The Supreme Court of South Carolina

Request for Written Comments

The Commission on Lawyer Conduct requests that this Court consider adopting the American Bar Association's Model Court Rule on the Provision of Legal Services Following Determination of a Major Disaster with minor changes. The language the Commission proposes for adoption as Rule 426 of the South Carolina Appellate Court Rules, along with a recommended amendment to the comments to Rule 5.5 of the Rules of Professional Conduct contained in Rule 407, SCACR, is attached.

Persons or entities desiring to submit written comments regarding the Commission's proposal may do so by filing an original and seven (7) copies of their written comments with the Supreme Court. The written comments must be sent to the following address:

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

The Supreme Court must receive any written comments by May 16, 2014. Additionally, the Court requests that an electronic version of the comments in Microsoft Word or WordPerfect be e-mailed to rule426@sccourts.org by that same date.

Columbia, South Carolina
April 16, 2014

RULE 426

PROVISION OF LEGAL SERVICES FOLLOWING

DETERMINATION OF MAJOR DISASTER

(a) Determination of Existence of Major Disaster. Solely for purposes of this Rule, the Supreme Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:

(1) this jurisdiction and whether the emergency caused by the major disaster affects the entirety or only a part of this jurisdiction, or

(2) another jurisdiction, but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) shall extend only to lawyers who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.

(b) Temporary Practice in this Jurisdiction Following Major Disaster. Following the determination of an emergency affecting the justice system in this jurisdiction pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are in need of pro bono services and the assistance of lawyers from outside of this jurisdiction is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended, or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a pro bono basis without compensation, expectation of compensation, or other direct or indirect pecuniary gain to the lawyer. Such legal services shall be assigned and supervised through an established not-for-profit bar association, pro bono program, or legal services program or through such organization(s) specifically designated by the Supreme Court.

(c) Temporary Practice in this Jurisdiction Following Major Disaster in Another Jurisdiction. Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred,

suspended, or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

(d) Duration of Authority for Temporary Practice. The authority to practice law in this jurisdiction granted by paragraph (b) of this Rule shall end when the Supreme Court determines that the conditions caused by the major disaster in this jurisdiction have ended except that a lawyer then representing clients in this jurisdiction pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation. The lawyer shall not thereafter accept new clients. The authority to practice law in this jurisdiction granted by paragraph (c) of this Rule shall end 60 days after the Supreme Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(e) Court Appearances. The authority granted by this Rule does not include appearances in court except:

(1) pursuant to Rule 404 and, if such authority is granted, any fees for such admission shall be waived; or

(2) if the Supreme Court, in any determination made under paragraph (a), grants blanket permission to appear in all or designated courts of this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included, any *pro hac vice* admission fees shall be waived.

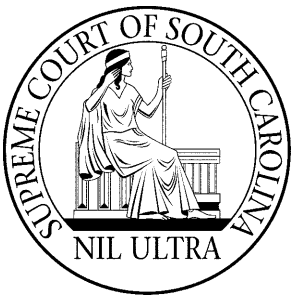
(f) Disciplinary Authority and Registration Requirement. Lawyers providing legal services in this jurisdiction pursuant to paragraphs (b) or (c) are subject to the Supreme Court's disciplinary authority and the Rules of Professional Conduct of this jurisdiction as provided in Rule 8.5 of the Rules of Professional Conduct. Lawyers providing legal services in this jurisdiction under paragraphs (b) or (c) shall, within 30 days from the commencement of the provision of legal services, file a registration statement with the Clerk of the Supreme Court. The registration statement shall be in a form prescribed by the Supreme Court. Any lawyer who provides legal services pursuant to this Rule shall not be considered to be engaged in the unlawful practice of law in this jurisdiction.

(g) Notification to Clients. Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, of any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in this jurisdiction.

Comment 14 to Rule 5.5, RPC, Rule 407, SCACR, would be amended as follows:[1]

[14] Paragraph (c)(3) requires that the services arise out of or be reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work for the client might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issue involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. Lawyers not otherwise authorized to practice law in this jurisdiction desiring to provide pro bono legal services on a temporary basis in this jurisdiction following a major disaster should consult Rule 426, SCACR (Provision of Legal Services Following Determination of Major Disaster).

[1] Additions to the comment are underlined.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
April 16, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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2014-UP-013-Roderick Bradley v. The State	Pending

The Supreme Court of South Carolina

RE: Electronic Transfers from Lawyer Trust Accounts

Appellate Case No. 2014-000261

ORDER

The South Carolina Bar has submitted proposed amendments to the South Carolina Appellate Court Rules that specifically permit lawyers to transfer funds from lawyers' trust accounts to pay electronic filing fees by way of debit.

Pursuant to Article V, § 4 of the South Carolina Constitution, we adopt the portion of the Bar's proposal that amends the Comments to Rule 1.15, RPC, Rule 407, SCACR, as set forth in the attachment to this Order. The changes are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 10, 2014

Rule 1.15, RPC, Rule 407, SCACR, is amended to add Comment 9 as set forth below. The remaining comments are renumbered to reflect the addition of new Comment 9.

> [9] In order to pay recording fees, submission fees, filing fees, or similar fees on behalf of a client or third party, a lawyer may authorize the electronic transfer of funds from the lawyer's trust account to a government agency or a vendor duly authorized by a government agency to collect such fees. Such authorization may include granting the government agency or its duly authorized vendor the right to debit the funds authorized by the lawyer from the lawyer's trust account, subject to the requirements of Rule 1.15(f)

The Supreme Court of South Carolina

RE: Rule Amendments

Appellate Case Nos. 2013-002479, 2013-002681, and 2013-002682.

ORDER

On January 15, 2014, the following orders were submitted to the General Assembly pursuant to Article V, § 4A of the South Carolina Constitution.

(1) An order amending Rule 244 of the South Carolina Appellate Court Rules.

(2) An order amending Rules 11 and 77 of the South Carolina Rules of Civil Procedure.

(3) An order adding Rule 41.2 to the South Carolina Rules of Civil Procedure.

A copy of these orders is attached. Since ninety days have passed since submission without rejection by the General Assembly, the amendments contained in the above orders are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 15, 2014

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Appellate Court Rules

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Appellate Court Rules (SCACR) are amended as follows:

(1) Rule 244(b), SCACR, is amended to read:

> **(b) Procedure.** The certification order shall be signed by the presiding judge or the chief judge, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. A certification order shall set forth the questions of law to be answered, all findings of fact relevant to the questions certified, and a statement showing fully the nature of the controversy in which the questions arose. The Supreme Court will not consider any documents or other evidentiary materials unless the certifying court has submitted those materials. The Supreme Court may request the original or copies of all or of any portion of the record before the certifying court to be filed with the Court, if, in the opinion of the Supreme Court, the record or a portion thereof may be necessary in deciding to accept or in answering the questions. In the event a party believes that additional materials from the record before the certifying court are necessary, it shall notify the Supreme Court and the certifying court so that the certifying court can determine if the additional materials will be submitted.

(2) Paragraphs (d)-(g) of Rule 244, SCACR, are re-designated as Paragraphs (e)-(h) of that rule.

(3) Rule 244(d), SCACR, is added as follows:

(d) Pro Hac Vice Admission. Within fifteen (15) days of the date of the order of the Supreme Court agreeing to answer the certified question(s), any counsel representing a party before the certifying court who is not licensed to practice law in South Carolina and who desires to participate in the proceedings before the Supreme Court, shall make a motion to be admitted pro hac vice and file the application required by Rule 404, SCACR. In recognition of the unique nature of the proceedings under this rule, a counsel representing a party before the certifying court may be admitted pro hac vice without associating South Carolina counsel and without paying the application fee required by Rule 404. In all other respects, the motion and application must fully comply with the requirements of Rules 240 and 404, SCACR.

These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 15, 2014

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Rules of Civil Procedure

Appellate Case No. 2013-002682

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 11 and Rule 77 of the South Carolina Rules of Civil Procedure (SCRCP) are amended as shown in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 15, 2014

The first paragraph of Rule 11(a), SCRCP, is amended to provide as follows:

> **(a) Signature.** Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina, and whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

Rule 77(d), SCRCP, is amended to provide as follows:

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by first class mail upon every party affected thereby who is not in default for failure to appear, and shall make a note in the case file or docket sheet of the mailing. For parties proceeding in the SCE-File electronic filing system, the clerk shall serve a notice of the entry by electronically transmitting a Notice of Electronic Filing to all parties. Such mailing or electronic transmission shall not be necessary to parties who have already received notice. Such mailing or electronic transmission is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of entry on any other party in the manner provided in Rule 5 for the service of such papers. In addition to the above, in post-conviction relief actions, the post-conviction relief judge shall submit the signed order or judgment to the clerk of court for filing and the clerk shall promptly provide notice of the entry of judgment and serve a copy of the signed order to the parties. Pursuant to Rule 5(b) service shall be made solely on the attorney when the applicant is represented by counsel and, where an applicant is proceeding pro se, service shall be made upon the applicant at the last known address provided to the clerk by the applicant.

Note to 2014 Amendment

This amendment requires the clerk to serve notice of entry of an order or judgment through the SCE-File electronic filing system for all parties who are proceeding in the electronic filing system. Any party or the attorney for a party who is a traditional filer and not proceeding in the electronic filing system must be served by first class mail as provided in paragraph (d).

The Supreme Court of South Carolina

Re: Amendment to the South Carolina Rules of Civil Procedure

Appellate Case No. 2013-002681

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the South Carolina Rules of Civil Procedure (SCRCP) are amended as shown in the attachment to this order to add Rule 41.2, SCRCP. This amendment shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 15, 2014

The South Carolina Rules of Civil Procedure are amended by adding the following rule:

RULE 41.2

PRIVACY PROTECTION FOR FILINGS

(a) Redaction. A person filing a document in paper or electronic format shall not include, or will redact where inclusion is necessary, the following personal identifying information.

(1) Social Security Numbers, Taxpayer Identification Numbers, Driver's License Numbers, Passport Numbers or Any Other Personal Identifying Numbers. If it is necessary to include personal identifying numbers in a document, the parties should utilize some other identifier. Parties shall not include any portion of a social security number in a filing.

(2) Names of Minor Children. If a minor is the victim of a sexual assault or the victim in an abuse or neglect case, the minor's name must be completely redacted and a term such as "victim" or "child" should be used. In all other cases, the minor's first name and first initial of the last name (i.e., John S.), or only the minor's initials (i.e., J.S.) should be used.

(3) Financial Account Numbers, Including Any Type of Bank Account Numbers, Personal Identification Number (PIN) Code, or Passwords. If financial account numbers are relevant, only the last four digits of these numbers should be used.

(4) Home Addresses of Minors, Sexual Assault and Abuse and Neglect Victims, and Non-Parties. If a home address of a minor, sexual assault victim, or non-party must be included, only the city and state should be used.

(5) Date of Birth. If a date of birth must be included, only the year of birth should be included.

Note:

Easy access to electronic court records raises privacy concerns. This rule details the type of personal information that parties are required to redact in court filings. Parties preparing or filing documents are

prohibited from filing documents which contain personal identifying information delineated in S.C. Code Ann. § 30-2-330(A). Parties should exercise caution and refrain from including any unnecessary personal identifying information in court filings so as to limit the necessity of redacting documents. Furthermore, parties should exercise caution in including other sensitive personal data in filings, such as medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

(b) Reference Lists. Where personal data identifiers are relevant to an issue in the case, a filing that contains redacted information may be filed together with a confidential reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed as a confidential document, which is not available to the public, and may be amended as of right. The confidential reference list shall not be made available on the Case Management System Public Index and may only be viewed by the parties and the court and staff. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information. No order of the court is required to file a reference list.

Note:

Paragraph (b) provides for the same procedure as provided in Rule 5.2(g) of the Federal Rules of Civil Procedure and permits parties to file a reference list to accompany a redacted filing. Parties should only file a reference list if the redacted information is relevant to an issue in the case or necessary to understand the filing.

(c) Responsibility to Redact. The clerks of court and their staff will not review filings for redaction or to determine if materials should be sealed pursuant to Rule 41.1, SCRCP. The responsibility for ensuring that information is redacted or sealed rests with counsel and the parties.

(d) Limitations on Remote Access to Electronic Files. Some documents or images that are filed may be removed from the Case Management System Public Index.

(1) The clerk of court may remove documents, exhibits, or other filings that may be highly inflammatory or otherwise potentially harmful.

(2) Documents, exhibits, or other filings which are removed under paragraph (d)(1) may be viewed at the courthouse.

(e) Requests to Remove. An individual may request that a clerk of court remove, from an image or copy of an official record placed on the Case Management System Public Index, any data which should have been redacted under paragraph (a) of this rule.

(1) Any request to remove data which should not have been included or should have been redacted in accordance with paragraph (a) must be made in writing, legibly signed by the requester, and delivered by mail, facsimile, electronic transmission, or in person to the clerk of court. The request must specify the document and the page number of the document that contains information to be redacted.

(2) The clerk of court has no duty to inquire beyond the written request to verify the identity of an individual requesting redaction.

(3) A fee must not be charged for the redaction pursuant to the request.

Note:

Paragraph (e) of this rule is consistent with the requirements of S.C. Code Ann. § 30-2-330(B).

The Supreme Court of South Carolina

Re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings

Appellate Case No. 2013-002681

ORDER

On August 13, 2007, this Court issued an interim Order concerning the use of personal data identifiers in documents filed in the Supreme Court and the Court of Appeals (appellate court). In the Order, the Court noted that, under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public. The Court also observed the electronic availability of documents filed in the appellate court raised significant privacy concerns for parties in appeals. Since that time, the appellate court has created and implemented the South Carolina Appellate Case Management System. This system currently allows the public to view documents filed in appeals in limited types of civil appeals via the internet. Furthermore, the General Assembly has enacted legislation specifically prohibiting parties from filing documents containing certain personal identifying information. *See* S.C. Code Ann. § 30-2-330(A).

We reiterate that parties shall not include, or will partially redact where inclusion is necessary, personal identifying information from documents filed with the appellate court.[1] Documents filed in the appellate court shall not include the following:

[1] We also reiterate that the restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed. This information will remain private.

1. Social Security Numbers, Taxpayer Identification Numbers, Driver's License Numbers, Passport Numbers or any other Personal Identifying Numbers. If it is necessary to include personal identifying numbers in a document, the parties should utilize some other identifier. Parties shall not include any portion of a social security number in a filing.

2. Names of Minor Children. If a minor is the victim of a sexual assault or the victim in an abuse or neglect case, the minor's name must be completely redacted and a term such as "victim" or "child" should be used. In all other cases, the minor's first name and first initial of the last name (i.e., John S.), or only the minor's initials (i.e., J.S.) should be used.

3. Financial Account Numbers, including any type of Bank Account Numbers, Personal Identification Number (PIN) Code, or Passwords. If financial account numbers are relevant, only the last four digits of these numbers should be used.

4. Home Addresses of minors, sexual assault and abuse and neglect victims, and non-parties. If a home address of a minor, sexual assault victim, or non-party must be included, only the city and state should be used.

5. Date of Birth. If a date of birth must be included, only the year of birth should be included.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), and *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991),

must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

A filing that contains redacted information may be filed together with a confidential reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. This list must be filed confidentially and may be amended as of right. The confidential reference list shall not be made available to the public and may only be viewed by the parties and the appellate court and staff. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information. No order of the court is required to file a reference list.

Parties should also exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for ensuring that information is redacted or sealed rests with counsel and the parties.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 15, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Amisub of South Carolina, Inc., AnMed Enterprises, Inc./HealthSouth, LLC, Georgetown Memorial Hospital, Hilton Head Health System, L.P., Medical University Hospital Authority, Piedmont HealthSouth Rehabilitation, LLC, The Regional Medical Center of Orangeburg and Calhoun Counties, Trident NeuroSciences Center, LLC, Waccamaw Community Hospital, Abbeville Nursing Home, Inc., South Carolina Hospital Association, and South Carolina Health Care Association, Petitioners,

v.

South Carolina Department of Health and Environmental Control, Respondent.

Appellate Case No. 2013-001530

ORIGINAL JURISDICTION

Opinion No. 27382
Heard March 6, 2014 – Filed April 14, 2014

RELIEF GRANTED

C. Mitchell Brown and Travis Dayhuff, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia,

William W. Wilkins, Andrew A. Mathias, and Burl F. Williams, all of Nexsen Pruet, LLC, of Greenville, for Petitioners.
W. Marshall Taylor, Jr., Ashley C. Biggers, and James B. Richardson, Jr., all of Columbia, for Respondent.

Swati S. Patel, Chief Legal Counsel for the Office of the Governor, and M. Todd Carroll and Kevin A. Hall, both of Womble Carlyle Sandridge & Rice, LLP, all of Columbia, for Amicus Curiae The Office of the Governor.

CHIEF JUSTICE TOAL: This matter comes before the Court in its original jurisdiction. Ten health care entities, along with the South Carolina Hospital Association and the South Carolina Health Care Association (collectively, Petitioners), seek a declaration from this Court that the South Carolina Department of Health and Human Services (DHEC) is obligated to enforce the State Certification of Need and Health Facility Licensure Act (the CON Act)[1] and fund the certificate of need (CON) program despite the South Carolina House of Representative's failure to override the Governor's veto of the line item in the state budget providing funding for the program. We grant Petitioners' requested relief.

FACTS/PROCEDURAL BACKGROUND

The South Carolina General Assembly initially passed the CON Act in 1971. It is a comprehensive approach to containing health care costs for South Carolinians by controlling the construction of health care facilities, the provision of certain services, and the purchase of health care equipment so as to avoid duplication of health care services. Since its adoption in 1971, the CON Act and its corresponding regulations have evolved into a sophisticated regulatory scheme. Under the CON Act, a person or health care facility must obtain a CON from DHEC before constructing a new health care facility, establishing certain health care services, making capital expenditures on certain health care projects, or acquiring certain types of health care equipment. S.C. Code Ann. § 44-7-160 (Supp. 2013). In addition, the CON Act and the regulations promulgated pursuant

[1] S.C. Code Ann. §§ 44-7-110 to -394 (2002 & Supp. 2013).

to the CON Act set forth, *inter alia*, specific CON application procedures, project review criteria, and penalties for non-compliance. S.C. Code Ann. §§ 44-7-110 to -394 (2002 & Supp. 2013); 24A S.C. Code Ann. Regs. §§ 61-15 (2012). DHEC is responsible for administering the CON program. S.C. Code Ann. § 44-7-140.

In August 2012, DHEC submitted its agency appropriations request to Governor Nikki Haley for Fiscal Year 2013–2014, requesting appropriations for four programs: (I) Administration; (II) Programs and Services; (III) Employee Benefits; and (IV) Non-[R]ecurring Appropriations. DHEC requested funding for the CON Program in subsection (II)(F)(2), Facility & Service Development. DHEC specifically asked for a $773,000 increase from the previous year to be paid from the state's general fund to fund the CON program, resulting in a total of $1,759,915 requested funding for subsection (II)(F)(2). However, in her Executive Budget for Fiscal Year 2013–2014, the Governor recommended no additional funding for the CON program and only allocated a total of $986,615 in combined funds for subsection (II)(F)(2).

In its 2013–2014 appropriations bill, the General Assembly appropriated $1,759,915 to DHEC for subsection (II)(F)(2), as requested by DHEC. By letter dated June 25, 2013, the Governor vetoed certain line items in the General Assembly's appropriations bill. Veto 20, entitled "Closing Programs That Don't Work" (Veto 20), specifically vetoed subsection (II)(F)(2). In her veto message, the Governor stated: "The [CON] Program is an intensely political one through which bureaucratic policy makers deny healthcare providers from offering treatment. We should allow the market to work rather than politics."[2]

The House of Representatives sustained Veto 20.[3] According to Representative Brian White, Chairman of the Ways and Means Committee

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[2] Although subsection (II)(F)(2) included funding for other services such as the Certificate of Public Advantage program, review of architectural plans, inspection of the construction of health care facilities, and fire and life safety requirement inspections at health care facilities, the Governor's veto message only specifically mentioned the CON program.

[3] Only if the body in which a bill originated overrides a veto is the veto sent to the other body for its consideration. Therefore, because the House of Representatives did not override Veto 20, it was not sent to the Senate for its consideration.

(Chairman White), he asked the House members to sustain Veto 20 because DHEC had "other funds in that agency they can use and [can] move other people over for that purpose." Thereafter, the General Assembly passed Act No. 101, 2013 S.C. Acts 1, the General Appropriations Act for Fiscal Year 2013–2014 (the 2013–2014 Appropriations Act).

On June 28, 2013, DHEC Director Catherine Templeton issued a letter to health care providers communicating that DHEC would no longer fund the CON program. In pertinent part, the letter stated:

> The sustained veto shows the intention of both the Executive and Legislative branches to suspend the operation of the [CON] program for the fiscal year beginning July 1, 2013. . . . [DHEC] has no independent authority to expend state funds for [the CON program] and therefore, the veto completely suspends the program for the upcoming fiscal year. Accordingly, [DHEC] cannot review new or existing applications for [CONs] as of July 1. Moreover, [DHEC] cannot take any [CON] enforcement action. Should the General Assembly restore the program in the future, [DHEC] will not be inclined to take enforcement actions under [the CON Act] for activity that occurs during the program's suspension, unless instructed otherwise by the General Assembly. Suspending the program has the practical effect of allowing new and expanding health care facilities to move forward without the [CON] process.

In response, Chairman White and Representative Murrell Smith, Chairman of the Ways and Means healthcare subcommittee, issued a statement regarding Veto 20, stating in pertinent part that "[t]he House of Representatives did not intend to eliminate the CON Program or its statutory requirements. In fact, the House believes there are a number of ways for the CON Program to retain its function and purpose."

DHEC discontinued the CON program effective July 1, 2013. As of that date, DHEC had thirty-nine undecided CON applications and requests pending.

Petitioners, each past CON recipients, future CON applicants, or pending CON applicants, filed a petition for original jurisdiction, seeking declarations that DHEC's duty to administer the CON program during Fiscal Year 2013–2014 was

not suspended and that DHEC has a duty to seek alternative means of funding.

Pursuant to Rule 245, SCACR, we granted Petitioners' petition for original jurisdiction. We further accepted the Governor's amicus curiae brief pursuant to Rule 213, SCACR.

ISSUES

I. Whether DHEC's duty to administer the CON program was suspended for Fiscal Year 2013–2014 after the House of Representatives sustained the Governor's line item veto eliminating funding for the program?

II. Whether DHEC must fund the administration and enforcement of the CON program?

LAW/ANALYSIS

We preface our opinion by emphasizing the significance of the separation of powers doctrine to the decision we must render in this matter. The South Carolina Constitution provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

S.C. Const. art. 1, § 8. This constitutional mandate "prevents the concentration of power in the hands of too few, and provides a system of checks and balances." *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013); *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982). The General Assembly "has plenary power over all legislative matters unless limited by some constitutional provision." *Hampton*, 403 S.C. at 403, 743 S.E.2d at 262 (citing *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 438–39, 181 S.E.2d 481, 486 (1935)). The executive branch, on the other hand, "is constitutionally tasked with ensuring 'that the laws be faithfully executed.'" *Id.* (quoting S.C. Const. art. IV, § 15).

History reveals that litigation often arises because of conflicts between the branches of the government. *McLeod*, 278 S.C. at 312–13, 295 S.E.2d at 636. While case law within our state and across the nation involving separation of powers disputes is not a model of consistency, one theme reverberates throughout: the court's role in upholding the separation of powers doctrine is to maintain the three branches of government in positions of equality. When asked to resolve a conflict in which the Governor attempts use her veto pen to rewrite a permanent law, this Court must adhere to well-established separation of powers principles, leaving the power to legislate to the General Assembly, and the power to execute the laws and to veto legislation to the Governor.

I. Enforcement of the CON Act

The General Assembly must provide annually for all expenditures in a general appropriations act in order to fund the ordinary expenses of state government and to direct the expenditure of these funds. S.C. Code Ann. § 2-7-60 (2005); *Ex parte Georgetown Cnty. Water & Sewer Dist.*, 284 S.C. 466, 469, 327 S.E.2d 654, 656 (1985) (citations omitted). Pursuant to the South Carolina Constitution, "[b]ills appropriating money out of the Treasury shall specify the **objects and purposes** for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections." S.C. Const. art. IV, § 21 (emphasis added); *see also* S.C. Code Ann. § 2-7-60 (requiring that all appropriations "shall be in a definite sum for each purpose or activity with such itemization under the activity as may be deemed necessary by the General Assembly"). In other words, the General Assembly must structure each appropriations act so that each item or section designates an amount of money allocated for a particular function.

Upon an appropriation act's ratification, the act is sent to the Governor for his or her approval. Unlike the general veto power, the Governor has the authority to line item veto a general appropriations act. If the Governor exercises his or her line item veto power, the General Assembly then has the opportunity to either sustain or override the veto. The Governor returns his or her veto, along with a veto message, to the body in which the bill originated. S.C. Const. art. IV, § 21. In the case of a general appropriations act, the House initiates the bill and first receives a veto. If the House overrides the veto by an affirmative two-thirds vote, then the veto is sent to the Senate for its consideration. *See id.* Therefore, the General Assembly may override a line item veto by an affirmative two-thirds vote

of each chamber. *Id.* However, if either chamber of the General Assembly does not override the Governor's veto, it is sustained, and the line is stricken. At that point, the bill becomes law notwithstanding the Governor's veto. *Id.*; *Edwards v. State*, 383 S.C. 82, 91, 678 S.E.2d 412, 417 (2009). The extent and particularities of the Governor's and the General Assembly's respective powers in this setting are crucial to the outcome of this matter, and we will address each in turn.

A. Governor's Line item Veto Power

The Governor may exercise the veto power "only when clearly authorized by the constitution, and the language conferring it is to be strictly construed." *Jackson v. Sanford*, 398 S.C. 580, 584, 731 S.E.2d 722, 724 (2011); *Drummond v. Beasley*, 331 S.C. 559, 569, 503 S.E.2d 455, 457 (1998). Article IV, section 21 of the Constitution provides for the Governor's line item veto power as follows:

> If the Governor shall not approve any one or more of the **items or sections** contained in any bill appropriating money, but shall approve of the residue thereof, it shall become a law as to the residue in like manner as if he had signed it. The Governor shall then return the bill with his objections to the items or sections of the same not approved by him to the house in which the bill originated, which house shall enter the objections at large upon its Journal and proceed to reconsider so much of the bill as is not approved by the Governor. The same proceedings shall be had in both houses in reconsidering the same as is provided in case of an entire bill returned by the Governor with his objections; and if any item or section of the bill not approved by the Governor shall be passed by two-thirds of each house of the General Assembly, it shall become a part of the law notwithstanding the objections of the Governor.

S.C. Const. art. IV, § 21 (emphasis added). The Governor's line item veto is a "negative power to void a distinct item." *Drummond*, 331 S.C. at 565, 503 S.E.2d at 457.

Under article IV, section 21, "the Governor can only veto those parts [in an appropriations bill] labeled by the legislature as items or sections." *Drummond*, 331 S.C. at 563, 503 S.E.2d at 456. Over the years, this Court has developed case law interpreting the reach of the Governor's power to veto "items or sections"

within an appropriations bill. *See, e.g.*, *Jackson*, 398 S.C. at 589, 731 S.E.2d at 726–27; *Drummond*, 331 S.C. at 563, 503 S.E.2d at 457; *S.C. Coin Operators Ass'n v. Beasley*, 320 S.C. 183, 187–188, 464 S.E.2d 103, 105 (1995); *Cox v. Bates*, 237 S.C. 198, 220, 116 S.E.2d 828, 837 (1960); *State ex rel. Long v. Jones*, 99 S.C. 89, 92, 82 S.E.2d 882, 883 (1914). These decisions, interpreting the Governor's line item veto authority, certainly impact the effect of the House of Representatives' failure to override Veto 20. In striving to maintain the proper constitutional balance between the branches of our state's government, we take this opportunity to clarify and modify the language in one of these cases.

In *Jackson v. Sanford*, this Court found the Governor's line item veto of *part* of an item within an appropriations bill resulted in improper modification of legislation and thus was an unconstitutional exercise of the veto power. 398 S.C. at 588–89, 731 S.E.2d at 726–27. In that case, Governor Sanford purported to veto the portion of funds allocated to the State Budget and Control Board to be drawn from the General Fund, yet did not veto the purpose for which those funds were allocated. *Id.* at 583, 587, 731 S.E.2d at 723, 725. According to the Court, the "net result" of the Governor's line item veto was that "the total appropriation for each of the Board's programs, positions, and expenses was reduced by the amount the General Assembly had designed to be drawn from the General Fund, but the programs, positions, and expenses themselves were not eliminated." *Id.* at 587, 731 S.E.2d at 725.

The Court began its analysis in *Jackson* by defining "'item' for constitutional purposes," as "embrac[ing] a specified sum of money together with the 'object and purpose' for which the appropriation is made." *Id.* at 585, 731 S.E.2d at 725 (footnote omitted) (citing S.C. const. art. IV, § 21). The Court then stated that if "a line in the appropriations bill is vetoed in a constitutional manner and the veto is sustained, then the line is stricken and there is no longer any authority to expend state funds for the purpose stated on the line." *Id.* at 588, 731 S.E.2d at 726 (citation omitted). Finally, the Court concluded that the Governor's veto in that case was unconstitutional because "the Governor is empowered to veto 'items,' which comprise both the designated funds and the objects and purposes for which the appropriation is intended," but may not veto only part of an item. *Id.* at 589, 731 S.E.2d at 726.

Today, we clarify the language in *Jackson* defining "item" and discussing a line item's objects and purposes. What is meant is that the line item veto

eliminates any authority to expend the vetoed funds for the objects and purposes specified on the line. To the extent *Jackson* is read to imply that a line item's objects and purposes refer to the underlying legislation, we now recognize that these assertions in *Jackson* are imprecise. It is argued by DHEC that this language implies and should be construed to mean that a line item veto extends beyond a line in an appropriations act to affect an underlying permanent law. This implication is not intended.

The "objects and purposes" of a line item within an appropriations act merely refer to the label—designating the funding for a particular purpose—that the General Assembly must attach to any line item in an appropriations act. *See* S.C. const. art. IV, § 21; *Ex parte Georgetown*, 284 S.C. at 469, 327 S.E.2d at 656; *cf. Fla. H.R. v. Martinez*, 555 So. 2d 839, 843 (Fla. 1990) (defining a specific appropriation as an "identifiable, integrated fund which the legislature has allocated for a specified purpose" (citation omitted)).

We hold that a Governor's line item veto destroys only the funding provided for in that line item.[4] Accordingly, the Governor has no authority to utilize the line item veto power to negate the effect of a long-standing permanent law. The authority to enact, modify, or repeal legislation lies solely within the General Assembly's broader authority. *See McLeod*, 278 S.C. at 312, 295 S.E.2d at 636. As the Supreme Court of Florida has explained, the line item veto power "is intended to be a negative power, the power to nullify, or at least suspend, legislative intent. *It is not designed to alter or amend legislative intent.*" *Martinez*, 555 So. 2d at 843 (emphasis in original) (quoting *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980)).

While the line item in the 2013–2014 Appropriations Act provides funding for the CON program, the underlying CON Act mandates the existence of the CON program. Therefore, we hold that Veto 20 reached only as far as to nullify the object and purpose of section (II)(F)(2) of the 2013–2014 Appropriations Act—the

[4] Furthermore, to the extent that any language in this Court's prior decisions suggests that a Governor's veto may nullify more than just the funding provided for in a line item, we find that language is overly broad. *See, e.g.*, *Drummond v. Beasley*, 331 S.C. 559, 564, 503 S.E.2d 455, 457 (1998); *State ex rel. Long v. Jones*, 99 S.C. 89, 82 S.E. 882 (1914) (stating that when a line item veto was sustained, "everything embraced in that item failed to become law").

funding for the CON program and any other programs included in that line item.

The Governor's veto message leaves no doubt that she intended to use her line item veto power to abolish the entire CON program. However, the Governor is not empowered to exercise her veto pen in a manner that so broadly affects public policy and attempts to alter legislative intent by reaching back to repeal a permanent law. *See Hampton*, 403 S.C. at 403, 743 S.E.2d at 262 ("Included within the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be." (citation omitted)). Absent a proper delegation of power to a non-legislative body to make policy determinations, "policymaking is an intrusion upon the legislative power." *Id.* Similarly, we agree with the Supreme Judicial Court of Massachusetts that a "principle of great importance in our tripartite form of government is 'that it is for the Legislature, and not the executive branch, to determine finally which social objectives or programs are worthy of pursuit.'" *Op. of the Justices*, 376 N.E.2d 1217, 1221 (Mass. 1978) (citation omitted).

To permit the Governor to exercise her line item veto power to abolish the CON program—a program mandated by permanent law—would certainly alter and amend legislative intent. Moreover, expanding the line item veto power to allow it to reach a permanent law enacted years earlier by vetoing a line item in an appropriations act would violate the separation of powers doctrine.

Notwithstanding the Governor's inability to abolish a program established by permanent legislation through a line item veto, we acknowledge that the General Assembly may suspend or repeal permanent legislation and effectively abolish a program established by such law. Therefore, because the House of Representatives sustained Veto 20, we must analyze now whether the General Assembly intended to suspend DHEC's duty to administer the CON program for Fiscal Year 2013–2014.

B. General Assembly's Intent to Suspend

As discussed *supra*, it is the General Assembly's prerogative to modify or repeal legislation and to make policy decisions. *See Hampton*, 403 S.C. at 403, 743 S.E.2d at 262. Here, we find that the General Assembly did not intend to suspend DHEC's obligations under the CON Act for Fiscal Year 2013–2014.

There is no question that the General Assembly has the power, where there is no constitutional prohibition, to temporarily suspend a statute's operation. *McLeod*, 256 S.C. at 26, 180 S.E.2d at 640. An appropriations act, though generally temporary in duration, "has equal force and effect as a permanent statute" and may suspend the operation of a permanent statute during the time the appropriation act is in force. *Plowden v. Beattie*, 185 S.C. 229, 236, 193 S.E. 651, 654 (1937) (citations omitted). "When such intention is clearly manifest[,] this [C]ourt has no choice but to give force and effect thereto." *McLeod*, 256 S.C. at 26, 180 S.E.2d at 640.

The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). It is well-established that this Court will not construe a statute by concentrating on an isolated phrase. *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent."); *see also Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "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 light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Moreover, statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. *Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citations omitted).

In determining whether a permanent statute is suspended, we must look to the budget proviso juxtaposed with the permanent statute. *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 374, 718 S.E.2d 432, 435, 436 (2011). In this regard, there must be an "irreconcilable conflict" between the appropriations

act and the permanent statute before we will find the latter temporarily suspended. *Plowden*, 185 S.C. at 236, 193 S.E.2d at 654 (citations omitted). Thus, only provisions of a permanent statute that conflict with the current budget provisos are suspended. *Beaufort Cnty.*, 395 S.C. at 374, 718 S.E.2d at 436 (citing *McLeod*, 256 S.C. at 26, 180 S.E.2d at 640).

For example, in *McLeod*, the Court reconciled a controversy arising out of two legislative enactments dealing with state officers' salaries. 256 S.C. at 23, 180 S.E.2d at 639. A permanent statute and an appropriations act each provided differing salary amounts for state officers, such as the Governor and Lieutenant Governor.[5] *Id.* at 24, 180 S.E.2d at 639–40. Citing precedents requiring an "irreconcilable conflict" and manifest legislative intent to suspend a permanent statute, the Court found that the permanent statute designating salaries was suspended during Fiscal Year 1970–1971 because there was an express conflict. *Id.* at 27, 180 S.E.2d at 641.

Likewise, in *Beaufort County*, the Court considered whether an appropriations act allowing the State Election Commission to use funds toward a presidential primary suspended the temporal limitation of a permanent statute which authorized the State Election Commission and the county election commissions to conduct presidential primaries for the particular election cycle. 395 S.C. at 369–71, 718 S.E.2d at 434–35. The Governor vetoed the budget provisos, but the General Assembly overrode the vetoes. *Id.* at 374–75, 718 S.E.2d at 437. In holding that the appropriations act suspended the temporal limitation of the permanent statute and authorized the commissions to conduct a presidential primary, the Court discerned legislative intent from both "the statutory scheme *and* budget provisos," finding the General Assembly intended to temporarily suspend the conflicting temporal limitation of the permanent statute in favor of the budget proviso. *Id.* at 374, 718 S.E.2d at 436.

In contrast to *McLeod* and *Beaufort County*, we find no irreconcilable conflict between the CON Act and the absence of funding in the 2013–2014 Appropriations Act. The failure to fund the CON program does not negate the

[5] For example, the 1969 act fixed the Governor's salary at $35,000 and the 1970 appropriations act provided for a $25,000 salary. *McLeod*, 256 S.C. at 24, 180 S.E.2d at 639.

directive issued by the General Assembly (and detailed in the CON Act) mandating DHEC administer the CON program.

Even more importantly, we find that in sustaining Veto 20, the General Assembly did not intend to suspend DHEC's duty to administer the CON program. We must evaluate the effect of Veto 20 in light of the entirety of the CON Act. The CON program is mandated by the CON Act, a free-standing, permanent piece of legislation that has evolved into an expansive regulatory scheme, not by a line item appropriation. DHEC does not argue that the General Assembly has repealed the entire CON Act, but only that Veto 20 suspends DHEC's duty to administer the CON program. We cannot conceive that by sustaining Veto 20, the General Assembly intended to abolish a program mandated by permanent law which itself has not been repealed.[6]

Further, in construing the General Assembly's intent, we find great significance in the fact that only the House of Representatives had the opportunity to override Veto 20. Because the House failed to overrule Veto 20, the veto was not sent to the Senate for its consideration. The Senate never had the opportunity to demonstrate its intent. Thus, a finding that the House of Representatives' decision to sustain Veto 20 reflected the General Assembly's intent as a whole to suspend the CON program would ignore an entire chamber's intent. We cannot sanction such a result.

Finally, DHEC urges this Court to consider the Governor's veto message in determining legislative intent. DHEC argues that by sustaining Veto 20, the House of Representatives agreed with the Governor's intention to abolish the CON program. We disagree. The Governor's veto message is not a part of the 2013–2014 Appropriations Act and "does not have the force of law [because] it is [neither] a legislative act nor an Executive Order." *Drummond*, 331 S.C. at 564,

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[6] As evidence of legislative intent to suspend the CON program, DHEC points to the final proviso in the 2013–2014 Appropriations which states that "[a]ll acts or parts of acts inconsistent with any of the provisions of Part IA or IB of this act are suspended for Fiscal Year 2013–2014." We do not find that this provision suspends the CON program. Not only was this standard provision included pre-veto as a part of the General Assembly's 2013–2014 appropriations bill initially *granting* the funding DHEC requested, we cannot construe this provision in isolation.

503 S.E.2d at 458. To hold otherwise would violate the separation of powers doctrine by altering the allocation of powers granted to the three branches of government by our state's constitution. Therefore, the Governor's veto message abolishing the CON program has no force of law. The power to abolish the CON program lies exclusively within the realm of the General Assembly and here, we cannot discern the requisite intent.

Although Veto 20 effectively struck the funding for subsection (II)(F)(2) in the 2013–2014 Appropriations Act, we find that in sustaining Veto 20, the General Assembly did not intent to suspend the CON program. Therefore, we hold that DHEC has a duty to administer the CON program, as contemplated by the CON Act, for Fiscal Year 2013–2014.

II. Funding the CON Program

Petitioners argue that DHEC is required to fund the CON program, regardless of the 2013–2014 Appropriations Act's failure to appropriate funding for the program. We agree.

Our state's constitution unquestionably permits a Governor's line item veto—if constitutional and not overridden by the General Assembly—to eliminate a line item providing funding for a particular purpose. *See* S.C. Const. art. IV, § 21. Nevertheless, under separation of powers principles, "[e]xecutive agencies are required to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid." *Edwards*, 383 S.C. at 91, 678 S.E.2d at 417 (citing *Layman v. State*, 376 S.C. 434, 450, 658 S.E.2d 320, 328 (2008)). In a case such as this, we recognize one caveat: "[a]s creatures of statute, regulatory bodies such as DHEC possess only those powers which are specifically delineated." *City of Rock Hill v. S.C. Dep't of Health & Envtl. Control*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990).

We have held that the permanent law mandating the CON program was not affected by House of Representatives' decision to sustain Veto 20. Under the CON Act, DHEC's responsibility to administer the CON Act is not discretionary, and thus, DHEC must comply with the CON Act—a duty that inevitably encompasses funding the CON program.

DHEC contends that the General Assembly's failure to provide funding for the CON program in the 2013–2014 Appropriations Act forecloses the possibility of administering the CON program. We view this argument as a smoke screen. Contrary to DHEC's argument, we conceive at least two alternate means of funding the CON program specifically delineated to DHEC.

First, DHEC may utilize its emergency regulatory authority to adopt a fee structure to support the administration of the CON program. Section 44-7-150(5) of the South Carolina Code provides that DHEC "may charge and collect fees to cover the cost of operating the [CON] program, including application fees, filing fees, issuance fees, and nonapplicability/exemption determination fees." S.C. Code Ann. § 44-7-150(5) (2010). DHEC "shall develop regulations which set fees as authorized by this article." *Id.* The statute requires DHEC to determine the level of the fees "after careful consideration of the direct and indirect costs incurred by [DHEC] in performing its various functions and services in the [CON] program." *Id.*

DHEC points to the statute's provision requiring that the first $750,000 collected in accordance with this section must be deposited into the general fund of the state. *Id.* However, any fee collected in excess of $750,000 "must be retained by [DHEC] and designated for the administrative costs of the [CON] program." *Id.* According to DHEC, it collected less than $750,000 in fees in each fiscal year since 2010, meaning that all money collected during those years was deposited into the state's general fund. Therefore, DHEC argues that it is unlikely that DHEC could collect enough fees in Fiscal Year 2013–2014 to retain enough funding to operate the CON program. We find this argument unpersuasive. Section 44-7-150(5) clearly authorizes DHEC to charge and collect fees at any level of its choosing. Neither the 2013–2014 Appropriations Act nor any other law limits that authority.

Second, the 2013–2014 Appropriations Act contains a general proviso stating, in pertinent part:

> 117.9. (GP: Transfers of Appropriations) Agencies and Institutions **shall be authorized to transfer appropriations** within programs and **within the agency** with notification to the Division of Budget and Analyses and Comptroller General. No such transfer may exceed twenty percent of the program budget. Upon request, details of such

> transfers may be provided to members of the General Assembly on an agency by agency basis.

(Emphasis added.) Veto 20 and the General Assembly's failure to fund the CON Program in the 2013–2014 Appropriations Act do not prevent DHEC from exercising this authority to transfer appropriations within the agency.[7]

DHEC has indicated an unwillingness to resort to this funding option. However, we find that proviso 117.9 provides DHEC with a feasible mechanism by which it could fund the CON program and thus carry out its statutorily mandated obligation. Therefore, we find that the General Assembly, through section 44-7-150(5) and proviso 117.9, has provided DHEC with possibilities for funding the CON program other than the receipt of funds from the 2013–2014 Appropriations Act. While we hold that DHEC must fund the CON program, we decline to specify the manner in which DHEC must do so.

CONCLUSION

For the foregoing reasons, we hold that the House of Representatives' decision to sustain Veto 20 did not suspend DHEC's duty to administer the CON program. Therefore, we declare that DHEC has a duty to administer and fund the CON program for Fiscal Year 2013–2014 as contemplated by the CON Act.

JUDGMENT FOR PETITIONERS.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLECIONES, J., concurring in part and dissenting in part in a separate opinion.

[7] Indeed, Chairman White encouraged DHEC to do just that in his floor comments on the veto.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, when the House sustained the Governor's veto, the effect was to prevent the expenditure of funds by DHEC for the CON program for fiscal year 2013-2014. *Jackson v. Sanford*, 398 S.C. 580, 731 S.E.2d 722 (2011). In my view, the CON program and its requirements remain the law, but all applications in process are suspended, no new applications can be accepted, and all other matters are in limbo unless and until the program is again funded.

The Governor's Veto 20 provides:

> **Veto 20 Part IA, Page 100; Section 34, Department of Health and Environmental Control; II. Programs and Services, F. Health Care Standards, 2. Facility/Service Development – Total Facility & Service Development: $1,759,915 Total Funds; $1,422,571 General Funds**
>
> The Certificate of Need program is an intensely political one through which bureaucratic policymakers deny new healthcare providers from offering treatment. We should allow the market to work rather than politics.[8]

In my view, this is an effective line item veto of appropriations found in Part IA, § 34, II F. 2, to wit:

F. **HEALTH** CARE STANDARDS

2. FACIL/SVC DEVELOPMENT

PERSONAL SERVICE

CLASSIFIED POSITIONS	1,376,569	1,187,333
	(9.74)	(6.83)
UNCLASSIFIED POSITIONS	117,743	117,743

[8] To the extent the Governor's veto message indicated her intent to "abolish" the CON program, it is irrelevant. *E.g. Drummond v. Beasley*, 331 S.C. 559, 503 S.E.2d 455 (1998).

	(1.00)	(1.00)
OTHER PERSONAL SERVICES	15,643	8,818
TOTAL PERSONAL SERVICE	1,509,955	1,313,894
	(10.74)	(7.83)
OTHER OPERATING EXPENSES	249,960	128,677
*TOTAL FACILITY & SERV DEVEL	1,759,915	1,442,571
	(10.74)	(7.83)

I agree with the majority that the effect of Veto 20 was to eliminate funding for the CON program for fiscal year 2013-2014. *State ex rel. Long v. Jones*, 99 S.C. 89, 82 S.E. 882 (1914). The House did not override this veto, and I know of no basis for a court to inquire into the "intent" behind the House vote using maxims of statutory construction.[9] Nor do I understand the majority's concern that the Senate

[9] The majority errs when it relies upon statements concerning "intent" made by members, whether found in the House Journal or other sources. Pursuant to the enrolled bill rule:

> [T]he true rule is, that when an act has been duly signed by the presiding officers of the General Assembly, in open session in the Senate-House, approved by the Governor of the state, and duly deposited in the office of the secretary of state, it is sufficient evidence, nothing to the contrary appearing upon its face, that it passed the General Assembly, and that it is not competent either by the journals of the two houses, or either of them, or by any other evidence, to impeach such an act. And this being so, it follows that the court is not at liberty to inquire into what the journals of the two houses may show as to the

did not have the opportunity to vote on the Governor's veto since the House did not override it. This procedure is mandated by our Constitution, which operates in the same manner whenever there is a gubernatorial veto, that is, the vetoed bill is returned first to the chamber where it originated. Only if that body votes to override the veto by a two-thirds majority does the other chamber have the opportunity to consider the veto. S.C. Const. art. IV, § 21. I simply do not understand why the majority finds "great significance" in the fact the Constitution's procedure was honored here.

We have recently held that if an appropriations veto is lawful (and there is no challenge to the veto here) and the veto is not overridden (and there is no challenge to the House vote), then "there is no longer any authority to expend state funds for

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> successive steps which may have been taken in the passage of the original bill.
>
> The court gives the following reasons for the adoption of the enrolled bill rule: 'Public policy, certainty as to what the law is, convenience, and that respect due by the courts to the wisdom and integrity of the Legislature, a co-ordinate branch of the government, all require that the enrolled bill, when fair upon its face, should be accepted without question by the courts.'
>
> . . .
>
> Having been properly authenticated as required by the Constitution, it becomes the "sole expository of its own contents and the conclusive evidence of its existence and valid enactment," and this court cannot look to the Journals of either House or to other extraneous evidence in order to ascertain its history or its provisions, or to inquire into the manner of its enactment.
>
> *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 19-20, 186 S.E. 625, 629 (1936) (internal citations omitted).

There is no legal basis for an inquiry into "intent" here.

the purpose stated on the line." *Jackson v. Sanford, supra*; *see also State ex rel. Long, supra*. I believe that the majority and I agree on the meaning of this rule: there can be no funding for the CON program during fiscal year 2013-2014 unless and until the General Assembly appropriates funds for this purpose. *See* Singer & Singer 1 *Southerland Statutory Constr.* § 16:9 (2010) (if gubernatorial appropriation veto not overridden, legislature may reenact a separate appropriations act).

I know of no authority that would permit this Court to order DHEC to fund the CON program in the face of the House's failure to override the Governor's line item veto. Such interference with the prerogatives given to the executive and the legislature under our Constitution is a clear violation of the separation of powers doctrine. *Compare Hampton v. Haley*, 403 S.C. 395, 743 S.E.2d 258 (2013) (allowing executive agency to decline to spend legislatively appropriated funds based on its own policy choices would violate the doctrine). Further, to read the proviso in Part IB, § 117.9, which permits agencies to redistribute appropriated funds, as does the majority, negates the Governor's line item veto authority and undermines our constitutional system. Under the majority's reading, an agency is free to ignore the will of the Governor as expressed through her veto, and that of the General Assembly in sustaining that veto, and may spend money as it sees fit. The majority cites no authority to support its construction of this proviso,[10] and I will be surprised if there were any as such a reading would effectively negate the Governor's veto authority. Finally, if it were true that DHEC could revive the dormant CON program simply by raising fees through its emergency regulatory authority, then any rogue agency could operate in defiance of the Constitution which gives the Governor and the General Assembly the authority to suspend the operation of a program by line item veto and subsequent vote.

I agree with the majority that the CON program continues to exist despite the Governor's veto and the House's failure to override that veto, and that its statutory

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[10] Since this proviso does not "specify objects and purposes" nor "appropriate several amounts in distinct items and sections," it is not subject to the Governor's veto authority. S.C. Const. art. IV, § 21; *Florida Senate v. Harris*, 750 So.2d 626 (Fla. 1999). Under the majority's view, the inclusion of this "unvetoable" proviso in an appropriations bill which is included only to satisfy the terms of S.C. Code Ann. § 11-9-10) gives entities receiving funds under that bill free reign to spend those monies as they see fit.

and regulatory requirements must be met before one may proceed with a regulated activity. However, until funding for this program is reinstated by the General Assembly, no new matters can be initiated and all pending matters are in limbo.

For the reasons given above, I respectfully dissent from the majority's finding that the Court can order DHEC to fund the CON program.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jacqueline Y. Carter, Respondent,

v.

Verizon Wireless and American Home Assurance Co., Appellants.

Appellate Case No. 2012-212924

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

Opinion No. 5191
Heard December 11, 2013 – Filed January 29, 2014
Withdrawn, Substituted and Refiled April 16, 2014

AFFIRMED IN PART, REVERSED IN PART

Grady Larry Beard and Nicolas Lee Haigler, both of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Appellants.

Jeremy Andrew Dantin, of Harrison White Smith & Coggins, PC, of Spartanburg, for Respondent.

CURETON, A.J.: After the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) denied Jacqueline Carter (Claimant) benefits for an alleged change of condition to her injured knee, the circuit court reversed. Verizon Wireless Southeast and American Home Assurance Company (collectively

Employer) appeal, arguing the circuit court erred in reversing the Appellate Panel's determinations concerning a change in Claimant's condition, intervening causes,[1] and future medical treatment. Employer further argues the form of the circuit court's order adversely affected its ability to comply with appellate court rules. We affirm in part and reverse in part.

FACTS

On December 27, 2006, Claimant suffered a work-related injury to her left knee. After Dr. Walter Grady performed surgery on her knee in June 2007, Claimant reached maximum medical improvement (MMI) on March 3, 2008. At that time, Dr. Grady assigned Claimant an 18% impairment rating.

In February 2009, Claimant fractured her right ankle and returned to Dr. Grady for care. She was wheelchair-bound for six to eight months while it healed. At her October 2009 workers' compensation hearing, Claimant stated her right ankle had healed completely. On December 3, 2009, Commissioner Barden awarded Claimant workers' compensation benefits for a 25% permanent partial disability to her left lower extremity, including causally-related medical care and treatment. Commissioner Barden found Claimant "had pre-existing advanced degenerative joint disease." Additionally, Commissioner Barden concluded Claimant was "entitled to causally-related future medical treatment that may tend to lessen her period of disability, as recommended by the authorized treating physician, *including* Darvocet or comparable medication."[2] (emphasis added).

In the summer of 2010, Claimant claimed to have noticed increased pain and swelling in her left knee. On November 4, 2010, she returned to Dr. Grady, who examined her and increased her impairment rating from 18% to 42%. On November 29, 2010, Claimant filed a Form 50, alleging she needed additional medical treatment due to a change of condition.

I. Testimony

[1] We view the Appellate Panel's findings on intervening causes as alternative findings.

[2] Commissioner Barden's decision was apparently affirmed by the Appellate Panel.

On February 3, 2011, the parties deposed Dr. Grady. Dr. Grady testified he typically told patients that if their pain level was constantly above a level five, they should consider a knee replacement. Although Claimant's pain level was constantly at level five or above in 2008, Dr. Grady did not recommend knee replacement to her at that time because (1) she was only forty-nine years old and (2) he believed a patient knew better than anyone else when he or she reached the point of needing a knee replacement. According to Dr. Grady, Claimant was eligible for a knee replacement going back to 2008, but whether or when to undergo the surgery was up to Claimant.

Dr. Grady opined that from the last time he saw Claimant in January 2008 to the date of his deposition, her knee had "materially worsened" due to natural degeneration of her arthritic condition. Based on his November 2010 examination, Dr. Grady determined Claimant's knee had materially worsened because her joint space had narrowed, the medial tibial femoral joint compartment had collapsed, and she reported increased pain. He calculated her increased disability level based solely upon the two-millimeter narrowing of her joint space.

Dr. Grady testified he lacked sufficient information to determine whether any of Claimant's new complaints originated before or after the October 2009 hearing. Nonetheless, he stated his medical opinion, "within a reasonable degree of medical certainty," was that Claimant experienced "a natural progression of her disease process from the time that [he] did surgery on her until the time that [he] saw her on November 4th, 2010." He agreed that Claimant's worsening condition was "more of a degenerative[,] insidious, slow problem" rather than "acute in nature." Dr. Grady acknowledged his opinion was influenced by the nature of the exercise routine Claimant was participating in at the time she realized her knee pain was increasing. However, although Dr. Grady conceded her exercise possibly could have accelerated the deterioration in her condition, he believed the end result would have been the same, whether she exercised or not.

On February 16, 2011, the parties appeared before Commissioner Wilkerson. Claimant testified she was working as a bank teller and was able to sit or stand as needed to do her job. Claimant explained that after her right-ankle fracture healed and she was released from the wheelchair, she began exercising at the gym in order to lose weight and strengthen her knee. She became aware of increased problems with her left knee in June of 2010, after she started water aerobics. Claimant chose

water aerobics over other exercise options because it limited the pressure on her knee, and Dr. Grady had recommended it for her after her surgery.

Claimant denied ever injuring herself while doing water aerobics. She was still doing water aerobics at the time of the hearing, despite the pain in her knee, and had lost forty-eight pounds since the previous summer. Claimant's pain level was an eight on a ten-point scale at the time of the hearing. Because Darvocet was no longer available, Claimant's family physician prescribed Tramadol for her. Claimant testified Tramadol did not adequately handle her pain. Claimant admitted the following statements from her 2009 hearing remained true: (1) she felt pain every day and every night, (2) the pain was "an uncomfortable throbbing feeling" that worsened the more she worked, (3) she was unable to sleep without prescription medication, (4) she had difficulty walking long distances, (5) she could not walk more than about ten minutes without problems, and (6) she could not maneuver stairs without support.

However, according to Claimant, several of her complaints at the time of the hearing differed from her 2009 complaints. Specifically, the pain she felt at the time of the hearing was "[a]bsolutely" worse than the pain she felt in 2009, having risen from a five to an eight on a ten-point scale. She had crepitus on flexion and extension, evident by the crunching sound in her knee. Finally, her leg would not bend or flex as much as it had in 2009, and she had fluid on her left knee.

In an order dated April 18, 2011, Commissioner Wilkerson denied Claimant's request for benefits, finding she "did not sustain a compensable change of condition with regard to her left knee." He found "at least two intervening causes – Zumba [classes] as well as a broken right ankle in February of 2009 . . . caused [Claimant] to place more weight on her left knee" and her "current problems are not related to her 2006 accident with Verizon." Furthermore, Commissioner Wilkerson concluded Commissioner Barden's order of December 3, 2009, entitled Claimant "to causally-related future medical treatment that may tend to lessen her period of disability, as recommended by the authorized treating physician, *specifically restricted* to Darvocet or a comparable medication." (emphasis added).

II. Appeals

Claimant appealed, and the Appellate Panel affirmed Commissioner Wilkerson's order in its entirety. The Appellate Panel restated the findings of fact and

conclusions of law from Commissioner Wilkerson's order, including the specific restriction of Claimant's future medical treatment to "Darvocet or a comparable medication."

Claimant appealed to the circuit court,[3] which, in an order dated July 16, 2012, reversed the decision of the Appellate Panel. After reviewing the evidence in the record, the circuit court concluded the Appellate Panel's findings were affected by errors of law. In particular, the circuit court ruled the record contained "no substantial evidentiary or legal support" for the Appellate Panel's finding that Claimant did not suffer a change of condition. Next, it ruled the Appellate Panel's finding of two intervening causes of Claimant's change of condition was "both an error of law and clearly erroneous in light of the evidence." Finally, the circuit court reversed the Appellate Panel's modification to the provision in the December 3, 2009 order allowing for future medical treatment, specifically stating Claimant

> is entitled to the treatment recommended by the authorized treating physician relative to [her change of] condition, namely a total knee arthroplasty to be performed at a suitable time as determined by [Claimant] and the authorized treatment physician, as well as other medications or treatment as recommended by the authorized treating physician.

This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Appellate Panel. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). Under the APA, an appellate court may reverse or modify the decision of the Appellate Panel if the substantial rights

[3] Because Claimant's injury occurred in 2006, her appeal was to the circuit court under former section 42-17-60 of the South Carolina Code (1985). The current version, under which appeals from the Appellate Panel are to the court of appeals, applies only to injuries sustained on or after July 1, 2007. 2007 Act No. 111, Pt. I, Section 30.

of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2012); *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010).

The Appellate Panel is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, an appellate court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence. *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Appellate Panel's] finding from being supported by substantial evidence." *Id.*

LAW/ANALYSIS

I. Change of Condition

Employer first asserts the circuit court erred in reversing the Appellate Panel's determination Claimant did not suffer a change of condition. We agree.

Section 42-17-90(A) of the South Carolina Code (Supp. 2012) permits the review of a previous workers' compensation award "on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation." A change of condition in a workers' compensation claim is "a change in the claimant's physical condition as a result of the original injury, occurring after the first award." *Causby v. Rock Hill Printing & Finishing Co.*, 249 S.C. 225, 227, 153 S.E.2d 697, 698 (1967).

"In workers' compensation cases, this [c]ourt, as well as the circuit court, serves only to review the factual findings of the Appellate Panel and to determine whether the substantial evidence of record supports those findings." *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 285, 678 S.E.2d 825, 833 (Ct. App. 2009).

Commissioner Barden's decision of December 3, 2009, states she considered not only medical records dated up to and including March 3, 2008, but also the testimony Claimant gave on October 15, 2009, which included statements about her condition on that date. Accordingly, we find Commissioner Barden made Claimant's initial award based upon a determination of Claimant's condition as of October 15, 2009.

We do not view the change of condition issue in this case to be as difficult as the parties view it. Clearly Commissioner Barden determined Claimant "had pre-existing advanced degenerative joint disease." A careful reading of Dr. Grady's testimony reflects there was a "natural progression" of her disease.[4] At one point, he testified that Claimant's condition was "more of a degenerative[,] insidious, slow problem." He opined, "It's my professional medical opinion within a reasonable degree of medical certainty that [Claimant] per my examination, history, physical, etc.[,] had a natural progression of her disease process from the time that I did surgery on her until the time that I saw her on November 4th, 2010." He also stated that while it was possible Claimant's exercising may have accelerated her condition, he believed "we are going to arrive at the same end result whether it would have been six months later, eight months later, or [twelve] months later, as we did when I saw her on November 4." Finally, while Dr. Grady and Claimant disagreed as to her level of pain when he saw her on November 4, 2010, he testified that it remained the same as when he saw her in 2008. Of course, questions of credibility rest within the discretion of the Appellate Panel, not the circuit court or this court.

Accordingly, we hold Dr. Grady's testimony and portions of Claimant's testimony constitute substantial evidence supporting the Appellate Panel's decision that Claimant did not suffer a change of condition. Further, any change in Claimant's condition was the result of the natural progression of her pre-existing degenerative joint disease and not the result of her original injury. *See Brown v. R.L. Jordan Oil Co.*, 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987) ("[A] condition due *solely* to natural progression of a preexisting disease is not compensable.").

[4] Claimant may have confused the degeneration of her condition caused by her injury with the degeneration of her condition resulting from the natural progression of her pre-existing degenerative joint disease.

II. Future Medical Treatment

Employer asserts the circuit court erred in reversing the Appellate Panel's modification of the language in the December 3, 2009 order concerning the extent of Claimant's future medical benefits. We disagree.

An appellate court may reverse or modify the decision of the Appellate Panel if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or not supported by substantial evidence in the record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2012).

In December 2009, after reciting Claimant was taking Darvocet for both her left knee injury and her non-work-related right ankle fracture, Commissioner Barden found Claimant was "entitled to receive *Dodge*[5] medicals that may tend to lessen her period of disability, as recommended by the authorized treating physician, *including* Darvocet or comparable medication." (emphasis added). In April 2011, Commissioner Wilkerson stated Dr. Grady had testified Claimant's treatment had not changed, found "Darvocet or a comparable medication [wa]s the only compensable medication," then concluded:

> Under § 42-17-60 and *Dodge v. Bruccoli, Clark, Layman, Inc.*, . . . and pursuant to the Order of Commissioner Barden filed December 3, 2009, [C]laimant is entitled to causally-related future medical treatment that may tend to lessen her period of disability, as recommended by the authorized treating physician, *specifically restricted* to Darvocet or a comparable medication.

(emphasis added).

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[5] *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 582, 514 S.E.2d 593, 597 (Ct. App. 1999) (holding employers are obligated to provide injured workers with medical treatment beyond the date of MMI upon a finding by the Workers' Compensation Commission that the treatment "would tend to lessen the period of disability").

Although the Appellate Panel did not explain why it imposed this restriction on Claimant's future medical care, it echoed Commissioner Wilkerson's decision to replace "including" with "specifically restricted to," adding only that its finding "that Darvocet or a comparable medication is the only compensable medication" "clarifie[d] any earlier decision on that point."

We find the Appellate Panel's order misstates Dr. Grady's opinions and deposition testimony. At his deposition, Dr. Grady testified "within a reasonable degree of medical certainty" that Claimant experienced "a natural progression of her disease process from the time that [he] did surgery on her until the time that [he] saw her on November 4th, 2010." He repeatedly opined that from the last time he saw Claimant in January 2008 to the date of his deposition, the condition of Claimant's knee had materially worsened due to the natural degeneration of her arthritic condition. According to Dr. Grady, Claimant was already eligible for a knee replacement in 2008, but he left the decision to her because he believed a patient knew best whether she needed surgery.

The replacement of "including" with "specifically restricted to" in Commissioner Wilkerson's April 2011 order deprived Claimant of the opportunity to seek any medical treatment besides pain medications for her deteriorating knee condition. This is contrary to the previous decision of Commissioner Barden which was either not appealed or was affirmed by the Appellate Panel.[6] Moreover, the record does not establish Claimant is no longer in need of a total knee arthroplasty or other medications and treatment as recommended by the authorized treating physician. We find the Appellate Panel's restriction affected Claimant's substantial right to receive future medical care and treatment that would tend to lessen the period of her disability. Accordingly, the circuit court did not err in striking the restriction.

CONCLUSION

We reverse the circuit court's determination that substantial evidence in the record does not support the Appellate Panel's finding that Claimant suffered no change of condition. Furthermore, we find the circuit court did not err in reversing the Appellate Panel's modification of Commissioner Barden's decision governing

[6] The record before this court does not include proceedings related to this decision.

Claimant's future medical care and treatment in the 2009 award. We conclude Employer's remaining issues on appeal are moot in view of this decision.

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

H. Eugene Hudson, Appellant,

v.

Mary Lee Hudson, Respondent.

Appellate Case No. 2012-212690

Appeal From Horry County
Timothy H. Pogue, Family Court Judge

Opinion No. 5217
Heard March 11, 2014 – Filed April 16, 2014

REVERSED

C. Dixon Lee, III, of McLaren & Lee, of Columbia, and E. Windell McCrackin, of McCrackin, Barnett & Richardson, LLP, of Myrtle Beach, for Appellant.

Carolyn R. Hills and James L. Hills, both of Hills & Hills, P.C., and Russell Warren Mace, III, and Nicole N. Mace, of The Mace Firm, all of Myrtle Beach, for Respondent.

SHORT, J.: In this divorce action, H. Eugene Hudson (Husband) appeals the family court's equitable distribution award to Mary Lee Hudson (Wife). Husband argues the family court erred in the following rulings: (1) finding a prenuptial

agreement (the Agreement) was unconscionable; (2) awarding an equitable interest in the increase in value of allegedly nonmarital property; (3) exercising jurisdiction over allegedly nonmarital property; (4) failing to make specific findings of fact; and (5) requiring Husband to pay a portion of Wife's attorney's fees. We reverse.

FACTS

The parties began dating in 1995 or 1996 and became engaged in November 1999. Husband was a licensed attorney, but he was no longer practicing. Husband owns his own business, Myrtle Beach Lifeguards, Inc. (Lifeguards), and he has numerous profitable investments. Wife has an Associate's degree in fashion merchandising, and she has spent most of her career in networking and marketing. The marriage was Husband's second and Wife's first. No children were born of the marriage. At the time of the marriage, Husband was sixty-three years old and Wife was forty-one years old. The parties separated on October 19, 2008.

The parties entered into the Agreement on February 4, 2000, and were married on February 19, 2000. The Agreement provides in relevant part:

> 7. The Husband hereby waives, discharges, releases, and quit-claims any and all right, title or interest whatsoever which he may claim in the property now owned, or hereafter acquired, of Wife by reason of this marriage.
>
> 8. The Wife hereby waives, discharges, releases, and quit-claims any and all right, title or interest whatsoever which she may claim in the property now owned, or hereafter acquired, of Husband by reason of this marriage.
>
> 9. Each party waives, discharges, and releases any and all claims and rights that he or she may acquire by reason of the marriage, including, but not limited to, the following:
>
> . . . .

> d. any claim for alimony, support, any interest in any asset in the name of the other party, or any other name arising from the marriage . . . .

Husband filed this divorce action. The family court bifurcated the final hearing to first determine the validity of the Agreement and to then take testimony on the remaining issues.

Husband testified he believed the Agreement would protect Lifeguards and all income derived therefrom. He understood "if the marriage didn't work out that it would place the parties back where they were." Wife testified she believed the Agreement's purpose was to protect Husband's family property, including a flea market. The family court found the parties intended to protect the "lifeguard service."

Husband's attorney drafted the Agreement. Husband testified he recommended Wife take the Agreement to an attorney, Steven Solomon, with whom he had once shared an office building. Solomon and Husband were allegedly close friends and colleagues. Wife testified Husband called her on February 4 to sign the Agreement. He allegedly told her she could not use her attorney of choice, Alan Clemmons, but she had to use Solomon. Wife did not understand she could not use Clemmons because he was employed with Husband's lawyer's firm at the time.

Wife testified she never saw the Agreement prior to arriving at Solomon's office, and she never read it. She and Solomon talked for about an hour while Solomon flipped through the Agreement. Wife testified she expressed concern to Solomon about the Agreement and told him she had not read it. She also expressed her belief the Agreement's purpose was to protect Husband's family's flea market property because Husband was concerned about it. Solomon allegedly discussed the family property with her, and told her she was protected and the Agreement was fair. According to Wife, Solomon discussed portions of the Agreement, but he never explained she was waiving alimony, inheritance rights, or marital earnings. Rather, Solomon told Wife that Husband was a "fine individual, he'd known him for a very long time." Wife went from Solomon's office to Husband's attorney's

office and signed the Agreement with Husband present on February 4, 2000.[1] Neither Husband nor Wife paid Solomon a fee.

Wife testified the wedding plans were in full force, the wedding was in two weeks, she had sold her vehicle, and she had quit her job at the time she signed the Agreement. She explained that under the circumstances, she would have signed the Agreement regardless of whether it was fair, unless she knew it was fraudulent.

Dr. Douglas Ritz, a clinical psychologist, testified he evaluated Wife. Ritz noted the two-week time frame between Wife signing the Agreement and the date of the wedding added a heightened sense of urgency to Wife. He further agreed Wife had so much confidence and trust in Husband that "she would do most anything he requested." Dr. Ritz concluded Wife was not under the legal definition of duress when she signed the Agreement. However, he believed she would have been devastated to walk away from the relationship and the impending wedding at the time. Dr. Ritz opined Wife was capable at the time the Agreement was signed, but she was emotional and trusted Husband. He concluded Wife would not have been able to understand the Agreement in the short period of time she was with Solomon.

Husband admitted Wife was a good wife; shopped for groceries and cooked; and paid for renovations to the home. Wife testified she also helped Husband at Lifeguards, including computerizing the business, entertaining the lifeguards, and setting up and taking down umbrellas and chairs.

Husband omitted the flea market property and a franchise fee agreement from his financial declaration attached to the Agreement. Husband claimed he omitted the flea market property because at the time the Agreement was signed, his mother had a life estate in the property, and he had a remainder interest. He claimed he omitted the franchise fee agreement because although the franchise agreement was in his name, he leased it to Lifeguards for $50,000 per year and considered it Lifeguards' asset.

Wife's financial expert, Jeffrey E. Kinard, concluded the marital portion of Husband's earnings during the marriage was $551,878. Kinard also conservatively

[1] Husband testified he was not present when Wife signed the Agreement. Wife testified they signed the Agreement together.

estimated the value of Lifeguards at $1.1 million and attributed $500,437 to a "marital allocation."

The family court issued an order filed January 12, 2012, and it held a hearing on both parties' motions to reconsider. In its amended final order, filed June 21, 2012, the family court found Wife was not under duress at the time she signed the Agreement. As to unconscionability, the family court made the following findings:

> This Court does not find that the [A]greement is unconscionable as far as it deals with alimony and support. However, as it deals with equitable division of marital property - in other words, the earnings, marital earnings or increase in value of non-marital property, I do find that to be unconscionable in this action.

Thereafter, the court found Kinard was the only expert witness who testified as to the valuation of Husband's business holdings, and it found his work and conclusions "to be entirely credible and believable." The court equitably divided the "marital estate" by finding net marital earnings of $552,378. After considering the contributions of the parties to the marriage, the court awarded Wife a 45% share and Husband a 55% share. The court found Wife responsible for her own business-related debt of $16,783 and awarded her $248,070 as marital property division and $52,000 in attorney's fees and costs. Husband's appeal follows.

STANDARD OF REVIEW

On appeal from the family court, an appellate court reviews factual and legal issues *de novo*. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011).

LAW/ANALYSIS

1. Enforceability of the Agreement

Husband argues the family court erred in finding the Agreement was unconscionable as to equitable distribution. We agree.

Our supreme court adopted the following test to determine whether a prenuptial agreement should be enforced: "(1) Was the agreement obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?" *Hardee v. Hardee*, 355 S.C. 382, 389-90, 585 S.E.2d 501, 504 (2003) (internal quotation marks omitted).

Acknowledging this test, the family court found Wife was not under duress at the time she signed the Agreement, and the enforceability of the Agreement was met on all aspects of the first prong of the *Hardee* test. The family court further found the following:

> As far as the third prong of the *Hardee* test, as to whether the facts and circumstances have changed since the [A]greement was executed, so as to make its enforcement unfair and unreasonable, I find that the provisions of the . . . [A]greement that deal with alimony and support will be upheld.

As to unconscionability, which is the second prong of the test, the family court found the Agreement unconscionable as to equitable division. Thus, we review whether the Agreement, regarding equitable division, was unconscionable and whether facts and circumstances have changed so as to make enforcement of the Agreement unfair or unreasonable.

Our supreme court in *Hardee* defined unconscionability as "the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Hardee*, 355 S.C. at 390, 585 S.E.2d at 505. Courts are limited to considering the facts and circumstances that exist at the time of the execution of the contract when determining unconscionability. *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005).

Under South Carolina's law governing unconscionability, we find the family court erred in finding the Agreement was unconscionable as to equitable distribution.

Prenuptial agreements by their nature are agreements entered into prior to marriage to resolve support and property division if the marriage ends. *Id*. at 264, 612 S.E.2d at 473. Such agreements "are not opposed to public policy but are highly beneficial to serving the best interest of the marriage relationship." *Stork v. First Nat'l Bank of S.C.*, 281 S.C. 515, 516, 316 S.E.2d 400, 401 (1984).

Husband and Wife both cite *Hardee*, which we find distinguishable. The wife in *Hardee*, while precluded from alimony and attorney's fees, was not barred from receiving an equitable division of the property acquired during the parties' marriage. *See Hardee*, 355 S.C. at 386-87, 585 S.E.2d at 503. The agreement in *Hardee* provided that "all properties of any kind or nature . . . which belong to each party, shall be and forever remain the personal estate of the said party . . . ." *Id.* at 384, 585 S.E.2d at 502. However, the agreement in *Hardee* also provided: "The provisions contained herein shall in no way affect the property, whether real, personal or mixed which shall be acquired by the parties, whether titled separately or jointly, subsequent to the date of this Agreement." *Id.* at 385, 585 S.E.2d at 502 (emphasis removed). The supreme court found the "provision patently and unambiguously allow[ed] Wife equitable distribution of any and all property acquired by the parties during the marriage . . . ." *Id.* at 387, 585 S.E.2d at 503.

In this case, the Agreement provided both Husband and Wife waived "any and all right, title or interest whatsoever which [he or] she may claim in the property now owned, or hereafter acquired, of [the other] by reason of this marriage." The Agreement also provided each party waived "any interest in any asset in the name of the other party." Thus, both Husband and Wife waived interest in the other's property. Unlike *Hardee*, there was no clause providing separate treatment for property acquired during the marriage. We find the Agreement's terms were not so one-sided or oppressive that no reasonable person would make them and no fair and honest person would accept them; therefore, the Agreement was not unconscionable as to equitable division.

Furthermore, we find the facts and circumstances in existence at the time the Agreement was signed did not make the otherwise valid agreement unconscionable. Wife argues the high pressure exerted on her due to the impending wedding and the parties' unequal bargaining power rendered the Agreement unconscionable. We disagree.

Wife testified she would have signed the Agreement regardless of its fairness, so long as it was not fraudulent. Although we have concern regarding Husband's referral of Wife to a friend for legal counsel, we find Wife willingly agreed to use Solomon as her counsel, and she knew of his failure to adequately advise her when she signed the Agreement. Wife admitted Solomon did not discuss the details of the Agreement and merely told her Husband was a good guy. Additionally, her psychologist testified Wife was capable at the time she signed the Agreement. We find the circumstances when the Agreement was signed did not render the Agreement unconscionable.

We likewise disagree with the family court's findings that the changes in circumstances since the Agreement was executed make enforcement fair only as to alimony and support. The court in *Hardee* looked at the changes in circumstances of the wife during the marriage, finding the wife was totally disabled and unable to support herself, but the facts and circumstances at the time of enforcement of the agreement had not changed to such an extent that it was unfair or unreasonable to enforce the agreement. *Id.* at 390-91, 585 S.E.2d at 505. The court in *Hardee* found, "Wife here had a meaningful choice: she could have refused to sign the agreement and opted against marrying Husband if he insisted on a prenuptial agreement." *Id.* at 390, 585 S.E.2d at 505.

We conclude Wife's circumstances in this case have likewise not changed since the time the parties executed the Agreement so as to make the Agreement unfair or unreasonable. Thus, we also find no merit in Wife's reliance on *Holler*. In *Holler*, this court concluded the wife, who was from the Ukraine, did not enter into the premarital agreement freely and voluntarily, noting that not only was the wife pregnant when she executed the premarital agreement, but also her visa was about to expire (thus requiring her to leave the United States unless she married), she could not understand the agreement, and she had no money of her own to retain or consult with an attorney or a translator. *Holler*, 364 S.C. at 268, 612 S.E.2d at 475-76.

In this case, Wife entered the marriage with insignificant assets and was unemployed. At the time of the separation, Wife was employed and had substantially the same assets as when she entered the marriage, although she had a debt of $16,783 from a loss incurred due to the sale of her own business. We find *Holler* distinguishable and further find circumstances since the execution of the

Agreement have not changed so as to make enforcement of the Agreement unfair or unreasonable.

Finally, Wife maintains Husband's failure to disclose the flea market and the franchise fee agreement from his financial declaration at the time of the execution of the Agreement rendered the Agreement unconscionable. The family court found Wife failed to meet the first prong of the test for unconscionability, and Wife did not appeal that finding. *See Hardee*, 355 S.C. at 389-90, 585 S.E.2d at 504 (explaining the first prong of the test is whether a prenuptial agreement was obtained through fraud, duress, mistake, or through misrepresentation or nondisclosure of material facts).

We find Husband's failure to disclose these assets was not substantially significant, and it did not affect the unconscionability of the Agreement. We find the Agreement itself is not unconscionable, and neither the attendant nor subsequent circumstances equated to unconscionability or rendered the Agreement unfair or unreasonable. Thus, we reverse the equitable distribution award to Wife. Furthermore, during oral argument, Wife acknowledged that if this court found the Agreement was valid, it would prevent the family court from awarding any equitable distribution.

2. Attorney's Fees

Husband argues the family court erred in awarding Wife $52,000 in attorney's fees and costs. In light of our finding that the Agreement was not unconscionable, we agree and reverse the award of attorney's fees and costs. *See Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (explaining beneficial results obtained are to be considered in determining whether an award of attorney's fees should be made); *Myers v. Myers*, 391 S.C. 308, 321, 705 S.E.2d 86, 93 (Ct. App. 2011) (stating "it 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").

3. Remaining Issues

Husband also argues the family court erred in exercising jurisdiction over allegedly nonmarital property and in failing to make specific findings of fact. In light of our disposition on the equitable distribution issue, we decline to address Husband's

remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not rule on remaining issues when the disposition of a prior issue is dispositive of the appeal).

CONCLUSION

Based on the foregoing analysis, the family court's award of equitable distribution and attorney's fees is

REVERSED.

FEW, C.J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wells Fargo Bank, N.A., successor-in-interest to Wachovia Bank, National Association, Plaintiff,

v.

Marion Amphitheatre, LLC, David P. Gannon, Michael Guarco, Carolina Entertainment Complex, LLC, and 4 Prophets, LLC a/k/a 4 Profits, LLC, Defendants,

Of whom David P. Gannon and Michael Guarco are the Appellants,

And 4 Prophets, LLC, a/k/a 4 Profits, LLC, is the Respondent.

Appellate Case No. 2012-211806

Appeal From Marion County
W. Haigh Porter, Special Referee

Opinion No. 5218
Submitted November 1, 2013 – Filed April 16, 2014

REVERSED AND REMANDED

Edgar Lloyd Willcox, II and Walker H. Willcox, Willcox, Buyck & Williams, P.A., both of Florence, for Appellants.

John Paul Williams, Jr., of Marion, for Respondent.

FEW, C.J.: David P. Gannon and Michael Guarco appeal the special referee's order awarding 4 Prophets, LLC a $12.5 million default judgment. We reverse and remand to the circuit court for a damages hearing.[1]

I. Facts and Procedural History

This appeal stems from a foreclosure action Wells Fargo Bank, N.A. initiated against Marion Amphitheatre, LLC, David P. Gannon, Michael Guarco, Carolina Entertainment Complex, LLC, and 4 Prophets concerning real property in Marion County. 4 Prophets filed an answer, asserting cross-claims against Marion Amphitheatre, Gannon, and Guarco. In the cross-claims, 4 Prophets alleged it entered into a written agreement with Guarco in 2006, pursuant to which 4 Prophets would own an equitable, undivided, one-half interest in the real property, if Guarco acquired the property. Guarco subsequently acquired the property, and he titled it in Marion Amphitheatre's name. 4 Prophets alleged Gannon, Guarco, and Marion Amphitheatre mortgaged the property to Wells Fargo's predecessor-in-interest without 4 Prophets' knowledge or consent, and fraudulently allowed the property to go into foreclosure, thereby wrongfully depriving 4 Prophets of its equitable interest. 4 Prophets alleged the property "has a fair market value well in excess of $25 million dollars," and it sought $12.5 million in damages.

Gannon and Guarco did not respond to the cross-claims, and the clerk of court recorded an entry of default. The circuit court then referred the case to a special referee. Gannon and Guarco filed a motion to set aside the entry of default, which the special referee denied. During the hearing on that motion, the special referee directed 4 Prophets to submit an affidavit setting forth the amount of damages and a proposed written order for judgment. The managing member of 4 Prophets submitted an affidavit stating he "believe[d] the present fair market value of the subject property to be the sum of $25 million," and 4 Prophets was entitled to $12.5 million.

Gannon and Guarco objected to 4 Prophets' proposed order, and the special referee held a hearing to address their objections. At the hearing, Gannon and Guarco argued the damages were not liquidated or a sum certain under Rule 55(b)(1) of the South Carolina Rules of Civil Procedure. 4 Prophets did not present any evidence at this hearing other than the affidavit. After the hearing, the special referee issued the order proposed by 4 Prophets.

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

In the order, the special referee held that because Gannon and Guarco defaulted, they admitted the property had a fair market value of $25 million, as alleged in 4 Prophets' cross-complaint. The special referee awarded liquidated damages based on 4 Prophets' claim to a one-half interest in the property. Guarco filed a "Motion to Amend Order and Judgment," which the special referee denied.

II. Law and Analysis

Gannon and Guarco argue the special referee erred by finding the damages were liquidated, and the special referee should have conducted a damages hearing. We agree.[2]

"A defendant in default admits liability but not the damages . . . ." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) (citing *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981)). "[T]he defaulting defendant has conceded liability. However, a defaulting defendant does not concede the [a]mount of liability." *Solley*, 397 S.C. at 203, 723 S.E.2d at 603 (quoting *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978)). Even "[i]n a default case, [therefore,] the plaintiff must prove . . . the amount of his damages, and such proof must be by a preponderance of the evidence." *Solley*, 397 S.C. at 204, 723 S.E.2d at 603 (citation omitted).

In *Solley*, we relied on *Renny* and *Howard* for the principle that a plaintiff must prove his damages even when the defendant has defaulted as to liability. *Renney* and *Howard*—both decided before the Rules of Civil Procedure were adopted[3]—are among the most recent in a line of cases in which our supreme court criticized trial courts for awarding default damages in the inflated amounts sometimes found in the prayer for relief in a complaint. In *Howard*, for example, the supreme court stated, "It is common knowledge . . . that in a tort action the amount stated in the prayer for relief often bears little relation to the amount which the plaintiff is entitled to recover. The prayer in an action may not serve as a substitute for proof." 271 S.C. at 240, 246 S.E.2d at 881. In *Renney*, the supreme court stated, "This case is one more in a series of cases which has given the court great concern.

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[2] We have reviewed 4 Prophets' arguments relating to the timeliness of this appeal, and we find the arguments are without merit.

[3] *See* Rule 86, SCRCP ("These rules shall take effect on July 1, 1985.").

They involve large awards in default claims involving unliquidated damages." 275 S.C. at 566, 274 S.E.2d at 292. In *Solley*, we reversed part of an award of special damages, not because the trial court awarded the amount demanded in the prayer, but because the plaintiff failed to prove the amount of the alleged loss. 397 S.C. at 210, 723 S.E.2d at 606. As *Solley* demonstrates, therefore, the principle that a plaintiff must prove his damages even when the defendant is in default applies to all damages claims in default cases.

The principle is incorporated into Rule 55(b) of the South Carolina Rules of Civil Procedure. Under the rule, when a plaintiff makes a claim for liquidated damages, a sum certain, or a sum which can by computation be made certain, he may prove the amount of his damages simply by filing an affidavit of the amount due. *See* Rule 55(b)(1), SCRCP ("When the claim of a party seeking judgment by default is for a liquidated amount, a sum certain or a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and *upon affidavit of the amount due*, shall enter judgment for that amount . . . ." (emphasis added)).[4] In some circumstances, "A verified pleading may be used in lieu of an affidavit . . . ." *Id.*[5] Even when the claim fits into one of the damages categories that Rule 55(b)(1) allows to be proven by affidavit or verified complaint, however, the trial court retains the discretion to conduct a hearing. *See* Rule 55(b)(2), SCRCP ("If . . . it is necessary . . . to determine the amount of damages . . . , the court may conduct such hearing . . . as it deems necessary and proper . . . .").

In this case, 4 Prophets' alleged loss of the value of real estate does not fit into any of the categories of damages a plaintiff may prove by affidavit or verified complaint. A "[c]laim for . . . damages is 'liquidated' in character if [the] amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law." *Black's Law Dictionary* 839 (5th

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[4] We recognize that "liquidated damages" overlaps with, and possibly includes, all damages that are sum certain or that can by computation be made certain.

[5] In *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 457 S.E.2d 340 (1995), our supreme court recognized a fourth category in which a plaintiff may prove damages without a damages hearing. The court held that in an action on an account, the trial court may enter default judgment without a hearing when the amount of damages is supported by a verified statement of account that is served with the complaint. 318 S.C. at 290, 457 S.E.2d at 342-43.

ed. 1979); *see also Lewis v. Congress of Racial Equality*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981) ("In liquidated-damages cases, the amount is usually a sum certain[,] or at least the amount is capable of ascertainment by computation.");[6] *Beckmann Concrete Contractors, Inc. v. United Fire & Cas. Co.*, 360 S.C. 127, 131, 600 S.E.2d 76, 78 (Ct. App. 2004) (stating unliquidated damages are "'[d]amages that . . . cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury'" (quoting *Black's Law Dictionary* 397 (7th ed. 1999))). Thus, 4 Prophets' damages are not liquidated. 4 Prophets' damages are also not a sum certain and cannot be made certain by computation. *See Black's Law Dictionary* 204 (5th ed. 1979) (defining certain as "precise; . . . definitive; . . . unambiguous; or, in law, capable of being identified or made known without liability to mistake or ambiguity, from data already given"). The valuation of real estate is a subjective determination, and thus, damages measured by loss of value in real estate are inherently uncertain. Even the statement of value upon which 4 Prophets relies in this case is, "I believe the present fair market value . . . to be . . . $25 million," and is based on the hearsay recital of two appraisals, both of which were at least eighteen months old at the time 4 Prophets filed the affidavit. The simple fact that a party claims a specific amount of damages does not make the claim a sum certain.

Nevertheless, relying only on the affidavit of 4 Prophets' managing member and Rule 55(b)(1), the special referee awarded damages in the amount of $12.5 million. Because 4 Prophets' theory of the measure of its damages was based solely on the value of real estate, which is not liquidated, not a sum certain, and cannot be made certain by mathematical calculation, we hold the special referee erred in awarding damages without conducting a damages hearing. *See* 46 Am. Jur. 2d *Judgments* § 298 (2006) ("In the context of a default judgment, unliquidated damages normally are not awarded without an evidentiary hearing. Where damages claimed are not readily ascertainable from the pleadings and record, a hearing is appropriate to determine the amount of damages."); *Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983) (holding a judgment by default may not be entered without a hearing on damages unless the complaint

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[6] *Lewis* also predates the Rules of Civil Procedure. *Lewis* remains applicable, however, because the term "liquidated damages" was added to the language we adopted in 1998 from Federal Rule of Civil Procedure 55(b)(1) "since this is the terminology which has traditionally been used in South Carolina." Rule 55, SCRCP note to the 1998 Amendments.

indicates the amount claimed is liquidated or capable of ascertainment from definite figures contained in the documentary evidence or in detailed affidavits).

III. Conclusion

Accordingly, we reverse and remand to the circuit court for a damages hearing.

REVERSED AND REMANDED.

PIEPER and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Moorhead Construction, Inc., Craft Construction Company, Inc., and Miller Construction Company, LLC, Respondents,

v.

Enterprise Bank of South Carolina, Pendleton Station, LLC, and Angelo Penza, Defendants,

Of whom Enterprise Bank of South Carolina is the Appellant.

Appellate Case No. 2012-213318

Appeal From Anderson County
Ellis B. Drew, Jr., Master-in-Equity

Opinion No. 5219
Heard April 11, 2014 – Filed April 16, 2014

VACATED AND REMANDED

Thomas Elihue Dudley, III and M. Stokely Holder, Kenison, Dudley & Crawford, LLC, both of Greenville, for Appellant.

David James Brousseau, McIntosh, Sherard, Sullivan & Brousseau, of Anderson, for Respondents.

FEW, C.J.: The respondents—Moorhead Construction, Inc., Miller Construction Company, LLC, and Craft Construction Company, Inc.—sought foreclosure of their mechanic's liens against Enterprise Bank of South Carolina, and the master awarded them money judgments. Enterprise Bank appeals, arguing the master had no legal basis for entering money judgments against it. We vacate the judgments and remand for foreclosure proceedings.

Pendleton Station, LLC ("PSL") hired Moorhead to be the general contractor for a development project involving two tracts of land owned by PSL—the "2-Acre Tract" and "Tract A"—and another tract owned by an individual investor—"Tract B." Moorhead subcontracted with Miller and Craft to perform work on the project. Enterprise Bank served as the construction lender for the project.

Two years into the project, PSL stopped paying Moorhead and its subcontractors and defaulted under the loan agreements with Enterprise Bank. PSL executed a deed-in-lieu of foreclosure to Enterprise Bank that conveyed title to Tract A, and Enterprise Bank subsequently obtained title to the 2-Acre Tract and Tract B. The respondents each filed mechanic's liens on all three tracts. They then brought suit for breach of contract against PSL and foreclosure against Enterprise Bank. The master did not rule on the claims against PSL but entered money judgments against Enterprise Bank.

We hold the master had no authority to enter money judgments in the respondents' foreclosure actions against Enterprise Bank. The procedures for enforcing a mechanic's lien are provided by statute, *see* S.C. Code Ann. §§ 29-5-10 to -440 (2007 & Supp. 2013), and "must be strictly followed." *Cohen's Drywall Co. v. Sea Spray Homes, LLC*, 374 S.C. 195, 199, 648 S.E.2d 598, 600 (2007). A court cannot depart from the plain language of the statute when enforcing a mechanic's lien. *See Zepsa Constr., Inc v. Randazzo*, 357 S.C. 32, 38, 591 S.E.2d 29, 32 (Ct. App. 2004) (holding a party was "limited to recovery provided for by the strict terms of the mechanic's lien statute"); *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985) (stating mechanic's liens can only be "enforced in accordance with the conditions of the statute creating them"); *Clo-Car Trucking Co. v. Clifflure Estates of S.C., Inc.*, 282 S.C. 573, 576, 320 S.E.2d 51, 53 (Ct. App. 1984) (stating the court is "not at liberty to depart from the plain meaning of [the] language" contained in the mechanic's lien statute).

As a matter of law, Enterprise Bank cannot be liable for money judgments because the respondents had no contractual relationship with Enterprise Bank or any other right to recover damages. *See Arnet Lewis Constr. Co., Inc. v. Smith-Williams & Assocs., Inc.*, 269 S.C. 143, 151, 236 S.E.2d 742, 746 (1977) (allowing a party that brought an action to foreclose a mechanic's lien to recover a judgment based upon a contract cause of action because the complaint stated "facts sufficient to constitute a [contract] cause of action"). Rather, the exclusive remedy available to the respondents against Enterprise Bank is foreclosure of their mechanic's liens. *See* S.C. Code Ann. § 29-5-260 (2007) (stating when the master determines a valid and enforceable mechanic's lien exists, it "shall order a sale of the property"); *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 353, 338 S.E.2d 631, 635 (1985) (stating "the mechanic's lien statute may not be used as a vehicle for collecting damages for breach of contract"). We find the master erred by awarding money judgments instead of ordering foreclosure.

Furthermore, it is the function of the master, not the appellate courts, to determine whether foreclosure is appropriate and, if so, to order it. Enterprise Bank raises eleven issues on appeal with multiple subparts, each containing separate arguments that the master committed error. We find it appropriate to remand for the master to reconsider the parties' arguments as to all disputed issues and make the necessary findings of fact and conclusions of law on the record before deciding whether to order foreclosure.

We find the master erred in awarding money judgments on the respondents' foreclosure claims. Thus, the order of the master is

VACATED and REMANDED.

GEATHERS, J., concurs.

SHORT, J., concurring in part and dissenting in part:

I concur in part and dissent in part. I agree with the majority that as a matter of law, Enterprise Bank cannot be liable for a money judgment because the Respondents had no contractual relationship with Enterprise Bank or any other right to recover damages. I also agree the exclusive remedy available to the Respondents against Enterprise Bank is foreclosure of their mechanic's liens.

Therefore, the master erred by awarding money judgments instead of ordering foreclosure.

I further find the master correctly determined the Respondents' mechanic's liens were filed in accordance with South Carolina law, and the master correctly determined the amounts due to Respondents at that time under the mechanic's liens. At oral argument, both parties conceded the bank bonded off the property; therefore, there is no longer a claim for foreclosure. As a result, I would remand the case for the master to determine the amounts now due to Respondents.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Martha Goodwyn, Respondent,

v.

Shadowstone Media, Inc. and Robert Pachaly,
Appellants.

Appellate Case No. 2012-212705

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5220
Heard March 3, 2014 – Filed April 16, 2014

REVERSED

Brian Pratt Robinson, Bruner Powell Wall & Mullins, LLC, of Columbia, for Appellants.

Thomas Jefferson Goodwyn, Jr., Goodwyn Law Firm, LLC, of Columbia, for Respondent.

FEW, C.J.: Martha Goodwyn brought suit against her former employer Robert Pachaly and his company Shadowstone Media, Inc., alleging violations of the Payment of Wages Act, S.C. Code Ann. §§ 41-10-10 to -110 (Supp. 2013). After the jury returned a verdict for Goodwyn, the trial court granted her motion for treble damages and attorney's fees under subsection 41-10-80(C) of the Act. We

reverse this decision because there was a bona fide dispute as to Goodwyn's entitlement to unpaid wages.

I. Facts and Procedural History

In April 2009, Goodwyn accepted a sales position with Shadowstone Media selling advertising space in a coupon book that was to be distributed to the public. After working five months, Goodwyn received a total of $1,298 from seven paychecks paid bi-monthly from May 15 to July 31, 2009. She also earned a total of $404 in commissions from ten sales. However, Goodwyn sent Pachaly a resignation letter in September 2009, claiming she was "forced to resign" because she "ha[d] not been getting paid per [their] agreement at the time of [her] hire." In the letter, she requested back pay in the amount of $8,694. Goodwyn subsequently brought suit against Shadowstone Media and Pachaly for breach of contract and violation of the Payment of Wages Act.

At trial, Goodwyn testified that during her interview for the sales position, she told Pachaly she "had two kids that were in daycare" and needed to earn at least $300 per week to cover the cost of daycare. According to Goodwyn, Pachaly agreed to pay her a salary of $300 a week plus commissions earned on sales. Although Pachaly recalled Goodwyn mentioning that "she had to clear [$300] on a weekly basis," he denied offering to pay her a fixed amount per week. Instead, Pachaly testified, "Initially, all the people that were working sales were placed on a commission basis," and Goodwyn "had the same as everybody else in the beginning." Pachaly relied on the terms of a "hiring letter," which he claimed he "handed" to Goodwyn in the office soon after she began working and also mailed to her. The letter stated her compensation was "based on commissions earned from the [sale] of the [advertising space in the coupon books]." Goodwyn denied ever receiving the hiring letter.

According to Pachaly, this commission-based pay arrangement changed after Goodwyn approached him sometime in May asking for a "draw" of $300 against her commissions. Pachaly told her he "could probably work something out" for $250. Pachaly planned for Goodwyn to sell each advertising space in the coupon book for $295 per month, with the goal being to sign up businesses for twelve months of advertising space. He stated, "[B]ased on . . . the price we were charging [for advertising space], if she was closing at that rate, that wouldn't have been a problem" for her to draw against her commissions.

Goodwyn, however, was unable to sell the advertising space at the full monthly rate of $295, and instead negotiated sales at reduced rates. She testified she was unaware, at least in the beginning of her employment, that her commissions would be reduced as a result of selling advertising space at a discounted rate. Instead, she believed Pachaly would pay her a full commission of $1,000 per sale at the time she made the sale. Although Goodwyn admitted that around "the end of May, beginning of June," Pachaly told her "he would have to adjust the commissions" due to the reduced sales rates, she claimed they "never talked about a number."

Relying on the terms of the hiring letter, Pachaly disputed Goodwyn's entitlement to full commissions at the time of the sale. Although the letter provided that the standard commission for selling twelve months of advertising space was $1,000, the letter also stated that if "an ad rate is discounted, then the commissions will be reduced accordingly." Consistent with the terms of the hiring letter, Goodwyn's commissions were reduced based on the price at which she sold the advertising space. This reduction in commissions was documented by an exhibit submitted by Pachaly at trial, entitled "Calculation of Commissions Earned," which Goodwyn claimed she first saw after the lawsuit commenced. Pachaly also argued the hiring letter refuted Goodwyn's claim that she was to receive a commission at the time of the sale. According to the letter, employees were to be "paid upon the collection by the company of the ad costs from the accounts," which typically occurred "monthly over a 12 month period." Thus, employees were to receive "one twelfth of the total commission . . . each month upon collection of that month's bill from the advertiser."

Pachaly never printed any coupon books and "thr[e]w in the towel on . . . the [coupon] book idea" in August 2009. In September, Goodwyn sent Pachaly a letter that stated she was "forced to resign" because she had been paid "less than $1,500 despite [Pachaly] agreeing to pay [her] a $300 per week draw plus commission." Although the letter stated Pachaly "began paying [her] something close to the $300/week at first (only $250/week)," she calculated Pachaly owed her $8,694 in back pay—$6,600 in salary, $3,500 in commissions, "less the $1406 [he] already paid [her]." Pachaly testified the amount Goodwyn claimed to be owed "seemed a little preposterous" because Shadowstone Media collected a total of only "$1200 to $1400 off [her] sales."

During Goodwyn's testimony, she clarified several inconsistencies between the amount she claimed in the resignation letter and the amount she claimed at trial. First, she testified she "misspoke" in using the word "draw" in the letter, as it did not correctly represent "what she and [Pachaly] agreed to." She explained that while "a draw is when you get money up front for future sales," Pachaly agreed to pay her $300 per week in salary on top of any commissions she earned. Second, Goodwyn testified she "guesstimated" in arriving at the commission figure stated in the letter—$3,500—because she had never seen "a scale or anything telling [her] exactly what [her] commission was." Goodwyn claimed she later calculated the correct amount of commissions owed to her—$4,850—by using the Calculation of Commissions Earned document submitted by Pachaly. She reached this total by adding the figures from the column "Full Commission," which showed the amount Goodwyn would have earned had each client paid for a year of advertising space. Pachaly asserted the correct amount of commissions due was $404, which is the total from the "Commissions Earned" column. Goodwyn testified she was entitled to full commissions for all her sales because "it was by no fault of [her] own that [the clients] didn't pay the rest" of the monthly payments due under their year-long contracts. She explained that had Pachaly printed the coupon books, the clients would have paid the remainder of the monthly amounts because they "were extremely excited about the book."

The jury awarded Goodwyn $3,444 in damages under the Payment of Wages Act, but nothing for breach of contract. Goodwyn made a post-trial motion pursuant to subsection 41-10-80(C) for treble damages and attorney's fees. The trial court granted the motion, finding "there was not a sufficiently close question of law or fact that would discourage the award of [treble] damages" and attorney's fees.[1]

II. Existence of a Bona Fide Dispute

The Payment of Wages Act provides that when an employer fails to pay wages, an employee may recover "an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow." § 41-10-80(C). An award of treble damages and attorney's fees is appropriate only when "there [i]s no good faith wage dispute" because "an employer should not be

[1] Goodwyn's total award amounted to $16,417—$10,322 in treble damages, $4,928 in attorney's fees, and $1,167 in costs.

penalized . . . for failure to pay wages upon assertion of a valid defense to payment." *Rice v. Multimedia, Inc.*, 318 S.C. 95, 98-99, 456 S.E.2d 381, 383 (1995). Thus, the trial court must determine whether "a bona fide dispute" exists as to an employee's entitlement to wages before awarding treble damages or attorney's fees. *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600-01, 675 S.E.2d 414, 415-16 (2009). When reviewing such an award, "this court can take its own view of the facts." *Ross v. Ligand Pharm., Inc.*, 371 S.C. 464, 471, 639 S.E.2d 460, 464 (Ct. App. 2006); *see also O'Neal v. Intermedical Hosp. of S.C.*, 355 S.C. 499, 509-511, 585 S.E.2d 526, 532 (Ct. App. 2003) (reversing an award of treble damages because, based on the court's review of the record, "a bona fide dispute existed as to whether and to what extent [the employee] was entitled to payment").

The trial court rejected the argument that the hiring letter created a bona fide dispute concerning Goodwyn's entitlement to wages. The court noted Goodwyn "had never seen [the hiring] letter prior to the taking of her deposition," and found the letter "would not constitute a bona fide good faith defense to the failure to pay wages under the facts of this case." We disagree. It is not merely the existence of the hiring letter that creates a bona fide dispute in this case. Rather, the terms of the letter combined with all the evidence give rise to a bona fide dispute "as to whether and to what extent [Goodwyn] was entitled to payment" of salary and commissions. *O'Neal*, 355 S.C. at 509-511, 585 S.E.2d at 532.

As to salary, there is evidence to justify Pachaly and Shadowstone Media's defense to payment. The terms of the hiring letter defeat Goodwyn's entitlement to any salary because the letter provided for payment on a commission basis. Goodwyn, however, denied ever receiving this letter, which was contrary to Pachaly's testimony that he "handed" it to her and mailed her a copy. Thus, there was a dispute as to whether Goodwyn knew or accepted the terms of employment contained in the hiring letter. Additionally, there is evidence that sometime in May, the commission-based arrangement set forth in the letter changed when Pachaly agreed to pay Goodwyn a weekly draw of $250. Goodwyn denied agreeing to receive "a draw," but instead contended Pachaly agreed to pay her a weekly salary of $300, plus commissions, during her interview in April. She admitted in her resignation letter, however, that Pachaly "began paying [her] something close to the $300/week at first (only $250/week)." This evidence calls into question Goodwyn's claim that she is owed $6,600 in salary, especially considering the dispute as to whether she agreed to receive draws against her commissions or a salary. Thus, we find a bona fide dispute existed as to whether

Goodwyn was entitled to any back payment of salary, and if so, the amount to which she was entitled.

As to whether Goodwyn was owed any commissions, the terms of the hiring letter provide Goodwyn was to be "paid upon the collection by the company of the ad costs from the accounts." Pachaly and Shadowstone Media assert their failure to pay is justified because Shadowstone Media "never collected on most of the sale[s]." In response, Goodwyn asserts she expected to be paid commissions "up front" at the time of the sale. "[T]he relevant date for determining whether the employer reasonably withheld wages is the time at which the wages were withheld." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 316, 698 S.E.2d 773, 782 (2010). If the terms of the hiring letter accurately reflect Goodwyn's pay arrangement, Pachaly was justified in withholding commissions until payment was received.

Moreover, on the facts of this case, the jury's partial award of wages indicates it determined that Pachaly properly withheld a portion of wages to which Goodwyn claimed she was entitled. In *O'Neal*, the employee claimed she was owed $2,541 for accrued time-off upon her discharge. 355 S.C. at 504, 585 S.E.2d at 529. The employer asserted, however, that she was terminated for misconduct, which prohibited payment for accrued time-off under its employment policy. *Id.* The jury found for the employee but awarded her only part of her claimed wages—$1,350. 355 S.C. at 506, 585 S.E.2d at 530. The trial court trebled the jury's award, finding the jury's award of damages indicated it "determined [the employer] did not terminate [her] for cause and thus no good faith basis for refusal to pay benefits was established." 355 S.C. at 506, 509, 585 S.E.2d at 530, 531. The court of appeals reversed, stating a jury's "finding that an employee is entitled to recover unpaid wages is not equivalent to a finding that there existed no bona fide dispute as to the employee's entitlement to those wages." 355 S.C. at 509-11, 585 S.E.2d at 531-32. The court explained the jury awarded the employee "damages equal to payment for only a portion" of what she claimed, which "indicat[ed] the jury determined that [the employer] properly withheld payment for the remaining portion of accrued hours." 355 S.C. at 509, 585 S.E.2d at 532.

In this case, Goodwyn claimed she was entitled to $8,694, but the jury awarded her only $3,444. The jury's award indicates it found Goodwyn was entitled to some, but not all, of the payment she claimed Pachaly withheld. While a jury's partial award of damages does not, by itself, create the existence of a bona fide dispute,

we find that under the facts of this case, it indicates Pachaly and Shadowstone Media established a good faith basis for refusal to pay at least a portion of her claimed wages. *See O'Neal*, 355 S.C. at 509, 585 S.E.2d at 532.[2]

III. Conclusion

We find a bona fide dispute existed as to whether and to what extent Goodwyn was entitled to payment.[3] Therefore, the trial court's award of treble damages and attorney's fees is

REVERSED.

GEATHERS, J., concurs.

SHORT, J., concurs in result only.

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[2] Pachaly and Shadowstone Media also assert they "overpaid" Goodwyn because she earned only $404 in commissions but received draws against these commissions in the amount of $1,298. Although the jury's award of $3,500 indicates it disagreed with this position, its partial award of Goodwyn's claimed damages indicates a bona fide dispute existed as to the extent to which Goodwyn was entitled to wages.

[3] Given this finding, we decline to address other issues Pachaly and Shadowstone Media raise on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address appellant's remaining issues on appeal when resolution of a prior issue was dispositive).