The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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N O T I C E

IN THE MATTER OF MICHAEL JAMES SARRATT, PETITIONER

Michael James Sarratt, who was definitely suspended from the practice of law for a period of nine (9) months, retroactive to February 4, 2010, has petitioned for reinstatement as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Wednesday, August 24, 2011, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

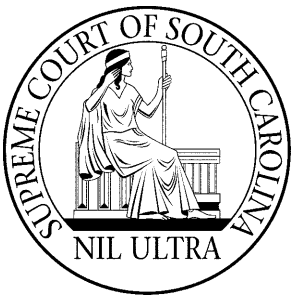
Any individual may appear before the Committee in support of, or in opposition to, the petition.

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

Columbia, South Carolina

July 22, 2011

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
July 25, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mark Felker Dahle, Respondent.

Opinion No. 27010
Submitted June 28, 2011 – Filed July 25, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Richard J. Breibart, of The Law Firm of Richard Breibart, LLC, of Lexington, for respondent.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29, RLDE, Rule 413, SCACR.

Respondent is a member of the South Carolina Bar and the Florida Bar.[1] On July 26, 2010, the Supreme Court of Florida suspended respondent from the practice of law for one (1) year upon adoption of the uncontested report of the referee accepting respondent's

[1] Respondent resides in Florida.

Conditional Guilty Plea for Consent Judgment. In the Matter of Dahle, 42 So.3d 800 (2010). A copy of the Conditional Guilty Plea for Consent Judgment is attached.[2]

Pursuant to Rule 29(a), RLDE, the Office of Disciplinary Counsel (ODC) notified the Court of respondent's suspension by the Supreme Court of Florida.[3] In accordance with Rule 29(b), RLDE, the Clerk provided ODC and respondent with thirty (30) days in which to inform the Court of any reason why the imposition of identical discipline was not warranted in South Carolina.

ODC filed a response stating it had no information that would indicate the imposition of identical discipline was not warranted. Respondent did not file a return.

Rule 29(d), RLDE, provides that the Court shall impose the identical discipline imposed in another jurisdiction unless the attorney or ODC demonstrate or the Court finds that "it clearly appears upon the face of the record from which the discipline is predicated" that the identical discipline is improper for several stated reasons. "In all other aspects, a final adjudication in another jurisdiction that a lawyer has been guilty of misconduct …shall establish conclusively the misconduct … for purposes of a disciplinary … proceeding in this state." Rule 29(e), RLDE.

After thorough review of the record, we conclude that a one (1) year suspension from the practice of law is the appropriate sanction and hereby suspend respondent from the practice of law in this state for one (1) year. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

---

[2] This Court's file contains a copy of the dated and signed Conditional Guilty Plea for Consent Judgment.

[3] Respondent did not notify ODC of his suspension in Florida as required by Rule 29(a), RLDE.

DEFINITE SUSPENSION.

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

IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,

Complainant, Case No. SC10-94

[TFB Case Nos. 2009-30,683(10B);

v. 2010-30,006(10B)]

MARK FELKER DAHLE,

Respondent.

_____/

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

COMES NOW, the undersigned Respondent, Mark Felker Dahle, and files this Conditional Guilty Plea to the formal Complaint filed herein. This plea is filed pursuant to R. Regulating Fla. Bar 3-7.9(b).

1. Respondent is acting freely and voluntarily in this matter.

2. The disciplinary measures to be imposed upon Respondent are as follows:

A. One-year suspension from the practice of law; and,

B. Payment of costs, as set forth more fully herein.

3. This plea is based on the following factual scenarios:

COUNT I

[TFB Case No. 2009-30,683(10B)]

A. In February 2004, Janie Bell Burch died intestate. One daughter, Rochelle Brown survived her. Ms. Brown had seven adult daughters: one of whom was Johnnie Mae Glover.

B. After Ms. Burch's death, a claim for nursing home neglect settled for $93,000. After payment of attorney's fees to the personal injury attorney and costs there was $55,861 net to the estate. However, the $93,000 was a part of the gross estate for purposes of calculation of probate attorney's fees.

C. In addition, the probate estate consisted of a homesteaded house valued at $45,000 and furniture and furnishings valued at $5,000.

D. Ms. Glover, decedent's granddaughter, was appointed Personal Representative (hereinafter referred to as "PR"). The PR signed an attorney's fee agreement with Respondent.

E. The settlement funds were collected and deposited into Respondent's IOTA trust account.

F. On June 30, 2004, Respondent was paid $3,000 in legal fees and $550 for costs.

G. On July 14, 2004, Respondent was paid another $3,800 in attorney's fees from trust. Respondent provided Ms. Glover with supplemental invoices, dated July 15, 2004, reflecting fee charges for extraordinary services.

H. On October 19, 2004, the claims period ended. Seven claims totaling $51,006.23 were received.

I. Over the next 19 months, Respondent was paid an additional $25,710 in attorney's fees.

J. On or about the date of each additional payment, Respondent obtained Ms. Glover's consent for the payment and signature upon a new fee contract reflecting extraordinary work performed for that additional fee.

K. By June 2006, Respondent compromised the Medicaid claim to $7,020.76. Six other claims remained unpaid. Respondent was paid $32,510 in attorney's fees.

L. In December 2006, Ms. Brown hired attorney Matthew D. Ellrod. Mr. Ellrod disputed Respondent's legal fee on behalf of Ms. Brown.

M. To settle the disputed legal fee, Respondent arranged for the estate to be reimbursed $30,000 by his insurance carrier.

COUNT II

[TFB Case No. 2010-30,006(10B)]

N. In June 2009, Respondent self-reported his conduct in violation of the Rules Regulating The Florida Bar, arising during his representation of Lorraine Smith, niece of Aurelia Abelene McKinney, relative to Ms. Kinney's estate.

O. In or about 1991, Ms. McKinney and her husband obtained estate-planning documents. Ms. McKinney's husband died in 1992.

P. On December 4, 1995, Ms. McKinney consulted with Respondent to have him review her estate planning. Among other documents, Ms. McKinney provided Respondent with 2 revocable living

trust documents. One revocable living trust appeared to be executed validly on its face. Respondent was advised that the notary and at least one witness were not present when Ms. McKinney and her husband signed the document. The second revocable living trust was facially not validly executed.

Q. Between 1995 and 2006, Respondent provided estate-planning services to Ms. McKinney. According to Respondent, Ms. McKinney did not want her son, Gerald Lee McKinney, to know about her estate planning. In 1995, she disinherited her son in favor of her niece, Lorraine Smith.

R. In 1995, Respondent prepared a new trust and pour over will for Ms. McKinney.

S. Following Ms. McKinney's death in 2006, seven annuities were paid over to Ms. Smith.

T. In December 2006, Ms. Smith gave Ms. McKinney's son $60,000. Ms. Smith was under no obligation to do so.

U. Ms. McKinney's 1995 will was filed in or about August 2006.

V. In April 2008, Michael D. Minton, an attorney with Dean Mead, inquired about the status of the McKinney Estate planning on behalf

of Ms. McKinney's son. Respondent provided a copy of Ms. McKinney's 1995 trust and will.

W. On July 17, 2008, a demand for a copy of the 1991 trust document was received from Joel C. Zwemer, another attorney with Dean Mead, on behalf of the son.

X. Respondent met with Ms. Smith and advised her that she could: 1) provide both trust documents; 2) provide nothing; 3) provide the trust document that appeared properly executed; or, 4) provide the trust document that did not appear to be executed properly.

Y. On July 28, 2008, Respondent and Ms. Smith elected to give the facially insufficient trust document to Mr. Zwemer. At that time, Respondent did not disclose the existence of the trust document that appeared facially sufficient.

Z. When Respondent and Ms. Smith learned of the potential lawsuit by the son against the estate, Ms. Smith hired Attorney Daniel Allison Carlton from Sarasota to represent her in any litigation.

AA. Neither Respondent nor Ms. Smith advised Mr. Carlton of the second, apparently sufficient trust agreement until June 2009. Respondent continued to maintain his legal conclusion that the second, apparently

sufficient trust agreement was not a valid trust in that it was not executed with the formal requirements of the law.

BB. In August 2008, an estate was opened, naming Ms. Smith as Personal Representative.

CC. On or about November 4, 2008, Respondent met with Mr. Carlton, Ms. Smith and attorneys with Dean Mead. At that meeting, Respondent learned that Mr. Zwemer had filed an Amended Complaint on November 4, 2008.

DD. Thereafter, Mr. Carlton filed a motion to dismiss, arguing, in part, that the plaintiffs failed to state a cause of action.

EE. In the estate matter, the plaintiffs brought a petition to remove Ms. Smith as Personal Representative and to remove Respondent as attorney for the estate.

FF. The hearing on Mr. Carlton's motion to dismiss was held on June 1, 2009. In part, Mr. Carlton argued that the copy of the 1991 trust document appended to the complaint was invalid.

GG. On June 1 or 2, 2009, Respondent revealed the second trust document to Mr. Carlton for the first time. Respondent revealed the second

trust document, as he did not want to perpetuate a fraud through Mr. Carlton's arguments that were based without his knowledge of the second trust.

HH. Upon learning of the second trust, Mr. Carlton advised the judge and opposing counsel of the existence of the second trust.

II. Respondent through his counsel immediately notified The Florida Bar of his conduct and voluntarily provided a sworn statement to Bar Counsel as to his conduct.

4. The Respondent admits that by reason of the foregoing he has violated the following Rules Regulating The Florida Bar: 4-1.5(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee; 4-3.4(a) A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act; and, 4-4.1(a) In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

5. Factors and considerations of mitigation relevant to the discipline include the following:

A. Respondent has no prior disciplinary history [9.32(a)].

B. Respondent has suffered from personal and family health-related problems. [9.32(c)].

C. Restitution made in Count I. [9.32(d)].

D. Respondent self-reported the conduct detailed in Count II, and he has been cooperative throughout this disciplinary proceeding [9.32(e)].

E. Respondent provided affidavits from members of his religious community attesting to his good character [9.32(g)].

F. Respondent's stress related issues, arising from personal and family health-related problems, have impaired his judgment and decision-making, for which he has sought and received treatment [9.32(h)].

G. Respondent has expressed remorse for his misconduct [9.32(l)].

6. Factors and considerations of aggravation relevant to the discipline include the following:

A. Multiple offenses [9.22(d)].

B. Substantial experience in the practice of law [9.22(i)].

7. If this Conditional Guilty Plea is not finally approved by the referee and the Supreme Court of Florida, then it shall be of no effect and may not be used against Respondent in any way.

8. If this plea is accepted, then the Respondent agrees to pay all costs associated with this case pursuant to R. Regulating Fla. Bar 3-7.6(q) for **$1,980.60**. These costs are due within 30 days of the Court order. Respondent agrees that if the costs are not paid within 30 days of this Court's order becoming final, the Respondent shall pay interest on any unpaid costs at the statutory rate. Further, Respondent acknowledges that if, unless otherwise deferred by the Board of Governors of The Florida Bar, the cost judgment is not satisfied within 30 days of the judgment becoming final, Respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6.

9. The Respondent further acknowledges his obligation to pay the costs of this proceeding and that payment is evidence of strict compliance with the conditions of any disciplinary order or agreement, and is also evidence of good faith and fiscal responsibility. Respondent understands

that failure to pay the costs of this proceeding will reflect adversely on any reinstatement proceedings or any other bar disciplinary matter in which the Respondent is involved.

10. This Conditional Guilty Plea for Consent Judgment fully complies with all requirements of the Rules Regulating The Florida Bar.

Dated this 2nd day of July, 2010.

s/ Mark Felker Dahle
MARK FELKER DAHLE
Respondent
Attorney No. 716405

Dated this 2nd day of July, 2010.

s/ David R. Ristoff
DAVID R. RISTOFF
Counsel for Respondent
Attorney No. 358576

Dated this 2nd day of July, 2010.

s/ Kenneth H. P. Byrk

KENNETH H. P. BRYK

Bar Counsel

Attorney No. 164186

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charleston County School District, Appellant,

v.

Robert W. Harrell, in his official capacity as Speaker of the S.C. House of Representatives, Ken Ard in his official capacity as President of the S.C. Senate, Nikki R. Haley in her official capacity as Governor of the State of South Carolina, and the State of South Carolina, Respondents.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 27011
Heard January 18, 2011 – Filed July 25, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Armand Derfner and D. Peters Wilborn, Jr., of Derfner, Altman & Wilborn, both of Charleston, for Appellant.

Attorney General Alan Wilson, Assistant Deputy Attorney General J. Emory Smith, Jr., of Office of the Attorney General; Bradley S. Wright, Charles F. Reid, Michael R. Hitchcock, and Kenneth M. Moffitt, all of Columbia, for Respondents.

JUSTICE HEARN: Charleston County School District (School District) appeals from the circuit court's order granting a Rule 12(b)(6), SCRCP, motion to dismiss its complaint alleging the unconstitutionality of Act. No. 189 of 2005 (Act 189), as well as its decision to dismiss the Governor as a party to this action.[1] Although we affirm the circuit court's dismissal of the Governor, we find School District's complaint sufficiently states a cause of action that Act 189 is unconstitutional. We therefore affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

South Carolina adopted a charter school law in 1996, called the South Carolina Charter Schools Act (Charter Schools Act). The General Assembly amended the Charter Schools Act once in 2002 and again in 2006. In the Charter Schools Act, the General Assembly provided rules governing all aspects of the organization, approval, and operation of charter schools in South Carolina, as well as the obligations of each sponsoring school district.

In 2005, the General Assembly passed Act 189, which provided, in part, as follows:

[1] By order dated July 19, 2011, the current Governor and current President of the Senate were substituted as parties for the former Governor and former President of the Senate.

> Section 5A. (A) The Charleston County School District may not deny a charter school, charter school teacher, or charter school student anything that is otherwise available to a public school, public school teacher, or public school student including, but not limited to, the provisions in subsection (B).
>
> (B)(1) The local school district of a charter school in Charleston County may not charge rent to a charter school that was covered from an existing public school.[2]

By its terms, Act 189 only applied to charter schools in Charleston County, but it did not purport to amend the Charter Schools Act.

School District filed a complaint against Speaker of the House Robert Harrell, President of the Senate Andre Bauer, Governor Mark Sanford, and the State of South Carolina (collectively, Respondents), seeking a declaratory judgment that Act 189 was unconstitutional.[3] The complaint alleged that Act 189 was special legislation in violation of Article III, § 34 and Article XIII, § 7 of the South Carolina Constitution because the subject of charter schools was already comprehensively addressed by the Charter Schools Act and Act 189 only applied to Charleston County's charter schools without any reasonable basis for doing so.

Respondents filed a joint motion to dismiss under Rule 12(b)(6), SCRCP. The circuit court granted Respondents' motion, finding that Act 189

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[2] Other subsections of subsection (B) included provisions regarding Charleston County charter school's application for grants, charter school teacher's nominations for Teacher of the Year, and charter school student's qualifications for Laura Brown Fund Grant. These subsections are not pertinent to this appeal.

[3] Initially, School District's complaint only listed Harrell, Bauer, and Sanford as defendants. These Respondents filed a motion to dismiss in lieu of an answer. After a hearing on this motion, the circuit court ordered that School District add the State as a defendant. School District filed an amended complaint a few weeks later, adding the State as a party as well as a claim that Act 189 is inconsistent with the 2006 amendments to the Charter Schools Act.

was constitutional, Act 189 had not been overruled by the 2006 amendments to the Charter Schools Act, and that the Governor should be dismissed because he had no authority given to him under Act 189. This appeal followed.

ISSUES

School District raises five issues in this appeal:

1. Did the circuit court err in failing to find Act 189 unconstitutional as a special law in conflict with the state-wide Charter Schools Act?

2. Did the circuit court err in finding Act 189 constitutional as a special provision in a general law?

3. Did the circuit court err in granting a motion to dismiss based on matters outside the pleadings?

4. Did the circuit court err in failing to find Act 189 superseded by the 2006 amendments of the Charter Schools Act?

5. Did the circuit court err in dismissing the Governor as a defendant?

STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007). The motion may not be sustained if the facts alleged in the complaint and the inferences drawn therefrom would entitle the plaintiff to relief under any theory. *Id.* "[P]leadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties." *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005) (citing *Stroud v. Riddle*, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973)).

LAW/ANALYSIS

School District argues the circuit court erred by considering matters outside the pleadings in the motion to dismiss, in finding that a logical basis exists for deeming Act 189 a special provision in a general law, and in dismissing the Governor as a party. Respondents assert the circuit court properly considered certain factors regarding Charleston County's unique topography and geography because they were established by case law and statute; that Act 189 falls within the General Assembly's broad discretion to pass legislation impacting an individual school district; and, that because School District cannot link the Governor's authority to Act 189, he was properly dismissed as a party. We find School District's complaint stated a viable cause of action raising the unconstitutionality of Act 189 as special legislation where a general law can be made applicable. We further find that the circuit court erred in considering matters outside the pleadings but correctly dismissed the Governor as a party.

Article XI, Section 3 of the South Carolina Constitution gives the General Assembly the right to "provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." This section imbues the General Assembly with more discretion with respect to legislation impacting a school district than it enjoys in other areas. *See McElveen v. Stokes*, 240 S.C. 1, 10, 124 S.E.2d 592, 596 (1962) ("[T]he scope of the legislative power is much broader in dealing with school matters than is the scope in dealing with various other subjects."). However, this right is not without certain limitations. Article III, Section 34 of the South Carolina Constitution states, in pertinent part: "In all other cases, where a general law can be made applicable, no special law shall be enacted." "[L]egislation regarding education is not exempt from the requirements of Art. III, § 34 (IX)." *See Horry County v. Horry County Higher Educ. Comm'n*, 306 S.C. 416, 419, 412 S.E.2d 421, 423 (1991) (citations omitted).

We outlined the framework to determine whether special legislation exists in *Kizer v. Clark*, 360 S.C. 86, 600 S.E.2d 529 (2004). "A law is general when it applies uniformly to all persons or things within a proper

class, and special when it applies to only one or more individuals or things belonging to that same class." *Id.* at 92, 600 S.E.2d at 532. If the legislation does not apply uniformly, the inquiry then becomes whether the legislation creates an unlawful classification. *Id.* at 93, 600 S.E.2d at 532. However, the mere fact that a law creates a classification does not render it unlawful. *Id.* Instead, the constitutional prohibition against special legislation operates similarly to our equal protection guarantee in that it prohibits unreasonable and arbitrary classifications. *Id.* at 93, 600 S.E.2d at 533. "A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it." *Id.* Accordingly, special legislation is not unconstitutional where there is "a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded." *Horry County*, 306 S.C. at 419, 412 S.E.2d at 423. Thus, where a special law will best meet the exigencies of a particular situation, it is not unconstitutional. *Med. Soc. of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999). "In other words, the General Assembly must have a logical basis and sound reason for resorting to special legislation." *Horry County*, 306 S.C. at 419, 412 S.E.2d at 423 (citation omitted).

As an initial matter, we hold the circuit court improperly considered matters outside the pleadings in deciding Respondents' motion to dismiss. In support of its decision to grant the motion to dismiss, the circuit court cited to a South Carolina federal district court case which found Charleston County has a unique geography with nearly one hundred miles of coastline that is divided by rivers and linked by bridges. *See United States v. Charleston County Sch. Dist.*, 738 F. Supp. 1513, 1521 (D.S.C. 1990), *affirmed in part and vacated in part on other grounds*, 960 F.2d 1227 (4th Cir. 1992). It is a well-settled principle that in resolving a Rule 12(b)(6) motion to dismiss, the court is limited to a consideration of the allegations contained within the four corners of the complaint. *See Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In using the federal district court case to supply facts from outside the complaint, the circuit court impermissibly went beyond the proper parameters of a motion to dismiss.[4] Therefore, we hold the circuit court erred

[4] We recognize that a motion to dismiss may be converted into a motion for summary judgment when the court considers matters outside the pleadings.

when it included matters outside the complaint in deciding this motion to dismiss.

Confining our analysis to the allegations contained in the complaint, and taking them to be true, as we must, we believe School District has stated a sufficient cause of action challenging the constitutionality of Act 189 to withstand a Rule 12(b)(6) motion to dismiss. School District alleges the Charter Schools Act is a general law that applies uniformly to every county in South Carolina. Furthermore, it alleges Act 189 improperly singles out only Charleston County as the recipient of special rules for areas covered by the Charter Schools Act without a rational basis for doing so. For example, School District's complaint points to Sections 59-40-140 and 59-40-170 of the South Carolina Code (Supp. 2009) as examples of where the Charter Schools Act already has laws concerning what Act 189 appears to cover.[5] In general, School District avers the Charter Schools Act places no obligation on a sponsoring district to provide services to a charter school, but Act 189 obligates a school district to do so. According to School District, these provisions illustrate the special treatment Act 189 affords to Charleston County, and School District's complaint alleges there is no reason for this

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Rule 12(b), SCRCP. However, in order for the conversion to take place, the parties must be "afforded a reasonable opportunity to introduce evidentiary matters" of their own. *Johnson v. Dailey*, 318 S.C. 318, 321, 457 S.E.2d 613, 615 (1995). Because School District was not afforded the opportunity to introduce evidence in response to that injected into the matter by the court, we decline to find that this Rule 12(b)(6) motion was converted into a motion for summary judgment.

[5] School District argues that Act 189 requires a school district to provide anything to a charter school that it provides to a public school, while section 59-40-140(E) states the provision of various services to a charter school are "subject to negotiation" between the charter school and the school district. Additionally, School District contends Act 189 forbids the charging of rent to a charter school for use of a building that formerly was a public school, while section 59-40-140(J) envisions charter schools independently acquiring their own facilities and section 59-40-170 requires a school district to grant the charter school "first refusal to purchase or lease," not occupy free of charge, any vacant buildings it no longer wants.

difference. Therefore, School District has stated a sufficient prima facie case that Act 189 is unconstitutional special legislation. However, we express no opinion regarding the ultimate constitutionality of Act 189.

Respondents direct our attention to a 2007 Attorney General's opinion which found Act 189 to be constitutional. The opinion found:

> The purpose of Act No. 189, when considered with the express goals of the Charter School Act of 1996, as amended, is to benefit the entire county of Charleston. Inasmuch as the South Carolina Charter School Act designates charter schools as part of the public school system, there is little doubt that the enactment of Act No. 189 sought to provide for the maintenance and support of the public schools of Charleston County, consistent with Act XI, § 3.

Op. S.C. Atty. Gen., Op. No. 07-139 (Oct. 19, 2007). Attorney General opinions, while persuasive, are not binding upon this Court. Moreover, at this procedural juncture, we are only concerned with whether School District's complaint states a viable cause of action sufficient to withstand a Rule 12(b)(6) motion to dismiss.

Finally, we affirm the dismissal of the Governor as a party to this action. Nothing in School District's complaint demonstrates a nexus between Governor or his authority and Act 189. Instead, School District only alleges that the Governor's ample executive powers render him an appropriate defendant in any suit where the constitutionality of a statute is challenged. This is an insufficient reason to name the Governor as a party defendant. While School District cites to cases where the Governor was a proper party, those cases dealt with the specific powers and responsibilities of the Governor. That plainly is not the case here. Therefore, we affirm the circuit court's ruling that the Governor should be dismissed from this action.

Because we find the circuit court erred in granting the motion to dismiss, we decline to address School District's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

CONCLUSION

We reverse the circuit court's order granting Respondents' motion to dismiss, and remand the case to the circuit court for further proceedings. In so doing, we reiterate that we express no opinion as to the validity or proper interpretation of any of the statutes cited herein. Instead, we merely hold that School District's allegations state a prima facie case that Act 189 is unconstitutional. However, we affirm the circuit court's ruling regarding the dismissal of the Governor as a party to this action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

CHIEF JUSTICE TOAL: Respectfully, I dissent. Although I agree with the majority that the circuit court judge improperly considered facts outside the pleadings, I would nevertheless affirm the circuit court's dismissal of this case because, in my assessment, the allegations in the complaint do not entitle Appellant to relief under any legal theory.

The majority found Appellant stated a prima facie case that Act 189 is unconstitutional because the act improperly singles out the Charleston County School District without a rational basis for doing so. In my opinion, unless there is a conflict between the special and the general law, the question of whether there is a logical basis for invoking a special law need not be reached.

The South Carolina Constitution prohibits the enactment of special or local laws "where a general law can be made applicable," S.C. Const. Art. III, § 34(IX), but permits the General Assembly to enact "special provisions in general laws." *Id.* § 34(X). This Court is deferential to the General Assembly when determining the constitutionality of a local law and will not declare that law unconstitutional "unless its repugnance to the Constitution is clear beyond a reasonable doubt," *Med. Soc'y of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999), or "there has been a clear and palpable abuse of legislative discretion." *Sirrine v. State,* 132 S.C. 241, 248, 128 S.E. 172, 174 (1925), *overruled on other grounds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). As the majority rightly points out, this Court affords the General Assembly even greater deference when evaluating local laws involving school matters. *See McElveen v. Stokes*, 240 S.C. 1, 10, 124 S.E.2d 592, 596 (1962). When local legislation involves public education, the constitutional restriction on the enactment of local laws must be viewed in light of the General Assembly's Article XI duty to "provide for the maintenance and support of a system of free public schools open to all children in the State . . . ." S.C. Const. art. XI, section 3; *McElveen*, 240 S.C. at 10, 124 S.E.2d at 596. Accordingly, this Court has traditionally sustained local laws relating to the state's public education system, *Bradley v. Cherokee Sch. Dist.*, 322 S.C. 181, 470 S.E.2d 570 (1996); *Smythe v. Stroman*, 251 S.C. 277, 289, 162 S.E.2d 168, 173 (1968); *Moseley v. Welch*, 209 S.C. 19, 33, 39 S.E.2d 133, 140 (1946); *Walker v. Bennett*, 125 S.C. 389, 118 S.E. 779 (1923), unless the Court finds the special law to be in direct conflict with the

general law such that the two cannot operate simultaneously, *Smythe v. Stroman*, 251 S.C. 277, 289, 162 S.E.2d 168, 173 (1968); *Kearse v. Lancaster*, 172 S.C. 59, 61, 172 S.E. 767, 768 (1934), or if the Court finds, through a rational basis analysis, that a general law could be made applicable, *Horry County v. Horry County Higher Educ. Com'n*, 306 S.C. 416, 418, 412 S.E.2d 421, 423 (1991).

Based on the allegations contained in the School District's complaint, I see no legal theory under which the School District could prevail. In my opinion, rather than conflicting with the Charter Schools Act, Act 189 merely operates within its framework. In its complaint, the School District alleges that Section 5(A) of Act 189 conflicts with section 59-40-140(D)[6] of the South Carolina Code. Section 5(A) of Act 189 reads:

> The Charleston County School District may not deny a charter school, charter school teacher, or charter school student anything that is otherwise available to a public school, public school teacher, or public school student including, but not limited to, the provisions in subsection (B).

Section 59-40-140(E) states that services provided by the local school district, "including, but not limited to, food services, custodial services, maintenance, curriculum, media services, libraries, and warehousing are subject to negotiation between a charter school and the sponsor or local school district." S.C. Code Ann. § 59-40-140(E) (Supp. 2010). On its face, I do not believe that subsection 5(A) of Act 189 conflicts with section 59-40-140(E). The general law requires that the school district open *all* of its services to negotiation with a charter school, while Act 189 states simply that the School District *may not deny* anything otherwise available to a public school. To me, these provisions work in conjunction.

The School District additionally alleges that subsection (B)(1) of Act 189 conflicts with sections 59-40-140(J) and 59-40-170 of the South Carolina

[6] After a 2006 revision to the Charter Schools Act, this is now section 59-40-140(E) (Supp. 2010). For clarity, I refer to the most current rendering of the provision.

Code. Subsection (B)(1) of Act 189 reads: "The local school district of a charter school in Charleston County may not charge rent to a charter school that was converted from an existing public school." Section 59-40-140(J) states that "[c]harter schools may acquire by gift, devise, purchase, lease, sublease, installment purchase agreement, land contract, option, or by any other means, and hold and own in its own name buildings or other property for school purposes and interests in it which are necessary or convenient to fulfill its purposes."

I read subsection (B)(1) of Act 189 to mean that the School District may not charge rent to charter schools housed in the School District's facilities by virtue of the fact they were formerly public schools. This provision is unrelated to section 59-40-140(J), which provides a listing of methods by which a charter school may *acquire* property. The two provisions can operate simultaneously, as a Charleston county charter school may remain in their buildings rent-free under the local law, but may also acquire property for use under any of the enumerated means of section 59-40-140(J).

I also disagree with the School District's claim that subsection (B)(1) of Act 189 conflicts with section 59-40-170 of the South Carolina Code. Rather, I believe subsection (B)(1) rests neatly within its prescription. Section 59-40-170 requires the Department of Education to provide charter schools, upon request, a list of vacant and unused portions of buildings owned by school districts, and if a school district decides to sell or lease one of these buildings, a charter school "must be given the first refusal to purchase or lease the building under the same *or better* terms and conditions as it would be offered to the public." S.C. Code Ann. §59-40-170 (Supp. 2010) (emphasis supplied). First, this provision refers to a charter school's acquisition of new property, and I believe subsection 5(A) of Act 189 allows a charter school that was converted to a public school to remain in the facility rent-free. But even if subsection 5(A) is not interpreted as narrowly, and it requires the School District to provide additional facilities to converted charter schools, the general law provides two options to school districts—they may either give first right of refusal under (1) the same terms, or (2) better terms. Subsection 5(A) of Act 189 simply requires the School District supply its facilities to converted charter schools under better terms than the

general public. Again, on its face, I do not see that Act 189 conflicts with any provision of the general law. Therefore, I would affirm the circuit court's dismissal of this case because I do not believe the School District's claim can prevail under any legal theory.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kelle Holden, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 27012
Submitted June 22, 2011 – Filed July 25, 2011

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen Ratigan, all of Columbia, for Petitioner.

Appellate Defender Elizabeth A. Franklin-Best, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: This Court granted the State's petition for a writ of certiorari to review the circuit court's order granting post-conviction relief

(PCR) to Kelle Holden as to her guilty plea. The State contends the circuit court judge erred in finding plea counsel ineffective for failing to adequately (1) discuss the charges with Holden, and (2) explain to Holden that she was pleading guilty without a sentence recommendation from the State. We reverse.

I. Factual/Procedural History

In 2005, Holden was arrested and indicted for numerous charges stemming from her participation, along with several other co-defendants, in a series of car break-ins that occurred in Greenville County over a six-month period. Following her arrest, Holden cooperated with law enforcement and gave a statement regarding her involvement.

On July 17, 2006, Holden pled guilty to the following charges: (1) one count of possession of methamphetamine; (2) three counts of grand larceny; (3) three counts of possessing or receiving stolen goods; (4) two counts of breaking and entering a motor vehicle; and (5) one count of attempted breaking and entering a motor vehicle.[1]

The plea judge sentenced Holden to the following concurrent terms of imprisonment: three years for possession of methamphetamine; ten years, suspended during probation, for count one of possessing or receiving stolen goods; five years for attempted breaking and entering a motor vehicle; five years for each count of grand larceny; and five years for each count of breaking and entering a motor vehicle. Additionally, the plea judge sentenced Holden to seven years for count two of possessing or receiving stolen goods; and ten years, suspended on time served and five years' probation, for count three of possessing or receiving stolen goods. These sentences were to run consecutive to the three-year sentence for possession of methamphetamine. Ultimately, Holden received an active sentence of ten years' imprisonment.

[1] The State *nol prossed* fifty-six other charges in consideration of Holden's decision to plead guilty.

Holden appealed her guilty plea and sentences to the Court of Appeals. She, however, voluntarily chose to withdraw her appeal. After the Court of Appeals dismissed the appeal, Holden filed a timely application for PCR in which she alleged that ineffective assistance of plea counsel rendered her guilty plea involuntary.

During the PCR hearing, Holden's plea counsel testified that Holden had sixty-four charges pending against her when he was retained as counsel. He further stated that he met with Holden "two or three times" prior to the guilty plea proceeding. Although counsel did not bring Holden's file to the hearing, he recalled that he "went over the incidents and the charges," discussed the impact of the State's evidence, and discussed the possibility of a plea with Holden during their meetings.

In terms of the plea, counsel testified he received a letter from the solicitor's office four days prior to Holden's guilty plea, wherein the State offered to drop fifty-six charges in exchange for Holden's plea, but declined to offer a sentence recommendation. The letter also stated that the offer would remain open for four months. Counsel further testified he informed Holden that "she might get three, four, [or] five years," but maintained he could not guarantee such a sentence as "[t]he judge could give her more time." Counsel testified that he attempted to procure a sentence recommendation from the solicitor's office, but was unsuccessful. According to counsel, he explained to Holden that there was no sentence recommendation from the State and that she could potentially receive the maximum sentence on each of the indicted charges. Counsel claimed Holden never informed him that she wanted to go to trial.

Holden testified she met with plea counsel on two occasions prior to the guilty plea proceeding. Although Holden acknowledged that counsel discussed the facts of the cases with her, she characterized the length of the discussions as "[v]ery little." According to Holden, plea counsel never reviewed discovery with her and did not discuss the elements of the pending charges. As to sentencing, Holden claimed counsel told her "about [the

State] dropping the charges" in consideration of her decision to plead guilty and that she "would probably get probation, but no more than three years."[2]

When asked about the plea proceeding, Holden acknowledged the judge had questioned her regarding her decision to plead guilty and had discussed the maximum sentences for each of the charges. Holden also recalled the solicitor's statement that there was no sentence recommendation. At the conclusion of her cross-examination testimony, Holden admitted she would not have filed the PCR application had she received less than a three-year sentence.

By written order, the PCR judge granted Holden's requested relief. In prefacing his decision, the PCR judge specifically found that plea counsel's testimony was "not credible" and noted that counsel "failed to bring his criminal defense file to the evidentiary hearing, even though his subpoena instructed him to do so."

As to plea counsel's representation, the PCR judge found that counsel failed to adequately discuss with Holden the State's evidence and the elements of the charges. The judge reasoned that counsel did not have enough time to thoroughly discuss the State's plea offer and its ramifications as the plea offer, which was to dismiss fifty-six charges, was tendered on the Thursday before the Monday plea proceeding.

The judge further concluded that plea counsel "misadvised [Holden] about the sentence she would receive if she accepted the State's plea offer and entered a guilty plea." In reaching this conclusion, the judge referenced testimony from the hearing where "plea counsel assured [Holden that] she would receive a sentence of less than three (3) years and probation if she pled guilty." The judge found that "[t]his was clearly not the case, as the State's

[2] Holden's mother, who testified at the PCR hearing, offered similar testimony wherein she stated plea counsel told her that Holden would receive twenty-four months of probation and be required to pay restitution.

offer was for [Holden] to plead guilty without a sentence recommendation." The judge further found that plea counsel's error was not cured by the solicitor's statement at the guilty plea proceeding regarding the lack of a sentence recommendation.

Finally, the judge ruled Holden had established that plea counsel did not provide effective assistance. As a result, the judge vacated Holden's convictions and remanded for a new trial.

This Court granted the State's petition for a writ of certiorari to review the decision of the PCR judge.

II. Discussion

A.

In challenging the PCR judge's order, the State contends the PCR judge erred in finding plea counsel ineffective for failing to adequately discuss with Holden the State's evidence and the elements of the charges. Additionally, the State asserts the PCR judge erred in finding plea counsel ineffective for failing to adequately explain to Holden that she was pleading guilty without a sentence recommendation from the State.

In support of these assertions, the State claims there is evidence that plea counsel sufficiently reviewed with Holden the charges and the lack of a sentence recommendation. Even assuming that plea counsel was deficient, the State maintains that Holden was not prejudiced as the plea judge read each of the indictments, which contained the elements of each crime charged, and the solicitor presented a factual recitation that formed the basis for the charges. Moreover, the State relies on the guilty plea transcript, which indicates that Holden was fully advised of the maximum sentences she was facing and that she was pleading guilty without a sentence recommendation.

Essentially, the State claims the plea colloquy cured any alleged deficiency in plea counsel's representation in advising Holden of the nature of

the charges, the maximum sentences she was facing, and the lack of a sentence recommendation on the part of the State.[3]

B.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The two-part test adopted in Strickland also "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985). "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

[3] The State also contends that any prejudice Holden may have suffered as a result of counsel's alleged errors was negated by the overwhelming evidence of Holden's guilt. As will be discussed, we find it unnecessary to address this argument as the State's primary arguments are meritorious.

"To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.'" Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill, 474 U.S. at 56 (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy, 339 S.C. at 33, 528 S.E.2d at 420.

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge "if there is any evidence of probative value sufficient to support them." Dempsey, 363 S.C. at 368, 610 S.E.2d at 814. "If no probative evidence exists to support the findings, the Court will reverse." Id. at 368-69, 610 S.E.2d at 814.

C.

Initially, we acknowledge the PCR judge's finding that plea counsel's testimony was not credible.[4] We, however, conclude that plea counsel's lack of credibility is not determinative of whether counsel was ineffective. Even if plea counsel's testimony was not credible, Holden's testimony refutes the PCR judge's conclusion that Holden received ineffective assistance of counsel. Moreover, any deficiency on the part of plea counsel was cured by the plea colloquy.

During the PCR hearing, Holden testified plea counsel informed her that the State would dismiss certain charges in consideration of her decision to plead guilty. She also acknowledged that she discussed the facts of the cases with plea counsel prior to the plea proceeding. Although Holden believed she would receive no more than a three-year sentence, she admitted that plea counsel never discussed or presented a sentence recommendation from the State. Significantly, Holden never testified that she would not have pled guilty if plea counsel had properly explained the charges, the elements of the offenses, or reviewed the State's evidence with her.

Additionally, a review of the plea proceeding reveals that Holden was clearly aware of the elements of the charged offenses, the State's evidence as to the charges, and the potential sentences.

Throughout the proceeding, the plea judge thoroughly questioned Holden about her decision to plead guilty. Initially, the judge read through each of the indictments that outlined the charged offenses. After the solicitor presented a factual recitation and stated that there was no sentencing recommendation, Holden acknowledged that she wished to plead guilty. The judge then instructed Holden regarding the maximum sentences that she could receive for each offense. Following these instructions, Holden stated she understood the nature of the charges and the possible sentences. The

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[4] See Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) (recognizing that appellate courts give great deference to a PCR court's finding when matters of credibility are involved).

judge then specifically identified each of the constitutional rights that Holden would be waiving by pleading guilty. Holden acknowledged the consequences of pleading guilty and admitted she was guilty of the charged offenses. Holden also denied that she had been promised anything to get her to plead guilty. Based on the comprehensive questioning and Holden's answers, the plea judge accepted Holden's plea and determined that it was knowing and voluntary.

In view of this evidence, we conclude that any alleged deficiency in plea counsel's representation was cured by the plea colloquy. See Bennett v. State, 371 S.C. 198, 205 n.6, 638 S.E.2d 673, 676 n.6 (2006) (reversing grant of PCR and stating that "even where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range"); Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003) (reversing grant of PCR and holding that even if plea counsel erroneously informed defendant that his sentence would only be three years, the information conveyed at the plea hearing cured any misconception caused by counsel's alleged inaccurate advice); Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998) (reversing grant of PCR on the ground that there was no evidence to support the PCR judge's finding that applicant received ineffective assistance of counsel due to erroneous sentencing advice where "any misconception was cured at the plea hearing"); Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (reversing grant of PCR and recognizing that in considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing).

Furthermore, on each of the sentencing sheets there is a "checked" box indicating that the plea was "Without Negotiations or Recommendation." By signing each of these forms, Holden manifested her desire to plead guilty and acknowledged the lack of a sentence recommendation. See James v. State, 377 S.C. 81, 85, 659 S.E.2d 148, 150 (2008) (reversing grant of PCR as to applicant's guilty plea where plea sheet and applicant's conduct at plea hearing expressed applicant's desire to plead guilty).

Finally, we find that PCR was not warranted as Holden's primary complaint regarding plea counsel's representation was that she did not receive a sentence of less than three years. As evidenced by the above-outlined testimony, it is clear that Holden hoped and expected to get a lesser sentence. However, "[w]ishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." Wolfe, 326 S.C. at 165, 485 S.E.2d at 371.

Based on the foregoing, we find there is no probative evidence to support the PCR judge's finding that Holden received ineffective assistance of counsel with respect to her guilty plea.

III. Conclusion

In conclusion, we reverse the decision of the PCR judge and reinstate Holden's guilty plea as the record does not support the PCR's judge's finding that Holden received ineffective assistance of counsel.

REVERSED.

TOAL, C.J., PLEICONES, KITTREDGE, JJ., concur. HEARN, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolina Chloride, Inc., Respondent/Petitioner,

v.

Richland County, a South Carolina Political Subdivision, Petitioner/Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 27013
Heard March 15, 2011 – Filed July 25, 2011

AFFIRMED IN PART, REVERSED IN PART

Andrew F. Lindemann, William H. Davidson, II, and Michael B. Wren, of Davidson & Lindemann, of Columbia, for Petitioner-Respondent.

Edward D. Sullivan, Christian Stegmaier, and Amy L. Neuschafer, of Collins & Lacy, of Columbia, for Respondent-Petitioner.

JUSTICE BEATTY: Carolina Chloride, Inc. brought this action against Richland County alleging the County incorrectly advised it of the legal zoning classification of its property and that it lost a potential sale of the property due to the zoning issue. The trial judge directed a verdict for the County on all of Carolina Chloride's claims. The Court of Appeals reversed and remanded as to the claims for negligence and negligent misrepresentation, but upheld the directed verdict as to Carolina Chloride's remaining claims. Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct. App. 2009).[1] This Court granted cross-petitions from the County and Carolina Chloride seeking writs of certiorari to review the decision of the Court of Appeals. We affirm in part and reverse in part.

I. FACTS

In November 1996, Carolina Chloride purchased 7.67 acres of land from IBM for $85,000.00. The land was located on Killian Road in Richland County, near some railroad tracks. Carolina Chloride intended to use the property for storing and distributing calcium chloride, a chemical used to control dust and ice on roads, as well as to treat drinking water. This use required M-2 zoning, which designated a Heavy Industrial District. Robert Morgan was the sole owner of Carolina Chloride.

Prior to the purchase, Carolina Chloride's realtor, Ervin Ott, contacted the County to inquire about the zoning classification of the IBM property. The realtor could not recall who he had spoken to, but stated the person informed him the IBM property was zoned M-2. There is no indication that either Morgan or Ott personally checked the County's Official Zoning Map or the ordinances establishing the zoning districts.

Shortly after Carolina Chloride purchased the property, Morgan, its president, requested a building permit from the County. A question arose about the property's zoning, so Morgan visited Terry Brown, who was then the County's Zoning Administrator. Brown told Morgan he would check into it and get back to him.

[1] Because Carolina Chloride is the initiating party for this lawsuit, we have returned the captioning to its designation as it appeared in the trial court.

In a letter to Morgan dated December 5, 1996, Brown stated that it was his "opinion" that the property "should properly be zoned M-2, Heavy Industrial." Brown added, "The tax map was in error and has been amended to reflect the proper zoning of M-2, Heavy Industrial." (Emphasis added.) There is no indication in the record, however, that Brown ever produced an Official Zoning Map or ordinance showing the property was zoned M-2 by County Council.

Over the next several years, Carolina Chloride added improvements of more than $400,000.00 to the property, including a mini-warehouse business. As part of this process, Carolina Chloride requested and received the necessary County approval. The employees indicated on the various permits and other documents that the property was zoned M-2.

In 2002, Morgan began negotiating with Allen Watson, his son, Luke Watson, and Luke's wife, Johnette, for the sale of the property and the businesses for $1.1 million. Questions arose about an easement and possibly splitting the lot as the Watsons were contemplating selling off the chemical business and expanding the mini-warehouse business. During the negotiations, Morgan and the Watsons contacted the County about whether the Watsons' planned expansion of the mini-warehouse business would be in conformance with the property's legal zoning designation.

On February 13, 2003, John Hicks, whose County letterhead identified him as the Development Services Manager, wrote to Morgan at Carolina Chloride and advised him that the Carolina Chloride property was actually zoned RU (Rural District), not M-2, and that the existing facilities were non-conforming uses that could legally continue, but could not be expanded. Hicks enclosed a copy of the portion of the Official Zoning Map showing the RU designation on Carolina Chloride's parcel. However, Hicks encouraged Morgan to file an application for County Council to rezone the property:

> You may apply to amend the existing zoning map to M-2 or some other suitable zoning district. Zoning map amendments require action by the Planning Commission and adoption of an ordinance by the County Council. The process requires about three months to complete.

Carolina Chloride did not immediately petition for County Council to rezone the property. Instead, Morgan submitted Brown's 1996 letter stating it was his opinion the property was zoned M-2 to County officials and asked them to take corrective action, but they declined to do so. Morgan continued his existing operations on the property during this time without interference from the County.

Some six months later, on August 1, 2003, Carolina Chloride submitted an "Official Zoning Map Amendment Application" seeking rezoning of the property to M-2. On October 21, 2003, County Council gave a third reading to an ordinance officially rezoning the Carolina Chloride property from RU to M-2, and it was attested to by the Clerk of Council on November 4, 2003.

Meanwhile, the Watsons decided not to purchase the Carolina Chloride property and businesses, reportedly due to the zoning issue. However, no written contract had ever been executed by the parties, and Morgan acknowledged that there were several contingencies to their arrangement. For example, Allen Watson wanted Morgan to work for him for a year and exercise due diligence in the handling of some financial records. Additionally, there was an issue regarding how to handle the income from a cell phone tower on the property that went directly to Morgan rather than to Carolina Chloride.

In 2005, Carolina Chloride filed an amended complaint against Richland County asserting numerous civil claims, including, among others, constructive fraud, deprivation of substantive due process, governmental and promissory estoppel, gross negligence, inverse condemnation, negligence, and negligent misrepresentation. Carolina Chloride essentially alleged the County had incorrectly advised it of the legal zoning classification of its property and that it had lost a potential sale due to the zoning issue.

After Carolina Chloride presented its case-in-chief, the trial judge directed a verdict for the County on all of Carolina Chloride's claims. The Court of Appeals reversed and remanded as to the claims for negligence and negligent misrepresentation, but upheld the directed verdict as to the remaining claims Carolina Chloride presented on appeal. The County and Carolina Chloride both appeal.

II. LAW/ANALYSIS

A. THE COUNTY'S APPEAL

The County argues the Court of Appeals erred in reversing the directed verdict in its favor on Carolina Chloride's claims for negligence and negligent misrepresentation.

(1) Negligence and Negligent Misrepresentation

As an initial matter, the County argues the Court of Appeals erred in finding there was a factual question regarding the zoning designation of the property that precluded a judgment in its favor as a matter of law. The County asserts zoning designations are legal, not factual, issues.

The County further argues the Court of Appeals erred in reversing the grant of a directed verdict on the claims for negligence and negligent misrepresentation because those claims are premised on a misstatement of law upon which Carolina Chloride had no justifiable right to rely.

In contrast, Carolina Chloride contends its negligence claim is based not only on the County's statements regarding the property's zoning designation, but also on the County's failure to exercise reasonable care in maintaining and interpreting the Official Zoning Map and associated records. Carolina Chloride asserts the County committed negligence by virtue of the failure of Brown in 1996 or Hicks in 2003 to advise Carolina Chloride of the correct legal zoning classification of its property.

"When upon a trial the case presents only questions of law the judge may direct a verdict." Rule 50(a), SCRCP. The trial judge must deny a motion for a directed verdict when the evidence yields more than one inference or its inference is in doubt. Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999).

"When reviewing a ruling on a motion for directed verdict, we must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Hurd v. Williamsburg County, 363 S.C. 421, 426,

611 S.E.2d 488, 491 (2005). This is the same standard applied by the trial judge. All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C., 385 S.C. 428, 685 S.E.2d 163 (2009).

Neither the trial judge nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). This Court will reverse the trial judge's ruling only when there is no evidence to support the ruling or it is controlled by an error of law. Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171, 648 S.E.2d 585 (2007).

To recover on a claim for negligence, a plaintiff "must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." Tanner v. Florence County Treasurer, 336 S.C. 552, 561, 521 S.E.2d 153, 158 (1999) (quoting Andrews v. Piedmont Air Lines, 297 S.C. 367, 369, 377 S.E.2d 127, 128 (1989)). "The absence of any one of these elements renders the cause of action insufficient." Andrews, 297 S.C. at 369, 377 S.E.2d at 128-29.

"To establish liability for negligent misrepresentation, the plaintiff must show '(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.'" Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (quoting AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992)).

"The duty of care is not a duty to take every possible care, still less is it a duty to be right; it is the familiar duty to exercise that care a reasonable man would take in the circumstances." AMA Mgmt. Corp., 309 S.C. at 223, 420 S.E.2d at 874. "[T]he plaintiff as part of his case must show that his reliance on the misrepresentation was reasonable." Id. "There is no liability for

casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." Id. (emphasis added).

The trial judge directed a verdict on the claims for negligence and negligent misrepresentation on several grounds, including, as to negligent misrepresentation, that Carolina Chloride could have, through reasonable diligence, acquired knowledge of the proper zoning designation from the public records, and that both claims were barred by the South Carolina Tort Claims Act.

The Court of Appeals ruled a question of fact existed as to the proper zoning designation of the property and that Carolina Chloride did not have the ability to determine the true zoning designation from the public records. Carolina Chloride, 382 S.C. at 652, 677 S.E.2d at 901. It also found the claims were not barred by the Tort Claims Act. Id. at 648-51, 677 S.E.2d at 899-901.

On appeal to this Court, the County argues the zoning designation of property is a legislative decision that is established by ordinance, and it is a matter of law, not fact, citing this Court's recent opinion in Quail Hill, L.L.C. v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010). The County asserts the applicable legal zoning classification is not subject to the discretion of government officials, and it cannot be changed except through legislative action by County Council as prescribed by law. Thus, the legal zoning classification of any particular parcel of property may be ascertained only by referring to the ordinance establishing the zoning as well as by referring to the Official Zoning Map of Richland County.

The County contends there is no indication in the record that the Official Zoning Map ever showed the subject property to be zoned M-2 prior to County Council's enactment of the 2003 ordinance changing the zoning from RU to M-2. Further, the record does not support a finding that John Hicks made a mistake in his February 13, 2003 letter about the zoning. Rather, he accurately reported that the Official Zoning Map characterized the property as RU, and he provided a copy of the map to Carolina Chloride. Moreover, contrary to Carolina Chloride's assertion, Hicks's statement was

not an "overruling" of the M-2 classification mentioned by Brown. Rather, Brown was mistaken when he reported that he believed the property to be M-2.

In Quail Hill, the plaintiff alleged it had relied on the mistaken representations of the County, prior to purchasing its property, that the property was zoned RU (Rural District), a classification that would allow it to develop manufactured housing on the property. Quail Hill, 387 S.C. at 227, 692 S.E.2d at 501. The information was conveyed by Richland County Subdivision Coordinator Carl Gosline based on his review of the County's records, including tax records. Id. However, after Quail Hill began development, the County's Zoning Administrator consulted the Official Zoning Map in response to complaints from neighboring landowners and determined the property was actually zoned RS-1, a residential classification that prohibits manufactured homes. Id. at 228, 692 S.E.2d at 502. County Council thereafter denied Quail Hill's request to rezone the property from RS-1 to RU. Id. at 229, 692 S.E.2d at 502. Quail Hill did not appeal from the County's decision, but instead brought a civil action alleging, among other claims, negligence and negligent misrepresentation. Id.

This Court found Quail Hill's claims for negligence/negligent misrepresentation (which were treated as one claim) based on the incorrect zoning information failed as a matter of law. Id. at 240-41, 692 S.E.2d at 508-09. We ruled Quail Hill could not justifiably rely on the representations of County staff as to the proper zoning designation because the plaintiff could have reviewed the Official Zoning Map to ascertain the correct zoning classification of the property. Id. at 241, 692 S.E.2d at 509. Further, we held that misrepresentations as to matters of law are not actionable and that the zoning classification of property is a matter of law, not fact. Id.; see also id. at 238, 692 S.E.2d at 507 (recognizing that the zoning classification of property is a matter of law).

Similarly, in the current appeal, there was a mistake made in advising the property owner of the property's legal zoning classification. Brown incorrectly advised Carolina Chloride, after its purchase, that the property was zoned M-2 based on his review of the "tax map." Brown did not state that he had ever reviewed the Official Zoning Map, however, and the only

documents in the record indicate that the Official Zoning Map has consistently listed this property as being zoned RU, not M-2. The County states part of the confusion might have arisen because when IBM owned the 7.67 acres it sold to Carolina Chloride, it was part of a larger parcel designated as Tax Map Number 17-400-04-02. However, after the 7.67 acres were purchased by Carolina Chloride, the smaller parcel was assigned a different identification, Tax Map Number 17-400-08-04. It is unclear exactly what precipitated the mistake in this case. The zoning classifications of the neighboring parcels in the area varied, however, so it could not be assumed that all of the property in the area held the same classification.

The fact that the error was made by Brown, the Zoning Administrator, rather than another County official, does not negate the fundamental principle recognized in Quail Hill that no action will generally lie for a misrepresentation as to a matter of law. Quail Hill, 387 S.C. at 241, 692 S.E.2d at 509. All individuals are presumed to know the law, including the nature and extent of a government official's authority, and they are charged with the knowledge that an ordinance may be changed only through compliance with proper procedures. Meyer v. Santema, 559 N.W.2d 251 (S.D. 1997). In Meyer, the court observed that the "City's misrepresentations concerned interpretation and implementation of a zoning ordinance, which is a matter of law—misrepresentations of law are not actionable." Id. at 255 (emphasis added).

Although Brown opined that the property was M-2, he stated he was referring to a tax map, not the Official Zoning Map, and only the Official Zoning Map and the County ordinances contain the controlling property zoning classifications. See Richland County, S.C., Code § 26-33 (2003) ("[T]he official copy of the zoning map maintained in the office of the zoning administrator plus official records of the clerk of court regarding actions of the county council to amend district boundaries shall constitute the only official description of the location of zoning district boundaries, and persons having recourse to this ordinance for any purpose are hereby so notified.").

Further, although Brown stated the "tax map" had been "amended" to reflect M-2 zoning, only County Council can enact legislation to change a parcel's legal zoning classification in compliance with the procedures

outlined in the Richland County Code, and such amendments are thereafter officially recorded and reflected on the Official Zoning Map. Brown, as the Zoning Administrator, did not have the authority to "amend" the Official Zoning Map or an ordinance. Rather, only County Council can perform this legislative act. See id. § 26-401 ("Requests for amendments shall be submitted in writing to the zoning administrator whose duty it shall be to present such amendment requests to the planning commission for review and to the county council for determination."). In this case, Brown was not authorized to amend the property's zoning classification and since no Official Zoning Map ever indicated the property was zoned anything but RU, Carolina Chloride could not rely upon Brown's representation as to this matter of law.

In Northernaire Productions, Inc. v. Crow Wing County, 244 N.W.2d 279 (Minn. 1976), the Supreme Court of Minnesota held county officials are not liable in tort for negligently misrepresenting the legal requirements of their zoning ordinance to members of the public who rely on that misrepresentation. The plaintiffs, promoters of a rock concert, sued for damages after they were erroneously advised of the zoning requirements for the area where they had planned to stage a concert. Id. at 280. The court stated "the alleged misrepresentation by the county officials in the case at bar concerned interpretation of the zoning ordinance, a matter of law." Id. at 281. The court stated the general rule is "misrepresentation of law is not actionable." Id.

The court noted its holding was partly "based on considerations of public policy." Id. at 282. There was no dispute that the alleged misrepresentations were made in a good-faith effort to respond to the plaintiffs' inquiries, and were concededly made without malice or an intent to deceive. Id. The court observed: "To subject county officials to the prospect of liability for innocent misrepresentation would discourage their participation in local government or inhibit them from discharging responsibilities inherent in their offices. Their reluctance to express opinions would frustrate dialogue which is indispensable to the ongoing operation of government." Id.

We agree with this reasoning. To hold otherwise would impose an impossible burden on the County (and taxpayers) to act, in effect, as an insurer of all information given by County employees under all circumstances. Due to the sheer volume of inquiries processed by the County, it would be unreasonable to impose a requirement of 100% fail-proof accuracy under the threat of tort liability on matters of law.[2]

Although it is certainly unfortunate that a mistake occurred in this case, Carolina Chloride had no legal right to rely solely upon the representations of County personnel and should have consulted the official record to determine the legal zoning classification of its property. Carolina Chloride's owner and its broker are both experienced in business matters, but it appears that neither Morgan nor his broker personally inspected the County's official records prior to making a sizable investment in developing the property. Despite Carolina Chloride's contention that it is a distinguishable allegation, we find its assertion that the County failed to properly maintain its zoning records merely restates the same essential accusation regarding the erroneous information it was given regarding the property's legal zoning classification. Accordingly, we hold the trial judge's grant of a directed verdict to the County was proper and we reverse the determination of the Court of Appeals as to these two claims.

We take this opportunity, however, to encourage the County to make every reasonable effort to reduce the chances of such errors occurring in the future. For example, routinely informing inquiring property owners that the legal status of the property may be definitively ascertained only through a check of the public records and implementing a system of having more than one employee check the zoning status would all serve to heighten the public's awareness that zoning is a legal matter than cannot be altered by the representations of County employees. Although for public policy reasons the County is not held liable for every innocent error or mistake made by its employees, the County should make every reasonable effort to minimize the chances of such mistakes occurring, which will benefit both the public and the County.

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[2] We offer no opinion on the County's potential liability for misrepresentations not involving a statement of law.

(2) Additional Grounds for Directed Verdict

The County further argues a directed verdict is appropriate on the claims for negligence and negligent misrepresentation based on Carolina Chloride's alleged failure to exhaust its administrative remedies and the application of immunity under the South Carolina Tort Claims Act. Because we have found these claims fail as a matter of law for the reasons stated above, we need not reach the County's remaining arguments.

B. CAROLINA CHLORIDE'S APPEAL

The Court has also granted a cross-petition for a writ of certiorari filed by Carolina Chloride, which raises two issues.

(1) Inverse Condemnation Claim

Carolina Chloride first argues the Court of Appeals erred in upholding the trial judge's directed verdict for the County on its inverse condemnation claim. Carolina Chloride argues Hicks's 2003 letter constitutes "affirmative conduct" that was not a simple mistake, but "a ruling by the County that reversed the existing M-2 zoning designation," causing it harm.

Inverse condemnation is a cause of action by a property owner against a governmental entity to recover the value of property that has been effectively "taken" by the governmental entity, although not through the process of eminent domain. Kiriakides v. Sch. Dist. of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009). "An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property." Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005).

The second method, regulatory inverse condemnation, requires proof of two elements: (1) affirmative conduct, and (2) a taking. Id. at 657, 620 S.E.2d at 80. When the claim stems from an allegation of a temporary denial of less than all economically viable use of the property, the central inquiry is whether the delay ever became unreasonable. Id. at 660, 620 S.E.2d at 81. "Until regulatory delay becomes unreasonable, there is no taking" Id.

Two circumstances are important: (1) the economic impact on the claimant, especially the extent to which the governmental entity has interfered with the claimant's investment-backed expectations, and (2) the character of the governmental action. Id. at 659, 620 S.E.2d at 80.

"To prevail in such an action, a plaintiff must prove 'an affirmative, aggressive, and positive act' by the government entity that caused the alleged damage to the plaintiff's property." WRB Ltd. P'ship v. County of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006) (citations omitted).

"A landowner has the burden of proving damages for the taking of the landowner's property, whether through condemnation proceedings or by inverse condemnation." Kiriakides, 382 S.C. at 14, 675 S.E.2d at 442. "Not all damages that are suffered by a private property owner at the hands of the governmental agency are compensable." Id. "The property itself must suffer some diminution in substance, or it must be rendered intrinsically less valuable." Id.

"[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request." Id. (quoting Cobb v. South Carolina Dep't of Transp., 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005)).

In the current appeal, the trial judge noted that Carolina Chloride did not appeal from Hicks's decision, and he did not believe there could be a claim for a temporary regulatory taking where the event complained of was never appealed. The trial judge further stated that he believed the case of Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005) was controlling and that there had been no regulatory taking.

Upon review, the Court of Appeals found the trial judge properly granted a directed verdict for the County on the inverse condemnation claim. Carolina Chloride, 382 S.C. at 654, 677 S.E.2d at 903. The Court of Appeals found the only time frame in which an alleged taking could have occurred would have been between February 13, 2003, the date of the County's letter, and November 4, 2003, when the County amended the property's zoning to M-2, because at all other times Carolina Chloride used the property in

compliance with M-2 zoning and without any governmental interference. Id. at 654, 677 S.E.2d at 902.

The Court of Appeals further observed that "[t]he sole evidence Carolina Chloride presents of governmental action constituting an affirmative act is Hicks' alleged mistaken assessment of the zoning ordinances applicable to Carolina Chloride's property." Id. The Court of Appeals determined a mistaken assessment of the zoning ordinances applicable to Carolina Chloride's property was not an "affirmative, aggressive, positive act" that damaged Carolina Chloride's property. Id. (citing WRB Ltd. P'ship v. County of Lexington, 369 S.C. 30, 630 S.E.2d 479 (2006)).

We agree the trial judge's grant of a directed verdict on the inverse condemnation should be affirmed for several reasons.

If the trial judge is deemed to have alternatively ruled Carolina Chloride failed to exhaust its administrative remedies, this ruling, right or wrong, would require affirmance as Carolina Chloride did not timely dispute this alternative ground. See, e.g. Richland County v. Palmetto Cablevision, 261 S.C. 222, 199 S.E.2d 168 (1973) (stating an unchallenged ruling, right or wrong, becomes the law of the case).

As to the finding that there was no regulatory taking, this is amply supported by the record. There is no evidence that Hicks erred in advising Carolina Chloride in 2003 that its property was zoned RU. There is no Official Zoning Map or any ordinance in the record indicating that the property was ever legally zoned anything other than RU prior to County Council officially rezoning the property to M-2 in late 2003. Further, the County's notification in 2003 that the property was zoned RU, and the County's requirement that Carolina Chloride follow authorized procedures in having the property rezoned is a proper exercise of its governmental authority. To the extent any other mistakes were made by County personnel, such mistakes do not constitute "an affirmative, positive, aggressive act" such as would support the finding of a taking. Cf. Collins v. City of Greenville, 233 S.C. 506, 105 S.E.2d 704 (1958) (finding no positive act where the city, in attempting to unclog a sewer line, made a mistake that caused an overflow and inadvertently damaged the plaintiff's property).

We agree with the Court of Appeals that Carolina Chloride used its property as if it were zoned M-2 at all times. Carolina Chloride itself delayed for six months in applying for a zoning change after Hicks advised it to do so. Once Carolina Chloride submitted its application, it was quickly processed and approved in three months as Hicks had estimated in his February 2003 letter. During this time, all of Carolina Chloride's existing operations were allowed to continue as if it had an M-2 designation without interference.

Normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like have long been considered permissible exercises of police power and a person "is not entitled to compensation merely because he had to obtain a zoning change to develop his property." Byrd v. City of Hartsville, 365 S.C. 650, 660, 620 S.E.2d 76, 81 (2005).

In Byrd, this Court held an eleven-month delay in acting on a property owner's petition to rezone a portion of his property did not effect a taking as the delay did not affect the property owner's ability to continue using the land and did not cause a disproportionate economic impact upon the owner even though he alleged he had wanted to sell a portion of the property. This Court stated continuation of the existing use of the property is the property owner's "primary expectation" when considering an owner's investment-backed expectations for the property. Id. at 662, 620 S.E.2d at 82 (citing Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978)). We find Byrd is controlling here and that the trial judge and the Court of Appeals properly concluded Carolina Chloride's claim for inverse condemnation fails as a matter of law.

(2) Exclusion of Deposition

Carolina Chloride next argues the Court of Appeals erred in upholding the exclusion of Terry Brown's deposition.

At trial, Carolina Chloride wished to introduce the deposition it had taken of Brown, who was formerly the County's Zoning Administrator. At the time of his deposition, however, Brown had left this position and become

a member of the Board of Adjustment.[3] The trial judge excluded the deposition based on the County's objection pursuant to Rule 32(a)(2), SCRCP, which provides in relevant part that the deposition "of anyone who at the time of taking the deposition was an officer, director, or managing agent" of a governmental agency, corporation, partnership, or association that is a party may be used for any purpose by an adverse party. The County maintained the deposition was not admissible because Brown did not fall within the scope of the rule.

The trial judge rejected Carolina Chloride's only argument that Brown met the requirements of Rule 32(a)(2) because he was currently a member of the Board of Adjustment. The judge's ruling applied only to Brown's deposition testimony and did not prevent Brown from being called as a witness at trial.

The Court of Appeals found no abuse of discretion, stating Carolina Chloride "did not lay any foundation as to why Brown's role on the Board qualifies under Rule 32(a)(2)." Carolina Chloride, 382 S.C. at 644, 677 S.E.2d at 897. The court observed Carolina Chloride could have attempted to demonstrate that Brown qualified as an unavailable witness under Rule 32(a)(3), SCRCP or, if Brown was available, he should have been called as a witness at trial. Id. The court did not reach Carolina Chloride's additional argument referencing Rule 801(d)(2), SCRE because it was not raised to and ruled upon by the trial judge and, therefore, was not preserved since an issue cannot be raised for the first time on appeal. Id. at 645 n.4, 677 S.E.2d at 897 n.4 (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)).

[3] See Richland County, S.C., Code § 26-602 (2003) (stating the Board of Adjustment decides appeals from any order, requirement, decision, or determination made by the Zoning Administrator in enforcing the Zoning Ordinance); see also id. § 26-601.1 (providing the Board of Adjustment shall be comprised of seven members appointed by County Council for a three-year term, and the board shall elect one of its members as chairman for a one-year term).

Carolina Chloride now asserts the Court of Appeals erred in excluding the deposition because the County asked Carolina Chloride not to contact or have ex parte discussions with Brown, so it honored this request and took his deposition instead. Carolina Chloride contends the County treated Brown as its employee by making this request, citing Rule 3.4(f)(1) of the Rules of Professional Conduct, Rule 407, SCACR (observing a lawyer should not request a person other than a client to refrain from voluntarily giving relevant information unless the person is a relative, employee, or other agent of a client); therefore, Brown should be considered the County's employee for purposes of satisfying the requirements of Rule 32(a)(2), SCRCP.

Although we are deeply troubled by the County's seemingly inconsistent positions regarding this witness, Carolina Chloride's argument was not raised to and ruled upon by the trial judge so as to preserve it for review. Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733. We note, however, that Carolina Chloride did proffer Brown's deposition for the record and it has failed to demonstrate any prejudice in its exclusion, in any event. See generally Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008) ("[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice.").

III. CONCLUSION

As to the County's appeal, we reverse the Court of Appeals and hold the trial judge properly granted a directed verdict to the County on the claims for negligence and negligent misrepresentation. As to Carolina Chloride's appeal, we affirm the Court of Appeals, which upheld the exclusion of Brown's deposition and the grant of a directed verdict to the County on the claim for inverse condemnation.

AFFIRMED IN PART, REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Donald M. Brandt, Appellant.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 27014
Heard November 3, 2010 – Filed July 25, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James M. Griffin and Margaret N. Fox, both of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General Mark R. Farthing, all of Columbia, for Respondent.

Daniel A. Speights, C. Alan Runyan and A. Gibson Solomons, all of Speights & Runyan, of Hampton, for Amicus Curiae Elizabeth K. Gooding.

JUSTICE BEATTY: After Donald M. Brandt produced a fraudulent document in a civil proceeding, a circuit court held Brandt in civil and

criminal contempt. In turn, the court dismissed Brandt's legal malpractice action with prejudice and ordered him to serve six months in jail and pay the defendants' attorneys' fees and costs in the amount of $883,621.93.

Subsequently, based on the fraudulent document, the State indicted Brandt for forgery in an amount greater than $5,000.[1] After a jury found Brandt guilty of the indicted offense, the trial judge sentenced Brandt to ten years' imprisonment, suspended upon the service of four years, followed by five years' probation and payment of restitution in the amount of $883, 621.93. Brandt appeals his forgery conviction and sentence. We affirm in part, reverse in part, and remand.

I. Factual/Procedural Background

A. Legal Malpractice Action

In 1998, Brandt sued Elizabeth K. Gooding and her law firm Gooding & Gooding, P.A. (collectively "Gooding") for legal malpractice based on Gooding's representation of him in a real estate transaction. During the course of discovery, Brandt presented to his attorney a document (the "Edisto Farm letter"), which appeared to have been sent by Ronald L. Summers, the Senior Vice President of Edisto Farm Credit (the lender in the transaction) to Brandt on September 18, 1995. Brandt also provided the letter to his malpractice expert. The letter was then introduced in the expert's deposition and used by him to opine that Gooding had committed malpractice.

The document, if authentic, would have imputed knowledge to Gooding of a conflict of interest related to the representation of Brandt in the real estate transaction. Gooding, however, claimed the document was fraudulent. As a result, Gooding requested a hearing to determine whether the document was authentic. Additionally, Gooding requested the court hold Brandt in contempt and award costs if such authenticity could not be

[1] S.C. Code Ann. § 16-13-10(A)(2) (2003).

established. Circuit Court Judge Diane Goodstein delayed a contempt hearing until it could be determined whether the document was authentic. [2]

In subsequent motions before Circuit Court Judge Paul M. Burch, Gooding moved for summary judgment, dismissal of the legal malpractice action, and contempt. At the hearing on these motions,[3] Gooding presented an expert in document examination and authenticity who opined that the letter was fraudulent.

At the conclusion of the hearing, Judge Burch found Brandt in contempt for committing fraud on the court. As a result, he dismissed Brandt's Complaint as a sanction and granted summary judgment in favor of Gooding. Judge Burch also held Brandt in criminal contempt for perpetrating a fraud upon the court and sentenced him to six months' imprisonment.

Approximately one month later, Judge Burch held a hearing regarding additional sanctions against Brandt. By order dated January 9, 2002, Judge Burch memorialized his earlier oral ruling regarding contempt and the concomitant sanctions.

On appeal, this Court affirmed Judge Burch's grant of summary judgment to Gooding and his findings of civil and criminal contempt. Brandt v. Gooding, 368 S.C. 618, 629, 630 S.E.2d 259, 264 (2006).

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[2] At this hearing, Judge Goodstein granted Brandt's counsel's motion to be relieved and gave Brandt sixty days to retain new counsel.

[3] Brandt was accompanied by an attorney who informed the court that he had agreed to represent Brandt for the limited purpose of obtaining access to the disputed letter for testing by Brandt's expert. He further explained that he had a conflict and could no longer represent Brandt. After addressing the limited issue and making the letter a court exhibit, the judge dismissed the attorney from the proceedings. Brandt claimed he could not find anyone else to represent him and, thus, proceeded without counsel for the remainder of the proceedings.

Following the issuance of this Court's opinion, Judge Burch held a hearing to establish the amount of attorneys' fees and costs that should be awarded under the prior contempt order of January 9, 2002. On August 13, 2007, he entered an order that required Brandt to pay $255,353.44 to Gooding & Gooding, P.A. and $628,268.49 to Elizabeth K. Gooding.

On appeal, this Court reversed Judge Burch's award to Gooding on the ground there was no competent evidence to support the finding that Gooding incurred any attorneys' fees and costs. Brandt v. Gooding, Op. No. 2010-MO-010 (Sup. Ct. filed Apr. 12, 2010). As to Gooding & Gooding's award, this Court modified the award holding that the law firm was only entitled to "those fees and costs incurred by Respondent law firm from the date Brandt introduced the fraudulent letter (April 4, 2001) to the date the trial court denied Brandt's motion for reconsideration (May 16, 2002) [and] were directly related to Brandt's introduction of the letter." Brandt, slip op. at 2. As a result, we modified the circuit court's order so as to award $80,547.89, plus applicable interest accrued to Gooding & Gooding. Id.

B. Forgery Conviction

During the pendency of the above-outlined proceedings, a Charleston County grand jury indicted Brandt for forgery in an amount greater than $5,000 based on the September 18, 1995 Edisto Farm letter.

In the course of Brandt's jury trial, which was conducted by Circuit Court Judge Roger M. Young, the State presented testimony regarding the underlying real estate transaction, the legal malpractice action, and the authenticity of the Edisto Farm letter.

In terms of the real estate transaction, Gooding testified she performed the closing for an Aiken real estate transaction involving Brandt and the Lombard Corporation, whose partners included Don Houck and Johnny Godley. The actual closing took place on December 14, 1995. According to Gooding, she learned of Brandt's involvement only a few weeks before the closing. Gooding acknowledged that Brandt had filed a legal malpractice claim against her primarily on the ground that Gooding had failed to properly protect his interest in the land deal. Gooding disputed Brandt's claim on the

basis that she had not been aware that Brandt was a party to the transaction until shortly before the December 1995 closing date. When presented with the September 18, 1995 Edisto Farm letter,[4] Gooding claimed she had not been hired by Brandt by the date of the letter, nor was it her job to secure financing from Edisto Farm Credit. Had the letter been true, Gooding testified that "[i]t would have established my connection with Mr. Brandt in this matter and this transaction almost three months before I had any knowledge of him being involved." She further testified the letter contradicted the sworn testimony she had given in a deposition regarding the legal malpractice case.

Lawrence Richter, Jr., Brandt's attorney who filed the legal malpractice action, testified Brandt came to him alleging that Gooding had "purported to represent all three (Brandt, Godley, and Houck) but did not represent them equally. She did not protect [his] rights in the same way that the other two members' rights were protected."

Because one of the key issues in dispute concerned Gooding's knowledge of when Brandt became involved in the land transaction, Richter deposed Gooding, Brandt, and Summers. Richter also retained Professor John Freeman as an expert witness to support Brandt's claim of Gooding's malpractice.

Richter testified that on December 27, 2000, he and his law partner met with Brandt and Freeman regarding the case. During the meeting, Brandt produced a faxed copy of a letter he claimed to have just discovered in his home. The letter was dated September 18, 1995, was on Edisto Farm Credit letterhead, and was purportedly signed by Summers. Subsequently, the letter was introduced into the case for the first time during Freeman's deposition in April 2001. When Gooding's counsel questioned the authenticity of the letter, Richter believed it was necessary to retain a professional examiner to

[4] The body of the letter indicated that Gooding had been hired by Brandt, confirmed that she was aware of Brandt's involvement in the land deal, and that she was responsible for securing financing from Edisto Farm Credit on behalf of Brandt.

authenticate the document. Brandt, however, directed Richter not to have the document examined.

Richter acknowledged the letter significantly impacted the case against Gooding in that the date of the letter "together with the statements in the letter, would have supported Mr. Brandt's version of the facts that Ms. Gooding knew very early on of his involvement in the real estate transaction in issue, and it would have been a statement to that effect by somebody else other than Mr. Brandt." Assuming the letter to be accurate and true, Richter believed it would have substantially increased the value of Brandt's case, "far more than $5,000."

In April 2001, Marvin Dawson, a private document examiner, analyzed the letter produced by Brandt and concluded the signature on the letter was not genuine. Dawson further determined that the letter was not produced on the computer or typewriter used by the secretary at Edisto Farm Credit, was not sent from the fax machine at Edisto Farm Credit, did not have a watermark like other Edisto Farm Credit paper, and had microscopic security dots, which represented technology that post-dated the letter.

After Dawson's review, the letter was sent to the United States Secret Service for further analysis. Susan Fortunato, a document analyst for the Secret Service, analyzed the Edisto Farm letter. During her examination of the letter, Fortunato discovered a serial number in a pattern of yellow dots. Based on these dots, Fortunato determined that the letter had been produced on December 10, 2000 around 3:00 p.m. using a Xerox machine with the serial #043391 located at a Kinko's copy shop in Augusta, Georgia. Fortunato also learned that the copy machine was not installed in the Kinko's shop until January 6, 2000. Because the pattern of yellow dots did not exist until 2000, Fortunato definitively testified that the document "didn't exist until the year 2000."

In addition to the testimony of the document examiners, the State presented the testimony of Summers and Dell Murdaugh, the administrative loan assistant who prepared the documents for the real estate loan.

Murdaugh testified that between 1995 and 2000 she typed all the correspondence for Summers and assisted in preparing loan documents. Although it was customary to retain copies of all correspondence, Murdaugh testified there was not a copy of the September 18, 1995 letter in her file. Murdaugh also believed the letter was false in that it was missing the typist's initials, was not formatted like the standard documents, and had different spacing and wording than normally used. Additionally, Murdaugh testified she had reviewed the Edisto Farm Credit telephone records and determined there were no calls made to Brandt on the date of the faxed letter.

Summers also testified the letter was a forgery as he did not dictate, write, or sign the letter. He further noted there was no copy of the letter in his files. In terms of the text of the letter, Summers stated the letter conflicted with his understanding of the transaction and the terminology was inconsistent with the typical manner in which loans were handled by Edisto Farm Credit.

The State presented Professor Freeman as its final witness. Freeman recounted the December 27, 2000 meeting where he was apprised of the Edisto Farm letter. Freeman believed the letter was "very, very significant" and strengthened Brandt's credibility given the date of the letter and the fact that it was purportedly written by a third party. He further testified the document "harkens back to September," was "consistent with the Brandt story," and was the "very opposite of what Beth Gooding has said under oath." In terms of the effect of the letter, Freeman opined that it "took the probability of winning (the lawsuit), way up," and substantially increased Brandt's potential for recovery more than $5,000.

At the close of the State's case, Brandt moved for a directed verdict and renewed his pre-trial motions, which included a motion to dismiss on Double Jeopardy grounds. Judge Young denied all of Brandt's motions.

After Brandt's counsel indicated that the defense would not present any evidence, Judge Young held a charge conference. During the conference, Brandt's counsel requested a number of jury instructions, including an instruction on "legal efficacy" related to the evidentiary value of the Edisto Farm letter. Judge Young denied the request to charge because he was "not

aware that [the instruction] would be a correct [statement of] South Carolina law." In response, Brandt's counsel claimed that "South Carolina laws have not addressed this issue."

Ultimately, the jury convicted Brandt of forgery in an amount greater than $5,000. Following the verdict, Judge Young delayed the imposition of the sentence to allow for the preparation of a pre-sentence report and to allow time for any restitution issues to be addressed.

Brandt filed post-trial motions, which included a motion for a new trial on the ground the Edisto Farm letter lacked "legal efficacy" and there was insufficient evidence presented as to the value of the letter. Judge Young denied each of Brandt's post-trial motions.

On September 11, 2009, Judge Young held a sentencing hearing. During the hearing, the parties indicated that no restitution agreement had been reached. At the conclusion of the hearing, Judge Young ordered restitution in the amount of $883,621.93. He then sentenced Brandt to ten years' imprisonment, suspended upon the service of four years, followed by five years' probation and payment of restitution.

Following the denial of his motion for reconsideration, Brandt appealed his conviction and sentence to the Court of Appeals. This Court certified this appeal pursuant to Rule 204(b), SCACR.

II. Discussion

A. Double Jeopardy

Brandt contends the trial judge erred in failing to dismiss the forgery indictment and in failing to grant his motion for a directed verdict on the ground that Double Jeopardy barred the forgery prosecution. Because Brandt had previously been convicted of criminal contempt based on the Edisto Farm letter, he claims the Double Jeopardy Clause of the United States and South Carolina Constitutions prohibited the successive forgery prosecution

for the same offense.[5] In support of his position, Brandt primarily relies on the United States Supreme Court case of United States v. Dixon, 509 U.S. 688 (1993), a case in which the Supreme Court held that Double Jeopardy protection applies to non-summary criminal contempt prosecutions as it does in other criminal prosecutions.[6]

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[5] Following this Court's decision affirming Brandt's conviction for criminal contempt, Brandt filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. Ultimately, the federal district court ruled in favor of Brandt on the grounds that Brandt was denied his constitutional rights to notice, counsel, and an opportunity to be heard on the charge of criminal contempt. Brandt v. Ozmint, 664 F. Supp. 2d 626 (D.S.C. 2009). On appeal, the Fourth Circuit Court of Appeals affirmed the district court's order. Brandt v. Ozmint, Nos. 09-7907 & 09-7909, 2011 WL 567469 (4th Cir. Feb. 18, 2011). Because the federal proceedings effectively vacate the prior conviction, Brandt can no longer assert that his forgery prosecution was barred by Double Jeopardy. However, in the event the Fourth Circuit's decision is reversed, we have addressed the merits of Brandt's arguments.

[6] In Dixon, the Supreme Court considered two cases in which the defendants, Dixon and Foster, had been tried for criminal contempt for violating court orders that prohibited them from engaging in conduct that was the subject of later criminal prosecutions. Dixon, 509 U.S. at 691-92. In analyzing these cases, the Court overruled Grady v. Corbin, 495 U.S. 508 (1990), a decision that added the "same conduct" test to the Blockburger analysis. Id. at 704. Although the Court reinstated Blockburger as the exclusive means of determining whether two charges are the same for Double Jeopardy purposes, there was no majority opinion as to the appropriate method of application. Essentially, two opposing factions emerged from the opinion. Chief Justice Rehnquist adhered to a strict application of the Blockburger "same elements test." Id. at 713-14. In contrast, Justice Scalia compared the elements of the offenses based on a "lesser-included offense" analysis, finding that the substantive criminal offense was "a species of lesser-included offense" of the judicial order that had been violated and formed the basis of the criminal contempt conviction. Id. at 700-03.

Brandt raised his Double Jeopardy claim in his pre-trial motions and his motion for a directed verdict. In denying Brandt's motion, the trial judge stated:

> But there are two parts to double jeopardy. There is the same conduct, which I find, [its] the same conduct, but under the statute for forgery, there is no requirement that the forged document be introduced into a legal proceeding. So as I see it, the moment that [Brandt] produced that, theoretically, to his lawyers, he procured the use of it, and that, in and of itself right there, would support a forgery conviction, even though it perhaps never got used in the legal proceeding. So in my mind, at least, that is what - - it doesn't meet the second element of double jeopardy, and that is the same elements, the Blockburger test, if you will.

We agree with the trial judge that the Double Jeopardy Clause did not bar the State's prosecution of Brandt for forgery. Although our reasons will be more fully discussed, we hold the trial judge's decision is correct because: (1) the facial similarities of Dixon to Brandt's case do not render Dixon dispositive; (2) our appellate courts, in post-Dixon decisions, have repeatedly employed the "same elements test" in analyzing purported Double Jeopardy violations; and (3) the elements for the offenses of criminal contempt and forgery are decidedly different and, thus, constitute separate and distinct offenses.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions operate to protect citizens from being twice placed in jeopardy of life or liberty for the same offense. The United States Constitution, which is applicable to South Carolina via the Fourteenth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. Similarly, the South Carolina Constitution states: "No person shall be subject for the same offense to be twice put in jeopardy for life or liberty . . . ." S.C. Const. art. I, § 12.

In interpreting the Double Jeopardy clause, this Court has stated that "[t]he Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense." Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999). "A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses." State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct. App. 1996).

"The United States Supreme Court and the South Carolina Supreme Court have determined that in the context of criminal penalties, the Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932) 'same elements' test is the sole test of double jeopardy in successive prosecutions and multiple punishment cases." State v. Cuccia, 353 S.C. 430, 438, 578 S.E.2d 45, 49 (Ct. App. 2003) (citing United States v. Dixon, 509 U.S. 688 (1993), and State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997)); see State v. Elders, 386 S.C. 474, 481, 688 S.E.2d 857, 861 (Ct. App. 2010) ("In both multiple punishment and successive prosecution cases, double jeopardy claims are evaluated under the 'same elements' test set forth in Blockburger v. United States, 284 U.S. 299 (1932)").

"Under traditional double jeopardy analysis, multiple punishment is not prohibited where each offense calls for proof of a fact that the other does not." Cuccia, 353 S.C. at 438, 578 S.E.2d at 49; Blockburger, 284 U.S. at 304 (stating "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"). "Under the Blockburger test, a defendant may be convicted of two separate crimes arising from the same conduct without being placed in double jeopardy where his conduct consists of two distinct offenses." Elders, 386 S.C. at 482, 688 S.E.2d at 861 (citations omitted). An application of the Blockburger test "requires a technical comparison of the elements of the offense for which the defendant was first tried with the elements of the offense in the subsequent prosecution." Moyd, 321 S.C. at 258, 468 S.E.2d at 9.

In his argument, Brandt seizes upon the divided opinion in Dixon to support his claim that Double Jeopardy bars his forgery prosecution. In particular, he disregards Chief Justice Rehnquist's "literal same-elements analysis," and instead advocates an application of Justice Scalia's "lesser-included offense" method of analysis. As we interpret Brandt's arguments, he applies the "same elements test" by essentially comparing the underlying conduct between the offenses of criminal contempt and forgery.

We, however, need not choose between the divergent views of Chief Justice Rehnquist and Justice Scalia as this case does not involve a violation of a court order as in Dixon. Furthermore, even if we were to choose between the two views, we find this state's post-Dixon jurisprudence definitively establishes that our courts have adopted a traditional, strict application of the Blockburger "same elements test."

In order to apply the Blockburger analysis, it is necessary to examine the individual elements of the criminal contempt conviction and the forgery offense.

The offense of forgery is codified in section 16-13-10 of the South Carolina Code, which provides: "It is unlawful for a person to utter or publish as true any false, forged, or counterfeited writing or instrument of writing." S.C. Code Ann. § 16-13-10(A)(2) (2003). In interpreting this code section, our appellate courts have found that "[t]he three important factors requisite to constitute forgery by uttering or publishing a forged instrument are: (1) it must be uttered or published as true or genuine, (2) it must be known by the party uttering or publishing it that it is false, forged, or counterfeited, and (3) there must be intent to prejudice, damage, or defraud another person." State v. Wescott, 316 S.C. 473, 477, 450 S.E.2d 598, 601 (Ct. App. 1994) (citing State v. Singletary, 187 S.C. 19, 196 S.E. 527 (1938)).

In terms of criminal contempt, this Court affirmed Brandt's contempt conviction, stating:

> Direct contempt involves contemptuous conduct in the presence of the court. State v. Kennerly, 337 S.C. 617, 620, 524 S.E.2d 837, 838 (1999). A person may be found guilty of direct

> contempt if the conduct interferes with judicial proceedings, exhibits disrespect for the court, or hampers the parties or witnesses. State v. Havelka, 285 S.C. 388, 389, 330 S.E.2d 288 (1985). Direct contempt that occurs in the court's presence may be immediately adjudged and sanctioned summarily. Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L.Ed 642 (1994).

Brandt, 368 S.C. at 628, 630 S.E.2d at 264. Applying these principles to Brandt's case, this Court concluded:

> In the present case, the record shows that Brandt presented a fraudulent document to the court. The document was introduced at the deposition of Professor John Freeman. In addition, the deposition was introduced into evidence in the case as an attachment to his Memorandum in Support of Motion for Reconsideration. Further, the record shows that Brandt was the sole cause of the introduction of the document into this case when he provided a supplemental response to the request to produce one day before Professor Freeman's deposition. We hold that the introduction of the document into the deposition constituted an introduction of the document into the presence of the court, warranting a citation for direct contempt.

Id. at 628-69, 630 S.E.2d at 264.

We find each offense requires proof of a fact that the other does not. Specifically, the offense of forgery does not require any interference with judicial proceedings that is "calculated to obstruct, degrade, and undermine the administration of justice." Brandt, 368 S.C. at 628, 630 S.E.2d at 264. In comparison, the commission of criminal contempt does not require the "uttering or publishing of a fraudulent document."

Accordingly, Brandt's subsequent prosecution for forgery did not violate the Double Jeopardy Clause as the prior criminal contempt conviction involved decidedly different elements. Cf. State v. Pace, 337 S.C. 407, 417, 523 S.E.2d 466, 471 (Ct. App. 1999) (concluding that Double Jeopardy did

not bar convictions for both forgery and insurance fraud, based on a forged "Affidavit of Total Theft of a Motor Vehicle" that was submitted to insurer "[b]ecause each offense contains at least one element which must be proven by an additional fact that the other does not require"); see Jay M. Zitter, Annotation, Contempt Finding as Precluding Substantive Criminal Charges Relating to the Same Transaction, 26 A.L.R.4th 950, 952 (1983 & Supp. 2010) (discussing state and federal cases where courts have ruled that double jeopardy safeguards were not involved where a defendant found in contempt is later prosecuted under penal statutes for the same actions; recognizing in those cases that "the purpose of contempt citations is to maintain the dignity of and respect for the court and court proceedings, while the purpose of criminal charges is to punish violators of society's norms").

B. Directed Verdict Motion

Brandt asserts the trial judge erred in denying his motion for a directed verdict where the State failed to produce evidence to establish that: (1) the forged letter had "legal efficacy"; (2) Brandt knew the letter was forged and presented it with intent to defraud; and (3) the value of the forged letter was $5,000 or more.

"If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. at 292, 625 S.E.2d at 648. The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

As will be discussed, we find the trial judge correctly denied Brandt's motion for a directed verdict. Viewing the evidence in the light most favorable to the State, there was sufficient evidence to submit the offense of forgery to the jury.

(1). "Legal Efficacy"

As to this ground, Brandt contends the Edisto Farm letter lacks legal efficacy because it could not have served as the foundation for the legal liability of Elizabeth Gooding or her law firm. In support of his argument, Brandt cites the Court of Appeals' decision in State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007), aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010). Specifically, Brandt directs the Court's attention to the following language:

> To constitute forgery, it is essential that the falsely made or altered instrument possess some apparent legal efficacy; otherwise it would have no tendency to defraud. As long as a forged instrument is the apparent foundation of legal liability, the instrument need not be complete in all its particulars to amount to forgery.

Id. at 402, 649 S.E.2d at 48 (citations omitted) (emphasis added).

Additionally, Brandt avers the letter did not have legal efficacy to support the forgery conviction as its sole value was to provide evidence in the civil lawsuit. Because Brandt believes he had a viable claim for legal malpractice "irrespective" of the letter, he asserts the letter had no legal efficacy. Brandt explains that Gooding's conduct, and not the letter, served as the basis for instituting his legal malpractice claim.

In support of these contentions, Brandt relies on three out-of-state cases[7] and the following provision from *Corpus Juris Secundum*:

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[7] See State v. Cearley, 92 P.3d 1284 (N.M. Ct. App. 2004) (concluding photocopies of altered non-carbon records of checks, tendered by defendant in civil action, were not instruments purporting to have legal efficacy); State v. Scott, 185 P.3d 1081 (N.M. Ct. App. 2008) (reversing forgery conviction based on fraudulent doctor's note used as an excuse for missing a scheduled court hearing; finding the fraudulent document did not have legal efficacy

> The element of forgery requiring that the defendant has falsely made or altered an instrument purporting to have "legal efficacy" does not include instances where the sole legal value of the instrument is its potential use as evidence.

37 C.J.S. Forgery § 6 (Supp. 2010).

We find Brandt's arguments fail for several reasons. Initially, Brandt employs an overly-narrow interpretation of the legal efficacy element. Because this case involves a letter, as opposed to a traditionally-forged negotiable document such as a check, Brandt attempts to negate the forgery conviction on the ground a forged letter could not directly and definitively establish Gooding's duty to Brandt.

Our appellate courts' decisions, including Lee-Grigg, have taken a broad approach as to what type of document can constitute the basis of a forgery conviction and the requisite effect the document must have on the alleged forgery victim.

In terms of the types of documents involved in forgery, our appellate courts have not limited a conviction solely to negotiable instruments nor have the courts precluded a conviction where the forged document served as an evidentiary basis in a civil trial. See, e.g., State v. Floyd, 36 S.C.L. (5 Strob.)

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given it merely had potential evidentiary value); Gooch v. State, 31 So. 2d 776 (Ala. 1947) (concluding a "Sunday-dated" check, without extrinsic facts showing its legal efficacy, could not support a forgery conviction).

We find the cases cited by Brandt are distinguishable from the instant case. First, the New Mexico forgery statute specifically includes the term "legal efficacy." N.M. Stat. Ann. § 30-16-10 (Supp. 2010). Secondly, based on our research, the New Mexico cases and the Alabama case reflect a minority view as it does not appear that other jurisdictions have taken such a limited approach in analyzing the offense of forgery. Furthermore, as will be discussed, these cases are inconsistent with our state's jurisprudence regarding forgery.

58 (1850) (considering conviction involving a forged receipt that was used in the defense of the underlying civil suit; stating "[m]any statutes have been passed . . . to enlarge the range of the common law as to the description of instruments that should be protected against the cunning perpetrators of this offence" to forge); State v. Murray, 72 S.C. 508, 52 S.E. 189 (1905) (affirming forgery conviction involving a lease that defendant had offered into evidence in a civil case for specific performance of the contract); State v. Zimmerman, 79 S.C. 289, 60 S.E. 680 (1908) (affirming forgery conviction involving a false entry made in a public record with intent to deceive and defraud).

Furthermore, the requisite prejudicial effect of a document in a forgery proceeding has been broadly construed by our appellate courts. See Lee-Grigg, 374 S.C. at 402, 649 S.E.2d at 48 (discussing legal efficacy of a forged instrument and stating, "Any writing that may defraud or prejudice another, or that, if genuine, would have legal effect or operate as the foundation of another man's liability may be the subject of forgery. It is sufficient if the forged instrument, believed to be genuine, might have operated to the prejudice of another."); State v. Webster, 88 S.C. 56, 58, 70 S.E. 422, 423 (1911) ("The purpose of the statute against forgeries is to protect society against fabrication, falsification, and the uttering, publishing, and passing of forged instruments, which, if genuine, would establish or defeat some claim, impose some duty, or create some liability, or work some prejudice in law to another, in his right of person or property." (citations omitted)); see also State v. Bullock, 54 S.C. 300, 311-12, 32 S.E. 424, 428-29 (1899) ("It is not necessary to state how the instrument could have been used for the purpose of fraud. It is enough if it appears from the character of the instrument, together with the provisions of the statute, that it might have been so used in connection with other facts, real or simulated, either then existing, or with which it was to be afterwards connected." (citation omitted)).[8]

[8] Additional support for this position may be found in the decisions of other jurisdictions. See People v. Cunefare, 102 P.3d 302, 308-09 (Colo. 2004) (holding that statute prohibiting forgery encompasses not only forgery of instruments affecting pecuniary interests, but also forgery of instruments having other legal effects); People v. Muzzarelli, 770 N.E.2d 1232, 1235 (Ill. App. Ct. 2002) (affirming forgery conviction and finding that forged letter

Applying our appellate courts' broad interpretation of forgery, we conclude the State presented sufficient evidence of this element to withstand Brandt's motion for a directed verdict as to the legal efficacy of the Edisto Farm letter.

Gooding testified the letter, if found to be true, would have established her connection with Brandt almost three months before she had knowledge of him being involved in the land transaction. Equally important, Gooding testified the letter would have contradicted her sworn deposition testimony. Gooding also stated that "everyone has pointed to that letter from the very beginning as some evidence of [her] culpability."

In addition to Gooding, other witnesses testified regarding the significance of the letter. Richter, Brandt's attorney who initiated the legal malpractice claim, confirmed Gooding's assessment that the letter would have significantly impacted the legal malpractice lawsuit. In his testimony, Professor Freeman emphasized that the letter was "very, very significant," affected Gooding's credibility as a witness and, in turn, strengthened Brandt's case against Gooding. Summers, who adamantly denied his signature on the letter, also confirmed the significance of the letter in that it directly contradicted his deposition testimony and would have established Brandt's version of what transpired regarding the land transaction.

Clearly, this testimony established that the forged letter had legal efficacy in that it had the potential of prejudicing or damaging Gooding in the

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submitted by defendant to sentencing court asking for leniency had legal effect as it was capable of affecting the rights or obligations of another; stating "[t]hough property or monetary loss may be the most common forgeries, they are not exclusive"); see also R.P. Davis, Annotation, Invalid Instrument as Subject of Forgery, 174 A.L.R. 1300, 1304 (1948 & Supp. 2010) (discussing cases of the general broad type as to what instruments are the subject of forgery; stating that a generally-accepted definition of forgery is that "the offense consists of the false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability" (emphasis added)).

civil lawsuit as well as subjecting her to perjury charges and potential ethical violations.

(2). Intent to Defraud

Brandt claims the trial judge erred in denying his motion for a directed verdict given the State failed to present evidence that Brandt knew the Edisto Farm letter was forged and that he presented it to Richter and Freeman with the intent to defraud Gooding.

Brandt, however, disregards the significant fact that the knowledge and intent to defraud elements of the offense of forgery may be proven by circumstantial evidence. See Lee-Grigg, 374 S.C. at 403-04, 649 S.E.2d at 49 (stating "[b]ecause intent is seldom susceptible to proof by direct evidence, the circumstances surrounding the making or uttering of the forged instrument are relevant for establishing the requisite intent"; recognizing that "a person is said to act knowingly if he is aware the result is practically certain to follow from his conduct, whatever his desire may be as to that result" (citations omitted)); Murray, 72 S.C. at 515, 52 S.E. at 191 (affirming conviction for forging and uttering a false lease and stating "[t]he intent is only matter of circumstance, which naturally follows and springs out of the facts").

A review of the record reveals the State presented sufficient evidence to establish Brandt's knowledge that the letter was forged and his intent to use the letter to defraud. Through the testimony of Dawson and Fortunato, the State conclusively established that the letter was a forgery. Given that Brandt possessed the document and presented it to his attorney, there is evidence that Brandt had knowledge that the document was forged. Cf. State v. Orr, 225 S.C. 369, 374, 82 S.E.2d 523, 526 (1954) ("It is insisted on the part of appellant that there is no evidence tending to prove that he made, or caused to be made, the check here charged to be forged. This would be true but for the rule that one found in the possession of a forged instrument of which he purports to be the beneficiary, and applying it to his own use, must, in the absence of explanation satisfactory to the jury, be presumed to have forged it or to have been privy to its forgery." (citation omitted)).

Furthermore, the circumstances surrounding Brandt's presentation of the letter to his attorney and expert witness are clearly susceptible to the inference that Brandt intended to use the document to defraud. Although extensive discovery had been conducted following the filing of the 1998 legal malpractice lawsuit, Brandt discovered the document and produced it to his attorney and expert witness in 2000, which was shortly before the key deposition of Freeman. Viewing this evidence in the light most favorable to the State, there is evidence of Brandt's knowledge that the document was a forgery and his intent to defraud. See Murray, 72 S.C. at 514, 52 S.E. at 190-91 (finding that where there was an "abundance of testimony to the effect that said writing was forged" . . . "[i]t is at least a reasonable inference from these facts, that the defendant knew the writing was forged").

(3). Value of the Letter

Brandt contends the trial judge erred in denying his motion for a directed verdict as the State failed to present evidence that the value of the forged letter was $5,000 or more.

In explaining his denial of Brandt's motion for a directed verdict, the trial judge stated, "I think there is value in the case in excess of $5,000 under the testimony of Mr. Richter and Professor Freeman." We find the judge erred in considering the value of the fraudulent document in the context of a directed verdict motion. As will be discussed, the determination of the value of a forged document is not an element of the offense of forgery. Instead, it should only be a consideration for sentencing purposes after a person has been convicted of forgery.

Section 16-13-10, the code section that outlines the offense of forgery, consists of two subsections. As previously discussed, subsection A outlines the elements of forgery. S.C. Code Ann. § 16-13-10(A)(2) (2003) ("It is unlawful for a person to utter or publish as true any false, forged, or counterfeited writing or instrument of writing."). In conjunction, subsection B outlines the penalties that must be imposed on one who is convicted of forgery. Specifically, this subsection provides in relevant part:

> A person who violates the provisions of this section is guilty of a:
>
> (1) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both, if the amount of the forgery is five thousand dollars or more.
>
> . . .
>
> If the forgery does not involve a dollar amount, the person is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both.

S.C. Code Ann. § 16-13-10(B)(1) (2003) (emphasis added).[9]

On its face, the Edisto Farm letter does not involve a dollar amount. Moreover, the evidence presented by the State regarding any amount was purely speculative as the testimony indicated the letter would have increased the value of Brandt's claim against Gooding "substantially" more than $5,000 and increased Brandt's "probability of winning" the lawsuit that would have resulted in damages in excess of $5,000. We find this evidence is insufficient to establish a dollar amount. In the absence of a dollar amount, we hold that Brandt could have been found guilty only of a misdemeanor and sentenced to imprisonment for a period of three years or less, ordered to pay a fine, or both.

Based on the foregoing, we find the State presented sufficient evidence to support the trial judge's decision to submit the charge of forgery to the jury. However, because there was insufficient evidence to establish a dollar amount of the Edisto Farm letter, we reverse Brandt's felony sentence.

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[9] Recently, this code section was amended to change the penalties for forgery. S.C. Code Ann. § 16-13-10 (Supp. 2010). Notably, if a person is convicted of a forgery in an amount less than $10,000, he is subject to five years' imprisonment, payment of a fine, or both.

Accordingly, we remand for the circuit court to sentence Brandt for a misdemeanor forgery conviction. See State v. Brown, 360 S.C. 581, 597-98, 602 S.E.2d 392, 401 (2004) (holding that when a conviction is reversed due to insufficient evidence, an appellate court may remand a case for sentencing on a lesser-included offense after the court considers the following six factors: (1) the evidence adduced at trial fails to support one or more elements of the crime of which appellant was convicted; (2) the jury was explicitly instructed it could find the defendant guilty of the lesser-included offense and was properly instructed on the elements of that offense; (3) the record on appeal contains sufficient evidence supporting each element of the lesser-included offense; (4) the State seeks a sentencing remand on appeal; (5) the defendant will not be unduly or unfairly prejudiced; and (6) the Court is convinced justice will be served by such a result after carefully considering the record as well as the interests and concerns of both the defendant and the victim of the crime).

C. "Legal Efficacy" Request to Charge

Brandt claims the trial judge erred in denying the following request to charge: "A document whose sole value is its potential use in a civil lawsuit does not have sufficient 'legal efficacy' to support a forgery charge."

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996).

"[T]he trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The substance of the law is what must be charged to the jury, not any particular verbiage." Adkins, 353 S.C. at 318-19, 577 S.E.2d at 464.

"A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." State v. Austin, 299 S.C 456, 458, 385 S.E.2d 830, 831 (1989). "However, if the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." Id. "'It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge.'" State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (quoting Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000)). "If there is any evidence to support a charge, the trial court should grant the request." Williams, 367 S.C. at 195, 624 S.E.2d at 445.

"To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). A trial judge's failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues. Id. at 479, 697 S.E.2d at 583-84. "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." Id. at 479, 697 S.E.2d at 584.

Brandt's argument is merely a continuation of his argument regarding the denial of his motion for a directed verdict on the ground the letter lacked "legal efficacy." As previously discussed, we disagree with Brandt's overly-narrow construction of this term. To establish the legal efficacy of a forged document, the State was only required to show that the letter had the potential to prejudice or damage the intended victim. Furthermore, our appellate courts, as previously cited, have upheld forgery convictions where the forged document was used as evidence in a civil trial.

Viewing the judge's charge as a whole, we find it sufficiently covered this element. First, the judge properly instructed the jury on the elements of forgery by using the statutory language of section 16-13-10. Secondly, the judge explained each of the elements individually. Finally, the judge charged the "legal efficacy" element as follows:

> To constitute forgery, it is [essential] that a falsely made or altered instrument [possess] some apparent legal [efficacy]; otherwise, it would have no tendency to defraud. As long as a forged instrument is the apparent foundation of legal liability, the instrument need not be complete [in] all its particulars to amount to forgery, and any writing that may defraud or prejudice another, or that, if genuine, would have legal effect and operate as the foundation of another man's liability may be the subject of forgery. It is sufficient if the forged documents, believed to be genuine, might have operated to the prejudice of another.

The judge's charge accurately reflects this state's current law regarding the offense of forgery. In fact, the text of the charge tracks the language in Lee-Grigg, the case primarily relied upon by Brandt. Lee-Grigg, 374 S.C. at 402, 649 S.E.2d at 48. Thus, the judge's denial of Brandt's request to charge does not warrant reversal as the charge as a whole afforded the jury the proper test for determining the issues presented at trial.

D. New Trial

Brandt contends the trial judge erred in refusing to grant his motion for a new trial where the evidence failed to establish the Edisto Farm letter had legal efficacy and was valued at $5,000 or more. In support of this contention, Brandt reiterates his arguments regarding the trial judge's denial of his motion for a directed verdict.

As previously discussed, the State presented sufficient evidence that the forged letter possessed legal efficacy as there was testimony establishing the prejudicial and damaging effect of the letter to Gooding. Furthermore, the value of the Edisto Farm letter did not affect Brandt's conviction. Thus, any lack of evidence as to its value would not have warranted the grant of a new trial to Brandt. Instead, as we previously ruled, the value of the forged document was only relevant for sentencing purposes. Accordingly, we find the trial judge did not abuse his discretion in denying Brandt's motion for a new trial. See State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) (recognizing that a trial judge has the discretion to grant or deny a motion for

a new trial, and his decision will not be reversed absent a clear abuse of discretion).

III. Conclusion

We find the State presented sufficient evidence to support a forgery conviction. Because the forged document did not involve a dollar amount and the State did not present evidence of a definitive dollar amount, we hold the trial judge erred in sentencing Brandt for a felony conviction. Accordingly, we remand to the circuit court for sentencing on the misdemeanor.[10]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

[10] We need not address Brandt's argument regarding the trial judge's failure to conduct a "full and fair" restitution hearing or his claim that the amount of restitution was excessive given the parties informed this Court that they have reached a settlement as to restitution.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Langdale,
Employee/Claimant, Respondent,

v.

Harris Carpets and
Gevity/Staff Leasing,
Employers, and American
Home Assurance, c/o AIG,
Alleged Carrier, and S.C.
Uninsured Employers' Fund, Defendants,

Of whom, Harris Carpets is, Respondent,

and Gevity/Staff Leasing,
Employers, and American
Home Assurance, c/o AIG,
Alleged Carrier are, Appellants.

Appeal From Richland County
Appellate Panel, Workers' Compensation Commission

Opinion No. 4853
Submitted February 1, 2011 – Filed July 20, 2011

AFFIRMED

G. D. “Doc” Morgan, Jr. and Amanda L. C. Bradley, both of Columbia, for Appellants.

Jeffrey Dean Ezell, of Greenville and Steven M. Krause, of Anderson; for Respondents.

WILLIAMS, J.: Gevity/Staff Leasing and its carrier, American Home Assurance, c/o AIG (collectively "Gevity"), appeal the appellate panel of the Workers' Compensation Commission's ("Appellate Panel") order affirming the Workers' Compensation single commissioner's ("single commissioner") award of temporary total disability benefits to David Langdale ("Langdale"). Gevity argues the Appellate Panel erred in affirming the single commissioner's: (1) finding Harris Carpets acted as an agent for Gevity by withholding premiums from Langdale's paycheck; (2) finding the manager of Harris Carpets advised Gevity that Langdale was to be covered under its workers' compensation policy; (3) finding liability should be placed on Gevity as opposed to Harris Carpets and/or the South Carolina Uninsured Employers' Fund to provide workers' compensation coverage for Langdale; (4) finding Gevity failed to fulfill its obligations under the contract and Harris Carpets and Gevity are estopped from denying workers' compensation coverage as a matter of equity; and (5) finding Langdale is currently entitled to temporary total disability benefits. We affirm.

FACTS

On January 30, 2008, while installing flooring as an independent contractor for Harris Carpets, Langdale suffered a compensable injury to his left lower extremity when carrying tiles down a flight of stairs.[1] Harris

[1] Langdale is an independent contractor, and none of the parties have contested the compensability of the accident.

Carpets has periodically contracted with Langdale to install floors for over twenty years, but Langdale began working on a full-time basis for Harris Carpets in 2006. Throughout the time Langdale worked for Harris Carpets, he paid ten percent of his earnings to Harris Carpets to secure workers' compensation insurance.

Five months prior to Langdale's injury, Harris Carpets contracted with Gevity to provide human resource services, including payroll processing, management consulting, and administering health and retirement benefits. In addition, Gevity provided workers' compensation coverage to Harris Carpets' workers pursuant to the Professional Services Agreement ("Agreement") the parties executed in August 2007.

After his injury, Langdale properly notified Harris Carpets of the accident and sought workers' compensation coverage. Harris Carpets and Gevity both refused to provide coverage for Langdale's injuries. As a result, Langdale timely filed a Form 50, requesting a hearing and seeking temporary total disability benefits as well as medical treatment for his left knee. Harris Carpets and Gevity each responded with a Form 51 denying coverage. Harris Carpets denied coverage, averring Langdale was a statutory employee of Gevity. Gevity denied coverage, asserting Langdale was not a covered employee of Harris Carpets.

After a hearing on October 23, 2008, the single commissioner found Langdale's injury compensable and issued an order finding, inter alia, the following: (1) Langdale was an independent contractor; (2) Harris Carpets deducted ten percent of Langdale's pay for the purchase of workers' compensation insurance; (3) Harris Carpets' manager testified he advised Gevity that Langdale was to be covered; (4) both Gevity and Harris Carpets were estopped from denying coverage as a matter of equity; (5) Harris Carpets was acting as an agent of Gevity by withholding workers' compensation premiums from Langdale's paycheck; and (6) Gevity and Harris Carpets both failed to meet their obligations under the Agreement. In addition, the single commissioner awarded medical and temporary total benefits commencing on March 13, 2008 to Langdale.

Gevity appealed to the Appellate Panel, which affirmed the findings of the single commissioner. This appeal followed.

STANDARD OF REVIEW

The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a workers' compensation decision. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Id. at 620, 611 S.E.2d at 300. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Id. at 620, 611 S.E.2d at 301.

Where the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Bass v. Isochem, 365 S.C. 454, 468, 617 S.E.2d 369, 376 (Ct. App. 2005). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." Frame v. Resort Servs. Inc., 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004) (citing Parsons v. Georgetown Steel, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995)). "In an appeal from the [Appellate Panel], neither this court nor the circuit court may substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

LAW/ANALYSIS

A. Agency Relationship

Gevity asserts the Appellate Panel erred in finding Harris Carpets acted as an agent for Gevity when Harris Carpets withheld premiums from Langdale's paycheck. We disagree.

The existence of an agency relationship is a question of fact to be determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal. Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 173-74, 467 S.E.2d 439, 442 (1996); Hinson v. Roof, 128 S.C. 470, 474, 122 S.E. 488, 489 (1924). Agency may be implied or inferred and may be proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000) (citing Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982)).

Gevity avers the Appellate Panel erred in finding the existence of an agency relationship because Gevity and Harris Carpets never agreed to enter into an agency relationship. The Agreement signed by the parties contained a provision prohibiting either party from acting as the agent of the other party unless specifically authorized to do so in writing.[2] The single commissioner and Appellate Panel found Harris Carpets was acting as an agent of Gevity by withholding workers' compensation premiums from Langdale's checks despite the provision in the parties' Agreement prohibiting an agency relationship. See Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145-46, 425 S.E.2d 764, 773 (Ct. App. 1992) ("An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow.").

[2] Paragraph 30 of the Agreement specifically states: "Nothing set forth in this Agreement shall be deemed to create a partnership or joint venture between [Harris Carpets] and Gevity, and no fiduciary duty shall arise from the relationship created hereunder. In no event may either party act as the agent of the other party unless specifically authorized in writing to do so."

Gevity asserts the Agreement did not authorize Harris Carpets to withhold workers' compensation premiums on its behalf. Despite this contention, the evidence proves Harris Carpets performed duties on behalf of Gevity when Harris Carpets deducted money from its employees and contractors to pay Gevity. In return, Gevity acted on Harris Carpets' behalf when Gevity provided workers' compensation insurance to Harris Carpets' workers. See Bankers Trust of S.C. v. Bruce, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984) ("Generally, agency may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case.") (emphasis added). Even though the Agreement did not explicitly establish an agency relationship, we find these actions by Harris Carpets and Gevity amount to a binding agency relationship. See Beasley v. Kerr McGee Chem. Corp., 273 S.C. 523, 526, 257 S.E.2d 726, 727 (1979) ("It is well established that the terms of a contractual agreement are not conclusive in determining the association between two parties where there is evidence outside the contract establishing an agency relationship."). As the existence of an agency relationship is a question of fact, and this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, we find the single commissioner and Appellate Panel's findings are supported by substantial evidence. See Stone, 360 S.C. at 274, 600 S.E.2d at 552 ("In an appeal from the [Appellate Panel], neither this court nor the circuit court may substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.").

B. Langdale's Coverage under Harris Carpets' Insurance Policy

Gevity asserts the Appellate Panel erred in finding the manager of Harris Carpets advised Gevity that Langdale was to be covered under its workers' compensation policy. We disagree.

In a workers' compensation case, the Appellate Panel is the ultimate fact finder. DeBruhl v. Kershaw Cnty. Sheriff's Dep't., 303 S.C. 20, 24, 397 S.E.2d 782, 785 (Ct. App. 1990). The final determination of witness credibility and the weight to be accorded evidence is reserved to the

Appellate Panel and it is not the task of courts to weigh the evidence as found by the single commissioner. Id. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. See Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991) (finding regardless of a conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Appellate Panel is conclusive).

A review of the record reveals conflicting evidence exists as to whether Scott Junkins, the manager of Harris Carpets, informed Gevity that Langdale was covered under its workers' compensation policy. At the hearing, Mr. Junkins initially testified his office manager provided the list of Harris Carpets' covered employees to Gevity. When questioned by the single commissioner, however, Mr. Junkins stated that, to the best of his knowledge, neither he nor anybody in his company specifically notified Gevity that Langdale was to be covered. Shortly after this exchange, Mr. Junkins testified on cross-examination he told Gevity about Langdale and Langdale's desire for coverage during the parties' initial meeting in August 2007. Despite this conflict in Mr. Junkins' testimony, the single commissioner concluded Harris Carpets advised Gevity that Langdale was to be covered, which we defer to on appeal. See Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999) (stating the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel and it is not the task of this court to weigh the evidence). Accordingly, we find substantial evidence in the record to support the findings of the single commissioner and the Appellate Panel on this issue.

C. Gevity's Liability for Langdale's Workers' Compensation Coverage

Gevity contends the Appellate Panel erred in finding liability should be placed on Gevity as opposed to Harris Carpets and/or the Uninsured Employer's Fund to provide workers' compensation coverage for Langdale. We disagree.

This court's review is limited to determining whether the Appellate Panel's decision is unsupported by substantial evidence or controlled by an

error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). Our review of the record finds the Appellate Panel's decision is supported by substantial evidence and there is no error of law. Gevity admits five months prior to Langdale's injury, Harris Carpets contracted with Gevity to manage paperwork, provide consulting services, and provide workers' compensation coverage through Gevity's workers' compensation insurer. After contracting to undertake these responsibilities in August 2007, representatives of Gevity met with Harris Carpets, and the parties determined who was to be covered under the workers' compensation insurance policy. As noted above, the single commissioner and Appellate Panel found Harris Carpets informed Gevity that Langdale was a covered employee. In addition, by withholding premiums from Langdale's check, Harris Carpets served as an agent of Gevity thereby requiring Gevity to provide workers' compensation for Harris Carpets' workers. Because Harris Carpets was insured by Gevity at the time of Langdale's accident, Gevity must provide coverage for Langdale's accident. Accordingly, we find substantial evidence in this record to support the findings of the single commissioner and the Appellate Panel that Gevity is responsible for providing workers' compensation coverage for Langdale.

D. Estoppel as a Matter of Equity

Gevity argues the Appellate Panel erred in finding Gevity failed to fulfill its obligations under the Agreement and in finding Gevity and Harris Carpets are estopped from denying workers' compensation coverage as a matter of equity. We disagree.

The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. S. Dev. Land & Golf Co., v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993) (citing Frady v. Smith, 247 S.C. 353, 359, 147 S.E.2d 412, 415 (1966), overruled on other grounds by Tolemac, Inc. v. United Trading, Inc., 326 S.C. 103, 484 S.E.2d 593 (1997)). To successfully assert the doctrine of estoppel, a party must

show a (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position. See S. Dev. Land & Golf Co., 311 S.C. at 33, 426 S.E.2d at 750.

Harris Carpets' actions meet the essential elements of estoppel. First, Harris Carpets falsely represented to Langdale he was a covered employee under its workers' compensation insurance policy when Harris Carpets continued to deduct ten percent from each of Langdale's paychecks. Second, Harris Carpets had the expectation Langdale would rely on coverage when Harris Carpets offered Langdale the opportunity to sign a waiver to decline workers' compensation insurance, but Langdale refused, wanting to be covered under Harris Carpets' policy. Finally, Harris Carpets had constructive knowledge Langdale would not have been covered under its workers' compensation policy when Mr. Junkins admitted he did not read the Agreement even though he signed it. See Shenker v. Baltimore & O. R., 374 U.S. 1, 13 (1963) (stating that implicit in the principle of constructive knowledge is that one is chargeable with knowledge of that which in the exercise of reasonable care he should have known). Accordingly, Harris Carpets' conduct meets the essential elements of estoppel.

Gevity's actions also meet the essential elements of estoppel. First, Gevity falsely represents a position inconsistent with its subsequent conduct. Gevity maintains Langdale is not covered because Harris Carpets and Langdale did not adhere to the provisions of the Agreement by failing to provide form "GNL GL-800," a document which is to be completed by the client and the worker to initiate coverage. Although Langdale and Harris Carpets never filled out form "GNL GL-800," Mr. Junkins testified Gevity never provided Harris Carpets with this form. Moreover, oral argument before the Appellate Panel revealed Harris Carpets provided Gevity a list of employees, and none of these employees were required to submit form "GNL GL-800," but obtained coverage. Second, Gevity also had the intention, or at least expectation, that employees paying workers' compensation premiums would be relying upon coverage should they be injured. Finally, Gevity had constructive knowledge of the real facts. Gevity asserts it was never provided notice Langdale was to be a covered employee because form "GNL GL-800" was never submitted. Despite this contention, Gevity had the

ability to audit Harris Carpets pursuant to the parties' Agreement, which would have revealed the employees covered under the policy. Although Gevity was not required to perform an audit, it had five months to review Harris Carpets' financial records, which would have likely revealed Langdale's workers' compensation premiums were not being paid to Gevity. See Shenker, 374 U.S. at 13 (stating that implicit in the principle of constructive knowledge is that one is chargeable with knowledge of that which in the exercise of reasonable care he should have known). As a result, Gevity's actions meet the essential elements of estoppel.

Langdale satisfies the essential elements of the doctrine of estoppel. First, the record provides ample evidence Langdale had no knowledge of Harris Carpets' or Gevity's actions. At the hearing, Langdale and Mr. Junkins both stated Harris Carpets made representations Langdale was covered under its workers' compensation policy. Langdale had no way of knowing the truth as to the facts in question as he continued to pay ten percent of each paycheck for workers' compensation insurance and did not know Gevity had an agreement with Harris Carpets or that Gevity even existed. Second, it is undisputed Langdale relied upon these representations of coverage. Finally, by declining the waiver of workers' compensation he was initially offered, Langdale changed his position in relying upon coverage when he agreed to have ten percent deducted from each paycheck. Accordingly, we find the decision by the Appellate Panel estopping both Gevity and Harris Carpets from denying coverage is supported by reliable, probative, and substantial evidence in the record.

E. Temporary Total Disability Benefits

Gevity and Harris Carpets assert the Appellate Panel erred in finding Langdale is currently entitled to temporary total disability benefits.[3] We disagree.

[3] Although Harris Carpets does not appeal the decision of the Appellate Panel, Harris Carpets concurs in Gevity's argument with regard to Langdale's entitlement to temporary total disability benefits.

Section 42-1-120 of the South Carolina Code (2010) defines disability as the "incapacity because of injury to earn the wages which an employee was receiving at the time of the injury in the same or some other employment." The issue of the extent of disability is a question of fact to be proved as any other fact is proved. Arnold v. Benjamin Booth Co., 257 S.C. 337, 342, 185 S.E.2d 830, 832 (1971). "This court's function is not to resolve conflicts in the evidence but to determine from the record if substantial evidence supports the agency's finding." Hanks v. Blair Mills, Inc., 286 S.C. 378, 384, 335 S.E.2d 91, 95 (Ct. App. 1985).

Gevity and Harris Carpets aver Langdale should have returned to work six to eight weeks following his surgery, and therefore, Langdale's temporary total disability benefits were proper only until October 3, 2008. Specifically, Gevity and Harris Carpets argue there is no medical evidence on which the single commissioner based his finding and Langdale is an experienced, independent contractor who is able to work in some capacity. However, we find Langdale presented satisfactory evidence to support the award of temporary total disability benefits. Langdale's last day of work was March 13, 2008, and he had surgery to repair the left medial and lateral meniscal tears on August 7, 2008. At the time of surgery, Dr. Kirk Hensarling opined it was likely Langdale would be out of work for six to eight weeks following the surgery, but "working as a flooring installer and being on his knees a great deal of time may be difficult for him." Although Dr. Hensarling has not specifically provided a medical leave slip to the court, he has not released Langdale to return to work and still sees Langdale on a regular basis. See Gilliam v. Woodside Mills, 319 S.C. 385, 388, 461 S.E.2d 818, 819 (1995) (recognizing the termination of temporary benefits and replacement with permanent benefits is only proper upon a finding of maximum medical improvement).

At the hearing, Langdale specifically testified about his pain and work limitations. Langdale emphasized he cannot squat, bend his knee, bear weight on his knee, or walk for any period of time without pain. Given these ailments, Langdale explained he would be unavailable to return to work because it would require him to bend over and kneel for long periods of time. In addition to Langdale's own testimony, the Appellate Panel reviewed a record containing extensive medical evidence demonstrating Langdale

incurred medial and lateral meniscal tears. See Fishburne v. ATI Systems Int'l, 384 S.C. 76, 87, 681 S.E.2d 595, 600 (Ct. App. 2009) ("The [Appellate Panel] is given discretion to weigh and consider all evidence, including both lay and expert testimony.").

The single commissioner heard the testimony at the hearing and found Langdale's testimony regarding his medical condition credible. In addition, the Appellate Panel affirmed the single commissioner's finding as to the temporary total disability benefits concluding the award was supported by reliable, probative, and substantial evidence on the record. See Etheredge v. Monsanto Co., 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002) ("The final determination of witness credibility and the weight to be accorded evidence in workers' compensation cases is reserved to the [Appellate Panel]."). Accordingly, we affirm the award of temporary total disability benefits to Langdale.

CONCLUSION

Accordingly, the Appellate Panel's decision is

AFFIRMED.[4]

GEATHERS and LOCKEMY, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jekeithlyn Ross, Appellant,

v.

Jimmy Ross, Respondent.

Appeal From Spartanburg County
Letitia Verdin, Family Court Judge

Opinion No. 4854
Heard May 4, 2011 – Filed July 20, 2011

REVERSED AND REMANDED

David Michael Collins, Jr., and N. Douglas Brannon, both of Spartanburg, for Appellant.

Hattie Evans Boyce, of Spartanburg, for Respondent.

HUFF, J.: Jekeithlyn Ross (Wife) appeals a family court order denying her claim for alimony, arguing the family court erred in determining the physical violence and threats of violence by Jimmy Ross (Husband) did not

justify the application of equitable tolling for Wife's claim. We reverse and remand.

FACTS

Husband and Wife were divorced on March 4, 2005, on the statutory ground of habitual drug use by Wife. In the divorce decree, the family court gave Wife thirty days to initiate a claim for alimony. On July 20, 2007, Wife filed a complaint seeking "a reasonable amount of permanent periodic alimony." The family court bifurcated Wife's request for alimony and ordered a hearing on whether Husband threatened or coerced Wife to prevent her from filing the action for alimony.

At the hearing, Wife testified about the tumultuous nature of the marriage and their relationship following the divorce. She testified Husband physically abused her during and after the marriage. According to Wife, she did not seek alimony earlier because Husband threatened to kill her if she pursued a claim against him. She presented evidence this threat caused her to enter into a safe house in June of 2005. In addition, she presented evidence he continued to harass her while she was working at Dillard's department store. She also testified he attacked her in April, 2007 when she came home from work. As a result of this attack, Husband was arrested and charged with criminal domestic violence, and Wife received a protective order against him. Throughout her testimony, Wife admitted she could not afford a lawyer; however, she always accompanied this admission with testimony she continued to be afraid of Husband.

Husband testified he did not threaten Wife and had very little contact with her following the divorce. He claimed he did not know where she lived following the divorce.

The family court found Husband "prevent[ed] [Wife] from exercising her right to seek alimony under the previous court order by the use of physical violence and threats." However, the family court also found Wife "later did not seek alimony because she could not afford an attorney." The

family court concluded, "While the facts of this case may have at one time supported the rare application of equitable tolling, the delay of two and a half years in seeking alimony is unreasonable and does not reflect that [Wife] exercised the requisite diligence in this matter." This appeal followed.

STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. Simmons v. Simmons, 392 S.C. 412, ___, 709 S.E.2d 666, 667 (2011); see Lewis v. Lewis, 392 S.C. 381, ___, 709 S.E.2d 650, 652 (2011). However, we recognize that the family court is in a superior position to determine the credibility of the witnesses. Lewis, 392 S.C. at ___, 709 S.E.2d at 655. Furthermore, the burden is on the appellant to demonstrate the family court's findings are against the preponderance of the evidence. Id. Accordingly, we will affirm the findings of the family court unless the appellant satisfies this court that the preponderance of the evidence is against those findings. Id.

LAW/ANALYSIS

Wife argues the family court erred in holding her claim for alimony was time barred.

The family court relied on this court's opinion in Hooper v. Ebenezer Senior Services & Rehabilitation Center, 377 S.C. 217, 231-32, 659 S.E.2d 213, 220 (Ct. App. 2008), rev'd, 386 S.C. 108, 687 S.E.2d 29 (2009), in which this court held: "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff . . . [and] is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights . . . ." While this court held the case was barred by the statute of limitations, the supreme court reversed, finding application of the doctrine was warranted by the facts of that case. Hooper v. Ebenezer

Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009).[1] The supreme court explained the doctrine of equitable tolling may be applied to toll the running of the statute of limitations "to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits . . . ." Id. at 115, 687 S.E.2d at 32. The court explained:

> The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Id. at 116-17, 687 S.E.2d at 33 (internal quotation marks and citation omitted).

The court noted the party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. Id. at 115, 687 S.E.2d at 32. The supreme court cautioned, "[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Id. at 117, 687 S.E.2d at 33.

Husband was charged with criminal domestic violence three times during the marriage. The abuse continued after the parties' divorce. In June, 2005, Wife received counseling and shelter from Safe Homes Emergency Shelter in Spartanburg citing fear of Husband to counselors. She told a staff person "she had been threatened to be killed if she pursued alimony." Wife lived at the safe home for two months. She claimed during that time Husband attempted to contact her through the mail.

[1] The supreme court issued its opinion in Hooper after the family court's order was filed.

Husband's harassment of Wife continued while she was employed with Dillard's department store.[2] Wife testified Husband followed her home from work and hung around waiting on her. In addition, she testified Husband came into the store and threw balls of paper at her. As a result, the store placed a trespass notice against him.[3]

One of Wife's co-workers from Dillard's testified that on more than one occasion when she was giving Wife a ride home from work, Husband followed them. On other occasions during the drive home, Wife received telephone calls from Husband, which Wife placed on speaker phone. The co-worker testified she could hear the anger in his voice. On one occasion, the co-worker found Husband standing near her car in the parking lot after Wife had borrowed it and had left her laundry in the car. The co-worker stated Wife said she was fearful for her safety, and the co-worker believed the fears were justified.

Wife stated that on April 6, 2007, Husband attacked her in the parking lot of her apartment complex. He was arrested and charged with criminal domestic violence as a result of the attack. Following this incident, Wife successfully sought a protective order against Husband, which remained effective until April 18, 2008. Wife filed her complaint for alimony approximately three months after the 2007 attack.

The family court found Wife established Husband prevented her from bringing the alimony action by the use of physical violence and threats. However, the court found that at some point, the reason Wife failed to bring the action was because she could not afford an attorney rather than her fear of Husband. Although Wife testified several times she was unable to afford an

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[2] Although the record is not clear when the harassment incidents occurred, it shows Wife began her employment with Dillard's in October, 2005, and apparently she was still employed by Dillard's at the time South Carolina Vocational Rehabilitation successfully closed its file on her in November, 2006.

[3] Husband testified this event did not occur and he was not banned from the store.

attorney, these statements were continuously coupled with testimony she was still afraid of Husband. The evidence indicates Wife was threatened and abused throughout the marriage, and the threats and abuse continued until at least April, 2007. The record does not support a finding that at some point the threats and abuse stopped and only Wife's inability to hire counsel prevented her from bringing the action. Accordingly, we find the family court erred in denying Wife's claim for alimony. We therefore remand the case to the family court to determine whether Wife is entitled to pursue her claim for alimony.[4]

REVERSED AND REMANDED.

SHORT, J. concurs.

PIEPER, J., concurs in a separate opinion.

PIEPER, J., concurring:

I concur in the decision to remand this case to the family court. However, I would specifically find that the posture of this bifurcated case does not warrant the application of equitable tolling to the court-imposed

[4] Wife argues on appeal the family court erred in applying the stringent standard of equitable tolling set forth in Hooper because the time limitation in the case was created by a judge rather than by a statute of limitations. We find this argument is not properly before the court and is not the basis for our decision. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). However, on remand, the family court should consider applying Rule 6 of the South Carolina Rules of Civil Procedure, which provides when a court order requires or allows an act to be done at or within a specified time, "upon motion made after the expiration of the specified period, for good cause shown, [the court may] permit the act to be done."

time period ordered by the family court. Instead, I would remand to allow the family court to make findings as to whether Wife has shown sufficient cause to extend the original court-imposed time period in which to pursue her claim for alimony. See Rule 6(b), SCRCP (permitting the enlargement of time within the court's discretion "upon motion made after the expiration of the specified period, for good cause shown, to permit the act to be done."); Rule 2(a), SCRFC (not exempting Rule 6, SCRCP, from family court proceedings). Moreover, a remand is appropriate because the family court employed a stricter equitable tolling analysis to the request, as opposed to a more liberal Rule 6 analysis.