly overruled by subsequent decisions issued by this Court.

In Wright, which was decided in 1940 prior to the enactment of sections 56-7-10 and 56-7-15, the defendant was convicted before the Mayor's Court in the Town of Honea Path of driving under the influence. Wright, 194 S.C. at 463, 9 S.E.2d at 925. The defendant appealed, arguing his conviction was a nullity because no warrant was issued setting forth the nature and grounds of the accusations against him. Id. at 466, 9 S.E.2d at

[4] Furthermore, it is of some import that section 22-3-710 is contained within the "Criminal Procedure" section of Title 22 and not the "Criminal Jurisdiction" section.

926. In response, the Town contended it was not necessary to issue a warrant in a municipal court where the arrest was made for an offense committed in the presence and view of police officers. Id.

Analyzing the precursor to section 22-3-710, this Court rejected the Town's contention and reasoned:

> There is a marked difference between the arrest of an offender by an officer without a warrant, and proceedings before a magistrate which include formal charges supported by oath, bail, and trial. Nor does the provision in Section 930, to the effect that proceedings before magistrates shall be summary, dispense with the very process which gives them jurisdiction. Without doubt, the administration of the law, and the rights of persons charged with crime can best be served by a due observance of statutory requirements. It is the constitutional right of a person charged with a criminal offense to be fully informed of the nature and cause of the accusation. Article I, Section 18 of the Constitution. When a warrant is issued, substantially setting forth the offense, and the verdict of the jury, or that of the magistrate, is endorsed thereon, this paper becomes original evidence, and prevents any possibility of the prisoner being again tried for the same offense. And this was no doubt one of the reasons which moved the Legislature to require that all prosecutions be commenced by the issuance of a warrant. And because the rights of the accused are not only of interest to him, but concern the state, the statutory requirement may not be waived.

Id. at 468-69, 9 S.E.2d at 927.[5]

[5] Notably, the Court in reaching its decision relied primarily on the case of State v. Praser, 173 S.C. 284, 175 S.E. 551 (1934), wherein the defendant was convicted in municipal court for breach of the peace and vagrancy. On appeal, this Court vacated the defendant's conviction for vagrancy on the ground that no warrant had been issued for this offense as the defendant was orally charged during the proceedings for the breach of the peace offense. Id.

Thirteen years later, this Court recognized the flawed analysis in Wright when it issued its opinion in State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In Langford, the defendant was arrested without a warrant for DUI after the alleged offense was committed in view of the arresting officers. Id. at 23, 73 S.E.2d at 855. The defendant was released on bond. When the defendant failed to appear before the municipal court, the defendant's bond was forfeited and the violation was reported to the State Highway Department. Approximately three years later, the defendant was arrested and charged as a second offender. Id. at 24, 73 S.E.2d at 855. During the trial of this offense, the defendant moved for a directed verdict on the grounds the first offense was a nullity as the municipal court did not have jurisdiction and there had never been a lawful forfeiture of bail to constitute a first offense. Id. After the trial judge granted the defendant's motion, the State appealed. Id.

The primary issue on appeal involved the question of whether there can be a valid forfeiture of bail where no arrest warrant had been issued. This Court, however, also discussed the jurisdictional implications of the precursor to section 22-3-710. Id. at 26, 73 S.E.2d at 856-57. In prefacing its discussion, this Court noted the distinction between subject matter jurisdiction and jurisdiction over the person. Id. In doing so, this Court expressed its disagreement with the holdings in Wright and Praser.

Although this Court acknowledged that it was not "called upon now to pass upon the legality of the trial and conviction of an accused without a warrant," it nevertheless espoused the following:

> There is no constitutional requirement in this State that criminal prosecutions in inferior courts shall be commenced by the issuance of a warrant. The provision in Section 930 of the 1942 Code that all proceedings in such courts 'shall be

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at 286, 175 S.E. at 551. We believe Praser should not have served as the basis for the Wright decision due to the significant factual differences. Unlike the defendant in Praser, Wright was on notice of the charged offense as he was apprised of the DUI charge at the time the officers arrested him.

> commenced on information under oath * * * upon which, and only which, shall a warrant of arrest issue', cannot reasonably be construed as forbidding any steps in the judicial process until an information under oath is filed.

Id. at 31, 73 S.E.2d at 859.

Two decades later, this Court issued a series of opinions that appear to implicitly overrule the Wright decision. See State v. Prince, 262 S.C. 89, 91, 202 S.E.2d 645, 646 (1974) (analyzing precursor to section 56-7-10 and rejecting defendant's contention that the magistrate court was without jurisdiction of his person to hear DUI case because no arrest warrant had been issued as the statute "expressly provides that service of the uniform traffic summons 'shall vest all traffic courts with jurisdiction to hear and dispose of the charge for which such ticket was issued and served'"; finding authorities relied upon by defendant were inapplicable "because they involved trials antedating the 1971 statute"); State v. Fennell, 263 S.C. 216, 220, 209 S.E.2d 433, 434 (1974) (citing Praser, Wright, and Langford and stating "[t]he issuance of either a uniform traffic ticket or a warrant charging the respondent with the offense of reckless driving was necessary to give the magistrate jurisdiction to dispose of that particular offense" (emphasis added)); State v. Biehl, 271 S.C. 201, 203, 246 S.E.2d 859, 860 (1978) (recognizing that section 56-7-10 "does not repeal [section] 22-3-710 . . . [i]t merely provides a method of acquiring jurisdiction in traffic cases tried in 'all traffic courts'"; finding issuance of a uniform traffic ticket vests jurisdiction in the traffic court to hear a case involving an offense which the officer, who issued the summons, did not actually see, and, "[t]he issuance of the uniform traffic ticket merely summons the accused person to appear before a magistrate, where he may submit any contention relative to the preservation of his rights"); see also City of Goose Creek v. Brady, 288 S.C. 20, 21, 339 S.E.2d 509, 510 (1986) (citing Biehl and finding issuance of a uniform traffic ticket was sufficient and an arrest warrant unnecessary under section 22-3-710 in order to charge and try defendant in municipal court with DUI and driving left of center; recognizing that a uniform traffic ticket complied with constitutional mandates where it apprised the defendant of the charge as well as the time, date, and place the offense allegedly occurred).

In 1990, the General Assembly enacted section 56-7-15, which specifically references section 56-7-10, to expand the list of offenses for which a uniform traffic ticket may be used to arrest a person and to authorize the magistrate court to hear these offenses. This enactment, however, did not operate to increase the subject matter jurisdiction of the magistrate court as the punishment for the offense for which the traffic ticket is issued must be "within the jurisdiction of magistrates court and municipal court." Id. § 56-7-15(A).

Based on the above-outlined case and statutory evolution, we find the PCR judge's reliance on Wright was erroneous as was his ultimate decision to vacate Bayly's conviction. Section 56-7-15 authorized the officer to issue a uniform traffic ticket for simple possession of marijuana as this offense was committed in his presence and the punishment for this offense fell within the purview of the magistrate court. Specifically, simple possession of marijuana is classified as a misdemeanor that is punishable by not more than thirty days' imprisonment or a fine not less than $100 or more than $200. S.C. Code Ann. § 44-53-370(d)(4) (Supp. 2010). As previously stated, section 22-3-540 provides for magistrate courts to have exclusive jurisdiction of all criminal cases in which punishment does not exceed a fine of $100 or imprisonment for thirty days and section 22-3-550(A) increases the amount of the maximum fine to $500. Thus, we find no procedural or jurisdictional defects that operated to invalidate Bayly's conviction.

## III.

Accordingly, we reverse the PCR judge's order as it was controlled by an error of law. See Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) (recognizing that this Court will reverse the decision of the PCR judge when it is controlled by an error of law).

**REVERSED.**[6]

**TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in a separate opinion.**

[6] Justice Pleicones disagrees with our reliance on State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) in analyzing the question regarding subject matter jurisdiction. He opines that Gentry is inapposite because Gentry merely concerned the appropriate time to raise a challenge to the sufficiency of an indictment. He is correct that Gentry reiterates that the insufficiency of an indictment must be raised prior to the swearing of the jury. However, he overlooks the fact that the primary issue in Gentry was a challenge to the subject matter jurisdiction of the circuit court. Specifically, the subject matter jurisdiction challenge was based on an alleged insufficiency in the indictment, not the timeliness of the challenge to the insufficiency in the indictment. Justice Pleicones acknowledged this fact when he authored the opinion in State v. Dudley, 364 S.C. 578, 614 S.E.2d 623 (2005), wherein he relied almost exclusively on Gentry to find that extraterritorial jurisdiction is not a component of subject matter jurisdiction. Indisputably, Gentry is the seminal case in our jurisprudence that deals in concert with subject matter jurisdiction and the sufficiency of an indictment. We would note that, aside from his disagreement with the import of Gentry, the concurrence merely restates the majority opinion.

**JUSTICE PLEICONES:** I concur in result but write separately because I would not employ the reasoning of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), in determining this case, as I believe it inapposite. I believe the Constitution and statutory law govern.

Use of a uniform traffic ticket is authorized for offenses "committed in the presence of a law enforcement officer if the punishment is within the jurisdiction of magistrates court and municipal court." S.C. Code Ann. §56-7-15(A) (Supp. 2011). The jurisdiction of magistrates court is limited to those offenses subject to fines or forfeitures not exceeding five hundred dollars, imprisonment not exceeding thirty days, or both. S.C. Code Ann. § 22-3-550(A) (Supp. 2011). Thus, a uniform traffic ticket may be issued for any offense that is both committed in the presence of a law enforcement officer and subject to a maximum penalty of no more than thirty days' imprisonment and a five hundred dollar fine.

In this case, a traffic ticket was issued for simple possession of marijuana when the law enforcement officer discovered the marijuana in respondent's constructive possession. The offense was thus committed in the presence of a law enforcement officer. As the majority recognizes, the maximum penalty for conviction under § 44-53-370(d)(4) for possession of one ounce or less of marijuana is thirty days' imprisonment and a fine of $200. Thus, issuance of a uniform traffic ticket was permissible under §§ 56-7-15(A) and 22-3-550(A).

A magistrates court has jurisdiction over offenses for which valid arrest warrants have issued pursuant to S.C. Code Ann. § 22-3-710. A uniform traffic ticket may substitute for the arrest warrant pursuant to S.C. Code Ann. § 56-7-10 (Supp. 2011) ("The service of the uniform traffic ticket shall vest all traffic, recorders' and magistrates' courts with jurisdiction to hear and to dispose of the charge for which the ticket was issued and served."). As noted above, § 56-7-15(A) allows the use of uniform traffic tickets in lieu of the arrest warrant required under § 22-3-710. See also S.C. Const. art. V, § 26 ("The General Assembly shall provide for [magistrates'] terms of office and their civil and criminal jurisdiction."). Thus, a properly issued uniform traffic ticket vests magistrates court with jurisdiction to hear and dispose of

the related charge, and I agree with the majority that the magistrates court had jurisdiction to hear and dispose of the offense in this case.

I disagree that the General Assembly's grant of general subject matter jurisdiction in §§ 22-3-540 and 22-3-550 is sufficient to confer the authority to exercise jurisdiction in the face of the requirements of §§ 22-3-710, 56-7-10, and 56-7-15(A).

The majority cites State v. Gentry, supra, for the proposition that an indictment is not necessary to confer subject matter jurisdiction on a circuit court; by analogy, neither an arrest warrant nor a uniform traffic ticket is necessary to vest a magistrates court with jurisdiction. Recently this Court, in rejecting a subject matter jurisdiction argument, clarified that "Gentry merely held that a defendant must challenge an indictment prior to the swearing of the jury. Because the sufficiency of the indictment is not at issue here, Gentry is inapposite." State v. Dickerson, 395 S.C. 101, 120, 716 S.E.2d 895, 905-06 (2011). Since we have no challenge to the sufficiency of the uniform traffic ticket here, Gentry is inapposite. Moreover, the General Assembly provided for indictment or waiver. See S.C. Code Ann. § 17-23-130 (2003). It has not chosen to provide for a defendant's ability to waive the warrant or ticket. See Town of Honea Path v. Wright, 194 S.C. 461, 9 S.E.2d 924 (1940). Whether couched as an issue of subject matter jurisdiction or as the court's jurisdiction, I believe a magistrates court conviction obtained without one of the specified charging documents is a nullity. Id.

I therefore concur only in the result reached by the majority.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Robert Whitesides, Appellant.

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Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

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Opinion No. 27110
Heard February 23, 2012 – Filed April 4, 2012

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**AFFIRMED**

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Blake A. Hewitt and John S. Nichols, both of Bluestein, Nichols, Thompson and Delgado, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, and Assistant Attorney General Ashley A. McMahan, all of Columbia, for Respondent.

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**JUSTICE PLEICONES:** After a bench trial, appellant was convicted of possession of a firearm during the commission of the crime of trafficking in

marijuana. On appeal, he contends that the trial court erroneously convicted him without finding that a nexus existed between his possession of firearms and his drug trafficking. While we agree that a nexus between the possession of the firearm and the underlying violent crime must be established, we find that the trial judge made a factual finding that such a nexus existed in this case and that the finding was supported by evidence in the record. We therefore affirm.

## FACTS

In December 2007, appellant was arrested in the parking lot outside his apartment after authorities received information identifying him as a marijuana dealer. After appellant's arrest, law enforcement personnel recovered marijuana from his person; a pistol from the door panel of his car; marijuana in jars and bags, scales, smoking pipes, and other drug paraphernalia from his apartment; and approximately twenty pounds of marijuana and a .357 caliber pistol along with a few other items from a safe appellant owned. Appellant pleaded guilty to two marijuana trafficking charges. After a bench trial at which the statements of several witnesses were admitted into the record, he was found guilty of possession of a firearm during commission of a violent crime in violation of S.C. Code Ann. § 16-23-490(A) (2003). This appeal followed.

## ISSUES

1. Does the crime of possession of a firearm during the commission of a violent crime require proof of a nexus between possession of the firearm and the violent crime?
2. Was such a nexus established in this case?

## DISCUSSION

Appellant contends that the crime of possession of a firearm during the commission of a violent crime requires proof of a nexus between the possession and the violent crime, so that mere proof of constructive possession of a firearm is insufficient to support a conviction. We agree, and hold that the State must prove a nexus between the predicate offense and the

defendant's actual or constructive possession of a firearm during its commission.

Section 16-23-490(A) imposes a penalty, in addition to the penalty for the underlying offense, on those convicted of possessing a firearm during the commission of a violent crime. It provides, in pertinent part:

> (A) If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60,[1] he must be imprisoned five years, in addition to the punishment provided for the principal crime.

Appellant argues, and we agree, that the statute must be interpreted as requiring a nexus between the underlying violent crime and the possession of a firearm.

"In the interpretation of statutes, our sole function is to determine and, within constitutional limits, give effect to the intent of the legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute." State v. Ramsey, 311 S.C. 555, 561, 430 S.E.2d 511, 515 (1993). The words of the statute must be given their ordinary meaning unless something in the statute indicates that the legislature intended a different meaning. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011).

The subject matter and general purpose of the statute lead us to conclude that the General Assembly intended to penalize possession of a firearm only when possession furthers or is intended to further a violent

[1] S.C. Code § 16-1-60 (Supp. 2007) provides that drug trafficking as defined in § 44-53-370(e) is a violent crime.

crime. The statute punishes the visible display of a knife or an object that appears to be a firearm during the commission of a violent crime. Visibly displaying a knife or an object that appears to be a firearm furthers the criminal's objectives by increasing the cost of resistance or interference. Thus, a nexus is inherent in this prohibited conduct.

The statute also criminalizes the possession[2] of a firearm during the commission of a violent crime even if not visibly displayed. Because a firearm has greater power to inflict harm, its mere presence at the scene of the crime is a greater threat than that of a knife or an object that appears to be a firearm. Thus, the General Assembly determined that merely possessing a firearm in furtherance of a violent crime warrants a penalty.

However, the fact that the General Assembly sought to deter even the possession of a firearm in connection with a violent crime does not suggest that it intended to criminalize any possession of a firearm, no matter how unrelated, during the commission of a violent offense.[3] The General Assembly's evident purpose was to increase the penalty of engaging in more dangerous conduct, whether that conduct is displaying a knife, firearm, or object that appears to be a firearm or possessing a firearm in furtherance of a violent offense. The General Assembly's purpose would not be furthered by penalizing possession of a firearm that is entirely unrelated to the violent

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[2] The element of possession required under the statute is unaffected by our holding today. We have held that the term "possession" embraces actual or constructive possession. State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980). In Halyard, this Court held that the appellant was not entitled to a directed verdict on a charge of possessing a firearm during the commission of a violent crime despite the fact that all of the eyewitnesses to the robbery testified that the appellant was not the person carrying the firearm. Id. at 399-400, 264 S.E.2d at 842.

[3] We note that the definition of a violent offense in § 16-1-60 includes boating under the influence resulting in death, vessel operator's failure to render assistance resulting in death, failure to stop when signaled by a law enforcement vehicle resulting in death, and felony driving under the influence.

offense. Indeed, finding that no nexus is required may raise constitutional questions in some cases, since the Second Amendment protects the possession of lawful firearms by ordinary citizens. See District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. Chicago, 561 U.S. 3025 (2010). We have no reason to suppose that the General Assembly intended to create constitutional questions, and our interpretation of the statute avoids them. Ramsey, supra.

In sum, we find that the General Assembly's purpose in enacting this statute was to penalize defendants who actually or constructively possess a firearm in order to further a violent crime and who thereby increase the attendant risk of harm. We therefore hold that such a nexus must be established in order to convict a defendant for possessing a firearm during the commission of a violent crime. Other courts have arrived at the same conclusion when they have interpreted similar statutes. See Arizona v. Petrak, 198 Ariz. 260, 264, 266, 8 P.3d 1174, 1178, 1180 (Ariz. Ct. App. 2000); Wright v. Virginia, 53 Va. App. 266, 280, 282, 284, 670 S.E.2d 772, 779-81 (Va. Ct. App. 2009); see also Louisiana v. Blanchard, 776 So.2d 1165, 1171 (La. 2001); Collins v. Alaska, 977 P.2d 741, 753 (Alaska Ct. App. 1999) (Mannheimer, J., concurring in opinion adopted by majority).

A nexus may be established by showing that the firearm furthered, advanced, or helped in the commission of the crime. See Wright, 53 Va. App. at 283, 670 S.E.2d at 780. A nexus between possession of a firearm and drug trafficking would exist if the firearm is accessible to the trafficker and thereby "provides defense against anyone who may attempt to rob the trafficker of his drugs or drug profits." Similarly, "possessing a gun, and letting everyone know that you are armed, lessens the chances that a robbery will even be attempted." Id. at 283, 670 S.E.2d at 780 (quoting United States v. Ceballos-Torres, 218 F.3d 409, 412 (5th Cir. 2000)).

Appellant pleaded guilty to two charges of trafficking in marijuana. At the conclusion of a bench trial on the charge of possession of a firearm during the commission of a violent crime, the judge found him guilty. The trial judge interpreted section 16-23-490(A) as not requiring the showing of a nexus and found appellant guilty based upon his finding that appellant

constructively possessed the firearms that were located in his car and safe during the commission of his trafficking offenses.

Appellant argues that this naked finding was insufficient to support a conviction because it failed to establish a nexus, and we agree. However, these were not the judge's only findings. The judge also found a sufficient nexus from evidence that appellant ordinarily carried a pistol for the purpose of letting others know that he was armed while dealing drugs. Appellant argues that this finding was not supported by the evidence in the record. When a defendant is tried without a jury, the judge's findings of fact are entitled to the same deference as a jury's findings of fact and will not be disturbed unless no evidence reasonably supports them. State v. Hill, 286 S.C. 283, 284, 333 S.E.2d 789, 790 (Ct. App. 1985). The trial court's finding was based on a witness's statement that was admitted into evidence. Thus, evidence in the record supports the judge's finding that a nexus was established in this case. We find no error.

## CONCLUSION

A nexus between possession of the firearm and the underlying violent crime must be established in order for a defendant to be convicted of possession of a firearm during the commission of a violent crime. In this case, the trial judge found that a nexus existed. His factual findings are entitled to great deference and are based upon competent evidence in the record. We therefore **AFFIRM**.

**TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Creola Young, Appellant,

v.

Charleston County School District, Respondent.

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Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

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Opinion No. 27111
Heard November 16, 2011 – Filed April 4, 2012

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**REVERSED AND REMANDED**

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Deena Smith McRackan, of Charleston, and W. Allen Nickles III, of Columbia, for Appellant.

Alice F. Paylor, of Rosen Rosen & Hagood, of Charleston, for Respondent.

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**CHIEF JUSTICE TOAL:** Creola Young (Appellant) appeals the order of the circuit court, upholding the Charleston County School Board's (Board) decision not to renew Appellant's employment contract, on the

ground that the Board violated Appellant's procedural due process rights. We reverse and remand for further proceedings.

## FACTS/PROCEDURAL BACKGROUND

Appellant taught fifth grade at E.B. Ellington Elementary School (School) in Charleston County for six years. During Appellant's tenure there, she received multiple warnings and feedback about inappropriate conduct and poor judgment with students, and her failure to provide instruction in a satisfactory manner.[1] On May 14, 2009, the Associate Superintendent of the Charleston County School District (District) recommended the Board not renew Appellant's teaching contract. Appellant made a timely request for a hearing before the Board concerning the recommendation. The Board delegated the hearing function to a three-member committee comprised of Board members. The committee convened for a hearing on the renewal recommendation on June 22 and 25, 2009. Appellant was represented by counsel at this hearing and testified before the three-member panel. Following the hearing, the panel voted to uphold the recommendation of non-renewal by a vote of two to one. On July 7, 2009, the committee reported to a quorum of the Board during a special telephonic executive session held for the express purpose of deciding whether to renew two teaching contracts, one of which was Appellant's contract.[2] Appellant was not present at this meeting.[3] The Board did not have the opportunity to review the hearing transcript as it was prepared after the Board issued its written order

[1] Appellant's indiscretions included throwing a chair at a student, pulling a student's hair, leaving her class unsupervised during which time a student was injured during a fight, and the consistently poor standardized test scores of her students.

[2] Eight of the nine Board members participated in the July 7th meeting, with six of those members participating by phone. One member who was participating by phone left the meeting at 10:30 a.m. and did not participate in the vote.

[3] At oral argument, Appellant's counsel read from an e-mail sent by the Board's in-house counsel to Appellant, notifying her of the meeting just fifteen minutes before the meeting took place.

dismissing Appellant from her position. At the end of the executive session, the Board reconvened in open session and voted to accept the committee's recommendation not to renew Appellant's contract by a vote of four to three.

On August 3, 2009, the Board issued a formal, written decision, finding the School submitted substantial evidence that Appellant incompetently provided instruction to her students, failed to obey a district directive and order of her supervisor, acted unprofessionally in carrying out her job duties, and was unfit for her position. Consequently, the Board decided not to renew Appellant's teaching contract for the 2009–2010 school year. Appellant filed a timely appeal to the circuit court, and the circuit court affirmed the decision of the Board.[4] This case is before the Court pursuant to Rule 204(b), SCACR.

## ISSUES

I. Whether the Board's review of Appellant's non-renewal appeal hearing violated Appellant's procedural due process rights guaranteed by the state's constitution and statutes.

II. Whether the Board violated Appellant's due process rights by not convening a quorum to hear Appellant's non-renewal appeal.

III. Whether the Board's failure to issue a decision within ten days of the hearing on the matter violated section 59-25-470 of the South Carolina Code.

[4] Appellant appealed the Board's grounds for dismissal to the circuit court, claiming her dismissal was not supported by substantial evidence in the Record. The circuit court found there was substantial evidence to support Appellant's dismissal. Appellant has not appealed the propriety of this portion of the circuit court's decision, and therefore, Appellant's dismissal on substantive grounds is the law of the case.

## STANDARD OF REVIEW

This Court's scope of review when reviewing decisions of school boards is governed by the Administrative Procedures Act (APA), S.C. Code Ann. § 1-23-380 (Supp. 2011). *Lee Cnty. Sch. Bd. of Trs. v. MLD Charter Sch. Acad. Planning Comm.*, 371 S.C. 561, 565, 641 S.E.2d 24, 26 (2007). A "review of the administrative law judge's order must be confined to the record." S.C. Code Ann. § 1-23-610(B) (Supp. 2011). In this case, the Court is not called to review the substantive determinations of the Board, but only whether Appellant was afforded the procedural due process prescribed by our laws and our constitution. As such, the Court may

> reverse or modify the decision if substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> . . . .

*Id.* § 1-23-610(B).

## ANALYSIS

Appellant contends that the process afforded her was constitutionally deficient in one of two ways. First, Appellant asserts that due process requires a quorum of the Board to be present at the non-renewal hearing, and therefore, the hearing before a three-member panel of the Board violated her rights. Alternatively, Appellant asserts that a quorum of the Board must have the opportunity to weigh the credibility of the witnesses, make evidentiary rulings, or review the record, and here, a quorum of the Board did not have that opportunity. Without reaching the delegation issue, we find that, at a

minimum, a quorum of the Board must engage in a *meaningful* review of the evidence and testimony presented at the dismissal hearing. Such a review did not take place in this case. Therefore, we reverse and remand for further proceedings.

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972), the United States Supreme Court recognized that public school teachers have a property interest in continued employment and, commensurate with that property interest, the state must provide notice and an opportunity to be heard before a teacher may be deprived of the right to continued employment. Accordingly, the General Assembly has fixed a "mode of procedure" to be followed in teacher dismissal matters through the enactment of the Teacher Employment and Dismissal Act (TEDA). *See* S.C. Code Ann. §§ 59-25-410 to -530 (2004 & Supp. 2011). Specifically, section 59-25-470 provides:

> Within fifteen days after receipt of notice of suspension or dismissal, a teacher may serve upon the chairman of the board or the superintendent a written request for a hearing before the board. If the teacher fails to make such a request, or after a hearing as herein provided for, the District Board of Trustees shall take such action and shall enter such order as it deems lawful and appropriate. The hearing shall be held by the board not less than ten nor more than fifteen days after the request is served, and a notice of the time and place of the hearing shall be given the teacher not less than five days prior to the date of the hearing. The teacher has the privilege of being present at the hearing with counsel and of cross-examining witnesses and may offer evidence and witnesses and present any and all defenses to the charges. The board shall order the appearance of any witness requested by the teacher. The complainants shall initiate the introduction of evidence in substantiation of the charges. Within ten days following the hearing, the board shall determine whether the evidence showed good and just cause for the notice of suspension or dismissal and shall render its decision accordingly, either affirming or withdrawing the notice of suspension or dismissal.

*Id.* § 59-25-470.

Promulgated before the passage of TEDA, section 59-19-110 of the South Carolina Code grants a school board general rule-making authority and states:

> This rule-making power shall specifically include the right, at the discretion of the board, to designate one or more of its members to conduct any hearing in connection with any responsibility of the board and to make a report on this hearing to the board for its determination.

*Id.* § 59-19-110 (2004). The Board relies upon this provision for its authority to delegate the hearing function to a three member sub-committee of the Board.

This Court's decision in *Pettiford v. South Carolina State Board of Education,* 218 S.C. 322, 62 S.E.2d 780 (1950), elucidates the requirement that, at a minimum, a quorum of a school's board of education must review the evidence presented at a non-renewal or dismissal hearing in a meaningful way. In *Pettiford,* the Court considered the question of whether the State Board of Education violated the petitioner's due process rights when only two members of the State Board of Education heard the testimony of the witnesses rather than a quorum of that body. 218 S.C. at 341, 62 S.E.2d at 788–89. The Court held that the petitioner's due process rights were not violated by the delegation of the fact-finding function to hearing officers, so long as they presented their findings to the full board, and the full board then based its decision on such facts:

> [D]ue process requires that an administrative board, or body, when acting in a quasi-judicial capacity, *must consider all the evidence* before rendering its decision upon any particular question. This does not mean that this administrative board, or body, must itself hear the evidence, *but it must have the evidence before it,* and consider such evidence when rendering its decision.

*Id.* at 345–6, 62 S.E.2d at 791 (emphasis added).[5] The Court continued, "The record and evidence shows that this requirement has been met in rendering its decision . . . ." *Id.* at 346, 62 S.E.2d at 791.

Assuming arguendo that the delegation authority given school boards in section 59-19-110 extends to dismissal or non-renewal hearings, this code section requires those persons designated to conduct a hearing "to *make a report* on this hearing to the board for its determination." S.C. Code Ann. 59-19-110 (2004) (emphasis added). The Record in this case is devoid of any evidence that such a report was made to a quorum of the Board. What is clear to this Court is that a meaningful review, as contemplated by *Pettiford*, could not have taken place. It is undisputed that the hearing transcript was not available at the July 7, 2009 specially-called telephonic meeting of the Board.[6] The only evidence in the Record of the Board's review was the minutes recorded from this meeting. The minutes state that "[t]he public and the media were duly notified of the meeting, in compliance with the South Carolina Freedom of Information Act." However, an e-mail read at oral argument reflected that Appellant was informed of the meeting by the Board's in-house counsel just fifteen minutes before the meeting took place. This notice was insufficient to allow Appellant to be present and, importantly, to be represented by counsel before the full Board. The minutes do not reflect that the hearing committee provided the Board a "report," as required by section 59-19-110. Rather, the minutes state that the Board merely "approved the recommendation of the hearing committee to uphold the non-renewal" of Appellant's contract. Without a transcript to recount the evidence, and without the presence of Appellant or Appellant's counsel to represent her interest, the Board could not have properly considered the

[5] In reciting this portion of *Pettiford* we make no decision as to the legitimacy of the Board's delegation in this case. *Pettiford* was decided over twenty years before the General Assembly promulgated TEDA and addresses the invalidation of teaching certificates rather than the dismissal of a teacher.

[6] The hearing transcript was prepared two months later on September 7 and 8, 2009.

evidence.[7] However, the Board's final order states, "After *considering the evidence presented and the arguments of counsel*, the Board has determined that the recommendation to not renew [Appellant's] contract for the 2009-2010 school year should be upheld." (emphasis added). In our opinion, this is a disingenuous representation of the procedure that actually took place.

The Board maintains the review consisted of an oral recitation of the arguments made at the non-renewal hearing by the three-member sub-committee that conducted the hearing. Even assuming such colloquy took place, an oral recitation of the hearing proceedings by Board members that voted against renewal, outside the presence of Appellant and her counsel, is inherently prone to bias. An indispensible component of procedural due process is that the persons legally responsible for making a decision must be informed and unbiased. *See Garris v. S.C. Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) ("Due process requires an administrative board, when acting in a quasi-judicial capacity, to consider all the evidence before deciding a particular question."). Accordingly, we find that a meaningful review requires some showing that the Board made an informed decision based on the evidence presented by both parties. Anything less deprives school district employees the rights afforded them under TEDA to have a dismissal or non-renewal recommendation adjudicated by the Board. *See* S.C. Code Ann. § 59-25-470 (Supp. 2011) (following a hearing, the Board is responsible for rendering a decision).

## CONCLUSION

The review undertaken by the Board of Appellant's non-renewal hearing was insufficient to satisfy the due process requirements of our constitution and of TEDA. Therefore, we reverse the Board's decision to uphold the District's recommendation of non-renewal of Appellant's teaching

[7] The dissent contends the circuit court judge's finding that "a report and recommendation were presented" to a quorum of the Board was supported by substantial evidence in the record. Reviewing the same minutes relied upon by the circuit court judge, we do not find substantial evidence that Appellant's interests were represented before this tribunal, as due process requires.

contract and remand the case for proceedings that are in-line with statutory and constitutional prescriptions. This issue being dispositive, we decline to reach the additional issues brought by Appellant. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

**REVERSED AND REMANDED.**

**BEATTY and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.**

**JUSTICE PLEICONES:** I respectfully dissent, and would affirm the circuit court's order.

I agree that a public school teacher must be afforded procedural due process before she can be dismissed from employment. I would hold that S.C. Code Ann. § 59-19-110 (2004) permits respondent (Board) "to designate one or more of its members to conduct any hearing in connection with any responsibility of the board and to make a report on this hearing to the board for its determination." Finally, I agree that due process entitled appellant to (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. E.g., In re Vora, 354 S.C. 590, 582 S.E.2d 413 (2003). As I understand this case, appellant was afforded all these rights at her committee hearing. See also S.C. Code Ann. § 59-25-470 (2004).

The majority reverses the circuit court order upholding appellant's dismissal based upon a finding that the committee's oral report to the Board was inadequate to permit the Board to make a dismissal decision consonant with due process. I disagree. In Pettiford v. South Carolina State Bd. of Educ., 218 S.C. 322, 62 S.E.2d 780 (1950), this Court adopted the circuit court order finding a teacher had been afforded due process before having her teaching certificate revoked. That order notes:

> As pointed out by Mr. Chief Justice Wolfe, there has been considerable misconception of the doctrine announced in Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 912, 80 L.Ed. 1288. The Morgan case does not hold, as it is sometimes cited as holding, that the administrative agency which renders a decision, in a quasi-judicial proceeding, must actually hear the evidence and see the witnesses. It does hold that the administrative agency which makes the findings must address itself to the evidence, and upon the evidence before it must conscientiously reach a conclusion which it deems such evidence to justify. In announcing this rule, however, the Supreme Court of the United States, speaking through Mr. Chief Justice Hughes, says: 'This necessary rule does not

> preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them'.
>
> . . . .
>
> As I construe the doctrine, due process requires that an administrative board, or body, when acting in a quasi-judicial capacity, must consider all the evidence before rendering its decision upon any particular question. This does not mean that this administrative board, or body, must itself hear the evidence, but it must have the evidence before it, and consider such evidence when rendering its decision.
>
> Pettiford, at 344-346, 62 S.E.2d at 790-791.

Here, the Board's minutes show that the Board was in executive session for twenty minutes to discuss two personnel matters before voting to uphold the hearing committee's recommendation not to renew appellant's teaching contract. The majority concludes that because there was no written transcript of the hearing at the time the Board met, that because the minutes do not use the word 'report,' and because neither appellant nor her counsel were there to represent her interests, "the Board could not have properly considered the evidence." This conclusion ignores the circuit court judge's finding that, based upon these same minutes, "a report and recommendation were presented . . . ." We may not overturn this factual finding which is supported by substantial evidence in the record. E.g., Risher v. South Carolina Dep't of

Health and Enviro. Control, 393 S.C. 198, 712 S.E.2d 428 (2011) (scope of review in APA appeals).

The majority further finds that the Board's written order stating its decision was made "[a]fter considering the evidence presented and the arguments of counsel . . . . is a disingenuous representation of the procedure that actually took place." (emphasis removed). Unlike the majority, I have no special insight into what the Board considered during its executive session when it received the hearing committee's report, but would take it at its word that it considered both the evidence and the legal arguments.

Appellant was afforded procedural due process at her evidentiary hearing. The Board represents it considered the evidence and arguments during its executive session, at a meeting for which proper public notice was given,[8] and I, like the circuit court, accept their statement as true. See Felder v. Charleston Cty. School Dist., 327 S.C. 21, 489 S.E.2d 191 (1997) ("school board members are clothed with a presumption of honesty and integrity in the discharge of their decision-making responsibilities"). I would therefore affirm the circuit court order.

**KITTREDGE, J., concurs.**

[8] S.C. Code Ann. § 30-4-80 (2007). I am unaware of any special notice requirements applicable to appellant or her attorney.

# The Supreme Court of South Carolina

In the Matter of Joseph R. Neal, Jr., Respondent.

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ORDER

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On March 6, 2012, respondent was indicted on one count of Rape and one count of Furnishing Alcohol to a Person under Twenty-One in violation of the laws of the State of Georgia. The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, and requesting the Court appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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 Angela Christy Tyner, Esquire, is hereby appointed as attorney to protect respondent's South Carolina clients' interests. Ms. Tyner shall take action as required by

Rule 31, RLDE, Rule 413, SCACR, and as provided by this order, to protect the interests of respondent's South Carolina clients.

Upon demand, respondent shall deliver all client files which have any nexus in South Carolina to Angela Christy Tyner, Esquire. "Nexus" shall include, but shall not be limited to, any files involving cases pending in any South Carolina local, state, or federal court or which, if filed, would be filed in any of those courts; property, real or personal, situated in South Carolina; any agreements which shall take effect predominately in South Carolina; and any other file in which a substantial part of the matter is carried out in South Carolina.

Respondent is ordered to segregate his law office trust and/or escrow account(s) and forward all funds which have a South Carolina nexus to Angela Christy Tyner, Esquire. Ms. Tyner shall deposit these funds in a separate account and she may make disbursements from the account which are necessary to effectuate this appointment. In addition, respondent shall forward all property belonging to clients and/or related to client matters, bank statements, cancelled checks, disbursement schedules, trust account records, and the like which have a nexus in this state to Ms. Tyner.

Respondent shall promptly forward all mail related to the above matters to Angela Christy Tyner, Esquire.

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

IT IS SO ORDERED.

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

Columbia, South Carolina

March 27, 2012

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Ex parte: Stephen E. Lipscomb, Ron Safko, and L. K. Harrell, III, Appellants,

In re:

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson, Janette H. Robinson, Respondents,

v.

Stonington Development, LLC, Appellant.

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Appeal From Richland County
L. Casey Manning, Circuit Court Judge

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Opinion No. 4961
Heard January 25, 2012 – Filed April 4, 2012

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**REVERSED**

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George Verner Hanna, IV, William Saltzman, and Timothy Quinn, all of Columbia, for Appellants.

H. Freeman Belser, of Columbia, for Respondents.

**WILLIAMS, J.:** Stonington Development, LLC (Stonington), Stephen Lipscomb (Lipscomb), Ron Safko (Safko), and L.K. Harrell, III (Harrell) (collectively, Appellants) appeal the circuit court's order of civil contempt and assessment of attorney's fees against them for Stonington's failure to abate the discharge of sediment-laden storm water onto the Hollis's and Robinsons' (collectively, Respondents) residential properties. We reverse.

## FACTS/PROCEDURAL HISTORY

Stonington is the developer of a residential subdivision in the Blythewood area of Columbia, South Carolina. Respondents own properties immediately downstream from Stonington's development. On July 29, 2005, Respondents filed suit and asserted several causes of action against Stonington on the grounds that Stonington damaged their properties as a result of increased stormwater runoff and siltation from the development project. On April 6, 2007, after a four-day trial, a jury returned a verdict against Stonington for $400,000 in actual damages and $3,500,000 in punitive damages.[1] Respondents then filed a separate lawsuit against Lipscomb, Stonington's majority shareholder, to pierce Stonington's corporate veil. Lipscomb, in turn, joined Harrell and Safko as third-party defendants.[2]

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[1] Stonington appealed several aspects of the underlying punitive damages award in Hollis v. Stonington Dev., LLC, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011). This court affirmed the denial of the directed verdict motion on punitive damages and the jury charge on punitive damages but found the imposition of a $3.5 million dollar punitive damages award excessive and accordingly reduced the award to $2 million dollars. Id. at 407, 714 S.E.2d at 917.

[2] The suit to pierce Stonington's corporate veil in that action is not before this court on appeal.

After the April 6, 2007 jury verdict, Respondents elected to proceed under a private nuisance cause of action and accordingly moved to enjoin Stonington from discharging sediment-laden stormwater onto Respondents' properties. On September 17, 2007, the circuit court issued a Form 4 order granting Respondents' motion for a permanent injunction, and in a subsequent, formal order dated June 26, 2008, enjoined Stonington "from discharging sediment-laden stormwater onto [Respondents'] property and causing damage thereto." The circuit court then held the injunction was "binding upon Stonington Development, LLC and its officers, agents, employees, and members" in accordance with Rule 65(d), SCRCP. The same day, Respondents personally served the injunction on Stonington, Lipscomb, Harrell, and Safko.

Neither Stonington nor its members filed a Rule 59(e), SCRCP, motion to reconsider the injunction, nor did they appeal the issuance of the injunction. On September 11, 2008, Respondents filed a motion to hold Stonington and its members in civil contempt for willfully disregarding the court's prior injunction. The circuit court issued a rule to show cause on November 6, 2008, which was served on Stonington and each member. After one continuance, the circuit court held a hearing on April 14, 2009, at which time Respondent Janette Robinson (Robinson), Kevin Lee (Lee) of the Stonington Homeowners' Association, and Lipscomb testified.

During the hearing, Robinson testified that when it rained, muddy water entered Respondents' ponds by way of an unnamed tributary. She stated a seventy-two inch pipe coming out the back of Stonington's stormwater management system fed into this tributary. The sediment and discharge from the pipe discolored the water and caused erosion of the soil and ponds on Respondents' properties. When questioned, Robinson stated Respondents did not attempt to remediate the problems because it was Stonington's problem to fix. Robinson acknowledged Stonington laid hay bales and erected three sets of silt fences along the sewer line between the properties but stated siltation was not an issue in those areas. She testified she was aware Lipscomb hired Carolina Erosion Control to abate the problem

of siltation. In addition, Robinson stated she had not taken any engineers to the property since the trial to assess where the siltation was coming from and had taken no samples from the pond since the date of trial. However, she stated Respondents failed to take any remedial action by removing the silt from the ponds because there "was no sense in cleaning out the pond until the problem is stopped." Robinson submitted numerous photographs of Respondents' ponds and wetlands to document her complaints and support her testimony.

Kevin Lee, chair of the Advisory Committee for the Stonington Homeowners' Association, testified at the hearing. He testified he had lived in Stonington for four years. During that time, he saw the development erect silt fences, lay hay bales, and he observed contractors in different areas attempting to remediate the siltation issues. Lee observed siltation in the sediment pond in Stonington's development as well as the main pond behind Stonington's clubhouse but acknowledged he had never been to Respondents' properties or ponds. Lee claimed the lawsuit forced Stonington to financially abandon the Homeowners' Association, which adversely affected the quality of the development and the homeowners' property value.

Lipscomb also testified about efforts he undertook on behalf of Stonington to abate the siltation and stormwater issues. He stated:

> I've had – there's been three separate engineers to look over the plans. And I've also hired professionals to keep the necessary silt fencing and dams in place. And I also had some – another professional company to monitor that. And I hired – I asked all around and I hired the best people recommended – that I could get recommended in the state.

The circuit court excluded the reports from Carolina Stormwater Services due to the engineer's failure to appear at the hearing. However, Lipscomb testified Carolina Stormwater Services inspects the property and issues a report to him every seven days. He stated Carolina Stormwater

Services also engineered a silt rock dam to prevent sediments from the stormwater pipes from entering Respondents' ponds. Lipscomb admitted there were other actions that could be taken to ameliorate the situation, but because of his inability to further develop upper lots in the development as a result of the injunction, the land surrounding Respondents' property that was contributing to the problems could not be fully stabilized.

After viewing photographs submitted by both parties and hearing the foregoing testimony, the circuit court issued an order on September 28, 2009, finding Stonington and its members in contempt of court. In the contempt order, the circuit court found Stonington, Lipscomb, Safko, and Harrell jointly and severally liable for compensatory contempt based on Stonington's "minimal efforts . . . to stop the siltation and increased runoff problems." The circuit court fined Stonington and its members $25,000 to be paid to Respondents. It also authorized Respondents to submit a motion and supporting affidavit for reasonable attorney's fees and costs specifically incurred as a result of Respondents' efforts to enforce the injunction. Respondents then submitted a motion for attorney's fees and costs, and the circuit court ordered Stonington, Lipscomb, Safko, and Harrell to pay Respondents $52,695, which included $25,000 in compensatory contempt as well as $27,695 in attorney's fees and costs. Stonington, Lipscomb, Safko, and Harrell submitted Rule 59(e), SCRCP, motions for both orders, which the circuit court denied. This appeal followed.

## STANDARD OF REVIEW

"A decision on contempt rests within the sound discretion of the [circuit] court." Floyd v. Floyd, 365 S.C. 56, 71, 615 S.E.2d 465, 473 (Ct. App. 2005). It is within the circuit court's discretion to punish by fine or imprisonment every act of contempt before the court. Miller v. Miller, 375 S.C. 443, 454-55, 652 S.E.2d 754, 760 (Ct. App. 2007). On appeal, this court should reverse the contempt decision only if it is without evidentiary support or the circuit court abused its discretion. Floyd, 365 S.C. at 71-72, 615 S.E.2d at 473.

## LAW/ANALYSIS

### A. Contempt

First, Appellants argue the circuit court erred in holding them in contempt because Respondents failed to present clear and convincing evidence that Appellants intentionally disregarded or willfully disobeyed the injunction. We agree.

"Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001). "A willful act is one . . . done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Ex parte Cannon, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009). "Once the moving party has made out a prima facie case [for contempt], the burden then shifts to the respondent to establish his . . . defense and inability to comply with the order." Id. "If, through no fault of his own, the contemnor is unable to obey a court order, the contemnor cannot be held in contempt." Id. "Civil contempt must be [shown] by clear and convincing evidence." Poston v. Poston, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998).

We find Respondents failed to present clear and convincing evidence at the rule to show cause hearing that Stonington and its members willfully and intentionally disobeyed or disregarded the circuit court's injunction.

Both Robinson and Lipscomb agreed that Stonington's efforts have not stopped all discharge of sediment-laden stormwater onto Respondents' property. As such, Stonington has failed to do everything required by the terms of the injunction. However, Stonington's failure to do so does not necessarily render it in contempt. Our case law is clear that contempt is only proper when a party voluntarily and intentionally disobeys or disregards a court order. See Ex Parte Kent, 379 S.C. 633, 637, 666 S.E.2d 921, 923 (Ct.

App. 2008) (holding that a willful act is one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law").

Lipscomb testified he hired consultants and workers to monitor Respondents' property and to erect fencing, rock dams, and hay bales. Although Robinson testified the efforts Lipscomb made were insufficient because they did not alleviate the siltation and stormwater runoff issues, she acknowledged the presence of the silt fencing and hay bales and was aware of Stonington's hiring of consultants and engineers to address the stormwater and siltation issues. Furthermore, Lee's testimony that he saw Stonington erect silt fences and lay hay bales and observed contractors in different areas attempting to remediate the siltation issues supports Stonington's contention that it made good faith efforts to abide by the terms of the injunction.

A good faith attempt to comply with the court's order, even if unsuccessful, does not warrant a finding of contempt. See Abate v. Abate, 377 S.C. 548, 554, 660 S.E.2d 515, 519 (Ct. App. 2008) (holding father's failure to give child medication during summer visitation, despite court's order to do so, did not warrant a finding of contempt because father made a good faith effort to comply with the order so that his disobedience was not willful); Burnell v. Burnell, 359 S.C. 361, 365-66, 597 S.E.2d 24, 26-27 (Ct. App. 2004) (finding the family court erred in holding mother in contempt because mother made good faith effort to comply with joint custody order); see also State v. Spare, 374 S.C. 264, 270, 647 S.E.2d 706, 709 (Ct. App. 2007) (finding trial court erred in revoking probation for failure to pay restitution because probationer was making progress, albeit slow, toward paying his restitution obligation, which negated the trial court's finding that probationer willfully failed to comply with order). Because the evidence does not clearly and convincingly prove Appellants intentionally violated the mandates of the injunction, we find the circuit court's contempt order was

without evidentiary support, and thus, we reverse the circuit court's decision to hold Stonington, Lipscomb, Harrell, and Safko in contempt.[3]

**B. Attorney's Fees**

Appellants raise several grounds in support of their argument that the circuit court erred in assessing attorney's fees against Stonington as well as Lipscomb, Harrell, and Safko. Because the award of attorney's fees was predicated on the circuit court's finding of contempt, we reverse the award of attorney's fees. See Myers v. Myers, 391 S.C. 308, 321, 705 S.E.2d 86, 93-94 (Ct. App. 2011) ("[I]t is not improper for this court to reverse an attorney's fees award when the substantive results achieved by trial counsel are reversed on appeal.").

## CONCLUSION

Accordingly, the circuit court's ruling is

**REVERSED.**

**SHORT and GEATHERS, JJ., concur.**

[3] We need not address any of Appellants' remaining arguments on the circuit court's contempt ruling because our determination on this issue is dispositive; thus, we decline to address those remaining issues in this appeal. See Futch v. McAllister Towing 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).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Wachovia Bank National Association, Successor By Merger to Wachovia Bank, N.A., Appellant,

v.

Arthur L. Beane, Jr., and Virginia Beane, Respondents.

Appeal From Charleston County
Kristi L. Harrington, Circuit Court Judge

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Opinion No. 4962
Heard November 4, 2010 – Filed April 4, 2012

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**REVERSED**

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John H. Tiller, of Charleston, for Appellant.

John F. Martin, of Charleston, for Respondents.

**FEW, C.J.:** Wachovia Bank National Association appeals from judgment entered on a jury verdict in favor of Arthur and Virginia Beane. Wachovia contends the trial court erred in denying its motion for a new trial absolute. We agree and reverse.

## I. Facts and Procedural History

In January 2002, the Beanes borrowed $370,473.41 from Wachovia to start a new business. As security for the loan, the Beanes pledged a securities account they held with Wachovia since 2000. In May 2003, after the Beanes defaulted on the note, Wachovia filed a complaint demanding payment of the entire outstanding balance on the loan, which at that time was $224,625.37.

Almost three years later, in March 2006, the Beanes sought to amend their answer to assert a counterclaim for negligent mismanagement of the securities account. In January 2007, Wachovia filed a motion for summary judgment as to the Beanes' obligation on the note. The master-in-equity heard both motions in August 2007. The master granted Wachovia's motion for summary judgment finding "no genuine issue as to any material fact that the debt is owed by the Beanes." However, the master found "a genuine question of fact as to the amount now due, owing and unpaid upon the Note" and set a damages hearing. The master granted the Beanes' motion to amend their answer "to the extent the Defendant seeks to establish the right to setoff of the amount owed under the Note."

The issues of damages due to Wachovia under the note and the Beanes' setoff claim were tried before the circuit court in December 2008. The Beanes' expert testified Wachovia's mismanagement of the securities account resulted in underperformance in the amount of $176,121.00. At the close of the Beanes' evidence, Wachovia made a motion for a directed verdict as to setoff. Wachovia argued the master's order allowing the Beanes to assert setoff limited their recovery to the amount due on the note and the only evidence of damages incurred by the Beanes was the testimony of $176,121.00 of underperformance. The trial court denied the motion.

The trial court submitted the Beanes' setoff claim to the jury. The court charged the jury that it may award only one form of relief—money damages. The charge and verdict form gave the jury two options: award the Beanes damages in a specific amount for Wachovia's alleged mismanagement of the securities account, or find no liability and award a verdict to Wachovia. Nevertheless, the jury awarded the Beanes three separate elements of relief:

(1) money damages "in the amount of $198,395.17," (2) "plus all attorney fees," and (3) "any remaining amount on the Beanes' loan account forgiven."

Wachovia renewed the arguments it made for directed verdict in a motion for judgment notwithstanding the verdict. Wachovia also made motions for new trial absolute or, in the alternative, new trial nisi remittitur. The trial court denied Wachovia's motions.

## II. New Trial Absolute

Wachovia made a motion for a new trial absolute based on the jury's failure to follow the trial court's instructions. Specifically, Wachovia argued the jury's award of attorney's fees and forgiveness of the note was improper under the law, not supported by any evidence, and in direct contradiction of the jury charge. In Wachovia's motion for a new trial nisi remittitur it argues even the dollar amount of the verdict exceeds the amount of the recoverable loss testified to by the Beanes' own expert. We agree and hold the motion for a new trial absolute should have been granted.

"If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (emphasis omitted); Curtis v. Blake, 392 S.C. 494, 500, 709 S.E.2d 79, 82 (Ct. App. 2011) (internal quotations marks omitted). "A trial judge's refusal to grant a new trial absolute when the verdict is grossly inadequate or excessive is an abuse of discretion" and on appeal this court will grant a new trial absolute. Allstate Ins. Co. v. Durham, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993). The combined effect of the three elements of the jury's verdict in this case demonstrates the jury awarded relief that was grossly excessive, based its decision on matters outside of the evidence, and did not follow the jury instructions.

First, the jury awarded the Beanes forgiveness of the remaining amount of the loan account. Because the trial court's charge did not permit the jury to award this relief, and because the master awarded summary judgment on the note, the jury acted outside of its authority in awarding this relief. Moreover,

there was no evidence presented as to the amount due on the loan as of the date of trial. Therefore, it was impossible for the jury to determine if the Beanes proved damages that equaled or exceeded the amount due on the loan. As to this element of the verdict, the jury awarded relief not permitted by the trial court in an unknown amount as to which there is no evidentiary support.

Second, the jury awarded the Beanes attorney's fees. The parties presented no evidence of attorney's fees, the trial court did not instruct the jury that it could award attorney's fees, and as a matter of law, attorney's fees are not recoverable in this action. See Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997) ("Attorney's fees are not recoverable unless authorized by contract or statute."). After the jury returned the verdict, both parties and the trial court agreed that attorney's fees were not recoverable. The trial court could not cure this improper action of the jury by simply excluding the attorney's fees from the judgment.

Third, the jury awarded the Beanes $198,395.17. However, the only evidence of damages suffered by the Beanes as a result of the negligent mismanagement of the securities account is the testimony of their expert stating the account underperformed by $176,121.00. While it may have been possible for the Beanes to prove consequential damages beyond the financial loss due to underperformance of the account, no such proof was offered. The Beanes contend on appeal that the expert's testimony of $176,121.00 does not include interest. However, the record gives the jury no basis on which to determine how to calculate any lost interest. We also note the trial court charged pain and suffering as an element of damages. However, there is no evidence in the record concerning pain and suffering.[1] Therefore, the

[1] The record contains no explanation as to why pain and suffering was charged. Pain and suffering damages are recoverable for physical pain and resulting suffering caused by personal injuries. See Boan v. Blackwell, 343 S.C. 498, 501-02, 541 S.E.2d 242, 244 (2001) ("An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself."). Pain and suffering damages are not recoverable in a claim for mismanagement of a financial account.

maximum award supported by the evidence presented in this case is the amount of damages testified to by the Beanes' expert—$176,121.00.

The combination of the three elements of damages yields a grossly excessive verdict. The verdict demonstrates that the jury acted on some basis other than the evidence presented and that it did not follow the legal instructions given by the trial court. Our courts have consistently held that when a grossly excessive jury verdict is based on improper considerations such as these, the trial judge must grant a new trial. See O'Neal, 314 S.C. at 527, 431 S.E.2d at 556.

## III. Wachovia's Motions as to Setoff

Wachovia contends the trial court erred in not granting its motion for directed verdict or JNOV as to setoff. We agree. "When we review a trial judge's . . . denial of a motion for directed verdict or JNOV, we reverse only when there is no evidence to support the ruling or when the ruling is governed by an error of law." Watson v. Ford Motor Co., 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010) (internal quotation marks omitted). We are "required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party." Pridgen v. Ward, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (Ct. App. 2010) (internal quotation marks omitted).

The trial court denied the JNOV motion because it found the master's order did not limit the amount the Beanes could recover under their setoff claim to the amount due under the note. We find this was an error of law. The Beanes attached a copy of their proposed amended answer to the motion to amend. The proposed answer contained two claims alleging negligent mismanagement. The first was a "counterclaim" alleging the Beanes were "damaged . . . in an amount to be determined." The second was an "affirmative defense" for setoff. The setoff claim included the specific allegation that "[t]o the extent the [Beanes] are obligated to [Wachovia] their obligation should be setoff by the funds lost due to . . . mismanagement." (emphasis added). The master's order mirrored the language of the setoff claim, stating the Beanes' "Motion to Amend [their] Answer and to allege counterclaims . . . is granted to the extent the [Beanes] seek[] to establish the

right to a setoff of the amount owed under the Note." The master's order did not permit any amendment to the Beanes' answer other than to allege a setoff.

The Beanes argue, however, that an award for setoff may exceed the underlying claim. This is correct under Rule 13, SCRCP, which states "[a] counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." (emphasis added). However, the Beanes' claim for setoff in their proposed amended answer limited itself "to the extent [the Beanes] are obligated to [Wachovia]." The master's order granted the amendment only to allow the Beanes' setoff claim, and did not allow the Beanes' proposed counterclaim, which sought recovery beyond the amount due on the note.

We find the master acted within his discretion to limit the proposed amendment in this manner. The Beanes waited almost three years before they made any motion to amend their answer. Trial courts have wide discretion to grant or deny motions to amend, particularly after such a significant delay. See Hale v. Finn, 388 S.C. 79, 87-88, 694 S.E.2d 51, 56 (Ct. App. 2010) ("Courts have wide latitude in amending pleadings and, . . . the matter of allowing amendments is left to the sound discretion of the trial judge."). Because the master's order limited the amendment of the Beanes' answer to assert a claim for setoff, the trial court erred in not granting JNOV to limit the amount the Beanes could recover on their setoff claim to the amount due under the note.

## IV. Conclusion

The trial court's decision not to grant a new trial amounts to an abuse of discretion. Accordingly we reverse that decision, vacate the judgment entered, and remand for a new trial in which the Beanes' claims for negligent mismanagement of the securities account will be limited to a setoff from the amount due on the loan.

**THOMAS, J., concurs.**

**LOCKEMY, J., dissenting in a separate opinion.**

**LOCKEMY, J., dissenting**: I dissent with the majority because I believe due to this case's exceptional circumstances, it can be resolved by reforming the jury's verdict.

"A trial court is vested with very limited power to correct a jury verdict which is defective in form, but which in substance clearly and definitively expresses the jury's intentions." Vinson v. Hartley, 324 S.C. 389, 406, 477 S.E.2d 715, 724 (Ct. App. 1996). "However, the trial court can correct, reform, or remold such a verdict so as to express the jury's clear and definitely manifested intention." Id. "The correction of a jury verdict may be appropriate in those exceptional situations where it is clear there has been a mere ministerial error in reporting the verdict." Id.; see 75B Am. Jur. 2d Trial § 1612 (2007).

"A trial court may amend a verdict in matters of form, but not of substance." Vinson, 324 S.C. at 406, 477 S.E.2d at 724. "A change of substance is a change affecting the jury's underlying decision, but a change in form is one which merely corrects a technical error made by the jury." Id. "The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs." Id.

In Carolina State Hwy. Dep't v. Miller, 237 S.C. 386, 394-95, 117 S.E.2d 561, 565 (1960), our supreme court addressed amendment of a verdict by the trial court:

> After the amendment the verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment.

"'The law rather forbids this [c]ourt assuming to take upon itself the powers, duties, rights, and privileges of a jury.'" Vinson, 324 S.C. at 407, 477 S.E.2d at 724 (quoting Anderson v. Aetna Cas. & Sur. Co., 175 S.C. 254, 282, 178 S.E. 819, 829-30 (1934)).

Here, I find the trial court erred in failing to instruct the jury on the law of setoff, as well as in allowing the jury to award damages for negligence beyond a complete setoff. I conclude the language of the master's order strictly limited the Beanes to asserting a setoff and only permitted the Beanes to allege causes of action that established their right to a setoff. See 20 Am. Jur. 2d Counterclaim, Recoupment & Setoff § 7 (2005) (noting a setoff must rest on a claim enforceable in its own right). However, the trial court's errors did not obscure the jury's clear belief that the Beanes were wronged and the jury's clear intent to compensate the Beanes in an amount at least equivalent to a complete setoff of their damages.

I find the evidence presented at trial supports a verdict of a full setoff against the $224,625.37 that the Beanes owed under the note. Jack Herrmann, the Beanes' financial expert, testified the securities account underperformed by $176,121 due to Wachovia's mismanagement. Herrmann explained if Wachovia invested the Beanes' money in stocks and bonds with an average amount of risk, the securities account would have had sufficient funds to pay off the balance on the note. Herrmann also explained if Wachovia had not liquidated the Beanes' account at the bottom of the market it would have recovered some of its value and the Beanes "probably would have had enough funds . . . to pay the balance of the loan." Furthermore, the Beanes lost the opportunity to earn interest on the amount of the account balance at liquidation and on the amount the account underperformed.

A jury deliberated and decided the specific issue that the majority sends back for a new trial. I believe it unnecessary and an inefficient administration of justice to require a new trial in which the award would be limited to a complete setoff, when simply amending the verdict to reflect a complete setoff would represent the original jury's intentions without invading the jury's province.[2] Here, this court has the ability to correct an error in form. There is no change in the substance of the verdict because the jury's underlying decision remains intact. Thus, I would propose amending

[2] I emphasize again that this is indeed an exceptional case. See Vinson, 324 S.C. at 406, 477 S.E.2d at 724. While reformation should not be done lightly, I believe case law supports it in this instance.

the verdict to its legal limit, rather than sending the issue before a new jury for a trial in which the award is limited to a complete setoff.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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The State, Appellant,

v.

Mark Allen Hoyle, Respondent.

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Appeal From York County
John C. Hayes, III, Circuit Court Judge

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Opinion No. 4963
Heard March 19, 2012 – Filed April 4, 2012

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**REVERSED**

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Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia; and Solicitor Kevin Brackett, of York, for Appellant.

John M. Foster, of Rock Hill, for Respondent.

**PIEPER, J.:** This appeal arises out of Appellant Mark Allen Hoyle's magistrate's court conviction for driving under the influence (DUI). The circuit court found the magistrate erred by failing to suppress the incident site

video recording due to incomplete Miranda[1] warnings; consequently, the circuit court remanded the case to the magistrate's court for a new trial. On appeal, the State argues the circuit court erred in ordering the suppression of the video recording because the arresting officer gave Hoyle sufficient Miranda warnings in compliance with section 56-5-2953 of the South Carolina Code (Supp. 2011). We reverse.

## FACTS

On March 21, 2009, Hoyle was charged with DUI. Upon his arrest, the officer advised Hoyle of the following: (1) he had the right to remain silent; (2) anything he said could be used against him in a court of law; (3) he had the right to an attorney; and (4) if he could not afford an attorney, one would be appointed for him prior to questioning. The officer did not advise Hoyle that he had the right to terminate the interrogation at any time and to not answer any further questions. Hoyle was convicted of DUI. Hoyle appealed his conviction, arguing the magistrate's court erred in refusing to dismiss the charge, or in the alternative, erred in failing to suppress certain evidence, because (1) he was not fully advised of his Miranda rights and (2) certain audio portions of the sequence of events were missing.[2] At the hearing before the circuit court, Hoyle relied on State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996), and argued the incident site video recording should be suppressed because it did not contain the officer instructing Hoyle of the Miranda warning that a suspect has the "right to terminate the interrogation at any time and not to answer any further questions." The

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

[2] To the extent this second issue was independent of the Miranda issue, that issue was neither ruled on by the circuit court, nor argued on appeal to this court. In fact, Hoyle clarified his argument before the circuit court in stating "the only question I submit to this court that they have to decide, that you have to decide, Your Honor, is whether [Hoyle is] entitled to dismissal or a remand for further proceedings for suppression of evidence for deficient Miranda."

circuit court agreed, remanded for a new trial, and ordered the incident site video recording be suppressed. This appeal followed.

## STANDARD OF REVIEW

In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011). The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70 (Supp. 2011). "The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law." State v. Johnson, 396 S.C. 182, 186, 720 S.E.2d 516, 518 (Ct. App. 2011).

## LAW/ANALYSIS

The State argues the circuit court erred in suppressing the incident site video recording and remanding for a new trial because Hoyle was given appropriate Miranda warnings in compliance with section 56-5-2953. We agree.

"'All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.'" State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). The court should look to the plain language of the statute. Binney v. State, 384 S.C. 539, 544, 683 S.E.2d 478, 480 (2009). If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008).

The applicable provisions of the statute in question follow:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
> (1)(a) The video recording at the incident site must:
> (i) not begin later than the activation of the officer's blue lights;
> (ii) include any field sobriety tests administered; and
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

S.C. Code Ann. § 56-5-2953(A)(1)(a) (Supp. 2011).

To give force to the Constitution's protection against compelled self-incrimination, the United States Supreme Court established in Miranda "certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." Duckworth v. Eagan, 492 U.S. 195, 201 (1989). The Miranda court held that a suspect in custody must be warned of the following rights:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479.

The court also explained that "[o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 473-74. Furthermore, if the suspect decides,

after receiving the Miranda warnings, that he wishes to remain silent, the custodial officers must "scrupulously honor[]" his "right to cut off questioning." Michigan v. Mosley, 423 U.S. 96, 104 (1975).

In State v. Kennedy, this court cited Miranda, stating:

> A suspect in custody may not be subjected to interrogation unless he is informed that: he has the right to remain silent; anything he says can be used against him in a court of law; he has a right to the presence of an attorney; if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires; and he has the right to terminate the interrogation at any time and not to answer any further questions.

325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996), aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

The issue in Kennedy was whether the defendant voluntarily waived his Miranda rights. Id. at 306, 479 S.E.2d at 844. The court did not discuss the sufficiency of the warnings given, and the court did not discuss whether the officer informed the defendant of his right to terminate the interrogation. Id. at 306-09, 479 S.E.2d at 844-46. On the other hand, in State v. Cannon, police gave the defendant the following Miranda warning:

> You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to talk to a lawyer and have him present with you while you are being questioned; if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one.

260 S.C. 537, 542-43, 197 S.E.2d 678, 680 (1973), cert. denied, 414 U.S. 1067 (1973). The defendant appealed, arguing the warnings were insufficient

and should have included the following language: "If you decide to answer any questions now without a lawyer present, you will still have the right to stop answering at any time or until you talk to a lawyer." Id. at 543, 197 S.E.2d at 680. The South Carolina Supreme Court disagreed and found that Miranda does not require an officer to inform a suspect of his right to stop answering questions at any time. Id.

The language in Miranda is clear that the right to terminate the interrogation at any time and to not answer any further questions is not a required Miranda warning. Miranda only requires four warnings, and the United States Supreme Court did not include the right to terminate the interrogation at any time as one of the four warnings. See Miranda, 384 U.S. at 479 (holding a suspect in custody must be warned prior to any questioning that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires"). Furthermore, pursuant to Miranda, the right to terminate an interrogation arises after warnings are given. See id. at 473-74 ("Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.").

Recent United States Supreme Court decisions interpreting Miranda also recognize Miranda includes four rights. See Berghuis v. Thompkins, 130 S. Ct. 2250, 2259 (2010) (quoting Miranda for the proposition that a suspect "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires" (internal quotation marks omitted)); Florida v. Powell, 130 S. Ct. 1195, 1204 (2010) (noting that "[t]he four warnings Miranda requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed").

Our interpretation of Miranda and Cannon is also consistent with other jurisdictions that have considered the issue and determined that under Miranda an officer is not required to inform a suspect of a right to stop questioning after it has begun. See United States v. Lares-Valdez, 939 F.2d 688, 690 (9th Cir. 1991) (finding that the Miranda court contemplated the right to cease questioning and declined to include it among the warnings necessary to protect a suspect's Fifth and Sixth Amendment rights); Mock v. Rose, 472 F.2d 619, 622 (6th Cir. 1972) (holding Miranda warnings do not include the right to stop answering questions at any time); Flannagin v. State, 266 So. 2d 643, 651 (Ala. 1972) (holding an officer is not required under Miranda to inform a suspect that he has the right to stop questioning at any time because "[t]he right of an accused to exercise [the four Miranda] rights at any time during the proceeding is not a separate right of which he must be independently informed. It is, instead, the practical result of his exercising those other rights at a time of his choosing"); Katzensky v. State, 183 S.E.2d 749, 751 (Ga. 1971) ("Miranda does not require the officers to advise the individual that he may withdraw the waiver of his constitutional rights at any time during the interrogation.").

For the bench, bar, and law enforcement, we recognize a need may exist to clarify any perceived confusion about the reach of Kennedy.[3] Regarding the language at issue herein, we interpret that part of Kennedy as being dicta.[4] Moreover, even if we were to interpret the reach of Kennedy otherwise, the South Carolina Supreme Court's opinion

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[3] See Op. S.C. Att'y Gen., 2009 WL 1968618 (June 4, 2009) (responding to an inquiry by the South Carolina Sheriffs' Association as to whether Kennedy affords a fifth right that must be included in a Miranda warning).

[4] Notably, subsequent opinions from this court have cited Kennedy when stating the rule on Miranda warnings; however, no case cites the language in Kennedy that an officer must inform a suspect of the right to terminate the interrogation at any time and to not answer any further questions. See State v. Breeze, 379 S.C. 538, 544, 665 S.E.2d 247, 250 (Ct. App. 2008); State v. Lynch, 375 S.C. 628, 633 n.5, 654 S.E.2d 292, 295 n.5 (Ct. App. 2007).

in Cannon serves as the controlling precedent for purposes of our review. While one panel of this court cannot overturn prior published precedent of another panel of this court absent en banc review, we need not do so in order to apply controlling South Carolina Supreme Court precedent. Based on the foregoing, we find that the South Carolina Supreme Court does not interpret Miranda to require an oral or written warning on the right to terminate an interrogation at any time and to not answer any further questions.[5]

A review of the incident site video recording indicates the officer gave Hoyle all four warnings required by Miranda; thus, the officer fully complied with both Miranda and section 56-5-2953. See S.C. Code Ann. § 56-5-2953(A)(1)(a)(iii) (Supp. 2011) ("The video recording at the incident site must . . . show the person being advised of his Miranda rights."). Therefore, we reverse the circuit court's order and reinstate the conviction.

## CONCLUSION

Accordingly, the order of the circuit court is hereby

**REVERSED.**

**KONDUROS and GEATHERS, JJ., concur.**

[5] Hoyle asserted various policy arguments in support of expanded warnings in South Carolina; however, we reject those arguments.