The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay License Fees Required by Rule 410 of the South Carolina Appellate Court Rules (SCACR)

O R D E R

The South Carolina Bar has furnished the attached list of lawyers who have failed to pay their license fees for 2013. Pursuant to Rule 419(d)(1), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 13, 2013.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be automatically terminated. Rule 419(f), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

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 24, 2013

Members Who Have Not Paid 2013 License Fees

Mr. William F. Able
PO Box 1971
Irmo, SC 29063

Ms. April Amanda Arrasate
151 Talcott Notch Rd
Farmington, CT 06032

Mr. David Grant Belser
17 N. Market St., Ste. 1
Asheville, NC 28801

Ms. Kimberly Hallman Busby
4 Sheldon Ln.
Hilton Head Island, SC 29926

Maj. Charles Clark III
55 Brent Point Rd.
Stafford, VA 22554

Mr. Eric James Davidson
1800 N. Charles St., Ste. 400
Baltimore, MD 21201

Mr. William E. Davis Jr.
171 Fairhaven Way
Chapin, SC 29036

Mr. William J. Dean
PO Box 26
New Hope, PA 18938

Ms. Aarati Prasad Doddanna
1643B Savannah Highway
Charleston, SC 29407

Mr. Brad Cameron Glosson
2309 Nevada Blvd.
Charlotte, NC 28273

Mr. Daniel Garvin Hall
10752 Deerwood Parl Blvd., S.
Jacksonville, FL 32256

Mr. Ronnie L. Hicks Jr.
13901 Sutton Park Dr. S.
Jacksonville, FL 32224

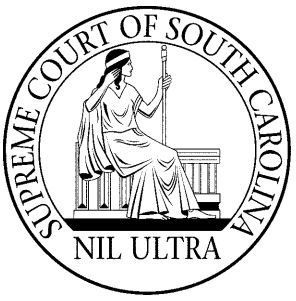
Mr. Robert J. Klug Sr.
1558 Chalk Avenue
Blue Bell, PA 19422

Ms. Susan T. Parke
136 King St
Hendersonville, NC 28792

Ms. Heather R. Perry
503 S. Edisto Ave.
Columbia, SC 29205

Mr. Reynaldo Quinones
3213 Florida Ave., Ste. C
Kenner, LA 70067

Mr. H. Michael Solloa Jr.
350 Jim Moran Blvd., Suite 100
Deerfield Beach, FL 33442



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18
April 24, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Retirement System Investment Commission, Petitioner,

v.

Curtis M. Loftis, Jr., as Custodian of the South Carolina Retirement Systems Group Trust, Respondent.

Appellate Case No. 2013-000754

IN THE ORIGINAL JURISDICTION

Opinion No. 27242
Heard April 16, 2013 – Filed April 17, 2013

DISMISSED

Henry Pickett Wall and Edward Wade Mullins, III, of Bruner Powell Wall & Mullins, LLC, of Columbia, for Petitioner.

William J. Condon, Jr., of Columbia; and Curtis W. Dowling, of Barnes Alford Stork & Johnson, LLP, of Columbia, for Respondent.

William A. Coates and Joseph Owen Smith, of Roe Cassidy Coates & Price, PA, of Greenville, for Amicus Curiae The State Retirees Association of South Carolina.

PER CURIAM: This Court accepted the petition of the South Carolina Retirement Investment Commission (the Commission) in its Original Jurisdiction to determine whether the Commission was entitled to a writ of mandamus requiring respondent, Curtis M. Loftis, Jr., in his capacity as custodian of the South Carolina Retirement Systems Group Trust, to authorize the funding of the Warburg Pincus Private Equity XI, L.P. investment (Warburg Pincus Fund XI). The Court also agreed to expedite the matter based on the Commission's assertion that the failure to fund the investment by April 16, 2013, would cause the Commission to default on its contractual obligations and result in severe financial penalties.

Loftis filed a return to the petition on April 15, 2013, stating he authorized the transfer of funds the morning of April 15 because information he had previously requested from the Commission, and which he maintained was a necessary prerequisite to authorizing the transfer of funds, had been submitted to the Court along with the Commission's attachments to its petition for a writ of mandamus. Loftis contended the action had been rendered moot because he performed the sole action the Commission requested this Court mandate he perform: authorizing the transfer of funds to Warburg Pincus Fund XI.

At oral argument, the parties conceded that funding for the Warburg Pincus Fund XI investment has occurred. Nevertheless, the Commission maintains Loftis' decision to fund the investment does not moot this matter in its entirety based on Loftis' alleged misapprehension of his legal authority in his position as custodian of the South Carolina Retirement Systems Group Trust. The Commission argues the Court should consider injunctive relief to direct the custodian to follow Commission directives to fund future investments. We disagree.

A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court. *Ex parte Doe*, 393 S.C. 147, 151, 711 S.E.2d 892, 894 (2011) (quoting *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006)); *Sloan v. Greenville Cnty.*, 361 S.C. 568, 572, 606 S.E.2d 464, 467 (2004). Where there is no actual controversy, this Court will not decide moot or academic questions. *Sloan v. Friends of the Hunley*, *id.* at 26, 630 S.E.2d at 477.

Generally, in mandamus cases, the performing of the act by the individual moots the case. *See Miller v. State*, 377 S.C. 99, 659 S.E.2d 492 (2008) (declining to issue a writ of mandamus to compel the clerk of court to accept a habeas petition because, among other things, petitioner's 2004 habeas petition became moot upon petitioner's release from prison). There are exceptions to this rule. *E.g. Nelson v. Ozmint*, 390 S.C. 432, 434-35; 702 S.E.2d 369, 370 (2010) (declining to dismiss the petition for a writ of mandamus as moot because the issue was capable of repetition but generally will evade review).

However, we believe the unique facts of this case render this matter moot. Here, the Commission sought a writ of mandamus compelling Loftis, as the statutory custodian of the Retirement Systems Group Trust, to authorize a transfer of funds to Warburg Pincus Fund XI. Indeed, the entire content of the Commission's petition and its attachments concern the funding of this particular investment. In our view, once Loftis agreed to perform the precise act sought in the petition for a writ of mandamus by authorizing the funding of the investment in Warburg Pincus Fund XI, there was simply nothing left for the Court to order, and it is now impossible for this Court to issue a writ of mandamus compelling Loftis to perform the act in question. *See Sloan v. Friends of the Hunley*, *id.* at 26, 630 S.E.2d at 477; *see also* 52 Am.Jur.2d *Mandamus* § 44 (West 2011) (a writ of mandamus should not issue in anticipation that a party will refuse to perform his or her duty when time comes).

Accordingly, we dismiss the petition for a writ of mandamus as moot.

DISMISSED

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of J. David Flowers

Appellate Case No. 2012-213120

Opinion No. 27243
Heard February 21, 2013 – Filed April 24, 2013

DEFINITE SUSPENSION

Disciplinary Counsel Lesley M. Coggiola and Assistant Disciplinary Counsel Ericka McCants Williams, both of Columbia, for Office of Disciplinary Counsel.

Desa Allen Ballard, of Ballard Watson Weissenstein, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) brought formal charges against James David Flowers (Respondent) for failing to file state and federal income tax returns for tax years 2007, 2008, 2009, and 2010. Following a hearing, the Hearing Panel of the Commission on Lawyer Conduct (the Panel) found Respondent violated Rule 8.4(b) of the Rules of Professional Conduct (RPC), Rule 407, SCACR, and Rules 7(a)(1) and 7(a)(5) of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR. Two members of the Panel recommended the sanction of a ninety-day definite suspension, and two members recommended an Admonition. ODC took exception to the recommendation of an Admonition, and Respondent took exception to the recommended ninety-day definite suspension. We definitely suspend Respondent from the practice of law for ninety days, retroactive to the date he filed his tax returns, and order him to pay the costs of these proceedings.

FACTS

ODC's investigation stemmed from an anonymous complaint that Respondent failed to file state and federal income tax returns for tax years 2007, 2008, 2009, and 2010. Respondent admits that he did not file income tax returns for these years. Respondent contends that a variety of mental health problems brought about by the stresses of his practice are to blame for his failure to file his tax returns. Respondent further contends that his mental health problems have precipitated his desire to quit the practice of law and led to his voluntary deactivation from the South Carolina Bar in September 2011. Respondent represents that no federal or state criminal charges are pending against him or anticipated, and that he filed his state and federal income tax returns for the delinquent tax years on February 17, 2012. However, Respondent further represents that he has not yet paid his delinquent taxes. Respondent has been cooperative with ODC throughout its investigation.

LAW

Respondent admits that by his misconduct, he has violated Rule 8.4(b), RPC, Rule 407, SCACR (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects). In addition, Respondent admits that his misconduct constitutes grounds for discipline pursuant to Rule 7, RLDE, Rule 413, SCACR, specifically Rules 7(a)(1) (it shall be a ground for discipline for a lawyer to violate or attempt to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We find a ninety-day suspension is the appropriate sanction for Respondent's misconduct. Accordingly, we suspend Respondent from the practice of law for a period of ninety days. This suspension shall be retroactive to the date upon which Respondent filed his state and federal income tax returns, February 17, 2012. However, due to the fact that Respondent has not yet paid his taxes, we also find

that Respondent may not request reinstatement until he has paid his delinquent taxes in full and has filed proof with the Commission on Lawyer Conduct of same. Furthermore, we order Respondent to pay the costs associated with these proceedings. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bernadette R. Hampton, Jackie B. Hicks, and Carlton B. Washington, Petitioners,

v.

The Honorable Nikki Haley, in her official capacity as Governor of South Carolina, The Honorable Richard Eckstrom, in his official capacity as Comptroller General for the State of South Carolina, The Honorable Curtis Loftis, in his official capacity as Treasurer of the State of South Carolina, and The South Carolina Budget and Control Board, Respondents.

Appellate Case No. 2012-212723

ORIGINAL JURISDICTION

Opinion No. 27244
Heard January 23, 2013 – Filed April 24, 2013

JUDGMENT FOR PETITIONERS

W. Allen Nickles, III, of Nickles Law Firm, LLC, of Columbia, for Petitioners.

C. Mitchell Brown, William C. Wood, Jr., and Michael J. Anzelmo, of Nelson, Mullins, Riley, & Scarborough, LLP, of Columbia, for Respondents.

John S. Nichols, of Bluestein, Nichols, Thompson and Delgado, of Columbia, for Amicus Curiae State Retirees Association of South Carolina.

JUSTICE HEARN: At its most basic level, this case presents a policy dispute: whose policy choice concerning health insurance premiums for State employees controls—the General Assembly's or the Budget and Control Board's? While policy decisions are matters left to the political branches, this Court is tasked with maintaining and enforcing the constitutional and statutory framework through which such issues must be resolved. We find that under the South Carolina Constitution, the General Assembly had and exercised the power to determine the contribution rates of enrollees for the State's health insurance plan in 2013. We hold the Budget and Control Board violated the separation of powers provision by substituting its own policy for that of the General Assembly, enter judgment for the petitioners, and direct the Board to use the appropriated funds for premium increases and return the premium increases previously collected from enrollees.

FACTUAL/PROCEDURAL BACKGROUND

I. THE STATE HEALTH PLAN

The State provides its employees and certain other persons with health insurance through a statewide, group health insurance plan (the Plan). The persons eligible for participation in the Plan, as set forth in Section 1-11-720 of the South Carolina Code (2005 & Supp. 2012), consist of State employees and retirees, their spouses and dependents, and employees of numerous statutorily specified entities, including for example, counties, municipalities, and private organizations.

Prior to 1992, the Budget and Control Board received authority yearly to administer the Plan through the annual appropriations act. In 1992, the General Assembly enacted Section 1-11-710 of the South Carolina Code, codifying the Board's authority to administer the plan. As it existed prior to 2012, section 1-11-710 provided in relevant parts:

(A) The State Budget and Control Board shall:

> (1) make available to active and retired employees of this State and its public school districts and their eligible dependents group health, dental, life, accidental death and dismemberment, and disability insurance plans and benefits in an equitable manner and of maximum benefit to those covered within the available resources.
>
> (2) approve by August fifteenth of each year a plan of benefits, eligibility, and employer, employee, retiree, and dependent contributions for the next calendar year. The board shall devise a plan for the method and schedule of payment for the employer and employee share of contributions . . . .
>
> The amounts appropriated in this section shall constitute the State's pro rata contributions to these programs . . . .
>
> (3) adjust the plan, benefits, or contributions, at any time to insure the fiscal stability of the system.
>
> (4) set aside in separate continuing accounts in the State Treasury, appropriately identified, all funds, state-appropriated and other, received for actual health and dental insurance premiums due. Funds credited to these accounts may be used to pay the costs of administering the health and dental insurance programs and may not be used for purposes of other than providing insurance benefits for employees and retirees. A reserve equal to not less than an average of one and one-half months' claims must be maintained in the accounts and all funds in excess of the reserve must be used to reduce premium rates or improve or expand benefits and funding permits.
>
> . . . .

On June 26, 2012, Act No. 278 was enacted, creating the South Carolina Public Employee Benefit Authority (PEBA) as codified at Section 9-4-10, *et seq.* of the South Carolina Code (Supp. 2012), and amending section 1-11-710 by

transferring the Board's powers and duties under that statute to PEBA.[1] Additionally, the Act made PEBA's decisions subject to approval by a majority vote of the Board as set forth in Section 9-4-45 of the South Carolina Code (Supp. 2012). The Act took effect July 1, 2012, and thus, as of that date, PEBA exercises the powers formerly exercised by the Board in relation to the Plan, and the Board has a veto power over PEBA's decisions.

Although nine of PEBA's eleven members had been appointed on or before the August 15th deadline for setting the yearly terms of the Plan as specified in section 1-11-710, only two members had taken the oath of office and only one member had filed his statement of economic interests on or before that deadline.

II. THE 2012 BUDGET PROCESS AND THE PLAN

The State's budget and the Plan's budget operate on different timetables because the State's fiscal year runs from July 1 to June 30, whereas the Plan's fiscal year runs from January 1 to December 31. For that reason, in addition to any premium increases the General Assembly decides the State must cover in the upcoming Plan year, the State's budget each year must also cover the last six months of the insurance premium increases set by the Board on August 15th of the previous year, an amount known as the "annualization."

Employees covered by the Plan are split into "general fund employees" and "non-general fund employees." General fund employees consist of State and school district employees, and the premiums borne by the State through general fund appropriations cover these employees. *See* S.C. Code Ann. § 1-11-710. For fiscal year 2012-2013, general fund employees constituted 51.6% of the Plan's enrollees. Non-general fund employees work for those entities specified in section 1-11-720, and if an employer entity chooses to provide insurance to its employees through the Plan, the employer is responsible for paying the employer portion of

[1] The Act substituted "Board of Directors of the South Carolina Public Employee Benefit Authority" for "State Budget and Control Board" in subsection 9 of the definitions provision of Article 5, Section 1-11-703 of the South Carolina Code. S.C. Code Ann. § 1-11-703 (Supp. 2012). The Act also substituted "board" for "State Budget and Control board" in subsection A of section 1-11-710. S.C. Code Ann. § 1-11-710 (Supp. 2012).

the premiums—the portion borne by the State for general fund employees. S.C. Code Ann. § 1-11-720.

In November 2011, the Board produced a memorandum informing the General Assembly of the Plan's needs in relation to the State's budget for fiscal year 2012-2013. The memorandum stated the Plan required an annualization of $14.264 million and $15.767 million to cover new, general fund retirees. Also, the Plan's insurance premiums had increased over the past year by $79,705,991. Thus, to cover the premium increases for the first six months of the Plan's fiscal year, the Plan required $39,852,996. Removing the portion attributable to non-general fund employees, the Plan required a premium increase of $20,564,146 for general fund employees.

The memorandum presented the General Assembly with three options for dividing the premium increases between the State and enrollees. First, the General Assembly could split the premium increases evenly between the State and enrollees which would require an appropriation of $14.487 million for premium increases, and when combined with the annualization and new retiree costs would necessitate a total appropriation of $44.878 million. Second, the General Assembly could place the entire premium increase on the State which would require an appropriation of $20.564 million, and when combined with the annualization and new retiree costs would necessitate a total appropriation of $50.595 million. Third, the General Assembly could place the entire premium increase on the enrollees which would only require appropriations for the annualization and new retiree costs, for a total appropriation of $30.031 million.

On August 3, 2012, the 2012-2013 Appropriations Act was enacted.[2] In Section 80C under a heading for State employee benefits, and a subheading for rate increases, the General Assembly appropriated $51,528,219 for health insurance employer contributions.

On August 8, 2012, the Board convened and considered the Plan's benefits and contribution rates for 2013. First, the Board discussed what powers it possessed after the creation of PEBA and concluded the Board served in a de facto capacity for PEBA because it did not yet exist. In the discussion of contribution

[2] *See* South Carolina Legislature, 2012-2013 Appropriations Bill H. 4813, http://www.scstatehouse.gov/sess119_2011-2012/appropriations2012/ta12ndx.php.

rates that followed, all of the members of the Board acknowledged the General Assembly fully funded the premium increases such that enrollees would not bear any of the increases. However, by a three-to-two vote, the Board decided to split the premium increase equally between the State and enrollees.

III. PROCEDURAL HISTORY

Petitioners Bernadette Hampton, Jackie Hicks, and Carlton Washington filed a petition for original jurisdiction and a complaint with this Court challenging the Board's decision. Hampton is Vice-President of the South Carolina Education Association, Hicks is President of the South Carolina Education Association, and Washington is Executive Director of the South Carolina State Employees Association. The petitioners all participate in the Plan's health insurance by virtue of their employment.

ISSUES PRESENTED

I. Did respondents violate the separation of powers required by the South Carolina Constitution?

II. Did the General Assembly unconstitutionally delegate legislative authority to the Board to unilaterally increase Plan premiums?

III. Is the challenged conduct subject to an injunction and mandatory reimbursement of premium increases to enrollees?

LAW/ANALYSIS

I. SEPARATION OF POWERS

The petitioners argue the Board did not have the power, except in limited circumstances not applicable here, to raise premiums for enrollees. They contend that the Board thus violated the separation of powers required by the South Carolina Constitution because it substituted its policy choices for those enacted by the General Assembly. We agree.

The South Carolina Constitution establishes three branches of government and requires they 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. I, § 8. This mandate of a

separation of powers stems from "the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

At its simplest, the constitutional division of powers can be described as "[t]he legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws." *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979). In our division of powers, the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision. *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 438–39, 181 S.E. 481, 486 (1935). Included within the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be. *State v. Moorer*, 152 S.C. 455, 479, 150 S.E. 269, 277 (1929); *Sutton v. Catawba Power Co.*, 101 S.C. 154, 157, 85 S.E. 409, 410 (1915). The executive branch is constitutionally tasked with ensuring "that the laws be faithfully executed." S.C. Const. art. IV, § 15. Of course, the executive branch, including the Board, may exercise discretion in executing the laws, but only that discretion given by the legislature. *See Moorer*, 152 S.C. at 478, 150 S.E. at 277. Thus, while non-legislative bodies may make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking is an intrusion upon the legislative power.

Respondents contend they had complete discretion to take the challenged action because the General Assembly simply appropriated the $51 million without any indication as to what the funds were appropriated for. In other words, the respondents argue the General Assembly did not direct the Board to fund the premium increases through any particular means, rather the Plan received a general appropriation of $51 million and the Board was required to decide how those funds should be spent. Alternatively, the respondents assert the Board had the power to decline the appropriated funds and unilaterally set the State and enrollee contribution rates. We reject both contentions.

We accept the unremarkable principle asserted by the respondents and acknowledged by other jurisdictions that an appropriation is only a spending cap, not a spending mandate, and therefore, an executive agency is generally not required to spend all appropriated funds. *See, e.g.*, *Detroit City Council v. Mayor of Detroit*, 537 N.W.2d 177, 181 (Mich. 1995) ("[A]n appropriation is not a

'mandate' to spend."); *Island Cnty. Comm. on Assessment Ratios v. Dept. of Revenue*, 500 P.2d 756, 763 (Wash. 1972) ("An appropriation of public monies by the legislature is not a mandate to spend, rather it is an authorization given by the legislature to a designated agency to use not to exceed a stated sum for specified purposes."); *see also* 81A C.J.S. *States* § 399 (2012) ("The appropriation is . . . merely an authorization to spend the appropriated sums."). To require otherwise would be to force agencies to waste tax dollars, rather than to encourage the efficient delivery of governmental services.

However, as established by this Court and decisions from other jurisdictions, an executive agency's power to decline to use all appropriated funds does not exist when there is a legislative mandate requiring the expenditure of those funds. We have made clear that "[t]he General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which appropriated monies shall be spent." *Edwards v. State*, 383 S.C. 82, 90, 678 S.E.2d 412, 416 (2009). Furthermore, where the General Assembly directs that appropriated funds be treated in a particular manner, executive agencies must comply with those directions. *See id.* at 91, 678 S.E.2d at 417 (holding that the "General Assembly has the authority to mandate that the Governor apply for federal funds which it has appropriated" and the Governor must comply with that mandate).

Other jurisdictions, while generally recognizing that an executive agency may decline to spend appropriated funds, also acknowledge that a statute may deprive an agency of that power by directing the expenditure of the funds. For example, in *Ellis v. City of Valdez*, 686 P.2d 700 (Alaska 1984), the Alaska Supreme Court recognized that beyond the usual appropriation of funds by the legislature, in some instances the legislature "both sets aside funds to be used by an administering authority for a particular purpose, and affirmatively directs the authority to accomplish the specified purpose." *Id.* at 705. The court went on to consider an appropriation of funds to purchase property and an agency's decision not to purchase the property. *Id.* at 704-06. The court concluded that because there was no "indication of a legislative mandate directing [the agency] to acquire [the property]," the agency was under no statutory duty to purchase the property. *Id.* at 706.

Similarly, in *Felicetti v. Secretary of Communities & Development*, 438 N.E.2d 343 (Mass. 1982), the Massachusetts Supreme Judicial Court considered

whether an executive agency acted contrary to an appropriations act by refusing to use appropriated funds. *Id.* at 344. The agency interpreted the act as requiring federal approval of the state's energy assistance plan prior to the agency releasing the funds to eligible individuals. *Id.* at 345. The court disagreed and construed the act as requiring the funds be distributed prior to federal approval. *Id.* at 346. The court noted that while executive agencies normally may decline to spend appropriated funds, that principle was not applicable because the agency's "action in withholding the funds effectively contravened Legislative policy." *Id.* Thus, the court held the agency's failure to use the appropriated funds as specified violated the appropriations act. *Id.* at 347.

In light of the appropriations act and section 1-11-710, we find the General Assembly mandated the appropriated funds be spent in full on the premium increases and afforded the Board no discretion as to enrollee premiums. The 2012-2013 Appropriations Act expressed the clear intent of the General Assembly that the entire $51 million appropriation be spent on the premium increases and enrollees not bear any of the premium increase. Under a subheading entitled "Rate Increases," the $51 million was listed as being appropriated for "HLTH INSURANCE-EMPLOYER CONTRIBUTIONS." Also, the amount, while slightly more than, closely corresponded to the amount specified in the Board's report to the General Assembly as necessary if the General Assembly decided the State should cover all of the premium increases. In short, in appropriating this amount for that purpose, the General Assembly made clear it had decided the State would bear all of the premium increase.[3] Furthermore, the members of the Board all acknowledged that the appropriation indicated that intent.

[3] The respondents dispute this conclusion by pointing to prior appropriations acts in which the General Assembly included provisos limiting the ability of the Board to raise enrollee premiums and the lack of such a proviso in the 2012-2013 Appropriations Act. For example, Proviso 63B.5 of the 1998-1999 Appropriations Act provided: "When devising a plan for the method and schedule of payment for the employer and employee share of contributions for Plan Year 1999, the Board shall not increase the contribution rates nor decrease benefits for State Health Plan participants." The respondents assert this language indicates the General Assembly understands that without such limitations, the Board can freely spend less than the full amount appropriated for premium increases. While provisos are useful where an appropriations act is open to interpretation, when an appropriation is clear, a

Additionally, section 1-11-710 mandates the expenditure of the funds appropriated for premium increases, and thus the Board does not have the power to decline to spend all of the appropriated funds. Section 1-11-710(A)(1) provides the Board shall make available to enrollees a group health plan with "maximum benefit to those covered within available resources." Therefore, the statute requires that the Board use all appropriated funds, because to do otherwise—to decline funds and instead place a greater burden on enrollees—would contravene the mandate to provide "maximum benefit . . . within available resources." In other words, section 1-11-710 directs the expenditure of the funds and thus deprives the Board of the power to decline to spend the appropriated funds.

Finally, we are guided in our consideration of section 1-11-710 and the 2012-2013 Appropriations Act by the nondelegation doctrine. That doctrine is a component of the separation of powers doctrine and prohibits the delegation of one

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proviso is unnecessary. Here, the appropriation was clear—the Board was to use all of the appropriated funds to cover the premium increases—and thus the lack of a proviso is immaterial.

Likewise the respondents argue the inclusion of a "carry-over" provision in the 2012-2013 Appropriations Act demonstrates the General Assembly's recognition that the Board can decline to spend the appropriated funds on premium increases. Contrary to the respondents' assertions, the carry-over provision is compatible with the Board having to use all funds appropriated for premium increases for that purpose because other sources of carry-over funds exist. For example, the Plan's costs for a particular year may be less than anticipated and the surplus funds could be carried-over to the next year.

The respondents also assert the General Assembly's attempt to amend section 1-11-710 through the 2000-2001 Appropriations Act indicates the Board has the power to decline appropriated funds. Section 21 of the 2000-2001 Appropriations Act as passed by the General Assembly would have restricted the Board's ability to raise enrollee contribution rates; however, Governor Hodges vetoed Section 21. Again, while the General Assembly there expressed a desire to codify specific restrictions on the Board's powers in relation to the Plan, that is immaterial in light of the General Assembly's clear intent for the Board to spend all of the 2012-2013 appropriated funds on the premium increases and section 1-11-710's clear mandate that the Board spend all appropriated funds.

branch's authority to another branch. *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978). While the legislature may not delegate its power to make laws, it may "authorize an administrative agency or board to 'fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *S.C. State Hwy. Dept. v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955) (citations omitted). Therefore, so long as a statute does not give an agency "unbridled, uncontrolled or arbitrary power," it is not a delegation of legislative power. *Bauer*, 271 S.C. at 233, 246 S.E.2d at 876.

In a somewhat similar case, the Board adopted a plan to reduce appropriations under the 1992 Appropriations Act because of projected revenue shortfalls. *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 423 S.E.2d 101 (1992). The Board's action was challenged as beyond its statutory authority, and we found that construing the statute as allowing the Board to reduce appropriations with the only limitation being that its reductions be as uniform as possible would violate the nondelegation doctrine. *Id.* at 216, 423 S.E.2d at 105. We held that "[i]f the Act is so broad as to allow the Board to apply reductions with the only requirement being that they be applied uniformly, the effect would be to allow the Board to appropriate funds with unbridled discretion." *Id.* Accordingly, we refused to construe the statute as unconstitutional when a constitutional reading was possible, and held the Board did not have the claimed discretion to reduce appropriations. *Id.*

Here, if the Board could decline appropriated funds based on its own policy choices, it would have the unbridled power to disregard the General Assembly's appropriations and make its own appropriations decisions. *See id.* at 212, 423 S.E.2d at 103 (holding that the appropriation of public funds is a legislative function and that the Board's claimed power to reduce appropriations according to its own criteria would be an impermissible delegation of legislative powers). Furthermore, if the Board can make its own choices as to enrollee premiums based solely on what it believes to be the best policy, the legislature has impermissibly delegated its powers to the Board. Therefore, to interpret section 1-11-710 and the 2012-2013 Appropriations Act as giving the Board the power to decline appropriated funds and instead set contribution rates at the level it desires would constitute an impermissible delegation of legislative powers in violation of the separation of powers. We will not construe statutes to be unconstitutional when susceptible to a constitutional interpretation. *Joytime Distributors & Amusement*

Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). That constraint on our interpretation of the statutes further supports our conclusion that the Board lacked the power to decline the appropriated funds.

In conclusion, we hold the Board violated the separation of powers by acting beyond its statutory authority and infringing upon the General Assembly's power to make policy determinations, when it declined to use the appropriated funds for the premium increases and instead raised enrollee contribution rates.

II. NONDELEGATION DOCTRINE

Having found that the Board violated the separation of powers in declining the appropriated funds and setting a different enrollee contribution rate, we need not consider the petitioners' assertion that the Board violated the nondelegation doctrine. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues where a prior issue was dispositive).

III. INJUNCTION AND REIMBURSEMENT

Petitioners request an injunction prohibiting the increase of their insurance premiums and compelling the Board to utilize the funds appropriated in the 2012-2013 Appropriations Act for premium increases. The respondents contend an injunction is not warranted because they will comply with this Court's ruling. An injunction is a drastic equitable remedy courts may use in their discretion in order to prevent irreparable harm to a party. *Denman v. City of Columbia*, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010). Due to its drastic and extraordinary nature, courts should issue injunctions with caution and only where no adequate remedy exists at law. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Petitioners do not face irreparable harm as the premiums paid can be returned. Also, the declaratory judgment entered herein provides petitioners with an adequate remedy at law. Accordingly, an injunction is not necessary.

Petitioners also seek the reimbursement to enrollees of all premium increases paid as a result of the Board's decision. Because we find the Board is required to use the appropriated funds for the premium increases, we agree that the premium increases were improperly collected and should be returned to enrollees.

CONCLUSION

For the reasons set forth, we enter judgment for the petitioners and declare the Board's premium increase unconstitutional as a violation of the separation of powers. We direct the Board to apply the appropriated funds to the Plan's premium increases and to return all premium increases collected from enrollees.

TOAL, C.J., BEATTY, and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas A. Bryson on behalf of himself and all similarly situated persons, Petitioner,

v.

State Budget and Control Board; Nikki R. Haley; Curtis M. Loftis, Jr.; Richard Eckstrom; and Hugh K. Leatherman, Jr.; in their official capacities as members of the State Budget and Control Board, Respondents.

Appellate Case No. 2012-213099

ORIGINAL JURISDICTION

Opinion No. 27245
Heard January 23, 2013 – Filed April 24, 2013

JUDGMENT FOR PETITIONER

Michael S. Medlock and C. Lance Sheek, of South Carolina Legal Solutions, LLC, of Columbia, for Petitioner.

C. Mitchell Brown, William C. Wood, Jr., and Michael J. Anzelmo, of Nelson, Mullins, Riley, & Scarborough, LLP, of Columbia for Respondents Nikki R. Haley, Richard Eckstrom, Curtis M. Loftis, Jr., and the South Carolina Budget and Control Board.

Michael R. Hitchcock, John Potter Hazard, V, and Kenneth M. Moffitt, of Columbia, for Respondent Hugh Leatherman, Jr.

JUSTICE HEARN: Petitioner brought this suit in the Court's original jurisdiction seeking a declaration that the South Carolina Budget and Control Board's August 8, 2012 decision raising enrollee premiums for the State's health insurance plan was a violation of the constitutionally mandated separation of powers. In *Hampton v. Haley*, Op. No. 27244 (S.C. Sup. Ct. filed April 24, 2013), we held the Board's decision violated the separation of powers. Accordingly, for the reasons stated therein, we enter judgment in favor of petitioner. We need not consider any of the other issues presented by petitioner because the separation of powers issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues where a prior issue was dispositive).

TOAL, C.J., BEATTY, and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

In the Matter of Charles E. Houston, Jr., Petitioner.

Appellate Case No. 2012-213047

ORDER

By order dated December 7, 2012, the Court found petitioner remained in civil contempt of Court and suspended him from the practice of law.[1] Petitioner has now filed an Amended Petition for Reinstatement in which he asserts he has complied with the requirements necessary to purge himself from civil contempt and requests the Court lift his suspension and reinstate him to the practice of law. Both the Office of Disciplinary Counsel and the Commission on Lawyer Conduct (the Commission) have filed returns to the Amended Petition. Neither opposes petitioner's reinstatement.

The Court finds petitioner has complied with the requirements necessary to purge himself from civil contempt. Accordingly, the Court lifts petitioner's suspension and reinstates him to the practice of law.

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[1] By order dated June 18, 2012, the Court found petitioner in civil contempt for his failure to comply with an order issued on June 8, 2011. The June 18, 2012, order imposed certain obligations upon petitioner and specified that petitioner's failure to comply with any of the obligations "shall result in his immediate suspension from the practice of law."

Petitioner shall remain obligated to timely file monthly statements from his Certified Public Accountant with the Commission as required by the Court's June 8, 2011, June 18, 2012, and December 7, 2012, orders.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Pleicones, J., not participating

Columbia, South Carolina

April 17, 2013

The Supreme Court of South Carolina

In the Matter of Louis S. Moore, Petitioner.

Appellate Case No. 2012-212482

ORDER

On May 18, 2009, the Court suspended petitioner from the practice of one (1) year. *In the Matter of Moore*, 382 S.C. 610, 677 S.E.2d 598 (2009). On July 11, 2011, the Court suspended petitioner from the practice of law for ninety (90) days, retroactive to the May 18, 2009, suspension, and ordered he pay the costs of the disciplinary proceeding within thirty (30) days of the order. *In the Matter of Moore*, 393 S.C. 361, 713 S.E.2d 293 (2011).

Petitioner has filed an Amended Petition for Reinstatement. The matter was referred to the Committee on Character and Fitness which issued a Report and Recommendation recommending reinstatement on certain conditions. Neither petitioner nor the Office of Disciplinary Counsel (ODC) filed exceptions to the Report and Recommendation.

The Amended Petition for Reinstatement is granted upon the following conditions:

1) for the first two (2) years of his reinstatement, petitioner shall be mentored by a lawyer approved by ODC; the mentor shall file quarterly reports documenting petitioner's progress in resuming the practice of law with the Office of Commission Counsel;

2) within six (6) months of the date of this order, petitioner shall pay $375.00 to Michael V. Howard as confirmed by the Certificate of Non-Compliance issued by the South Carolina Bar Resolution of Fee Disputes Board on October 26, 2009; and

3) within one (1) year of the date of this order, petitioner shall attend and complete the South Carolina Bar's Legal Ethics and Practice Program and shall immediately provide proof of attendance upon completion of the program to the Office of Commission Counsel.

Petitioner is reinstated to the practice of law.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Pleicones, J., not participating

Columbia, South Carolina

April 22, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brian K. Spears, Appellant.

Appellate Case No. 2010-162287

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Published Opinion No. 5119
Heard January 17, 2013 – Filed April 17, 2013

REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Brendan Jackson McDonald, all of Columbia, and J. Gregory Hembree, of Conway, for Respondent.

PIEPER, J.: Brian K. Spears appeals his convictions for murder and three counts of assault and battery with intent to kill (ABWIK). On appeal, Spears argues the trial court improperly admitted evidence of a prior shooting incident between Spears and Aaron Hammonds (Victim) that occurred one month before Victim was

killed. Spears contends the trial court failed to conduct a balancing test to determine if the probative value of the prior shooting testimony was substantially outweighed by the danger of unfair prejudice to Spears. We remand.

FACTS

On May 27, 2007, Victim was fatally shot on Ocean Boulevard in Myrtle Beach. Upon responding to the scene, Detective Michael Hull interviewed eyewitnesses. Detective Hull created a composite of the suspected shooter that resembled Jeffrey Bethea. After seeing the composite on the news, Bethea turned himself in to the police. Bethea told Detective Hull that Spears and Nathaniel Douglas were responsible for Victim's death. Thereafter, Bethea, Spears, and Douglas were each charged with murder and three counts of ABWIK. As part of an agreement with the State, Bethea pled guilty to voluntary manslaughter. As a result of Bethea's plea, Douglas and Spears became codefendants in the case.

During pretrial motions, the solicitor argued Victim's death was a gang-related revenge killing. The solicitor contended that Victim's death was connected to the murder of Eric Floyd. Prior to his murder, Victim pled guilty to accessory after the fact in connection with Floyd's murder and served a four-year sentence. Approximately one month after Victim was released from prison, Spears allegedly shot Victim in a Wal-Mart parking lot in North Carolina. Spears argued any introduction of gang evidence would be prejudicial under Rule 403, SCRE. The trial court asked the solicitor "what about the shooting the month before, was, is there some way to connect that with this gang as well. . . I'm just wondering are you going to be able to get that in." The solicitor responded that she would not know if she could lay the foundation for the Wal-Mart shooting until Danyell Hammonds' testimony was proffered. Spears then argued testimony about the Wal-Mart shooting should be excluded because it was hearsay and because there was not clear and convincing evidence of the shooting as required by Rule 404(b), SCRE. Upon completion of the arguments, the trial court found the gang affiliation evidence was relevant and the probative value of the gang affiliation evidence was not substantially outweighed by any danger of unfair prejudice it might have caused. Spears then questioned whether the trial court ruled on the admissibility of the shooting incident at Wal-Mart. The trial court, in response to Spears' question about the Wal-Mart shooting, took the matter under advisement and withheld its ruling pending the presentation of evidence at trial.

After the trial began, the court held an in camera hearing to proffer the testimony of Hammonds, Victim's sister, who intended to testify regarding Victim's statements about the Wal-Mart shooting. Hammonds testified that one month before Victim was fatally shot, Victim told her "Bos" shot him outside of a Wal-Mart in North Carolina. Hammonds indicated she knew Bos to be Spears.[1] According to Hammonds, Victim and Lemark Irons came to her house and ran to her room where she saw wet blood on Victim's shirt. Hammonds explained that she believed the shooting had just occurred because the blood in Victim's hand was still wet. Hammonds testified that Spears was a member of the 41-Curve gang and Victim was a member of the East Side Blood gang. Hammonds also testified a group of 41-Curve members told her that they were "going to get" Victim.

The trial court expressed its concerns that Hammonds' testimony was hearsay and questioned the solicitor about how she would get Hammonds' testimony regarding the Wal-Mart shooting admitted into evidence. Before the solicitor responded, Spears argued against introducing Hammonds' testimony of the prior shooting incident, stating "it's a 4[04](B) issue. My client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it." Spears also argued that the testimony was hearsay and "taking it together with the whole more prejudicial than probative thing and you've got my argument." The solicitor then argued Victim's testimony fell under the excited utterance hearsay exception.

Before adjourning for the night, the trial court discussed with Spears and the solicitor whether Hammonds' testimony was hearsay. The next day, Spears renewed his Rule 403, SCRE, argument. After further discussion on whether Hammonds' testimony was hearsay, the trial court admitted Hammonds' testimony about the Wal-Mart shooting under the excited utterance exception to hearsay. Next, the solicitor proffered the video of the Wal-Mart shooting to introduce Hammonds' testimony as prior bad act evidence pursuant to Rule 404(b), SCRE. The trial court asked the solicitor the purpose for which she was offering the prior shooting evidence under Rule 404(b). The solicitor responded the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected and argued the evidence was not clear and convincing. Spears also renewed all of his previous objections. The trial court found clear and convincing evidence existed to support admission of the Wal-Mart shooting

[1] Bos is Spears' street name.

testimony and admitted Hammonds' testimony of the Wal-Mart shooting as a prior bad act.

A jury found Spears guilty. The trial court sentenced Spears to thirty years' imprisonment for murder and twenty years' imprisonment for each ABWIK count, to be served concurrently. This appeal followed.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 609 (Ct. App. 2012). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

LAW/ANALYSIS

Spears' sole issue on appeal is that the trial court erred by failing to conduct an on-the-record balancing test to determine whether the probative value of the prior bad act testimony was substantially outweighed by the danger of unfair prejudice. We agree.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the perpetrator. Rule 404(b), SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). "Once

bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) (emphasis added). The court may exclude the 404(b) evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id*.

This court has held if "an on-the-record Rule 403 analysis is required, [we] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." *State v. King*, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002). In *King*, this court determined the trial court's ruling was "a compressed Rule 403/404(b) analysis" with "some indicia of his consideration of whether admission of the testimony was fair to King (*i.e.*, more probative than prejudicial)." *Id.* at 157, 561 S.E.2d at 647.

Here, the trial court ruled Hammonds could testify as to Victim's statements about the Wal-Mart shooting pursuant to the excited utterance exception to hearsay. Immediately thereafter, the solicitor proffered the video of the Wal-Mart shooting. The trial court indicated it understood the solicitor was offering the evidence of the prior shooting "under 404 or evidence of a prior bad act." The solicitor argued testimony regarding the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected, arguing the evidence was not clear and convincing and renewed all of his previous objections, including his earlier objection that the unfair prejudice of the Wal-Mart shooting testimony substantially outweighed its probative value. The trial court found clear and convincing evidence existed to support the prior bad act, but the trial court made no further findings. We recognize the trial court did spend time expressing its concerns and questioned the solicitor on the prior shooting. However, other than finding there was clear and convincing evidence of the prior shooting and Hammonds' testimony was admissible, the trial court made no specific findings on the record as to why the testimony had probative value, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.[2]

[2] Admission under an excited utterance theory would also be subject to a 403 objection and balancing analysis. *See* Rule 403, SCRE.

Furthermore, we find it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice. Unlike the trial court in *King*, here, the trial court made no indication that it considered Rule 403. Thus, if the trial court did consider the unfair prejudice of the Wal-Mart shooting testimony, it is not readily implicit or apparent from the record. For the foregoing reasons, we find the trial court erred by failing to conduct an on-the-record Rule 403 balancing test.

Having determined that the trial court erred by failing to conduct an on-the-record Rule 403 balancing test, we must next determine the proper remedy. South Carolina has not addressed the procedure for when an appellate court is unable to determine from the record whether the trial court considered Rule 403 in admitting a prior bad act under Rule 404(b). However, our courts have discussed the procedure for when the trial court fails to include a Rule 609, SCRE, balancing test on the record. *See State v. Colf*, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000). In *Colf*, the court of appeals undertook its own Rule 609(b) balancing test. *Id*. On appeal, the supreme court held that this court should have remanded the question to the trial court instead of conducting the balancing test itself. *Id*. The court reasoned that "[i]t is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision." *Id*. Furthermore, the supreme court explained, "[t]he balancing test required by Rule 609(b) must be conducted by the trial court." *Id*. (emphasis added).

Similarly, in *State v. Scriven*, this court was unable to determine whether the trial court "conducted a meaningful analysis to balance the impeachment value of these prior convictions, if any, against the prejudicial impact, as clearly required under Rule 609(a)(1)." 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000). Because the court was unable to ascertain whether the error was harmless, we remanded to the trial court with instructions to hold a hearing on the admissibility of the prior convictions and to carefully weigh the probative value of impeachment of the prior convictions against the prejudice to the defendant. *Id.* at 344, 529 S.E.2d at 77. We further instructed that in "the event the State does not carry its burden, or the court determines that the prejudicial impact to Scriven outweighed the probative value for impeachment, the court shall order a new trial. Otherwise, subject to further appellate review, the conviction is affirmed." *Id*.

More recently, this court found that the trial court erred by not conducting a proper Rule 609(b) balancing test because it provided no analysis of the prejudicial impact of admitting the defendant's prior conviction. *State v. Howard*, 384 S.C. 212, 223, 682 S.E.2d 42, 48 (Ct. App. 2009). We followed the procedure set forth in *Scriven*, and remanded for an on-the-record balancing test. *Id.*

We have reviewed other jurisdictions and found that when appellate courts cannot ascertain whether the trial court conducted a Rule 403 balancing test on the record, these courts have either: (1) determined whether the error was harmless; (2) conducted a de novo review and made a balancing decision; or (3) remanded for an on-the-record Rule 403 balancing test.

As indicated, some courts have ascertained whether the trial court's failure to conduct a Rule 403 balancing test is harmless. In *Wardlow v. State*, the Alaska Court of Appeals found the trial court committed error when it failed to conduct a balancing test under Rule 403 in admitting a witness' testimony as evidence pursuant to Rule 404. 2 P.3d 1238, 1248 (Alaska Ct. App. 2000). However, the court determined the defendant failed to establish he was unfairly prejudiced. *Id*. Therefore, the court held the trial court's error in failing to conduct a Rule 403 balancing test was harmless. *Id*. Similarly, the Mississippi Supreme Court has held the failure to apply a Rule 403 balancing test on the record could be harmless error. *McKee v. State*, 791 So.2d 804, 805 (Miss. 2001). In *McKee*, the trial court admitted testimony regarding the defendant's prior use of crack cocaine over the defendant's objection. *Id*. at 806. The court found the trial court erred by not applying the Rule 403 balancing test on the record. *Id*. at 810. However, the court also found the error was harmless based on the overwhelming evidence of the defendant's guilt. *Id*.

Other courts have found the trial court's failure to conduct an on-the-record Rule 403 balancing test is not reversible error when the appellate court can undertake a de novo review of the record and conduct its own balancing test. The Tenth Circuit held it had authority to "conduct a *de novo* balancing where the trial court failed to make explicit findings to support a Rule 403 ruling" on the admission of Rule 404(b) evidence. *United States v. Lazcano-Villalobos*, 175 F.3d 838, 847

(10th Cir. 1999).[3] Additionally, the Ninth Circuit explained that it reviews "for abuse of discretion a district court's decision to exclude evidence at trial." *United States v. Leo Sure Chief*, 438 F.3d 920, 925 (9th Cir. 2006). "However, when the district court excludes evidence under Federal Rule of Evidence 403 but does not engage in explicit balancing, we review such a determination de novo." *Id.* (footnote omitted).

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[3] Rule 403 of the Federal Rules of Evidence is worded differently than the South Carolina rule and provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 404(b) further provides:

> (b) Crimes, Wrongs, or Other Acts.
>
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
>
> (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
>
> (B) do so before trial -- or during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 404(b).

Finally, other courts have determined that remand is appropriate when the appellate court is unable to determine from the record whether the trial court implicitly made a Rule 403 finding. In *State v. Taylor*, the Arizona Supreme Court reversed and remanded for a Rule 403 determination. 817 P.2d 488, 492-93 (Ariz. 1991). The *Taylor* court recognized that even though the trial court did not specifically mention Rule 403 or prejudice in its analysis, "the record indicates that the court *may have been* weighing the prejudice against the probative value." *Id*. at 492. However, the court also found it could not determine whether the trial court excluded the prior conviction because it was irrelevant or because the prejudice outweighed the probative value. *Id*. The court noted that "[a] remand with instructions to conduct a Rule 403 determination may be ordered when uncertainty in a trial court's ruling might be removed." *Id*. (quoting *Shows v. M/V Red Eagle*, 695 F.2d 114, 118 (5th Cir. 1983)). Accordingly, the court remanded this issue with instructions to the trial court "to make an on-the-record finding based on specific facts and circumstances." *Id*. at 493.

Likewise, in *State v. McFarland*, the West Virginia Supreme Court held that because "the factors used by the circuit court in conducting the Rule 403 balancing test do not appear on the record, this Court is unable to effectively review the circuit court's decision to admit" the prior bad act evidence in question. 721 S.E.2d 62, 73 (W. Va. 2011). Therefore, the *McFarland* court held that the circuit court erred in failing to conduct an on-the-record balancing test required by Rule 403. *Id*. The court reversed and remanded to the trial court for a new trial. *Id*.[4]

[4] In the absence of on-the-record prejudice versus probative value findings as to the admission of a Rule 404(b) evidence, the Fifth Circuit has found it is "obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." *United States v. Robinson*, 700 F.2d 205, 213 (5th Cir. 1983). In *Robinson*, the court determined that its review of the record led to uncertainty concerning the admissibility of the extrinsic offense testimony and remanded the case to the trial court for an on-the-record balancing test. *Id*. at 214. Additionally, the Seventh Circuit recognizes the district court's deference in admitting Rule 404(b) evidence, but also recognizes the appellate court's authority to "reverse if the district court failed to consider the prejudicial nature of the Rule 404(b) evidence before allowing it to be admitted." *United*

Having discussed the options considered by other courts, we decline to conduct a de novo Rule 403 balancing test. This decision is consistent with our supreme court's prior decision that an appellate court should not conduct its own balancing process when the trial court does not perform a Rule 609(b), SCRE, balancing test in admitting a prior conviction. *See Colf*, 337 S.C. at 629, 525 S.E.2d at 249 (noting an appellate court should not undertake the Rule 609(b) balancing test itself, but should remand the question to the trial court).

We note the potential prejudice to Spears upon the introduction of this evidence. Spears was tried for shooting and killing Victim. The prior bad act testimony involved Spears shooting the Victim a month before the incident herein. Based upon these similarities, the jury could have determined Spears was guilty on an improper basis by relying on the Wal-Mart testimony as propensity evidence. *See State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity."); *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (stating when a "previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced"); *State v. Taylor*, 399 S.C. 51, 61, 731

States v. Ciesiolka, 614 F.3d 347, 357 (7th Cir. 2010). "A 'perfunctory' analysis is insufficient." *Id.* In *Ciesiolka*, the court held that:

> [T]he district court abused its discretion in failing to propound reasons for its conclusion that the probative value of [defendant's prior bad acts] was not substantially outweighed by the risk of unfair prejudice. We have reviewed the transcript of the district court's Rule 404(b) hearing, but could find no portion within it where the court explained its bare-bones conclusion that "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

Id.

S.E.2d 596, 601 (Ct. App. 2011) (recognizing the prejudicial effect of admitting "evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime"). Moreover, based upon the record herein, we are unable to say that the admission of the prior bad act testimony was harmless error. *See Black*, 400 S.C. at 27, 732 S.E.2d at 890 ("In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt."); *Scriven*, 339 S.C. at 344, 529 S.E.2d at 77 ("On the basis of this record, we are unable to say that the admission of these prior convictions was harmless error."). Accordingly, we find it appropriate to remand for an on-the-record Rule 403 balancing test.

CONCLUSION

Based on the trial court's failure to conduct a Rule 403 balancing test to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears, we remand with instructions for the trial court to conduct an on-the-record balancing test. If upon remand the trial court determines the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears, the court should order a new trial. If the trial court determines the probative value of the prior shooting testimony is not substantially outweighed by the danger of unfair prejudice to Spears, the conviction shall be affirmed subject to the right of appellate review.

REMANDED.

FEW, C.J., and WILLIAMS, J., concur.