The Supreme Court of South Carolina

In the Matter of Derek J. Lindenschmidt, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on April 20, 2004, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated April 27, 2007, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Derek J.

Lindenschmidt shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

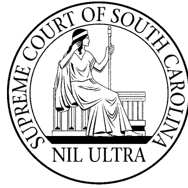
s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

Pleicones, J., not participating

Columbia, South Carolina

July 6, 2007



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF JOHN A. PINCELLI, PETITIONER

On June 25, 2007, Petitioner was definitely suspended from the practice of law for two years, retroactive to August 10, 2005. In the Matter of Pincelli, Opinion No. 26349 (S.C. Sup. Ct. filed June 25, 2007) (Shearouse Adv. Sh. No. 25 at 36). He has now filed a petition to be reinstated.

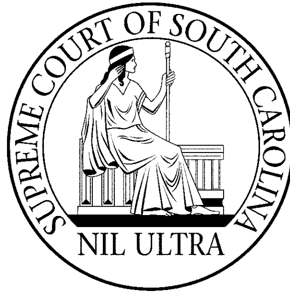
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

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

These comments should be received no later than September 14, 2007.

Columbia, South Carolina

July 16, 2007



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28

July 16, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

26356 – In the Matter of Douglas M. Schmidt 17

26357 – Starr Gadson v. ECO Services of SC 21

26358 – NY Times v. Spartanburg County School District 29

UNPUBLISHED OPINIONS

2006-MO-048 – Ernest Bolin v. State
(Richland County, Judge Alison Renee Lee)

PETITIONS – UNITED STATES SUPREME COURT

26253 – David Arnal v. Laura Fraser Pending

26279 – The State v. James Nathaniel Bryant Pending

26282 – Joseph Lee Ard v. William Catoe Pending

PETITIONS FOR REHEARING

26270 – James Furtick v. South Carolina Department of Corrections Pending

26328 – Thomas J. Torrence v. SC Department of Corrections Pending

26333 – State v. John Marcus Stevens Denied 7/2/07

26334 – John David Lee v. Robert Allen Bunch Pending

26337 – In the Matter of Harriet E. Wilmeth Pending

26339 – State v. Christopher Frank Pittman Pending

26345 – City of Rock Hill v. Suchenski Pending

26348 – Atwood Agency v. John Black Pending

26352 – In the Matter of Samantha D. Farlow Pending

26354 – Office of Regulatory Staff v. SCPSC Pending

2007-MO-036 – Forest Lawn v. City of Goose Creek Denied 7/2/07

2007-MO-039 – Davenport Properties v. SCDOT Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

Page

4272-Hilton Head Plantation Property Owners' Association, Inc., a South Carolina not-for-profit corporation v. Thomas Donald, Laura E. Donald, The State of South Carolina, Jane Doe and Robert Roe, Representing unknown Defendants, Minors, Incompetents, Persons Under Disability, and Members of the Armed Forces of the United States of America — 35

4273-Howard L. Hendricks v. William T. Hicks, and Miss Kitty's Inc. — 41

4274-Ernest Lamar Bradley and Esther K. Bradley v. John Doe and AccuSweep, Inc. — 46

4275-David Neal v. Don H. Brown and South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management — 68

4276-John J. McCrosson v. Kimberly Paige Tanenbaum — 83

UNPUBLISHED OPINIONS

2007-UP-340-Thomas O'Neal et al. v. Unita Pearson et al.
(Fairfield, Judge Kenneth G. Goode)

2007-UP-341-Auto Owners Insurance Company v. Sharon L. Barber, as personal Representative of the Estate of Joseph M. Taylor
(Dillon, Judge John M. Milling)

2007-UP-342-Ronald Lynn Jenkins v. Maria T. Jenkins
(Richland, Judge Berry L. Mobley)

2007-UP-343-Jane Agnew Brown, Izetta Pruitt Agnew, Timothy Wigington Agnew, Thomas Simpson Agnew, Rebecca Ann Girardieau, all individually and as Trustees for Thomas Simpson Agnew as Guardian of John Pruitt Agnew v. Susan Agnew Worthington and James Hugh Agnew
(Anderson, Judge Ellis B. Drew, Jr.)

2007-UP-344-James H. Dickey, individually and as personal representative for the Estate of Ruth S. Dickey, Deceased, v. Clarke Nursing Home, Cooke Associates Of Florence, Inc., Carolinas Hospital System, and Does A-Z
(Florence, Judge John M. Milling)

2007-UP-345-Linda Kay Fernandes v. Joseph Carlos Fernandes
(Charleston, Judge Frances P. Segars-Andrews)

2007-UP-346-The State v. Elbert Blocker
(Aiken, Judge Doyet A. Early, III)

2007-UP-347-BPD Diversified, Inc., d/b/a Bank Planning and Design v. Benchmark Capital Investment, LLC
(Greenville, Judge Charles B. Simmons, Jr.)

2007-UP-348-Roosevelt Eison v. State of South Carolina
(Union, Judge Lee S. Alford)

2007-UP-349-The State v. Jesse Holland
(Anderson, Judge Clifton Newman)

2007-UP-350-Virginia W. Alford v. Joseph L. Tamsberg, Jr. and State of South Carolina
(Charleston, Judge Roger M. Young)

2007-UP-351-Eddie Wayne Eldridge et al. v. S.C. Department of Transportation
(Greenwood, Special Referee Robert M. Erwin, Jr.)

2007-UP-352-Sheila E. and Frank E. v. Tiffany D. et al.
(Pickens, Judge Alvin D. Johnson)

2007-UP-353-Department of Social Services v. Crystal S. et al.
(Spartanburg, Judge Georgia V. Anderson)

PETITIONS FOR REHEARING

4208--State v. Christopher Pride	Granted	07/02/07
4237-State v. R. Lee-Grigg	Pending	
4243-Williamson v. Middleton	Pending	
4246-Duckett v. Goforth	Pending	

4247-State v. L. Moore	Pending
4254-Ecclesiastes Prod. v. Outreach	Pending
4256-Shuler v. Tri-County Electrical	Pending
4258-Plott v. Justin Enterprises	Pending
4261-State v. J. Edwards	Pending
4262-Town of Iva v. Holley	Pending
4264-Law Firm of Paul L. Erickson v. Boykin	Pending
4265-Osterneck v. Osterneck	Pending
4267-State v. T. Davis	Pending
4270-State v. J. Ward	Pending
4271-Mid-South Management v. Sherwood Dev.	Pending
2007-UP-125-State v. M. Walker	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Denied 07/02/07
2007-UP-201-State v. L. Shaw	Denied 06/28/07
2007-UP-202-Young v. Lock	Denied 07/02/07
2007-UP-218-State v. T. Brown	Pending
2007-UP-255-Marvin v. Pritchett	Pending
2007-UP-256-SCDSS v. Gunderson	Pending
2007-UP-276-Green v. Morris	Pending
2007-UP-280-State v. C. Williams	Pending
2007-UP-287-State v. L. Ellerbe	Pending

2007-UP-296-State v. S. Easterling	Pending
2007-UP-299-Alstaetter v. Liberty	Pending
2007-UP-301-SCDSS v. Turpin	Pending
2007-UP-313-Self v. City of Gaffney	Pending
2007-UP-316-Williams v. Gould	Pending
2007-UP-317-Peltier v. Metts	Pending
2007-UP-318-State v. S. Wiles	Pending
2007-UP-321-State v. D. Dillard	Pending
2007-UP-324-Kelley v. Kelley	Pending
2007-UP-331-Washington v. Wright Construction	Pending
2007-UP-337-SCDSS v. Sharon W.	Pending
20007-UP-345-Fernandes v. Fernandes	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

3949 – Liberty Mutual v. S.C. Second Injury Fund	Pending
3968 – Abu-Shawareb v. S.C. State University	Pending
3983 – State v. D. Young	Pending
4014 – State v. D. Wharton	Pending
4022 – Widdicombe v. Tucker-Cales	Pending
4047 – Carolina Water v. Lexington County	Pending
4060 – State v. Compton	Pending
4071 – State v. K. Covert	Pending
4089 – S. Taylor v. SCDMV	Pending

4100 – Menne v. Keowee Key	Denied 07/05/07
4107 – The State v. Russell W. Rice, Jr.	Pending
4111 – LandBank Fund VII v. Dickerson	Pending
4118 – Richardson v. Donald Hawkins Const.	Pending
4119 – Doe v. Roe	Pending
4120 – Hancock v. Mid-South Mgmt.	Pending
4121 – State v. D. Lockamy	Pending
4122 – Grant v. Mount Vernon Mills	Pending
4127 – State v. C. Santiago	Pending
4128 – Shealy v. Doe	Pending
4136 – Ardis v. Sessions	Pending
4139 – Temple v. Tec-Fab	Pending
4140 – Est. of J. Haley v. Brown	Pending
4143 – State v. K. Navy	Pending
4144 – Myatt v. RHBT Financial	Pending
4145 – Windham v. Riddle	Pending
4148 – Metts v. Mims	Pending
4156--State v. D. Rikard	Pending
4157– Sanders v. Meadwestvaco	Pending
4159-State v. T. Curry	Pending
4162 – Reed-Richards v. Clemson	Pending

4163 – F. Walsh v. J. Woods	Pending
4165 – Ex Parte: Johnson (Bank of America)	Pending
4168 – Huggins v. Sherriff J.R. Metts	Pending
4169—State v. W. Snowdon	Pending
4170--Ligon v. Norris	Pending
4172 – State v. Clinton Roberson	Pending
4173 – O'Leary-Payne v. R. R. Hilton Heard	Pending
4175 – Brannon v. Palmetto Bank	Pending
4176 – SC Farm Bureau v. Dawsey	Pending
4178 – Query v. Burgess	Pending
4179 – Wilkinson v. Palmetto State Transp.	Pending
4180 – Holcombe v. Bank of America	Pending
4182 – James v. Blue Cross	Pending
4183 – State v. Craig Duval Davis	Pending
4184 – Annie Jones v. John or Jane Doe	Pending
4185—Dismuke v. SCDMV	Pending
4186 – Commissioners of Public Works v. SCDHEC	Pending
4187 – Kimmer v. Murata of America	Pending
4189—State v. T. Claypoole	Pending
4195--Rhoad v. State	Pending
4196—State v. G. White	Pending
4197—Barton v. Higgs	Pending

4198-Vestry v. Orkin Exterminating	Pending
4200—Brownlee v. SCDHEC	Pending
4202-State v. A. Smith	Pending
4205—Altman v. Griffith	Pending
4206—Hardee v. W.D. McDowell et al.	Pending
4209-Moore v. Weinberg	Pending
4211-State v. C. Govan	Pending
4212-Porter v. Labor Depot	Pending
4216-SC Dist Council v. River of Life	Pending
4217-Fickling v. City of Charleston	Pending
4220-Jamison v. Ford Motor	Pending
4224-Gissel v. Hart	Pending
4225-Marlar v. State	Pending
4227-Forrest v. A.S. Price et al.	Pending
4231-Stearns Bank v. Glenwood Falls	Pending
2005-UP-345 – State v. B. Cantrell	Pending
2005-UP-490 – Widdicombe v. Dupree	Pending
2005-UP-580 – Garrett v. Garrett	Pending
2006-UP-037-State v. Henderson	Pending
2006-UP-194-State v. E. Johnson	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Denied 06/20/07

2006-UP-222-State v. T. Lilly	Pending
2006-UP-237-SCDOT v. McDonald's Corp.	Pending
2006-UP-241-Marin v. Black & Decker	Pending
2006-UP-243-Sun Trust Mortgage v. Gobbi	Pending
2006-UP-245-Gobbi v. People's Federal	Pending
2006-UP-247-State v. Hastings	Pending
2006-UP-256-Fulmer v. Cain	Granted 07/03/07
2006-UP-262-Norton v. Wellman	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-303-State v. T. Dinkins	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-309-Southard v. Pye	Denied 07/05/07
2006-UP-313-Uzenda v. Pittman	Pending
2006-UP-314-Williams et. al v. Weaver et. al	Pending
2006-UP-315-Thomas Construction v. Rocketship Prop.	Pending
2006-UP-316-State v. Tyrelle Davis	Pending
2006-UP-317-Wells Fargo Home Mortgage v. Thomasena J. Holloway and Albert Holloway	Pending
2006-UP-320-McConnell v. John Burry	Pending
2006-UP-323-Roger Hucks v. County of Union	Pending
2006-UP-329-Washington Mutual v. Hiott	Pending
2006-UP-332-McCullar v. Est. of Campbell	Pending

2006-UP-333-Robinson v. Bon Secours	Pending
2006-UP-350-State v. M. Harrison	Pending
2006-UP-359-Pfeil et. al v. Walker et. al	Pending
2006-UP-360-SCDOT v. Buckles	Pending
2006-UP-367-Coon v. Renaissance	Pending
2006-UP-372-State v. Bobby Gibson, Jr.	Pending
2006-UP-374-Tennant v. Georgetown et al.	Pending
2006-UP-377-Curry v. Manigault	Pending
2006-UP-378-Ziegenfus v. Fairfield Electric	Pending
2006-UP-385-York Printing v. Springs Ind.	Pending
2006-UP-390-State v. Scottie Robinson	Pending
2006-UP-393-M. Graves v. W. Graves	Pending
2006-UP-395-S. James v. E. James	Pending
2006-UP-401-SCDSS v. Moore	Pending
2006-UP-403-State v. C. Mitchell	Pending
2006-UP-412-K&K v. E&C Williams Mechanical	Pending
2006-UP-413-Rhodes v. Eadon	Pending
2006-UP-416-State v. Mayzes and Manley	Pending
2006-UP-417-Mitchell v. Florence Cty School	Pending
2006-UP-420-Ables v. Gladden	Pending
2006-UP-426-J. Byrd v. D. Byrd	Pending

2006-UP-427-Collins v. Griffin	Pending
2006-UP-431-Lancaster v. Sanders	Pending
2007-UP-004-Anvar v. Greenville Hospital Sys.	Pending
2007-UP-010-Jordan v. Kelly Co. et al.	Pending
2007-UP-015-Village West v. Arata	Pending
2007-UP-023-Pinckney v. Salamon	Pending
2007-UP-048-State v. J. Ward	Dismissed 07/02/07
2007-UP-056-Tennant v. Beaufort County	Pending
2007-UP-061-J. H. Seale & Son v. Munn	Pending
2007-UP-062-Citifinancial v. Kennedy	Pending
2007-UP-063-Bewersdorf v. SCDPS	Pending
2007-UP-064-Amerson v. Ervin (Newsome)	Pending
2007-UP-066-Computer Products Inc. v. JEM Rest.	Pending
2007-UP-087-Featherston v. Staarman	Pending
2007-UP-090-Pappas v. Ollie's Seafood	Pending
2007-UP-091-Sundown Operating v. Intedge	Pending
2007-UP-098-Dickey v. Clarke Nursing	Pending
2007-UP-109-Michael B. and Andrea M. v. Melissa M.	Pending
2007-UP-110-Cynthia Holmes v. James Holmes	Pending
2007-UP-111-Village West v. International Sales	Pending
2007-UP-130-Altman v. Garner	Pending

2007-UP-133-Thompson v. Russell	Pending
2007-UP-135-Newman v. AFC Enterprises	Pending
2007-UP-147-Simpson v. Simpson	Pending
2007-UP-162-In the matter of W. Deans	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Douglas M. Schmidt, Respondent.

Opinion No. 26356
Submitted June 12, 2007 – Filed July 9, 2007

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Douglas M. Schmidt, of Graniteville and New Orleans, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of a letter of caution, a confidential admonition, or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent is licensed to practice law in South Carolina and Louisiana. Until January 2005, respondent operated a law office in Louisiana

only. However, following the train derailment in Graniteville, South Carolina in January 2005, respondent opened a law office in Graniteville.

Advertisements

In January 2005, respondent published several advertisements in the *Aiken Standard* newspaper in order to solicit clients as a result of the train accident. In two of these advertisements, respondent failed to disclose the location, by city or town, where he principally practiced law. Respondent also posted a billboard in Graniteville using a form of the word "specialist," when in fact respondent is not a specialist certified by this Court.[1]

Solicitation Letters

On February 8, 2005, respondent sent a solicitation letter (Letter #1) to residents in and around Graniteville, in which respondent referred to himself as a "neighborhood attorney" and included his photograph. Letter #1 stated his staff "will review your claim to see if you are entitled to damages" and stated he was able to "achieve the best legal results possible." Respondent failed to disclose that he principally practiced law in Louisiana, did not disclose how he obtained the information prompting the communication, included a form of the word "expert," and provided an incorrect address and telephone number for the Commission on Lawyer Conduct (the Commission). Respondent did not file a copy of Letter #1 with the Commission and did not pay the required filing fee within ten days of mailing the letter.

On February 18, 2005, respondent sent another solicitation letter (Letter #2) to residents in and around Graniteville. Letter #2 was similar, but not identical to Letter #1, in that respondent removed his photograph and the word "expertise." Although respondent filed a copy of Letter #2 with the Commission, he failed to provide a list of persons to whom the letter was sent.

---

[1] Respondent taped over the word upon discovery of the error.

On March 3, 2005, respondent sent a third solicitation letter (Letter #3) to residents in and around Graniteville, in which he used the phrase "experts in law." Respondent failed to file a copy with the Commission, pay the filing fee, or provide a list of persons to whom it was sent within ten days of mailing Letter #3. On March 22, 2005, respondent attempted to file Letter #3 with the Commission, but failed to include a list of persons to whom it was mailed.

By letter dated March 7, 2005, ODC notified respondent of a complaint filed against him as a result of the solicitation letters and requested a response within fifteen days. Respondent failed to respond.[2]

Client Letter

On June 16, 2005, respondent sent a letter to his clients regarding a proposed settlement. In the letter, respondent stated he was "picking up an average of an additional 25 clients a day," when, in fact, he was only adding between one and six clients per day. Although respondent believed the statement to be true, he did not verify this statement before including it in the letter.

LAW

Respondent admits his conduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 7.1(a) (lawyer shall not make false, misleading, deceptive or unfair communications about the lawyer or his services); Rule 7.1(b) (lawyer shall not make communications that are likely to create an unjustified expectation about results the lawyer can achieve); Rule 7.1(c) (lawyer shall not compare his or her services with other lawyers' services); Rule 7.2(i) (all advertisements shall disclose the geographic location, by city or town, of the

[2] Respondent ultimately responded to the complaint following notice of a full investigation.

office in which the lawyer principally practices law); Rule 7.3(c) (every written or recorded communication subject to this Rule must comply with filing requirements); Rule 7.3(g) (any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication shall disclose how the lawyer obtained the information prompting the communication); Rule 7.4(b) (lawyer shall not include any form of the words "expert" or "specialist" in advertisements); Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Starr Gadson, by her Guardian ad Litem, Kathy Gadson, Respondent,

v.

ECO Services of South Carolina, Inc., and Joseph Jenkins, of whom Joseph Jenkins, is, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Jasper County
Paul M. Burch, Circuit Court Judge

Opinion No. 26357
Heard May 2, 2007 – Filed July 16, 2007

REVERSED AND REMANDED

Joseph R. Weston, of Weston Law Firm, of Mt. Pleasant, for Petitioner.

Daniel E. Henderson, of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, of Ridgeland, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' decision in Gadson v. ECO Services of South Carolina, Op. No. 2005-UP-130 (S.C. Ct. App. filed February 18, 2005). Joseph Jenkins (Petitioner) contends the Court of Appeals erred in affirming the trial court's denial of his motions for directed verdict and judgment notwithstanding the verdict (JNOV). We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner was employed by ECO Services of South Carolina, Inc. (ECO), a solid waste contractor. On August 6, 1997, instead of returning ECO's vehicle to the Hilton Head office, Petitioner drove the vehicle to Hardeeville where he picked up several passengers, including Starr Gadson (Respondent) and his cousin, John Jenkins, and drove them to McDonald's. Petitioner then drove them to a store where John purchased one or two wine coolers. John shared the wine coolers with another passenger.

Petitioner drove them to Purrysburg Landing, where they talked for about an hour. On the way back to Hardeeville, John drove the vehicle. John reached a speed of 80 miles per hour before losing control of the vehicle. Several passengers, including Respondent, were thrown from the vehicle and sustained injuries.

Respondent filed an action against ECO and Petitioner, alleging negligence and negligent entrustment. Neither Petitioner nor John appeared at trial. However, Petitioner did move for a directed verdict. The jury returned a verdict against all three defendants, finding: (1) ECO entrusted the vehicle to Petitioner; (2) ECO was negligent in entrusting the vehicle to Petitioner; (3) ECO's negligence proximately caused Respondent's injuries; (4) John was driving the vehicle at the time of the accident and was doing so negligently; (5) John's negligence proximately caused Respondent's injuries; (6) Petitioner was not driving the vehicle at the time of the accident; and (7) Petitioner was negligent in entrusting the vehicle to John. The jury awarded Respondent $50,000 in actual damages.

Both ECO and Petitioner moved for JNOV and a new trial based on juror misconduct. The trial court dismissed both motions finding they were not timely filed. The Court of Appeals remanded and the trial court considered and denied the motions. ECO and Petitioner appealed. Based on the definition of negligent entrustment as provided by the Restatement (Second) of Torts § 308 (1965), the Court of Appeals affirmed as to Petitioner and reversed as to ECO. Gadson v. ECO Services of S.C., Op. No. 2005-UP-130 (S.C. Ct. App. filed February 18, 2005). Specifically, the Court of Appeals considered Petitioner's driving record and work history and found ECO neither knew nor should have known Petitioner intended or was likely to use the truck in such a manner as to create an unreasonable risk of harm to others. As for Petitioner, the Court of Appeals found he knew or should have known John's use of the vehicle was likely to cause harm considering their familial relationship and the fact John consumed alcohol before driving.

ISSUE

Did the Court of Appeals err in affirming the trial court's denial of Petitioner's motions for directed verdict and JNOV and in finding Petitioner negligently entrusted the vehicle to John Jenkins?

STANDARD OF REVIEW

When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). The Court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002). The motions should be denied when either the evidence yields more than one inference or its inference is in doubt. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006). An appellate court will only reverse the lower court's ruling when there is no evidence to support the ruling or when the ruling is controlled by

an error of law. Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999).

LAW/ANALYSIS

Petitioner argues the Court of Appeals erred in affirming the trial court's denial of his motions for directed verdict and JNOV and in finding he negligently entrusted the vehicle to John Jenkins. Specifically, Petitioner argues there is no evidence from which a jury could have reasonably concluded he knew or had reason to know John was likely to use the vehicle in a manner involving unreasonable risk of physical harm to himself or others.

According to our case law, the elements of negligent entrustment are: (1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking; (2) the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver. Jackson v. Price, 288 S.C. 377, 342 S.E.2d 628 (Ct. App. 1986). However, in determining whether Respondent met her burden of proving the elements of negligent entrustment, the Court of Appeals applied Restatement (Second) of Torts §§ 308 and 390,[1] which

---

[1] Section 308 provides:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Section 390 provides:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving

extend liability when the owner knows or had reason to know that such person is likely because of his youth, inexperience, or otherwise, to create an unreasonable risk of physical harm to himself and others. We decline to adopt sections 308 and 390 of the Restatement based on this set of facts, and we analyze this case under the elements of negligent entrustment set forth in Jackson.

The Court of Appeals erred in finding Petitioner knew John would cause harm because Petitioner knew John had been drinking alcohol prior to driving the vehicle. Over an hour before driving the vehicle, Petitioner witnessed John purchase and consume wine coolers. It is disputed whether John purchased one or two wine coolers and whether he shared the drinks with another passenger. Petitioner stated in his brief and Respondent testified at trial that John did not appear intoxicated. Furthermore, there was no evidence as to John's drinking habits or his driving record. The sole evidence supporting the claim for negligent entrustment against Petitioner is the fact John had one or two wine coolers prior to driving. Knowledge that a driver has had a drink or two is a far cry from meeting the first element of negligent entrustment that there be knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking.

Viewing the evidence in the light most favorable to Respondents, there was no support for the contention Petitioner, or even Respondent, for that matter, knew John was intoxicated; nor was there evidence Petitioner knew John had a habit of being intoxicated and driving. Evidence John consumed as little as half of a wine cooler[2] an hour before driving the vehicle does not support a finding of negligent entrustment against Petitioner. See, *e.g.*, Greene v. Jenkins, 481 S.E.2d 617 (Ga. Ct. App. 1997) (parents were not

---

unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

[2] Respondent testified John split the wine cooler with another passenger.

liable for entrusting vehicle to son when parents knew son had a couple of drinks, but did not know he was incompetent due to intoxication and when passenger in wrecked vehicle testified she would not have ridden with the son had she believed he was intoxicated); Gibson v. Bruner, 178 A.2d 145 (Pa. 1961) (JNOV granted to father who entrusted truck to son after son had consumed four bottles of beer when there was no evidence son was intoxicated or unable to drive the truck competently).

The Court of Appeals also erred in finding Petitioner knew John would cause harm simply because John was Petitioner's cousin. The Court of Appeals held, "[Petitioner] was apparently familiar with John's character, because he was John's cousin." Gadson v. ECO Services of S.C., Op. No. 2005-UP-130 (S.C. Ct. App. filed February 18, 2005). Respondent presented no evidence Petitioner had any knowledge of John's drinking habits, driving record, or general behavior. Assuming Petitioner was aware of John's character simply because Petitioner and John are cousins was error.

Finally, the Court of Appeals erred in finding the jury could have inferred the elements of negligent entrustment had been met when Petitioner failed to testify on his own behalf. The failure of a defendant to testify raises an inference that his testimony, if it had been submitted, would have been unfavorable to his position. See, *e.g.*, Crocker v. Weathers, 240 S.C. 412, 126 S.E. 335 (1962). However, Respondent presented no evidence Petitioner knew John would create an unreasonable risk of harm other than evidence Petitioner and John were cousins and John consumed a minimal amount of alcohol before driving. Respondent carried the burden of proof and failed to present any evidence Petitioner negligently entrusted the vehicle to John. See Ross v. Paddy, 340 S.C. 428, 433, 532 S.E.2d 612, 614 (Ct. App. 2000) ("The burden of proof is on the plaintiff to establish the negligence of the defendant."). Respondent failed to meet her burden of proof and cannot rely on the absence of Petitioner at trial to fill the void of evidence.

CONCLUSION

The Court of Appeals erred in affirming the trial court's denial of Petitioner's motion for a directed verdict because Respondent failed to

submit any evidence establishing the necessary elements of negligent entrustment.

REVERSED AND REMANDED.

TOAL, C.J., MOORE, J., and Acting Justice J. Cordell Maddox, concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that petitioner's JNOV motion should have been granted, but write separately because I believe we should adopt Restatement (Second) of Torts, §§ 308 and 390 as alternative methods of proving negligent entrustment. I fear that our current formulation would not admit of liability where a person permitted an individual to drive an automobile knowing that the driver was intoxicated, but where there was no evidence the supplier knew the driver was a habitual drinker or addicted to alcohol. In my view, adoption of sections 308 and 390 would eliminate this loophole. That said, I agree that even under these formulations, there is no evidence that petitioner knew or should have known that John Jenkins was likely to operate the vehicle in a manner which created an unreasonable risk of harm. I therefore concur in the decision to reverse and remand the Court of Appeals' decision affirming the trial court's denial of petitioner's JNOV motion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The New York Times Co.,
d/b/a The Spartanburg Herald-
Journal, and Bob Dalton, Respondents,

v.

Spartanburg County School
District No. 7, Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 26358
Heard June 20, 2007 – Filed July 16, 2007

AFFIRMED

Kenneth E. Darr and Carlos C. Johnson, both of Lyles, Darr & Clark, of Spartanburg, for Appellant.

Jay Bender, of Baker, Ravenel & Bender, of Columbia, for Respondents.

JUSTICE PLEICONES: This is an appeal from an order granting injunctive relief and attorney's fees under the Freedom of Information Act ("FOIA") to plaintiffs New York Times Co., d/b/a The Spartanburg Herald-

Journal, and Bob Dalton, city editor for the paper (collectively, "respondents"). We affirm.

FACTS

In 2003, while Spartanburg County School District No. 7 ("appellant") was searching for a school superintendent, respondents transmitted a FOIA request seeking material relative to appellant's search. Specifically, respondents requested, "[A]ccess to all materials gathered by the Spartanburg School District No. 7 Trustees regardless of form, relating to not fewer than the final three applicants considered for the District No. 7 superintendent's position."[1]

Appellant described its superintendent selection process as beginning with a group of approximately thirty applicants. That group was narrowed to five "semi-finalists," out of which two "finalists" were selected. The district had assured the five semi-finalists that only the identities of the finalists would be revealed. As a result, appellant only offered to make available material relating to the two individuals considered to be "finalists."

Respondents filed a complaint shortly thereafter, seeking a declaratory judgment that appellant violated S.C. Code Ann. § 30-4-40(a)(13) and injunctive relief restraining the district from withholding further information related to the superintendent search.

After a non-jury trial, the circuit court found that appellant had violated § 30-4-40(a)(13), ordered the disclosure of additional information, and awarded attorney's fees and costs to respondents.

---

[1] Respondents' request tracked the language found in S.C. Code Ann. § 30-4-40(a)(13) (Supp. 2007).

ISSUES

1. Did appellant violate § 30-4-40(a)(13) by disclosing information relating to only the two applicants it deemed to be the final applicants?

2. Did the circuit court err by awarding attorney's fees and costs to respondents, where appellant acted in good faith based on its reasonable understanding of the statute?

ANALYSIS

In a case raising a novel question regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). We cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. City of Columbia v. Am. Civ. Liberties Union of South Carolina, Inc., 323 S.C. 384, 388, 475 S.E.2d 747, 749 (1996).

In interpreting a statute, our primary purpose is to ascertain the intent of the legislature. Beattie v. Aiken County Dept. of Soc. Serv., 319 S.C. 449, 452, 462 S.E.2d 276, 278 (1995). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Id. (citing Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)).

FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864-865 (2001). FOIA must be construed so as to make it possible for citizens to learn and report fully the activities of public officials. S.C. Code Ann. § 30-4-15 (Supp. 2007).

S.C. Code Ann. § 30-4-40(a)(13), which exempts from mandatory disclosure certain material gathered in the search to fill a public employment position, provides:

> (a) A public body may but is not required to exempt from disclosure the following information:
> ….
> (13) All materials, regardless of form, gathered by a public body during a search to fill an employment position, **except that materials relating to not fewer than the final three applicants under consideration for a position must be made available for public inspection and copying**.

S.C. Code Ann. § 30-4-40(a)(13) (emphasis added). The circuit court determined that this provision required disclosure of material relating to applicants in the pool from which the employment selection was made, provided that pool contained not fewer than three people.

Appellant contends that § 30-4-40(a)(13) only mandates disclosure of those applicants deemed by the public body to be the "final" applicants, even if that number is fewer than three. We disagree.

The statutory language requiring disclosure of materials relating to "not fewer than the final three applicants" requires the public body to disclose the final pool of applicants comprised of at least three people. We do not agree with appellant that only those applicants deemed by the agency to be "finalists" are subject to disclosure. According to the plain language of the statute, disclosure is limited to the final pool consisting of not fewer than three applicants.

Application of the statute in this case requires that disclosure be limited to the final group numbering more than two- i.e., the five semi-finalists, not the entire group of thirty applicants. The term "final" in § 30-4-40(a)(13)

refers to the last group of applicants, with at least three members, from which the employment selection is made.

Appellant also argues that § 30-4-40(a)(13), as interpreted by the circuit court, has the absurd effect of forcing public employers to name three finalists even though there may only be two qualified candidates. We disagree.

The fact that a public employer has to disclose information regarding an employment search does not in any way force the employer to officially name three finalists. The statute simply requires a public employer to disclose material relating to a larger group of applicants if it chooses to name one or two "finalists." Construing § 30-4-40(a)(13) as urged by appellant would allow public employers to avoid disclosure by naming only one or two "finalists." We will reject a statutory interpretation that leads to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Kiriakides v. United Artists Commun., Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Our interpretation of § 30-4-40(a)(13) comports with the plain language of the statute and promotes the purpose of FOIA.

Appellant also argues that the circuit court abused its discretion by awarding attorney's fees and costs to respondents. We disagree.

South Carolina Code Ann. § 30-4-100(b) (Supp. 2007) allows for an award of attorney's fees where the party seeking relief prevails in whole or in part. After the circuit court granted relief to respondents, it directed respondents to submit material in support of their claim for attorney's fees and costs. Appellant does not challenge the amount of the award nor the material submitted in support of the award.

Appellant contends that if the Court finds it violated § 30-4-40(a)(13), attorney's fees are not proper because appellant acted in good faith based on its reasonable understanding of that section. We previously rejected the same argument in Socy. of Prof. Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984). No good faith exception exists for an award of attorney's fees

under FOIA. Accordingly, the circuit court did not abuse its discretion in awarding attorney's fees and costs to respondents pursuant to § 30-4-100(b).

CONCLUSION

We hold that appellant violated FOIA by not disclosing material relating to the applicants in the group of five. Furthermore, the circuit court did not abuse its discretion by awarding attorney's fees to respondents. The circuit court's order is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hilton Head Plantation Property Owners' Association, Inc., a South Carolina not-for-profit corporation, Appellant,

v.

Thomas M. Donald, Laura E. Donald, Dieter Meuderscheid, Rita Meuderscheid, M. Simone Lawrence, Alan J. Palchak, Dori S. Palchak, Jacqueline T. Strickland, John J. Geiger, Joyce A. Geiger, J. Keith Elmblad, June A. Elmblad, J. Louis Grant, Mary Jean Farley, Daniel M. Driscoll, Leslie Hunt Driscoll, Vincent Paul Eck, Cecile O'Neill Eck, Edgar B. Seeley, Cynthia H. Seeley, Guy M. Blount, Melanie Blount, The State of South Carolina, and Jane Doe and Robert Roe, representing unknown Defendants, Minors, Incompetents, Persons Under Disability, and Members of the Armed Forces of the United States of America, Defendants,

of whom Thomas Donald,
Laura E. Donald, The State of
South Carolina, Jane Doe and
Robert Roe, representing
unknown Defendants, Minors,
Incompetents, Persons Under
Disability, and Members of the
Armed Forces of the United
States of America, are Respondents.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Special Referee

Opinion No. 4272
Submitted June 1, 2007 – Filed July 6, 2007

AFFIRMED

Daphne A. Burns, of Mt. Pleasant and Douglas Whitsett MacNeille, of Hilton Head Island, for Appellant.

Dean B. Bell and Gregory Milam Alford, both of Hilton Head Island and Assistant Deputy Attorney General J. Emory Smith, Jr., of Columbia, for Respondents.

PER CURIAM: In this quiet title action, the Hilton Head Plantation Property Owners' Association, Inc. (the Association) appeals the special referee's order determining the State of South Carolina owns title to certain disputed land (the Property). On appeal, the Association contends the special referee erred in failing to find it obtained the Property through chain of title or adverse possession. We affirm.

FACTS

The Hilton Head Plantation Company, Inc. (the Developer) owned and developed a large tract of land known as Hilton Head Plantation. To further this development, the Developer created the Association. Within Hilton Head Plantation lies Bear Creek Subdivision II (the Subdivision). A salt marsh conservatory borders lots 48 through 60 of the Subdivision. The Property consists of a strip of land lying between these lots and the high water mark in the salt marsh conservatory.

In July 2000, the Association filed this quiet title action against the individual owners of lots 48 through 60, the State, and any other party claiming an interest in the Property. The Association asserted title to the Property through a quitclaim deed from the Developer or alternatively through adverse possession. The State answered, claiming paramount title to the Property pursuant to the public trust doctrine. Thomas M. and Laura E. Donald, the owners of lot 54 in the Subdivision, also answered, reiterating the State's argument. No other party asserted an interest in the Property.

The case was referred to a special referee for trial. At trial, Jack Best, an employee of the Developer from 1972 to 1984, testified the Developer dredged a nearby creek in 1972 and 1973. This dredging caused spoil to build up and created a berm between Hilton Head Plantation and the marsh area. Best further testified that prior to these activities, the area now constituting the Property was tidal. In addition, the Developer did not provide for a buffer area between the newly platted lot lines and the marsh.

The special referee held the Property was created in the early 1970's by spoil from the Developer's dredging. Consequently, the special referee concluded the area belongs to the State. The Association filed a motion to reconsider, which the special referee denied. This appeal followed.

STANDARD OF REVIEW

Generally, an action to quiet title to land lies in equity. Goldman v. RBC, Inc., 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006). However, when the defendant's answer raises an issue of paramount title to land, such as would, if established, defeat plaintiff's action, the issue of title is legal. Mountain Lake Colony v. McJunkin, 308 S.C. 202, 204, 417 S.E.2d 578, 579 (1992); see also Bryan v. Freeman, 253 S.C. 50, 52, 168 S.E.2d 793, 793-94 (1969) ("[W]hen the defendant's answer raises an issue of paramount title to land, such as would, if established, defeat plaintiff's action, it is the duty of the court to submit to a jury the issue of title as raised by the pleadings."). "Therefore, in a case tried without a jury, the factual findings of a judge regarding title will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings." Wigfall v. Fobbs, 295 S.C. 59, 60-61, 367 S.E.2d 156, 157 (1988).

LAW/ANALYSIS

The Association contends the special referee erred in refusing to find it acquired the Property through chain of title or adverse possession. We disagree.

"Historically, the State holds presumptive title to land below the high water mark." McQueen v. South Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003); see also Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 396, 252 S.E.2d 133, 135 (1979) ("This Court has held that lands lying between the usual high water line and the usual low water line on tidal navigable watercourses enjoy a special or unique status, being held by the State in trust for public purposes."). "One asserting title to this land must prove a specific grant from the sovereign[,] which is strictly construed

against the grantee." Coburg Dairy, Inc. v. Lesser, 318 S.C. 510, 512, 458 S.E.2d 547, 548 (1995).

The Association claims the Developer, as the owner of Hilton Head Plantation at the time the Property was created, obtained title to the Property through accretion. As a result, the Association asserts its quitclaim deed from the Developer conveyed the Property to the Association. Generally, a riparian owner enjoys the right to any lands formed by accretion. 78 Am. Jur. 2d Waters § 35 (2002); see also 65 C.J.S. Navigable Waters § 95 (2000) ("[A]ny increase of soil to land adjacent or contiguous to a navigable stream or water, formed by accretion or alluvion, belongs to the riparian or littoral owner."). However, "artificial accretions which are caused solely by the act of the upland owner should not inure to his benefit, for the upland owner should not be permitted to enlarge his own estate at the expense of the State." Horry County v. Tilghman, 283 S.C. 475, 481, 322 S.E.2d 831, 834 (Ct. App. 1984) (quoting Borough of Wildwood Crest v. Masciarella, 222 A.2d 138, 143 (N.J. Ch. 1966); see also 65 C.J.S. Navigable Waters § 96 (2000) ("Under the common law, a littoral owner cannot extend its own property into water by landfilling or purposely causing accretion.").

In this case, Best's testimony supports the special referee's conclusion that the Property was formed by the Developer's dredging activities in the early 1970's. Best's testimony also supports the special referee's decision that the State owned the Property because it was below the high water mark before this dredging. As a result, the Developer did not have title to the Property at the time it quitclaimed the Property to the Association. A fortiori, the Association may not claim the Property through a deed from the Developer. Finally, based on our finding that the State holds title to the Property, the Association also may not claim the Property through a theory of adverse possession. See Davis v. Monteith, 289 S.C. 176, 179-80, 345 S.E.2d 724, 726 (1986) ("[A]dverse possession does not run against the [S]tate or its duly constituted political subdivisions."). Based on the foregoing, the special referee's decision is

AFFIRMED. [1]

STILWELL, SHORT, and WILLIAMS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Howard L. Hendricks, Respondent,

v.

William T. Hicks, and Miss Kitty's Inc., Appellant.

Appeal From Horry County
J. Stanton Cross, Jr., Master in Equity

Opinion No. 4273
Submitted June 1, 2007 – Filed July 6, 2007

AFFIRMED

Irby E. Walker, Jr., of Conway, for Appellant.

William W. DesChamps, Jr., of Myrtle Beach, for Respondent.

STILWELL, J.: William T. Hicks and Miss Kitty's, Inc. (hereafter collectively Hicks) contend the master in equity erred in finding Hicks liable for fraud. We affirm.[1]

---

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

FACTS

Hicks leased the property in question from Danny Enterprises in 1998. Hicks and Howard Hendricks entered into a contract in 2002, pursuant to which Hicks' leasehold interest was assigned to Hendricks. Hendricks also purchased all the furniture, fixtures, equipment, inventory, and good will connected with the ongoing business and the premises. The contract also gave Hendricks the right to offset any loss or damage he incurred in the event of a breach of any of the warranties, representations, or covenants in the contract from any sum he may still owe.

Hicks specifically warranted that "public water is available to the premises" and "applicable zoning permits operation of an adult entertainment business on the premises." The contract further stated, "we have no knowledge of any fire, health, safety, building, pollution, environmental, zoning or other violation of law in respect to the property . . . ."

Hicks was operating a "gentleman's club" on the premises prior to entering into the transaction with Hendricks and was litigating with the City of Myrtle Beach concerning sewer service to the property. The property had to be within the city limits to connect to the sewer lines, but city zoning ordinances prohibited the operation of adult-oriented businesses in that particular location.[2] Even though a state court order held that the city was under no obligation to provide sewer service, Hicks still contended he was entitled to the service, and the dispute was ongoing in federal court at the time of the transaction with Hendricks.

The Department of Health and Environmental Control (DHEC) notified Hicks of a temporary allowance permitting him to use the "pump and haul" method of waste disposal until the business could connect to public sewer. Hicks was then notified that if he could not connect to public sewer service

[2] Hicks argued that because he had paid a sewer impact fee, he had a continuing contract with the city to provide sewer service to the premises regardless of annexation into the city.

he would have to cease operating his business because continued use of a septic system would constitute a violation.

Hendricks was aware there was an ongoing dispute between the city and Hicks with respect to the sewer connection. However, it was not until after the closing that Hendricks learned of the cease and desist order from DHEC. He also discovered that much of the furniture and other personal property covered by the assignment was not clear of liens and encumbrances as warranted. This resulted in Hendricks spending significant amounts of money replacing the furniture and televisions that were repossessed.

Hendricks attempted to work with DHEC in order to reach a compromise on the sewer situation. However, his efforts were to no avail. Hendricks then informed Hicks of his intention to invoke the offset provision set forth in the contract.

Hendricks filed a complaint against Hicks alleging fraud, conversion, and breach of contract. Hicks filed a timely counterclaim alleging breach of contract. The matter was referred to the master who, after a hearing on the merits, issued an order granting judgment in favor of Hendricks for $100,826.51 ($72,000 on the fraud cause of action and $28,826.51 on the conversion cause of action).[3] The order also dismissed Hicks' counterclaim with prejudice.

STANDARD OF REVIEW

An action for fraud is one at law. Bivens v. Watkins, 313 S.C. 228, 230, 437 S.E.2d 132, 133 (Ct. App. 1993) (applying a legal standard of review on appeal from causes of action alleging fraud, negligent misrepresentation, and breach of fiduciary duty). In an action at law tried

[3] The master also found for Hendricks on the breach of warranty claim, but only awarded damages pursuant to the fraud and conversion claims. Hendricks' conversion claim was based on Hicks' improper self-help reclamation of the property after Hendricks attempted to invoke the offset provisions of the contract.

without a jury, the court's findings of fact will be upheld on appeal when the findings are reasonably supported by the evidence. Butler Contracting, Inc., v. Court Street, LLC, 369 S.C. 121, 127, 631 S.E.2d 252, 255 (2006). The court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or clearly influenced or controlled by an error of law. Id. at 127, 631 S.E.2d at 255-56.

LAW/ANALYSIS

Hicks contends the master erred in finding him liable for fraud without evidence supporting each element. We disagree.

To establish a claim of fraud, plaintiffs must show by clear and convincing evidence (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard for its truth or falsity; (5) intent that the plaintiff act upon the representation; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. King v. Oxford, 282 S.C. 307, 311, 318 S.E.2d 125, 127 (Ct. App. 1984). Failure to prove any one of these elements is fatal to recovery. O'Shields v. Southern Fountain Mobile Homes, Inc., 262 S.C. 276, 281, 204 S.E.2d 50, 52 (1974).

Hicks contends that because Hendricks was aware of the litigation between himself and the city, Hendricks could not have reasonably relied on any representation regarding available sewer service. He further argues that any warranty regarding health or safety violations could not be false because his litigation with the city was ongoing and unresolved. We disagree.[4]

Hicks warranted that he had "no knowledge of any fire, health, safety, building, pollution, environmental, zoning, or other violation of law in respect to the property or any part thereof" . . . nor had he "received written

---

[4] This appeal only involves the fraud cause of action based on the warranties and representations in the contract and lease assignment, not the fraud cause of action concerning the personal property, as Hicks makes no argument concerning the personal property in his brief.

notice from any federal, state, county, or municipal government authority alleging any such violations." He went on to warrant specifically "that applicable zoning permits operation of an adult entertainment business on the premises." The combination of these warranties represented to Hendricks that the purpose for which he was leasing the property, to open an adult entertainment business, would be possible.

Even though Hendricks was aware of the sewer-related litigation, he did not know DHEC was requiring discontinuation of the "pump and haul" method of waste disposal, leaving him with no sewer service to the property. Regardless of whether the city had improperly denied sewer service to Hicks, there was clearly a notice from DHEC that the continued use of a septic system constituted a violation.

Hendricks testified that Hicks showed him the "pump and haul" system and explained the existing waste disposal system when he viewed the property before signing the contract. The parties discussed possible repairs that could be made to the system. At no point, however, did Hicks indicate this was an unacceptable form of waste removal nor did Hicks disclose that he had been told by DHEC that the "pump and haul" system was only temporary. Hendricks did not learn of the cease and desist order until the day after closing when he contacted DHEC himself. This omission, coupled with the warranty that there were no health or safety violations related to the property, misled Hendricks on a clearly material issue.

As a result of the false representations, Hendricks was placed in the position of being unable to satisfy waste disposal requirements without being annexed into the city, at which time he would no longer be able to operate the adult entertainment business. The master found that Hendricks proved by clear, cogent, and convincing evidence that the representations made by Hicks were false, were justifiably relied on by Hendricks to his detriment, and Hendricks is entitled to judgment against Hicks. There is ample evidence in the record to support the master's ruling.

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ernest Lamar Bradley and Esther K. Bradley, Appellants,

v.

John Doe and AccuSweep, Inc., Respondents.

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Op. 4274
Submitted May 9, 2007 – Filed July 6, 2007

AFFIRMED

Donald Higgins Howe and Walter Bilbro, Jr., of Charleston, for Appellants.

Margaret Helen Fanning, of Charleston, for Respondents.

ANDERSON, J.: Ernest Lamar Bradley (Bradley) appeals the trial court's decision granting John Doe (Doe) summary judgment on Bradley's claim for recovery under his uninsured motorist coverage.[1] Bradley (1) contends the trial court erred in finding no one independently witnessed Bradley's accident, and (2) maintains independent witnesses existed to provide circumstantial evidence that an unknown vehicle caused the accident. We affirm.[2]

FACTUAL/PROCEDURAL BACKGROUND

On December 18, 2002, Bradley left the Waffle House restaurant at approximately 3:00 a.m. and began driving home. After traveling less than one-quarter mile on College Park Road in Ladson, South Carolina, Bradley swerved to avoid an object in the northbound lane. Bradley lost control of his vehicle, veered off the road, and struck a tree.

Bradley telephoned his son, whom he left minutes earlier at the Waffle House, to come and assist him. After summoning his son Bradley walked to the side of the road and began signaling for help with a flashlight. At about 3:15 a.m., United States Air Force Lieutenant Colonel Clifton Douglas, Jr. drove passed Bradley, turned his vehicle around, and headed toward the accident scene. When Douglas returned in the northbound lane he saw a "large white garbage can bag" in the middle of his lane. Douglas parked his vehicle, approached Bradley, and observed that Bradley was bleeding from a head laceration. While helping Bradley, Douglas heard another passing vehicle strike and drag the garbage bag down the road. Bradley's son and

[1] Ernest Bradley is joined by his wife Ester as "Appellants," and John Doe is joined by Accusweep, Inc. as "Respondents." However, for purposes of this appeal, we refer only to Ernest Bradley and John Doe.

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

daughter subsequently arrived and noted the trash bag and trash scattered on the roadway.

Bradley's friend, Thomas Bosley, had been with Bradley at the Waffle House. As Bosley drove home on College Park Road minutes before Bradley, he saw "a large trash bag in the middle of the [northbound] lane," less than one-quarter mile from the restaurant. Bosley claimed he narrowly avoided the garbage bag and continued driving about another quarter-mile on College Park Road when he encountered a "white street sweeper's truck." Bosley observed this truck "drop another similar trash bag onto the public roadway." He learned the next morning about Bradley's accident.

Bradley brought this action against his insurer to collect under the uninsured motorist provision of his policy. The insurer represented Doe as the unknown driver. Doe moved for summary judgment arguing Bradley failed to satisfy the statutory requirement for recovery under the uninsured policy provision because no one independently witnessed Bradley's accident. The trial court granted Doe's summary judgment motion and denied Bradley's motion to alter or amend the judgment.

STANDARD OF REVIEW

In reviewing the grant of a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56, SCRCP. Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006); Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004). In

determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party; Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 213, 609 S.E.2d 565, 567 (Ct. App. 2005).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct. App. 2005) (citing McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct. App. 2004)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Id. (citing Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Jones, 364 S.C. at 228, 612 S.E.2d at 722 (citation omitted). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Id. "Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues." BPS, Inc. v. Worthy, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005).

LAW/ANALYSIS

Bradley asserts the trial court erred in granting Doe's summary judgment motion. Specifically, Bradley urges that he satisfied the independent witness requirement in section 38-77-170(2) of the South Carolina Code of Laws by providing testimony from independent witnesses regarding circumstantial evidence of an unknown driver's negligence. We disagree.

I. Requirements of S.C. Code Ann. § 38-77-170

Section 38-77-170 establishes the conditions under which an insured may recover uninsured motorist coverage when the owner or operator of the motor vehicle causing injury or damage is unknown:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
>
> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

S.C. Code Ann. § 38-77-170 (2002) (emphasis added).

Where there is no physical contact with a vehicle driven by an unknown motorist, someone other than the owner or operator of the insured vehicle must have witnessed the accident and attest to the facts of the accident in a signed affidavit. See Wausau Underwriters Insurance Company

v. Howser, 309 S.C. 269, 274-75, 422 S.E.2d 106, 110 (1992) (holding "no physical contact with the unknown vehicle is necessary when a witness other than the owner or driver of the insured vehicle is available to attest to the facts of the accident.").

II. Rules of Statutory Construction

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996); Shealy v. Doe, 370 S.C. 194, 199, 634 S.E.2d 45, 48 (Ct. App. 2006). The first question of statutory interpretation is whether the statute's meaning is clear on its face. Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002); Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 622, 622 S.E.2d 733, 738 (Ct. App. 2005) (cert. granted January 31, 2007).

When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this Court has no right to impose another meaning. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, ___, 642 S.E.2d 751, 754 (2007); see Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001). "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Mun. Ass'n of S.C. v. AT & T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); see also Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning, nothing to the contrary appearing.").

The legislature's intent should be ascertained primarily from the plain language of the statute. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005) (citing State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503. 506 (Ct. App. 2004); Stephen v. Avins Const. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996)). What a legislature says in the text of a statute is considered the best evidence of the

legislative intent or will. Jones, 364 S.C. at 230, 612 S.E.2d at 723 (citing Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001)). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Jones, 364 S.C. at 230, 612 S.E.2d at 723 (citing Hitachi Data Sys. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. Smith v. South Carolina Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. State v. Morgan, 352 S.C. 359, 367, 574 S.E.2d 203, 207 (Ct. App. 2002). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." Collins Music Co., Inc. v. IGT, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005) (quoting TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)). Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Jones, 364 S.C. at 230, 612 S.E.2d at 723 (citing Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. See Hinton v. South Carolina Dept. of Prob., Parole and Pardon Servs., 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004); Doe v. Roe, 353 S.C. 576, 580, 578 S.E.2d 733, 735-36 (Ct. App. 2003).

III. Interpretation of S.C. Code Ann § 38-77-170

"The issue of interpretation of a statute is a question of law for the court." Catawba Indian Tribe, 372 S.C. at 519, 642 S.E.2d at 754 (citing Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law.")).

Section 38-77-170(2) is clear on its face. It expressly requires that someone other than the owner or operator of the insured vehicle witness the accident. "The plain language of § 38-77-170(2) requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident 'must have been witnessed by someone other than the owner or operator of the insured vehicle' and the 'witness must sign an affidavit attesting to the truth of the facts of the accident contained therein.' " Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 744 (2002).

> The Legislature first enacted a "John Doe" statute in 1963, recognizing an insured's right to receive uninsured motorist coverage for injuries caused by unknown drivers. Since the statute's enactment, the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent "John Doe" actions. The initial safeguard was a requirement that the unknown vehicle make "physical contact" with the plaintiff's car. Act No. 312, 1963 S.C. Acts 535.
>
> Then in 1987, the Legislature amended the statute once again to allow insureds to bring a "John Doe" action regardless of physical contact as long as an independent person witnessed the accident. Act. No. 166, 1987 S.C. Acts 1122.

Shealy v. Doe, 370 S.C. 194, 202, 634 S.E.2d 45, 49 (Ct. App. 2006) cert. pending (citing Gilliland v. Doe, 357 S.C. 197, 199-200, 592 S.E.2d 626, 627-28 (2004)).

> The legislature again amended the statute in 1989, and added the sworn affidavit requirement. The statute at large effecting this most recent amendment provides that the act is "to amend section 38-77-170 relating to the requirements to recover under the uninsured motorist provisions when the at-fault party is unknown, so as to require a witness to the accident to sign an affidavit attesting to the truth of the facts about the accident and to provide a warning statement to be displayed on the affidavit." Act No. 148, 1989 S.C. Acts 439.

Collins, 352 S.C. at 466, 574 S.E.2d at 741.

In Collins, our supreme court concluded that "[t]he legislature unambiguously required that a plaintiff seeking to recover against her uninsured motorist coverage for the negligence of an unknown John Doe driver strictly comply with the plain language of the statute." 352 S.C. at 466, 574 S.E.2d at 741. In order to avoid colliding with vehicle driven by an unknown driver, Collins swerved and collided with another vehicle. Id. at 464-65, 574 S.E.2d at 740. She sustained injuries and sought recovery under her uninsured policy provision. Id. Although Collins did not produce a witness-signed affidavit at trial, she produced a witness at trial who testified the unknown driver caused Collins' collision. Id. Collins argued the witness' testimony satisfied the statutory requirements under section 38-77-170(2). Id.

Citing Criterion Ins. Co. v. Hoffmann, 258 S.C. 282, 188 S.E.2d 459, (1972), the Collins court reiterated the historical reasoning underlying the strict compliance requirement:

> The right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver of an uninsured automobile is a creature of the legislature. Except for the statute, and endorsements required, no right exists to recover from one's own insurance carrier. One must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of law. . . .
>
> It is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier . . . .
>
> The terms of the statute . . . are clear and not ambiguous. This being true, there is no room for construction and we are required to apply the statute according to its literal meaning. Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover.

Collins, 352 S.C. at 467-68, 574 S.E.2d at 741-42 (quoting Criterion, 258 S.C. at 290-92, 188 S.E.2d at 462-63).

The court held strict compliance was mandatory and reversed the court of appeals' ruling that testimony at trial was the "functional equivalent" of a signed affidavit. Collins, 352 S.C. at 471, 574 S.E.2d at 743. "The statute makes no provision for the functional equivalent of an affidavit." Id. Consequently, the court declined to create an exception in the statute where none previously existed. Id.

In Gilliland v Doe, our supreme court considered "to what extent an independent witness must testify about the causal connection between the unknown vehicle and the accident . . ." in order to comply with section 38-77-170(2). 357 S.C. at 200, 592 S.E.2d at 628. Gilliland crashed into a tree after being run off the road by an unknown vehicle. Id. at 198, 592 S.E.2d at 627. A witness waiting to enter the same roadway saw Gilliland crash, but did not see the unknown vehicle. Id. However, before the accident the witness did observe two sets of oncoming headlights. Id. After Gilliland's crash the witness noticed the second set of headlights "arcing through a field," as if making a u-turn and leaving the accident scene. Id.

Addressing the requirement that an independent witness must attest to "the truth of the facts of the accident," the Gilliland court agreed with the court of appeals' interpretation that the witness must "be able to attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." Id. at 200, 592 S.E.2d at 628. The court concluded the witness's attestation provided circumstantial evidence supporting Gilliland's testimony "that an unknown driver contributed to her accident." Id. at 202, 592 S.E.2d at 629. Specifically, the court determined the witness, in addition to observing the accident, "saw the lights of an unknown car that was turning around and fleeing the scene of the accident." Id. (citing Marks v. Indus. Life & Health Ins. Co., 212 S.C. 502, 505, 48 S.E.2d 445, 446 (1948) ("The attending circumstances along with direct testimony may be taken into account by the jury in arriving at its decision as any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proven lead to the conclusion with reasonable certainty.")).

In contrast to the holding in Collins, the Gilliland court reasoned the "fact requirement in section 38-77-170(2) was "arguably ambiguous" and "therefore, a strict interpretation . . . would undermine the statute's purpose." Gilliland, 357 S.C. at 201, 592 S.E.2d at 628. The plaintiff in Shealy v. Doe, 370 S.C. 194, 200, 634 S.E.2d 45, 48 (2006), attempted to broaden Gilliland by urging that evidence other than the personal observations of an independent eye witness might satisfy section 38-77-170(2). In Shealy, two men riding in a truck bed were thrown from the vehicle and injured when the

driver swerved suddenly to allegedly avoid hitting an unknown vehicle. Id. at 196, 634 S.E.2d at 46. Shealy submitted an affidavit stating the driver of the truck told him he swerved to avoid colliding with an unknown vehicle. Id. at 197, 634 S.E.2d at 46. We held Shealy's affidavit did not satisfy the independent witness requirement under section 38-77-170(2). Id. at 198, 634 S.E.2d at 47.

Shealy asserted section 38-77-170(2) did not require the witness's affidavit to be based on personal knowledge. This court concluded that argument directly contravene[d] the language of the statute:

> Shealy submitted affidavits of two people who apparently did not witness the accident; their affidavits do not attest to facts they perceived, but merely restate the perceptions of the vehicle's operator. Thus Shealy produced no evidence that someone other than [ ], the operator of the insured vehicle, witnessed the accident. [The] affidavits do not comply with th[e] express directive [in section 38-77-170(2)].

Id. at 200, 634 S.E.2d at 48.

We reasoned that

> Shealy's interpretation of section 38-77-170(2) would totally eviscerate the statute's efficacy as it would allow an owner or operator to inform any third-party of the facts of the accident and have that third-party swear out an affidavit as to the owner or operator's version of the events. In Collins, our supreme court elucidated that the "obvious purpose" of the affidavit requirement of section 38-77-170(2) is "fraud prevention." Shealy's reading of the statute would circumvent the fraud-preventing function of subsection (2), rendering that section meaningless.

Id. at 200-201, 634 S.E.2d at 48-49 (internal citation omitted).

Relying on Gilliland, Shealy maintained the affiants provided circumstantial evidence of the accident sufficient to comply with section 38-77-170(2). Id. at 201, 634 S.E.2d at 49. We distinguished Gilliland, explaining the affidavits Shealy submitted, unlike those in Gilliland, did not contain circumstantial evidence based on independent personal knowledge that supported the driver's version of the accident. Id. at 205, 634 S.E.2d at 51. At best, Shealy's affidavits merely repeated the driver's account of what happened and did not independently corroborate the driver's version of the accident. Id.

> The purpose of section 38-77-120(2) is to prevent fraud. Concomitantly, the affidavit of the independent witness must contain some independent evidence that an unknown vehicle was involved in the accident. Shealy failed to satisfy the statute's mandate; thus, the court properly granted summary judgment.

Id.

IV. The Factual Record

The sole issue for consideration in the case sub judice is whether the circumstantial evidence provided by Bradley's affiants complies with the statutory mandate in section 38-77-170(2). We hold it does not.

Bradley relies on Gilliland in maintaining that circumstantial evidence provided by independent witnesses is sufficient to survive summary judgment. However, Bradley overlooks that the affiant in Gilliland contemporaneously witnessed both the collision and the headlights of an unknown vehicle turning and leaving the scene. The witness's testimony,

based on her personal observations, independently corroborated Gilliland's account of how that accident occurred.

Here, Bradley was the only witness to the accident. None of the affiants actually saw Bradley swerve to avoid a trash bag in the road and collide with the tree. By Bradley's own testimony, he initially thought it was an injured dog lying in the road that caused him to veer off and lose control. The fact that three people saw the bag of trash in the same roadway does not implicate involvement of another vehicle. Testimony that a sweeper truck a quarter-mile down the roadway dropped a similar trash bag likewise fails to establish a sufficient causal link between the sweeper truck and Bradley's collision.[3]

Our courts have historically required strict compliance with section 38-77-170(2). Collins v. Doe, 352 S.C. 452, 470, 574 S.E.2d 739, 743 (2002) Where the accident involves no physical contact between the insured's vehicle and the unknown vehicle, the accident "must have been witnessed by someone other than the owner of operator of the insured vehicle" and the witness must sign an affidavit attesting to the truth of the facts of the accident contained therein." Id. "Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement." Id.

A plaintiff's strict compliance with the affidavit requirement is mandatory. In Collins, the court held trial testimony was not the functional equivalent of an affidavit and did not satisfy the affidavit requirement. In Shealy, witnesses' affidavits based on third-party communication rather than

[3] Bradley does not argue that hitting the trash bag constituted physical contact with the unknown vehicle. However, even if the trash bag did, in fact, fall from the sweeper truck, Bradley's collision with it would not meet section 38-77-170's physical contact requirement. Our supreme court has held the physical contact requirement is not met when a plaintiff's vehicle collides with an unattached portion of an unknown vehicle. See Wynn v. Doe, 255 S.C. 509, 180 S.E.2d 95 (1971); Davis v. Doe, 285 S.C. 538, 331 S.E.2d 352 (1985).

on personal knowledge of how the accident occurred failed to meet the affidavit requirement. Contrastively, in Gilliland, the independent witness's personal observations of the accident corroborated Gilliland's own account of the facts surrounding her accident and complied with the affidavit requirement.

"For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." Shealy v. Doe, 370 S.C. 194, 205, 634 S.E.2d 45, 51 (Ct. App. 2006). Bradley's affiants had no personal knowledge of the facts of the accident. Their observations before and after the accident did not establish with reasonable certainty a causal connection between Bradley's injury and an unknown vehicle. The affidavits of independent witnesses must contain some independent evidence of an unknown vehicle's involvement in the accident. Bradley failed to comply with the statute's mandate.

CONCLUSION

We rule the affidavits submitted by Bradley did not raise a genuine issue of material fact as to whether Bradley's collision resulted from involvement with an unknown vehicle. The trial court properly granted Doe's summary judgment motion.

Accordingly, the trial court's decision is

AFFIRMED.

KITTREDGE, J., concurs.

SHORT, J. dissents in a separate opinion.

SHORT , J. (dissenting): I would reverse the order granting summary judgement and for that reason, I respectfully dissent. I adopt the majority's

facts and standard of review, but I disagree with the analysis and would find as follows.

Section 38-77-170 of the South Carolina Code dictates the "conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown" and states:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
>
> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

The record fails to include any allegation that Bradley failed to comply with the first or third elements of the above statutory requirement. However, Doe claims Bradley failed to meet either of the two possible prongs set forth in the statute's second requirement. I will address these requirements individually.

The first possible manner in which the second requirement could be met would be to offer proof that the unknown vehicle contacted the insured's vehicle during the accident. Bradley does not allege any contact was made with another vehicle, but he noted in his affidavit that he believed he had made contact with the garbage bag prior to veering off the road. The trial court correctly applied South Carolina case law in finding that even if this contact had occurred, it would not constitute physical contact with the unknown vehicle as required by the statute. See Wynn v. Doe, 255 S.C. 509, 180 S.E.2d 95 (1971) (holding a motorcyclist's contact with a very slick and dangerous chemical substance on the highway, such having been dumped or spilled there by an unknown vehicle, did not constitute physical contact with the unknown vehicle); See also Davis v. Doe, 285 S.C. 538, 331 S.E.2d 352 (1985) (holding a wheel bearing which had dislodged from an unknown vehicle and broken through the insured's windshield did not constitute physical contact with the unknown vehicle).

The above noted Davis opinion, while noting the physical contact requirement was instituted to prevent fraudulent claims, invited the legislature to change this strict physical contact requirement should they find such a change to be "advisable." 285 S.C. at 541, 331 S.E.2d at 354. Perhaps in response to this invitation, the legislature, in a 1987 amendment, added a second means by which an insured could satisfy the statutory requirements for recovery.[4] See Wausau Underwriters Insurance Company v. Howser, 309 S.C. 269, 275, 422 S.E.2d 106, 109 (1992). This second prong (Witness Prong) requires that a witness to the accident other than the owner/operator of the insured vehicle must attest in a signed affidavit to the facts of the accident.

[4] A subsequent 1989 amendment to §38-77-170, instituted the requirement to prominently display on the face of the affidavit the specific language "A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW."

While it is clear an item which has fallen from an unknown vehicle and struck an insured's vehicle can not satisfy the physical contact element of the statutory requirement, I see no reason why it could not satisfy the Witness Prong. The wisdom behind not allowing the physical contact requirement to be satisfied by contact with something which has fallen off a vehicle is evident. A vehicle owner or operator who sought to defraud could easily refer to any item as having dislodged from an unknown vehicle and struck his vehicle while leaving the insurance company without a means to determine otherwise. However, I fail to see how an independent witness observing an item falling from a vehicle would not be permitted to satisfy the Witness Prong of the statutory requirement. I can discern no difference between a vehicle owner or operator who crashes in evasion of an item which has fallen off a vehicle and a vehicle owner or operator who crashes in evasion of the vehicle itself. Both situations result in an unknown vehicle causing bodily injury and/or property damage to the insured. In either instance, the same protection against fraud would apply in that a witness other than the vehicle owner or operator would have to submit an affidavit attesting to the events which caused the accident. Having established the applicability of the statute, I now seek to determine its satisfaction.

Doe urges this court to construe the statute strictly. He argues the statute's language "the accident must have been witnessed" dictates that the affidavits of only those who have seen the accident itself are permitted. I find such a strict construction of the statute would undermine the statute's purpose. In fact, our state Supreme Court has recognized ambiguities in §38-77-170(2) and has urged a liberal construction. Howser, 309 S.C. at 275, 422 S.E.2d at 110; Gilliland v. Doe, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004).

I believe the intent of the language "the accident must have been witnessed" is to direct that the witness must have observed the factors leading to the accident. Someone other than the owner or operator of the insured vehicle simply witnessing the accident without witnessing an unknown vehicle's contribution can not logically be interpreted as entitling the owner or operator to an uninsured motorist claim. Both this court and the South

Carolina Supreme Court have addressed the witnessing requirement accordingly.

In Shealy v. Doe, this court found that two men who had been thrown from the back of a swerving pick-up truck were not entitled to recover under the driver's uninsured motorist policy. 370 S.C. 194, 634 S.E.2d 45 (2006). The affidavits submitted by these two men stated that the driver of the pick-up truck told them that he had swerved to avoid colliding with an unknown vehicle. Id. at 197, 634 S.E.2d at 46. This court held these affidavits "do not attest to facts they perceived, but merely restate the perceptions of the vehicle's operator." Id. at 200, 634 S.E.2d at 48. Additionally, this court stated that the affidavits were from two people who apparently did not witness the accident. Id. Clearly, these two men thrown from the truck witnessed the accident itself. In fact, there was no accident until they were thrown from the truck and landed on the roadway. Thus, this court was clearly construing "witnessing the accident" to mean "witnessing the events leading to the accident."

In Gilliland v. Doe, Gilliland, after crashing into a tree and sustaining significant injuries, alleged she was run off the road by an unknown vehicle. 357 S.C. at 198, 592 S.E.2d at 627. No one other than Gilliland witnessed the unknown vehicle. Another driver, Gayle Norris, was waiting to enter the roadway when she observed Gilliland round a curve in the road and crash. Id. at 198-99, 592 S.E.2d at 627. Norris never saw a second vehicle, but did observe two sets of headlights, and observed the second set of headlights "arcing through a field" as if the second vehicle was making a u-turn and leaving the accident scene. Id.

The Gilliland court entertained an analysis of whether circumstantial evidence could be used to satisfy the independent witness requirement. If Norris's witnessing the accident alone were enough, then the Court would not have performed an analysis to determine if circumstantial evidence was appropriate evidence to be used in documenting the events leading to the accident. Further, the Supreme Court agreed with this court's earlier characterization of the §38-77-170(2) requirement. Both courts found that the independent witness must "be able to attest to the circumstances

surrounding the accident, i.e. what actions of the unknown driver contributed to the accident." Id. at 201, 592 S.E.2d at 628 (quoting Gilliland v. Doe, 351 S.C. 497, 501-02, 570 S.E.2d 545, 548 (Ct. App. 2002)). The Supreme Court found this analysis "constitutes a fair interpretation of the ambiguous fact requirement of §38-77-170(2)." Gilliland, 357 S.C. at 201, 592 S.E.2d at 628.

I find the critical query in these matters is not whether an independent witness has observed the actual accident itself, but rather it is whether an independent witness has observed evidence of an unknown vehicle causing bodily injury or property damage to the insured. To find otherwise could create absurd results. One could reasonably foresee an independent witness who clearly observes an unknown vehicle create a hazard but be prevented from attesting to these facts because just prior to the accident he lost sight of the vehicles as they rounded a bend in the road. In situations where an independent witness observes evidence of an unknown vehicle's contribution to the accident, I fail to see the necessity of observing the accident itself. This is especially true in light of the purpose of §38-77-170(2). This statute was enacted to protect insured drivers from damages caused by unknown drivers while maintaining safeguards against fraudulent claims. Gilliland, 357 S.C. at 199, 592 S.E.2d at 627. Our Supreme Court has instructed that legislative intent must be construed only after reading each of the statutes contained in the same act together. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). This court has noted "the uninsured motorist legislation is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished." Franklin v. Devore, 327 S.C. 418, 421, 489 S.E.2d 651, 653 (Ct. App. 1997). Having established this interpretation of the witness requirement, I next endeavor to ascertain the propriety of using circumstantial evidence to establish the events leading to the accident.

While none of the affiants utilized by Bradley observed the actual accident itself, Bradley attempts to rely upon the circumstantial evidence created by their observations. As noted above, the South Carolina Supreme Court, in the Gilliland opinion, undertook an analysis of whether

circumstantial evidence could be used to satisfy the independent witness requirement of §38-77-170(2). The Court found "[t]he attending circumstances along with direct testimony may be taken into account by the jury in arriving at its decision as **any fact in issue may be established by circumstantial evidence**, if the circumstances, which must themselves be proven lead to the conclusion with reasonable certainty." Gilliland, 357 S.C. at 202, 592 S.E.2d at 629 (emphasis added) (quoting Marks v. Indus. Life & Health Ins. Co., 212 S.C. 502, 505, 48 S.E.2d 445, 446 (1948)). The Court held that Norris's statements regarding seeing two sets of headlights and what appeared to be an unknown vehicle making a u-turn were supportive of Gilliland's testimony and contained circumstantial evidence which created "a question of fact as to causation for the jury." Gilliland, 357 S.C. at 202, 592 S.E.2d at 629. The jury's verdict in favor of Gilliland was reinstated. Id.

Lastly, I recognize temporal and spatial restrictions exist when seeking to utilize circumstantial evidence. One can reasonably foresee attempts to utilize circumstantial evidence which was gathered a significant amount of time or distance from the accident itself, and I note these instances must be addressed under the peculiar facts of each individual accident. In this matter, both Bosley and Bradley stated they left Waffle House shortly after 3 a.m.. Bosley stated he drove approximately one-quarter of a mile, swerved to avoid a large trash bag in the road, and then observed a street sweeper truck drop a similar garbage bag onto the road about one-quarter of a mile from the first trash bag. Bradley stated he swerved to avoid the same first trash bag Bosley had seen and crashed his vehicle only minutes after Bosley had left the Waffle House. Shortly after the accident, at approximately 3:15 a.m., Lieutenant Colonel Douglas also observed the large trash bag in the road when he stopped to assist Bradley. All of these events took place over a maximum time period of less than fifteen minutes and the second trash bag was dropped approximately one-quarter of a mile from the accident. I find this evidence falls within temporal and spatial requirements.

The closeness in time between Bosley's and Douglas's observations of the trash bag on the road and the time of Bradley's accident, and the closeness in time and proximity between the accident and Bosley's observation of the street sweeper truck dropping a similar trash bag onto the

roadway are relevant. These circumstances elevate the notion of an unknown driver contributing to Bradley's accident from mere speculation to plausible circumstantial evidence. Accordingly, I find this circumstantial evidence is sufficient to create a question of fact for the jury as to the issue of causation. Viewing the evidence and all reasonable inferences that may be drawn from such evidence in the light most favorable to Bradley, I find sufficient circumstantial evidence exists to warrant a trial in this matter.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Neal, Appellant,

v.

Don H. Brown and South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Respondents.

Appeal From Charleston County
Mikell R. Scarborough, Special Circuit Court Judge

Opinion No. 4275
Heard October 10, 2006 – Filed July 13, 2007

REVERSED

Michael A. Molony and Lea B. Kerrison, of Charleston, for Appellant.

Andrew K. Epting, Jr., Clayton B. McCullough, and Leslie S. Riley, of Charleston, for Respondents.

BEATTY, J.: This appeal arises out of David Neal's second permit application for a dock. Neal appeals the circuit court's order affirming the Office of Ocean and Coastal Resource Management's (OCRM's) Coastal Zone Management Appellate Panel's (Appellate Panel's) decision that had the effect of denying him the dock permit. We reverse.

FACTS

In 1997, three adjacent parcels of land, located at 111 Hibben Street (the property), in Mount Pleasant, were conveyed to Neal Brothers, Inc., a company in which Neal was a part owner. The three parcels had all been owned by the McIver family since 1930. The property had a five foot wide by one hundred and nineteen foot long strip connecting the inland property to Charleston Harbor. Neal had the property surveyed as required by his title insurance company prior to purchase. The survey, which indicated the three parcels were one lot, was recorded at the Charleston County Register of Mesne Conveyances on September 10, 1997. Shortly after it was recorded, Neal Brothers transferred title of the property to Tompkins and Company, LLC (Tompkins).[1]

In 1998, Neal first applied for a critical area permit to build a dock off of the property's five feet of waterfront access. OCRM denied the first application stating: "Your dock is proposed to extend from a 5' wide access path. This lot was apparently replatted in February, 1997 as a combination of 3 lots. As such, this lot does not meet the minimum lot width standard in order to qualify for a single family dock." Neal initially appealed the denial, but the appeal was dismissed without prejudice after an agreement with OCRM that allowed Neal to reapply for a permit.

In September 1999, Amy Willis, the property owner adjacent to the property, filed suit against Neal and Tompkins, claiming ownership of the five feet by one hundred and nineteen feet strip of land extending from the property to Charleston Harbor. The disputed property included Tompkins' five feet of waterfront access. The trial court examined both chains of title,

[1] Neal is a controlling member and agent of Tompkins.

moved the property line nine inches, but otherwise determined the property in question belonged to Tompkins in fee simple absolute.

In June 2001, Neal applied a second time for a critical area permit to build a dock off of the five feet of waterfront access. At the time Neal applied for the second dock permit, the regulation controlling dock permits provided:

> For lots platted and recorded after May 23, 1993, before a dock will be permitted, a lot must have 75 feet of water frontage along the marsh edge and at least 75 feet of frontage between extended property lines. . . . Lots less than 50 feet wide are not eligible for a dock.[2]

23A S.C. Code Ann. Regs. 30-12(A)(2)(o) (Supp. 2001). OCRM granted the permit application despite much public opposition, including from property owners adjacent to Neal. One of those adjacent owners, Don Brown, appealed the issuance of the permit to the administrative law court (ALC), arguing the property was not platted and recorded in its current form until 1997, and therefore, it must comply with regulation 30-12(A)(2)(o) (the regulation).

A hearing was held before the ALC. Neal's neighbors, Brown and Willis, testified regarding their opposition to the dock. In addition to his own testimony, Neal presented the testimony of Richard Chinnis, the Director of Regulatory Programs at OCRM. Chinnis testified that he drafted the regulation that was adopted by the General Assembly. Chinnis stated that he was incorrect in his initial belief that the property had been "resubdivided"

---

[2] The regulation has been amended several times. The relevant part of the regulation currently reads, "This section applies to lots subdivided or resubdivided after May 23, 1993. . . . (i) To be eligible for a private, community or commercial dock, a lot must have: (a) 75 feet of frontage at the marsh edge, and . . . (iii) Lots less than 50 feet wide are not eligible for a dock." 23A S.C. Code Ann. Regs. 30-12(A)(1)(o) (Supp. 2006).

when he denied Neal's first application for a permit to build a dock. Chinnis also testified that OCRM interpreted the regulation as applying to lots subdivided into smaller lots after the effective date. Because the property had existed in its present form since the early 1900s, with no "resubdivision," Chinnis testified that OCRM determined that the regulation did not apply to the property and granted Neal's second application for a dock permit. When asked by the ALC to specifically define how he interpreted "platted and recorded" in evaluating Neal's permit application, Chinnis stated:

> The wording in the court case . . . the basis that his lot had existed in its present form. When somebody buys a . . . every time I've bought a house, the lots had to be replatted. The lot wasn't recreated as a new lot, it was just replatted as a result of some financial arrangement or final recording. Mr. Neal's lot obviously was platted after '97, but it was the same lot that had existed for 30, 40, 50 years. So it wasn't a new lot, it was created and originally platted and recorded.

The ALC agreed with OCRM's interpretation of the regulation. Looking to Dorman v. Department of Health and Environmental Control, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002),[3] the ALC found the regulation would only prohibit docks from properties with less than seventy-five feet of water frontage, or prohibit shared docks from properties with less than fifty feet of water frontage, if the property was platted and recorded after the effective date, May 23, 1993. The ALC further determined that the regulation applied to properties platted and recorded after May 23, 1993, only as a result of a subdivision of property. The ALC reasoned that "[t]he term 'platted and recorded' assumes the platting and recording involves a change

[3] In Dorman, this court found the regulation only barred docks at properties that were less than seventy-five feet and less than fifty feet wide where the lots were platted and recorded after May 23, 1993. Dorman, 250 S.C. at 167, 565 S.E.2d at 123 ("By its clear terms, this subsection is inapplicable to this lot and does not prohibit the issuance of a dock permit in this case.").

in the configuration of the property." The ALC concluded "[t]o assume otherwise would lead to an absurd result" because when property owners, who had owned property in the same configuration for many years, recorded or rerecorded a plat of their property at any time after May 23, 1993, they would be subject to the seventy-five feet requirement. The ALC also determined if the regulation applied to any platting and recording, it would prevent the construction of a dock for a purchaser of a lot that formerly qualified for a dock because a survey and plat are normally required for title insurance at the time of purchase. The ALC further found that if a lot was recorded prior to May 23, 1993, even if it was never platted before the date, the regulation would not apply. Finally, the ALC noted that the construction of a small dock from Neal's property would not detrimentally affect the neighbors' property values or use and enjoyment of their own property in violation of regulation 30-11(B)(10).[4] Accordingly, the ALC affirmed OCRM's issuance of the permit because the regulation did not apply to the property.

Brown appealed the ALC's ruling to the Appellate Panel. The Appellate Panel correctly described its scope of review and determined the ALC erred in its "interpretation of [the regulation] by concluding that 75 feet of frontage was not required in order for [Neal] to receive a private recreational dock permit" and reversed the ALC's order. The Appellate Panel's order did not contain any findings of fact.

Neal then appealed the Appellate Panel's ruling to the circuit court, which affirmed. The circuit court found the property had been platted and recorded more than one time after May 23, 1993; therefore, the regulation applied to the property and a new dock was impermissible because the property's waterfront footage was less than both the seventy-five foot and fifty foot requirements. The court found that the Neal property could not enjoy "grandfathered" status with regard to the regulation. Finally, the court

---

[4] This section requires general consideration by the OCRM of how any project would potentially affect the value and enjoyment by neighboring property owners in a critical area. 23A S.C. Code Ann. Regs. 30-11(B)(10) (Supp. 2006).

found a dock would interfere with neighbors' value, use, and enjoyment of their property. Neal filed a motion for reconsideration claiming the circuit court impermissibly made findings of fact. The circuit court denied the motion for reconsideration and issued a new order reiterating its decision and declaring that its previous order did not include findings of fact. This appeal followed.

STANDARD OF REVIEW

In contested permitting cases, the ALC serves as the finder of fact. S.C. Code Ann. § 1-23-600(B) (Supp. 2006); Brown v. South Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002); Dorman, 350 S.C. at 164, 565 S.E.2d at 122. On appeal to the Appellate Panel, the standard of review is whether the ALC's findings are supported by substantial evidence pursuant to section 1-23-610(C) of the South Carolina Code (Supp. 2006). S.C. Code Ann. § 1-23-610(C) (Supp. 2006); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct. App. 2004), cert. denied (Feb. 15, 2006). Thus, the Appellate Panel can reverse the ALC if the findings are not supported by substantial evidence or are based on an error of law. Dorman, 350 S.C. at 165, 565 S.E.2d at 122. The ALC's findings are supported by substantial evidence if, looking at the record as a whole, there is evidence from which reasonable minds could reach the same conclusion the administrative agency reached. Grant v. South Carolina Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

Judicial review of the Appellate Panel's decision to the circuit court is governed by section 1-23-380(A)(6) of the South Carolina Code (2005), which provides:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have

> been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(6) (2005).[5] This section also governs our review of the circuit court's decision. South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control, 363 S.C. 67, 73, 610 S.E.2d 482, 485 (2005); Brown, 348 S.C. at 512, 560 S.E.2d at 413.

LAW/ANALYSIS

I. Application of the Regulation

Neal argues the ALC correctly found that the regulation, and thus the width limitations for a dock, do not apply to the property because the property was not "platted and recorded" after May 23, 1993. Thus, he

[5] This section was amended, effective July 1, 2006, to provide for an appeal from the Appellate Panel directly to this court. S.C. Code Ann. § 1-23-380 (A)(1) (Supp. 2006). The amended section also renumbered the language of prior section 1-23-380 (A)(6) (2005) to section 1-23-380(A)(5) (Supp. 2006). However, the underlying appeal proceeded under the prior version of this section from the Appellate Panel to the circuit court and then to this court. Thus, the judicial review is controlled by the prior version, section 1-23-380 (A)(6) (2005).

asserts, the circuit court erred in affirming the Appellate Panel's reversal of the ALC's decision. We agree.

Generally, "[c]ourts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ." South Carolina Coastal Conservation League, 363 S.C. at 75, 610 S.E.2d at 486; see Dunton v. South Carolina Bd. of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons."); Dorman, 350 S.C. at 167, 565 S.E.2d at 123-24 (finding the portion of the Appellate Panel's order construing its regulation was proper).

If a statute's terms are clear, the court must apply the terms according to their literal meaning. Brown v. South Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002). "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." Id. While the appellate court usually defers to the Appellate Panel's construction of its own regulation, where the Appellate Panel's interpretation is contrary to the plain language of the regulation, the court will reject its interpretation. Id. at 515, 560 S.E.2d at 414.

Nevertheless, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, **and that language must be construed in light of the intended purpose of the statute.**" Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998)(emphasis in original). "However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature . . . ." Id. "If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect." Id.

The central question in this case is whether the property was "platted and recorded" prior to May 23, 1993. However, the terms "plat" and "survey" are used interchangeably throughout this record.[6] Thus, before determining the issues at hand, we take this opportunity to distinguish the terms. Generally, a "survey" is the process of determining the actual boundaries of a particular piece of property. Black's Law Dictionary 1445 (6th ed. 1990). A "survey" can also be the result of a determination of boundary lines of a particular piece of property reduced to writing, such as in a map. Id.; see Overstreet v. Dixon, 131 S.E.2d 580, 583 (Ga. App. 1963) (holding that a survey is the process by which a parcel of land is measured and its contents ascertained and is also a statement of or a paper showing the result of the survey with the courses and distances and quantity of the land).

A "plat," on the other hand, is generally a map of a piece of property or a plan of more than one piece of property as laid out in a subdivision and with reference to lots, streets, and block numbers. Black's Law Dictionary 1151 (6th ed. 1990) (defining "plat" as a "map of a specific land area such as a town, section, or subdivision showing the location and boundaries of individual parcels of land subdivided into lots, with streets, alleys, easements, etc., usually drawn to scale"). Although not specifically defined as such in this state, many jurisdictions have defined "plat" as a document signifying the subdivision of property or the dedication of property for a particular use. See Sellon v. City of Manitou Springs, 745 P.2d 229, 234 (Colo. 1987) (holding that the term "plat" as used in a zoning ordinance referred to a subdivision map); N. Indiana Pub. Serv. Co. v. McCoy, 157 N.E.2d 181, 184 (Ind. 1959) (holding that a plat is a division of land into lots, streets, and alleys by means of a representation on paper so that they can be identified); Gannett v. Cook, 61 N.W.2d 703, 707 (Iowa 1953) (holding that a plat is not a deed but is a subdivision of land into lots, streets, and alleys marked upon

[6] One witness at the hearing before the ALC, real estate attorney Kenneth C. Krawcheck, was asked if there was a difference between the terms. He replied: "Practically, not very much. They look identical. A survey could be said to be any drawing of a piece of property, whereas a plat is a document intended for recordation or actually recorded. But the terms are used somewhat interchangeable."

the earth and represented upon paper). Thus, we find that, generally, a "plat" is a map of a piece of property or an area of land subdivided into lots.

Certainly, the terms "plat" and "survey" are interrelated. Notwithstanding their common usage, the terms are not synonymous. See State v. Bilbao, 943 P.2d 926, 928 (Idaho 1997) (noting that "records of survey" and "plats" are not synonymous because the recording of a subdivision plat is intended to partition property while a record of survey is not intended to serve as evidence or notice that a landowner is seeking to partition the tract into lots).

With those definitions in mind, we turn to the present case. We find the circuit court erred by not reversing the Appellate Panel and reinstating the order of the ALC. The "clear terms" of the regulation include the words "platted and recorded" with no further definitions or qualifications. Although it would appear to bar Neal's dock application because a survey was made of his property and recorded after the effective date of the regulation, we agree with the ALC that interpreting "platted and recorded" in this manner would lead to absurd results. It would mean that an owner of property that would qualify for a dock permit under this regulation could be divested of this opportunity simply by having a survey performed and recorded at the insistence of a title insurance company when getting a second mortgage or at the urging of a court when a neighbor institutes a boundary dispute. It is apparent from the testimony of Richard Chinnis, drafter of the regulation and the person in charge of interpreting it at OCRM, that the word "plat" as used in the regulation was intended to indicate a subdivision of property, not the mere recordation of a survey. This evidence supports the ALC's determination of the legislative intent of the regulation.

The ALC's determination of the legislative intent is further supported by the General Assembly's decision to amend the regulation. After Neal's hearing in front of the ALC and prior to the Appellate Panel issuing its order in the present case, the regulation was amended to replace the words "platted and recorded after May 23, 1993," with the words "subdivided or resubdivided after May 23, 1993." 23A S.C. Code Ann. Regs. 30-12(A)(1)(o) (Supp. 2006). Reference to the General Assembly's subsequent

amendment of a statute can be considered clarification of the legislative intent. Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (noting that a subsequent statutory amendment may be interpreted as clarifying statutory intent); Stuckey v. State Budget & Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("A subsequent statutory amendment may be interpreted as clarifying original legislative intent."); Cotty v. Yartzeff, 309 S.C. 259, 262 n.1, 422 S.E.2d 100, 102 n.1 (1992) (noting that the court's interpretation of the statute was supported by subsequent amendments to the statute which clarified the legislative intent).

There was substantial evidence to support the ALC's factual findings that the regulation applied only to lots subdivided after the effective date. The subsequent amendment of the regulation to specify its application only to lots "subdivided and resubdivided" further clarifies the General Assembly's intent and supports the ALC's findings. Despite the fact that the property's water frontage was less than both the seventy-five foot and the fifty foot requirements, the property in question qualified for a dock prior to May 23, 1993, and had not been subdivided into smaller lots after that date. Accordingly, the regulation did not apply to the property and should not bar Neal's dock permit application.

Although the Appellate Panel is free to interpret OCRM's regulations and this interpretation is normally entitled to deference, we find there are compelling reasons to disregard the Appellate Panel's interpretation of the regulation in this case. South Carolina Coastal Conservation League, 363 S.C. at 75, 610 S.E.2d at 486 (holding that the Appellate Panel, not OCRM staff, is normally entitled to deference in interpreting its own regulations "unless there is a compelling reason to differ"). The Appellate Panel's order merely states that it was reversing the ALC because it misinterpreted the seventy-five foot requirement for awarding Neal a dock permit. The order does not explain how the ALC made an error of law. See Brownlee v. South Carolina Dep't of Health & Envtl. Control, 327 S.C. 119, 128, 641 S.E.2d 45, 49 (Ct. App. 2007) (noting that absent an explanation by the Appellate Panel of why it believed the ALJ erred as a matter of law in its interpretation of Regulation 30-12(A)(2)(n) or of why the facts supported the Appellate

Panel's interpretation of the regulation, the court could find no error of law meriting reversal of the ALJ).

The ALC correctly found that the word "plat," as used in this regulation, refers to a subdivision of property. The ALC's interpretation of the regulation is supported by substantial evidence and does not amount to an error of law. Thus, we find the circuit court erred in affirming the Appellate Panel's decision to reverse the order of the ALC.

II. Circuit Court's Findings of Fact

Neal also contends the circuit court applied the wrong standard of review in its order by making its own findings of fact. We agree.

As previously discussed, the ALC serves as the finder of fact in environmental permitting cases, and the Appellate Panel's standard of review is whether the ALC's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-600(B) (Supp. 2006); Brown, 348 S.C. at 520, 560 S.E.2d at 417; Dorman, 350 S.C. at 164, 565 S.E.2d at 122. The circuit court has a limited scope of review, and it cannot consider issues that were not raised to and ruled upon by the Appellate Panel. Kiawah Resort Assocs. v. South Carolina Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995) ("As such, the circuit court, like this Court, has a limited scope of review, and cannot ordinarily consider issues that were not raised to and ruled on by the administrative agency.").

The Appellate Panel's order did not make any findings of fact or even reference the findings of fact by the ALC with which it disagreed. The Appellate Panel merely stated that the ALC erred in determining that seventy-five feet of water frontage was not required for Neal to receive a dock. The circuit court's order makes many new "findings of fact" that were not even addressed by the Appellate Panel and were in direct conflict with the facts found by the fact finder, the ALC. The circuit court readily acknowledged in its order that it was deciding some matters not considered by the Appellate Panel.

Neal points to the following examples where the court made new findings: (1) the circuit court found that a plat was never recorded showing the Neal property as one parcel until 1997; (2) the court found that Neal's own expert took a position in the litigation adverse to Neal; and (3) the court found that Neal's dock would be too close to the adjoining landowners' property and would impact the neighbors value, use, and enjoyment. With the possible exception of the first example, these findings directly conflict with the findings by the ALC. Further, the Appellate Panel did not rule on the questions of experts or the impact on adjoining landowners' property. While there may be some evidence in the record to support the circuit court's findings, the court is not entitled to make findings when reviewing an appeal from the Appellate Panel. The court's only considerations are whether: there has been a violation of the statute; the agency has exceeded its authority; the agency made a decision upon an unlawful procedure; the decision was affected by an error of law; the decision was clearly erroneous in light of the substantial evidence of record; or the Appellate Panel's decision was characterized by an abuse of discretion. S.C. Code Ann. § 1-23-380(A)(6) (2005).

The circuit court's review is limited to matters decided by the Appellate Panel. Because the Appellate Panel only determined the ALC erred in its interpretation of the seventy-five foot requirement found in the regulation, the circuit court's review was limited to this consideration. Since the circuit court went on to make new factual findings based on the record and rule on matters not decided by the Appellate Panel, we find the circuit court erred in exceeding its scope of review.

CONCLUSION

There is substantial evidence in the record to support the ALC's finding that the regulation did not bar Neal's dock permit application because the property was not subdivided, and the property had been in the current configuration since owned by the McIvers prior to 1940. Thus, the surveys conducted thereafter did not amount to having the property "platted and recorded" under the regulation. Further, the circuit court erred in reviewing the record and making new findings of fact on matters not decided by the

Appellate Panel. We find the Appellate Panel erred in reversing the ALC, and the circuit court erred in affirming. Therefore, the order of the circuit court upholding the Appellate Panel's order is

REVERSED.

WILLIAMS, J., concurs. GOOLSBY, J., dissenting in a separate opinion.

GOOLSBY, J. (dissenting): I respectfully dissent and would uphold, as did the circuit court, the reversal by the Appellate Panel of the order of the Administrative Law Court that affirmed the issuance by the Office of Ocean and Coastal Resource Management of a dock permit to the respondent David Neal. The relevant part of the regulation at issue provides, "For lots platted and recorded after May 23, 1993, before a dock will be permitted, a lot must have 75 feet of water frontage along the marsh edge . . . ."[7] S.C. Code Ann. Regs. 30-12(A)(2)(o) (Supp. 2001). Inasmuch as Neal possesses only five feet of frontage and platted and recorded his lot in 1997, the plain language of the regulation applies and serves to proscribe issuance of the dock permit that he seeks.

[7] As the majority opinion points out, this regulation has been amended several times. See supra note 2.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John J. McCrosson, Appellant,

v.

Kimberly Paige Tanenbaum, Respondent.

Appeal From Charleston County
Jack Alan Landis, Family Court Judge

Opinion No. 4276
Heard February 7, 2007 – Filed July 13, 2007

AFFIRMED IN PART and REVERSED IN PART

Donald Bruce Clark, of Charleston, and Mark O. Andrews, of Mt. Pleasant, for Appellant.

Desa Ballard, of W. Columbia, John S. Nichols, of Columbia, and Susan T. Kinard, of Mt. Pleasant, for Respondent.

HEARN, C.J.: John J. McCrosson (Husband) appeals an order of the family court granting Kimberly Paige Tanenbaum (Wife) custody of the parties' two children, ordering Husband to pay $5,500 per month in child

support and $100,000 for Wife's attorney's fees, and dividing the marital property in such a way that Wife receives ninety percent of the estate. We affirm in part and reverse in part.

FACTS

Husband and Wife have known each other since they were young children, having attended the same elementary school while growing up in Aiken, South Carolina. The parties lost touch after high school, but rekindled their friendship when both were living in Charleston. Wife, who has a master's degree in education, was teaching elementary school, and Husband, who is now an orthopedic surgeon, was finishing his education at the Medical University of South Carolina.

After dating for approximately eighteen months, the parties married on April 8, 1995. Although Wife initially informed the family court in an affidavit submitted at the temporary hearing that the parties had a "healthy and normal sexual relationship," all the evidence at trial, including Wife's testimony, contradicts that initial statement. In fact, the parties' sexual incompatibility plagued the couple throughout the marriage.

During the first year of marriage, Wife taught elementary school while Husband was a medical resident. Wife became pregnant that year and quit her job during the summer of 1996 so that she could be a stay-at-home mother for Matthew, who was born on August 12, 1996.

In 1999, the parties moved to New York so Husband could complete his residency in orthopedics. While in New York, Wife met a man named Max while at Barnes & Noble with Matthew, who was three years old at the time. Wife befriended Max, and ultimately the two had a sexual affair. Wife admitted that she would either leave Matthew with a babysitter or with Husband while she secretly met with Max. Husband suspected the affair, especially after he found incriminating emails between Wife and Max. Husband confronted Wife about his suspicions, and Wife denied having sex with Max but admitted having an "emotional affair." A serious argument between Husband and Wife ensued, and Wife not only threatened to leave the

marriage but actually packed her bags. Both parties agree the argument ended with Husband apologizing profusely and asking that they "start over" and try to make the marriage work.

In October of 2000, Wife again told Husband she did not want to be married. The couple went to counseling for the first time, in an effort to salvage their marriage. Two months later, Wife gave birth to the parties' second child, Anna Madden. Despite this happy event, Husband and Wife's marriage continued to deteriorate.

By this time, Husband's income had increased significantly. In February 2001, the parties hired Annie Carter to help clean the home and Valerie Turner to help watch the children. Valerie quit around December of 2002, and Annie began working two days a week, spending half of her time cleaning and half of her time caring for the children.[1] Annie testified that, at one point, she suspected Wife was having an affair because she spent so much time away from home. Annie also noted that Wife was more reserved with Anna Madden and "never even played with her." As between the two parties, Annie believed Husband was the more nurturing parent.

In January 2002, the parties purchased a second home in McClellanville, which was on deep water (the Shellmore residence). After moving into the home, Wife's HIV-positive cousin,[2] Matthew Madden, was released from prison after serving nine years for murder. Wife wanted her cousin to move into the parties' home so that he could have a fresh start. Annie Carter was relieved from her duties because Matthew Madden was going to take care of the home. Husband testified that he was apprehensive about the arrangement, but he acquiesced in an effort to make Wife happy.

---

[1] At one point, Wife claimed Annie was not a nanny. Later, however, Wife testified that Annie was not a good housekeeper but was a great child care provider. Wife also testified at one point that Annie was not terminated, but she quit, and at another point she said she was terminated.

[2] We note this fact because it was one of several reasons Husband was wary of Matthew Madden being used as the children's caretaker.

However, Husband insisted Matthew Madden leave the home when Husband learned Wife was leaving the children unsupervised in his care.

In July of 2002, the parties continued to try to salvage their relationship by attending marriage counseling with Alice Timmons. When the issue of Husband's lingering suspicions of Wife's infidelity came up, Wife continued to deny ever having an affair.

In August of 2002, Valerie Turner returned to the parties' home and worked twenty hours a week. The parties left their children in Valerie's care while they were out of town for the weekend. When the parties returned, they learned that someone had stolen their checkbook and attempted to negotiate those stolen checks. The perpetrator was a gentleman Valerie had invited to the parties' home while she was caring for the children. The parties also found an empty condom wrapper stuffed behind a cushion of the couch in the children's playroom. Wife contacted Valerie, who admitted having the man over to the house, but denied having sex with him. After hearing Valerie's apology, as well as her explanation that the condom wrapper had simply fallen out of her purse, Wife wanted to give Valerie a second chance and continue using her as the children's nanny. Husband, however, demanded Valerie be fired, which ultimately happened.

After Valerie was fired, Wife received a phone call from a woman who was considering hiring Valerie as a nanny. Wife lied about the reason Valerie had been fired, explaining instead that Valerie was let go simply because the parties were going through a divorce and Wife could no longer afford a nanny.

During the parties' marriage, Husband was not only concerned about Wife's past infidelity, but he also grew suspicious of Wife's relationship with a female friend, Adrienne. Husband confronted Wife about his suspicions, which ultimately resulted in the parties' separation.

During the separation, the parties attempted to reconcile and pursued counseling, this time with Acton Beard. During these counseling sessions, Wife again denied ever being unfaithful to Husband. At trial, Wife admitted

she had been untruthful when she denied the affair, but that Max "was never an issue in [the] marriage after [she promised to stop seeing him] . . . even in marriage counseling, it wasn't like it was concentrated on." She explained that she was too terrified to admit the affair to counselors for fear it would ruin the marriage.

In February of 2003, Husband met with Ken and Mary Ann Caldwell. Ken was a partner in Husband's orthopedics practice, and Ken and Mary had previously been the parties' Sunday school teachers. The Caldwells convinced Husband that Wife's behavior could be forgiven, and Husband called Wife to discuss the possibility of reconciling. The parties talked on the phone over the course of several days and eventually they went to church together. They spent the day at the Shellmore residence with the children, and they both spoke openly about the problems in the marriage. Husband explained that he did not like Wife's relationship with Adrienne, even if nothing sexual was occurring between them. Wife assured Husband that she and Adrienne were not sleeping together, but Wife finally confessed to her affair with Max. After this admission and a long conversation, Husband and Wife had sex.[3]

The parties' reconciliation was short-lived. Husband testified that after their reconciliation weekend, Wife told all of her friends and family that she and Husband had sex and he had forgiven her. However, when Husband tried to see Wife again, she declined to see him. The following weekend Husband took the children to Virginia for a previously planned ski trip. On the drive home, he called Wife and left a message on her voicemail. When she returned the call, the caller I.D. was blocked. Wife said she was in the car with her sister. More phone calls with a blocked I.D. followed, and Husband inquired why that was happening. Wife eventually admitted that

[3] Husband testified that after the parties had disrobed and he was about to engage in intercourse with Wife, she giggled and said, "I guess this takes care of Max." Wife denies this.

she was actually at home with Adrienne.[4] Shortly upon his return to South Carolina, Husband filed for divorce.

At a temporary hearing, the parties were awarded true joint custody of their children. Husband had the children from Thursday afternoon to Monday morning, and Wife had the children for the remainder of the week.[5] Summers were split equally between the parties, and Husband was ordered to pay $2,000 per month in child support, in addition to paying the mortgage, utilities, and phone services for both marital homes. Husband was also ordered to pay for the children's educational expenses.

During the eighteen months that elapsed between the complaint being filed and the final hearing, Wife had two more confirmed affairs. However, she never withdrew her request for alimony. One affair was a "one-night stand" with "Rhett," a man she met at the beach. The other was a longer term relationship with a man named Darren Kerr. At her deposition, Wife denied the affair with Rhett, but she admitted it at trial. She explained that she was afraid to tell the truth about Rhett because it might cause her to lose custody of the children. As for Darren Kerr, the family court found Wife in contempt of court for going to the Christmas parade with Darren and her daughter, Anna Madden. The family court also found Wife in contempt of court for violating a consent order which prohibited her from exposing the children to

---

[4] Wife admits she lied to Husband about being out with her sister, but claims she told Husband this because she was upset that he had not informed his mother of the parties' reconciliation. Because she was upset with Husband, Wife did not want him to come to her house. According to Wife, Adrienne's presence in the home was coincidental, as she had merely stopped by to look at some exercise equipment Wife was selling.

[5] Wife complained about this arrangement because Husband had the children over the weekend and she had the children during the school week. She said that she had to beg Husband for extra time with the children and complained that she never had a weekend with the children after the temporary order was issued. When confronted with calendars on cross examination, Wife admitted Husband had allowed her numerous weekends with the children.

an alcoholic friend of Wife's who had recently been arrested for driving her car into her boyfriend's house.[6]

The final hearing was a lengthy, twelve-day trial that was heard piece-meal over an eight month period. Numerous witnesses testified on behalf of both parties. Husband's witnesses portrayed him as an involved and loving father who was committed to putting his children before work. Wife's witnesses portrayed her as a model mother who took an active role in her children's school and church life.

Although Husband acknowledges that Wife was the primary caretaker of Matthew during his early years, Husband testified that Wife's attitude towards motherhood and her capabilities as a parent changed remarkably when the parties moved to New York. According to Husband, after Anna Madden was born, Wife suffered from post-partum depression and never seemed to bond with their daughter. Husband also asserts that Wife used daycare excessively in order to pursue her own private life. Husband explained that he was at a point in his career where he had the luxury of setting his own hours and that he could easily arrange his schedule around the children's needs.

Wife claims that she has always been the primary caretaker of the children, and unlike Husband, whose number one priority is work, her life has revolved around the children. Wife also claims that the great majority of the time she spent out of the home was for child-centered activities, such as being Matthew's room mother and chairing the school's Halloween carnival.

The guardian ad litem, Stephen Dey, filed a lengthy and thorough report. In the report, the guardian explained that he first believed that Husband's claims about Wife were farfetched and that he found Wife to be charming and sincere. However, after spending more time with both parties, he learned Wife tended to answer questions untruthfully. She admitted to lying about her affair with Max and lying about going out with her sister

---

[6] Wife was also held in contempt for failing to pay Husband's attorney for fees related to a motion to compel.

when in fact Adrienne was at the house. She also admitted that she lied to another parent regarding the circumstances of Valerie Turner's termination.

The guardian also expressed concern over Wife's ability to parent based on her handling of an incident during the parties' separation. While the children were in Wife's custody, Wife took the dog outside one evening, and Anna Madden, who was not quite three years old, climbed out of her crib and walked out of the house. Wife soon realized Anna Madden was missing and called the police. Anna Madden was found within fifteen minutes at a neighbor's house. Wife never told Husband about their daughter's "escape" even though Husband lived on deep water. The guardian explained that he was not so concerned about Anna Madden being lost, as scary things like that can happen to the best of parents, but was more worried by Wife's failure to reveal the incident to Husband because she did not want it to hurt her custody case.

The guardian also noted that even though Wife reported being "heartbroken" when the children were in Husband's care, she had Anna Madden in full-time, five days per week daycare even after joint custody was ordered. When the guardian asked Wife about this, she said she did it because that is what the temporary order required. The temporary order does not contain any directive requiring full-time daycare.

The guardian expressed concern that Wife made the parties' son, Matthew, feel uncomfortable because she would interrogate him about what had transpired while the children were in Husband's care. The guardian and the children's therapist, Karen Tarpey, spoke to both parties about protecting the children from such inquiries.

After the guardian filed his initial report, one of Wife's best friends, Michelle Crossland, contacted the people the guardian had interviewed and asked them if they wanted to correct anything the guardian reported. Ms. Crossland personally delivered a letter to Annie Carter, the parties' former nanny and housekeeper, who provided some of the most unfavorable information regarding Wife. The letter was hand-delivered while Annie was

working at a home of Ms. Crossland's friend. Despite receiving this letter, Annie testified that the guardian had accurately summarized her views.

At trial, Wife accused the guardian of being biased. She alleged that he told her she should settle the case in favor of Husband because no sitting judge would rule against Husband's attorney, whose wife is a family court judge.[7] Wife also claims the guardian told her the case would likely be heard by one of two Berkeley County judges, "both of whom are reputed to be unlikely to award custody to a litigant if any adultery or other morality issues are raised." The guardian's version of what he told Wife is much different. According to him, he met with both parties, with the blessing of their attorneys, after mediation failed. Apparently, there was miscommunication regarding Husband's settlement offer, and both attorneys agreed the guardian would be in the best position to clear up that miscommunication. The guardian claims he spoke with both parties separately prior to trial. During that communication, he explained where they were in the litigation process. He told them that if they went to trial it would most likely be in front of an out of county judge because Husband's attorney is married to a Charleston County judge. The guardian admitted that he told the parties theirs was not the kind of case he would want to bring in front of a judge. He also talked with the parties about the concept of "fair." He explained that what is fair to one may be unfair to the other and that if either wanted fair, he or she would have to "go out to Ladsen because they have a fair in October." The guardian apologized for making this flippant remark, but again stressed that he was trying to persuade the parties to consider mediation, as both parties' attorneys urged him to.

Notably, at trial, Wife blamed the guardian's bias as the reason she did not inform Husband of Anna Madden's escape. However, Anna Madden was lost in October of 2003, and the guardian did not have the above conversation with Wife, to which she attributes his bias, until December of 2003.[8]

---

[7] At trial, Mark Andrews represented Husband. Mr. Andrews is married to Judge Frances Segars-Andrews, a family court judge in Charleston.

[8] Incidentally, the guardian did not find out about Anna Madden being lost until Husband mentioned it in February of 2004. Husband explained he had

After the trial, the family court granted primary custody to Wife and ordered Husband to pay $5,500 per month in child support. In the order, the family court noted "concern" regarding statements Wife alleged the guardian had made and the family court found "these statements tend to impune [sic] both the Judiciary and the entire Judicial System." For that reason, it appears the family court judge gave little if any weight to the guardian's report. In addition to granting Wife primary custody, the family court ordered the marital property be divided fifty-fifty[9] between the parties and ordered Husband to pay $100,000 towards Wife's attorney's fees. This appeal followed.[10]

STANDARD OF REVIEW

In appeals from the family court, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 615 S.E.2d 98 (2005). In spite of this broad scope of review, we remain mindful that the family court judge saw and heard the witnesses and generally is in a better position to determine credibility. Id.

---

not said anything before because he did not want it to have a chilling effect on Wife's decision to report incidents like that in the future.

[9] Husband contends that even though the family court ordered a fifty-fifty division, the way in which the marital estate was divided resulted in Wife receiving ninety percent of the assets. These issues regarding valuation are addressed below.

[10] Our court superseded the family court's final order upon Husband's petition. We reinstated the joint custody arrangement established in the temporary order, reduced Husband's child support to $2,000 per month, and ordered the appeal be expedited.

LAW/ANALYSIS

I. Child Custody

Husband first argues the family court erred in awarding Wife primary custody of the children. We agree.

Initially, we note that the family court had favorable findings with regard to each party's parenting ability. As to Wife, the court found:

> Since Matthew's birth, [Wife] has not worked outside of the home and seemed to devote significant time and energy to matters related to the children's activities. She has been very engaged in the children's school activities, being a room mother and also volunteering and participating in a variety of activities and events at the children's schools. This has continued to be true during the pendency of this action. This Court is satisfied that the children are happy and well cared for when in [Wife's] care and know how much she loves them.

Likewise, the family court commended Husband as a parent:

> [Husband] is also a dedicated and loving parent. While [Husband's] time with Matthew was somewhat limited during the first two years after Matthew's birth due to the demands of the Husband's residency program, I find that [Husband] was a "hands on" parent even during those early years and has become ever increasingly involved in all aspects of the children's lives. Credible testimony was provided by neighbors, Matthew's soccer coach and others who testified as to their observations of [Husband's] healthy, instructive, and nurturing

> relationship and interactions with the children. The children are clearly happy and well cared for while in [Husband's] care.

South Carolina law is clear that when considering child custody, neither parent has any right paramount to the right of the other. S.C. Code Ann. § 21-21-10. The tender years doctrine, a legal principle favoring mothers over fathers in custody disputes, was abolished by statute over a decade ago. S.C. Code Ann. § 20-7-1525 (Supp. 2005). When making a determination regarding custody, a parent's gender is of no significance. Kisling v. Allison, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001). Rather, the best interests of the children are the paramount and controlling consideration in all custody controversies. Woodall v. Woodall, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (Ct. App. 1996). To determine what is in the children's best interests, courts should consider the "character, fitness, attitude and inclination on the part of each parent as they impact on the child." Parris v. Parris, 319 S.C. 308, 310, 460 S.E.2d 571, 572 (1985). Additionally, courts should consider how the custody decision will impact all areas of the child's life, including "psychological, spiritual, educational, familial, emotional, and recreational aspects." Id.

In awarding Wife primary custody, the family court concluded:

> [Wife] has been the children's primary caretaker for the majority of their lives . . . . [Wife] has demonstrated parenting skills superior to those of [Husband] and even though Husband states that he will be devoting less time to his career and more time to the family, his career is such that he will be busy and by necessity will be away from the children at odd hours. Husband is career centered while Wife is child centered. [Wife] has shown that she is well suited to meet the children's needs, paying consideration to the ages of the children, and Husband has shown an inability to trust. . . . Wife has demonstrated Christian values of forgiveness,

> repentance, and tolerance while Husband has failed to demonstrate those same attributes as they pertain to his Wife. Finally, I find that [Wife] is most likely to encourage a healthy ongoing relationship between the children and [Husband]. Husband still maintains that Wife is wicked and immoral, continues to maintain that Wife is a lesbian and continues to hang on to hate and anger, refusing to take responsibility for his part of the break down in the marital relationship.

After an exhaustive review of the record, we find no support for the majority of these findings by the family court. Although Wife did not work outside the home and may have been the children's primary caretaker when they were infants, there was ample evidence that her role in the children's lives diminished as they grew older. Both children began attending daycare when they were two years old, and prior to the parties' separation, they had hired a nanny to work in their home twenty hours a week. Wife admitted that she used a babysitter on at least one occasion so that she could meet with Max, and Annie Carter, who had worked in the parties' home for fifteen months, observed that Wife spent a significant amount of time away from the home. Even during the pendency of the litigation, when Wife only had the children three nights a week, she continued to have Anna Madden in full-time, five-days-a-week preschool. When asked by the guardian why she chose full-time preschool, Wife contended that the temporary order required it; however, there was no such requirement in the order. Furthermore, at the time of the final hearing, the parties had been operating under a joint custody arrangement for eighteen months, so the amount of time each party spent with the children had equalized.

The record also does not support the family court's finding that Husband's career will require him to work at odd hours. Husband's testimony, as well as the testimony from his medical assistant, indicated that Husband would be able to perform surgeries while the children were in school. In fact, during the period of time when the parties operated under the

temporary order, Husband often took Fridays off so that he could be with Anna Madden during the day rather than sending her to preschool.

As for the family court's admiration of Wife's "Christian value of repentance," we are not as impressed. Wife denied her affair with Max for several years, and she did not admit to sleeping with Rhett until she was on the stand, after having already perjured herself on the subject. Furthermore, adultery was a major issue in the case because Wife never withdrew her request for alimony. Under such circumstances, we are sympathetic to Husband's struggle to forgive.[11] While we do believe it is important for divorced parents to foster, not sabotage, their children's relationship with the other parent, there is no indication that Husband's inability to forgive Wife's affairs hindered the children's relationship with Wife. To the contrary, the guardian reported that it was Wife who made the parties' son feel uncomfortable because she would interrogate him about what had transpired while the children were in Husband's care. At trial, Husband testified he would "do everything within [his] power to foster a loving relationship between [Wife] and the children for the rest of [his] life."

---

[11] The parties' Christian religion was a major theme throughout the trial. The family court's finding regarding Husband's inability to forgive seems largely based on an entry from Husband's prayer journal, which was given to Wife in discovery. According to the family court order, Husband's journal "indicates that his desire is to see to it that Wife be broken and humbled and pray that the evil does not prevail against him." While this excerpt may seem harsh when read in isolation, the entire entry actually reflects a writer who is desperately hopeful that his marriage might be saved. The entry reads:

> Today is the meeting with [Acton] Beard. I pray that I am obedient to God's will in the meeting. Spirit of love and peace preside. Wisdom for [Acton] Beard, myself, and Paige. Paige be broken, humble, honest. Paige see I want to help her, not hurt her. Let me receive instruction and rebuke if appropriate. God be glorified! Children's interests a priority.

Finally, we disagree with the finding that Husband did not take responsibility for his part in the marital break-up. After the parties argued about Wife's relationship with Max while they still lived in New York, it was Wife who packed her bags and was ready to leave the relationship and Husband who begged forgiveness and asked her to stay. Furthermore, it was Husband who contacted Wife in February of 2003 and initiated the brief period of reconciliation between the parties. Even during the trial, Husband testified that he was "[g]ravely sorry if there [was] something that [he] could have done better."

"In determining the best interest of the child[ren], the court undertakes the awesome task of looking into the past and predicting which of the two available environments will advance the best interest of the child and bring about the best adjusted mature individual." Cook v. Cobb, 271 S.C. 136, 142, 245 S.E.2d 612, 615 (1978). Looking at the parties' past behavior, we have serious concerns regarding Wife's judgment as a parent and her ability to raise well-adjusted, mature children.

The family court listed a number of examples where each party showed poor judgment in "child related subjects and circumstances." Mother's list included such alarming behavior as failing to notify Father that the parties' daughter had "escaped" from her crib, ventured outside, and had been lost for approximately fifteen minutes one evening; violating the temporary order's prohibition against having the children around a paramour; violating a consent order prohibiting her from having the children around an alcoholic friend of hers who was facing criminal charges; and hiring her cousin, a convicted murderer who was HIV positive, as the children's nanny. Mother also wanted to give a "second chance" to Valerie Turner even though compelling evidence suggested Valerie had sexual relations in the children's playroom with a man who stole and later tried to negotiate blank checks he acquired while in the parties' home. When another parent called seeking a reference for Valerie, Mother was dishonest about the circumstances under which Valerie was fired and provided a positive recommendation, thus putting an innocent child at risk.

Husband's list of "poor judgment" contained much less serious mishaps. While in Husband's care, the parties' son received a cut while playing with a PVC pipe with his friend, and on another occasion, the son cut his feet on oyster shells while walking barefoot at Husband's home. The son also was bruised when he was hit near the eye with a paintball while Husband's medical assistant was watching the children. The parties' daughter received burns to her fingertips when she accompanied Father to a hunt club and placed her hand on either a furnace or fire barrel; she also extensively cut her own hair when left unattended while in Father's care. Husband's list revolves more around every day accidents that happen to most children while growing up than it does poor parental decision-making skills.

In addition to Wife's poor judgment with regard to child related issues, we are deeply troubled by the number of times Wife was caught lying during the litigation. The family court listed seven instances that reflected negatively upon Wife's credibility: (1) the perjury she committed when she lied about her affair with Rhett during a deposition; (2) her being in contempt of court three times,[12] two of which involved instances where she exposed the children to people she was ordered not to; (3) her complaint during direct examination that she never had a weekend with the children since the issuance of the temporary order; (4) the statement from her initial affidavit wherein she claimed to have a "healthy and normal sexual relationship" with Husband; (5) her dishonesty, even to her own therapist, about her relationship with Max; (6) her testimony that she continually tried to reconcile with Husband up until March 2004, when in fact, she had two admitted adulterous affairs during that time; and (7) her lying about the circumstances of Valerie's termination when she was called as a reference.

After listing Wife's credibility problems, the family court went on to list twelve instances in which it found Husband was not credible: (1) his allegation that Wife traveled extensively, when evidence revealed she had only been alone on vacation for twelve days during the marriage; (2) his

[12] Since the final order, Wife has again been held in contempt of court for refusing to sign papers so that Husband could sell the Shellmore residence. Thus, Wife has been held in contempt on four occasions during this litigation.

claim that Wife suffered from sex addiction, which the family court found was untrue; (3) his allegation that Wife had a lesbian relationship with Adrienne; (4) his accusation that Wife was in and out of counseling for many years and on antidepressants, which the family court found was misleading; (5) his statement that Wife had no concerns about leaving the children in daycare so that she could travel; (6) his denial of knowing how Wife obtained a sex toy; (7) his statement that Wife told him about several sexual encounters with girls when she was a teenager; (8) his allegation that Wife drank excessively; (9) his accusation that Wife has psychiatric problems based on physical violence, atypical sexual behavior, depression, and significant alcohol consumption; (10) his claim that Wife did not like to do housework or to cook; (11) his suggestion that Wife may have been molested as a child; and (12) his allegation that Wife had slapped the children in anger.

We find that although Husband's list is longer, very few items, if any, actually impact Husband's credibility.[13] Many of the examples on the list surround his belief that Wife had sexually deviant tendencies, which the family court found were not true. While Husband may be incorrect in his conclusions about Wife, it is unfair for his credibility to be impugned simply because he harbors these suspicions, especially in light of Wife's history of being untruthful and having extra-marital affairs.

While the family court is generally in the better position to determine a party's credibility, where there are numerous confirmed instances of a party's dishonesty, as there are here, we believe a reviewing court may have the advantage because it can consider the facts of a case without being distracted

---

[13] Each accusation made by Husband has some support in the record, and in his appeal, Husband argues these findings regarding his credibility were incorrect. Because it is obvious from the lists themselves that the examples regarding Husband's lack of integrity were based upon the family court's determination that Husband failed to prove certain allegations against Wife and not based on proven lies told by Husband, we decline to go through each finding Husband disputes. Rather, we acknowledge none of the examples listed revealed any admitted lies told by Husband, whereas Wife's list contained numerous conclusively proven instances of her dishonesty.

by an emotionally charged trial. After thoroughly reviewing this 3,000-plus page record, the bulk of which revealed a web of deceit woven by Wife, the family court's order awarding Wife primary custody came, quite frankly, as a surprise twist ending. To reach such a conclusion, the family court not only adopted Wife's version of events as opposed to Husband's, but also relied on her word over that of witnesses with nothing to gain from the court's decision. For instance, the family court completely discredited the guardian's testimony simply based on Wife's allegations that the guardian was biased, even though Wife had already perjured herself for the admitted purpose of strengthening her case for custody. The guardian, on the other hand, had no vested interest in the case other than protecting the children's best interests. He has been a family court practitioner for thirty years, and the record revealed no history of him being untruthful. Moreover, Wife never moved to have the guardian removed from the case because of his alleged bias.

Based on the concerns addressed above regarding Wife's parental judgment and lack of credibility coupled with the well-supported and unappealed findings of the family court regarding Husband's ability to care for the children, we reverse the family court's decision awarding Wife primary custody. We adopt the visitation plan set forth in the family court's final order, except that Husband is the primary custodian, and Wife receives the visitation schedule originally given to Husband.

II. Child Support

Husband next argues the family court's award of $5,500 per month in child support was excessive. Because we reverse the custody arrangement and Husband does not seek any child support from Wife in this action, we need neither address the excessiveness of the support ordered nor remand this issue for recalculation.

III. Equitable Distribution

Husband also argues the family court erred in effectuating the fifty-fifty division of marital property. Specifically, Husband argues the value of the Shellmore residence, which he received in the division, should have been

reduced by a six percent real estate commission because the family court knew this asset was being sold. Husband also argues the family court overvalued the parties' boat by $6,000. We find these issues regarding valuation are not preserved for review because Husband failed to file a Rule 59(e) motion addressing these issues. See Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54-55 (Ct. App. 2006) (holding that the wife's argument regarding the family court's valuation of marital property was not preserved for appellate review because she failed to point out the alleged error to the family court in her Rule 59(e) motion).

IV. Attorney's Fees

Finally, Husband argues that if we reverse the custody determination, we should also reverse the award of $100,000 in attorney's fees to Wife. We agree.

In determining whether to award attorney's fees, the family court should consider four factors: (1) the party's ability to pay his or her own attorney's fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 415 S.E.2d 812 (1992). When the family court finds an award of attorney's fees is justified, the amount of fees should be determined by considering: (1) the nature, extent, and difficulty of the services rendered; (2) the time necessarily devoted to the case; (3) counsel's professional standing; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991); Deidun v. Deidun, 362 S.C. 47, 65, 606 S.E.2d 489, 499 (Ct. App. 2004). When a party's beneficial results are reversed on appeal, the attorney's fee award must also be reconsidered. See Rogers v. Rogers, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001).

We recognize that even though our opinion erases Wife's beneficial results, the other three E.D.M. factors for awarding attorney's fees weigh in Wife's favor due to Husband's superior financial position. However, in attempting to determine the amount of fees to award based on the factors set

forth in Glasscock, we come to the inescapable conclusion that no amount of attorney's fees is warranted.

In her brief, Wife admits the "overwhelming amount of time at trial was devoted to the issue of child custody." Wife did not receive beneficial results with regard to this issue, especially considering Husband's offer of settlement, in which he agreed to share equal time with the children, pay $2,000 per month in child support, and pay rehabilitative alimony.[14] We note that all of the attorney's fees for which Wife requested reimbursement were incurred after Wife's rejection of Husband's settlement offer. Furthermore, the other factors to be considered, such as the time devoted to the case and the difficulty of the case, were exacerbated by Wife's refusal to withdraw her request for alimony despite her three extra-marital affairs.

Based on these considerations, we find Wife is not entitled to any award of attorney's fees. Accordingly, we reverse that portion of the family court's order.

CONCLUSION

Based on the foregoing, we find Husband is better suited to have primary custody of the parties' two children. We therefore reverse the family court's order with regard to custody and child support. We further find Wife is not entitled to attorney's fees because she no longer received beneficial results and much of the litigation expenses are attributable to her own actions. Finally, we find Husband's arguments regarding the valuation of marital property are not preserved for our review. Accordingly, the order of the family court is

AFFIRMED IN PART and REVERSED IN PART.

BEATTY and WILLIAMS, JJ., concur.

---

[14] The parties stipulated that Husband's letter of settlement was only relevant to the issue of attorney's fees and would be viewed by the family court only after it had ruled on all other issues.