The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who were administratively suspended from the practice of law on April 1, 2010, under Rule 419(b)(2), SCACR, and remain suspended as of June 1, 2010. Pursuant to Rule 419(e)(2), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by July 1, 2010.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Pleicones, J., not participating.

Columbia, South Carolina
June 11, 2010

LAWYERS SUSPENDED FOR NON-COMPLIANCE
WITH MCLE REGULATIONS FOR THE
2009-2010 REPORTING PERIOD
AS OF JUNE 1, 2010

Carrie E. Adkins
Carolina Closing Services, LLP
403 Ravengill Court
West Columbia, SC 29169
SUSPENDED BY COURT EFFECTIVE 4/01/10-
FAILURE TO PAY 2010 BAR DUES

Gilbert S. Bagnell
1201 Main Street, Suite 1980
Columbia, SC 29201
INTERIM SUSPENSION 10/09/09

Jody V. Bentley
PO Box 415
Summerville, SC 29484
INTERIM SUSPENSION 9/18/09

C. Wesley Black
The Black Law Firm, PLLC
PO Box 876
Lincolnton, NC 28093

John B. Bowden
925 Cleveland Street, Unit 96
Greenville, SC 29601

Richard M. Campbell, Jr.
Richard M. Campbell, Jr., LLC
102 Sandy Creek Court
Greer, SC 29650
INTERIM SUSPENSION 5/5/10

Brian D. Coker
4891 Highway 153, Suite G
Easley, SC 29642
INTERIM SUSPENSION 2/3/10

Sherry B. Crummey
61 Morris Street
Charleston, SC 29403
INTERIM SUSPENSION 7/08/09

David C. Danielson
Danielson Law Firm, LLC
553 Talley Bridge Road
Marietta, SC 29661
INTERIM SUSPENSION 6/22/09

Justin B. Kaplan
Schaeffer Eye Center
PO Box 1310
Birmingham, AL 35173

Beth J. Laddaga
111 Springview Lane, Apartment 738
Summerville, SC 29485
SUSPENDED BY COURT EFFECTIVE 4/01/10-
FAILURE TO PAY 2010 BAR DUES

Spencer D. Langley
107 Moultrie Street
Greenville, SC 29605

Nancy H. Mayer
Nancy H. Mayer, Attorney at Law
PO Box 1305
Laurens, SC 29360
INTERIM SUSPENSION 4/30/09

Michael M. McAdams
PO Box 71150
Myrtle Beach, SC 29572
INTERIM SUSPENSION 4/21/10

J. Fitzgerald O'Connor, Jr.
The O'Connor Law Firm, PLLC
PO Box 1207
Chapin, SC 29036
INTERIM SUSPENSION 9/23/09

Rochelle A. Oldfield
Aiken County Solicitor's Office
109 SE Park Avenue
Aiken, SC 29801
SUSPENDED BY COURT EFFECTIVE 4/01/10-
FAILURE TO PAY 2010 BAR DUES

Brian C. Reeve
Brian C. Reeve PA
400 Mallet Hill Road, Apartment E
Columbia, SC 29223
SUSPENDED BY COURT EFFECTIVE 4/01/10-
FAILURE TO PAY 2010 BAR DUES

William G. Rogers, Jr.
910 East Jackson Street
Lamar, SC 29069

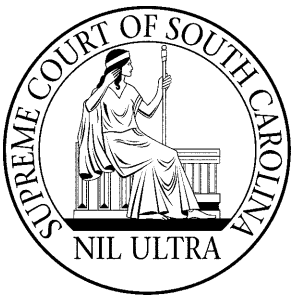
David Rosenblum
Rosenblum & Rosenblum, LLC
PO Box 320039
Alexandria, VA 22320
SUSPENDED BY COURT EFFECTIVE 4/01/10-
FAILURE TO PAY 2010 BAR DUES

David H. Smith II
Attorney at Law, PC
812 Towne Park Drive, Suite 300
Rincon, GA 31326
SUSPENDED BY COURT EFFECTIVE 4/01/10-
FAILURE TO PAY 2010 BAR DUES

Victoria L. Sprouse
3125 Springbank Lane, Apartment A
Charlotte, NC 28226
SUSPENDED BY COURT EFFECTIVE 4/01/10-
FAILURE TO PAY 2010 BAR DUES
DISBARRED BY COURT 5/17/10

Tamara L. Tucker
600 Peter Jefferson Place, Suite 100
Charlottesville, VA 22911

John D. Watts
118 South Pleasantburg Drive, Suite B
Greenville, SC 29607
SUSPENDED BY COURT EFFECTIVE 4/01/10-
FAILURE TO PAY 2010 BAR DUES



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
June 14, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

George Jensen Aakjer, III, Leight Andersen, Bobby Wayne Archer, Donald Lee Ard, Gary Philip Balcom, Thurman Odell Barnes, Ralph Hillary Bell, Jr., Marvin Simon Beverly, Steven M. Brinsfield, Laurie Ann Dzerwieniec, Jeffery Jay Galbrath, Ronald Dewayne Gause, Gwendolyn Marie Harvey, Jessica Jane Hayes, Anthony Odell Hyman, Molly Infield, Mark Dale Infield, Bonnie Roberts Johnson, Emmett Earl Jones, Dawn Michell Kelly, Richard Allen Lester, Rodney Alan Louhoff, Gary Edward Matson, Carla Williams Mercer, Richard O'Neil Mercer, Edward Dee Mitchum, Kathy Mitchum, Carol Justice North, Carol O'Day, William O'Day, III, Paul David Pinette, Steve Pinnell, Robert George Pinto, Debra A. Purcell, Rhonda Delette Robinson, Scott Allen Robinson, Rebecca Ann Rowan, Scott Rowan, Joseph Fred Ruddock, Jr., David Francis Speck, Anita Lynn

Teachey, Robert Larry
Thompson, Waddell H.
Thompson, Michael James
Timm, Debbie Timm, Rebel
JM Tyler, Janice Waites, Susan
Wall, and Edward Lucas
Williams, Petitioners,

v.

City of Myrtle Beach, City of
Myrtle Beach Municipal Court, Respondents.

ORIGINAL JURISDICTION

Opinion No. 26825
Heard February 3, 2010 – Filed June 8, 2010

JUDGMENT FOR PETITIONERS

Desa Ballard, of West Columbia, and James Thomas McGrath, of Richmond, Virginia, for Petitioners.

Michael W. Battle, of Battle, Vaught & Howe, of Conway, for Respondents.

JUSTICE PLEICONES: In response to various concerns stemming from motorcycle rallies, the City of Myrtle Beach enacted a number of

ordinances and amendments to ordinances (the Motorcycle Ordinances). Among the ordinances was Ordinance 2008-64, which required that any person riding a motorcycle wear a protective helmet and eyewear (the Helmet Ordinance). Petitioners were each cited for violating the Helmet Ordinance by failing to wear the requisite helmet and eyewear. They brought this action in this Court's original jurisdiction challenging the Helmet Ordinance on three points: (1) the Helmet Ordinance is preempted by State law; (2) the ordinance establishing the system for adjudicating infractions of the Helmet Ordinance, which has since been repealed, was so intertwined with certain Motorcycle Ordinances that its repeal caused the ordinances to fail[1]; and, (3) the current system for adjudicating alleged violations of the Helmet Ordinance in municipal court is improper as the municipal court lacks subject matter jurisdiction over the charges.

Petitioners seek a declaratory judgment finding the Helmet Ordinance and Motorcycle Ordinances invalid and a writ of prohibition barring the municipal court from exercising jurisdiction over the alleged violations of the Helmet Ordinance. We find: (1) that the Helmet Ordinance is preempted under the doctrine of implied field preemption; (2) that the Motorcycle Ordinances were impliedly repealed by the ordinance repealing the administrative hearing system; and, (3) since we invalidate the Helmet Ordinance, we do not reach Petitioners' argument seeking a writ of prohibition.

[1] Petitioners contend the following ordinances were invalidated by repeal of the ordinance establishing the administrative hearing system: 2008-61 (accommodations restrictions); 2008-62 (consumption and open possession of alcohol in parking areas); 2008-63 (use of parking lots for non-parking activities); 2008-64 (helmet and eyewear requirements for cycles and mopeds); 2008-65 (parking of trailers on public streets or unlicensed private lots); 2008-66 (convenience store and premises security); and 2008-67 (minor or juvenile curfew).

FACTS

For years, large motorcycle rallies were held in Myrtle Beach. A number of objections were had to the rallies based on, among other things, loud noise and rowdy behavior. Additionally, there was evidence the rallies placed a heavy burden on the local medical community, police, and other emergency responders.

In response, the City passed a number of ordinances and amendments dealing with rallies and motorcycles. Included among them was the Helmet Ordinance, an ordinance requiring all persons riding on motorcycles to wear approved helmets and eyewear. Under the language of the Helmet Ordinance, a violation was deemed an "administrative infraction." The City passed an ordinance establishing an administrative hearing system to conduct hearings on citations charging violations of certain municipal ordinances, including certain Motorcycle Ordinances. The administrative hearing ordinance was subsequently repealed.

Petitioners were each cited for failing to wear the requisite helmet and eyewear in the City. After the administrative hearing system was repealed, the City issued a Uniform Ordinance Summons for each person charged, requiring them to appear before a municipal court judge. This Court accepted Petitioners' petition for certiorari in its original jurisdiction before any charges were adjudicated.

ISSUES

I. Is the Myrtle Beach Helmet Ordinance preempted by State law?

II. Are the Motorcycle Ordinances impliedly repealed?

DISCUSSION

I. Preemption

A municipal ordinance is a legislative enactment and is presumed to be constitutional. Southern Bell Telephone and Telegraph Co. v. City of Spartanburg, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). The burden of proving the invalidity of a municipal ordinance is on the party attacking it. Id. This State's constitution provides that the powers of local governments should be liberally construed. See S.C. Const. art. VIII, § 17.

To determine the validity of a local ordinance, this Court's inquiry is twofold: (1) did the local government have the power to enact the local ordinance, and if so (2) is the ordinance consistent with the constitution and general law of this State. See Beachfront Entertainment, Inc., v. Town of Sullivan's Island, 379 S.C. 602, 605, 666 S.E.2d 912, 913 (2008). Petitioners advance a number of grounds for preemption of the Helmet Ordinance. We hold that the Helmet Ordinance fails under the doctrine of implied field preemption.

An ordinance is preempted under implied field preemption when the state statutory scheme so thoroughly and pervasively covers the subject as to occupy the field or when the subject mandates statewide uniformity. See South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006). The General Assembly addressed motorcycle helmet and eyewear requirements in S.C. Code Ann. §§ 56-5-3660 and 56-5-3670 (2009), respectively. The statutes generally require all riders under age twenty-one to wear a protective helmet and utilize protective goggles or a face shield. The Helmet Ordinance, in contrast, requires all riders, regardless of age, to wear a helmet and eyewear.

In S.C. Code Ann. § 56-5-30 (2009) the General Assembly authorized local authorities to act in the field of traffic regulation if the ordinance does not conflict with the provisions of the Uniform Traffic Act. Even assuming,

as the City contends, that the Helmet Ordinance does not conflict with the Uniform Traffic Act, we find that the ordinance may not stand as the need for uniformity is plainly evident in the regulation of motorcycle helmets and eyewear. Were local authorities allowed to enforce individual helmet ordinances, riders would need to familiarize themselves with the various ordinances in advance of a trip, so as to ensure compliance. Riders opting not to wear helmets or eyewear in other areas of the state would be obliged to carry the equipment with them if they intended to pass through a city with a helmet ordinance. Moreover, local authorities might enact ordinances imposing additional and even conflicting equipment requirements. Such burdens would unduly limit a citizen's freedom of movement throughout the State. Consequently, the Helmet Ordinance must fail under the doctrine of implied preemption.[2]

II. Implied repeal

As noted above, the City initially sought to enforce the Motorcycle Ordinances, including the Helmet Ordinance, in an administrative hearing tribunal, but later repealed the ordinance establishing the system. Petitioners contend the City's enactment of the ordinance repealing the administrative hearing system caused the entire Motorcycle Ordinance scheme to fail.[3] We agree.

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[2]Because we find that the Helmet Ordinance fails under implied field preemption, we need not reach Petitioners' remaining preemption issues. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not discuss remaining issues when disposition of prior issue is dispositive). Additionally, we need not address Petitioners' request for a writ of prohibition barring the municipal court from exercising jurisdiction over the alleged ordinance violations. See Sangamo Weston, Inc. v. National Surety Corp., 307 S.C. 143, 148, 414 S.E.2d 127, 130 (1992) ("This court will not issue advisory opinions . . . .").

[3] Though Petitioners phrase their argument as whether the administrative hearing ordinance is "severable" from the Motorcycle Ordinances, Petitioners actually argue implied repeal.

In general, repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement. See Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 141, 628 S.E.2d 38, 41 (2006). "The repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them." Spectre, LLC v. South Carolina Dep't of Health and Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010). When two statutes "are incapable of reasonable reconcilement, the last statute passed will prevail, so as to impliedly repeal the earlier statute to the extent of the repugnancy." See Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co., 295 S.C. 243, 247, 368 S.E.2d 64, 66 (1988).

As noted, the City of Myrtle Beach enacted a number of ordinances and amendments to ordinances in response to the motorcycle rallies. Among the ordinances were ordinances 2008-61 through 67, which the City passed with the designation that any violation constituted an "administrative infraction." The City also enacted Ordinance 2008-71, establishing an administrative hearing system which, as the City explained on its website, established a process "to handle infractions as specified in Ordinances 2008-61, 2008-62, 2008-63, 2008-64, 2008-65, 2008-66, and 2008-67." Ordinance 2008-71 set forth in detail the rules, powers, and procedures of the administrative hearing system.

We find that the above-cited ordinances were enacted with the specific condition that they be enforced in the specially-crafted administrative hearing system. The ordinances therefore cannot be reconciled with a later ordinance abolishing the system. Consequently, the Motorcycle Ordinances continuing to reference "administrative infractions" were impliedly repealed.

We note, however, that in the same ordinance which repealed the administrative hearing system, the City amended Ordinances 2008-61 (accommodations restrictions) and 2008-65 (parking of trailers on public streets or unlicensed private lots) to designate those violations as "misdemeanors" rather than "administrative infractions." Consequently, these ordinances are not impliedly repealed and remain in effect.

CONCLUSION

We find that the City Helmet Ordinance fails under implied field preemption due to the need for statewide uniformity and therefore issue a declaratory judgment invalidating the ordinance. Moreover, we hold that certain Motorcycle Ordinances were impliedly repealed by the ordinance repealing the administrative hearing system.

JUDGMENT FOR PETITIONERS.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Patricia O'Neill and Michael O'Neill, Plaintiffs,

v.

Ormega Smith and Yolanda Adams, Defendants.

CERTIFIED QUESTION OF LAW

Matthew J. Perry, Jr., United States District Court Judge

Opinion No. 26826
Heard March 2, 2010 – Filed June 14, 2010

CERTIFIED QUESTION ANSWERED

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

Robert A. McKenzie and Damon C. Wlodarczyk, both of McDonald, McKenzie, Rubin, Miller & Lybrand, of Columbia, for State Farm Mutual

Automobile Insurance Company, the Plaintiffs' Underinsured Motorist Carrier.

JUSTICE BEATTY: The question certified to this Court asks whether it would violate South Carolina's public policy for a plaintiff to seek an award of punitive damages in a tort action after signing a covenant not to execute against a defendant. We answer in the negative, holding it does not violate public policy because punitive damages serve additional purposes beyond merely punishing a specific individual, and the public policy as expressed in S.C. Code Ann. § 38-77-30(4) (2002) is to compensate the injured insured, not his insurer, and requires only that damages exceed the liability insurance limits of an at-fault motorist.

I. FACTS

Patricia and Michael O'Neill (Plaintiffs) brought this negligence action against Ormega Smith and Yolanda Adams (Defendants) seeking compensatory and punitive damages as a result of a vehicular accident. The action was brought in the United States District Court for the District of South Carolina based on diversity jurisdiction. Plaintiffs served a copy of the complaint upon State Farm, their underinsured motorist (UIM) carrier, in accordance with South Carolina law.[1]

The liability insurer for Defendant Adams tendered the limits of its policy to Plaintiffs in exchange for an "Agreement and Covenant Not to Execute." The covenant provided that, in consideration of the sum of $100,000 that the insurer paid to Plaintiffs, they agreed not to execute any judgment that they might obtain against the personal assets of Defendants and instead they would pursue recovery only through UIM coverage.

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[1] See S.C. Code Ann. § 38-77-160 (2002) (providing "[t]he [UIM] insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability").

State Farm, in its defense role, thereafter moved for partial summary judgment on Plaintiffs' claim for punitive damages, arguing the covenant effectively relieved Defendants from personal liability; therefore, allowing Plaintiffs to seek punitive damages would be misleading to the point of thwarting public policy and would perpetuate a fraud upon the court and the jury because it would be based upon the fiction that Defendants could be punished by an award of punitive damages. The presiding judge determined there was no precedent in South Carolina on this issue and certified the following question to this Court:

CERTIFIED QUESTION PRESENTED

> Does a plaintiff who has protected a defendant from personal financial responsibility through a covenant not to execute on that defendant's assets violate the public policy of South Carolina relating to punitive damages by seeking an award of punitive damages where payment of the punitive damage award will not come from either the defendant or from a source for which the defendant is responsible?

This Court accepted the certified question pursuant to Rule 244, SCACR.

II. STANDARD OF REVIEW

"In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

III. LAW/ANALYSIS

State Farm observes that "[t]he certified question accepted by this court is one of first impression in South Carolina." State Farm's "position [is] that

allowing a party to seek a punitive damage award when the tortfeasor has basically been released from all potential responsibility for paying the award violates the public policy purpose of awarding punitive damages."

State Farm argues allowing a plaintiff to pursue a claim for punitive damages after signing a covenant not to execute perpetrates a fraud upon the jury and public because the tortfeasor is insulated from harm. State Farm maintains punitive damages are intended to punish the wrongdoer and to deter the wrongdoer and others from engaging in similar conduct, but in this case a covenant not to execute protects Defendants from personal liability so they cannot be punished and there is no deterrence of Defendants or others. State Farm further argues it could promote collusion among nominal adversaries and its defense could be handicapped because "Defendants have no incentive to participate or cooperate" if they do not face personal liability.

In contrast, Plaintiffs assert the South Carolina General Assembly has expressly defined "damages" in the area of automobile insurance to include both actual and punitive damages, citing S.C. Code Ann. § 38-77-30(4) (2002). They contend that, "[u]sing the certified question, State Farm asks this Court to invalidate or rewrite the plain language of the legislature in S.C. Code Ann. § 38-77-30(4) and impose the non-public policy preferred by State Farm." Plaintiffs assert "the primary policy-making body of the State has spoken directly to the certified question and stated that the public policy of this State requires automobile insurers to cover and pay for punitive damages -- both in the liability context and in the UIM context." They maintain the covenant does not alter this clear pronouncement by the legislature.

State Farm contends Plaintiffs' "arguments are misplaced" because the certified question does not challenge whether punitive damages are generally available under UIM coverage, "but rather seeks a ruling on the very narrow issue of whether a claim for punitive damages may be prosecuted where the plaintiff has relieved the tortfeasor from any potential harm associated with a punitive damage award."

Initially, we note that the question here is centered on contracted insurance coverage pursuant to S.C. Code Ann. § 38-77-160 (2002). It is undisputed that State Farm offered the insurance coverage for a certain premium and Plaintiffs accepted the offer and paid State Farm the requested premium. Accordingly, our attention is necessarily drawn to the language of section 38-77-160, which states in pertinent part as follows:

> Such carriers shall . . . offer . . . underinsured motorist coverage . . . to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault . . . underinsured motorist . . . .

S.C. Code Ann. § 38-77-160 (2002) (emphasis added).

The plain and unambiguous language of the statute clearly requires that the focus be placed on the liability insurance limits of the at-fault motorist. Once the damages of Plaintiffs, State Farm's insureds, exceed the liability insurance limits of the at-fault motorist, State Farm's underinsurance contract with Plaintiffs is triggered statutorily. Whether or not the at-fault motorist has other assets out of which the excess damages could be paid is irrelevant. Plaintiffs are not legally required to pursue the assets of the at-fault motorist, although they may pursue the claim in order to establish the amount of excess damages sustained. Concomitantly, it is irrelevant that the excess damages are not actually paid by the at-fault motorist. This result clearly comports with the legislative intent as expressed in section 38-77-160. To conclude otherwise would violate the public policy as expressed by the legislature. The only relevant question is whether or not the damages sustained exceed the liability insurance limits of the at-fault motorist.

The legislature has defined "damages" as used in Chapter 77 governing automobile insurance to "include[] both actual and punitive damages." Id. § 38-77-30(4). The clear legislative indication is that all "damages," including actual and punitive damages, are recoverable under the pertinent insurance provisions. As a matter of law, these provisions become part and

parcel of the insurance contract.[2] Further, in examining the public policy surrounding punitive damage awards, it is readily apparent that South Carolina courts have recognized that these awards serve a multitude of purposes and are not limited solely to punishment of the individual wrongdoer.

Specifically, "punitive damages serve at least three important purposes: punishment of the defendant's reckless, willful, wanton, or malicious conduct; deterrence of similar future conduct by the defendant or others; and compensation for the reckless or willful invasion of the plaintiff's private rights." Clark v. Cantrell, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000).

In Clark, we noted "the important role that punitive damages play in the American system of justice generally, and in South Carolina in particular since at least 1784." Id. We observed that punitive damages, in addition to punishing the defendant and deterring similar conduct by the defendant and others, serve to vindicate the private rights of the plaintiff and they provide some measure of compensation to plaintiffs for the intentional violation of those rights that is separate and distinct from the usual measure of compensatory damages:

> Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others. . . . Punitive damages have now come, however, to be generally, though not universally, regarded, not only as punishment for wrong, but as

[2] Policy provisions cannot exclude coverage provided by law. See Boyd v. State Farm Mut. Auto. Ins. Co., 260 S.C. 316, 319, 195 S.E.2d 706, 707 (1973) ("It is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid.").

> vindication of private right. This is the basis upon which they are now placed in this state.

Id. (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 573, 106 S.E.2d 258, 261 (1958)).

Thus, contrary to State Farm's assertion, the policy reasons supporting an award of punitive damages are more than to punish the defendant and to deter the defendant and others from similar conduct. Punitive damages historically have also served the purpose of vindicating the private rights of the plaintiff.

Moreover, we hold that punitive damage awards, even though not paid directly by the tortfeasor because of the covenant, continue to serve several public policy aims; specifically, deterring similar conduct by the tortfeasor and others, as well as vindicating the private rights of the injured plaintiff. These purposes are fulfilled even if a specific defendant is not financially punished by imposition of an award.

Today, State Farm advances an argument that State Farm and other insurers have unsuccessfully argued in courts across the country in an effort to avoid their contractual duty to their insured. In Lavender v. State Farm Mutual Automobile Insurance Co., 828 F.2d 1517 (11th Cir. 1987), the United States Court of Appeals, Eleventh Circuit, rejected as "disingenuous" an argument from State Farm that it should not be liable for punitive damages since they were only available to punish a wrongdoer and it had done no wrong:

> State Farm's argument that it should not be liable for punitive damages in this case because the purpose of awarding punitive damages is to punish a wrongdoer, and State Farm has done no wrong, is disingenuous. State Farm readily admits that as a liability carrier, it would be liable for punitive damages against its insured even though the insurance company itself would have done no wrong.

Id. at 1518.

In Omni Insurance Co. v. Foreman, 802 So. 2d 195 (Ala. 2001), the Supreme Court of Alabama affirmed the trial judge's ruling rejecting the UIM carrier's request for judgment as a matter of law on the claim for punitive damages on the basis they would not serve the purposes for which punitive damages are allowed. Id. at 198-200. The UIM carrier had argued that, since the insured had already settled with the tortfeasor, the verdict would punish only the insured's own carrier, not the tortfeasor. Id. at 196.

The court noted that, on appeal, the UIM carrier "makes challenging public-policy arguments" regarding allowing punitive damages to be awarded against a UIM carrier that has done no wrong. Id. at 198. However, citing Lavender, 828 F.2d 1517, the court stated that "[t]he United States Court of Appeals for the Eleventh Circuit has previously addressed this very question and concluded that Alabama's UIM statute permits the recovery of punitive damages." Id. at 199. The court held the language in the statute providing UIM coverage for damages which the injured person is "legally entitled to recover" was plain and unambiguous, and it did not exclude punitive damages. Id. at 198. Thus, the fact that the award was not paid directly by the tortfeasor did not defeat the injured plaintiff's right to obtain UIM coverage.

In Stinbrink v. Farmers Insurance Co., 803 P.2d 664 (N.M. 1990), a case involving uninsured motorist (UM) coverage, the Supreme Court of New Mexico held that the exclusion of coverage for punitive damages in a UM policy was void as against public policy. The court reasoned punitive damages are included in the meaning of the state statute governing UM coverage, which provided the insured could recover all sums the insured was "legally entitled to recover" from the tortfeasor. Id. at 665-66. The court stated the legislative purpose behind enacting compulsory UM coverage is to protect an insured against the financially unresponsive motorist, not to protect the insurance company, and the only condition to protection under the provision is that the injured person must be entitled to recover damages

against the uninsured motorist. Id. at 665. The court concluded that such benefits could not be "contracted away" and a policy provision contrary to state law was void. Id. at 665-66.

In the current matter, State Farm has asked the federal court to bar Plaintiffs from pursuing the claim for punitive damages in the tort case now pending. Our legislature has defined damages in the insurance context to include both actual and punitive damages, and to deny an injured party the benefit of the party's own UIM coverage would itself violate public policy because it would abrogate the purpose surrounding UIM coverage, which is to benefit the insured party, and would also thwart the other purposes for imposing punitive damages beyond imposing a financial penalty on the tortfeasor; namely, deterrence and vindication of the private rights of the injured plaintiff. Cf. State Farm Mut. Auto. Ins. Co. v. Lawrence, 26 P.3d 1074 (Alaska 2001) (stating the purpose of the UIM statute is to provide *for* the insured, as an injured claimant, the same benefit level as that provided *by* the insured to those asserting claims against the insured and holding that, where an insured's liability policy provides coverage for punitive damages, the insured's UIM policy must mirror that and also cover the insured for the punitive damages that they are legally entitled to collect from an underinsured tortfeasor).[3]

The central purpose of UIM coverage is to protect the injured party, and vindication of the injured party's private rights is an integral part of that purpose, above and beyond the punishment of a specific individual. See Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) ("The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist.").

[3] There is no practical difference between the current case and a situation where there is no covenant, but the defendant does not have the financial resources to respond to a claim for damages beyond the limits of any liability insurance coverage that has already been tendered on the defendant's behalf. In either scenario, the defendant is essentially judgment-proof, and the UIM carrier would be responsible for responding to any deficit, up to the UIM policy limits.

Under South Carolina law, carriers must offer UIM coverage up to the limits of the insured's liability coverage. Plaintiffs accepted this offer and paid the corresponding premiums for coverage and are entitled to this contractual benefit. State Farm set its premiums with the knowledge that they are liable for compensatory and punitive damages under the insurance contract, and it cannot now be heard to complain that the delivery of benefits under the contract would thwart public policy.[4]

IV. CONCLUSION

We answer the certified question in the negative and conclude that it does not violate South Carolina's public policy to allow a plaintiff to seek punitive damages after signing a covenant not to execute against the personal assets of an at-fault defendant.

CERTIFIED QUESTION ANSWERED.

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

[4] We also reject the argument that State Farm would be disadvantaged here if it is unable to obtain the cooperation of, or the control of, the defendants because they have settled. The failure of a defendant to cooperate with an insurer would not relieve the insurer of the contractual obligation to pay a claim. See generally Cowan v. Allstate Ins. Co., 357 S.C. 625, 594 S.E.2d 275 (2004) (holding a party's noncooperation does not relieve the insurer of the obligation to pay an innocent third party).

JUSTICE KITTREDGE: Plaintiffs argue "the [certified] question may not be ripe for an answer." In this regard, Plaintiffs reference the premature nature of the question before this Court and conclude: "until there is a jury verdict that returns punitive damages, and the aggregate of punitive damages and actual damages exceeds $100,000, State Farm's exposure in this case is unsettled and premature." I agree. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006) ("Generally, this Court only considers cases presenting a justiciable controversy. A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.") (citations omitted); *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 261, 562 S.E.2d 633, 639 (2002) (declining to answer certified questions where questions "assume a dispute which may never arise" because this Court will not issue advisory opinions).

I vote to rescind our agreement to answer the certified question. Rule 244(e), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward D. Sloan, Jr., individually and on behalf of all others similarly situated, Appellant,

v.

Greenville Hospital System, a Political Subdivision of the State of South Carolina, and Leighton Cubbage, Chairman of the Board, Respondents.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 26827
Heard April 7, 2010 – Filed June 14, 2010

AFFIRMED

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

Boyd Benjamin Nicholson, of Haynsworth Sinkler Boyd, of Greenville, for Respondents.

JUSTICE BEATTY: Edward D. Sloan, Jr. ("Sloan") sued the Greenville Hospital System ("Hospital") and Leighton Cubbage, Chairman of the Board (collectively, "Respondents"), challenging the Hospital's method of procuring construction services. Sloan contended the Hospital is a state governmental body and must, therefore, comply with the requirements of the South Carolina Consolidated Procurement Code, S.C. Code Ann. §§ 11-35-10 to -5270 (Supp. 2009) ("Procurement Code"). The circuit court ruled the Hospital is a local political subdivision, not a state governmental body as defined by the Procurement Code, and it is not subject to the Code's procurement procedures. The circuit court further found the Hospital's own procurement provisions that were challenged by Sloan complied with state law. Sloan appeals from these rulings. We affirm.

I. FACTS

Sloan brought three declaratory judgment actions against Respondents challenging the Hospital's procurement procedures for construction services: (1) the Parking Deck Case, (2) the Construction Management Case, and (3) the Request for Qualifications ("RFQ") Case.

In all three actions, Sloan alleged the Hospital is a "political subdivision" of the state of South Carolina that was required to establish, and to abide by, appropriate procurement procedures as required by section 11-35-50 of the South Carolina Code. See S.C. Code Ann. § 11-35-50 (Supp. 2009) (stating "[a]ll political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement"). Sloan alleged the Hospital had violated its own "Policy for the Procurement of Construction and Design Services for the Greenville Hospital System" ("Hospital Policy") in securing the construction services and, moreover, that some of its policies violated section 11-35-50.

In 2005, Sloan was permitted to amend his complaints to allege that the Hospital is a state "board" or "governmental body" as defined by state law and that it must follow the requirements of the Procurement Code. Sloan alleged the Hospital had violated the Procurement Code in its handling of certain construction projects and, in the alternative, if the court deemed the

Hospital a local "political subdivision" rather than a state "governmental body," that certain provisions of the Hospital Policy violated section 11-35-50 because they did not embody "sound principles of appropriately competitive procurement." The three actions were consolidated for trial.

Sloan and Respondents filed cross-motions for partial summary judgment on the preliminary issue of whether the Hospital is a "governmental body" as defined in the Procurement Code. The circuit court granted partial summary judgment to the Hospital, ruling it is not a governmental body as defined by the Procurement Code. The circuit court found the Hospital was, instead, "a political subdivision, and more specifically, a special purpose district." Under this ruling, the Hospital was, therefore, entitled to institute its own procurement procedures.

Thereafter, in an order regarding the Parking Deck Case, the circuit court found the Hospital had improperly utilized the "Sole Source Procurement" method of selecting construction services under the Hospital's own procurement policy and that the contract for this work was, therefore, invalid and void. In a separate consent order, Sloan was awarded costs and attorney's fees of $21,789.95 in this matter. No appeal has been made from the rulings in the Parking Deck Case.

In a subsequent order regarding the two remaining matters, the Construction Management Case and the RFQ Case, the circuit court granted judgment to the Hospital. The circuit court rejected Sloan's argument that several provisions of the Hospital's Policy failed to embody the principles of appropriately competitive procurement as required by section 11-35-50 of the South Carolina Code.

Sloan appeals, arguing the circuit court erred in finding the Hospital was not a governmental body subject to the state's Procurement Code and, in the alternative, if the Hospital is a political subdivision, the Hospital violated its own Hospital Policy in securing the disputed construction projects and several of the policy provisions violate section 11-35-50's mandate that political subdivisions enact ordinances or procedures embodying sound principles of appropriately competitive procurement.

II. STANDARD OF REVIEW

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 114, 687 S.E.2d 29, 32 (2009) (citing Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)).

A suit for declaratory judgment is neither legal nor equitable; rather, it is determined by the nature of the underlying issue. Sloan v. Greenville County, 380 S.C. 528, 534, 670 S.E.2d 663, 666 (Ct. App. 2009). "The issue of statutory interpretation is a question of law for the court," and this Court may decide questions of law without deference to the trial court. Id. at 534, 670 S.E.2d at 667.

III. LAW/ANALYSIS

A. Governmental Body or Political Subdivision

Sloan first argues the circuit court erred in finding the Hospital is a political subdivision and not a governmental body as those terms are defined in the Procurement Code. If the Hospital is a governmental body, it is subject to the requirements of the Procurement Code, and if it is not a governmental body, the Hospital must follow the provisions of its own Hospital Policy that it adopted to govern the procurement of construction and design services.

Procurement Code

The South Carolina Legislature has stated the underlying purposes of the Procurement Code are "to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the

purchasing values of funds while ensuring that procurements are the most advantageous to the State and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act," as well as "to require the adoption of competitive procurement laws and practices by units of state and local governments[.]" S.C. Code Ann. § 11-35-20(a), (e) (Supp. 2009).

The Procurement Code "applies to every procurement or expenditure of funds by this State under contract acting through a *governmental body* as . . . defined" in the Procurement Code. Id. § 11-35-40(2) (emphasis added).

Governmental Body. The term "governmental body" is defined in the Procurement Code as follows:

> *"Governmental Body" means a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch.* Governmental body excludes the General Assembly or its respective branches or its committees, Legislative Council, the Office of Legislative Printing, Information and Technology Systems, and all local political subdivisions such as counties, municipalities, school districts, or public service or special purpose districts or any entity created by act of the General Assembly for the purpose of erecting monuments or commissioning art that is being procured exclusively by private funds.

Id. § 11-35-310(18) (emphasis added). "State" as used in the Procurement Code "means state government." Id. § 11-35-310(32). Sloan alleges the Hospital is a state government board.

Political Subdivision. In contrast, the Procurement Code states "'[p]olitical subdivision' means all counties, municipalities, school districts, public service or special purpose districts." Id. § 11-35-310(23). Political subdivisions are excluded from the definition of a governmental body and are

not subject to the procurement procedures outlined in the Procurement Code. Id. § 11-35-310(18).

Section 11-35-50 of Procurement Code requires political subdivisions to develop and adopt their own procurement procedures:

> All political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983. The Budget and Control Board . . . shall create a task force to draft model ordinances, regulations, and manuals for consideration by the political subdivisions. . . . A political subdivision's failure to adopt appropriate ordinances, procedures, or policies of procurement is not subject to the legal remedies provided in this code.

Id. § 11-35-50.

Hospital's Status

In considering the Hospital's status, the circuit court observed that the Hospital does not perfectly fit into any category, but that its purpose is essentially local and it is not a state "governmental body" as that term is defined by the Procurement Code; rather, it is a "political subdivision," and more particularly, a "special purpose district" serving local needs:

> GHS [the Hospital] does not fit perfectly within the categories that the State Procurement Code creates. As a result, the decision in answering the questions raised in this case is a difficult and close one. In the final analysis, however, GHS was created to serve a local governmental purpose -- providing hospital facilities and services in Greenville County. By its very nature, it is local: its Board consists of citizens from the City and County of Greenville; in the past it was funded through Greenville County bond issues; and its original structure came from the City of Greenville. One of the purposes of the State Procurement Code is to allow local political subdivisions the

> flexibility to choose competitive procurement mechanisms that are appropriate for their purpose. The Court finds that GHS is the type of local political subdivision that this policy objective is meant to cover. Thus the Court holds that GHS is not a governmental body as defined by . . . the State Procurement Code. Instead, the Court holds that GHS is a political subdivision, and more specifically, a special purpose district.

Background of the Hospital's Formation. The Hospital was created in 1947 by act of the South Carolina Legislature to provide hospital facilities to the residents of Greenville County. 1947 S.C. Acts 432. The legislature observed the city hospital then in existence was insufficient to meet the needs of all of the Greenville County residents and concluded "that the most practical and economical solution of the problem would be for the County of Greenville to take over the hospital, to expand its physical facilities[,] and to operate it for the benefit of all residents of Greenville County." Id. § 1.

Because the city was unwilling to convey the existing hospital to the county without some guarantee its future operation would be on a basis satisfactory to the city residents, the legislature created "an independent Board, free from the control of the corporate authorities of the City or the County and charged with the duty of operating said hospital and its expanded facilities for the benefit of the taxpayers and residents of all Greenville County[.]" Id. To this end, the legislature "established a Board, to be known as the Greenville General Hospital Board of Trustees." Id. § 4. The board was "authorized and empowered to do all things necessary or convenient for the establishment and maintenance of adequate hospital facilities for Greenville County[.]" Id. § 5.

In 1965, the legislature "created and established in Greenville County a district to be known as 'Greenville Hospital System District' (the district), which shall include and be comprised of all territory in Greenville County within the boundaries of Greenville County." 1965 S.C. Acts 626, § 2. In the act making this change, the legislature noted "that public hospital facilities in Greenville County are being presently provided by a public agency known as the Greenville General Hospital Board of Trustees (the hospital board)." Id. § 1. The legislature found that studies indicated the growth of Greenville

County would require a "tremendous expansion of existing facilities," so the legislature decided "to establish a hospital district co-extensive with Greenville County, and to create a commission as the governing agency thereof . . . ." Id. The district, acting through the commission, was empowered to issue general obligation bonds. Id. § 7.

In 1966, the legislature repealed 1965 S.C. Acts 626, which created the district. 1966 S.C. Acts 1286, § 15. The legislature observed that the Hospital had been expanding using general obligation bonds issued by Greenville County, and that it was changed to a district in contemplation of the district acquiring from the board all existing public hospital facilities in the county and the district being empowered to issue bonds itself, but litigation had ensued challenging the validity of the act and also contending that the district had to follow the debt limitation set forth in the state constitution. Id. § 1(6). The legislature noted the trial court had upheld the validity of the district, but ruled that it must observe the debt limitation. Id. § 1(7).

The legislature stated it had further considered the problem while an appeal was being perfected and found that, if the district were to be permitted to issue general obligation bonds, a constitutional amendment had to be adopted. Id. § 1(8). Further, the legislature noted that the district was not authorized to function until the Hospital board had conveyed the hospital properties to the district and, since no conveyance had yet been made, the board was still performing the functions committed to it under the Act of 1947. Id. The legislature concluded the board should, therefore, continue its functions and decided "to repeal the Act of 1965 in order that public hospital facilities in Greenville County may continue to function under the Hospital Board and in accordance with the authorizations of the Act of 1947." Id. By separate act in 1966, the legislature changed the name of the board to "the Greenville Hospital System Board of Trustees." 1966 S.C. Acts 1285, § 1.

In 1999, the Hospital adopted, "[i]n compliance with South Carolina Code Ann. § 11-35-50, and in accordance with the principles of appropriately competitive procurement practices," its Hospital Policy governing the approved procedures for the procurement of construction and design services.

Sloan's Arguments. Sloan argues "the clear intent" of the legislature's actions in 1965 and 1966 "was that the Greenville Hospital System Board would continue to operate as a Board created by the General Assembly, and not as a 'special purpose district' or political subdivision." He asserts other districts have been established in the same geographical area; therefore, the Hospital cannot be a special purpose district in the same territory because they would impermissibly overlap. Sloan also contends special purpose districts must have five characteristics: a distinct geographical description, the authority to issue general obligation bonds, taxing authority, inclusion of "district" in the entity's name, and they must serve a local governmental purpose. Sloan states the Hospital does not meet this five-part test.

The circuit court found Sloan's assertion there was an impermissible overlap of districts was without merit, observing: "Each of the acts creating these subsequently formed hospital districts makes clear that the hospital facilities to be constructed or otherwise acquired in those respective districts are to be operated by GHS [the Hospital]. At most, these subsequent districts were created to provide support to GHS. . . . The three later districts do not perform the same functions as GHS." See Wagener v. Smith, 221 S.C. 438, 445-46, 71 S.E.2d 1, 4 (1952) ("'[T]here cannot be at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction, and privileges.' Dillon, Municipal Corporations, (5th Ed.), Vol. I, Sec. 354, page 616. . . . The foregoing inhibition does not prevent the formation of two municipal corporations coextensive in area for different purposes."); S.C. Code § 6-11-435(B) (2004) (codifying the "overlap rule"). Moreover, the circuit court stated that "none of these districts operate today and [they] are inactive by operation of statute, specifically South Carolina Code Ann. § 6-11-1630."

The circuit court also rejected the five-part test set forth by Sloan, stating the legislature has never defined the term "special purpose district" to mandate inclusion of all five of these parameters and Sloan's "position has no support either in case law or the South Carolina Code." The court observed that "[i]n defining the term 'special purpose district' the General Assembly

has consistently determined that one factor that must be present is that an entity must serve a local governmental function or power."[1]

The circuit court noted that, prior to the adoption of home rule in South Carolina, governmental power was concentrated at the state level in Columbia, and counties and municipalities had limited authority to provide services to its citizens. Therefore, the legislature created special purpose districts to fill the void for these needed services.

The provision of hospital services was among the kinds of services made available via special purpose districts. See Knight v. Salisbury, 262 S.C. 565, 573, 206 S.E.2d 875, 878 (1974) (stating "[t]he special purpose district has been employed for hospitals, recreational and other purposes"). In Knight, this Court observed that in 1973, home rule (in which more authority was vested in local governments) put an end to the practice of creating special purpose districts within a given county, as special legislation relating to one county was no longer permitted; however, any existing units were allowed to continue functioning and county governments began providing services that were previously provided at the local level by special purpose districts. Id. at 573-75, 206 S.E.2d at 878-79.

We agree with the circuit court's determination that the true essence of a special purpose district is its scope and its focus on serving local, not state-wide, needs. In this case, the Hospital was established to provide medical services to all of the residents of Greenville County, where the existing city hospital was found to be insufficient to meet the increasing demand for services.

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[1] See S.C. Code Ann. § 6-11-410(a) (2004) ("'*Special purpose district*' shall mean any district created by act of the General Assembly prior to March 7, 1973, and to which has been committed prior to March 7, 1973, any local governmental function."); id. § 6-11-810(d) ("'*Special purpose district*' shall mean any district created by act of the General Assembly prior to March 7, 1973, and to which has been committed prior to March 7, 1973, any local governmental power or function."); id. § 6-11-1610 ("For the purposes of this article [governing special purpose or service districts], 'special purpose district' means any district created by an act of the General Assembly or pursuant to general law and which provides any local governmental power or function . . . .").

Although the word "board" was used in the enabling legislation, it was used in a descriptive, generic sense, as the legislation did not, in actuality, create a board that had state-wide authority or impact; rather, it was directed solely to local needs in a limited geographic area, i.e., Greenville County, and was to provide medical services solely in that area. Thus, it was created to serve a local purpose. The board consisted of residents from the city and county of Greenville, the original hospital was built by the city, and part of its funding came from local bond issues. The use of the term "board" or the absence of the specific phrase "special purpose district" is not determinative of the characterization of the entity. Cf. McLure v. McElroy, 211 S.C. 106, 110, 44 S.E.2d 101, 104 (1947) (referring to the "governing board" of a public hospital known as the "Union Hospital District" and noting "the district . . . is a governmental subdivision of the State"), *overruled in part by* Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997).

Sloan contends there was no intent that the Hospital function as a special purpose district, but our review of the legislative events leads us to the opposite conclusion. It is readily apparent that the 1966 legislation repealing the act creating the district was passed solely because of the pending litigation regarding the authority of the district to issue bonds, and was done after the trial court had already upheld the validity of the district. The legislative change was simply a temporary solution to allow the board to continue functioning on an interim basis until the legal questions involving the district could be resolved. After home rule was implemented in 1973, however, new special purpose districts could no longer be created within one county, but entities created before 1973 were allowed to continue operating. This complex legislative history makes the question of the Hospital's status difficult, as the circuit court noted, because it does not clearly fall into either category (governmental body or political subdivision), but we hold the circuit court properly resolved the question in favor of finding the Hospital was not a governmental body as that term is defined in the Procurement Code.

The legislative definitions of a "special purpose district" do not contain the five-part test articulated by Sloan and in fact demonstrate the legislature's intent to be as broad as possible so as to encompass the wide variety of entities serving local needs that were created before the adoption of home rule. As the circuit court found, the statutes enumerated above require only

that such entities (1) were created by the General Assembly, (2) that they were created prior to March 7, 1973, and (3) that they serve a local governmental function.

This Court has previously recognized that certain entities were special purpose districts, even though they did not possess all of the characteristics in the five-part test asserted by Sloan. See, e.g., Newman v. Richland County Historic Pres. Comm'n, 325 S.C. 79, 480 S.E.2d 72 (1997) (observing the Commission is a special purpose district created in 1963 pursuant to 1963 S.C. Acts 69). The Richland County Historic Preservation Commission did not have the authority to tax or to issue general obligation bonds, and the enabling legislation created it without using the word "district" or otherwise defining its geographical scope.

We hold the circuit court did not err in concluding the Hospital is not a state governmental entity subject to the procurement procedures detailed in the state's Procurement Code; rather, it is a special purpose district that is entitled to, and by law is required to, establish its own provisions embodying sound principles of appropriately competitive procurement as provided by section 11-35-50. The formulation of the Hospital and its board meets the broad parameters of a special purpose district as used in the Procurement Code, as there is no limiting definition that specifies particular requirements other than the essential one of serving a local need or purpose.

B. Compliance with Hospital Policy

Sloan next argues in the alternative that, even if the Hospital is a local political subdivision, the Hospital Policy does not embody sound principles of appropriately competitive procurement as required by section 11-35-50.

Overview of the Hospital Policy

The Hospital Policy was adopted on August 24, 1999 to govern contracts involving construction or design services. Hospital Policy II(B)(1). The Hospital Policy generally applies to "any expenditure of funds by Greenville Hospital System [the Hospital] for construction under contract

exceeding $100,000 and for design services under contract exceeding $50,000, except as specifically set forth herein." Hospital Policy II(B)(2).

"Invitation for Bids and Request for Proposals shall be the preferred methods for the selection of construction services." Hospital Policy III(A)(1). Further, "Request for Proposals shall be the preferred method for the selection of construction management services, design services and design-build services." Hospital Policy III(A)(2).

The "Methods of Source Selection" enumerated in the Hospital Policy include (1) Invitation for Bids, (2) Request for Proposals, (3) Sole Source Procurement, (4) Emergency Procurement, and (5) Small Construction Procurement. Hospital Policy III(B).

The Small Construction Procurement method provides: "Any construction procurement not exceeding $350,000 may be made by the Director by the solicitation[] of written quotations from a minimum of three qualified sources (or, if in the Director's judgment, there are fewer than three qualified sources, from all qualified sources), and the award shall be made to the lowest responsible/responsive bidder." Hospital Policy III(G). "Director" refers to "the President of Greenville Hospital System or his designee." Hospital Policy II(C)(6).

Under the Sole Source Procurement method, "[a] contract may be awarded for construction or design services without competition when the Director determines in writing that there is only one appropriate, practicable source for the required supply, service, equipment or construction item." Hospital Policy III(E).

Challenged Provisions

On appeal, Sloan contends several provisions in the Hospital Policy do not embody sound principles of appropriately competitive procurement as required by section 11-35-50. For example, Sloan asserts the Hospital Policy generally sets thresholds of $100,000 and $350,000 for application of the policy, whereas the state's Procurement Code, and other, regional codes,

contain a $25,000 threshold.[2] Sloan also asserts the Hospital Policy "fails to require competitive sealed bidding as the presumptive method of source selection." Sloan argues competitive sealed bidding is provided for in the state's Procurement Code, the Model Procurement Ordinance for Local Governments prepared by the Special Task Force on Local Government Procurement of the South Carolina Budget and Control Board, and in other local codes; therefore, the Hospital's "departure from this presumption cannot be deemed to embody 'sound principles of appropriately competitive procurement.'"

The circuit court ruled Sloan failed to meet his burden of proving the challenged provisions did not comply with section 11-35-50 and granted judgment to the Hospital.

The court began by noting that "Sloan essentially argues that because the Hospital's Policy does not follow several other procurement codes, most notably the State's Consolidated Procurement Code, the State Local Model Procurement Code, and the ABA Model Procurement Code, the [Hospital] Policy fails to embody sound principles of appropriately competitive procurement and thus conflicts with State law."

The court observed that Sloan argues that these are "community standards" that demonstrate a collective "legislative judgment" as to whether or not certain procurement policies are appropriately competitive. The court rejected Sloan's argument, stating the general assertion that these other codes set some formula that South Carolina is compelled to follow must fail in the absence of other proof.

The court stated that requiring local government to follow the "collective judgment" of other codes would effectively stifle innovation in the procurement practices of local government. The court noted both the state's Procurement Code and the Model Procurement Ordinance were adopted in

[2] The Procurement Code currently provides that "[c]ontracts greater than *fifty thousand dollars* must be awarded by competitive sealed bidding except as otherwise provided in Section 11-35-1510." S.C. Code Ann. § 11-35-1520(1) (Supp. 2009) (emphasis added). This threshold was increased from $25,000 after the time the contracts at issue here were executed. 2006 S.C. Acts 376, § 25 (effective June 13, 2006).

the early 1980s, so relying upon these sources in determining if something meets the "appropriately competitive" standard would result in stagnation and the inability to adopt newer and more innovative procurement methods.

Moreover, the court found that Sloan's argument conflicts with the Procurement Code itself as "there is simply no requirement that entities like the Hospital enact [procedures] that are the same as, or even similar to, the State Consolidated Procurement Code." The court explained, "By conscious decision of the legislature, . . . local governments are not subject to the State Procurement Code" and "[n]either are local governments required to adopt provisions similar to those of the State Code."

In Colleton County Taxpayers Association v. School District of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006), this Court held that the legislature's repeal of a provision in the Procurement Code had no relevance to the validity of an identical provision contained in the School District's procurement policy. We rejected the plaintiffs' suggestion that the repeal amounted to a determination that the School District's provision no longer embodied "sound principles of appropriately competitive procurement" within the meaning of section 11-35-50. Id. at 241, 638 S.E.2d at 694. We further held that the plaintiffs' "blanket conclusion" that the School District's provision must be inappropriate because it was no longer in the Procurement Code, without incorporating any supporting authority, effectively constituted a waiver of their argument. Id.

In the current appeal, the circuit court relied upon the Colleton County case in finding the provisions of the Procurement Code are "irrelevant" to what constitutes "sound principles of appropriately competitive procurement" and in determining local "procurement codes need not mirror the State Consolidated Procurement Code, the Local Model Code, or any other code."

This determination is supported by the fact that the chairman of the Task Force expressly stated in his cover letter presenting the Model Procurement Ordinance to the chairman of the South Carolina Budget and Control Board that the "ordinance is a recommended model and in no way is to be construed as a document which must be mandatorily adopted by any political subdivision." The chairman expressly stated: "There is no

requirement that the political subdivision would even have to consider this particular model. It is to be used for assistance and information only."

We hold the circuit court properly ruled Sloan has not met his burden of establishing that any of the challenged provisions failed to meet the requirements of section 11-35-50. Sloan's sole objection to these provisions is that the Hospital Policy does not mirror the terms of the Procurement Code, the Model Procurement Ordinance, and other regional codes. Sloan appears to apply a reverse presumption, i.e., that the challenged provisions in the Hospital Policy are *presumptively invalid* because they vary from the terms contained in the sources used for comparison. We agree with the circuit court that this difference, standing alone, is not enough to deem the Hospital Policy in violation of the statute's mandate to adopt "sound principles of appropriately competitive procurement."

As our courts have recognized, section 11-35-50 does not specify any particular procedures that are considered to embody the "appropriately competitive" standard; rather, the statute "clearly was intended to afford local governments needed flexibility to determine what is 'appropriately competitive' in light of the public business they must transact." Glasscock Co. v. Sumter County, 361 S.C. 483, 490, 604 S.E.2d 718, 721 (Ct. App. 2004).

In Glasscock, the court rejected the argument that section 11-35-50 should be construed to mandate sealed competitive bidding in almost every instance of public procurement, explaining: "This approach would effectively strip our state's local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt. Indeed, such a reading of section 11-35-50 runs wholly contrary to the home rule authority vested in local government by our constitution." Id. at 491, 604 S.E.2d at 722; cf. Charleston County Sch. Dist. v. Leatherman, 295 S.C. 264, 368 S.E.2d 76 (Ct. App. 1988) (observing state law requires a school district's proposed procurement code to be "substantially similar" to the state Procurement Code, a requirement that is not imposed universally). Accordingly, we find no merit to Sloan's argument that the Hospital Policy is improper because it varies from the provisions contained in other local procurement and model codes.

IV. CONCLUSION

Based on the foregoing, we affirm the circuit court's orders, which found the Hospital is not a state governmental body subject to the Procurement Code, but rather, is a local political subdivision, and that its own procurement procedures, as contained in its Hospital Policy, complied with state law.

AFFIRMED.

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

JUSTICE PLEICONES: I concur in the majority's decision to uphold the trial judge's ruling in favor of the respondents, but would do so on the ground that appellant lacks standing to bring this action. Rule 220 (c), SCACR ; compare Sloan v. Dept. of Transp., 379 S.C. 160, 666 S.E.2d 236 (2008)(Pleicones, J., dissenting); Sloan v. Dept .of Transp., 365 S.C. 299, 618 S.E.2d 876 (2005)(Pleicones, J., dissenting).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Media General Communications, Inc., and Media General Broadcasting of South Carolina Holdings, Inc., Respondents,

v.

South Carolina Department of Revenue, Appellant.

Media General, Inc., Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appeal From Richland County
Marvin F. Kittrell, Admininistrative Law Court Judge

Opinion No. 26828
Heard March 16, 2010 – Filed June 14, 2010

AFFIRMED

Lynn M. Baker, Managing Counsel, and Ronald W. Urban, Chief Counsel, both of South Carolina Department of Revenue, of Columbia, for Appellant.

Burnet R. Maybank, III, of Nexsen Pruet, of Columbia, for Respondents.

JUSTICE BEATTY: The appellant, the South Carolina Department of Revenue ("Department"), contends the Administrative Law Court ("ALC") erred in construing S.C. Code Ann. § 12-6-2320(A)(4) as allowing the three multistate corporations named herein to use the combined entity method in apportioning their income and determining their South Carolina corporate income tax liability. We affirm.

I. FACTS

This taxation case involves three corporations that are challenging the accounting procedure applied by the Department in calculating their corporate income taxes due in South Carolina. The taxes were based on income earned from intangible assets used in this state—royalty receipts from the use of trademarks, trade names, and licenses. The parties stipulated to the following facts.

Media General, Inc. ("Media General"), a Virginia corporation, is an independent, publicly-owned communications company headquartered in Richmond, Virginia. Media General maintains its commercial domicile in Virginia and is subject to income tax there. Media General is the parent company in a consolidated group of communications companies situated primarily in the Southeast with interests in newspapers, television stations, and interactive media.

Media General owns all of the stock of Media General Communications, Inc. ("MG Communications"), a Delaware corporation that is domiciled in, and subject to income tax in, Virginia. MG Communications owns Media General Operations, Inc. ("MGO"), a Delaware corporation, which, in turn, owns Media General Broadcasting of South Carolina Holdings, Inc. ("MG Broadcasting"), a Delaware corporation domiciled in, and subject to income tax in, Virginia.[1]

Media General and its affiliates comprise a "unitary group," which as used herein is defined as a business in which there is a high degree of interrelationship and interdependence among related entities so that the value of the business as a whole exceeds the sum of its individual elements. Unitary groups generally share a unity of management, ownership, and control of operations resulting in unquantifiable flows of value among the related entities of the business. Media General and its affiliates operate converged media operations where television, newspaper, and online products and information are merged and leveraged off of each other.

The Department conducted a corporate income tax audit of Media General, MG Communications, and MG Broadcasting. During the audit period, both MG Broadcasting and MG Communications owned intangible assets utilized in MGO's multistate operations, including those operations conducted in South Carolina. These intangibles included licenses and other authorizations issued by the Federal Communications Commission ("FCC") for the operation of various television broadcasting affiliates, as well as trademarks for the stations and a Florence daily newspaper.

MG Communications and MG Broadcasting each licensed their intangible assets to Media General and charged Media General a flat royalty fee. Media General then sublicensed the intangibles to MGO and charged MGO a royalty fee. The revenues generated by MGO from its South Carolina broadcasting and publishing operations consisted mostly of advertising sales revenue.

[1] MGO is not a party to the current action.

Media General also had an Administrative Services Agreement with MG Communications and MG Broadcasting. The license agreements, sublicense agreements, and the Administrative Services Agreement were all signed on behalf of each entity by the same individual who is a corporate officer for each company.

After evaluating the effects of the royalty income generated by the intangible assets, the Department issued assessments for the three taxpayers at issue in this case, Media General, MG Communications, and MG Broadcasting (collectively, "Taxpayers").

In determining these assessments, the Department utilized the separate entity apportionment method, which is the standard apportionment method used in South Carolina for apportioning income among multistate, related business entities. The ALC noted that this method "considers each entity having nexus with the taxing state as a separate and distinct entity, even if it is part of a unitary business."

This is in contrast to the combined entity apportionment method, which the parties have stipulated is defined for this matter as an accounting method whereby each member of a group carrying on a unitary business computes its individual taxable income attributable to activities in South Carolina by taking a portion of the combined net income of the group through the utilization of combined apportionment factors. The combined income of the unitary group is not computed for the purpose of taxing such income, but rather as a basis for determining the portion of income from the entire unitary business attributable to sources within South Carolina that is derived by members of the group subject to South Carolina's taxing jurisdiction. One of the purposes of this method is to capture the many subtle and largely unquantifiable transfers of value that take place among related companies of a single business enterprise.

South Carolina's statutory apportionment methodology as utilized in the Department's assessments and the calculation of taxes on returns filed during the audit period results in income taxes and license fees for Media General,

MG Broadcasting, MG Communications, and MGO in the amount of $3,758,320. In contrast, the combined apportionment methodology results in income taxes and license fees for these same entities in the amount of $863,179.

The Department's application of South Carolina's standard apportionment formula utilized in its proposed assessments does not fairly represent petitioners' business activities in South Carolina, thus resulting in a statutory distortion of petitioners' activities within South Carolina.

The corporations timely filed protests to the assessments and asked the Department to use the combined entity apportionment methodology as an alternative method to the separate entity apportionment method to fairly represent their business activities in South Carolina pursuant to S.C. Code Ann. § 12-6-2320(A)(4). This statute provides that if the allocation and apportionment provisions do not fairly represent the taxpayer's business activities in South Carolina, the taxpayer may petition for, or the Department may require, if reasonable, the employment of any other method to effectuate the equitable allocation and apportionment of the taxpayer's income.

The Department issued a Final Agency Determination upholding the proposed assessments. Although the Department agreed that the combined apportionment methodology fairly represents the corporations' business activities in South Carolina during the audit period, as compared to South Carolina's standard apportionment methodology, the Department declined the group's petition to use the combined apportionment method pursuant to section 12-6-2320(A)(4) on the ground that the Department has no authority to either grant a petition for, or require, the use of the combined apportionment method.

Media General filed this matter for a contested case hearing before the ALC. The parties filed cross-motions for summary judgment. The ALC granted Media General's motion for summary judgment, and denied the Department's motion. The ALC found the allowance of the use of "any other method" as provided by section 12-6-2320(A)(4) of the South Carolina Code

encompasses the combined entity apportionment method advocated by Media General and that this method should be applied in this case. The Department appeals from the ALC's ruling.

II. STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; see also ALC Rule 68 (stating the South Carolina Rules of Civil Procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules). A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. S.C. Code Ann. § 1-23-610(B)(a), (d) (Supp. 2009).

III. LAW/ANALYSIS

On appeal, the Department contends the ALC erred in construing section 12-6-2320(A)(4) of the South Carolina Code as allowing Taxpayers to use the combined entity method in apportioning their South Carolina corporate income tax. The Department asserts the ALC ignored South Carolina case law when it determined that combined entity apportionment was contemplated by section 12-6-2320(A)(4), there is a split of authority in other states that have adopted similar provisions, and the Department's long-standing administrative interpretation and application of the statute is entitled to deference.

A. South Carolina Corporate Income Tax Provisions

In South Carolina, "[a]n income tax is imposed annually at the rate of five percent on the South Carolina taxable income of every corporation . . . transacting, conducting, or doing business within this State or having income

within this State, regardless of whether these activities are carried on in intrastate, interstate, or foreign commerce." S.C. Code Ann. § 12-6-530 (2000).

A corporation's taxable income in South Carolina is computed using the Internal Revenue Code with modifications as provided by South Carolina law, and this amount is "subject to allocation and apportionment as provided in Article 17 of this chapter." Id. § 12-6-580.

Article 17, entitled "Allocation and Apportionment," provides certain income that is not related to business activity in South Carolina must be directly allocated to a taxpayer and is not subject to apportionment. See id. §§ 12-6-2220, -2230 (2000 & Supp. 2009). All income remaining after allocation is apportioned in accordance with the general apportionment statute, section 12-6-2250, or one of the special apportionment formulas. Id. § 12-6-2240 (Supp. 2009).

"If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State." Id. § 12-6-2210(B) (2000) (emphasis added).

In the current appeal, the Department utilized a standard statutory apportionment method based on gross receipts since the income in question was from intangible business assets. The gross receipts method requires the taxpayer to "apportion its . . . net income using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year." Id. § 12-6-2290 (Supp. 2009).

The statute in contention here, section 12-6-2320(A), provides for alternative methods of allocation and apportionment when the standard provisions in the South Carolina Code do not fairly represent the taxpayer's business activity in South Carolina:

> (A) If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> (1) separate accounting;
>
> (2) the exclusion of one or more of the factors;
>
> (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the State; or
> (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Id. § 12-6-2320(A) (2000) (emphasis added). Section 12-6-2320(A) of the South Carolina Code is identical to the Uniform Division of Income for Tax Purposes Act (UDITPA), section 18, Equitable Adjustment of Formula, and was passed by the South Carolina General Assembly in 1995.

Taxpayers petitioned under section 12-6-2320(A)(4) for the use of "any other method" of apportionment, and they have specifically requested that the Department apply the combined entity method in apportioning their income for South Carolina tax purposes. The Department stipulated that the standard statutory method it used did not fairly represent Taxpayers' income, and that the combined entity apportionment method did fairly measure Taxpayers' business activity in South Carolina, but it denied the petition based on its determination that it was not authorized under South Carolina law to apply the combined entity apportionment method.

B. Combined Entity Versus Single Entity Apportionment Methods

The ALC observed that the states typically apply one of two apportionment methods for multistate businesses. The first is the separate entity apportionment method, which considers each entity having some nexus with the taxing state as a separate entity, even if it is part of a unitary business. The second method, known as the combined entity apportionment method, considers the entities that are part of the unitary business such that the numerator represents all of the unitary entities' gross receipts from within the taxing state and the denominator consists of all of the unitary entities' gross receipts from everywhere.

The ALC compared the use of the separate entity apportionment method with the use of the combined entity apportionment method in calculating a corporation's income tax due in South Carolina:

> To determine the tax of a related entity of a multistate corporation in South Carolina using the separate entity apportionment method, each individual entity must determine a ratio to apply against its taxable income in South Carolina to arrive at a net taxable income. The ratio is determined by dividing each individual entity's gross receipts in this State or the sum of each individual entity's property, payroll and sales within this State, by each individual entity's gross receipts everywhere or the sum of each individual entity's property, payroll and sales everywhere. It then applies this ratio to the entity's taxable income in South Carolina to determine its net taxable income. The corporate tax rate (5%) is then applied to ascertain the tax owed this State.
>
> To determine the tax of a related entity or related entities of a multistate corporation in South Carolina by using the combined entity apportionment method, the individual entity or all related entities (if more than one taxpayer is transacting business in this

> state), must determine a ratio to apply against its/their taxable income to arrive at its/their net taxable income in South Carolina. The ratio is determined by dividing the gross receipts of all the related entities of the multistate corporation in South Carolina or all the related entities['] property, payroll, and sales from within South Carolina, by all the related entities['] gross receipts from everywhere or the related entities['] property, payroll, and sales from everywhere. The taxpayer (individual entity) then applies this ratio to the entity's taxable income in South Carolina to determine its net taxable income. The corporate tax rate (5%) is then applied to ascertain the tax owed this State.

The parties have stipulated that South Carolina uses the separate entity apportionment method as its standard method to determine the taxable income related to intangible property of multistate businesses transacting or doing business in South Carolina. The parties have further stipulated that the standard apportionment formulas do not fairly represent the South Carolina income of Taxpayers; therefore, section 12-6-2320(A) is applicable and the only question is the interpretation of the statute and whether it permits the combined entity apportionment method that Taxpayers request here.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). "The determination of legislative intent is a matter of law." Eagle Container Co. v. County of Newberry, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008) (quoting Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)).

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The best evidence of intent is in the statute itself: "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the

courts are bound to give effect to the expressed intent of the legislature." Id. (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03, at 94 (5th ed. 1992)).

If a statute's "terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense." Etiwan Fertilizer Co. v. South Carolina Tax Comm'n, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950). "The prime object, of course, in the construction of a statute is to ascertain and give effect to the legislative intent." Id.

The ALC found section 12-6-2320(A)(4) was clear on its face and that the legislative intent expressed therein was to allow the use of "any other method" to apportion income where the standard statutory formulas resulted in an unfair apportionment of a taxpayer's business income in South Carolina.

The Department disagrees and argues section 12-6-2320(A)(4) should not be construed to allow the combined entity apportionment method based on the legislative intent expressed in the corporate tax statutes requiring the filing of tax returns by a single entity. Specifically, the South Carolina Code defines "taxpayer" as including "an individual, trust, estate, partnership, association, company, corporation, or any other entity subject to the tax imposed by this chapter or required to file a return." S.C. Code Ann. § 12-6-30(1) (2000) (emphasis added). The Department notes the definition refers to a single corporation as a taxpayer and thus to separate filing requirements for each entity. Consequently, this definition must be used for the meaning of "taxpayer" as it appears in section 12-6-2320(A) and it limits the statute's application to a separate entity.

In Coca Cola Co. v. Department of Revenue, 533 P.2d 788 (Or. 1975), the Supreme Court of Oregon rejected a similar argument, finding the use of "taxpayer" in the singular did not prevent the Department of Revenue from applying combined reporting. The court stated: "While it is true, as plaintiff points out, that the statute speaks of taxpayer in the singular, this is no bar.

We note that the prior statute also spoke in the singular. Yet in [Zale-Salem, Inc. v. Tax Comm'n, 391 P.2d 601 (Or. 1964)] we approved combined reporting." Id. at 793. The court observed that "the fact that the Uniform Act does not specifically require (the combined method of reporting for a multicorporate business) constitutes no barrier to its adoption by the Multistate Tax Commission and the various member states." Id. at 793 n.4 (alteration in original) (citation omitted).

The Department also contends the combined entity apportionment method should not be allowed because it is not expressly provided for in section 12-6-2320 and the Department has never applied the combined entity apportionment method. The Department contends the ALC erred in failing to give deference to the agency's own interpretation. The Department further contends that use of the method is contrary to existing South Carolina law.

The ALC acknowledged that a court generally gives deference to an administrative agency's interpretation of an applicable statute or regulation. However, the ALC found the Department's interpretation was contrary to the plain language of the statute and was not entitled to deference.

An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language. Etiwan Fertilizer Co., 217 S.C. at 359, 60 S.E.2d at 684. We find the ALC was not required to defer to the Department's interpretation in this instance because it was contrary to the plain language of the statute. See Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citation omitted)).

The Department also asserts the ALC's ruling ignored existing South Carolina case law. The Department cites to NCR Corp. v. South Carolina

Tax Commission, 304 S.C. 1, 402 S.E.2d 666 (1991) (NCR I) and to NCR Corp. v. South Carolina Tax Commission, 312 S.C. 52, 439 S.E.2d 254 (1993) (NCR II), arguing these cases "remain good [law] for the proposition that South Carolina is a separate entity taxing state."

In NCR I, we noted that "[e]ach of the statutory sections defining the ratios of property, payroll, and sales use the singular word 'taxpayer.'" NCR I, 304 S.C. at 5, 402 S.E.2d at 669. We held that "subsidiary payroll, sales, and property . . . should generally not be considered under our statutory scheme." Id. at 6, 402 S.E.2d at 669.

In NCR II, NCR "contend[ed] the royalties and interest income paid by all of its forty-four foreign subsidiaries should be combined and then divided by the combined income of all the subsidiaries to determine the proportionate contribution of sales, property, and payroll by foreign subsidiaries." NCR II, 312 S.C. at 56, 439 S.E.2d at 256. Under this calculation, the gains of the various subsidiaries would be offset by the losses of others. Id. In contrast, the Tax Commission asserted "the trial court correctly made the calculation separately for each subsidiary and added each separate amount to the denominator of the apportionment formula." Id. This Court stated that "[s]ubsidiaries are treated as separate entities for tax purposes," and held the "Tax Commission's method of calculation is the better approach since it is consistent with general tax principles." Id.

The ALC found these cases were not controlling as they were decided prior to the enactment of section 12-6-2320, which clearly and specifically allows for the use of "any other method" to fairly represent a taxpayer's income when the standard apportionment formulas provided by statute do not fairly represent the taxpayer's business activity in South Carolina. The ALC determined this was a "relief provision" enacted by the South Carolina General Assembly that authorizes the use of the combined entity apportionment method. The ALC concluded "[t]he Department's interpretation would thwart legislative intent clearly expressed in the general allocation and apportionment statutes, would deny Taxpayers the equitable relief intended by the legislature when it enacted § 12-6-2320(A), and would

leave Taxpayers with an unreasonable and arbitrary apportionment of their taxable income in this state."

The Department acknowledges that the standard apportionment statutes result in statutory distortion of Taxpayers' incomes and taxes. However, the Department asserts that other methods, such as changing the factors to be considered in the apportionment ratios, may be used to correct the problems caused by application of the standard apportionment statutes. Despite its argument, to date the Department has not recalculated Taxpayers' income and taxes using any alternative method that it believes would fairly apportion Taxpayers' income from business activities in South Carolina.

We agree with the ALC that the legislature enacted section 12-6-2320 as a relief mechanism, and hold that the plain language of subsection (A)(4) clearly authorizes the Department to use "any other method" to effectuate an equitable apportionment of the taxpayer's income, including the combined entity apportionment method. The authority cited by the Department predates the legislative enactment and therefore is not controlling on this issue.

We emphasize that, as a general rule, the Department need not automatically use the method requested by a taxpayer, as it has the discretion to select an alternative method that fairly measures the taxpayer's income in South Carolina. In this case, however, the Department never recalculated Taxpayers' incomes using any other alternative method, and the Department stipulated that use of the combined entity apportionment method proposed by Taxpayers does result in a fair computing of Taxpayers' business activities in South Carolina. Accordingly, we uphold the ALC's determination that the combined entity apportionment method should be utilized by the Department for the tax period in question. The combined entity apportionment method is merely a mechanism for approximating the income attributable to the corporations that comprise a unified business, but this does not change the fact that the entities will be reporting the taxes due for each entity.

V. CONCLUSION

The Department concedes the standard apportionment formulas allowed under South Carolina law result in a statutory distortion of Taxpayers' incomes and that the combined entity apportionment method would fairly represent their business activities in South Carolina. We agree with the ALC that the legislature has placed no explicit limitation on the alternative methods that may be used under section 12-6-2320(A)(4), and consequently we affirm the ALC's ruling that the Department is authorized to use the combined entity apportionment method. Although the Department has the discretion to select an alternative method, the ALC has ordered in this case that the method be applied and we affirm this determination as the Department has not established that another method would be more appropriate. This ruling is limited to the tax period in question, and the Department may employ any other appropriate alternative method for future tax years.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phillip Chastain, as Personal Representative of the Estate of Ruth Chastain — Appellant,

v.

AnMed Health Foundation, a/k/a Anderson Area Medical Center, Inc., Jennifer Wright, RN, Cindy Wilson, RN, Janet Kincaid, RN, Marilyn Crawford, RN, Kris Burris, RN and Kristina Goldsmith, RN, — Respondents.

Appeal from Anderson County
Alison Renee Lee, Circuit Court Judge

Opinion No. 26829
Heard April 7, 2010 – Filed June 14, 2010

AFFIRMED

Joseph G. Wright, III, and Chad A. McGowan, both of McGowan, Hood and Felder, of Anderson, and F. Patrick Hubbard, of Columbia, for Appellant.

Andrew F. Lindemann, of Davidson & Lindemann, of Columbia, Attorney General Henry Dargan McMaster, and Assistant Deputy Attorney General J. Emory Smith, both of Columbia, and V. Clark Price and Fred W. Suggs, III, both of Greenville, for Respondents.

PER CURIAM: Appellant Ruth Chastain appeals orders reducing her verdict against respondent AnMed to $300,000 pursuant to a statutory cap and upholding the constitutionality of that cap. On appeal, she challenges the decision to reduce the verdict and also argues that the statutory caps violate several constitutional provisions. We affirm.

FACTS

Appellant was hospitalized for circulatory problems at AnMed where she was under the care of the six defendant nurses. Appellant's left leg was eventually amputated while she was at AnMed,[1] and she developed a sacral pressure sore. Appellant's condition worsened, and at her family's request she was transferred to another medical facility shortly after her pressure sore was surgically debrided at AnMed. When appellant arrived at the second facility her extremely large infected sore was classified as Stage IV, the most severe stage. Appellant remained at the second facility for eight and a half months, and then spent the next 316 days in other medical facilities.

Appellant brought this medical malpractice suit against AnMed, a charitable institution, and the six nurses. The jury returned a verdict for appellant against AnMed for $2.2 million dollars, and found appellant was 30% at fault. Since the jury found none of the nurses guilty of "reckless, wilful, or grossly negligent" care, they were not found individually liable. See S.C. Code Ann. § 33-56-180(A) (2006) (employee of charitable organization individually liable only for gross negligence).

[1] Her right leg had been amputated above the knee in 1996.

The trial judge reduced the jury verdict to $1.54 million to reflect appellant's contributory negligence. AnMed moved to reduce the verdict to $300,000 pursuant to a statutory cap. Appellant opposed the motion, arguing the cap did not apply and/or that such a reduction would be unconstitutional. The trial judge granted AnMed's motion and reduced the verdict to $300,000. After appellant's post-trial motion was denied, she filed this appeal.

AnMed is a charitable organization under the "South Carolina Solicitation of Charitable Funds Act," S.C. Code Ann. §§ 33-56-10 to -200 (2006) (CFA). Section 33-56-180(A) provides:

> A person sustaining an injury or dying by reason of the tortious act of commission or omission of an employee of a charitable organization, when the employee is acting within the scope of his employment, may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Tort Claims Act in Chapter 78 of Title 15. An action against the charitable organization pursuant to this section constitutes a complete bar to any recovery by the claimant, by reason of the same subject matter, against the employee of the charitable organization whose act or omission gave rise to the claim unless it is alleged and proved in the action that the employee acted in a reckless, willful, or grossly negligent manner, and the employee must be joined properly as a party defendant. A judgment against an employee of a charitable organization may not be returned unless a specific finding is made that the employee acted in a reckless, willful, or grossly negligent manner. If the charitable organization for which the employee was acting cannot be determined at the time the action is instituted, the plaintiff may name as a party defendant the employee, and the entity for which the employee was acting must be added

or substituted as party defendant when it reasonably can be determined.

Under the Tort Claims Act (TCA), recovery for an individual plaintiff is limited to $300,000 per occurrence, unless the tort-feasor is a licensed physician or dentist in which case the cap for an individual plaintiff is $1.2 million per occurrence. S.C. Code Ann. §§ 15-78-120(a)(1) and (a)(3) (2005). "Occurrence" is defined in the TCA as "an unfolding sequence of events which proximately flow from a single act of negligence." § 15-78-30(g).

ISSUES

1) Did the trial judge err in reducing the verdict from $1.54 million to $300,000?

2) Does the statutory limitation on appellant's recovery violate the equal protection clauses, the right to trial by jury, the right to a speedy remedy, or the constitutional requirement of separation of powers?

ANALYSIS

1. Verdict Reduction

The trial judge reduced appellant's recovery to $300,000, finding there was only one "occurrence" and thus § 15-78-120(a)(1) operated to reduce the award pursuant to § 33-56-180(A) ("actual damages…in an amount not exceeding the limitations on liability imposed in [§ 15-78-120]"). The trial judge reasoned the intent of the CFA was to limit the amount of damages recoverable from a charitable organization, and that to read the term "'occurrence' to include every incident where the defendant nurses violated the applicable standard of care[2] would clearly defeat the legislature's [intent]. . . . " Alternatively, the judge held that based on the jury charge and verdict form, it was impossible to determine the number of negligent acts or

[2] Appellant's expert testified to 2,372 deviations from the standard of care.

negligent nurses found by the jury and thus only one recovery was appropriate.

On appeal, appellant challenges both grounds. We find it necessary to uphold only one ground in order to affirm the trial judge's decision to reduce the verdict. E.g., South Carolina Dist. Council of Assemblies of God v. River of Life Internat'l Worship Center, 372 S.C. 581, 643 S.E.2d 104 (Ct. App. 2007). We hold that the general jury verdict supports the trial judge's decision, and affirm.

In her post-trial order, the judge gave as one reason for reducing appellant's award the impossibility of determining from the jury instruction and verdict forms whether the jury found one or more than one nurse had rendered negligent care to appellant. Thus, she held, it was impossible to conclude that the jury had found more than one occurrence. Appellant now contends that AnMed bore the burden of proving there was only one occurrence. We disagree.

Just as in any tort action, a CFA plaintiff bears the burden of proof. If she alleges multiple occurrences, that is, that there was more than one single act of negligence from which proximately flowed an unfolding sequence of events, she bears the burden of proving each occurrence. Here, the jury was never instructed on the definition of occurrence nor was it asked to determine whether there was more than one occurrence, either in the instructions or in its verdict. The trial judge correctly reformed this verdict to reflect a single occurrence.

2. Constitutional Challenges

Appellant contends that application of the $300,000 cap to her recovery violates the equal protection clauses of the state and federal constitutions, her right to trial by jury,[3] her right to a speedy remedy,[4] and the constitutional

[3] S.C. Const. art I, § 14.
[4] S.C. Const. art. I, § 9.

requirement of separation of powers.[5] We granted appellant's petition to argue against certain precedents which have decided these issues adversely to her position. After careful consideration, we adhere to those precedents and affirm the trial court's ruling upholding the cap's constitutionality pursuant to Doe v. Am. Red Cross Blood Servs., 297 S.C. 430, 377 S.E.2d 323 (1984) (upholding predecessor charitable immunity statutory cap against equal protection challenge); Wright v. Colleton County Sch. Dist., 301 S.C. 282, 391 S.E.2d 564 (1990) (rejecting equal protection, jury trial, speedy remedy, and separation of powers challenges to TCA caps); Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 413 S.E.2d 31 (1992) (differential medical caps constitutional); Giannini v. S.C. Dep't of Transp., 378 S.C. 573, 664 S.E.2d 450 (2008) (limits on recovery for governmental tort victims do not violate equal protection).

Conclusion

The circuit court's orders reducing appellant's verdict to $ 300,000 and denying appellant's constitutional challenges are

AFFIRMED.

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

[5] S.C. Const. art. I, § 8.

The Supreme Court of South Carolina

In the Matter of
John L. Drennan, Petitioner.

ORDER

On February 9, 2009, the Court definitely suspended petitioner from the practice of law for nine (9) months. In the Matter of Drennan, 381 S.C. 381, 673 S.E2.ed 431 (2009). Petitioner filed a Petition for Reinstatement which was referred to the Committee on Character and Fitness (CCF) pursuant to Rule 33(d), RLDE, Rule 413, SCACR.

After a hearing, the CCF filed a Report and Recommendation recommending petitioner be reinstated to the practice of law with conditions. Neither petitioner nor the Office of Disciplinary Counsel filed exceptions.

The Petition for Reinstatement is granted. Petitioner is reinstated to the practice of law subject to the following condition:

> within ten (10) days of the date of this order, petitioner shall enter into a two year monitoring contract with Lawyers Helping Lawyers (LHL) under terms recommended by LHL but which, at minimum, require petitioner to abstain from the use of alcohol and drugs and to

undergo random alcohol and drug testing; petitioner shall submit the results of each of his alcohol and drug tests to the Commission on Lawyer Conduct (the Commission).

Petitioner is warned that his failure to submit the required test results to the Commission or to comply with the terms of the monitoring contract may result in his termination or suspension from the practice of law.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Pleicones, J., not participating

Columbia, South Carolina

June 9, 2010

The Supreme Court of South Carolina

In the Matter of
Robert L. Gailliard, Petitioner.

ORDER

On October 27, 2004, the Court placed petitioner on interim suspension and, on January 24, 2005, he was indefinitely suspended petitioner from the practice of law. In the Matter of Gailliard, 362 S.C. 428, 608 S.E.2d 434 (2005); In the Matter of Gailliard, 361 S.C. 326, 604 S.E.2d 704 (2004). On November 30, 2009, petitioner filed a Petition for Reinstatement which was referred to the Committee on Character and Fitness (CCF) pursuant to Rule 33(d), RLDE, Rule 413, SCACR. After a hearing, the CCF issued a Report and Recommendation recommending petitioner be reinstated to the practice of law with conditions. Neither petitioner nor the Office of Disciplinary Counsel (ODC) filed exceptions to the CCF's Report and Recommendation.

The Court grants the Petition for Reinstatement subject to the following two conditions:

1) within six months after his reinstatement, petitioner shall complete the South Carolina Bar's Legal Ethics and Practice Program and Trust Account School; and

2) for two years after his reinstatement, he shall file quarterly financial reports with the Commission on Lawyer Conduct (the Commission).

Petitioner shall be sworn-in and readmitted to the practice of law at the next scheduled admission ceremony.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Pleicones, J., not participating

Columbia, South Carolina

June 9, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dorothy Hargrove, Appellant,

v.

Carolina Orthopaedic Surgery Associates, PA, Employer, and Hartford Fire Insurance Company, Respondents.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 4695
Submitted December 1, 2009 – Filed June 7, 2010

AFFIRMED

Hyman S. Rubin, of Columbia, for Appellant.

James P. Newman, Jr., and Andrew E. Haselden, both of Columbia, for Respondents.

THOMAS, J.: This is an appeal of a workers' compensation case. The single commissioner denied benefits and medical treatment to Dorothy Hargrove based on his determination that Hargrove failed to (1) meet the

statutory notice requirement and (2) prove that the problems from which she suffered resulted from a workplace accident. The appellate panel and the circuit court affirmed. We affirm as well.[1]

FACTS AND PROCEDURAL HISTORY

Hargrove worked as a transcriptionist for Carolina Orthopaedic Surgery Associates, P.A., for over twenty years. Before working for Carolina Orthopaedic, she worked twenty years as a clerk and transcriptionist for the York County Hospital. She intended to retire in 2003, but delayed her retirement until the end of 2004 because an issue arose with the Social Security Administration about her correct date of birth.

In 2003, while Hargrove was at work, her chair hit a runner and turned over backwards, causing her to fall to the floor. Although no one saw her fall, two other employees heard a noise when Hargrove's chair fell over and they helped her get up. Hargrove was embarrassed, shaken up, and sore, but continued to work that day. Hargrove maintained she promptly reported the accident to Mary Elkins, her immediate supervisor. Elkins, however, denied hearing Hargrove say she had fallen.

Hargrove first took samples of Vioxx and Bextra given to her by a technician at the office, but later consulted Dr. W. Scott James, a physician with Carolina Orthopaedic, when the medications failed to relieve her pain. Before she saw Dr. James, Hargrove clocked out for her appointment, as she was required to do if her problems were not work-related. Also, when she registered as a patient of Dr. James, Hargrove did not indicate her problems were work-related even though the form specifically requested this information.

Dr. James initially diagnosed Hargrove with bursitis; however, a subsequent M.R.I. revealed a moderate extruded disc fragment inferior to the L3-4, exerting "mass effect upon the right L4 nerve root," a central herniation at L-S1, and a concentric disc bulge from L1 through L3. Dr. James then referred Hargrove to Dr. Paul John Tsahakis, who performed a right L3-4

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

microendoscopic decompression. Shortly before her surgery, Hargrove applied for short-term disability benefits from Shenandoah Life Insurance Company. In addition to short-term disability, she also received five hundred sixty hours of donated sick time from other employees in the office. Several months later, Dr. Tsahakis found Hargrove reached maximum medical improvement with an impairment rating of ten percent. He also restricted her to working six hours per day.

In October 2004, Hargrove returned to work. Carolina Orthopaedic anticipated Hargrove would retire soon and had already hired someone to take her place full time; however, it assigned her tasks that students would normally perform. Hargrove continued to work until she retired at the end of 2004. By her own admission, Hargrove never told anybody that she intended to file for workers' compensation. Furthermore, according to Elkins, Hargrove indicated that her back pain resulted from having to care for her invalid brother. Elkins stated she first became aware that Hargrove was seeking workers' compensation benefits in April 2005, when Carolina Orthopaedic received a subpoena for Hargrove's medical records.

On August 8, 2005, Hargrove filed a Form 50, in which she stated the causative event took place September 1, 2003. In its Form 51, Carolina Orthopaedic alleged that Hargrove's claim "should be barred under § 42-15-20 [because] notice of injury was not given to the employer within ninety (90) days as required." In the form, Carolina Orthopaedic further stated it "reserves its right to assert any and all defenses available and applicable . . . as evidence may develop in the course of discovery."

The single commissioner heard the matter on September 12, 2006. By order dated and filed January 24, 2007, the single commissioner denied Hargrove's claim for benefits, finding (1) Hargrove failed to meet the statutory requirement regarding notice to the employer of a workplace injury and (2) even if she had met the notice requirement, she failed to prove her current complaints resulted from her alleged workplace accident. On May 18, 2007, the appellate panel affirmed the order of the single commissioner.

Hargrove petitioned the circuit court for judicial review of the matter. Following a hearing on September 5, 2007, the circuit court issued an order

affirming the appellate panel. Hargrove unsuccessfully moved to alter or amend the judgment of the circuit court and then filed this appeal.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions of the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "[N]either this court nor the circuit court may substitute its judgment for that of the agency as to the weight of the evidence on questions of fact but may reverse if the decision if affected by an error of law." Lockridge v. Santens of Am., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001).

LAW/ANALYSIS

The decision to deny Hargrove workers' compensation benefits, in which all prior tribunals that have adjudicated this matter concurred, was based on two independent grounds: (1) Hargrove's failure to give Carolina Orthopaedic timely notice of her workplace accident and (2) her failure to prove the conditions for which she sought compensation resulted from the accident. If we affirm either of these grounds, we can also uphold the decision to deny workers' compensation benefits. See Weeks v. McMillan, 291 S.C. 287, 292, 518 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous."). We base our affirmance of the denial of workers' compensation benefits on the finding that Hargrove failed to prove that the problems for which she sought workers' compensation benefits resulted from her accident.

I. Form 51

Hargrove first argues that because Carolina Orthopaedic did not raise the issue of causation in its Form 51, it was unfair to deny her claim on that ground. We disagree.

The South Carolina Administrative Regulations require an employer to "fully state its position and defenses, if any, replying to each specification in the [claimant's] Form 50 or Form 52." S.C. Code Regs. 67-603B (Supp. 2009). Failure by the employer to file the appropriate form "shall be deemed a general denial of liability for the benefits claimed," resulting in the employer's forfeiture of "each special and affirmative defense allowed by the [South Carolina Workers' Compensation] Act." Id. 67-603C (emphasis added). An employer who has failed to respond to a claimant's workers' compensation action is therefore precluded only from raising affirmative defenses and may still deny liability. Likewise, we hold that an employer who has responded to a workers' compensation claim may assert a general denial of liability whether or not the response expressly contests compensability. See Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998) ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation."). Moreover, as we have noted in our narrative of the facts, Carolina Orthopaedic stated in its Form 51 that it reserved the right to assert any applicable defenses supported by evidence developed during discovery.

II. Proximate cause

Hargrove next contends the only reasonable conclusion from the competent evidence in the record was that her problems resulted from her accident on the job. We disagree.

Hargrove maintains that the "uninterrupted sequence of events leading inexorably from her fall to her ruptured disc to her consequent surgery and permanent disability," along with her own testimony on causation, "constituted the only evidence in the record and the only plausible explanation for her problem." We disagree with this assertion. Regardless of what the medical evidence indicated, we cannot disregard the lay evidence on which the commission relied in finding Hargrove did not prove her problems resulted from her fall. See Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record."); Ballenger v. S. Worsted Corp., 209 S.C.

463, 467, 40 S.E.2d 681, 682-83 (1946) ("Medical testimony should not be held to be conclusive, irrespective of other evidence . . . .").

Hargrove clocked out for her appointment with Dr. James even though she was informed this would not be necessary for treatment of a workplace injury. Dr. James appeared to have been unaware of Hargrove's contention that her problems occurred as a result of her fall until he received a report from Dr. Tsahakis recounting her version of the events. In addition, Hargrove had reported experiencing lower back pain from having to care for her incapacitated brother. Furthermore, when she applied for short-term disability benefits, Hargrove never indicated her disability resulted from an accident at work. Hargrove's behavior indicated she herself did not consider her injury to be work-related. We will not disturb the appellate panel's decision regarding the weight to be given this evidence.

III. References to social security and retirement benefits

Hargrove complains that evidence of her social security and retirement benefits were improperly considered in denying her claim for compensation. We find no error.

Hargrove argues correctly that procedures regarding retirement and social security benefits cannot be used as a basis for a deciding a workers' compensation claim. See Stephenson v. Rice Servs., 314 S.C. 287, 289-90, 442 S.E.2d 627, 628 (Ct. App. 1994) (holding the commission cannot rely on a VA rating to find a claimant was totally disabled), rev'd on other grounds, 323 S.C. 113, 473 S.E.2d 699 (1996); Solomon v. W.B. Easton, Inc., 307 S.C. 518, 521, 415 S.E.2d 841, 843 (Ct. App. 1992) ("[A]wards and records of the Social Security Administration ordinarily cannot be relied upon to support or deny a workers' compensation claim.").

We acknowledge that the single commissioner mentioned Hargrove's aborted attempt to retire in 2003 and the fact that she had also applied for social security benefits. These references to retirement and social security benefits were not for the purpose of justifying the decision to deny Hargrove's claim for workers' compensation benefits. Rather, they provided only additional explanation as to why Hargrove, as she readily admitted in

her testimony, did not tell anyone she intended to file a workers' compensation claim.

CONCLUSION

For the foregoing reasons, we uphold the finding that Hargrove failed to prove her medical problems resulted from a workplace injury. Because affirmance of this finding is sufficient to uphold the denial of workers' compensation benefits, we decline to address the merits of the commission's alternative finding that Hargrove failed to timely notify Carolina Orthopaedic of her accident.

AFFIRMED.

KONDUROS, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kenneth L. Huckabee, Appellant.

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 4696
Heard May 19, 2010 – Filed June 9, 2010

AFFIRMED

Appellant Defender Lanelle Cantey Durant, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M.

Coombs, Jr., all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

PIEPER, J.: Kenneth L. Huckabee was convicted of voluntary manslaughter and assault of a high and aggravated nature. He now appeals, arguing the trial court (1) erred in allowing the State's primary witness to testify on reply following Huckabee's testimony when the witness was under a sequestration order but had been present in the courtroom following her initial testimony during the State's case-in-chief, and (2) erred in failing to instruct the jury that the sale of crack cocaine was irrelevant to the fault element in determining self-defense. We affirm.[1]

FACTS/PROCEDURAL HISTORY

On July 18, 2007, Kelly Ann Tavenier drove Jerry Bridwell to pick up Karim Hudani in Spartanburg, South Carolina. Bridwell was going to purchase Lortab pills from Hudani. Once Tavenier picked up Hudani, he told Tavenier to drive down a road where his friend lived. Tavenier traveled down a dead end street until Huckabee drove up in a white car with his girlfriend in the passenger seat. Hudani got out of Tavenier's car and went over to Huckabee. Huckabee got out of his car and walked over to the passenger side of Tavenier's car where Bridwell was seated. Huckabee then pulled out a gun, placed it in Bridwell's face, and demanded that Bridwell give Huckabee all of his money. Bridwell replied that he did not have any money, at which point Huckabee fired several shots at the ground and continued to demand Bridwell's money. Tavenier then sped off and heard three or four gun shots. As she drove off, she asked Bridwell if he was okay and he replied that he had been shot. Bridwell told Tavenier to take him to the nearest convenience store because typically police officers were always there and Tavenier did not know the route to the nearest hospital.[2] As she drove, Bridwell dialed 9-1-1. Once they arrived at the convenience store,

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.
[2] Bridwell died as a result of the two gunshot wounds.

Tavenier got out of the car, found a blanket in the back seat of the truck, and used it to apply pressure to Bridwell's back.

Meanwhile, when Huckabee returned to his car after Tavenier drove off, Huckabee told his girlfriend, "the lady pulled a gun on him." Hudani testified that he did not see Tavenier with a gun in the truck and the only person he saw with a weapon was Huckabee.

Once police arrived at the convenience store, Bridwell was transported to the hospital and Tavenier was taken back to the crime scene for questioning. Shortly thereafter, Tavenier was taken to the sheriff's department for additional questioning and for gunshot residue testing. Officer Simmons found no gunshot residue present on Tavenier. Officer Simmons further testified that there was only a slightly elevated amount of lead on Tavenier's hands which was not consistent with having fired or even handled a weapon. On cross-examination, however, Officer Simmons testified that gunshot residue could be removed from a person's hand by wiping it on a blanket or removed by exposure to a large amount of blood.

The grand jury indicted Huckabee on two separate charges of assault with intent to kill (AWIK) and murder on October 26, 2007. The case proceeded to trial March 4-6, 2008. During pretrial motions, the court granted defense counsel's motion to sequester the witnesses, with the exception of the lead case agent and Patricia Bridwell, the wife of the victim.

At trial, Huckabee testified that when he approached Tavenier's vehicle, he asked Tavenier and Bridwell what they wanted, at which point Tavenier unzipped her pocketbook, pulled out a gun, and aimed it at Huckabee. Huckabee stated that Tavenier demanded that Huckabee give her all of his money and "dope." Huckabee further testified that Tavenier then fired the gun and Huckabee fell to the ground as he heard another shot fired. Once she shot again, Huckabee pulled his gun out and started shooting into the truck.

After the defense rested, the State called Tavenier in reply. Defense counsel objected to her reply testimony because she had been seated in the courtroom since her initial testimony and, thus, would be in violation of the sequestration order. The court responded, "[t]his is reply testimony," to which defense counsel stated, "I understand. But she was allowed to stay in the courtroom." The court noted defense counsel's objection and proceeded to allow Tavenier to testify. During her reply testimony, Tavenier stated that she has never owned a purse in her life and only carries a man's wallet.

The judge charged the jury on the offenses of murder and AWIK, and the lesser included offenses of voluntary manslaughter and assault of a high and aggravated nature. Additionally, the judge instructed the jury on self-defense. In charging the jury on the four elements which make up the defense, the judge stated the following regarding the first element:

> First, it must be shown that the defendant was without fault in bringing on the immediate difficulty which necessitated the use of deadly force against another person that resulted in death or the infliction of serious bodily harm. In other words, a defendant cannot provoke or initiate or otherwise through his own fault bring about a difficulty and then claim the right of self-defense in the use of force in repelling an attack caused by his own provocation.

During jury deliberations, the foreperson submitted a question to the judge to define legal provocation and to clarify the phrase "without fault" as it related to self-defense. Additionally, the jury asked if selling crack cocaine was a felony in South Carolina. The court informed the jury the determination of whether the distribution[3] of crack cocaine is a felony is not a factor to be considered in its decision. As to the definition of legal provocation, the court stated:

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[3] The judge here used the word "distribution." All other references use the word "sale" interchangeably. No issue has been raised as to the use of these terms, nor do we believe it affects our disposition.

> [A] sufficient legal provocation is defined as the existence of facts and/or circumstances relating to an event as would naturally disturb the sway of reason of an ordinary reasonable and prudent person rendering that person's mind incapable of cool reflection and producing what, according to human experience, may be described as an uncontrollable impulse to do violence. So again, a legal provocation is the existence of facts and/or circumstances relating to an event that would naturally disturb the sway of reason of an ordinary reasonable and prudent person rendering that person's mind incapable of a cool reflection and producing what, according to human experience, may be described as an uncontrollable impulse to do violence.

As to the definition of "without fault," the court clarified "that it must be shown that the defendant was without fault in bringing on the immediate difficulty which necessitated the use of deadly force against another that resulted in death or potentially serious bodily harm." The court further elaborated, "[i]n other words, a defendant cannot provoke, initiate or otherwise through his own fault bring about a difficulty that necessitates a response of the use of deadly force and then claim the right of self-defense . . . ."

Once the jury retired again to the jury room, defense counsel asked the court to consider telling the jury that the sale of crack cocaine itself was not the fault element that would preclude self-defense. Based on the jury's questions, he argued that the jurors were assuming the sale of crack cocaine was the fault that might eliminate the applicability of the first prong of self-defense. The court stated the jury was simply asking if selling crack cocaine was a felony in South Carolina and if it desired additional clarification, the jury would request further guidance from the court.

The jury subsequently returned to the courtroom with a written statement from the foreman stating that he and his fellow jurors were having difficulty understanding the phrase "being without fault in bringing on a difficulty" as it related to the defense of self-defense. The court stated, and then repeated: "A person claiming self-defense cannot by his own conduct provoke, initiate or otherwise through his own fault cause someone to attack him and then claim the right of self defense in the use of deadly force in repelling an attack which was caused by his own provocation." The jury retired and defense counsel renewed his objection, asking the court to instruct the jury again based on the first question that the sale of crack cocaine was irrelevant in its deliberations because it appeared the jury was still focused on the same question of fault. The judge stated that the most recently submitted question did not address the issue of crack cocaine or the distribution thereof so he had to assume the jury understood the previous question and declined to issue any further instruction to the jury.

The jury returned to the courtroom an hour later and indicated that a decision had been reached on one of the indictments but not as to the other indictment. The judge instructed the jury to continue to deliberate; thirty minutes later, the jury reached its verdict. On the indictment for murder, the jury found Huckabee guilty of voluntary manslaughter; on the indictment for AWIK, the jury found Huckabee guilty of assault of a high and aggravated nature. The court sentenced Huckabee to incarceration for a term of thirty years for the offense of voluntary manslaughter and incarceration for a term of ten years for the offense of assault of a high and aggravated nature, to be served concurrently, with credit for the amount of time already served. This appeal followed.[4]

[4] While both the notice of appeal and appellant's brief generically reference the conviction and sentence without specifying whether one or both convictions are being appealed, we have proceeded in an abundance of caution on both the voluntary manslaughter and assault of a high and aggravated nature convictions.

ISSUES ON APPEAL

(1) Did the trial court err in allowing the State's primary witness/victim to testify in reply in violation of the sequestration order?

(2) Did the trial court err in failing to instruct the jury that the distribution of crack cocaine by appellant was irrelevant to the decision?

STANDARD OF REVIEW

In criminal cases, the appellate court only reviews errors of law and is bound by the trial court's factual findings unless the findings are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The decision whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial judge." State v. Saltz, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001). Likewise, the admission of reply testimony is within the sound discretion of the trial court and will only result in reversal if the admission of such testimony is found to be prejudicial. State v. Farrow, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998). As to jury instructions, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). Jury instructions must also be considered as a whole, and if the instructions are free from any error, isolated portions which might be misleading will not constitute reversible error. State v. Sims, 304 S.C. 409, 422, 405 S.E.2d 377, 384 (1991).

ANALYSIS

Huckabee argues he was prejudiced by the reply testimony of Tavenier because her testimony cast doubt upon his self-defense theory. He claims

the State called Tavenier in reply for the purpose of shaping her testimony to counteract the testimony of Huckabee. We disagree.

"The purpose of the exclusion rule is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial; and if a witness violates the order he may be disciplined by the court. The question of the exclusion of the testimony of the offending witness, however, depends upon the particular circumstances and lies within the sound discretion of the trial court." U.S. v. Leggett, 326 F.2d 613, 613-14 (4th Cir. 1964). A circuit court may order the sequestration of any witness by order or by motion of a party. Rule 615, SCRE. However, a party is not entitled to have witnesses sequestered as a matter of right;[5] instead, the decision to sequester a witness is within the sound discretion of the circuit court. State v. Simmons, 384 S.C. 145, 173, 682 S.E.2d 19, 33-34 (Ct. App. 2009).

This court dealt with a similar issue in State v. Fulton, 333 S.C. 359, 509 S.E.2d 819 (Ct. App. 1998), wherein the appellant argued that the trial judge erred in allowing testimony from two of the State's witnesses called on reply when both had remained in the courtroom after their initial testimony and both had been subject to a sequestration order. Fulton, 333 S.C. at 375, 509 S.E.2d at 827. Citing the rule that the decision to sequester a witness is left to the sound discretion of the trial judge and that such discretion extends to the State's right to recall a witness in reply who was present in the courtroom during a portion of the trial, the court affirmed the trial court's ruling. Id. The court simply stated, "[a]fter a review of the record, we find

[5] Moreover, we note the rights of victims under article I, section 24 of the South Carolina Constitution, known as the Victim's Bill of Rights, as well as section 16-3-1550(B) of the South Carolina Code. By this statute, a person must not be sequestered from a proceeding adjudicating an offense of which he was a victim. S.C. Code Ann. § 16-3-1550(B) (2003). However, this issue was not raised to or addressed by the trial court and is not before us as there was no objection to the sequestration order.

no abuse of discretion by the trial judge in allowing the State to present the reply testimony." Id.[6]

More recently, in State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009), this court found no abuse of discretion by the trial court in allowing a witness subject to a sequestration order to testify after being in the courtroom during another witness's testimony. Simmons, 384 S.C. at 173-74, 682 S.E.2d at 34. In so holding, the court explained that there was no evidence presented to establish that the witness "knowingly and intentionally entered the courtroom in an effort to violate the order." Id. at 173, 682 S.E.2d at 34. Further, the witness was only present for a small portion of the other witness's testimony which did not pertain to his own testimony. Id. at 174, 682 S.E.2d at 34. Additionally, the witness testified that he entered the courtroom because he had been "sent for" as he was the next witness to testify. Id. Finally, the court found the witness's testimony reflected his notes from interrogating the defendant and the defendant did not attempt to show any inconsistencies between the witness's notes and his testimony as a result of being present during the other witness's testimony. Id.

Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief. Farrow, 332 S.C. at 194, 504 S.E.2d at 133. "Nevertheless, the improper admission of this evidence may not serve as the basis for reversal unless found to be prejudicial." Id. This court has held that a witness previously placed under a sequestration order may testify on reply. Fulton, 333 S.C. at 375, 509 S.E.2d at 827 (finding no abuse of discretion by the trial judge in allowing reply testimony from two previously sequestered witnesses who had remained in the courtroom following their initial testimony); see also Gattison v. S.C. State College, 318 S.C. 148, 151, 456 S.E.2d 414, 415 (Ct. App. 1995) (finding no abuse of discretion in allowing unsequestered witnesses to testify on reply given the limited nature of their testimony).

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[6] Appellant fails to mention Fulton in his brief and only relies on a case from the United States Court of Appeals for the Ninth Circuit for his argument that a sequestration order applies to the exclusion of witnesses who have testified in the case-in-chief but may also be called as reply witnesses.

Here, the trial court did not abuse its discretion by allowing Tavenier to testify in reply. On reply, Tavenier was asked only three questions: (1) did she own a purse; (2) did she own a pocketbook; and (3) had she ever owned a purse, pocketbook, or a shoulder strap of any kind. Tavenier's testimony was limited in scope to merely contradict the contention raised by Huckabee that Tavenier pulled a gun out of her purse. It was not admitted to complete the State's case-in-chief. Furthermore, an abuse of discretion does not occur solely because the reply testimony is contradictory to the previously presented testimony. State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) ("The admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony."); State v. South, 285 S.C. 529, 535, 331 S.E.2d 775, 779 (1985) ("Any arguably contradictory testimony is proper on reply, and the trial judge properly exercised his discretion."); State v. Stewart, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984) ("The admission of testimony which is arguably contradictory of and in reply to earlier testimony does not constitute an abuse of discretion."). Thus, based upon prior precedent in South Carolina allowing a sequestered witness to testify on reply where that witness was present in the courtroom during other testimony, and based upon the content of Tavenier's reply testimony, the trial court did not abuse its discretion in allowing Tavenier's reply testimony.

Next, Huckabee argues that he was prejudiced by the judge's refusal to instruct the jurors not to consider the sale of crack cocaine in their deliberations. Huckabee claims the jury's questions indicated confusion and that the original instructions were not sufficiently clear prior to deliberations. We find no error in the judge's refusal of counsel's requested charge.

In response to the jury's question regarding whether the sale of crack cocaine is a felony, the circuit court did not err in responding that the issue of whether the distribution of crack cocaine is a felony is not a factor to be considered by the jury in its deliberations. In addition, the court also correctly declined defense counsel's subsequent request to charge the jury that the sale of crack cocaine in and of itself was not the fault which would eliminate the possibility of self-defense. "Judges shall not charge juries in respect to

matters of fact, but shall declare the law." S.C. Const. art. V, § 21 (2009). When reviewing a jury charge for alleged error, the charge must be considered as a whole in light of the evidence and issues presented at trial. Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). If the jury charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error and the charge is considered correct if it contains the correct definition and adequately charges the law. Id. "The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." State v. Benjamin, 345 S.C. 470, 474, 549 S.E.2d 258, 260 (2001).

Moreover, "[n]o instruction should be given which tenders an issue which is not presented or supported by the evidence . . . [as] even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury." State v. Mollison, 319 S.C. 41, 48, 459 S.E.2d 88, 93 (Ct. App. 1995) (internal citation and quotation omitted). Thus, the trial judge should narrowly tailor his response to the specific jury question asked. State v. Smith, 304 S.C. 129, 132, 403 S.E.2d 162, 164 (Ct. App. 1991) ("Quite often, the judge must tailor, mold and even sculpt the law in fashioning an answer to fit the question.") (emphasis added). Here, the judge directly answered the specific question that was first asked by the jury: whether selling crack cocaine is a felony in South Carolina. The jury's second question failed to mention the issue of crack cocaine, and thus, the judge's response and refusal to charge the jury on the sale of crack cocaine as it relates to the fault element of self-defense was adequate to specifically answer the second question. Accordingly, we find no error in the judge's refusal to give the requested charge; alternatively, we find no prejudice as to the instructions given.

CONCLUSION

Based on the foregoing, the trial court's decision is

AFFIRMED.

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