The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF GEORGE K. LYALL, PETITIONER

On October 13, 1997, Petitioner was definitely suspended from the practice of law for nine months. In the Matter of Lyall, 328 S.C. 121, 492 S.E.2d 99 (1997). He has now filed a petition to be reinstated.

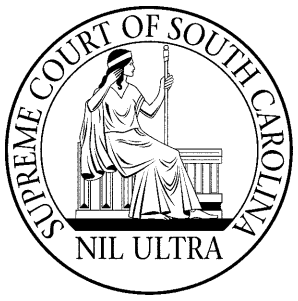
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than August 2, 2004.

Columbia, South Carolina

June 3, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24

June 7, 2004

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Lyndon B. Jones, Respondent.

Opinion No. 25834
Heard May 13, 2004 - Filed June 7, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Susan M. Johnston, and Michael S. Pauley, all of Columbia, for the Office of Disciplinary Counsel.

Lyndon B. Jones, pro se, of Brooklyn, New York.

PER CURIAM: This attorney disciplinary matter consolidates three matters. After a hearing, at which Respondent did not appear, the full panel recommended Respondent be disbarred. We instead suspend the Respondent from the practice of law in this State for one year.

PROCEDURAL HISTORY

Respondent was placed on interim suspension on January 16, 2002, and formal charges were filed in these matters on July 22, 2002. Respondent did not file an Answer and was held in default by the subpanel of the Commission on Lawyer Conduct. Pursuant to the Default Order, the factual

allegations in the Formal Charges are deemed admitted by Respondent. Rule 24, of the Rules of Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR.

FACTS

The subpanel found Respondent was properly served with both the Notice of Hearing and the Order of Default. The subpanel found the following matters constituted misconduct and warrant disciplinary action:

A. The Allen Matter

Respondent represented Complainant at his criminal trial, where Complainant was convicted and sentenced to prison. Respondent filed a Notice of Appeal on Complainant's behalf with the Court of Appeals. A lawyer from the South Carolina Office of Appellate Defense (Appellate Defense) attempted to contact Respondent by telephone regarding Respondent's status as Complainant's attorney. Respondent did not return the call. Appellate Defense sent Respondent a letter asking Respondent if he were retained or court-appointed and offering to take over the appeal upon Respondent's request if Respondent were court-appointed. Respondent failed to respond to the letter. Once again, a representative from Appellate Defense called Respondent, but Respondent failed to return the phone call.

Respondent failed to perfect Complainant's appeal and failed to communicate with Complainant regarding the status of the appeal. Respondent also failed to respond to inquiries, letters, and telephone calls from Complainant and his family members. Complainant's appeal was dismissed.

B. The Brown Matter

Complainant retained Respondent for a fee of $500 to obtain a divorce for her on the grounds of spousal abuse. Respondent instructed Complainant to pay half of her legal fee prior to the filing of pleadings and to pay the

balance on the day of the hearing. Complainant paid Respondent $300 toward the full fee.

Respondent took no action on behalf of Complainant. Respondent represented to Complainant that he had filed the appropriate pleadings. However, he did not provide Complainant with copies, and Complainant verified with the Family Court that nothing had been filed on her behalf, other than a restraining order against Complainant's husband.

Respondent did not respond to Complainant's phone calls made to the law firm where he was previously employed. When Complainant learned that Respondent was no longer employed with the firm, she tried contacting him at his home and through an answering service. He did not respond.

C. Cooperation with Disciplinary Authority's Investigation

Respondent failed to update or notify the South Carolina Bar of Respondent's change in address and employment. The Attorney to Assist Disciplinary Counsel wrote Respondent two letters asking Respondent to cooperate in the preliminary investigation and to respond to lawful requests for information. The Attorney to Assist also called Respondent numerous times. Respondent did not respond to any of the inquiries or otherwise cooperate with the investigation.

Respondent was required to appear before Disciplinary Counsel pursuant to Rule 19(c)(4), RLDE. Respondent had informed the South Carolina State Bar, when he was admitted, that he was also admitted to the New York State Bar. At Respondent's appearance, Respondent represented under oath that he was not a licensed member of the New York State Bar. At the time, Respondent was admitted and registered as an attorney in good standing with the New York State Bar. Respondent's representations under oath were deliberately misleading and/or were conscious misrepresentations of the facts.

Respondent was advised during his appearance before Disciplinary Counsel that the appearance was continued pending Respondent's

compliance with the subpoena. The subpoena required Respondent to provide complete trust records for all trust and escrow accounts utilized in Respondent's practice of law from 1999 until the present. Respondent failed to provide records for the years of 2000 and 2001. The Office of Disciplinary Counsel and agents of SLED attempted, unsuccessfully, to contact Respondent numerous times.

FINDINGS

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5 (Fees); Rule 3.2 (Expedite Litigation); Rule 3.3 (Candor Toward a Tribunal); Rule 3.4 (Fairness to Opposing Party and Counsel); Rule 4.1 (Truthfulness in Statements to Others); Rule 8.1 (Cooperation with Disciplinary Authority); Rule 8.4(a) (Violate Rules of Professional Conduct): Rule 8.4(d) (Conduct Involving Dishonesty); and Rule 8.4(e) (Conduct Prejudicial to the Administration of Justice). Respondent also violated Rules 7(a)(1), (3), (5), (6), and (7) of RLDE, Rule 413, SCACR, as well as Rule 402(g), SCACR. The rule violations are deemed admitted by virtue of Respondent's default to the Formal Charges. Rule 24, RLDE, supra.

The only issue before the subpanel was an appropriate sanction. The subpanel recommended that Respondent be disbarred. The full panel accepted the subpanel's recommendation as its own. The recommendation and its acceptance appear, understandably, to have been significantly influenced by Respondent's default. Respondent appeared in mitigation at oral argument and expressed contrition.

CONCLUSION

The authority to discipline attorneys and the manner in which discipline is given rests entirely with the Supreme Court. In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). The Court may make its own findings of fact and conclusions of law and is not bound by the full panel's recommendation. In

re Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). The Court must administer the sanction it deems appropriate after a thorough review of the record. Id.

While Respondent's delicts were serious, we find that disbarment is not the appropriate sanction. Respondent is suspended from the practice of law in this State for one year. Respondent must pay, within 90 days, the costs in this matter totaling $655.30, as well as reimburse Ms. Brown $300 for the retainer paid by her. In order to be reinstated, Respondent must comply with the requirements of Rule 33(f), RLDE of Rule 413, SCACR, and may petition at the earliest not sooner than 270 days prior to the expiration of the period of suspension.

Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anne S. Parker, Appellant,

v.

Winfield W. Shecut and Marion A. Shecut, III, Respondents.

Appeal from Orangeburg County
Olin D. Burgdorf, Master-In-Equity

Opinion No. 25835
Heard April 8, 2004 - Filed June 7, 2004

AFFIRMED

William O. Pressley, Jr., Perrin, Perrin, Mann and Patterson, PA, of Spartanburg, for Appellant.

Angus Faust Carter, III, of Carter Law Firm, PA, of Orangeburg, Robert A. McKenzie, Gary H. Johnson, II, both of McDonald, McKenzie, Rubin, Miller & Lybrand, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: Anne S. Parker appeals the master-in-equity's findings on remand concerning, among other things, calculation of damages for ouster and attorney's fees and interest awards. This appeal was certified from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Since 1995, Anne S. Parker (Anne) and her brothers, Marion A. Shecut, III (Bo) and Winfield W. Shecut (Win), have been involved in litigation concerning property bequeathed to them by their mother. The litigation began when Anne sued her brothers, seeking to partition the estate according to the terms of their mother's will—which directed that the 1.2 million dollar estate be divided equally—rather than by the terms of a private agreement (agreement) signed by the siblings a year after their mother's death.

Under the agreement and its addendum, Win received a house in Orangeburg, several tracts of farmland, a portion of a tract of farmland known as Cope property (which included a six-acre pond), and farming equipment. Anne and Bo jointly received the remaining farmland on the Cope property (including a two-thirds share of the pond), commercial property, a residential lot, and a beach house in Edisto. To manage their jointly owned properties, Anne and Bo formed a partnership called Shecut Investments. Shortly after they formed the partnership, Anne and Bo began to disagree about how the property should be managed. As a result, Anne brought the underlying partition action, seeking to repudiate the agreement.

The master-in-equity conducted two sets of hearings. The first set of hearings centered on whether the agreement signed by the siblings was valid. After the hearing, the master issued an order dated July 10, 1997, (1) finding that the agreement was valid and ordering its specific performance; (2) ordering Anne to pay Win $30,377 in actual damages for breaching the agreement; (3) ordering Anne to pay Win's attorney's fees; and (4) dismissing the action as to Win. Anne immediately appealed, but the appeal was held in abeyance until the master ruled on the remaining issues.

The second set of hearings primarily focused on the partitioning of the properties jointly owned by Anne and Bo. In his second order, dated

February 17, 1998, the master (1) partitioned all property jointly owned by Anne and Bo, excepting the Edisto beach house, which was ordered to be sold; (2) found that Bo was justified in changing the locks to the beach house when he suspected that Anne had vandalized it; (3) awarded Win $23,699.37 in attorney's fees to be paid from Anne's share of the beach-house-sale proceeds; (4) directed that Anne's and Bo's attorney's fees be paid from the beach-house-sale proceeds; and (5) awarded Bo $30,000 in actual damages, to be paid by Anne, for a lost business opportunity. Anne appealed.

The Court of Appeals (1) affirmed the master's finding that the agreement was valid; (2) affirmed the award of attorney's fees to the brothers, with Win's to be paid from Anne's share of the beach-house-sale proceeds; (3) affirmed the master's finding that Anne was not ousted or excluded from using the beach house; (4) reversed the award of $30,377 in actual damages to Win for breach of contract; (5) reversed the award of $30,000 to Bo for a lost business opportunity; and (6) remanded the issue of whether Anne maintained an interest in the Cope property pond.

Before the matter was considered on remand, this Court granted certiorari to review one issue: whether the Court of Appeals erred in finding that Anne failed to show ouster. *Parker v. Shecut*, 349 S.C. 226, 562 S.E.2d 620 (2002). This Court reversed the Court of Appeals' decision on the ouster issue and held that Bo ousted Anne from the Edisto beach house. Consequently, the case was remanded, and the lower court was instructed to (1) determine the amount of damages, if any, due Anne for ouster and (2) proceed with the sale of the beach house.

Finally, on remand, the master considered issues from this Court, the Court of Appeals, and those consented to by the parties. The following findings are relevant to the present appeal: (1) the beach house was sold for $785,000, and the proceeds are being held by the court until this appeal is resolved; (2) Bo owes Anne $16,995 in damages for ouster; (3) Anne no longer owns a portion of the pond on the Cope property; (4) Win's request for appellate attorney's fees, plus interest, is granted; (5) Anne and Bo are equally responsible for the escrow agent's fees; (6) Anne's and Bo's requests for appellate attorney's fees are denied.

Anne raises the following issues on appeal:

I. Did the master err in his calculation of ouster damages?

II. Did the master err in updating the escrow accounting?

III. Did the master err in finding that Anne no longer owned the pond?

IV. Did the master err in awarding appellate attorney's fees to Win?

V. Did the master err in awarding interest on Win's attorney's fees?

VI. Did the master err in failing to order that money judgments for Anne be paid from the beach-house-sale proceeds?

VII. Did the master err in ordering Anne to pay half of her attorney's fees, half of Bo's attorney's fees, half of the escrow agent's fees, and half of the costs of an appraisal?

LAW/ANALYSIS

Standard of Review

When reviewing an equitable action, this Court may find facts in accordance with its own view of the preponderance of the evidence. *Anderson v. Anderson*, 299 S.C. 110, 113, 382 S.E.2d 897, 899 (1989).

I. Ouster Damages

Anne argues that the master erred in his calculation of ouster damages. She argues that the damages should have been calculated using the rental value of the beach house without adjustment for expenses. She also argues she is entitled to treble damages. We disagree with both arguments.

This Court defined "ouster" as "the actual turning out or keeping excluded a party entitled to possession of any real property." *Parker v.*

Shecut, 349 S.C. 226, 230, 562 S.E.2d 620, 622 (2002) (citation omitted). "Ouster" may occur when there is "a possession attended with such circumstances as to evince a claim of exclusive right and title and a *denial of a right of the other tenants to participate in the profits*." *Id.* (emphasis added) (citing *Woods v. Bivens*, 292 S.C. 76, 80, 354 S.E.2d 909, 912 (1987)). The ousting co-tenant "is liable as a trespasser for the rental value of the property beyond his ownership share." *Id.* at 230, 562 S.E.2d at 623 (citing *Jones v. Massey*, 14 S.C. 292, 307-08 (1880)).

In the present case, the master awarded Anne $16,995 in damages for Bo's ouster between June 13, 1997 and August 5, 2002. To calculate the damages, the master reviewed the gross rental values of the property between 1993 and 1995, which were as follows: $8,497 (1993); $18,181 (1994); and $19,841 (1995). The master took the highest, most recent value of $19,841 and subtracted $13,222 in allowable, out-of-pocket expenses,[1] leaving an annual rental value of $6,619. As a result, Anne's one-half share of the rental value was $3,310 per year, totaling $16,995 over the five-year ouster period.

We hold that the master properly calculated the ouster damages. This Court held that Bo was liable "for the rental value of the property beyond his ownership share." *Parker*, 349 S.C. at 230, 562 S.E.2d at 623. In addition, this Court explained that "ouster" involves a denial of a right to participate in the *profits* of the property. *Id.* at 230, 562 S.E.2d at 622. Had Bo and Anne continued to maintain the beach house as a rental property, Anne would not have pocketed the gross rental value of the property; instead, as a co-tenant, Anne would have had to pay her share of the expenses. Therefore, by awarding Anne the rental value of the property less allowable expenses, the master properly calculated the ouster damages.

Anne also argues that she is entitled to treble damages under S.C. Code Ann. §§ 15-67-410 and 15-67-420 (1976). We disagree. These statutes apply in circumstances in which one has forcibly entered and "disseized" property. In its prior opinion, this Court held that Bo was to be treated as a trespasser,

[1] Allowable expenses included rental commissions, utilities, cleaning services, owner repairs, agency repairs, and taxes.

liable for the rental value of the property beyond his ownership share, not as one who has forcibly entered and "disseized" property. Therefore, these statutes do not apply to the facts in this case, and Anne is not entitled to treble damages. *See Du Pre v. Tilghman Lumber Co.*, 114 S.C. 269, 272, 103 S.E. 526, 527 (1920) (holding trespass not sufficient to sustain an action for forcible entry and detainer).

II. Escrow Accounting

Anne argues that the master erred in updating the escrow accounting by failing to include certain bartered and paid rents. We disagree.

Since November 12, 1997, Carole Gunter (Gunter) has been the escrow agent for the Shecut family. Her primary responsibility as the escrow agent has been to manage all Shecut properties, including collecting rents, paying taxes, and renewing insurance policies. At the hearing on remand, Gunter submitted a detailed report documenting all money received and paid during her term. The master instructed Gunter to review her accounting once again, ensuring that all rents and expenses related to property owned by Anne and Bo (as Shecut Investments) were allocated equally. Income generated and expenses incurred after the property was partitioned were to be treated individually, based on who owned the property. After reviewing the accounting as instructed, Gunter submitted a revised report to the court.

The master relied on Gunter's revised report in his decision, a decision that ultimately benefited Anne. The report showed that Bo owed Anne $5,609.77, Win owed Anne $4,694.39, and the escrow balance was $845.77. In the final calculation, Anne was awarded $18,949.44, which included the amounts owed by Bo and Win, the escrow balance, and amounts owed to Anne in the court's prior order. Of the total amount due Anne, $13,409.28 was to be paid by Bo and specifically accounted for bartered and paid rents.

Because the master's order took into consideration money due Anne for bartered and paid rents, we find that the master did not err in his final accounting.

III. Pond

Anne argues that the master erred in finding that Anne no longer owned a share of the six-acre pond located on the Cope property. This argument is based on the fact that the master did not specifically mention the pond in his February 17, 1998 order, which simply partitioned the "Cope property." We disagree.

Originally, in their private agreement, the siblings decided that the pond would "be kept in good condition and maintained as a pond for the mutual use and enjoyment of all parties of this agreement." But in the partition action, the portion of the pond owned jointly by Anne and Bo was allotted to Bo. The Court of Appeals subsequently found that this division deprived Anne of her agreed interest in the pond because the master relied on an incorrect property survey. Therefore, the Court of Appeals remanded the issue.

On remand, the master explained that "the value of the pond was considered by the Court when Bo and Anne partitioned the joint property under the Agreement." He cited the appraisal and testimony of Chuck Henson (Henson) as support for his decision in the partition action. Anne called Henson to testify on remand, and Henson confirmed that the value of the pond was $2,000 per acre.

Given that Henson's appraisal report was part of the record in the partition action; the master stated that he relied on this report in partitioning the "Cope property"; and the master heard testimony from Henson on remand confirming the pond's value, it is clear that the pond was fully considered in the partitioning of the jointly owned property and upon remand.

Therefore, the master properly found that Anne's interest in the pond had been allotted to Bo, she received fair value for the pond, and she no longer has an interest in or rights associated with the pond.

IV. Win's Appellate Attorney's Fees

Anne argues that the master erred in awarding Win appellate attorney's fees because Win was no longer a party to the action after all claims against him were dismissed in the initial, July 10, 1997 order. As a result, Anne argues, the court lacked jurisdiction to decide the issue of Win's attorney's fees in the subsequent proceedings. We disagree.

When the Supreme Court remits a case to the circuit court, the circuit court "acquires jurisdiction to enforce the judgment and take any action consistent with the Supreme Court ruling." *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 413, 414-15, 438 S.E.2d 248, 249 (1993). Additionally, whether respondents are entitled to appellate attorney's fees pursuant to a statute[2] is a determination for the circuit court. *Taylor v. Medenica*, 332 S.C. 324, 326, 504 S.E.2d 590, 591 (1998).

In the present case, Win's involvement in the proceedings did not cease upon the issuance of the July 10, 1997 order. Win remained a named defendant and participant during the second set of hearings. In fact, the master specifically addressed the issue of Win's attorney's fees in the February 17, 1998 order.

Because Anne appealed the findings of both orders, Win continued to participate in the case as a named respondent whose interests could be affected by the appellate court's decision. Moreover, the Court of Appeals remanded the pond issue—a pond that was partly owned by Win—which forced Win to remain involved in the litigation on remand.

Therefore, we hold that the master properly considered the issue of Win's appellate attorney's fees, and it was within the master's discretion to award the fees accordingly.

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[2] The applicable statute in this case states: "[t]he court of common pleas may fix attorneys' fees in all partition proceedings and, as may be equitable, assess such fees against *any or all of the parties in interest*." S.C. Code Ann. § 15-61-110 (1976) (emphasis added).

V. Interest on Win's Attorney's Fees

Anne argues that the master erred in awarding post-judgment interest on Win's attorney's fees. She argues that because the fees were to be paid from the beach-house-sale proceeds, interest should not have accrued until the beach house was sold. We disagree.

S.C. Code Ann. § 34-31-20(B) (1976 as amended) provides that "[a]ll money decrees and judgments of court enrolled or entered shall draw interest according to law." A party need not plead for such interest; it is due as a matter of course. *Calhoun v. Calhoun*, 339 S.C. 96, 102, 529 S.E.2d 14, 17 (2000). An award of attorney's fees may be considered part of a monetary judgment and draw interest accordingly. *Christy v. Christy*, 317 S.C. 145, 152, 452 S.E.2d 1, 5 (Ct. App. 1994).

In the present case, Win was awarded $14,162.49 in interest. The master calculated interest due from February 17, 1998, the date that (1) the beach house was ordered to be sold, and (2) Win was awarded attorney's fees in the amount of $23,699.37 to be paid from Anne's share of the beach-house-sale proceeds.

Anne did not pay the fees and now claims that the interest, if any, should be calculated from August 20, 2002—the date the beach house was sold—since that is the date the proceeds became available. We disagree.

As this Court noted in its decision, nothing prevented Anne or Bo from proceeding with the sale of the beach house according to the master's instructions in the February 17, 1998 order. Further, this Court stated, "the sale should have proceeded."

Anne could have expedited the availability of the proceeds by proceeding with the beach house sale as directed, giving her the means to pay Win's attorney's fees. The awarding of attorney's fees to Win was a judgment against Anne, and she failed to take any action to abate the running of the interest. Given that the underlying case and the subsequent appeals dealt primarily with disputes between Bo and Anne, with Win having a

passive role in most of the litigation, we find that it was equitable for the master to award interest on Win's attorney's fees only.

VI. Money Judgments for Anne

On remand, the master specifically ordered that awards payable to Bo, Win, and their respective attorneys be paid from the beach-house-sale proceeds. But the master did not specify the source of money judgments due Anne. Anne argues that her awards should also come from the proceeds of the beach house sale so that the awards will be legally enforceable. We disagree.

Anne's concern is that she will have to continue the present litigation to enforce judgments in her favor. This argument is without merit. There is no indication in the record that either Win or Bo has interfered with Anne's receipt of payments due her. The force of the judgment itself should ensure that Anne collects.

Therefore, Anne is not entitled to alter the judgment so as to provide additional assurance that she will receive the money judgments.

VII. Fees and Costs

The master ordered that the following fees and costs be paid from the beach-house-sale proceeds: Anne's attorney's fees, Bo's attorney's fees, the escrow agent's fees, and the cost of an appraisal. Since the proceeds from the beach house sale are to be divided equally, the master's order essentially requires Anne to pay half of these fees and costs. Anne argues that this was error and that Bo should be required to pay all fees and costs since "Bo's wrongdoings have put the trial court and the parties to much legal effort and increased costs." We disagree.

As to the attorney's fees, it was within the master's discretion to order that attorney's fees be paid from the beach-house-sale proceeds and therefore be shared equally. The record does not indicate that either party was more at fault than the other such that one party should have been required to pay the attorney's fees for both parties. We also note that Anne actually benefited

from the master's order since her attorney's fees ($13,173.80) were higher than Bo's ($7,999.00), and Bo had to pay half of Anne's attorney's fees.

As to the escrow agent's fees, the escrow agent was appointed for the benefit of all parties to the litigation, including Anne. Further, the escrow agent's responsibilities largely centered on managing the properties owned jointly by Anne and Bo.

The appraisal cost of $2,000 stems from the appraisal of one of Anne's properties. The escrow agent ordered the appraisal to determine whether the property should be sold so that its proceeds could be deposited into the diminishing escrow account. This was within the escrow agent's discretion, and ultimately, the decision benefited Anne: Anne owned the property that was appraised and used the appraisal report when the property was sold.

Anne has been an active participant throughout this near decade-long litigation. Therefore, it was equitable for the master to order Anne to pay her share of the fees and costs.

CONCLUSION

For the foregoing reasons, we AFFIRM the master-in-equity's findings.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Paula H. Thomas, concur.

The Supreme Court of South Carolina

In the Matter of
Randolph Frails, Respondent.

ORDER

On February 5, 2002, respondent was administratively suspended from the practice of law after he failed to file a report of compliance with mandatory continuing legal education requirements for 2001. By order of this Court dated April 17, 2002, respondent was directed to surrender his certificate to practice law. Respondent was subsequently placed on interim suspension . In the Matter of Frails, 256 S.C. 431, 589 S.E.2d 759 (2003). Respondent now petitions the Court to reinstate him to the practice of law.

After consideration of respondent's submissions and all applicable rules, we hereby reinstate respondent to the practice of law.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 1, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Estate of Rosemary C. Sherman, by and through its personal representative, Terry Maddock, Appellant,

v.

The Estate of Norman E. Sherman, by and through its personal representative, Joan Snodgrass, Respondent.

Appeal From Beaufort County
Thomas Kemmerlin, Special Circuit Court Judge

Opinion No. 3811
Heard April 8, 2004 - Filed June 1, 2004

AFFIRMED

Catherine West Olivetti, of Bluffton, and G. Richardson Wieters, of Hilton Head Island, for Appellant.

Deborah Ann Malphrus, of Ridgeland, and Jay A. Mullinax, of Hilton Head Island, for Respondent.

HEARN, C.J.: This appeal arises from a declaratory judgment regarding a deed executed by Rosemary C. Sherman to herself and her husband, Norman E. Sherman. The trial court found the deed effectively created a right of survivorship, and therefore, the subject property belonged in fee simple to Norman's estate. We affirm.

FACTS

Rosemary was the owner in fee simple absolute of her residence. On June 27, 1985, she conveyed her property to Norman and herself without using an intervening conveyance. The granting clause in the deed reads as follows:

> Rosemary C. Sherman . . . do[es] grant, bargain, sell and release unto said Norman E. Sherman and Rosemary C. Sherman for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion.

The habendum clause contains similar language.

Rosemary died in February of 2002, predeceasing Norman who died ten days later. Believing the 1985 deed failed to create a joint tenancy because an intervening or "straw man" conveyance was not used, Rosemary's estate ("Appellant") brought this action against Norman's estate ("Respondent") to determine the deed's validity and the nature and extent of the interest it conveyed. Respondent argued that although straw man conveyances were typically used in the past, section 62-2-804 of the South Carolina Code (Supp. 2003) applies retroactively to Rosemary's deed and allows an owner to convey property to himself and another in joint tenancy.

The trial judge agreed with Respondent and found that Respondent owned the land in fee simple. This appeal follows.

STANDARD OF REVIEW

The issue of title is legal in nature. Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 428, 489 S.E.2d 223, 224 (Ct. App. 1997). In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000).

ISSUES ON APPEAL

I. Whether South Carolina follows the common law with respect to the conveyance of real property in observing the unities of time, title, interest, and possession?

II. Whether the trial court erred in finding that, in 1985, no intervening conveyance was necessary to observe the four unities of time, title, interest, and possession?

III. Whether the trial court erred in retroactively applying section 62-2-804 of the South Carolina Code to a 1985 deed?

LAW/ANALYSIS

Appellant argues that because Rosemary did not use an intervening conveyance or straw man to convey the property to herself and Norman, the four unities of title were lacking, and therefore, no valid joint tenancy was created. Appellant asserts that, at most, Rosemary's 1985 deed created a tenancy in common. "The common law method of creating a joint tenancy requires a conveyance to have four unities: unity of interest, unity of title, unity of time, and unity of possession." Smith v. Rucker, __ S.C. __, 593 S.E.2d 497, 499 (Ct. App. 2004) (citing Jenkins v. Jenkins, 8 S.C.L. (1 Mill) 48, 52 (1817)). While this court recognizes the common practice of using an intervening conveyance in this type of transfer in order to effectively observe the four unities, we need not reach issues I or II because we find that

section 62-2-804 of the South Carolina Code (Supp. 2003) applies retroactively.

> Section 62-2-804 provides as follows:
>
> > When any person is seized or possessed of any estate of joint tenancy at the time of his death, the joint tenancy is deemed to have been severed by the death of the joint tenant and the estate is distributable as a tenancy in common unless the instrument which creates the joint tenancy, including any instrument in which one person conveys to himself and one or more other persons, or two or more persons convey to themselves, or to themselves and another or others, expressly provides for a right of survivorship, in which case the severance does not occur. While other methods for the creation of a joint tenancy may be utilized, an express provision for a right of survivorship is conclusively deemed to have occurred if the will or instrument of conveyance contains the names of the devisees or grantees followed by the words "as joint tenants with right of survivorship and not as tenants in common".

S.C. Code Ann. § 62-2-804 (Supp. 2003) (emphasis added). In 1996, the statute was amended to include the language that allows one person to create a joint tenancy by conveying property to himself and one or more other persons, without the use of a straw man. Id. That same year, the South Carolina General Assembly also provided that "[t]his act . . . applies to joint tenancies created either prior to or after the effective date of the act." Id. By its plain language, section 62-2-804 retroactively applies to deeds created prior to its enactment and allows for the creation of a joint tenancy with rights of survivorship without the use of an intervening conveyance.

Appellant argues section 62-2-804 conflicts with section 27-7-40; thus, the trial court erred in applying section 62-2-804 to Rosemary's deed.

We disagree. Section 27-7-40 of the South Carolina Code (Supp. 2003) states:

> In addition to any other methods for the creation of a joint tenancy in real estate which may exist by law, whenever any deed of conveyance of real estate contains the names of the grantees followed by the words "as joint tenants with rights of survivorship, and not as tenants in common" the creation of a joint tenancy with rights of survivorship in the real estate is conclusively deemed to have been created.

The statute lists the incidents of ownership which amount to joint tenancies and further provides that "[t]he provisions of this section must be liberally construed to carry out the intentions of the parties. This section supersedes any conflicting provisions of Section 62-2-804." S.C. Code Ann. § 27-7-40 (Supp. 2003).

Appellant contends section 62-2-804's recognition that one person may create a joint tenancy by a conveyance to himself and another conflicts with section 27-7-40, and therefore, section 27-7-40 controls. Appellant further asserts that section 62-2-804's retroactive application is in conflict with section 27-7-40's prospective application. In essence, Appellant claims that when Rosemary executed the deed in 1985, in order to create a valid joint tenancy, she either had to use the specific language provided in section 27-7-40 or use an intervening conveyance. We disagree, and agree with the trial judge who held that the two statutes are not in conflict. There is simply no provision in section 27-7-40 which conflicts with section 62-2-804's instruction that one person can create a joint tenancy by a conveyance to himself and another without the use of a straw man. Further, we find no provision in section 27-7-40 that conflicts with the retroactivity provision of section 62-2-804.

Based on the above, we find the trial judge properly applied section 62-2-804 retroactively to Rosemary's 1985 deed. Under section 62-2-804, a deed which purports to create a joint tenancy with rights of

survivorship will not be severed at the death of one of the joint tenants even if the grantor failed to utilize an intervening conveyance so long as the deed expressly provides for a right of survivorship. The language in Rosemary's deed stating that the property would pass, "upon the death of either of them then to the survivor of them," expressly provides for the right of survivorship. Therefore, applying section 62-2-804 retroactively, we find Rosemary effectively created non-severable rights of survivorship in her 1985 deed. As such, we find the trial judge did not err in giving section 62-2-804 retroactive application and declaring that the subject property belonged to Respondent in fee simple.

Moreover, the result is the same whether the 1985 deed created a joint tenancy or a tenancy in common because Rosemary's intention to create a survivorship benefit will be enforced where it is clearly manifested by the deed. In Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953), a deed to husband and wife purported to create a tenancy by the entirety. A tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person." Id. at 185, 75 S.E.2d at 47. The supreme court found that the tenancy by the entirety could not exist. However, because the deed granted the property to husband and wife, as tenants by the entirety, and the survivor of them, the supreme court effectuated the right of survivorship. The court stated, "[we] think that by adding the phrase 'and the survivor of them', the parties in this case clearly indicated the nature of the estate intended to be created, namely, that upon the death of either of the grantees the absolute estate should vest in the survivor." Id. at 191-92, 75 S.E.2d at 50.

Similarly, Rosemary's deed plainly stated that upon the death of one of them, the property would pass "to the survivor of them." Just as the survivorship language in the deed in Davis created a survivorship right, we find this language in Rosemary's deed created a survivorship right, regardless of whether the deed created a joint tenancy or a tenancy in common. "It is elementary that the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well settled rule of law or public policy." Id. at 184, 75 S.E.2d at 47. The language in the 1985 deed states Rosemary's intention to create a right of

survivorship. See Rucker, __ S.C. __, 593 S.E.2d 497, 498 (finding a deed granting property to husband and wife "for and during their joint lives and upon the death of either of them, then to the survivor" unquestionably created survivorship rights). Therefore, even if a tenancy in common was created, the language in the deed establishing Rosemary's intention to create a right of survivorship allows the benefit of survivorship to be attached to this estate. As a result, upon Rosemary's death, Norman became the owner of the property in fee simple absolute. Accordingly, the trial judge properly ruled in favor of Respondent.

CONCLUSION

We find the 1985 deed created non-severable rights of survivorship and, as such, the trial judge did not err in giving section 62-2-804 retroactive application and declaring that the subject property belonged to Respondent in fee simple. In addition, regardless of whether the deed created a joint tenancy or a tenancy in common, a survivorship benefit still attached to the estate because of the applicable language of intent in the deed. Accordingly, the decision of the trial judge is

AFFIRMED.

ANDERSON and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Joshua Adam Galbreath, Appellant.

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

Opinion No. 3812
Heard April 7, 2004 – Filed June 1, 2004

AFFIRMED

John Dennis Delgado and Kathrine Haggard Hudgins, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Assistant Attorney General David Spencer, all of Columbia; and Solicitor Druanne Dykes White, of Anderson, for Respondent.

HEARN, C.J.: After a jury convicted Joshua Galbreath of assault and battery of a high and aggravated nature (ABHAN), defense

counsel filed a motion for a new trial alleging three instances of juror misconduct. The trial judge held a hearing and considered affidavits, but refused to reconvene the jury for questioning and denied the new trial motion. We affirm.

FACTS

A group of friends, including Lee Rogers, were celebrating Quicha Tannery's birthday at her house. During the course of the evening, Joshua Galbreath and his friends visited the party, and almost immediately upon Galbreath's arrival, a fight broke out between his group of friends and some of the individuals who were previously at the party.

Rogers testified that during the fight, he heard Galbreath tell a friend to go "get the gun." Rogers stated that he went to help carry one of his injured friends back into Tannery's house when he turned and saw Galbreath hit him with a shotgun. Three other witnesses also testified that Galbreath hit Rogers with a shotgun.

Galbreath denied ever hitting Rogers with the shotgun, but he admitted that one of his friends had taken out a gun. Galbreath contended he took the gun away from his friend with the intent of returning it to the car. However, the police arrived before he could return the gun to the car, so instead, Galbreath threw it into some bushes

The jury found Galbreath guilty of ABHAN, and the trial judge sentenced him to ten years, suspended on five years service and five years probation. Sometime after the trial, defense counsel contacted several jurors and became aware of allegations of impropriety involving the jury. Galbreath then filed a motion for a new trial, which included affidavits alleging juror misconduct. Galbreath contended that (1) Juror Jones was improperly influenced by an extra-judicial statement he heard while at lunch, (2) Juror Stone withheld information during voir dire, and (3) Juror Owens supplied improper sentencing information to the jury during deliberations. The trial judge heard arguments on the motion for a new trial but refused to

reconvene the jury for questioning. The judge explained he was denying the motion even accepting the allegations as true. Galbreath appeals.

STANDARD OF REVIEW

On appeal, the denial of a new trial motion will be disturbed only upon a showing of an abuse of discretion. State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998). A denial of a new trial based on alleged jury misconduct is reviewed for an abuse of discretion. State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69-70 (Ct. App. 2000). Likewise, where the motion is based upon allegations that a juror gave misleading or incomplete answers during voir dire, the trial court's denial of that motion will be affirmed absent a prejudicial abuse of discretion. Id.

LAW/ANALYSIS

I. Comments Overheard by Juror Jones

Galbreath first alleges that Juror Jones was improperly influenced by extra-judicial comments he heard during lunch. Specifically, Galbreath points to another juror's affidavit, which alleged:

> After the deliberations but before we left the jury room, a juror named Mark Jones stated that he went to a Mexican restaurant during the trial and the Defendant and his family and friends were there eating also. He stated that he heard people at the Defendant's table making threats and heard one of the men say that he would "cut that bitch's throat."

We agree with the trial judge that this allegation, even if true, does not entitle Galbreath to a new trial.

When an allegation is made that extraneous information may have improperly influenced jurors, the "[r]elevant factors to be considered . . . are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the

prejudice." Kelly, 331 S.C. at 141-42, 509 S.E.2d at 104 (1998). Further, where a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice. Covington, 343 S.C. at 163, 539 S.E.2d at 70.

In this case, Juror Jones was the only juror who might have considered the extraneous information during deliberations because the affidavit states that Jones did not mention the information to the others until after deliberations. As for the weight of evidence before the jury, the State presented four witnesses who testified that Galbreath hit Rogers in the head with a shotgun. Furthermore, although the trial judge was not able to specifically address the overheard conversation, he did instruct the jury that: "Under the oath you took, you swore to try the case based only and solely on the testimony, evidence and law presented and heard in this courtroom. It is your duty to lay aside all bias or prejudice or sympathy you may have in reaching your verdict." Considering these factors, we find the trial judge did not abuse his discretion in ruling that the comments Juror Jones overheard had very little prejudicial effect or influence on the jury's verdict.

Additionally, the statement Jones overheard was not made by Galbreath but by an individual who was dining with Galbreath, thereby lessening any possible prejudicial effect. Generally, the determination of whether extraneous information received by a juror during the course of the trial is prejudicial is a matter for determination by the trial judge, and we see no reason to upset the judge's finding that there was no prejudice. Kelly, 331 S.C. at 142, 509 S.E.2d at 104.

II. Juror Stone's Relationship with the Stinnett Family

Galbreath also argues that another juror, Juror Stone, intentionally withheld information during voir dire, and in support of this argument, Galbreath submitted various affidavits about a relationship between Juror Stone and the Stinnett family. Anna Stinnett was a victim and witness in this case, and Galbreath alleges that Stone knew Stinnett's mother. Galbreath also alleges that Stone's brother-in-law and nephew rent a pasture and house respectively from an undisclosed member of the Stinnett family. Even

assuming these allegations are true, we find Juror Stone did not intentionally withhold any information about her relationship with the Stinnett family from the trial court.

A new trial is only required when a juror intentionally conceals information during voir dire. State v. Woods, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001). Galbreath frames Stone's lack of disclosure as intentional and argues that the disclosure would have induced him to use a peremptory strike against her. However, during voir dire, the trial judge only asked if "[a]ny member of the jury panel [is a] close personal friend, [or] business associate of any of the potential witnesses?" Because none of the information in the affidavits indicates Juror Stone had a close personal friendship or business relationship with any of the witnesses, there is no evidence that she intentionally concealed any information from the trial judge.[1]

Galbreath also argues Stone was not forthright with the court because she did not respond when the trial judge asked whether any member of the jury panel knew of any reason why he or she could not give both the State of South Carolina and the defendant a fair and impartial trial. There is no suggestion in the affidavits that Juror Stone viewed herself as an incapable or uncomfortable juror. In fact, Stone's decision not to respond to this question suggests that she felt she could be an impartial and fair juror.[2] Furthermore, even if this court found some type of juror misconduct, Galbreath has made no showing of prejudice, especially considering he was acquitted for pointing and presenting a firearm at Anna Stinnett. See Covington, 343 S.C. at 163,

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[1] In Kelly, a capital case, a juror had once attended a death penalty rally and did not disclose this information when he was asked about his position on the death penalty. The court found no misconduct and stated that: "Juror P was not specifically asked if he had participated in death penalty activities in the past." 331 S.C. at 146, 509 S.E.2d at 107.

[2] "We hold that intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." Woods, 345 S.C. at 588, 550 S.E.2d at 284.

539 S.E.2d at 70 (requiring a showing of prejudice when a defendant seeks a new trial on the basis of juror misconduct).

III. Incorrect Sentencing Information from Juror Owens

Defense counsel also provided affidavits from Juror Owens and Juror Ellenburg, which state that during the course of deliberations, the subject of punishment arose after the jury had decided that Galbreath was not guilty of assault and battery with intent to kill but before it had made a decision on the lesser included charges of ABHAN and simple assault and battery. At that point, Juror Owens explained that, based on personal experience, Galbreath would receive a fine but no jail time if he was convicted of ABHAN. Jurors Owen and Ellenburg both allege that if they had known Galbreath was facing prison time, they would have gone through the elements of the charges again and would have found him guilty only of simple assault and battery. Galbreath argues this sentencing information, like the comments Juror Jones overheard while he was at lunch, constitutes "extraneous information or influence" and urges this court to remand the case for a new trial. We disagree and find that the erroneous sentencing information resulted from *internal* jury misconduct, and because the misconduct did not violate Galbreath's due process rights, we find no error in the trial judge's denial of Galbreath's motion for a new trial.

Traditionally, a juror's testimony was not admissible to prove either his own misconduct or the misconduct of other jurors. State v. Aldret, 333 S.C. 307, 310, 509 S.E.2d 811, 812 (1999). However, Rule 606(b), SCRE altered this common law rule, and now, juror testimony regarding external prejudical information or improper outside influence is allowed. The rule was further altered by State v. Hunter, 320 S.C. 85, 463 S.E.2d 314 (1995), which dealt with allegations of racial prejudice by the jury. Hunter carved out an exception to the rule against juror testimony regarding internal jury deliberations, holding that juror testimony is competent in cases involving internal misconduct where necessary to ensure fundamental fairness. Id., 320 S.C. at 88, 463 S.E.2d at 316.

External influence on a jury involves situations where jurors receive information during deliberations from some outside source. See State v. Robinson, 443 S.E.2d 306, 329 (N.C. 1994) (defining external influences as "information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence," but excluding "information which a juror has gained in his experience"). For example, in State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000), a juror consulted Black's Law Dictionary for the definitions of "malice aforethought" and "manslaughter" during the course of deliberations. The supreme court weighed the three factors our courts use to determine whether outside influences have affected the jury, and found that the lone juror's use of the dictionary, which merely reiterated definitions the trial court had given, did not affect the verdict. Likewise, in State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), the supreme court determined that no new trial was necessary where a religious pamphlet about God's view of the death penalty circulated in the jury room because there was no evidence the extraneous information affected the jury's verdict.

Here, there is no allegation that the incorrect sentencing information came from some extraneous source. Rather, it was given to the jury from a fellow juror, who had acquired the information from her own personal experience. See State v. Robinson, 443 S.E.2d at 329 (defining internal influences as "information coming from the jurors themselves"). Because the affidavits of Juror Owens and Juror Ellenburg concern internal jury deliberations, they can only be reviewed if the allegations suggest that fundamental fairness, i.e. due process was denied. Hunter, 320 S.C. at 88, 463 S.E.2d at 316. Thus, for this court to find that a new trial is warranted, we would have to find that Galbreath was denied due process because jurors mistakenly believed he would not serve jail time if convicted of ABHAN.

In South Carolina determining guilt or innocence is the duty of the jury, whereas sentencing is the duty of the court. A number of courts in other jurisdictions have dealt with allegations that jurors were misinformed about possible sentences, and in none of those cases did this misinformation result in a court overturning a verdict. See, e.g., Fullwood v. Lee, 290 F.3d 663, 684 (4th Cir. 2002) (holding that when a juror informs the jury about his

understanding that a capital murder defendant would serve less than life if sentenced to life, such information relates to the jury's internal discussions and may not be used to upend a verdict); Dobbs v. Zant, 963 F.2d 1403, 1411 (11th Cir. 1991), *rev'd on other grounds*, 506 U.S. 357 (1993) (barring juror testimony that jurors voted to impose death penalty under mistaken impression that defendant would not be executed); Robinson, 443 S.E.2d at 329-330 (holding that allegations jurors considered defendant's possibility of parole are allegations of internal influences and will not be considered); Lewis v. State, 549 S.E.2d 732, 736 (Ga. Ct. App. 2001) (refusing to hear testimony from jurors that they believed defendant would receive probation if convicted). While none of these cases specifically identified and analyzed the issue as one of fundamental fairness, the results suggest that fundamental fairness is not automatically violated when a jury considers and is mistaken about sentencing implications.

Although a jury's consideration of sentencing consequences may, in some situations, affect the fundamental fairness of a trial, we do not believe the allegations in this case support such a finding. Here, the jurors' affidavits assert that they would have reviewed the elements of ABHAN *again* if they had known Galbreath would be incarcerated. This allegation makes clear that, prior to rendering its verdict, the jury determined Galbreath's actions met the elements of ABHAN. Thus, there is no evidence Galbreath's due process rights were violated.

Accordingly, we affirm trial court's denial of a motion for a new trial.

AFFIRMED.

ANDERSON and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brett Bursey and Mining Association of South Carolina, Respondents,

v.

South Carolina Department of Health and Environmental Control and South Carolina Electric and Gas Company, Appellants.

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 3813
Submitted May 12, 2004 – Filed June 1, 2004

AFFIRMED

Elizabeth B. Partlow and Thomas G. Eppink, of Columbia, for Appellant South Carolina Electric and Gas Company.

Mason A. Summers, of Columbia, for Appellant South Carolina Department of Health and Environmental Control.

Brett Bursey, of Lexington, pro se.

Gregory J. English, of Greenville, for Respondent Mining Association of South Carolina.

ANDERSON, J.: The South Carolina Department of Health and Environmental Control ("DHEC") and the South Carolina Electric and Gas Company ("SCE&G") appeal a Circuit Court order affirming the decision of the South Carolina Mining Council. The Mining Council, deciding an appeal of a DHEC determination that SCE&G would not be required to obtain a mining permit in connection with its Lake Murray Dam remediation project (also referred to in various documents and briefs as the Saluda River Dam remediation project), ruled that SCE&G was required to obtain a mining permit. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

SCE&G is currently engaged in a dam remediation project, which includes construction of a back-up dam for the existing Saluda Dam at Lake Murray in Lexington County, South Carolina. The erection of this back-up dam is to be accomplished by mining materials from the construction site for use in the dam's construction. The quarry mined for this construction will cover from ten to sixty acres and possibly constitute the largest quarry in South Carolina upon completion. Activities in connection with this project will include exploration of the land for suitable materials, blasting, de-watering, crushing raw materials, and the production of concrete. All activities associated with this mining and construction will be conducted at the SCE&G site. None of the mined material will be used for off-site purposes or sold to third parties.

By letter dated May 15, 2001, SCE&G requested from DHEC a "letter of verification" stating that SCE&G was not required to obtain a mine

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

operating permit for this project. Craig Kennedy, Assistant Division Director for the Division of Mining and Solid Waste Management, responded in a June 5, 2001, letter that, because the mining proposed by SCE&G fell within an exception to the South Carolina Mining Act ("the Act"),[2] SCE&G was not required to obtain a mine operating permit for the project. Kennedy based his finding on the following language of the Act:

> (1) "Mining" means:
>
> > (a) the breaking of the surface soil to facilitate or accomplish the extraction or removal of ores or mineral solids for sale or processing or consumption in the regular operation of a business;
> >
> > (b) removal of overburden lying above natural deposits of ore or mineral solids and removal of the mineral deposits exposed . . . .
> >
> > . . . Mining does not include excavation or grading when conducted solely in aid of on-site farming or of on-site construction.

S.C. Code Ann. § 48-20-40(1) (Supp. 2003). Kennedy concluded: "[A] mine operating permit is not required for landowners excavating on their own property [when] all the excavated material is used on that same tract of land or contiguous tracts of land by the same land owner." Because Kennedy determined the proposed project constituted "on-site construction" as contemplated by the Act, DHEC did not require SCE&G to acquire a mine operating permit.

The Mining Association of South Carolina ("MASC") and Brett Bursey (collectively, "Respondents") appealed the DHEC decision to the Mining Council, a quasi-judicial body established by statute for the purpose of, among other things, hearing appeals of agency decisions related to mine

[2] S.C. Code Ann. §§ 48-20-10 to -310 (Supp. 2003).

operating permits. See S.C. Code Ann. §§ 48-20-40(2), 48-20-190, 48-21-10, 48-21-20 (1987 & Supp. 2003). Bursey's appeal, dated October 17, 2001, was received on October 22. MASC's appeal, dated October 19, 2001, was received on October 26.

SCE&G and DHEC filed motions with the Mining Council to dismiss the appeals on the ground that they were filed more than thirty days after Respondents had notice of the decision not to require a permit. See S.C. Code Ann. § 48-20-190 (Supp. 2003) ("The person taking the appeal within thirty days after the department's decision shall give written notice to the council through its secretary that he desires to appeal and filing a copy of the notice with the department at the same time."); 26 S.C. Code Ann. Regs. 89-290(B) (Supp. 2003) ("The person taking the appeal shall within thirty days after notification of the Department's decision, give written notice to the Mining Council through its secretary that he desires to take an appeal, at the same time filing a copy of the notice with the Department."). The Mining Council denied the motions to dismiss and reversed DHEC's decision, ruling that the SCE&G project required a mining permit under the Act.

SCE&G and DHEC (collectively, "Appellants") appealed the Mining Council's ruling to the Circuit Court. The court, applying the Administrative Procedures Act's (the "APA") "substantial evidence" standard of review, affirmed the Council's rulings on both the timeliness of the appeals and the interpretation of the Act requiring SCE&G to obtain a mine operating permit.

ISSUES

I. Did the Circuit Court err in applying the APA's "substantial evidence" standard of review?

II. Did the Circuit Court err in affirming the Mining Council's findings that Respondents' appeals were timely?

III. Did the Circuit Court err in affirming the Mining Council's conclusion that SCE&G's proposed activities require a mine operating permit?

LAW/ANALYSIS

I. Standard of Review

Appellants argue the Circuit Court erred in applying the "substantial evidence" standard of review enunciated in the APA. See S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003). Appellants contend the Mining Act, via the Act's reference to "Chapter 7 of Title 18," mandates a broader standard. See S.C. Code Ann. § 48-20-200 (Supp. 2003). We disagree.

A directly affected party, aggrieved by a DHEC determination to grant a mine operating permit, may appeal the decision to grant said permit to the Mining Council.[3] S.C. Code Ann. § 48-20-190 (Supp. 2003). A party is then granted the right to appeal the ruling of the Mining Council to the Circuit Court. S.C. Code Ann. § 48-20-200 (Supp. 2003). Section 48-20-200 requires that this appeal be taken "in the manner provided by Chapter 7 of Title 18." Id.

Chapter 7 of Title 18 generally deals with appeals to the Circuit Court from lower courts, namely the Magistrate's Court. See S.C. Code Ann. § 18-7-10 (1985). The chapter mainly concerns the procedural process these appeals are to follow when seeking review by the Circuit Court. See, e.g., S.C. Code Ann. § 18-7-20 (Supp. 2003) (granting thirty days from the date of the notice of the judgment in which to file a written notice of appeal to the Circuit Court). In addition, the chapter includes a general jurisdictional statute, section 18-7-10. The chapter later bestows upon the Circuit Court a

[3] It is unclear whether the Act grants a right of appeal to one aggrieved by a DHEC decision not to require a permit. See S.C. Code Ann. § 48-20-190 (Supp. 2003). Because this issue was not raised below or on appeal, it is not now before this Court. See Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 508 S.E.2d 848 (1998).

broad scope of review when hearing appeals which fall under this jurisdictional grant. See S.C. Code Ann. § 18-7-170 (1985) ("In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact."); Parks v. Characters Night Club, 345 S.C. 484, 489-90, 548 S.E.2d 605, 608 (Ct. App. 2001) ("Section 18-7-170 provides that on appeal from Magistrate's Court, the Circuit Court may make its own findings of fact.").

Appellants' assertion that the legislature intended Chapter 7's broad standard of review to apply to decisions of the Mining Council is unsound. The standard of review in section 18-7-170 is meant only to apply in appeals over which the Circuit Court gains jurisdiction solely by the jurisdictional grant of section 18-7-10, and not appeals where the court's jurisdiction is, by virtue of a separate statute, otherwise provided for "'by law.'" See Karl Sitte Plumbing Co. v. Darby Dev. Co., 295 S.C. 70, 76, 367 S.E.2d 162, 165 (Ct. App. 1988) ("Section 18-7-10 and 18-7-170 . . . apply where appeals of inferior courts or jurisdictions are not otherwise provided for "'by law.'"). The Circuit Court's jurisdiction over decisions of the Mining Council is granted by the Mining Act and not section 18-7-10. Therefore, this de novo standard of review does not automatically apply. Appeals from administrative agencies instead typically fall under the APA and its "substantial evidence" standard of review. See S.C. Code Ann. § 1-23-380 (Supp. 2003); Waters v. South Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996).

In Waters v. South Carolina Land Resources Conservation Commission, the South Carolina Land Resources Conservation Commission (SCLRCC) granted J.M. Huber Corporation a permit to mine kaolin in Lexington County. The South Carolina Mining Council affirmed SCLRCC's decision. An appeal was filed in the Circuit Court seeking review of the Mining Council order. The Circuit Court upheld the decision of SCLRCC and the Mining Council. On appeal, our Supreme Court applied the Administrative Procedures Act for appellate review purposes:

> This court's review of an administrative agency's findings of fact are limited. The court "shall not substitute its judgment

for that of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 1994). A court can reverse an agency's findings, inferences, conclusions or decisions only if they are, as appellants here argue, "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. §§ 1-23-380(A)(6)(e), -380(6)(f) (Supp. 1994).

"Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence. Id. Furthermore, the burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence. See Hamm v. AT & T, 302 S.C. 210, 394 S.E.2d 842 (1990).

Applying these principles to the instant case, we find the record contained "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Huber's mining operation would not cause an increase in the radioactive level of the water supply. South Carolina Dep't of Mental Retardation v. Glenn, 291 S.C. 279, 281, 353 S.E.2d 284, 286 (1987). The fact that Kennedy relied on circumstantial rather than direct evidence in forming his conclusions goes to the weight of the evidence. See Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984) (circumstantial evidence and inferences drawn therefrom may be relied on to support a finding of fact of an administrative agency); see also Palmetto Alliance, Inc., 282 S.C. at 433, 319

> S.E.2d at 697 (an agency's findings cannot be overturned "unless there is no reasonable probability that the facts could be as related by [the] witness upon whose testimony the finding is based"). Thus, the agency's decision was neither arbitrary, capricious, nor characterized by an abuse of discretion. See Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987) (an abuse of discretion occurs when a factual ruling is without evidentiary support).

Id. at 226-27, 467 S.E.2d at 917 (footnotes omitted).

Appellants assert that the standard of review was not a litigated issue in Waters. In applying the APA as a standard of review in Waters, our Supreme Court apodictically gave implicit and tacit approbation to the efficacy and applicability of the APA in an appeal from a Mining Council order.

The Mining Act's absence of a statute specifically prescribing a standard of review does not mandate that the Circuit Court apply a generalized standard found in a broadly referenced chapter of the Code, but rather manifests the intent of the General Assembly that the standard of review not depend "'upon which appellate court is to determine the appeal.'" Karl Sitte Plumbing Co. v. Darby Dev. Co., 295 S.C. 70, 76, 367 S.E.2d 162, 166 (Ct. App. 1988) (quoting May v. Hopkinson, 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986)). It is abundantly clear our Supreme Court has applied the APA's "substantial evidence" standard of review to appeals from Mining Council decisions. Concomitantly, the adoption of Appellants' arguments would vary the applicable standard of review from appellate court to appellate court and contradict this legislative intent. See Waters, 321 S.C. at 226-27, 467 S.E.2d at 917 (unmistakably applying the "substantial evidence" standard found in the APA to an appeal of a Mining Council decision). We conclude the language of section 48-20-200—appeals may be taken "in the manner provided by Chapter 7 of Title 18"—offers one seeking appeal of a Mining Council decision the procedural guidelines for doing so and does not convey to the Circuit Court the Chapter's broad standard of review.

The APA defines "[a]gency" as "each state board, commission, department, executive department or officer . . . authorized by law to make regulations or to determine contested cases." S.C. Code Ann. § 1-23-10(1) (Supp. 2003). Because the Mining Council is a commission authorized by law to determine contested cases concerning mine operating permits, it is an agency under the APA's definition. Thus, appeals from the Mining Council's decisions are properly decided under the APA's standard of review. See, e.g., Waters, 321 S.C. at 226-27, 467 S.E.2d at 917.

We find no error in the Circuit Court's application of the "substantial evidence" standard of review to the Mining Council's decision. Not only does the APA control the scope of review utilized by the Circuit Court, but it also requires this Court to apply the "substantial evidence" standard to this appeal.

Under the scope of review established in the APA, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003); Long Cove Home Owners' Ass'n, Inc. v. Beaufort County Tax Equalization Bd., 327 S.C. 135, 488 S.E.2d 857 (1997). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(A)(6)(e), (f) (Supp. 2003); McCraw v. Mary Black Hosp., 350 S.C. 229, 565 S.E.2d 286 (2002); Waters v. South Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996); see also Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (stating court may not substitute its judgment for that of agency as to weight of evidence on questions of fact unless agency's findings are clearly erroneous in view of reliable, probative, and substantial evidence on whole record).

Under this "substantial evidence" standard of review, the factual findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence. Sea Pines Ass'n for the Prot. of

Wildlife, Inc. v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc., 345 S.C. 594, 550 S.E.2d 287 (2001); Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 456 S.E.2d 892 (1995); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004). Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached in order to justify its action. Waters, 321 S.C. at 226, 467 S.E.2d at 917; Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's conclusion from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995); Muir, 336 S.C. at 282, 519 S.E.2d at 591. "[T]he burden is on Appellants to prove convincingly that the agency's decision is unsupported by the evidence." Waters, 321 S.C. at 226, 467 S.E.2d at 917; Tennis v. South Carolina Dep't of Soc. Servs., 355 S.C. 551, 558, 585 S.E.2d 312, 316 (Ct. App. 2003).

II. Timeliness of the Appeals

Appellants maintain the Circuit Court erred in affirming the Mining Council's finding that Respondents' appeals were timely. We disagree.

Respondents' arguments related to timeliness arise from the portion of the Mining Act that provides:

> The person taking the appeal **within thirty days after the department's decision** shall give written notice to the council through its secretary that he desires to appeal and filing a copy of the notice with the department at the same time.

S.C. Code Ann. § 48-20-190 (Supp. 2003) (emphasis added). While the language of the Mining Act seems to require notice of appeal to be filed within thirty days of the actual decision, the Act's concomitant regulations

state that the triggering point for the thirty-day clock is the date of notice of the DHEC decision. See 26 S.C. Code Ann. Regs. 89-290(B) (Supp. 2003) ("The person taking the appeal shall within thirty days after **notification** of the Department's decision, give written notice to the Mining Council through its secretary that he desires to take an appeal, at the same time filing a copy of the notice with the Department.") (emphasis added). The Act contains strict public notice requirements regarding the grant of a mine operating permit which make the date of notice easy to determine in those situations. See S.C. Code Ann. § 48-20-70 (Supp. 2003). However, because the triggering occurrence in the case at bar could be classified as a non-event (the decision not to require SCE&G to obtain a permit), concepts of general fairness required the Mining Council to determine the time Respondents received actual notice that DHEC had made the final decision not to require a permit before starting the thirty day clock.

A. The Bursey Appeal

Appellants claim that a conversation between Bursey and a DHEC employee—Craig Kennedy, Assistant Division Director for the Division of Mining and Solid Waste Management—provided Bursey with notice of the DHEC decision well before thirty days prior to the filing of his notice of appeal. As evidence of Bursey's knowledge of the DHEC decision, Appellants presented a letter from Bursey to DHEC dated June 29, 2001, which stated in part: "It is my understanding that DHEC staff has determined that the quarry operation need not be permitted." Appellants allege that this letter constitutes proof of Bursey's actual notice of the decision almost four months prior to the filing of his notice of appeal. Yet, a closer look at the entirety of the record reveals that this letter is not exactly the "smoking gun" Appellants claim.

While the letter does convey Bursey's knowledge that some "staff" at DHEC made a cursory decision not to require a permit, the letter as a whole seems to concern a "storm water permit" and makes no mention of a mine operating permit. At trial, Bursey declared he did not have knowledge of a final decision until October 15 and this letter was merely an unanswered request for more information about DHEC's determinations in regard to the

SCE&G project. The language of the letter supports this view of the evidence. DHEC did not respond to the letter with any finalized determinations about the project. Consequently, the date of Bursey's actual notice of the decision not to require a mine operating permit remains a disputed issue of fact.

Because evidence was presented on the issue, the final determination by the Mining Council was essentially based on the weight the Council placed on conflicting evidence. Pursuant to this Court's scope of review, we "shall not substitute [our] judgment for that of the agency as to the weight of the evidence on questions of fact." Waters, 321 S.C. at 226, 467 S.E.2d at 917 (citing S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003)). We affirm the decision of the Circuit Court as to the timeliness of Bursey's appeal.

B. The MASC Appeal

Appellants aver that a telephone conversation between a MASC official and a DHEC employee constituted actual notice of the DHEC decision not to require a mine operating permit more than thirty days prior to the filing of MASC's notice of appeal. Craig Kennedy, of DHEC, testified the decision was discussed with a MASC official in a telephone conversation on or around September 10, 2001. The record reveals that the communication of this decision was equivocal. Kennedy stated that he agreed to discuss the matter further with his supervisors. The MASC official reasonably interpreted this communication to mean that a final determination had yet to be made. The MASC official testified he did not receive notice of a final decision until September 27, within thirty days of his appeal.

The issue of timeliness as to the MASC appeal was a disputed issue of fact, with substantial evidence presented to the Mining Council on the issue. In weighing the conflicting evidence, the Council determined the MASC official's testimony was more credible and concluded, as a factual matter, the MASC appeal was timely filed.

In appeals of agency decisions, the agency's factual findings are presumed correct and will be set aside only if unsupported by substantial

evidence. Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 456 S.E.2d 892 (1995). A record review reveals that substantial evidence supports the decision. The Mining Council acted within its authority in determining the MASC appeal was timely filed. We affirm the decision of the Circuit Court as to the timeliness of MASC's appeal.

III. The Mine Operating Permit

Appellants argue the Circuit Court erred in affirming the decision of the Mining Council requiring SCE&G to obtain a mine operating permit. Appellants contend the record supports only one conclusion: the activities of SCE&G regarding its dam remediation project are exempted from the definition of "mining" by virtue of being excavation conducted solely in aid of on-site construction. We disagree.

Appellants rely on the part of the Mining Act which, in defining what constitutes "mining" under the Act, states: "Mining does not include excavation or grading when conducted solely in aid of on-site farming or of on-site construction." S.C. Code Ann. § 48-20-40(1) (Supp. 2003). Under Appellants' interpretation of the Act, the plain meaning of the exception dictates that any mine-related activities conducted solely in aid of on-site construction do not require a permit. See Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 97 (2002) ("When the statute's terms are clear and unambiguous, there is no room for an alternate construction, and courts must apply them according to their literal meaning.").

At issue here is the definition of the word "excavation." While not defined in the statute, the parties submit that the literal definition of "excavation" is akin to that of "digging." The Mining Council heard extensive testimony that the SCE&G project, while involving a substantial amount of "excavation," would include blasting with dynamite, de-watering, crushing, stockpiling, and making concrete. The Act's broad definition of "mining" reads in part: "the breaking of the surface soil to facilitate or accomplish the extraction or removal of ores or mineral solids for sale or processing or consumption in the regular operation of a business." S.C. Code

Ann. § 48-20-40(1)(a) (Supp. 2003). There is substantial evidence in the record that the activities of SCE&G, while clearly falling under the Act's broad definition of "mining," go beyond mere "excavation" as contemplated in the exception.

We conclude Appellants, no matter how tenable their position on this issue, have failed to show the decision of the Mining Council was "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(A)(6)(e), (f) (Supp. 2003); Waters, 321 S.C. at 226, 467 S.E.2d at 917. The Circuit Court ruled: "It was not arbitrary and capricious, nor an abuse of discretion in the court's view for a group of experts in the field of mining to look at a project to construct the biggest quarry in South Carolina and determine that it is more than excavation in aid of on-site construction." We find the record contained "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'" that the project went beyond the exception and required a mine operating permit. See Waters, 321 S.C. at 226, 467 S.E.2d at 917 (quoting South Carolina Dep't of Mental Retardation v. Glenn, 291 S.C. 279, 353 S.E.2d 284 (1987)).

CONCLUSION

We rule the Circuit Court correctly applied the APA's "substantial evidence" standard of review to the appeal from the Mining Council's order. There exists on the record substantial evidence to support the order of the Mining Council. Accordingly, the decision of the Circuit Court is

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beckmann Concrete Contractors, Inc., **Respondent,**

v.

United Fire and Casualty Co. and Golf Construction of America, **Defendants,**

Of Whom United Fire and Casualty is the **Appellant.**

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 3814
Heard May 12, 2004 – Filed June 1, 2004

VACATED and REMANDED

Neil S. Haldrup, of Charleston, for Appellant.

Daniel T. Brailsford, of Columbia, for Respondent.

ANDERSON, J.: Beckmann Concrete Contractors, Inc. (Beckmann) brought suit against United Fire and Casualty Co. (United) to collect on a payment bond that United issued to Golf Construction of America (Golf Construction). United was found in default for failing to file an answer. The court entered a default judgment against United. United moved for relief from the judgment alleging it did not receive notice under Rule 55(b)(2), SCRCP, and contending it was entitled to relief under Rule 60(b)(1), SCRCP. The court denied the motion. We vacate and remand.

FACTUAL/PROCEDURAL BACKGROUND

Golf Construction was employed to perform work at the Golf Club at Westcott Plantation. United supplied a payment bond to Golf Construction in the amount of $367,373.06 for the amount of the contract. The contract required Golf Construction to perform clearing, grubbing, and silt fence installation. Subsequently, the work to be performed by Golf Construction was expanded. However, United did not provide any additional payment bond, nor was the scope of its bond expanded to include the additional work of bridge construction or concrete work.

Beckmann was a subcontractor hired to work on the concrete golf cart paths. In a letter, Beckmann notified United that it was asserting a claim on the payment bond. United denied the claim and maintains that it owes nothing under the bond for the work performed by Beckmann. Beckmann subsequently filed a Summons and Complaint, alleging United issued a payment bond and is liable under that bond for the work performed by Beckmann. Beckmann averred it is owed $80,938.25.

Beckmann's counsel filed an Affidavit of Default, claiming United had failed to answer the complaint and failed to serve a notice of appearance. Beckmann filed a Certification and Petition for Default Judgment which iterated its claim of damages in the amount of $80,938.25, asserted the damages were liquidated damages, and claimed to have attached supporting

documentation for the damages. The Certification and Petition for Default Judgment provided:

> The undersigned attorney for Plaintiff hereby certifies that this application for default judgment, pursuant to Rule 55, SCRCP, against United Fire and Casualty Company is based upon a complaint alleging a cause of action based upon a liquidated debt; and further certifies that the following documents are either attached or have been filed with the Clerk of Court in support of the foregoing, to wit:
>
> a. Summons and complaint;
> b. Proper proof of legal service upon the defendant, United Fire and Casualty Company;
> c. Proper documentation supporting liquidated demand in the amount of eighty thousand nine hundred thirty-eight dollars and twenty-five cents ($80,938.25) set forth in complaint as provided by statute; together with proper documentation for award of attorney's fees and interest, if applicable, pursuant to the terms of a written agreement; and
> d. Affidavit of Default.

The court entered an order of default judgment against United and awarded $80,938.25 to Beckmann. United filed a motion for relief from the default judgment. United argued notice was required under Rule 55(b)(2), SCRCP, because the damages were not liquidated or sum certain damages. Additionally, United contended the judgment should be set aside under Rule 60(b)(1), SCRCP, or Rule 55(c), SCRCP, because the failure to answer was the result of excusable neglect or good cause.

The court found the claim was for liquidated damages and, therefore, notice was not required. The court concluded the reasons alleged by United for failing to file an answer were neither "excusable neglect" under Rule 60(b)(1) nor "good cause" under Rule 55(c).

STANDARD OF REVIEW

The power to set aside a default judgment is addressed to the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Frank Ulmer Lumber Co. v. Patterson, 272 S.C. 208, 250 S.E.2d 121 (1978); In re Estate of Weeks, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Estate of Weeks, 329 S.C. at 259, 495 S.E.2d at 459.

LAW/ANALYSIS

I. Unliquidated Damages

United claims the damages alleged by Beckmann were not liquidated damages and Beckmann did not follow the procedure mandated by Rule 55(b)(2), SCRCP, in regard to unliquidated damages. United argues the damages were unliquidated and, therefore, it was entitled to notice of the damages hearing.

When the defendant has not answered or otherwise appeared, there is no requirement that notice be given before entering a default judgment. See Rule 55(b), SCRCP; Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897 (1995). However, when the relief which is sought is unliquidated damages, Rule 5(a) specifically states that "notice of any trial or hearing on unliquidated damages shall also be given to parties in default." Rule 5(a), SCRCP.

In Lewis v. Congress of Racial Equality, 275 S.C. 556, 274 S.E.2d 287 (1981), our Supreme Court declared: "In liquidated-damages cases, the amount is usually a sum certain, or at least the amount is capable of ascertainment by computation." Id. at 560, 274 S.E.2d at 289. Black's Law Dictionary defines liquidated damages as "[a]n amount contractually

stipulated" in contrast to unliquidated damages which are "[d]amages that . . . cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." Black's Law Dictionary 395-97 (7th ed. 1999). Liquidated damages "are damages the amount of which has been made certain and fixed either by the act and agreement of the parties or by operation of law to a sum which cannot be changed by the proof." 22 Am. Jur. 2d Damages § 489 (2003). "They are also defined as damages the amount of which has been ascertained by judgment or by the specific agreement of the parties or which are susceptible of being made certain by mathematical calculation from known factors." Id. "In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict." Id.

A "liquidated claim" is "[a] claim for an amount previously agreed on by the parties or that can be precisely determined by operation of law or by the terms of the parties' agreement." Black's Law Dictionary 240. Finally, an "unliquidated claim" is defined as "[a] claim in which the liability of the party or the amount of the claim is in dispute." Id.

Beckmann filed its complaint alleging its right to collect on the payment bond provided by United. Beckmann specifically asked for "eighty thousand nine hundred thirty-eight dollars and twenty-five cents ($80,938.25), plus a reasonable attorney's fee as determined by the Court, interest in an amount to be proven at trial, and whatever other relief might be proper." There is no indication this is an amount agreed upon by the parties.

Additionally, the claim was clearly in dispute. When Beckmann first asserted its right to collect on United's payment bond, United denied the claim pending further information. United maintained the information provided indicated the claim was outside the scope of the bond provided by United to Golf Construction.

In Hecht Realty, Inc. v. Hastings, 262 S.E.2d 858 (N.C. Ct. App. 1980), the Court of Appeals of North Carolina discussed whether a claim was for liquidated damages:

> The mere demand for judgment of a specified dollar amount does not suffice to make plaintiff's claim one for "a sum certain" as contemplated by Rule 55(b). Such a demand is normally included in the prayer for relief in every complaint in which monetary damages are sought, including complaints alleging claims for damages for bodily injuries caused by a defendant's negligence. The complaint in the present case alleged a breach of contract by the defendant, but nothing in the allegations of the complaint makes it possible to compute the amount of damages to which plaintiff is entitled by reason of the breach.

Id. at 859-60 (emphasis added). Accordingly, the trial court erred in finding the claim made by Beckmann was for liquidated damages or a sum certain.

The claim by Beckmann was for unliquidated damages. In the case of unliquidated damages, Rule 55(b)(2) states: "Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action." Rule 55(b)(2), SCRCP (emphasis added). Concomitantly, it was improper for the trial court to enter a default judgment against United without conducting a damages hearing after notice to United pursuant to Rules 55(b)(2) and 5(a).

II. Liquidated Damages

Beckmann asseverates that the claim was one for a sum certain, which could be computed by the trial court. United asserts that if the damages were liquidated, Beckmann did NOT follow the procedure required by Rule 55(b)(1), SCRCP.

Even if we were to construe the claim as one for liquidated damages, Beckmann failed to follow the proper procedure outlined in Rule 55(b)(1) for obtaining a default judgment. Rule 55(b)(1) explicates:

> When the claim of a party seeking judgment by default is for a liquidated amount, a sum certain or a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs against the party against whom judgment by default is sought, if that party has been defaulted for failure to appear and if such party is not a minor or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

Rule 55(b)(1), SCRCP (emphasis added).

The complaint was not a verified pleading. Thereafter, Beckmann filed an Affidavit of Default and a "Certification and Petition for Default Judgment" (Certification), which stated the claim against United was "based upon a liquidated debt" and further asserted various documents were attached. The documents do not appear in the record and there is no indication they were received by the trial court or attached to the Certification. The Certification was not in the form of an affidavit and was not signed by an agent for Beckmann but by counsel only in the capacity as attorney.

Beckmann failed to file a verified pleading or an affidavit of the amount due. Thus, Beckmann failed to properly present proof of the nature of its claims such that the trial court would be able to calculate or otherwise verify the amount.

In the case sub judice, Beckmann did NOT comply with Rule 55(b)(1), SCRCP: (1) Beckmann did not file a verified pleading or an affidavit; and (2) no supporting documents in any form or fashion were attached to the Certification or filed in the office of the clerk of court.

CONCLUSION

The claim by Beckmann was for unliquidated damages, requiring complete and full compliance with the procedure outlined in Rule 55(b)(2). Beckmann failed to follow Rules 55(b)(2) and 5(a).

Alternatively, even if Beckmann's claim was liquidated, Beckmann did NOT follow the mandate of Rule 55(b)(1).

We vacate the judgment of default and remand to the Circuit Court for a damages hearing after proper notice is provided pursuant to Rules 5(a) and 55(b)(2).

VACATED and REMANDED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Edens, Personal Representative of the Estate of Christopher Edens, deceased, **Appellant,**

v.

Loris Bellini, S.p.a., Camel Robot S.r.i., Symtec, Inc., IDEA, Inc., Milliken & Company, Kelvin Statom, Kevin Gingerich and Dale Coy, **Defendants,**

Of whom Milliken & Company, Kelvin Statom, Kevin Gingerich and Dale Coy are the **Respondents.**

Appeal From Greenwood County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 3815
Submitted May 12, 2004 – Filed June 1, 2004

AFFIRMED

Stephen R. H. Lewis and Karen Creech, both of Greenville, for Appellant.

Mark W. Bakker and Henry L. Parr, Jr., both of Greenville, for Respondents.

ANDERSON, J.: Susan Edens, personal representative of the Estate of Christopher Edens (the Estate), filed wrongful death and survival actions against Milliken & Company, and three of its employees, Kelvin Statom, Kevin Gingerich, and Dale Coy (collectively, Respondents). The trial judge dismissed the claims pursuant to Rules 12(b)(1) and 56 of the South Carolina Rules of Civil Procedure. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On February 10, 1998, during the course of his employment as a subcontractor at Milliken's Abbeville plant, Christopher Edens was struck and crushed to death by a piece of machinery. Edens' employer, Sanders Brothers, Inc., had assigned him to the Abbeville plant where he assisted Milliken employees in various plant-related projects for about a year prior to his fatal on-the-job accident. During the morning and early afternoon on the day of the accident, Edens had been assisting Milliken employees install a cylinder on the door of a dye vat in the robotic shuttle area.

The area of the plant where the accident occurred had a massive robotic shuttle which moved back and forth on tracks to transport wool to and from dye vats where the wool was dyed. Along with other safety devices, pressure-sensitive "safety mats" were positioned on the floor between the dye vats. Once stepped upon, these mats would automatically stop the shuttle's movement.

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

Depositions of several Milliken employees revealed that, on the morning of the accident, Statom, the shuttle operator, had become "aggravated" because the safety mats were repeatedly stepped upon, stopping the robotic shuttle. As a result, Gingerich, acting on his own volition, disconnected the safety mats in his particular area of the plant floor. After disconnecting the mats, Gingerich warned Statom that Sanders Brothers employees would be working in that area and instructed him not to send the shuttle there. On the few occasions when the robotic shuttle approached the portion of the tracks where the employees were working on the dye vat project, the individuals working there were asked to leave the pathway of the shuttle so that it could pass through.

After work on the dye vat in this area was completed, both the Milliken employees and subcontractors dispersed. However, the safety mats were not reconnected. Later in the day, Edens returned to this dye vat area to check whether there was any leakage. The Milliken shuttle operator, unaware anyone was in the vicinity, activated the robotic shuttle in the dye vat area. The shuttle pinned Edens against a dye vat. He ultimately died from his injuries.

The Estate filed a Workers' Compensation suit against Edens' employer, Sanders Brothers, Inc., a mechanical contracting firm. The Workers' Compensation Commission awarded the Estate benefits for Edens' accidental death. On August 5, 1999, the Estate filed wrongful death and survival actions against various manufacturers and distributors of the allegedly defective machinery, averring negligence, strict liability, and breach of warranty.

On August 17, 2001, during the discovery process, the Estate moved to amend the complaints to include Milliken and individual Milliken employees,

Statom, Gingerich, and Coy,[2] as defendants with regard to a negligence cause of action.[3] The motion to amend was granted.

Respondents moved to dismiss the claims pursuant to Rules 12(b)(1), 12(b)(6), and 56, SCRCP. The Circuit judge granted the motion to dismiss pursuant to (1) Rule 12(b)(1) holding the court "lack[ed] subject matter jurisdiction because of the exclusivity provisions of the Workers' Compensation Act[4] when there is no evidence that [Respondents] deliberately or specifically intended the injury to occur" and (2) Rule 56 "because the statute of limitations expired before [the Estate]'s causes of action against the [Respondents] were asserted in this Court." The trial judge then entered judgment for Respondents pursuant to Rule 54(b), SCRCP.

ISSUE

> Did the Circuit Court err in concluding the Estate's action was barred by the exclusivity provision of the South Carolina Workers' Compensation Act?

STANDARD OF REVIEW

Coverage under the Workers' Compensation Act depends on the existence of an employment relationship. McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947); see also Gray v. Club Group, Ltd., 339 S.C. 173, 184, 528 S.E.2d 435, 441 (Ct. App. 2000) ("Before provisions of

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[2] Dale Coy was the engineering services manager for the dye package area at Milliken's Abbeville plant.

[3] This appeal relates solely to the tort liability of Milliken and Milliken employees.

[4] S.C. Code Ann. §§ 42-1-10 to 42-19-50 (1985 & Supp. 2003).

the Workers' Compensation Act can apply, an employer-employee relationship must exist; this is an initial fact to be established."). Workers' Compensation awards are authorized only if an employer-employee relationship exists at the time of the injury. Dawkins v. Jordan, 341 S.C. 434, 534 S.E.2d 700 (2000).

Whether or not an employer-employee relationship exists is a jurisdictional question. Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002); South Carolina Workers' Compensation Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995); see also Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998) (existence of employer-employee relationship is jurisdictional question; injured worker's employment status, as it affects jurisdiction, is matter of law for decision by court and includes findings of fact which relate to jurisdiction). The determination of whether a worker is a statutory employee is jurisdictional and therefore the question on appeal is one of law. Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 523 S.E.2d 766 (1999); Glass v. Dow Chem. Co., 325 S.C. 198, 482 S.E.2d 49 (1997). As a result, this Court has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence. Harrell, 337 S.C. at 320, 523 S.E.2d at 769; Glass, 325 S.C. at 202, 482 S.E.2d at 51; see also Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963), overruled in part on other grounds by Sabb v. South Carolina State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002) (existence or absence of employment relationship is jurisdictional fact which court must determine based on review of all evidence in record).

Where the issue involves jurisdiction, the appellate court can take its own view of the preponderance of the evidence. Nelson, 349 S.C. at 594, 564 S.E.2d at 112. It is South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. Dawkins, 341 S.C. at 439, 534 S.E.2d at 703.

The court may consider affidavits on a question of law in a jurisdictional motion without converting the motion into one for summary judgment. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, rather than a motion for summary judgment pursuant to Rule 56, SCRCP. Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995), overruled on other grounds by Sabb v. South Carolina State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002). If a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the trial court should treat the motion as if it were a Rule 12(b)(1) motion to dismiss. Id.

LAW/ANALYSIS

I. Exclusivity Provision of the Workers' Compensation Act

The Estate argues the trial judge erred in finding the Estate's action was barred by the exclusivity provision of the South Carolina Workers' Compensation Act (the Act). We disagree.

The Act contains an "exclusivity provision." See Sabb v. South Carolina State Univ., 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002) ("Because Sabb's claims, as employee of University, arose out of and in the course of her employment, the Workers' Compensation Act . . . provides the exclusive remedy for her."). This exclusivity provision is found at section 42-1-540:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

S.C. Code Ann. § 42-1-540 (1985) (emphasis added).

The Workers' Compensation Act is the exclusive remedy against an employer for an employee's work-related accident or injury. Fuller v. Blanchard, Op. No. 3763 (S.C. Ct. App. filed March 22, 2004) (Shearouse Adv. Sh. No. 12 at 16); see also Strickland v. Galloway, 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct. App. 2002) ("In circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident, the Act provides the exclusive remedy against the employer."). The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001).

"The exclusive remedy doctrine was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee." Strickland, 348 S.C. at 646, 560 S.E.2d at 449. The immunity is conferred not only on the direct employer, but also on co-employees. Id.

Under the exclusivity provision, a Workers' Compensation action is the exclusive means to determine claims against an individual's employer for work-related accidents and injuries. In the instant case, however, Edens was not a Milliken employee. Rather, he was employed by Sanders Brothers, and was thus a Milliken subcontractor.

Coverage under the Act is generally dependent on the existence of an employer-employee relationship. McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947); Tillotson v. Keith Smith Builders, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004). There are certain statutory exceptions to this general rule. One of these exceptions is found in § 42-1-400 of the Act which, under some circumstances, imposes liability on an employer or business owner for the payment of compensation benefits to a worker not directly employed by the employer. The Act specifically provides statutory employees are included within the scope of the Act:

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (1985).

Three tests are applied in determining whether the activity of an employee of a subcontractor is sufficient to make him a statutory employee within the meaning of § 42-1-400:

> (1) is the activity an important part of the owner's business or trade;
> (2) is the activity a necessary, essential, and integral part of the owner's trade, business, or occupation; or
> (3) has the identical activity previously been performed by the owner's employees?

Boone v. Huntington and Guerry Elec. Co., 311 S.C. 550, 430 S.E.2d 507 (1993); Riden v. Kemet Elec. Corp., 313 S.C. 261, 437 S.E.2d 156 (Ct. App. 1993); see also Meyer v. Piggly Wiggly No. 24, Inc., 338 S.C. 471, 473, 527 S.E.2d 761, 763 (2000) (holding there are three tests used to determine whether an employee was "engaged in an activity that is part of the owner's trade, business, or occupation"); Smith v. T.H. Snipes and Sons, Inc., 306 S.C. 289, 411 S.E.2d 439 (1991) (listing the three factors of the statutory employee test); Revels v. Hoechst Celanese Corp., 301 S.C. 316, 318, 391 S.E.2d 731, 732 (Ct. App. 1990) (finding the test used to determine if one is a statutory employee is "whether or not [the work] being done is or is not a part of the general trade, business or occupation of the owner."). If the activity at issue meets even one of these three criteria, the worker qualifies as the

statutory employee of the owner. Olmstead v. Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003). Any doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act. Riden, 313 S.C. at 263, 437 S.E.2d at 158.

Michael McGill, Edens' supervisor at Sanders Brothers, was assigned to Milliken's Abbeville plant. McGill stated:

> At the time of Mr. Edens' accident, Sanders' employees primarily assisted Milliken's maintenance associates when they requested assistance. On the morning of the accident, Mr. Edens was assisting Milliken associates, under their direction, with a modification of a dye vat in the dye package plant. Maintaining operations equipment in the dye package plant was an important and necessary part of Milliken's business at the Abbeville Plant. Mr. Edens, like other Sanders employees, assisted Milliken associates with various equipment maintenances and modifications throughout the dye package plant. With regard to the dye vat modification in particular, Mr. Edens did not bring any specific or unique expertise to the project. He was there to assist in the work that had to be done that morning.

In his affidavit, Coy, the engineering services manager for the dye package area at Milliken's Abbeville plant, declared:

> 2. At the time of Mr. Edens' accident, Milliken used employees from Sanders Brothers, Inc. ("Sanders") to assist Milliken's maintenance associates on various machinery maintenance and installation projects throughout the dye plant. On the morning of the accident, February 10, 1998, Mr. Edens was assisting Milliken associates by helping to modify the door to a dye vat in the dye package plant.
>
> 3. The work assigned to Mr. Edens on the day of the accident in the dye vat area was neither special nor unique. He was asked to assist, and was under the direction of, Milliken associates

> when he performed this work. Milliken associates could have performed and were in fact also performing the work he was doing that morning, and had done similar work in the dye vat area previously without the assistance of Mr. Edens or other Sanders employees.
>
> 4. Maintaining operations equipment and machinery in the dye package plant and modifying the dye vats in the dye package plant to make them more productive were important and necessary parts of Milliken's business at the Abbeville plant. Making the dye vats productive was an integral aspect of the dye package plant operations. Therefore, the work done to the door of the dye vat at issue was an important part of Milliken's operations in Abbeville.

The record reveals that Edens' work on the dye vat project satisfies each of the three criteria which independently show that an employee of a subcontractor is a statutory employee under the Act. The Circuit judge found that Edens was Milliken's statutory employee on the date of the accident. In this appeal, no issue is raised in regard to the status of Edens as Milliken's statutory employee on the date of the accident.

Based on the three criteria articulated in Meyer, Boone, and Smith, and the conclusion of the Circuit judge, we affirm the finding that Edens was Milliken's statutory employee on the date of the accident.

If a worker is properly classified as a statutory employee, his sole remedy for work-related injuries is to seek relief under the Workers' Compensation Act. Hancock v. Wal-Mart Stores, Inc., 355 S.C. 168, 584 S.E.2d 398 (Ct. App. 2003). He may not maintain a negligence cause of action against his direct employer or his statutory employer. Neese v. Michelin Tire Corp., 324 S.C. 465, 478 S.E.2d 91 (Ct. App. 1996), overruled on other grounds by Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (2000). The exclusivity provision of the Act applies both to "direct" employees and to those termed "statutory employees" under § 42-1-400. Carter v. Florentine Corp., 310 S.C. 228, 423 S.E.2d 112 (1992), overruled

on other grounds by Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994).

Accordingly, the Estate's sole recourse against the Respondents for Edens' accidental workplace death was a Workers' Compensation recovery.

II. Intentional Tort Exception to the Act

The Estate contends it can pursue a negligence cause of action in this case based upon the intentional tort exception to the Act. We disagree.

An exception to the exclusivity provision exists where the injury is not accidental but rather results from the intentional act of the employer or its alter ego. Cason v. Duke Energy Corp., 348 S.C. 544, 560 S.E.2d 891 (2002); Dickert v. Metropolitan Life Ins. Co., 311 S.C. 218, 428 S.E.2d 700 (1993). Our Supreme Court declared:

> The only exceptions to the exclusivity provisions are: (1) where the injury results from the act of a subcontractor who is not the injured person's direct employer (§ 42-1-540); (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego [Dickert v. Met. Life Ins. Co., 311 S.C. 218, 428 S.E.2d 700 (1993)]; (3) where the tort is slander and the injury is to reputation [e.g., Loges v. Mack Trucks, Inc., 308 S.C. 134, 417 S.E.2d 538 (1992)]; or (4) where the Act specifically excludes certain occupations [S.C. Code Ann. §§ 42-1-350 through -375 (1976 and Supp. 2000)].

Cason, 348 S.C. at 547 n.2, 560 S.E.2d at 893 n.2 (refusing to carve out additional exception to exclusivity provision, holding that the Act does not permit employees injured in a catastrophic explosion to pursue litigation against their employer outside the exclusive remedy provisions of the Act).

The intentional tort exception is created through a deliberate intent to injure:

> The exception to the exclusivity provision is based upon the nature of the act that caused the injury—whether it was intentional or accidental. Only injuries caused by an "accident" are within the jurisdiction of the Commission. Intentional infliction of emotional distress is not an "accident." "[T]he employer will not be heard to allege that the injury was 'accidental' and therefore was under the exclusive provisions of the Workmen's Compensation Act, when he himself intentionally committed the act." 2A Larson, The Law of Workmen's Compensation § 68-11 (1989). **A common law cause of action will not be barred by the exclusivity provisions when the employer manifests a deliberate intent to injure the employee.** This exception is applicable to the intentional infliction of emotional distress. In Stewart [v. McLellan's Stores Co., 194 S.C. 50, 9 S.E.2d 35 (1940)], we recognized that an employee can maintain a common law action for the employer's intentional assault and battery. We extend that rule to allow actions for the intentional infliction of emotional distress. As this is the only type of tort which is involved in this case, we express no opinion as to the application of the exception to other intentional torts.

McSwain v. Shei, 304 S.C. 25, 29-30, 402 S.E.2d 890, 892 (1991), overruled on other grounds by Sabb v. South Carolina State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002) (emphasis added).

In Peay v. U.S. Silica Co., 313 S.C. 91, 437 S.E.2d 64 (1993), the South Carolina Supreme Court inculcated:

> **It is well settled that a common law cause of action is not barred by section 42-1-540 if the employer acted with a deliberate or specific intent to injure the employee.** McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991) (intentional infliction of emotional distress); Stewart v. McLellan's Stores Co., 194 S.C. 50, 9 S.E.2d 35 (1940) (malicious assault and battery). See also 2A Larson's Workmen's Compensation Law § 68.10 (1993) (hereinafter "Larson's"). Peay argues that injuries which are

"substantially certain" to result from an employer's act also should fall within the intentional injury exception to section 42-1-540. We disagree.

"Intent" is a state of mind about the consequences of an act. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts, § 8 (5th ed. 1984 & Supp. 1988). In its most narrow sense, "intent" denotes an actor's specific desire to cause the consequences of his act. See Restatement (Second) of Torts § 8A (1965). However, "intent" may be construed more broadly to include consequences which are not desired. Where an actor knows that consequences are substantially certain to result from his act and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. Id. and comment b. With these differing interpretations of "intent" in mind, we turn to the question whether the intentional injury exception to section 42-1-540 includes injuries that are substantially certain to result from an employer's act.

. . . **Giving the intentional injury exception to section 42-1-540 its most narrow construction, we find that only those injuries inflicted by an employer who acts with a deliberate or specific intent to injure are exempted from the exclusive remedy of workers' compensation coverage.** Accord 2A Larson's, § 68.13. Consequently, we decline to follow North Carolina's adoption of the substantial certainty standard articulated in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Id. at 93-94, 437 S.E.2d at 65-66 (footnote omitted and emphasis added). The standard articulated in Peay regarding employers "also would apply to injuries intentionally inflicted by a co-employee." Id. at 94 n.1, 437 S.E.2d at 66 n.1. Any exception to Workers' Compensation coverage must be narrowly construed. Id. at 94, 437 S.E.2d at 65.

In contrariety to the Estate's argument, Peay is precedential and

controlling in regard to the case sub judice. Our Supreme Court, in Cason v. Duke Energy Corp., 348 S.C. 544, 560 S.E.2d 891 (2002), buttressed, augmented, and maximized the efficacy of Peay.

In his treatise on Workers' Compensation law, Professor Larson academically analyzed the intentional tort exception and its restriction to instances when harm is specifically intended:

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, **the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.**
>
> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, willfully failing to furnish a safe place to work, willfully violating a safety statute, failing to protect employees from crime, refusing to respond to an employee's medical needs and restrictions, or withholding information about worksite hazards, the conduct still falls short of the kind of actual intention to injure that robs the injury of accidental character.
>
> . . . .
>
> If these decisions seem rather strict, one must remind oneself that **what is being tested here is not the degree of gravity or depravity of the employer's conduct, but rather the narrow issue of the intentional versus the accidental quality of the precise event producing injury. The intentional**

> **removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.**

6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 103.03 (2002) (emphasis added and footnotes omitted).

The Estate cannot show Milliken, or any of Milliken's employees, had "a deliberate or specific intent to injure" Edens. See Peay, 313 S.C. at 94, 437 S.E.2d at 65-66 ("[O]nly those injuries inflicted by an employer [or co-employee] who acts with a deliberate or specific intent to injure are exempted from the exclusive remedy of workers' compensation coverage."). There is no evidence in the record that anyone affiliated with Milliken had any intention of harming Edens or any other individual. The Milliken employee who disconnected the safety mats did not do so with the intent to injure anyone. Rather, the mats were disabled because the repeated stopping of the robotic shuttle "aggravated" the shuttle operator. Further, the fact that, after the mats were disconnected, workers on the floor were warned whenever the shuttle passed nearby goes to prove a lack of intent by any of the Milliken staff to cause injury. In addition, the shuttle operator did not have a deliberate or specific intent to harm Edens, as he testified he was unaware Edens was in the dye vat area when the robotic shuttle was sent to the vat. We note the Estate's argument that it is entitled to apply the intentional tort exception is, at best, disingenuous, where a negligence cause of action was clearly pled in the amended complaint.

Moreover, in applying for and receiving a Workers' Compensation recovery, the Estate admitted that Edens' death resulted from an accident in the workplace. The language of the Commission's order states: "It appears that the deceased, Christopher J. Edens, . . . on or about February 10, 1998 . . . sustained an injury by accident arising out of and in the course of said employment which led to his death on that date." (emphasis added).

Based on these undisputed facts, the Circuit Court correctly determined the "intentional tort exception had no application" to the Estate's claims. The affidavits filed by the Estate did not address, much less contradict, the undisputed facts. **The Estate did not submit any evidence suggesting that anyone intended to harm or injure Edens or that an intentional tort occurred.** Concomitantly, the trial judge did not err in concluding the Estate's action was barred by the Workers' Compensation Act.[5]

CONCLUSION

Based upon the foregoing, the trial judge's order granting Milliken's motion for dismissal under Rule 12(b)(1), SCRCP, is

AFFIRMED.[6]

HUFF and KITTREDGE, JJ., concur.

[5] The Estate claims this Court should examine the findings of the Occupational Safety and Health Administration (OSHA) investigation conducted at the Milliken plant after Edens' death. We decline to address this argument as we are not empowered to create an exception to the exclusivity rule based upon post-accident conduct by an employer.

[6] In light of our disposition of the Estate's issue regarding the exclusivity provision, we decline to address the issue as to the statute of limitations.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SCDSS/Child Support Enforcement, O/B/A Washington State and Denisse Brady,	**Plaintiffs,**
of whom SCDSS/Child Support Enforcement is	**Appellant,**

v.

Thomas S. Carswell,	**Respondent.**

Appeal From Greenville County
Stephen S. Bartlett, Family Court Judge

Opinion No. 3816
Heard May 12, 2004 – Filed June 1, 2004

REVERSED AND REMANDED

John Edward Chambers, Jr., of Greenville; for Appellant.

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

ANDERSON, J.: This action arose when the South Carolina Department of Social Services sought to register and enforce an out-of-state child support order. The family court dismissed the action, finding the order had already been registered and superseded by a previous South Carolina order. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

This action initially arose in South Carolina in 1991 when the South Carolina Department of Social Services ("DSS") sought enforcement of a State of Washington order requiring Thomas S. Carswell, a resident of South Carolina and father of two children with Denisse T. Carswell, to pay child support in the amount of $478.00 per month and day care expenses of $278.00 per month. This enforcement action was brought by DSS at the request of Denisse T. Carswell, a resident of Washington, and pursuant to the Uniform Reciprocal Enforcement of Support Act. See S.C. Code Ann. § 20-7-960 (1985). Respondent Thomas S. Carswell ("Carswell") answered and counterclaimed, seeking a modification of the order because of a substantial reduction in wages and a change in circumstance that obviated the mother's need for daycare expenses.

DSS and Carswell consented to a reduction in child support, which resulted in a September 18, 1991 family court order requiring a child support payment of $41.20 per week and a supplemental payment of $10.30 a week to satisfy the arrearages. This order was further modified by three South Carolina orders that either increased amounts of support or altered the payment schedule from a weekly payment to a monthly payment. No South Carolina order ever explicitly nullified the Washington order.

In 2002, DSS filed a Notice of Filing and Registration of Foreign Support Order, which sought to register the Washington order for enforcement, collect arrearages in the amount of $45,333.02, and institute wage withholding. Significantly, this action did not arise because Carswell's support obligation was in arrears, but because DSS contends that it has the right to seek enforcement of the original Washington order. In fact, Carswell

had made advance payments. Carswell filed a motion to dismiss. The family court found only one support order continued to exist, the modifying order issued by the South Carolina court. The court ruled:

> That there exists only one support order, the modified order of support issued on September 18th, 1991 by this Court.
>
> While this Court continued to have jurisdiction to modify its order of support plaintiff sought a modification of the September 18th, 1991 support order, and defendant's child support was increased by this Court's order dated October 7th, 1992.
>
> The only order of child support to be enforced by this Court is the Court's order of October 7th, 1992.

DSS argues the court erred in failing to find there were two enforceable orders, the Washington and South Carolina orders, and in not applying the Full Faith and Credit for Child Support Orders Act to the Washington order.

STANDARD OF REVIEW

In appeals from the family court, the court of appeals has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Davis v. Davis, 356 S.C. 132, 135, 588 S.E.2d 102, 103 (2003); Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999). However, this broad scope of review does not require this court to disregard the findings of the family court. Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003); Wooten v. Wooten, 356 S.C. 473, 476, 589 S.E.2d 769, 770 (Ct. App. 2003).

LAW/ANALYSIS

I. The family court erred in failing to find there existed two enforceable child support orders.

At the time of entry for both the Washington and initial South Carolina orders, the Uniform Reciprocal Enforcement of Support Act ("URESA") governed the enforcement of interstate support orders. While the Uniform Interstate Family Support Act is a successor statutory framework, it did not become effective until July 1, 1994, and URESA remains the applicable law for the enforcement of rights, forfeitures, and liabilities as they stood under URESA. South Carolina Dep't. of Soc. Servs. v. Hamlett, 330 S.C. 321, 324, 498 S.E.2d 888, 890 (Ct. App. 1998).

URESA was designed to improve and extend enforcement of support obligations against obligors in other states. Baugh v. Baugh, 280 S.C. 59, 61, 309 S.E.2d 756, 757 (1983). URESA allows an out-of-state support order to be registered in this State and then enforced as a support order issued by this State. S.C. Code Ann. §§ 20-7-1150 and 20-7-1155 (1985). In 1991, Appellant brought an action pursuant to URESA to enforce a Washington order that required Respondent to pay monthly child support and contribute to daycare expenses. An agreement was made between the parties that Respondent would pay an amount less than the Washington order required, and an order stating that the "Parties Agree" was entered by the court codifying this agreement. This modification of the support order was allowed under URESA. See Balestrine v. Jordan, 275 S.C. 442, 443-44, 272 S.E.2d 438, 438-39 (1980).

In 2002, DSS sought to file and register the Washington order so that it could enforce the support obligation, collect arrearages, and institute wage withholding. The family court dismissed the case after finding only the South Carolina order was entitled to enforcement. This was error.

Importantly, under the statutory framework created by URESA, multiple support orders can exist. Badeaux v. Davis, 337 S.C. 195, 206, 522 S.E.2d 835, 840 (Ct. App. 1999). Section 20-7-1110 of URESA states:

> A support order made by a court of this State pursuant to this subarticle does not nullify and is not nullified by a support order made by a court of this State pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law regardless of priority of issuance unless otherwise specifically provided by the court. Amounts paid for a particular period pursuant to any support order made by the court of another state must be credited against the amounts accruing or accrued for the same period under any support order made by the court of this State.

(emphasis added); see South Carolina Dep't of Soc. Servs. v. Hamlett, 330 S.C. 321, 326, 498 S.E.2d 888, 890-91 (Ct. App. 1998) (citing URESA); see also Roy T. Stuckey, Marital Litigation in South Carolina 656-59 (3d ed., 2001) (discussing URESA and specifically the required compliance with the antinullification clause).

The issue before this court is whether any of the South Carolina orders nullified the Washington order. A careful examination of the initial order, as well as the three subsequent South Carolina orders, fails to reveal any clear intent to nullify the Washington order. The only recognition of a Washington order occurs on the initial South Carolina order. On this order are the words "URESA—Washington (State)," apparently modifying the preprinted title, "Support Order." While this language acknowledges that the Order concerns an out-of-state support obligation governed by URESA, it does not rise to the level of a nullification of the Washington order. Therefore, the Washington order remains extant and enforceable.

II. The Full Faith and Credit for Child Support Orders Act requires that the Washington order be recognized.

An additional legislative response to the need for a uniform and less complex system of interstate child support enforcement actions is the federal Full Faith and Credit for Child Support Orders Act ("FFCCSOA"), which has, as one of its purposes, the desire "to avoid jurisdictional competition and conflict among State courts in the establishment of child support orders." Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, § 2(c)(3), 108 Stat. 4064 (1994) (codified as Historical and Statutory Notes at 28 U.S.C.A. § 1738B (West 2003)). The FFCCSOA achieves this goal by creating a system where some court has continuing, exclusive jurisdiction over any support order. 28 U.S.C.A. § 1738B(d) (West 2003). Prior to ascertaining if Washington had continuing, exclusive jurisdiction, we must determine the efficacy of the FFCCSOA to this case.

The Washington order was dated in 1990 and the South Carolina order was issued in 1991. Both of these orders came prior to the 1994 effective date of the FFCCSOA. Therefore, we must decide if the FFCCSOA can be applied retroactively.

The FFCCSOA does not expressly provide for retroactive application. North Carolina and Georgia have determined the Act can and should be applied retroactively. Georgia Dep't of Human Res. v. Deason, 520 S.E.2d 712, 719-20 (Ga. Ct. App. 1999); Twaddell v. Anderson, 523 S.E.2d 710, 717 (N.C. Ct. App. 1999); see also In re Marriage of Yuro, 968 P.2d 1053, 1057 (Az. Ct. App. 1998); Jennings v. DeBussy, 707 A.2d 44, 46-48 (Del. Fam. Ct. 1997); Matter of Isabel M. v. Thomas M., 624 N.Y.S.2d 356, 357 (N.Y. Fam. Ct. 1995).

These courts first noted the language and purpose of both the Act and the legislative history is of a remedial nature, which suggests a retroactive application to assist in the collection of past arrearages. Deason, 520 S.E.2d at 719; Twaddell, 523 S.E.2d at 717. Under South Carolina law, statutes that are remedial or procedural in nature are generally held to operate retrospectively. See South Carolina Dep't of Revenue v. Rosemary Coin

Mach., Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000); Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund, 277 S.C. 604, 607, 291 S.E.2d 667, 669 (1982); Hercules, Inc. v. South Carolina Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (noting statutes affecting the remedy, not the right, are generally retrospective). Therefore, the provisions of the FFCCSOA should be applied retroactively.

In addition to looking at whether the statute is remedial in nature, the United States Supreme Court has enunciated a test to determine if an injustice would occur as a result of the retroactive application of a law. The three factors to consider are: the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in law upon those rights. Bradley v. Sch. Bd. of City of Richmond, 416 U.S. 696, 717, 94 S.Ct. 2006, 2019, 40 L.Ed.2d 476, 491-92 (1974).

In the case at bar, the FFCCSOA does not impose a new obligation because a parent's support obligation arises at the birth of a child. See generally Lunsford v. Lunsford, 277 S.C. 104, 104, 282 S.E.2d 861, 862 (1981) (finding a parent has a legal obligation to support a minor child); Campbell v. Campbell, 200 S.C. 67, 72, 20 S.E.2d 237, 239 (1942) (recognizing it is nothing less than a "principle of nature" that a parent has an obligation to maintain and support his child). The statute deals with matters of great congressional concern, i.e., the need to enforce interstate child support orders. Deason, 520 S.E.2d at 720; Twaddell, 523 S.E.2d at 717. Finally, the obligor is not deprived of a right that has matured or become unconditional because the preexisting obligation remains the same. Id. Thus, under Bradley, the obligor suffers no injustice by the retroactive application of the FFCCSOA. Id.

Because we have established the FFCCSOA can be applied retroactively, we must discern the impact of the FFCCSOA on this case. The FFCCSOA settles the interrelationship between various support orders by creating a system where there is one court with continuing, exclusive jurisdiction. Roy T. Stuckey, Marital Litigation in South Carolina 653-55 (3d ed., 2001). The FFCCSOA states: "A court of a State that has made a child support order consistently with this section has continuing, exclusive

jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order." 28 USCA § 1738B(d) (West 2003). Washington is the home of the child and has continuing, exclusive jurisdiction, unless the South Carolina order was a modification pursuant to the FFCCSOA.

In order to modify an existing order, the FFCCSOA requires:

> A court of a State may modify a child support order issued by a court of another State if—(1) the court has jurisdiction to make such a child support order pursuant to subsection (i) [requiring no party reside in the issuing state and the order is registered in the State with jurisdiction over the nonmovant party]; and (2) (A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or (B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

28 U.S.C.A. § 1738B(e) (West 2003); cf. Badeaux v. Davis, 337 S.C. 195, 214, 522 S.E.2d 835, 845 (Ct. App. 1999) (applying the FFCCSOA and finding no modification to an out-of-state order filed pursuant to UIFSA).

The order was not modified under subsections (1) or (2)(A) because mother and child resided in Washington at the time of the hearing. Subsection (2)(B) does not apply because there is no evidence in the record that the contestants have filed written consent with Washington for South Carolina to modify the order and assume continuing, exclusive jurisdiction. See Badeaux, 337 S.C. at 214, 522 S.E.2d at 845. The FFCCSOA dictates that Washington has continuing, exclusive jurisdiction and that the Washington order be accorded full faith and credit by South Carolina.

CONCLUSION

Because the family court erred in failing to find there existed two enforceable child support orders and in not applying the FFCCSOA, we

REVERSE AND REMAND.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John D. Wimberly, Appellant/Respondent,

v.

Wayne Barr, Steve Rutland and Roy Rutland, d/b/a South Willow Logging and Roy Rutland Logging and Southeastern Forest Products, Inc., Respondents/Appellants.

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 3817
Heard February 11, 2004 – Filed June 1, 2004

AFFIRMED IN PART, REVERSED IN PART

Todd Raymond Ellis, of Columbia, for Appellant-Respondent.

Arthur E. White, Jr., of W. Columbia, and Robert Buffington, of Columbia, for Respondents-Appellants.

CURETON, A.J.: John D. Wimberly brought this action against Wayne Barr; Steve Rutland and Roy Rutland, doing business as South Willow Logging and Roy Rutland Logging; and Southeastern Forest Products, Inc., for cutting timber on his property without permission. The jury awarded actual and punitive damages. After post-trial motions, the trial judge decreased the amount of actual damages to equal three times the value of the timber pursuant to S.C. Code Ann. § 16-11-615 (2003)[1] (the timber statute). The punitive damages were not altered. Wimberly appeals the reduction of the actual damages. The Rutlands and the logging companies (collectively referred to as Respondents) appeal the failure to reduce the punitive damages.[2] We affirm in part and reverse in part.

FACTS

Wimberly owns 157 acres of wooded property in Orangeburg County which he leases for hunting. Barr is an adjoining landowner. In 1999, Barr sold the harvestable timber on thirty-five acres of his property to Southeastern. Southeastern contracted with the Rutlands to perform the logging.

There was some confusion over the exact location of the dividing line between the properties. Although there was a cleared roadway and flags on Wimberly's property, neither the road nor the flags delineated the property line with Barr. Wimberly was concerned that the loggers would cut timber from his property. On at least three occasions, either Wimberly or his lessees informed Barr of the location of the property line.

Barr testified that he told Mike Grooms, the owner of Southeastern, and Roy Rutland that they were not to cut up to the flagged tract of land. The loggers cut right up to the flagged area, which resulted in the removal of timber from approximately 4.89 acres of Wimberly's property.

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[1] This statute has not been modified since its enactment in 1985. Accordingly, we cite to the current codification of the statute.

[2] Wayne Barr failed to file a Final Appellant's Brief of Respondent/Appellant. Accordingly, we will not consider his issues on appeal.

Wimberly brought this action against Respondents, alleging damages under theories of trespass, negligence, unfair trade practices, conversion, and violation of the criminal statute against removing timber without permission, S.C. Code Ann. § 16-11-580 (2003).[3] Wimberly informed the court before trial that he was not going forward on the claim under that statute.

Wimberly presented several expert witnesses to establish his damages totaling approximately $39,000. Charles Hills, a registered forester, testified that the timber cut from Wimberly's property had a fair market value of $4,163.63. Hills also estimated that it would cost $1,841 to prepare and replant Wimberly's land. Rudy Matthews, an outdoorsman, testified regarding the reduced value of the lease for recreational use of the property. Matthews testified that because the timber on Wimberly's property had been reduced, the property could accommodate fewer hunters. Mathews estimated that had the timber not been harvested, Wimberly could have accommodated nine to ten hunters at $400 per year each. The loss of lease value was estimated at $22,500. Rogers Cobb, a real property appraiser, opined the property was worth $113,000 prior to the harvesting of the timber and approximately $10,958 less after the harvesting.

Respondents moved for a directed verdict, arguing, in part, that Wimberly's damages should be limited to three times the value of the timber cut pursuant to S.C. Code Ann. § 16-11-615 (2003) (providing that when a landowner institutes a civil action for the wrongful harvesting of timber, his damages for the loss of his timber shall not exceed three times the fair market value of the timber). The trial court denied the motion to limit Wimberly's claim to three times the value of the timber and granted Respondents' motion for directed verdict on the claim of unfair trade practices. Wimberly consented to go forward only on the trespass claim. The jury was charged only on the law of trespass and was instructed to determine whether actual or punitive damages were proper. Neither party requested the timber statute be charged to the jury, and the statute was not charged.

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[3] Section 16-11-580 provides that it is "unlawful for anyone to knowingly or wilfully cut, destroy or remove any trees or timber of any kind . . . without the consent of the owner. . . ." S.C. Code Ann. § 16-11-580 (2003).

The jury returned a verdict in favor of Wimberly in the amount of $33,300.00 in actual damages and $30,000.00 in punitive damages. Respondents moved for judgment notwithstanding the verdict (JNOV) to reduce the amount of actual damages pursuant to section 16-11-615 to exactly three times the value of the timber cut. Additionally, they moved for JNOV as to both the actual and punitive damages alleging neither had been proven. In the alternative, they moved for a new trial absolute.

The trial court found the timber statute was the exclusive remedy for Wimberly's actual damages and reduced the actual damages award to $12,490.92, which was three times the value of the cut timber testified to by Wimberly's witness at trial. The court denied the remaining motions, thereby letting stand the $30,000.00 in punitive damages.

Wimberly appeals the grant of the JNOV as to the actual damages and Respondents appeal the trial court's failure to grant a JNOV as to punitive damages.

STANDARD OF REVIEW

Although the parties appeal the trial court's decision on a motion for a JNOV, the trial court's decision was based upon the court's interpretation of a statute. The issue of interpretation of a statute is a question of law for the court. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (holding the determination of legislative intent is a matter of law). Further, whether the timber statute creates an exclusive remedy is a novel question of law. Appellate courts are free to decide novel questions of law "with no particular deference to the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).

LAW/ANALYSIS

Wimberly argues the trial court erred in finding the timber statute is an exclusive remedy. He argues that proceeding under the timber statute is merely one remedy available, and because he proceeded under a trespass cause of action, he could recover all actual and punitive damages.

Respondents contend section 16-11-615 is the exclusive remedy by which Wimberly can recover damages caused by the removal of timber from his property. Respondents argue that because the statute is the exclusive remedy, the trial court erred in failing to grant their motion for a JNOV as to punitive damages.[4]

A.

The main issue in this appeal is whether the timber statute sets forth the exclusive remedy for recovering damages associated with the improper removal of timber or whether a landowner is able to bring additional causes of action. We find the statute does not create the exclusive remedy for all damages associated with the removal of timber.

Section 16-11-615 reads:

> In all criminal prosecutions for violation of the provisions of §§ 16-11-520, 16-11-580, and 16-11-10, relating to cutting or destroying timber, the defendant may plead the payment of not to exceed exactly three times the fair market value of the timber as determined by a registered forester and upon the plea being legally established and the payment of all costs accrued at the time of the plea he must be discharged from further penalty. If it is necessary to institute civil action to recover the fair market value of the timber, the State, in case of state lands, and the owner, in case of private lands, shall receive damages of not to exceed exactly three times the fair market

[4] Respondents have not appealed the finding that they trespassed on Wimberly's property. Nor do they appeal whether there was sufficient evidence to support the jury's finding of punitive damages. The sole issue raised by either side is the application of section 16-11-615 and whether it is an exclusive remedy for the recovery of damages related to the improper cutting of timber.

> value of the timber established by a registered forester if judgment is in favor of the State or the owner.

S.C. Code Ann. § 16-11-615 (2003).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). "Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

Section 16-11-615 has only been discussed in one prior case. In Stroud v. Elliott, 316 S.C. 242, 449 S.E.2d 261 (Ct. App. 1994), this Court determined the actual damages awarded by the jury for the improper removal of timber were not supported by the evidence and were excessive. While the amount was less than three times the fair market value of the timber, this Court refused to affirm on the additional sustaining ground that section 16-11-615 provides for recovery not to exceed three times the fair market value. The case proceeded under causes of action for trespass and to quiet title, not under the timber statute, and this Court noted the statute was never charged to the jury. Stroud, 316 S.C. at 244 n.1, 449 S.E.2d at 262 n.1 ("Section 16-11-615 provides that where an owner of private land brings an action to recover the fair market value of timber, the owner 'shall receive damages of not to exceed exactly three times the fair market value of the timber.' The trial court, however, did not charge this code section to the jury."). The issue of whether the statute provided the exclusive remedy for damages associated with the wrongful harvesting of timber was not addressed in Stroud.

We must look to the language of the statute itself for guidance. The statute is found within a section of the code addressing criminal trespass and the unlawful use of property. It allows a criminal defendant to be discharged from further penalties under a plea if the defendant pays the harmed landowner an amount of damages not to exceed three times the value of the cut timber. The statute also provides that a landowner can institute a civil

action to recover up to three times the value of the cut timber. S.C. Code Ann. § 16-11-615 (2003).

Although the timber statute provides that a landowner may institute a civil action to recover up to three times the fair market value of the timber cut, a clear reading of the statute does not prohibit a landowner from recovering other types of damages. Nothing in the statute provides that it is the exclusive remedy for all kinds of damages. The plain language of the statute clearly limits the damages only in a "civil action to recover the fair market value of the timber . . . " under the statute.

The action in the current case involved more than merely the recovery of the fair market value of the timber. Proceeding under a cause of action for trespass, Wimberly provided evidence of damage to the value of the hunting lease and damage to the fair market value of the property as a whole, in addition to the loss of the fair market value of the timber. While his recovery of damages for the timber may be limited to three times the fair market value of the timber removed, the statute does not express an intent by the Legislature that all damages resulting from that removal be capped at three times the fair market value.

Respondents argue, however, that the Legislature clearly intended the timber statute to be a cap on all types of damages emanating from the wrongful harvesting of timber. Respondents cite to the South Carolina Tort Claims Act[5] as an example of a statute wherein the Legislature created an exclusive remedy and a cap on damages. With certain specified exceptions, the Tort Claims Act provides the "exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." S.C. Code Ann. § 15-78-20(b) (Supp. 2003) (emphasis added). With some exceptions, the Tort Claims Act limits the amount of damages recoverable for any claim to $300,000. S.C. Code Ann. § 15-78-120(a)(1) (Supp. 2003). As the statute specifically notes that it is the exclusive remedy for any tort committed by a governmental employee, Respondents are correct that the Legislature intended to create an exclusive

[5] S.C. Code Ann. §§ 15-78-10 to -200 (Supp. 2003).

remedy under the Tort Claims Act, and the exclusive remedy contains a cap on recovery. However, the language of section 16-11-615 does not contain similar exclusivity language. Accordingly, Respondents' argument is without merit.

Further, Wimberly specifically waived his action under the timber statute before the trial began and proceeded only on a claim for trespass. As in Stroud, the timber statute was not charged to the jury. Because we find the Legislature did not express an intent to make the timber statute the exclusive remedy to recover all types of damages associated with the loss of timber, we also find that we cannot bind a party to restrictions found therein if the case did not proceed under the statute.

To restrict Wimberly's recovery to $12,490.92, when there is evidence in the record of damages in excess of the $33,000.00 in actual damages found by the jury, would supplant the existing common-law right to recover for all damages associated with another's wrongdoing. "The Legislature is presumed to enact legislation with reference to existing law, and there is a strong presumption that it does not intend by statute to change common-law rules." Hoogenboom v. City of Beaufort, 315 S.C. 306, 318 n. 5, 433 S.E.2d 875, 884 n. 5 (Ct. App. 1992) (citing Columbia Real Estate & Trust Co. v. Royal Exch. Assurance, 132 S.C. 427, 128 S.E. 865 (1925)). "A statute is not to be construed as in derogation of common-law rights if another interpretation is reasonable." Id.

We find the Legislature did not intend to eliminate the common law right to collect all damages associated with a wrong. Instead, the Legislature intended to set forth a means for a landowner to recover the fair market value of timber wrongfully harvested in violation of the criminal statute. The plain language of the statute does not prohibit the landowner from also recovering for the other damages that naturally flow from the wrongful harvesting of timber. As such, we find the trial court erred as a matter of law in reducing the amount of actual damages to exactly three times the value of the timber pursuant to section 16-11-615. As the claim proceeded to the jury on a cause of action for trespass, the jury properly awarded actual damages to reflect all damages causally related to the trespass onto Wimberly's property.

B.

Additionally, we find the trial court properly denied Respondents' motion for JNOV as to the punitive damages.

Punitive damages may be awarded for trespass "when a defendant's acts have been willful, wanton or in reckless disregard of the rights of another." Fox v. Munnerlyn, 283 S.C. 490, 493, 323 S.E.2d 68, 69 (Ct. App. 1984). "The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). Trial courts should conduct a post-trial review of punitive damages to determine whether the award of punitive damages was proper. Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) ("Hereafter, to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) . . . 'other factors' deemed appropriate."). "The trial judge has considerable discretion regarding the amount of damages both actual or punitive awarded." Kuznik v. Bees Ferry Assoc., 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000), cert. dismissed, (Jan. 7, 2004).

In denying the Respondents' motion for JNOV as to the punitive damages, the trial court considered the evidence presented at trial and the Gamble factors. Evidence at trial indicated that Wimberly or hunters leasing his property informed Barr several times regarding the location of the property line. Wimberly requested that Barr obtain a survey to insure his property would not be harmed, but Barr did not want to incur the expense. Barr informed the loggers that they should not clear the land near the road or flags. When informed that the loggers were clearing land where they were instructed not to, Barr's wife arrived at the site and informed the loggers to

cease logging on Wimberly's property. The loggers ignored Mrs. Barr's instructions and continued to harvest timber from Wimberly's property.

We find there was evidence that Respondents' actions were willful, intentional, and in disregard of Wimberly's rights. Thus, the trial court did not abuse its discretion in denying Respondents' motion for JNOV as to punitive damages.

CONCLUSION

Because section 16-11-615 does not provide a cap on all damages emanating from the wrongful harvesting of timber, the trial court erred in reducing the amount of the actual damages award to three times the fair market value of the timber wrongfully harvested. The jury's original actual damages award shall be reinstated. The trial court did not err in affirming the jury's award of punitive damages. Accordingly, the decision of the trial court is

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and STILWELL, JJ., concur.