The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF DALLAS D. BALL, PETITIONER

Dallas D. Ball, who was indefinitely suspended from the practice of law, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 16, 2006, beginning at 1:00 p.m., in the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
May 11, 2006

The Supreme Court of South Carolina

In the Matter of Franklin
S. Henson, Respondent.

ORDER

The Office of Disciplinary Counsel petitions this Court for an order transferring respondent to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR. Respondent opposes the petition.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Danny R. Smith, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Smith shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Smith may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law

office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Danny R. Smith, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Danny R. Smith, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Smith's office.

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

s/ Jean H. Toal C. J.
FOR THE COURT
Pleicones, J., not participating

Columbia, South Carolina

May 12, 2006

The Supreme Court of South Carolina

In the Matter of Kenneth C. Inman, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Inman and the interests of Mr. Inman's clients.

IT IS ORDERED that Jeffery Edwin Johnson, Esquire, is hereby appointed to assume responsibility for Mr. Inman's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Inman may have maintained as a partner in the Inman & Johnson Law Firm, PC, as well as a solo practitioner in the Law Firm of Kenneth C. Inman, PC. Mr. Johnson shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Inman's clients and may make disbursements from Mr. Inman's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Kenneth C. Inman, Esquire, shall serve as notice to the bank or other financial institution that Jeffery Edwin Johnson, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Jeffery Edwin Johnson, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Inman's mail and the authority to direct that Mr. Inman's mail be delivered to Mr. Johnson's office.

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

Columbia, South Carolina
May 16, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19

May 22, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Debra Edwards, individually
and as class representative for
all those similarly situated, Appellant,

v.

SunCom, a member of the
AT&T wireless network, d/b/a
Triton PCS Operating
Company, LLC, Respondent.

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 26148
Heard March 21, 2006 – Filed May 15, 2006

DISMISSED

Natale Fata, of Surfside Beach, for Appellant.

Charles S. Altman, of Finkel & Altman, of Charleston, and Michael D. Hays, of Dow, Lohnes & Albertson, of Washington, for Respondent.

JUSTICE WALLER: This is an appeal from an order of the circuit court granting SunCom's motion to stay the action. The circuit court simultaneously ordered SunCom to seek a ruling from the Federal

Communications Commission (FCC) as to whether an "early termination fee" constituted a "rate charged."[1] Edwards appeals. We dismiss the appeal as interlocutory.

FACTS

In March 2000, Edwards signed a service agreement to become a SunCom cellular telephone customer. She cancelled the agreement after the initial 12 month service period, and was charged a $200.00 early cancellation fee. She filed this action in the circuit court alleging the cancellation fee was charged in breach of the terms of the agreement.[2] SunCom moved for judgment on the pleadings or alternatively to dismiss or stay the action. The trial court issued an order staying the matter and, further, requiring SunCom to petition the FCC to seek a declaratory ruling as to whether the early termination fee was a "rate charged." The matter was stayed pending the FCC's ruling. Edwards appeals.

ISSUE

The sole issue we need address is whether an order granting a stay is immediately appealable. We hold that it is not.

Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within S.C. Code Ann. § 14-3-330. Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004). Pursuant to S.C. Code Ann. § 14-3-330, the following types of orders are appealable:

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[1] A state is preempted from regulating the terms and conditions of commercial mobile telephone services by 42 USC § 332 (c)(3)(a) of the Federal Communications Act.

[2] The contract initialed by Edwards states, "My service plan has a 12 month service contract and if terminated prior to the end of that term I will be charged a cancellation fee of $200.00 to my account. I also understand that my contract automatically renews for one year past 3/24/01. I understand if I do not wish for my contract to automatically renew, cancellation requires 30 days written notification prior to automatic renewal date."

> 1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

We find the present order does not fall into any of these categories. It does not involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken.

An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." Mid-State Distribs. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Interlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2). Orders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Id. at 335 n. 4, 426 S.E.2d at 780 n. 4.

The order here does not discontinue the proceeding. It merely temporarily stays the matter pending a ruling by the FCC. Accordingly, we find an order granting a stay is not immediately appealable.

Edwards cited Hiott v. Contracting Services, 276 S.C. 632, 633, 281 S.E.2d 224, 225 (1981), as supporting her claim that an order granting a stay is directly appealable. However, Hiott adopted this rule, without discussion, citing Dill v. Moon, 14 S.C. 338 (1880). Dill dealt with the refusal to stay an action and, further, is based upon broad language which this Court no longer follows. The Dill court noted that the 1873 code allowed appeals from orders "involving the merits." It went on to cite an 1878 case holding that an order denying a motion to transfer a case to the county of the defendant's residence, after the law upon that subject had been changed, was immediately appealable. The Dill court stated, "[t]he word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case. . . . It may be concluded that whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies to this court." Under § 14-3-330, however, an order must affect a substantial right **and** prevent a judgment from which an appeal may later be taken in order to be immediately appealed. Accordingly, we find Hiott and Dill are no longer good law such that they are overruled.[3]

APPEAL DISMISSED.[4]

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

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[3] To the extent it is inconsistent with our holding today, we likewise overrule the Court of Appeals' recent opinion in Carolina Water Svc. v. Lexington County Joint Municipal Water and Sewer Comm'n, Op. No. 4047, S.C. Ct. Appeals filed Jan. 20 2006 (Shearouse Adv. Sh. No. 5 at 65).

[4] We note that, although we find no abuse of discretion in the grant of a stay in this case, Edwards is free to move the circuit court for a lift of the stay, or such other relief as may be necessary, if the matter pending before the FCC is unduly delayed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

WRB Limited Partnership, a South Carolina Limited Partnership, Appellant,

v.

County of Lexington, Respondent.

Appeal from Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26149
Heard April 19, 2006 – Filed May 15, 2006

REVERSED

D. Reece Williams, III, Jennifer N. Stone, and Michael W. Tighe, all of Callison Tighe & Robinson, LLC, of Columbia, for appellant.

Jeffery M. Anderson, Lisa Lee Smith, and Matthew D. Sullivan, all of Nicholson, Davis, Frawley, Anderson & Ayer, LLC, of Lexington, for respondent.

JUSTICE MOORE: Appellant WRB Limited Partnership (Landowner) commenced this inverse condemnation action against respondent Lexington County (County) alleging that methane gas from County's adjacent landfill contaminated Landowner's property.[1] The trial judge granted County's motion for summary judgment and Landowner appeals.

FACTS

The parties submitted affidavits indicating the following. Methane gas is produced as buried waste materials decay. It is a combustible and explosive gas that is hazardous in significant concentrations. To prevent the natural underground migration of methane to Landowner's adjacent property, County took several actions required by the South Carolina Department of Environmental Control and the Environmental Protection Agency including capping the landfill, installing venting pipes, and digging a trench near the property line where a methane gas recovery system was installed.

Landowner's expert opined that the migration of methane to Landowner's property resulted from "the geo-synthetic capping of [the landfill] in 2001 and the clay cap installed in 1990." This capping diverted the vertical migration of methane and caused it to vent laterally onto Landowner's property. County's expert summarily stated a contrary opinion that the capping "was not the cause of the methane gas migrating to [Landowner's] property."

The trial judge found that although there was a factual dispute regarding whether capping caused the migration of methane to Landowner's property, the capping in any event was not "an affirmative, positive, aggressive act" and therefore did not support an action for inverse condemnation.

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[1]The landfill closed in 1988.

ISSUE

Is the capping of the landfill an affirmative, aggressive, and positive act to support an action for inverse condemnation?

DISCUSSION

In an action for inverse condemnation, the property owner is the moving party claiming an act of the sovereign has damaged his property to the extent of an actual taking, entitling him to compensation. Cobb v. South Carolina Dep't of Transp., 365 S.C. 360, 618 S.E.2d 299 (2005). Whether the plaintiff has established a claim for inverse condemnation is a matter for the court to determine. *Id.* To prevail in such an action, a plaintiff must prove "an affirmative, aggressive, and positive act" by the government entity that caused the alleged damage to the plaintiff's property. Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981); Kline v. City of Columbia, 249 S.C. 532, 535, 155 S.E.2d 597, 599 (1967).

We find our decisions in Kline, *supra*, and Berry's On Main, *supra*, controlling on this issue. As in the case before us, these cases involved public improvements that allegedly damaged private property. In Kline, the City of Columbia was widening and improving a public street when a gas line was breached causing an explosion and fire on the neighboring property. In Berry's On Main, the City of Columbia undertook an urban redevelopment project that involved excavating a public street. The excavations flooded during heavy rain damaging the property owner's store. In both these cases we found an affirmative, aggressive, and positive act by the local government that supported a cause of action for inverse condemnation. *Cf.* Collins v. City of Greenville, 233 S.C. 506, 105 S.E.2d 704 (1958) (no positive act where the city, in attempting to unclog a sewer line, caused sewage to overflow from the plaintiff's commodes damaging his property).

Here, County undertook a permanent public project in capping the landfill. Whether this action resulted in a taking is not before us.

We simply find on the single element of an affirmative, aggressive, positive act that County's action meets this requirement and summary judgment should not have been granted.

REVERSED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice Knox McMahon, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Kurtz, Respondent,

v.

State of South Carolina, Petitioner.

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

Opinion No. 26150
Submitted March 22, 2006 – Filed May 15, 2006

AFFIRMED IN PART; REVERSED IN PART

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Attorney General David Spencer, all of Columbia, for Petitioner.

Assistant Appellate Defender Robert M. Pachak, of Columbia, for Respondent.

Code Commissioner Stephen T. Draffin, of South Carolina Legislative Council, of Columbia, for Amicus Curiae.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of post-conviction relief (PCR) to Respondent Michael Kurtz (Kurtz).

FACTS

Kurtz pled guilty to involuntary manslaughter and leaving the scene of an accident resulting in death and was sentenced to five (5) years for the manslaughter charge and twenty-five (25) years, suspended to seven (7) years, for leaving the scene of an accident.[1] Kurtz filed an application for PCR alleging ineffective assistance of counsel.

The PCR judge found trial counsel had misadvised Kurtz that he would be eligible for parole on the leaving the scene of an accident charge. He concluded trial counsel was ineffective and granted Kurtz a new trial. The State filed a motion to alter or amend the order on the ground the evidence did not support the conclusion that trial counsel misadvised Kurtz. The PCR judge denied the State's motion. Kurtz then hired new counsel and filed a motion pursuant to Rule 60(b), SCRCP, alleging the PCR judge erred in finding him ineligible for parole.[2] He asked the PCR judge to vacate the prior order granting him relief, reinstate his convictions, and find that he is parole eligible. The PCR judge granted the motion. The State appeals.

ISSUES

1) Did the PCR judge err in ruling on whether Kurtz was eligible for parole?

2) Did the PCR judge err in finding Kurtz was eligible for parole?

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[1]Kurtz admitted drinking the night of the accident. He hit a pedestrian killing her.

[2]S.C. Code § 24-13-100 states all Class A, B, and C felonies are no parole offenses and under § 24-13-125, a defendant convicted of such an offense must serve 85% of his sentence before he is eligible for parole.

DISCUSSION

1) Review by PCR judge

The State contends the PCR judge should not have ruled on the merits of the Kurtz's claim regarding parole eligibility. The State argues such claims are to be addressed through the Department of Probation, Parole, and Pardon Services ("DPPPS") pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

In deciding a similar claim, the Court held that "[t]he PCR court incorrectly concluded that petitioner's claim was an Al-Shabazz claim that can only be resolved in the Department of Corrections' internal grievance system." Coats v. State, 352 S.C. 500, 503, 575 S.E.2d 557, 558 (2003). The Court held this type of claim "is appropriate for PCR because [the defendant] alleges that counsel was ineffective for improperly advising him that he would be parole eligible." Id. Accordingly, pursuant to Coats, the PCR judge correctly ruled on Kurtz's claim.

2) Parole Eligibility

The State also contends the PCR judge erred in finding that Kurtz was eligible for parole. We agree.

In 1999, Kurtz pled guilty to leaving the scene of an accident where death results which is codified at S.C. Code Ann. § 56-5-1210(A)(3)(2006). In 1996, the General Assembly amended § 56-5-1210(A)(3) to provide that this offense is a felony with a sentence of not less than one year and not more than twenty-five (25) years and a fine between $10,000 and $25,000.

Pursuant to S.C. Code Ann. § 16-1-90 (2003 & Supp. 2005), all criminal offenses are classified according to the maximum sentence which can be imposed for the offense. The offenses are divided into felonies and misdemeanors and the felonies are further classified as A,

B, or C. A Class B felony carries a maximum sentence of twenty-five (25) years. Pursuant to S.C. Code Ann. § 24-13-100 (Supp. 2004), all Class A, B, and C felonies are classified as no parole offenses. Pursuant to S.C. Code Ann. § 2-13-66 (2005), the Code Commissioner is "to place crimes and offenses in the appropriate category as established by the General Assembly" in § 16-1-90. S.C. Code Ann. § 2-13-66 (emphasis added). "The Code Commissioner is specifically prohibited from changing the designation by the General Assembly of any crime or offense from felony to misdemeanor or from misdemeanor to felony and is like wise prohibited from changing the number of years of any sentence set by the General Assembly." Id.

In 1999, when Kurtz pled guilty, the offense of leaving the scene of an accident where death results had not yet been listed by the Commissioner as a Class B felony in § 16-1-90.[3] The offense did not appear in § 16-1-90 until the 2000 Supplement was published. The PCR judge found that since it was not classified as a Class B felony in § 16-1-90, S.C. Code Ann. § 24-13-100 was inapplicable and the offense was not a no parole offense when Kurtz pled guilty. He concluded Kurtz is eligible for parole and his trial counsel correctly advised him.

The State contends that Kurtz's parole eligibility does not hinge on the Code Commissioner's listing of the classification. We agree. As the State argues, once the General Assembly has enacted legislation providing that an offense is a felony with a maximum sentence of twenty-five (25) years, the offense is a Class B felony. Contrary to Kurtz's argument that attorneys would have to be clairvoyant regarding an offense's classification, the Code Commissioner has no discretion and his classification of the offenses is merely a ministerial duty.[4] To hold as Kurtz argues would mean that the effective date of any new

[3]This offense was classified as a Class B felony in 2000, approximately two years after Kurtz pled guilty.

[4]The Code Commissioner filed an amicus curiae brief in which he sides with the State.

legislation would not be until it is published in the Code. However, acts become effective upon the approval of the governor.[5]

Accordingly, we hold the offense of leaving the scene of an accident was a Class B felony and was a no parole offense when Kurtz pled guilty. Therefore, the PCR judge's grant of Kurtz's Rule 60 motion is reversed.

Affirm in part; Reverse in part.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

[5]As the Code Commissioner points out in his amicus brief, there will always be a lag time between an offense's enactment and its placement on the classification list.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward D. Sloan, individually and as a citizen and taxpayer and registered elector of the State of South Carolina, and on behalf of all others similarly situated, Appellant,

v.

Friends of the Hunley, Inc., and Warren F. Lasch, its Chairman, Respondents.

Appeal from Richland County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26151
Heard November 2, 2005 – Filed May 15, 2006

AFFIRMED IN PART; REVERSED IN PART

Jennifer J. Miller, and James G. Carpenter, both of Carpenter Law Firm, of Greenville, for Appellant.

Thornwell F. Sowell, III, of Sowell Gray Stepp & Laffitte, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: This case was certified for review from the court of appeals pursuant to Rule 204(b), SCACR. Appellant Edward D. Sloan Jr. (Sloan) brought an action against Friends of the Hunley, Inc. (Friends) and its chairman, Warren F. Lasch (Lasch), seeking injunctive and declaratory relief for a violation of the Freedom of Information Act (FOIA). After the commencement of the litigation, Friends provided Sloan with the requested information. Friends subsequently moved for summary judgment, arguing that the action was moot and that Sloan lacked standing. The trial court granted summary judgment in favor of Friends on all causes of action. We affirm in part and reverse in part.

FACTUAL / PROCEDURAL BACKGROUND

Friends is a nonprofit corporation dedicated to the recovery and conservation of the Confederate submarine, the *H.L. Hunley*. Sloan requested documents from Friends pursuant to FOIA in July of 2001. Friends refused to provide the requested documents contending that the corporation was not subject to FOIA. Sloan filed a Complaint alleging that Friends has received more than $13,000,000 in public funds, is a public body as defined by S.C. Code Ann. § 30-4-20(a) (1991), and has violated FOIA by refusing to provide certain documents to Sloan after a FOIA request. Sloan also alleged that Friends is merely the alter ego of the Hunley Commission (the Commission) and is, therefore, subject to all laws applicable to the Commission including FOIA.

Friends sought summary judgment arguing that Sloan's cause of action for a declaratory judgment finding Friends a public body subject to FOIA was moot because they had fully complied with Sloan's FOIA request. The trial court granted Friends' motion for summary judgment. Friends subsequently filed a motion for summary judgment with a second trial court contending that Sloan's alter ego cause of action improperly called on the Court to render an advisory opinion and also that Sloan did not have standing to maintain an action to establish Friends as the alter ego of the Commission. Judge John C. Hayes, III granted Friends' motion, finding that the action

essentially required an advisory opinion and that Sloan lacked sufficient standing. Sloan appealed and raises the following issues for review:

I. Did the trial court err in declining to consider whether Friends was a "public body" under FOIA?

II. Did the trial court err in finding that Sloan lacks standing?

III. Did the trial court err in granting Friends' motion for summary judgment as to the alter ego claim?

Lasch raises the following issue for review as an additional sustaining ground:

IV. Is Lasch entitled to summary judgment because he is being sued only in his capacity as the chairman of Friends?

LAW / ANALYSIS

STANDARD OF REVIEW

In reviewing the grant of summary judgment, this Court applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *South Carolina Elec. & Gas Co. v. Town of Awenda*, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004) (quoting *Osborne v. Adams,* 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. *Id.*

I. Declaratory Judgment

A. Mootness

Sloan argues that the trial court erred in declining to consider whether Friends was a "public body" under FOIA.[1] We disagree.

Generally, this Court only considers cases presenting a justiciable controversy. *Byrd v. Irmo High School*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract. *Id* at 431, 468 S.E.2d at 864. A moot case exists 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 reviewing court. *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). If there is no actual controversy, this Court will not decide moot or academic questions. *Id.* (citing *Jones v. Dillon-Marion Human Res. Dev. Comm'n.*, 277 S.C. 533, 535, 291 S.E.2d 195, 196 (1982)); *see also Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981). Although this Court has not addressed the issue of mootness as it pertains to FOIA, other courts have held that once the requested documents are produced, a justiciable controversy no longer exists. *Trueblood v. U.S. Dept. of Treasury, I.R.S.*, 943 F.Supp. 64, 67 (D.D.C.

[1] Friends contends that this issue is not properly before the Court. Friends argues that Sloan has only appealed the second trial court's order, and that because the first trial court issued the order finding the declaratory judgment action moot, this issue is not presently reviewable by this Court. While Friends is correct in the argument that the first trial court's order is not before the Court, Friends fails to acknowledge that the first trial court's order was amended to allow Sloan to go forward in his pursuit of a declaratory judgment in this cause of action. Accordingly, we find the order issued by the second trial court is the order that declared the declaratory judgment cause of action moot. Therefore, this issue is properly before the Court.

1996); *Misegades & Douglas v. Schuyler*, 456 F.2d 255, 255 (4th Cir. 1972); *Kaye v. Burns*, 411 F.Supp. 897, 901 (S.D.N.Y. 1976).

In the instant case, Sloan concedes that Friends has provided all documents requested pursuant to FOIA. Additionally, since the filing of this appeal, Friends has conceded that it is presently a public body as related to this litigation. The purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies. *Bellamy v. Brown*, 305 S.C 291, 295, 408 S.E.2d 219, 221 (1991). Because the information Sloan sought has been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment. Additionally, Sloan has further conceded that his interest in this matter is purely academic. Therefore, we find that the question is moot, and any judgment by this Court would constitute an advisory opinion. Accordingly, the trial court did not err in granting Friends' motion for summary judgment as to Sloan's request for a declaratory judgment.

B. Exceptions to Mootness

Sloan further contends that the trial court erred in finding that none of the general exceptions to mootness applied in this case. We disagree.

Two exceptions in which the court may address an issue despite mootness are 1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of important public interest. *Curtis v. State of South Carolina*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). Neither exception applies in this case.

In evaluating whether a moot issue is capable of repetition, yet evading review the Court does not require that the complaining party be subject to the action again. *Byrd*, 321 S.C. at 431, 468 S.E.2d at 864. However, the action must be one which will truly evade review. *Id* at 432, 468 S.E.2d at 864 (finding short term student suspensions will evade review because they are, "by their very nature, completed long before an appellate court can review the issues they implicate"); *but see Seabrook v. City of Folly Beach*, 337 S.C.

304, 307, 523 S.E.2d 462, 463 (1999) (holding that an action that is capable of repetition does not necessarily evade review).

In *Seabrook*, the plaintiffs brought an action against the city alleging that the city imposed conditions on a residential development for which it had no authority. 337 S.C. at 304, 523 S.E.2d at 462. After the trial court found in favor of the plaintiffs, the city removed the conditions and approved the plat. In reviewing the appeal this Court found that the issue was moot, and that although the scenario was capable of repetition, it did not evade review.

The instant case is analogous to *Seabrook*. Although Friends admits that the current situation is capable of repetition, it does not evade review. Should another person bring an action against Friends for a violation of FOIA and Friends fails to produce the requested documents, the Court will have the opportunity to review the issue.

In determining whether a moot issue should be reviewed under the public importance exception, the issue must present a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in "matters of important public interest." *Sloan v. Greenville County*, 361 S.C. 568, 570, 606 S.E.2d 464, 465-66 (2004) (citing *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596). This evaluation must be made based on the facts of each individual situation. *Id* at 571, 606 S.E.2d at 466.

Sloan's contention that his declaratory judgment action meets the public importance exception despite mootness is unsupported. Sloan does not present a "question of imperative and manifest urgency." Because Friends produced the requested documents, Sloan has been afforded the intended benefit of FOIA. Even assuming that this issue presents a matter of public importance, no imperative or manifest urgency exists in light of Friends' producing the requested documents and conceding that it is presently a public body under FOIA.

Accordingly, we hold that neither exception applies in this case. Therefore, we affirm the ruling of the trial court.

II. Standing

Sloan contends that the trial court erred in ruling that he did not have standing to bring this action. We agree.

Generally, a party must be a real party in interest to the litigation to have standing. *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (citing *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996)). A real party in interest is a party with a real, material, or substantial interest in the outcome of the litigation. *Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). However, the South Carolina General Assembly addressed the issue of standing in FOIA cases in a specific statutory provision. The statute provides:

> [a]ny citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

S.C. Code Ann. § 30-4-100(a) (1991). Additionally, this Court has held that standing under FOIA does not require the information seeker to have a "personal stake in the outcome." *Fowler v. Beasley*, 322 S.C. 463, 466, 472 S.E.2d 630, 632 (1996).

Accordingly, we find that the trial court erred in finding that Sloan lacked standing to bring this action.

III. Alter Ego Theory

Sloan argues that the trial court erred in granting Friends' motion for summary judgment as to the alter ego claim. We find no necessity to address this issue.

The alter ego cause of action is directly related to Sloan's cause of action for a declaratory judgment that Friends is a public body. This second cause of action has no independent significance apart from the averments pertaining to the first cause of action. Therefore, because we find the first cause of action moot, there is no necessity to address the issue of whether Friends is the alter ego of the Commission.

IV. Lasch's Entitlement to Summary Judgment

Lasch argues as an additional sustaining ground that he is entitled to summary judgment because he is being sued only in his capacity as chairman of Friends. We agree.

Because we find Sloan's causes of action against Friends moot, and neither the complaint nor issues on appeal contains any averments regarding Lasch beyond his capacity as chairman of Friends, we hold that Lasch is also entitled to summary judgment as to all issues on appeal.

CONCLUSION

For the forgoing reasons, we affirm the ruling of the trial court granting summary judgment to Friends. Additionally, we affirm the granting of summary judgment to Lasch. However, we reverse the trial court's finding that Sloan lacked standing to bring this action.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charleston County Department of Social Services and John Roe and Mary Roe, Intervenors, Petitioners,

v.

Pamela King, Kenneth King, Jr., and Cody King, a child, D/O/B- 03/24/97, Defendants,

of whom Pamela King is, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Frances P. Segars-Andrews, Family Court Judge

Opinion No. 26152
Heard January 31, 2006 – Filed May 22, 2006

REVERSED

R. Glenn Lister, Jr., and Daphne A. Burns, of Mt. Pleasant; and Frampton Durban, Jr., of Charleston County Department of Social Services, of North Charleston, for petitioners.

Robert V. DeMarco, of Charleston, for respondent.
Ruth F. Buck, of Sullivans Island, for Amicus Curiae.

Ellen Babb, of Mt. Pleasant, for Guardian Ad Litem.

JUSTICE MOORE: This petition arises out of a dispute over the termination of parental rights of a biological mother as to her youngest child. The family court found the grounds were met for terminating the mother's parental rights and that doing so was in the best interests of the child. The Court of Appeals reversed, upholding one ground for termination but finding the best interests of the child would be served by preserving the biological mother's parental rights. Charleston County Dep't of Soc. Servs. v. King, Op. No. 2005-UP-155 (S.C. Ct. App. filed March 4, 2005).[1]

Petitioners, Charleston County Department of Social Services (DSS) and the pre-adoptive parents of the child (the Kendles),[2] appeal the decision of the Court of Appeals. We reverse.

FACTS

Respondent, Pamela King (King), and her husband, Kenneth King, were arrested in October 1999, after attempting to pass a fraudulent check. The couple and their three children were traveling through South Carolina from Pennsylvania and were moving to Texas to live near King's family. The couple was arrested for obtaining goods under false pretenses. Upon further inspection by police, a crack pipe was found in King's purse.[3] The

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[1]Kenneth King, the biological father of the child, did not appeal the termination of his parental rights.

[2]Although the Kendles filed their motion to intervene under the pseudonyms John Roe and Mary Roe, they used their real names at the hearing.

[3]The charge regarding the crack pipe was dismissed.

couple was placed in jail and DSS took the children into emergency protective custody. At the time of removal, Casey was nine, Ashley was five, and Cody was two years old.

A treatment plan was presented to the family court in January 2000 and finalized as of July 2000. The plan directed King to undergo a psychological evaluation, complete parenting classes, complete various forms of counseling, and pay child support.

In February 2000, King and her husband moved from Charleston County to Jasper County. King completed parenting classes in September 2000. King attended counseling sessions, but then ceased to attend in April 2000. She later attended more counseling sessions for approximately five months. She paid six months of child support before her payments became sporadic.

King testified that, although she had never used drugs before, she began to use cocaine in October 2000. She twice tested positive for cocaine in February and June 2001. King testified she used cocaine two to three times a week from October 2000 to June 2001. Meanwhile, in February 2001, King left her husband and moved in with her mother and stepfather in Smoaks, South Carolina.[4] She resided there for approximately two years before the termination of parental rights (TPR) hearing and apparently continues to reside there with the two children who were returned to her. At the time of the TPR hearing, King was in divorce proceedings with her estranged husband. Throughout the time the children were in protective custody, King visited the children.

The Foster Care Review Board recommended terminating King's parental rights in October 2000. Because King had not fully complied with her treatment plan, the family court adopted a permanence plan of

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[4]King's mother and step-father moved to South Carolina to assist their daughter in regaining her children.

terminating King's parental rights as to all of her children in March 2001. The TPR action was filed in May 2001.

King, in the meantime, began to accomplish the goals set out in the treatment plan. She entered substance abuse treatment, which included family counseling, through a Drug Court program following her September 2001 arrest for breach of trust. She completed her substance abuse treatment in September 2002 and had completed all the requirements set out in the treatment plan except for paying child support, for which she was briefly imprisoned in March 2002. She completed the anger management and domestic abuse counseling in March 2001 and the psychological evaluation in June 2001. As a result, in April 2002, the Foster Care Review Board and the former guardian ad litem (GAL), Ruth Buck, changed their recommendations from termination of parental rights to reunification. DSS looked at each child's individual best interest and returned Ashley and Casey, an autistic child, to King in November 2002. DSS did not return Cody to King. The DSS caseworker testified it was in Ashley's and Casey's best interests to be returned to King, but it was not in Cody's best interest to be returned to King.

As for the children, they were placed in separate foster homes after being removed from their parents. Cody was placed with the Shanklin family for two years but was removed in September 2001.[5] He was then placed in two short-term households before being placed in the pre-adoptive home of Kurtis and Gayle Kendle in October 2001. When the Kendles took Cody in, the DSS caseworker informed them they could call him "Cody Kendle" and gave them a Medicaid card with the name "Cody Kendle." The caseworker also informed them they could raise him as their own son and represent themselves as his parents. The caseworker stated that such actions are

[5]When Cody arrived at the Shanklin home, he was underweight, scared, cried for his brother, and had food issues. He allegedly would eat until he made himself sick, hide food, and pick up objects and smell them to see if he could eat them. Cody was removed from the Shanklin home when the Shanklins separated.

standard practice for adoptive placements. She testified she informed the Kendles that Cody was a high-risk adoption.

When he was removed from the Kings, Cody was diagnosed with psychosocial dwarfism or psychosocial failure to thrive, an environmentally-induced condition that occurs when a child is not receiving appropriate nurturing behaviors from a parent.

DSS withdrew its action to terminate King's parental rights as to the older two children but continued with the action to terminate her rights as to Cody. After a hearing, the family court judge terminated King's parental rights pursuant to three statutory grounds. *See* S.C. Code Ann. §§ 20-7-1572 (2), (4), and (8) (Supp. 2005). First, the court found King had failed to remedy the condition which caused the removal within six months following the adoption of the placement plan. The family court judge also found King had failed to support her child by not paying child support in excess of six months. Additionally, the family court found Cody had been in foster care for fifteen of the most recent twenty-two months.

As for Cody's best interests, the family court found his best interests were served by terminating King's parental rights. The court noted that, at that time, Cody had spent over half his life in foster care and was thriving with the Kendles. The court found the evidence showed Cody did not have an accurate perception of his birth mother or siblings. He viewed his siblings only as two children with whom he visits and King as Casey and Ashley's mother. The court also noted the overwhelming evidence that Cody had "bonded" with the Kendles and referred to the Kendles as mom and dad. The court distinguished Cody's situation from that of his siblings because, due to Cody's young age, he had essentially no memory of his biological family.

The Court of Appeals reversed, finding only one of the grounds for termination existed, and that Cody's best interests would be served by preserving King's parental rights. The Court of Appeals found DSS had proved only one ground for TPR which was that Cody had been in foster care fifteen out of the most recent twenty-two months. The Court of Appeals found it was in Cody's best interests to return to King and his siblings. In

finding for King, the Court of Appeals relied on the Moore factors (to be discussed *infra*), and determined that Cody's best interests would be served by denying the termination of King's parental rights.

The Court of Appeals' decision upholding the family court's ruling that Cody had been in foster care fifteen out of the most recent twenty-two months at the time of the hearing was not appealed. Because one statutory ground for TPR has been met, the only issue remaining for us to consider is whether termination is in the best interest of the child. *See* S.C. Code Ann. § 20-7-1572 (Supp. 2005) (family court may terminate parental rights if it finds at least one of the nine statutory grounds for termination has been met and that termination is in the best interest of the child).

ISSUES

I. Did the Court of Appeals err by applying the Moore v. Moore[6] criteria to a determination of the best interests of the child in a termination of parental rights case?

II. Did the Court of Appeals err by ruling that the best interests of the child required the parental rights of the mother to be preserved?

DISCUSSION

I

Petitioners argue the Court of Appeals erred by applying the Moore factors to a determination of the best interests of the child in a termination of parental rights case. We agree.

The Moore case involved a child custody dispute between a natural father and the family that offered to take care of one of his five children. The

[6]300 S.C. 75, 386 S.E.2d 456 (1989).

natural father accepted the family's offer of taking care of the child, but continued to visit the child regularly. Eventually, when the family refused to allow the father to visit with the child except in their home, the father commenced a suit requiring the family to show cause why he should not be allowed to remove the child from their home.

In Moore, we stated the dilemma is how to assure that parents who temporarily relinquish custody for their child's best interests can regain custody when conditions become more favorable. To address this dilemma, we stated the following factors should be considered in making custody determinations when a natural parent seeks to reclaim custody of his child: (1) the parent must prove that he or she is a fit parent, able to properly care for the child and provide a good home; (2) the amount of contact, in the form of visits, financial support or both, which the parent had with the child while the child was in the care of a third party; (3) the circumstances under which temporary relinquishment occurred; (4) the degree of attachment between the child and the temporary custodian. After applying the criteria, we determined the natural father should be awarded custody of the child.

Petitioners argue the Moore factors were established to determine the best interests of a child in a custody dispute involving voluntary relinquishment of custody, not in a termination of parental rights action. Petitioners are correct.

The Moore factors have been used in actions seeking to regain custody after a voluntary relinquishment. *See, e.g.,* Malpass v. Hodson, 309 S.C. 397, 424 S.E.2d 470 (1992) (factors used in case where mother sought to regain custody after voluntarily relinquishing custody to maternal grandparents while in abusive relationship); Dodge v. Dodge, 332 S.C. 401, 505 S.E.2d 344 (Ct. App. 1998) (factors used in case where father sought to regain custody after voluntarily relinquishing custody to grandparents).

We have used the Moore factors in one termination of parental rights case. Hopkins v. South Carolina Dep't of Soc. Servs., 313 S.C. 322, 437 S.E.2d 542 (1993), *overruled on other grounds by* Joiner *ex rel* Rivas v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000). However, this case is

distinguishable. Although a TPR action was involved, the target of that action was an innocent natural father who had attempted to establish his paternity of the child but could not because the mother continually disappeared with the child and later, without the father's knowledge, subjected the child to abuse and neglect. While the child had not been voluntarily relinquished by the father as envisioned by the Moore case, DSS removed the child from the mother before the father was given a chance to establish his paternity; therefore, it was an action involving an innocent parent attempting to gain custody of his child from a third party. Therefore, Hopkins, does not stand for the proposition that the Moore factors should be used when determining the best interests of a child in a termination of parental rights case.

The Court of Appeals has also mentioned the Moore factors in a TPR case. In Shake, the parents of Michael voluntarily relinquished custody of him to the Department of Social Services (DSS) because he had been diagnosed with failure to thrive. Shake v. Darlington County Dep't of Soc. Servs., 306 S.C. 216, 410 S.E.2d 923 (Ct. App. 1991). DSS placed Michael with Shake and Shake later moved to terminate the parental rights of the parents and for custody of Michael regardless of termination of parental rights. The court found DSS and Shake had failed to establish grounds sufficient to meet the standard required to terminate parental rights. Therefore, the court found the mother's parental rights should not be terminated and did not reach the issue of whether the best interests of the child required that the mother's parental rights be terminated.

However, Shake further argued that even if parental rights were not terminated, it was in Michael's best interest to remain in her custody. The court utilized the Moore factors and determined that Michael's best interests required that he be placed in Shake's custody. The Court of Appeals, therefore, did not apply the Moore factors to the termination of parental rights portion of the case but only to the custody portion of the case.

Accordingly, the Court of Appeals erred by applying the Moore factors to the instant action. The Moore factors apply where a natural parent, who has voluntarily relinquished custody of his child, seeks to reclaim custody

from a third party. The Moore factors cannot apply in the termination of parental rights situation because that situation is governed by statute. *See* S.C. Code Ann. §§ 20-7-1560 to -1582 (Supp. 2005).

II

Petitioners argue that because Cody has bonded with the Kendles, is thriving in their home, and has no memory of his biological mother and siblings, his best interests require that King's parental rights be terminated.

Both parties questioned the experts presented at trial regarding Cody's best interests. Dr. Elizabeth Ralston, a clinical psychologist, testified she had observed Cody and the Kendles, and King and her other children. Dr. Ralston testified Cody had no verbal memory of his natural parents and did not identify King as his mother or Ashley and Casey as his siblings. Instead, she testified Cody identifies King as "Ashley and Casey's mother" and his siblings as "a boy and a girl, and as brother and sister." In Dr. Ralston's opinion, Cody has blossomed in the Kendles' care and no longer shows any symptoms of psychosocial dwarfism. On cross, Dr. Ralston testified Cody's removal from the Kendles might be mitigated by the fact that he was being returned to his natural mother and siblings if he had any memory of those people in that capacity. However, she testified Cody does not have that memory.

Dr. Charles Barton Saylor, a forensic psychologist, testified Cody did not express any recollection of his natural parents and did not have a real concept of his natural family. He testified Cody thinks of Mrs. Kendle, not King, as his mother. Dr. Saylor testified Cody's best interests would be served by allowing him to remain with the Kendles and have closure.

The DSS caseworker testified Cody is happy, bonded, and attached to the Kendles and has no real attachment to his mother during visits and that he mostly plays with his siblings during those visits.

One of the adoption specialists testified that Cody believes the Kendles' home is his home and that he is comfortable there. She felt his best interests required that he remain with the Kendles.

The Kendles testified that Cody calls them mom and dad and is very affectionate towards them. Mrs. Kendle, at the time of the hearing, was a stay-at-home mother and Mr. Kendle was a homebuilder working at an office inside the home.

The former GAL, Ruth Buck, testified Cody does not know King as his natural mother because he was too young when he was removed. Buck stated she changed her position regarding TPR because King never missed a visit with Cody and she saw an improvement in Cody's relationship with her once the estranged husband stopped visiting. She further changed her position because King made substantial progress on her treatment plan. She admitted that Cody has bonded with the Kendles and calls them mom and dad and that Cody has a nice home to live in with a private room. Buck testified that because King has been deemed to be a fit enough mother to take care of her special needs child, she is very able to accept Cody back into the family. Buck recommended that Cody be returned to King.

When reviewing the family court decision, appellate courts may make their own conclusions of whether DSS proved by clear and convincing evidence that parental rights should be terminated. South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 614 S.E.2d 642 (2005). We have stated: "The termination of the legal relationship between natural parents and a child presents one [of] the most difficult issues this Court is called upon to decide. We exercise great caution in reviewing termination proceedings and will conclude termination is proper only when the evidence clearly and convincingly mandates such a result." *Id.* at 626, 614 S.E.2d at 645.

Our General Assembly has mandated that when the interest of the child and the parental rights conflict, the interest of the child shall prevail. S.C. Code Ann. § 20-7-1578 (Supp. 2005). *See also* South Carolina Dep't of Soc. Servs. v. Cochran, *supra* (in balancing the interests of the child and the mother, the best interest of the child is paramount to that of the parent).

At the time of the family court hearing, Cody had been out of King's care for almost three and one-half years and had been with the Kendles for almost one and a half years. By the time King had completed her treatment plan, Cody was in a loving, stable environment with the Kendles and had no memory of his biological family. As the experts at trial testified, Cody did not realize King was his natural mother and he identified the Kendles as his parents. To remove Cody from the Kendles clearly would be very traumatic for him. We find the family court correctly determined that the best interests of Cody were that his mother's parental rights be terminated and that he remain with the Kendles. *See* § 20-7-1578 (if the child's interest and the parental rights conflict, the interest of the child shall prevail). Accordingly, the decision of the Court of Appeals is

REVERSED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice Howard P. King, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ernest Matthew Riddle, Petitioner,

v.

Jon Ozmint, Director, South Carolina Department of Corrections, Respondent.

ON WRIT OF CERTIORARI

Appeal From Cherokee County
J. Derham Cole, Post-Conviction Judge
James B. Stephen, Trial Judge

Opinion No. 26153
Heard February 1, 2006 – Filed May 22, 2006

REVERSED

Diana L. Holt and Teresa L. Norris, both of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, for Respondent.

PER CURIAM: We granted certiorari to consider a post-conviction relief (PCR) order denying relief to petitioner, a death row inmate. We find the solicitor's office violated Brady v. Maryland[1] when it suppressed certain evidence involving witness Jason Riddle (Jason), and that that office violated petitioner's due process rights when it failed to correct misstatements made by Jason while testifying against petitioner. See Napue v. Illinois, 360 U.S. 264 (1959). The PCR order denying petitioner relief is reversed, and the matter remanded for further proceedings.

FACTS/PROCEDURAL HISTORY

In the early morning hours of August 8, 1985, Mrs. Abby Sue Mullinax was murdered in her home when her throat was cut. Nineteen-year-old petitioner and his seventeen-year-old brother Jason were arrested on August 20, based on information supplied by their older brother, Bruce. On August 22, Jason gave a statement confessing that he and petitioner[2] had entered the home through a window, that he had stolen money from a purse on a dresser, and that petitioner had cut Mrs. Mullinax's throat.

Petitioner was convicted of the murder, burglary, and armed robbery of Abby Mullinax and received a death sentence. There was no physical evidence connecting petitioner with the murder and robbery of Mrs. Mullinax. Rather, the State's case rested on the eyewitness testimony of petitioner's alleged accomplice, his mildly mentally retarded brother Jason, and the testimony of various witnesses concerning petitioner's statements after Mrs. Mullinax's death.

At the 1986 trial Jason testified against petitioner. Bruce, who had been staying with Jimmy and Tammy Lewis in their home near Mrs.

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[1] 373 U.S. 83 (1963).

[2] Years later Jason would recant petitioner's involvement and name Bruce as his accomplice.

Mullinax's, testified that petitioner had come to the Lewis home around 3 or 4 am on the 8th, panicky, covered with blood, and wet from the knees down. Bruce testified that later that day Jason and petitioner were seen with cash, and that when a news story about the murder came on TV, petitioner said, "we don't have to worry about that bitch anymore." Tammy Lewis testified and confirmed Bruce's story about the money and petitioner's statement.

Fourteen-year-old Jerry Walker testified that several days after the murder petitioner said, in a joking manner, that he had killed a woman before. Another witness, James Buster Smith, testified that he, Jerry, and petitioner had gone to a lake around August 12, and that petitioner told them he had known Mrs. Mullinax, and that she had had valuable possessions and money in her home.

Petitioner called his stepmother to testify that Bruce had admitted turning Jason and petitioner in for reward money. Petitioner also called Clifton Coker, the Lewis's neighbor, who testified that shortly after the murder occurred he heard other neighbors Ricky and Lisa Nuzum (also spelled Newsome) up on his porch knocking on his door. He then heard car doors slam as they drove away. The next day he and his roommate found what appeared to be drops of blood on their porch. They cleaned up the blood. Bloodhounds taken to the Mullinax home "tracked" to the area around the Lewis-Nuzum-Coker homes and not to the barn. Although the jury learned only that the State had used bloodhounds but not what trail they had followed, at the PCR hearing the State acknowledged that the dogs had tracked to the Lewis-Nuzum-Coker homes.

On appeal, the Court affirmed the murder conviction but set aside the death sentence. State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987). Following a 1987 resentencing proceeding, a second jury returned a death sentence, which was also reversed on direct appeal. State v. Riddle, 301 S.C.

68, 389 S.E.2d 665 (1990). In 1991, a third jury returned a death sentence which was affirmed. Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994).[3]

This PCR action involves the guilt phase of the 1986 trial and the 1991 resentencing proceeding. We address only the grave constitutional violations which occurred during the 1986 guilt phase, and which mandate reversal of the PCR order.

ISSUES

1) Whether there is any evidence to support the PCR judge's finding that no Brady violation occurred?

2) Whether the PCR judge erred in concluding that the Solicitor's failure to correct Jason's false trial testimony did not require a new trial?

Scope of Review

On certiorari, this Court must uphold the PCR judge's findings where they are supported by any evidence of probative value in the record. Gibson v. State, 344 S.C. 515, 514 S.E.2d 320 (1999). We are concerned here not with the routine PCR issue whether trial counsel was ineffective, but instead with the question whether prosecutorial misconduct denied petitioner's due process right to a fair trial. Id.

1. Brady violation

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the

[3] All three circuit court proceedings were prosecuted by then-Solicitor Holman A. Gossett, Jr, while petitioner was represented in all trial proceedings by Kenneth L. Holland.

accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419 (1995); Gibson, *supra*. If a Brady violation is found to have occurred, PCR must be granted. Gibson, *supra*. Petitioner points to several instances of alleged Brady violations. We find it necessary to discuss only two.

First, as noted above, Jason gave a statement confessing to his and petitioner's guilt on August 22, 1985. The first trial commenced on January 27, 1986. On January 22, 1986, Jason gave a second statement to police which petitioner contends was not disclosed to his attorneys. The PCR judge found that had petitioner's counsel interviewed the officer who took notes of the statement between January 22 and the start of the trial, they would have learned of this statement. The PCR judge therefore concluded that the January 22 statement was available to petitioner, and thus the State's failure to disclose this statement did not violate Brady. We disagree. Not only is it unrealistic to require petitioner and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what Brady requires. The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching. Gibson, *supra*.

The PCR judge also held that nothing in Jason's January 22 statement was material for Brady impeachment purposes. Evidence is material under Brady if there is a "reasonable probability" that the result of the proceeding would have been different had the information been disclosed. E.g., State v. Proctor, 358 S.C. 424, 595 S.E.2d 480 (2004). The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial "resulting in a verdict worthy of confidence." Kyles v. Whitley, *supra*, at 434.

There were several inconsistencies between Jason's original statement and his trial testimony, and the undisclosed January 22 statement. Among these differences were whether Jason or petitioner removed the window fan from the window before entering the home; whether the brothers both went to the bedroom or whether one went to the kitchen and the other to the bedroom; whether the victim's purse was found on a large or small dresser; whether Jason fell before or after he heard the victim getting up, and where

he fell; where he was when he saw petitioner kill Mrs. Mullinax; what he saw or heard as he left the house; and whether they got $100 or $125.

The most glaring inconsistency is that in his January 22 statement, Jason claimed that a friend had picked the brothers up after the murder and given them a ride to the barn, whereas in his original statement and in his trial testimony he maintained the brothers had walked the approximately three miles from the Mullinax home to the barn. Before the commencement of the trial, officers questioned the person Jason identified as having given the brothers a ride, who denied having done so. The State therefore chose not to present any evidence of the brothers having been driven to the barn.

The impeachment value of this statement is clear. Either the brothers were given a lift or they were not: Jason could not have been telling the truth in all his statements. Moreover, without the automobile ride, it is difficult to conceive how the brothers were able to travel the three miles from the Mullinax home to the barn, and back to the Lewis's home, in the time between the murder and the time when Bruce testified they returned to the Lewis home.

Whether this statement alone was material under Brady is a close question. As we stated in Gibson, citing the United States Supreme Court:

> The overriding theme of the *Brady* cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play. In close cases, "the prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative…of a sovereignty…whose interest…in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."

> Kyles v. Whitley, 514 U.S. at 438-40 (quotes omitted) (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). In this case, a prudent solicitor would have chosen to disclose the January 22 questioning and the resulting statement.

When determining whether the suppression of more than one item of evidence was material under Brady, we consider the collective impact of the undisclosed evidence. Kyles v. Whitley, 514 U.S. at 436. The second undisclosed evidentiary item in this case was the fact that on January 24, 1986, two days after Jason's second statement and three days before the trial commenced, several police officers, Solicitor Gossett, and the solicitor's assistant took Jason by automobile to the Mullinax home and from there retraced the route he and Ernest took to the barn. There were questions asked of Jason during this outing, although it is unclear whether any new information was gleaned. The defense was not informed of this trip.

The PCR judge concluded, among other things, that information relating to the trip was in the prosecutor's file and therefore available to the defense under the solicitor's "open file" policy. The evidence at trial, however, was that the solicitor's office maintained an unusual "open file" policy in that they removed not only work product, but also "other documents on a case-by-case basis." Even had a true "open file" policy existed, the existence of such a policy does not negate the solicitor's Brady obligation. Porter v. State, Op. No. _____ (S.C. Sup. Ct. filed March 6, 2006). This is especially so where the "reconstruction" trip took place only three days before trial.

Jason was a young man of limited mental abilities: knowledge of this trip would have bolstered petitioner's contention that Jason was an unreliable witness who had to be coached, and whose testimony was not worthy of belief. Given the absence of any physical evidence tying petitioner to the Mullinax murder, the State's case rested almost exclusively on Jason's recounting.

The PCR judge's finding that the evidence of the January 22nd statement and the January 24 trip was not material under Brady is without evidentiary support in the record, and therefore is reversed.

3) Failure to correct false testimony

At the 1986 trial, Jason was asked more than once whether he had spoken about the case to anyone other than Officer Harris in August 1985 when he gave his first statement. Jason denied speaking with anyone other than his lawyers, neglecting to mention either the January 22, 1986 statement or the trip on January 24, 1986. The solicitor failed to correct Jason's false trial testimony.

The PCR judge found that the State did not violate due process by failing to correct Jason's false testimony because the State may have thought either that Jason misunderstood the questions or that he simply did not recall the recent events. Since the State did not know why Jason failed to testify truthfully, petitioner was found not to have met his burden of showing the State knowingly used perjured testimony.

We disagree. The issue is not why Jason failed to tell the truth: rather, it is why the solicitor, who knew Jason's testimony to be false, failed to correct it.

A "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. U.S., 405 U.S. 150, 153 (1972). The failure to correct false evidence is as reprehensible as its presentation. Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996). The PCR judge erred in concluding that the State was not obligated to correct Jason's false testimony, and in failing to hold that this violation of petitioner's due process rights required that he be granted a new trial.

CONCLUSION

The Constitution requires only that a defendant receive a fair trial, not a perfect one. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999). Petitioner's trial was rendered fundamentally unfair by prosecutorial misconduct. No probative evidence exists in this record to support the PCR judge's findings and conclusion. Accordingly, the PCR order denying petitioner relief is

REVERSED.

TOAL, C.J., MOORE, BURNETT, PLEICONES, JJ., and Acting Justice Brooks P. Goldsmith, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Palmetto Princess, LLC, Respondent,

v.

Georgetown County, Appellant.

Appeal From Georgetown County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 26154
Heard February 14, 2006 – Filed May 22, 2006

AFFIRMED

Jack M. Scoville, Jr., and John McIntyre Tolar, of Georgetown; William B. Regan and Frances I. Cantwell, of Regan and Cantwell, LLC, of Charleston, for appellant.

A. Camden Lewis and Arial E. King, both of Lewis, Babcock & Hawkins, LLP, of Columbia, for respondent.

JUSTICE MOORE: This is an appeal from a circuit court order granting respondent's (Palmetto Princess's) motion for summary judgment. We affirm.

FACTS

In April 2004, Palmetto Princess brought a declaratory judgment action against appellant, Georgetown County (the County), on the grounds the County had exceeded its authority in passing two ordinances and that the ordinances violated the South Carolina Constitution. Palmetto Princess brought the action because it intended to run a gambling day cruise, also known as a "cruise to nowhere," out of the County, and the County's ordinances prevented such a business.

The County's first ordinance, Ordinance # 2002-12, provides, in pertinent part:

> No person shall open, keep, maintain, dock, moor, anchor or operate any gaming vessel within the corporate limits of the County, or suffer any gaming vessel to operate from any marina, terminal or marine facility within the corporate limits of the County for the purpose of embarking or disembarking persons whose intent is to use gambling devices or gambling facilities within the vessel.
>
> . . .
>
> Anyone violating this ordinance shall be guilty of a misdemeanor and shall be punished by the payment of a fine of up to five hundred dollars and be sentenced to a term of imprisonment of up to thirty days in jail.

The County's second ordinance, Ordinance # 2004-11, provides, in pertinent part:

> The manufacture, reconditioning, repair, sale, transportation, possession or use of any gambling device on any vessel on a day cruise is prohibited.
>
> . . .
>
> Section 2. By enacting this ordinance, County Council under the authority delegated to it by the South Carolina Legislature in S.C. Code Ann. Section 4-9-25, exercises the authority granted the State of South Carolina by the Congress of the United States in 15 U.S.C. Section 1175(b)(2)(A)[1] and declares that Georgetown County is exempt from the provisions of 15 U.S.C. Section 1175(b)(1).
>
> Section 3. This civil prohibition is adopted for the sole objective of having gambling day cruises remain a federal offense within Georgetown County, under 15 U.S.C. Section 1175, and not for the purpose of rendering such conduct a misdemeanor penalized under state law, and such prosecution is hereby prohibited.

Both parties filed for summary judgment. The circuit court granted Palmetto Princess's motion for summary judgment based on two grounds. First, the court held the plain language of the Johnson Act makes clear that the authority to declare gambling day cruises illegal is vested with a State and not a county. Therefore, the County was without authority to enact the ordinances. Second, the court found that the ordinances violate article VIII, § 14, of the state constitution because the ordinances make conduct illegal that is not illegal under state law.

[1]Also known as the Johnson Act, to be discussed *infra*.

ISSUE

Did the circuit court err by finding the County had exceeded its authority in passing the ordinances?

DISCUSSION

The County argues it has authority to opt out of the Johnson Act and enact an ordinance prohibiting gambling day cruises. The County contends the Johnson Act allows a local government, rather than just a state government, to enact a law prohibiting gambling day cruises.

The Johnson Act generally prohibits the use or possession of any gambling device on a United States flag vessel. One exception is that the possession or transport of a gambling device within state territorial waters is not a violation of the prohibition if the device remains on board the vessel and is used only outside those territorial waters. 15 U.S.C. § 1175(b)(1). That exception does not apply, however, "if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute" prohibiting gambling day cruises. 15 U.S.C. § 1175(b)(2)(A) (emphasis added).

The circuit court correctly held that the plain language of the Johnson Act indicates that only a State, not a division of the state government such as the County here, can act to prohibit gambling day cruises. *See* Brown v. County of Berkeley, 366 S.C. 354, 622 S.E.2d 533 (2005) (clear and unambiguous words in a statute should be given their plain and ordinary meaning). The County's alleged power to enact the ordinances, therefore, cannot derive from the Johnson Act. We further note that, at the time the ordinances were enacted, the State had not opted out of the Johnson Act and had not enacted a statute prohibiting gambling day cruises.[2] *See* Stardancer

[2]Subsequent to the circuit court's order issued in this case, the General Assembly's Gambling Cruise Prohibition Act was signed into law by the

Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001) (gambling day cruises are not unlawful).

CONCLUSION

We conclude the plain language of the Johnson Act indicates that only a State, not a division of the state government such as the County here, can act to prohibit gambling day cruises. Therefore, the circuit court properly granted summary judgment to Palmetto Princess. *See* Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003) (summary judgment appropriate only if there is no genuine issue of material fact and moving party is entitled to judgment as matter of law). Given our decision, it is unnecessary to address the County's argument that the circuit court erred by finding its ordinances violated article VIII, §14, of the South Carolina Constitution. *See* Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005) (appellate court need not address remaining issues when resolution of prior issue is dispositive). Accordingly, the decision of the circuit court is **AFFIRMED.**

TOAL, C.J., BURNETT, J., and Acting Justices James W. Johnson, Jr., and Mark J. Hayes, II, concur.

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governor with an effective date of June 1, 2005. Section 3-11-200(A) of this Act specifically allows the type of ordinance enacted by the County.

The Supreme Court of South Carolina

Casey C. Lewis, Petitioner

v.

State of South Carolina, Respondent.

ORDER

By order dated January 30, 2006, the circuit court issued a conditional order of dismissal in this post-conviction relief case. This order gave petitioner twenty days to show cause why the conditional order should not become final. Instead of filing a reply to this conditional order of dismissal, petitioner has filed a petition for a writ of certiorari with this Court, which we have construed as a notice of appeal.

Under Rule 227, SCACR, and S.C. Code Ann. § 17-27-100 (2003), only a final decision or judgment in a post-conviction relief action is subject to review. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is

interlocutory; but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final." Adickes v. Allison & Bratton, 21 S.C. 245 (1884); see also Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993).

In our opinion, a conditional order of dismissal is not the final judgment in a post-conviction relief case since there is another act to be done before the rights of the parties are finally determined – the issuance of an order following the filing of a reply or the issuance of an order based on the default in filing a reply. S.C. Code Ann. § 17-27-70 (b) (2003). Accordingly, this matter is dismissed without prejudice.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
April 19, 2006

The Supreme Court of South Carolina

In the Matter of Anthony C. Odom, Respondent.

ORDER

Respondent has been arrested for criminal solicitation of a minor in violation of S.C. Code Ann. § 16-15-342 (Supp. 2005). As a result, the Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Michael W. Chesser, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Chesser shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Chesser may make disbursements from

respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Michael W. Chesser, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Michael W. Chesser, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Chesser's office.

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

s/ Costa M. Pleicones J.

FOR THE COURT

May 17, 2006
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

W.J. "Joey" Douan, Appellant,

v.

Charleston County Council and Charleston County Election Commission, Defendants,

Of whom Charleston County Council is the, Respondent.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 4112
Heard April 6, 2006 – Filed May 22, 2006

REVERSED AND REMANDED

Thomas R. Goldstein, of Charleston, for Appellant.

Joseph Dawson, III, Bernard E. Ferrara, Jr. and Cantrell M. Frayer, all of North Charleston, for Respondent.

KITTREDGE, J.: W.J. "Joey" Douan appeals from the circuit court's order granting Charleston County Council's (the Council) Rule 12(b)(6), SCRCP, motion to dismiss. The circuit court held Douan cannot recover attorney's fees under section 15-77-300 of the South Carolina Code (Supp. 2005) because his action against the Council is moot. We hold the circuit court erred in dismissing Douan's attorney's fee claim based on the doctrine of mootness. We reverse and remand.

I.

"A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). "The question is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Id.

II.

In 1995, the General Assembly enacted section 4-37-10 of the South Carolina Code (Supp. 2005). Section 4-37-10 authorizes a county to establish a transportation authority to oversee transportation-related projects funded through sales and use taxes or tolls. S.C. Code Ann. §§ 4-37-10 & -30 (Supp. 2005). If a county chooses to impose a sales and use tax, the county must enact an ordinance, and the ordinance must be accepted by the county citizenry through a referendum. S.C. Code Ann. § 4-37-30(A). The question posed on the referendum ballot must substantially adhere to the model question set forth in section 4-37-30(A)(3). If a majority of qualified electors answer the question in the affirmative, the sales and use tax is imposed. S.C. Code Ann. § 4-37-30(A)(4).

The underlying dispute in this case arose from the Council's enactment of an ordinance imposing a one-half percent sales and use tax to fund transportation-related projects within Charleston County. To effectuate the ordinance, the Council planned to hold a referendum on November 5, 2002. On October 7, Douan brought an action against the Council alleging the proposed ordinance exceeded the scope of section 4-37-30, which requires the ordinance be transportation-related. Douan further alleged the proposed referendum question violated section 4-37-30(A)(3), which provides the form the question presented to the voters must take. He sought a declaratory judgment, a writ of mandamus, and injunctive relief. Douan further sought attorney's fees under section 15-77-300, which allows the "prevailing party" of a "civil action" against a State political subdivision to recover attorney's fees.

On October 24, the circuit court denied Douan's requests for a writ of mandamus and injunctive relief. The court also declined to determine the legitimacy of the proposed referendum question, finding the issue rested in the supreme court's exclusive jurisdiction. Douan followed the lead of the circuit court and petitioned the supreme court. The supreme court, however, denied his petition, rejecting the view of the circuit court that the supreme court had exclusive jurisdiction over questions prepared by the Council. The exclusive jurisdiction of the supreme court is limited to questions prepared by the Ballot Commission. On November 1, Douan filed a motion for reconsideration, which the circuit court summarily denied.

On November 5, the referendum took place, and the proposed sales and use tax passed. The next day, Douan challenged the referendum through the administrative process provided by statutory election law. S.C. Code Ann. § 7-17-10 to -340 (1976 & Supp. 2005). Douan filed an election protest with the Charleston County Election Commission (the Commission) advancing the same grounds set forth in his civil action. The Commission rejected the election protest, and Douan appealed to the State Election Commission (the State Commission). The State Commission deadlocked, thus affirming the Commission's decision.

Douan appealed to the South Carolina Supreme Court, which ruled in his favor. Douan v. Charleston County Council, 357 S.C. 601, 612-13, 594 S.E.2d 261, 266-67 (2003). The supreme court voided the referendum results.

In the wake of the supreme court opinion, the previously filed civil action was called for trial in the Charleston County court of common pleas. Douan moved the circuit court for summary judgment on the issue of attorney's fees under section 15-7-300. The Council moved to dismiss the civil action on the ground of mootness pursuant to Rule 12(b)(6). The circuit court denied Douan's motion, and granted the Council's motion to dismiss, holding that the supreme court opinion ended the case in Douan's favor, rendering the claim for attorney's fees under section 15-77-300 moot. Douan appealed.

III.

Douan argues the circuit court erred in finding he was not entitled to attorney's fees under section 15-77-300 of the South Carolina Code because his civil action was moot. We agree with Douan and hold that his claim for attorney's fees under section 15-77-300 should not have been dismissed based on the doctrine of mootness.

Section 15-77-300 provides:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The statute clearly provides that certain elements must be met to recover attorney's fees: (1) the party seeking attorney's fees must be the prevailing party; (2) the unsuccessful agency must have acted without substantial justification in pressing the claim against the party; and (3) there must not be special circumstances that would make an award of attorney's fees unjust. City of Charleston v. Masi, 362 S.C. 505, 510, 609 S.E.2d 301, 304 (2005). A "prevailing party" is a party who successfully prosecutes the action by prevailing on the main issue and "in whose favor the decision or verdict is rendered and judgment entered." Heath v. County of Aiken, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (citing Buza v. Columbia Lumber Co., 395 P.2d 511, 514 (Alaska 1964)). The key factor in determining whether a party is a prevailing party is the degree of success obtained by the party seeking attorney's fees. Id. at 183, 394 S.E.2d at 711. Additionally, "a party need not be successful as to all issues in order to be found to be a prevailing party." Id. at 182, 394 S.E.2d at 711; Seckinger v. The Vessel, Excalibur, 326 S.C. 382, 388, 483 S.E.2d 775, 778 (Ct. App. 1997).

"A matter becomes moot 'when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.'" Collins Music Co., Inc. v. IGT, 365 S.C. 544, 549, 619 S.E.2d 1, 3 (Ct. App. 2005) (quoting Curtis v. State, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001) (alterations in original)).[1]

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[1] In civil cases, there are three exceptions to the mootness doctrine: (1) an appellate court can retain jurisdiction if the issue is capable of repetition yet evading review; (2) an appellate court can decide cases of urgency to

In our view, dismissal of Douan's claim for attorney's fees, based on the doctrine of mootness, was improper. The Council contended at oral argument that Douan's claim for attorney's fees is essentially premature since the underlying merits of the civil action have yet to be adjudicated, a view at odds with the doctrine of mootness. Indeed, Douan's request for attorney's fees may be addressed only after the underlying merits have been adjudicated.

Although Douan prevailed in the related administrative proceeding, we make no finding as to the preclusive effect of the supreme court opinion in this action. We further make no finding as to Douan's entitlement to an award of attorney's fees under section 15-77-300. We simply hold that Douan's claim is not moot, and he is entitled to pursue his claim for relief in the civil action, specifically the request for attorney's fees.[2]

IV.

The order of the circuit court dismissing as moot Douan's claim for attorney's fees under section 15-77-300 is

REVERSED AND REMANDED.

HEARN, C.J., and ANDERSON, J., concur.

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establish a rule for future conduct in matters of important public interest; and (3) if the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction. Collins Music, 365 S.C. at 549, 619 S.E.2d at 3. In this appeal, we do not reach an exception to the mootness doctrine, for Douan's claim for attorney's fees is not moot.

[2] Counsel for Douan stipulated at oral argument that the claim for attorney's fees is limited to the civil action.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roberta Selleck Pirri, Respondent/Appellant,

v.

John S. Pirri, Appellant/Respondent.

Appeal From Abbeville County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 4113
Heard December 6, 2005 – Filed May 22, 2006

AFFIRMED IN PART
REVERSED IN PART
AND REMANDED

Adam Fisher, Jr., of Greenville; for Appellant-Respondent.

J. P. Anderson, Jr., of Greenwood; for Respondent-Appellant.

BEATTY, J.: In this domestic cross-appeal, John Pirri ("Husband") argues the court erred in valuing marital property and in awarding attorney's

fees to Roberta Pirri ("Wife"). Wife argues the court erred in failing to award her alimony, failing to find certain property was marital, and failing to find certain property was transmuted into marital property. We affirm in part, reverse in part, and remand.

FACTS

Husband and Wife began living together in Connecticut in 1971. They never had a ceremonial wedding. However, Wife began using "Pirri" as her last name sometime in the 1970s, and the parties filed joint income tax returns from the 1970s on. Husband adopted Wife's then nineteen-year-old daughter, Julia, in 1981, and changed her name to Julia Pirri. The parties referred to each other as "husband" and "wife," and Husband's will left his estate to "Mrs. Pirri."

Husband was a successful veterinarian, and Wife worked in the clinic he owned from 1971 until 1978. In 1978, the parties closed the veterinary clinic and converted the property to an indoor shooting range. Husband and Wife continued to work at the shooting range until 1994. Husband later leased the property to the Widewater hotel development corporation in 1998. The parties maintained an affluent lifestyle, with joint checking accounts and investments, although Husband also had substantial investments in his own name.

In 1990, the parties purchased 216 acres in Abbeville County, South Carolina, titled the property in both of their names, and built a large house upon the land. They moved to South Carolina in 1996. In addition to the house and acreage, Husband purchased an airplane after the parties moved to South Carolina. The parties did not have any debt on these assets.

The parties separated in 2002 when Wife discovered sexually explicit emails between Husband and other men. Although Husband testified he was only having "cybersex" and not actual physical encounters, Wife and the parties' daughter, Julia, testified that Husband admitted having sexual encounters with two individuals with whom he was exchanging e-mails. Wife left the home and filed the underlying action seeking: a finding by the

family court of a common law marriage; a divorce on the ground of adultery; equitable division of all of the marital estate; alimony; and attorney's fees. Husband counterclaimed, denying the existence of a marriage and requesting certain property and an accounting in the event the court found a marriage existed.

At the beginning of the final hearing, the parties stipulated that a common law marriage existed in South Carolina. Husband was also allowed to amend his pleadings to include a claim for divorce based on one year of continuous separation. After hearing the evidence, the family court issued a final order declaring a common law marriage came into existence between the parties in 1996, when they moved to South Carolina. The court granted Husband a divorce based upon one year of continuous separation, divided the parties' property that was either jointly titled or obtained after 1996, denied Wife's request for alimony, granted Wife's request to return to the use of her maiden name, and awarded Wife $15,000 in attorney's fees. The court denied the motion to alter or amend the judgment, and both Husband and Wife appealed.

STANDARD OF REVIEW

In appeals from the family court, this court has authority to find the facts in accordance with our own view of the preponderance of the evidence. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). However, this broad scope of review does not require us to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). We are mindful that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002)

LAW/ANALYSIS

I. Husband's Appeal

A. Valuation of the Marital Home

Husband argues the family court abused its discretion in adopting Wife's valuation of the marital home and acreage over his valuation. We disagree.

In making an equitable distribution of marital property, the family court must identify real and personal marital property and determine the property's fair market value. Cannon v. Cannon, 321 S.C. 44, 48, 467 S.E.2d 132, 134 (Ct. App. 1996); Noll v. Noll, 297 S.C. 190, 192, 375 S.E.2d 338, 340 (Ct. App. 1988). "In the absence of contrary evidence, the court should accept the value the parties assign to a marital asset." Noll, 297 S.C. at 194, 375 S.E.2d at 340-41. The family court has broad discretion in valuing the marital property. Roe v. Roe, 311 S.C. 471, 478, 429 S.E.2d 830, 835 (Ct. App. 1993). A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented. Woodward v. Woodward, 294 S.C. 210, 215, 363 S.E.2d 413, 416 (Ct. App. 1987) (affirming the family court's valuation of property that was within the range of evidence presented); Smith v. Smith, 294 S.C. 194, 198, 363 S.E.2d 404, 407 (Ct. App. 1987) (noting that the family court is within its discretion to accept one party's valuation over the other party's).

There was evidence in the record to support the family court's valuation of the marital home. Both parties presented evidence regarding the value of the Abbeville County acreage and house. Wife had the acreage and 4,500 square foot house appraised by Robert J. Deering. According to the Deering appraisal, the house and land were valued at $725,000 as of September 26, 2002. Husband had the land and house appraised by Keith Ridgeway, who valued the property at $567,400. Although the final divorce decree had "$567,400" typed as the value adopted by the court, the family court judge crossed through this amount, wrote "$725,000" as the value, and

initialed the change. Thus, the final written order adopted Wife's value for the acreage and home.

Because the family court was free to accept Wife's valuation over Husband's, we find no abuse of discretion in the valuation of the marital home.

B. Attorney's Fees

Noting that Wife did not receive a divorce based on adultery, alimony, or transmutation of property, Husband argues Wife's attorney did not obtain a beneficial result and, thus, the family court erred in awarding her $15,000 in attorney's fees. We disagree.

The family court may order payment of attorney's fees to a party pursuant to statute. S.C. Code Ann. § 20-3-130(H) (Supp. 2004). Whether to award attorney's fees is a matter within the sound discretion of the trial court, and the award will not be reversed on appeal absent an abuse of discretion. Bakala v. Bakala, 352 S.C. 612, 633-34, 576 S.E.2d 156, 167 (2003). In determining whether an award of attorney's fees should be granted, the family court should consider: the parties' ability to pay their own fee; the beneficial results obtained by counsel; the financial conditions of the parties; and the effect of the fee on each parties' standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). To determine the amount of an award of attorney's fees, the court should consider: the nature, extent, and difficulty of the services rendered; the time necessarily devoted to the case; counsel's professional standing; the contingency of compensation; the beneficial results obtained; and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

In awarding attorney's fees to Wife, the family court noted it had considered all of the factors in determining whether to award attorney's fees and the appropriate amount of fees. The family court noted that the case involved many issues, including novel issues of law, and that Wife's attorney devoted a great deal of time to the case. The court specifically stated that

although "the court was not persuaded as to all the relief sought by [Wife's] attorney, beneficial results were clearly obtained."

We agree with the family court. Although Wife was unsuccessful in her attempt to use Connecticut law to obtain property purchased prior to 1996 and to receive a finding that property had been transmuted, she was successful in obtaining a finding that the parties were common law married, she received half of the post-1996 marital estate, and she was allowed to resume her pre-marital name. The family court adequately considered the factors, and we find no abuse of discretion.

II. Wife's Appeal

A. Alimony

Wife argues the family court erred in denying her alimony because the court failed to give adequate weight to the statutory factors by placing too much emphasis on the length of the marriage.[1] We agree.

"An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." Allen v. Allen, 347 S.C. 177, 183-84, 554 S.E.2d 421, 424 (Ct. App. 2001). "Alimony is a substitute for the support which is normally incident to the marital relationship." Craig v. Craig, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005). The purpose of alimony is to place the supported spouse in the position he or she enjoyed during the marriage. Id.

Factors to be considered in making an alimony award include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning

[1] Wife also argues the court erred by failing to require security for the payment of support. It does not appear that this issue has been raised below. Thus, it is not preserved for appeal. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that issues not raised to or ruled upon by the trial judge are not preserved for appellate review).

potential of the parties; (5) standard of living during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and non-marital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2004). "Our inquiry on appeal is not whether the family court gave the same weight to particular factors as this court would have; rather, our inquiry extends only to whether the family court abused its considerable discretion in assigning weight to the applicable factors." Allen v. Allen, 347 S.C. 177, 186, 554 S.E.2d 421, 425 (Ct. App. 2001). "No one factor is dispositive." Id. at 184, 554 S.E.2d at 425; Nienow v. Nienow, 268 S.C. 161, 171, 232 S.E.2d 504, 510 (1977) (holding that in alimony considerations, "all of the facts and circumstances disclosed by the record should be considered; no one factor should be determined dispositive").

At the time of trial, Wife was sixty-seven years old and Husband was seventy-five years old. The parties lived together from 1971 until 2002. Their common law marriage came into existence when the couple moved to South Carolina in 1996, and the marriage lasted until the parties divorced nearly eight years later in 2004. Nothing in the record indicated that either party suffered from ill health other than "infirmities of age." Husband was a retired veterinarian while Wife only had a high school education. Wife received $415 a month in social security income. Husband admitted he had "vastly more" income and resources than Wife, grossing more than $99,000 in 2002 from social security, retirement accounts, investment income, and $8,000 per month from the Connecticut rental property.

The parties maintained a high standard of living, living in a large house with no debt. Wife was awarded fifty percent of the marital property, minus amounts she withdrew during the litigation, for a total award of $464,850. In addition to his award of fifty percent of the marital estate, Husband had access to substantial property, including: a gun collection valued at $200,000; rental property in Connecticut; and separate Fidelity accounts valued at $159,000. There was a specific finding by the family court in apportioning the marital property that there was "marital misconduct on the

part of [Husband] which the court believes contributed significantly to the breakup of the marriage."

Although the family court indicated that it considered the appropriate factors in denying Wife alimony, the family court focused primarily on the length of the parties' marriage, stating as follows:

> The court denies [Wife's] application for alimony and finds that the duration of the marriage, from 1996 forward, with the final separation of the parties occurring in 2002, to be the conclusive factor. While the court recognizes that the other factors including financial conditions of the parties, needs of the party seeking alimony, respective earning capacities and individual wealth, conduct of the [Husband], ability to pay alimony, and actual income of the parties would militate in favor of [Wife], the court feels these do not outweigh the factor of the duration of the marriage.

The court denied Wife's argument on reconsideration that the court should have awarded alimony considering the statutory factors and "abundant caselaw."

We agree with Wife that the family court abused its discretion in denying alimony. Despite language in the order stating the family court had considered all the statutory factors and they militated in favor of Wife receiving alimony, the entire decision hinged on the length of the marriage.[2] Our courts have not determined that a relatively short marriage is the single determinative factor in denying alimony; alimony has been found proper in some cases where the marriage was of a much shorter duration than that in the present case. See Nienow, 268 S.C. at 172, 232 S.E.2d at 510 (remanding the issue of alimony for the family court to consider permanent periodic

[2] It appears the family court found the length of the common law marriage was to be measured only by the six years the parties lived together in South Carolina. However, the marriage lasted nearly eight years until the parties' divorce was final in 2004.

alimony to the wife in a fourteen-month marriage in light of "wife's accustomed standard of living, the disparity between the parties' wealth, and their respective earning capacities"); McDowell v. McDowell, 300 S.C. 96, 100, 386 S.E.2d 468, 470 (Ct. App. 1989) (affirming an award of alimony to the wife in a marriage of less than three years duration, despite the "relatively short" length of the marriage, after considering the other factors relevant to an alimony award); Johnson v. Johnson, 296 S.C. 289, 301-03, 372 S.E.2d 107, 114-15 (Ct. App. 1988) (finding the family court erred in not awarding permanent periodic alimony in a fourteen-month marriage where the factors favored alimony). Further, Husband's fault led to the breakup of the marriage, and he should not be rewarded in the consideration of alimony based upon the marriage's length. Johnson, 296 S.C. at 302-03, 372 S.E.2d at 115 ("An at fault spouse cannot destroy a marriage and then claim its short duration entitles him to more favorable consideration when economic adjustments attendant to divorce are made.").

Considering all the factors militating in favor of an award of alimony to Wife, especially the parties' standard of living, their relative incomes, and Husband's fault in the breakup of the marriage, the family court abused its discretion in only considering the length of the marriage. Wife is entitled to alimony. We remand this matter to the family court for a determination of the proper amount of alimony.

B. Nonmarital property

Wife argues the family court erred in failing to find that property obtained in Husband's name prior to the move to South Carolina was transmuted into marital property.[3] We disagree.

[3] Wife further argued in her brief that the property obtained while the parties lived in Connecticut should be considered marital property by this court because the parties considered themselves married while they lived there. Wife's counsel abandoned this argument at oral argument. We therefore decline to address it.

Property acquired prior to the marriage is generally considered nonmarital. S.C. Code Ann. § 20-7-473(2) (Supp. 2004). Nonmarital property may be transmuted into marital property. In determining whether property has been transmuted, courts must consider whether the property: (1) "becomes so commingled with marital property as to be untraceable;" (2) is titled jointly; or (3) "is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property." Jenkins v. Jenkins, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001). "Transmutation is a matter of intent to be gleaned from the facts of each case." Id. The burden is on the spouse claiming transmutation to produce objective evidence that the parties considered the property to be marital during the marriage. Id.

In 1958, Husband purchased the property that housed his veterinary clinic, then became the shooting range, and later was leased in 1998 to Widewater for hotel development. Wife did not draw a salary after 1973, and her support was always from Husband's income from the clinic and shooting range. Wife testified at the final hearing that she did not have control over the money from the lease of the Connecticut property and that sometimes the money was placed in the parties' joint account while it went "other places" at times. Husband testified at the hearing that he used money from the rental property to purchase equipment for the farm.

The family court determined that any transmutation must have occurred, if at all, after the 1996 date of the common law marriage. Reviewing the evidence, the court determined that Wife failed to meet her burden of proving transmutation of the Fidelity Investment account and the profits of the Connecticut property.

We agree with the family court. Although money from Husband's separate property was used to purchase items for the farm or to benefit the parties, nothing in the record shows Husband's intent to transmute the property or that the proceeds from the lease became commingled with marital property. Further, mere use of the income from Husband's separate property in support of the marriage does not transmute them into marital property. Peterkin v. Peterkin, 293 S.C. 311, 313, 360 S.E.2d 311, 313 (1987) (noting

that Husband's separate property inherited or given to him was not transmuted into marital property merely by the use of income derived from this property in furtherance of the marriage). Accordingly, Wife failed to prove transmutation of Husband's separate property acquired prior the 1996 marriage.

CONCLUSION

The family court did not err in determining the value of the marital home, awarding Wife attorney's fees, and in determining certain property acquired in Husband's name prior to the 1996 common law marriage was nonmarital and not transmuted. However, we find the court abused its discretion in considering only the length of the marriage to the exclusion of all of the other statutory factors in denying Wife alimony. We find Wife was entitled to alimony and remand the matter to the family court for a determination of the appropriate amount. Accordingly, the order of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ronald Edward Martin,
Employee, **Respondent,**

v.

Rapid Plumbing, Employer,
and Builders Mutual Ins. Co.,
Carrier, **Appellants.**

Appeal from Richland County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4114
Heard May 8, 2006 – Filed May 22, 2006

AFFIRMED

Richard C. Detwiler and Mikell H. Wyman, both of Columbia, for Appellants.

Stephen B. Samuels, of Lexington, for Respondent.

ANDERSON, J.: In this workers' compensation case, Rapid Plumbing contends the circuit court erred in (1) affirming the appellate panel's order denying the motion to admit evidence; (2) determining that Ronald Edward Martin was not at maximum medical improvement (MMI); (3) finding Rapid Plumbing improperly terminated temporary total disability benefits; (4) affirming and extending the assessment of penalties; and (5) affirming the commission's determination of the authorized treating physician. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Martin was a plumber's helper who had been employed by Rapid Plumbing for two months when he sustained a back injury while moving a fiberglass bathtub on May 28, 2002. Martin filed for workers' compensation benefits and Rapid Plumbing began providing medical treatment. Because Martin was unable to work, he was paid temporary total disability compensation starting on June 2, 2002.

Martin visited Doctor's Care on June 2, 2002. An MRI showed bulging discs and an annular tear. He received physical therapy, but after three sessions of physical therapy, he had not improved. Martin returned to Doctor's Care on July 24, 2002. The doctor determined physical therapy should be discontinued and referred Martin to an orthopedic surgeon. On August 7, 2002, Dr. William Felmly, an orthopedic surgeon, saw Martin. Martin complained of numbness, weakness, and leg swelling. Dr. Felmly noted, "The left lower extremity shows a bit of weakness in plantar flexion, a little bit of weakness of EHL, half grade on the peroneal . . . . The patient appears to have increased pain and discomfort on pinch test and rotation." Notwithstanding these findings, Dr. Felmly discharged Martin and returned him to full duty work. The return to work statement was faxed to Rapid Plumbing at Martin's request on August 10, 2002, and Martin returned to work on August 12, 2002.

On the day he returned to work, Martin worked with two plumbers installing bathtubs. He worked one full day cutting pipe, going up and down steps, lifting bathtubs, and unloading a truck. By the end of the day, Martin was "crawling around on [his] knees" and his "legs and back were hurting real bad." The next day, Martin advised Rapid Plumbing of his condition and was told to return to Doctor's Care. When Martin returned to Doctor's Care, they would not see him and the carrier refused to authorize the visit. At his own expense, Martin saw Dr. Donald Johnson at Carolina Spine Institute on September 11, 2002. Dr. Johnson noted an "easy to see" annular tear on Martin's MRI and found his symptoms to be consistent with that injury. Dr. Johnson recommended further treatment, and Martin was taken out of work.

Rapid Plumbing terminated Martin's temporary compensation on August 10, 2002. Rapid Plumbing served a Form 15 on Martin's attorney sometime between August 28, 2002 and September 9, 2002. The Form 15 alleged compensation had been stopped on August 10, 2002 because "claimant has been released to return to work without restrictions and employment has been offered." No supporting documentation was attached. Martin's attorney signed the Form 15 and requested a hearing to determine whether Rapid Plumbing legally terminated temporary compensation.

A single commissioner heard the case on December 19, 2002. During cross-examination of Martin, defense counsel introduced a surveillance videotape taken around December 10, 2002. The videotape showed Martin unloading wood from a pickup truck and using a log splitter to split the wood into firewood. Notwithstanding the video, the single commissioner issued a decision on February 20, 2003 finding Rapid Plumbing had illegally terminated Martin's temporary compensation and Martin was not at MMI. Rapid Plumbing was ordered to reinstate compensation and pay a 25% penalty to Martin. The commissioner designated Dr. Johnson as the authorized treating physician and ordered Rapid Plumbing to provide additional medical treatment as directed by Dr. Johnson.

Rapid Plumbing appealed to the appellate panel of the workers' compensation commission. The appellate panel heard the matter, and on October 29, 2003 one of the commissioner's wrote the parties advising them

of the panel's decision. The commission noted it was affirming, but authorized Rapid Plumbing's counsel "to send Dr. Johnson a letter, with the videotape enclosed, simply stating whether or not, based on his viewing of the videotape, he still believes that the Claimant is not at MMI." The letter stated that in the event Dr. Johnson changed his opinion regarding MMI and medical treatment, "it would be appropriate for the Defendants to then file a Form 21, Stop Pay."

On February 23, 2004, Dr. Johnson wrote a letter stating, "After reviewing Mr. Martin's videotape, I do believe that he is at maximum medical improvement." Dr. Johnson opined, "I would assign him an eight percent (8%) impairment to the whole person. I would place no particular restrictions on him at this time." Rapid Plumbing sought to reopen the record and obtain a reversal based on the Johnson letter. The panel heard arguments and concluded Rapid Plumbing had raised no new issues. On June 10, 2004, the appellate panel issued an order affirming in part and reversing in part the single commissioner. The appellate panel reduced the penalty period to August 10, 2002 through December 19, 2002. Rapid Plumbing appealed to the circuit court, which affirmed the appellate panel, but applied the penalty to the period from August 10, 2002 to July 9, 2004—the date when Rapid Plumbing resumed payment of temporary total disability.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the workers' compensation commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005); Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App.

2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Under the scope of review established in the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 495 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (2005).

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 48, 515 S.E.2d 532, 533 (1999); Frame, 357 S.C. at 528, 593 S.E.2d at 495. Accordingly, a reviewing court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact. Stephen, 324 S.C. at 337, 478 S.E.2d at 76. Instead, review of issues of fact is limited to determining whether the findings are supported by substantial evidence in the record. Hargrove, 360 S.C. at 289, 599 S.E.2d at 610-11. "On appeal, this court must affirm an award of the Workers' Compensation Commission in which the circuit court concurred if substantial evidence supports the findings." Solomon v. W.B. Easton, Inc., 307 S.C. 518, 520, 415 S.E.2d 841, 843 (Ct. App. 1992). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action." Howell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987).

LAW/ANALYSIS

I. Failure to Admit Evidence

Rapid Plumbing contends the appellate panel erred in failing to admit what it alleges was newly-discovered evidence, specifically the letter of Dr. Johnson dated February 23, 2004. We disagree.

Rapid Plumbing asseverates the Johnson letter should come in pursuant to 25A S.C. Code Ann. Reg. 67-707 (1997) which allows for the admission of newly-discovered evidence. The evidence sought to be admitted does not meet the standard for newly-discovered evidence. Regulation 67-707 (1997) provides that in order to introduce new evidence into the record on a case on review:

> C. The moving party must establish that the new evidence is of the same nature and character required for granting a new trial and show: (1) The evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a different result had the evidence been procurable at the first hearing; and (2) The evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery.

25A S.C. Code Ann. Reg. 67-707 (1997)

The requirements that the evidence must not be known to the party and could not have been secured by reasonable diligence have not been satisfied. The Johnson letter or its equivalent could have been secured at the first hearing by reasonable diligence. Rapid Plumbing had possession of the tape, yet failed to have a doctor review it. Additionally, Rapid Plumbing did not make a motion to adjourn or leave the record open to develop the evidence.

A conflicting doctor's report created after a hearing does not mandate a new trial. See Ancrum v. Low Country Steaks, 317 S.C. 188, 193, 452 S.E.2d 609, 612 (Ct. App. 1994) (noting that even if physician's reports, indicating that workers' compensation claimant possibly suffered from a herniated disc, were of same nature and character as that required for granting new trial, claimant failed to establish that, by reasonable diligence, such evidence could not have previously been secured and, thus, claimant was not

entitled to a new trial based on newly discovered evidence). Rapid Plumbing could have obtained a letter or testimony from Dr. Johnson regarding MMI and provided the evidence at the initial hearing. Because it failed to do so, Rapid Plumbing cannot now argue it deserves a new trial. The appellate panel merely allowed Rapid Plumbing to develop the record for a future Form 21 hearing by permitting it to communicate directly with Dr. Johnson. In no way did the appellate panel state it would allow Rapid Plumbing to admit a letter by Dr. Johnson. Accordingly, the circuit court did not err in finding the Johnson letter should not be admitted.

II. MMI

Rapid Plumbing argues the circuit court erred in finding Martin was not at MMI, when there was no evidence to support that conclusion. We disagree.

The appellate panel's factual findings are supported by substantial evidence. "Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." O'Banner v. Westinghouse Elec. Corp, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). Rapid Plumbing contends the circuit court erred in finding Martin was not at MMI because (1) Dr. Felmly returned Martin to work with no restrictions; (2) Martin returned to work on August 12, 2002; and (3) "the record reflects that the Claimant never presented an out of work excuse from any doctor to the employer or any conflicting doctor's opinions." Rapid Plumbing argues this Court should rely on Dr. Felmly's reports and Dr. Johnson's letter to reverse the appellate panel.

This Court's review is restricted to the evidence considered by the appellate panel in reaching its decision. The Johnson letter was not part of the record before the appellate panel and cannot be used to support Rapid Plumbing's argument. Although the appellate panel could have conceivably found otherwise based on Dr. Felmly's report, it weighed the conflicting opinions of the doctors and gave greater weight to Dr. Johnson's report. Any disagreements in the evidence are to be resolved exclusively by the appellate

panel. See Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999) (stating that where there is a conflict in the evidence, either by different witnesses or by the same witness, the appellate panel's findings of fact are conclusive). Dr. Johnson noted an "easy to see" annular tear on Martin's MRI and found his symptoms to be consistent with that injury. Further treatment was recommended and Martin was taken out of work. Dr. Johnson's report, combined with Martin's testimony, is sufficient evidence to affirm the appellate panel's findings.

III. Termination of Temporary Total Disability Benefits

Rapid Plumbing contends the circuit court erred in affirming the appellate panel's finding that Rapid Plumbing was barred from stopping payment of temporary total disability benefits on the grounds of a perceived deficiency in the Form 15. We disagree.

The reason given on the Form 15 for the termination was because "Claimant has returned to work without restrictions and employment has been offered." However, the statute is explicit that even under a Form 15, an employer can only terminate or suspend temporary compensation if one of the specified conditions is met. The applicable condition in this case allows termination or suspension if "the employee has returned to work; however, if the employee does not remain at work for a minimum of fifteen days, temporary disability payments must be resumed immediately[.]" S.C. Code Ann. § 42-9-260(B)(1) (Supp. 2005). Because Martin did not remain at work for fifteen days, Rapid Plumbing was required to resume payments immediately after he left work on August 13, 2002.

The rationale given by Rapid Plumbing is only applicable when suitable employment is offered but not accepted. See S.C. Code Ann. § 42-9-190 (1985) ("If an injured employee refuses employment procured for him suitable to his capacity and approved by the Commission he shall not be entitled to any compensation at any time during the continuance of such refusal."). Thus, had Martin refused to return to work, Rapid Plumbing would have had legal justification to terminate his temporary compensation.

Because Martin willingly returned to work, but was unable to continue work after one day, the reason given by Rapid Plumbing did not apply.

Even if Rapid Plumbing could have stopped temporary total disability benefits, it failed to follow the proper procedure for doing so as outlined by section 42-9-260 and regulation 67-504. Rapid Plumbing terminated the compensation on August 10, 2002, but failed to file and serve the Form 15 until at least August 28, 2002, and failed to attach the supporting documentation as required by section 42-9-260. These deficiencies are not mere technicalities, but are substantial deviations from the statutory procedure. The circuit court was correct in finding Rapid Plumbing wrongfully terminated temporary benefits.

IV. Penalty Period

The appellate panel affirmed the single commissioner's imposition of a 25% penalty on Rapid Plumbing on the overdue payments for temporary total disability benefits. However, the single commissioner set the time for assessment of the penalty starting August 10, 2002 and continuing until Rapid Plumbing resumed paying the benefits—a time which had yet to occur. The appellate panel reversed the commissioner in this aspect by limiting the penalty period to August 10, 2002 through December 19, 2002, the date of the hearing before the single commissioner. The circuit court set the penalty period as August 10, 2002 through July 9, 2004—the date when Rapid Plumbing resumed payment of benefits. Rapid Plumbing contends the court erred in increasing the penalty period. We disagree.

Section 42-9-260(G) of the South Carolina Code (Supp. 2005) requires employers to pay temporary total disability to an employee who has "been out of work due to a reported work related injury" for eight days. The penalty language of section 42-9-260 provides:

> (G) Failure to comply with this section **shall** result in a twenty-five percent penalty imposed upon the carrier or employer computed on the amount of benefits withheld in violation of this section, and the amount of the penalty must be paid to the

> employee in addition to the amount of benefits withheld. However, the penalty does not apply if the employer or carrier has terminated or suspended benefits when the employee has returned to any employment at the same or similar wage.

Id. (emphasis added).

The language of section 42-9-260(G) is mandatory. The statute sets the time of the penalty as beginning with the failure to comply with section 42-9-260 and continuing for as long as the benefits are wrongfully withheld. The appellate panel did not have discretion to limit the duration of the penalty to a time other than the date when payment of benefits was resumed. By the time the circuit court heard the case, the statutory penalty period had ended as Rapid Plumbing had resumed paying benefits to Martin. Therefore, the circuit court correctly set the penalty period as beginning on August 10, 2002 and continuing through the date Rapid Pluming resumed payments to Martin—i.e., July 9, 2004.

Additionally, Rapid Plumbing complains of the compensation rate upon which the penalty was assessed. However, Rapid Plumbing simply states the compensation rate should have been lower and fails to make an argument explaining its position. "Conclusory arguments constitute an abandonment of the issue on appeal." Civil Action No.: 2001-CP-32-0711 Carolina Water Serv., Inc. v. Lexington County Joint Mun. Water and Sewer Comm'n, 367 S.C. 141, 149, 625 S.E.2d 227, 231 (Ct. App. 2006); see also Houck v. State Farm Fire and Cas. Ins. Co., 366 S.C. 7, 17 n.5, 620 S.E.2d 326, 332 n.5 (2005) (noting an issue is abandoned if the appellant's brief treats it in a conclusory manner). The single commissioner made the finding that the rate should be $230.12, and absent an argument as to why that calculation is wrong, we cannot reverse.

V. Authorized Treating Physician

Rapid Plumbing argues the circuit court erred in affirming the appellate panel's order that Dr. Johnson be the authorized treating physician. We disagree.

As a preliminary matter, this issue has not been preserved for our review. Rapid Plumbing failed to object and have the issue ruled on by the circuit court and did not file a timely motion for reconsideration. See Talley v. S.C. Higher Ed. Tuition Grants Committee, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) (stating an issue raised in trial court but not ruled on by the trial court is not preserved for appellate review).

Even had this issue been preserved for our review, it fails on the merits. Regulation 67-509 states that while a claimant is receiving temporary compensation benefits, "[t]he employer's representative chooses an authorized health care provider and pays for authorized treatment." S.C. Code Ann. Reg. 67-509(A) (1990). However, section 42-15-60 of the Workers' Compensation Act provides:

> Medical . . . treatment . . . shall be provided by the employer. In case of a controversy arising between employer and employee, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. . . . [T]he employer may, at his own option, continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept an attending physician, unless otherwise ordered by the Commission. . . . The refusal of an employee to accept any medical, hospital, surgical or other treatment when provided by the employer or ordered by the Commission shall bar such employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Commission the circumstances justified the refusal, in which case the Commission may order a change in the medical or hospital service.

S.C. Code Ann. § 42-15-60 (1985); See also Grattis v. Murells Inlet VFW #10420, 353 S.C. 100, 113-14, 576 S.E.2d 191, 197-98 (Ct. App. 2003) (stating that where it deems it necessary, the appellate panel may override an employer's choice of medical provider and may excuse a workers'

compensation claimant's justified refusal to seek treatment from employer's provider, in these circumstances, the appellate panel may order a change in the medical or hospital service provided by employer to the claimant).

The appellate panel is afforded discretion to order medical treatment under section 42-15-60 when a controversy such as the one in the instant case arises. The designation of Dr. Johnson was consistent with the factual finding that additional treatment would lessen Martin's disability. The refusal by Doctor's Care to see Martin and Dr. Johnson's subsequent diagnosis created the controversy contemplated by the statute. This is not a case where an employee is refusing treatment offered by an employer. Rather, this is a situation where the employee feels he still needs treatment and the employer fails to provide it. The appellate panel acted within its discretion and the circuit court was correct in affirming the order confirming Dr. Johnson as the authorized treating physician.

CONCLUSION

The order of the circuit court is

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.