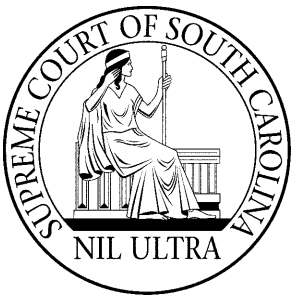

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30

July 30, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Furtick, Appellant

v.

South Carolina Department of Corrections, Respondent.

Appeal From Richland County
James R. Barber, Circuit Court Judge

Opinion No. 26270
Submitted January 18, 2007 – Refiled July 30, 2007

REVERSED

James Furtick, *pro se*, of Bennettsville, for Appellant.

Barton J. Vincent, Deputy General Counsel, of Columbia, for Respondent.

JUSTICE WALLER: This is a direct appeal from the circuit court's order affirming the Administrative Law Court's (ALC) summary dismissal of appellant James Furtick's prison grievance matter. After we issued our original opinion in which we reversed, Furtick v. S.C. Dep't of Corrections, Op. No. 26270 (S.C. Sup. Ct. filed February 20, 2007) (Shearouse Adv. Sh. No. 6 at 89), respondent filed a petition for rehearing. We now withdraw our

original opinion and issue this opinion. We deny respondent's petition for rehearing and reverse the circuit court's decision.

FACTS

In 2001, when Furtick was an inmate at Lee Correctional Institution, the Department of Corrections (DOC) charged him with possession of contraband.[1] After a major disciplinary hearing was held, Furtick was found guilty of the offense and reprimanded. As a result of the reprimand, Furtick alleges he did not earn his good time credit for the month of the infraction. Furtick appealed from this disciplinary decision through the DOC's internal grievance system; the DOC denied his grievance.

Furtick appealed the denial of his grievance to the ALC, and the DOC moved to dismiss the action based on a lack of subject matter jurisdiction. Finding that Furtick had no liberty interest in good time credits which he was unable to earn as a result of a rule violation, the ALC dismissed the matter.

Furtick sought review from the circuit court. The circuit court also found no liberty interest was implicated and therefore affirmed the ALC's decision.

ISSUE

Did the circuit court err in finding the ALC lacked jurisdiction over Furtick's claim?

DISCUSSION

Furtick argues that the circuit court erred by finding that the ALC lacked subject matter jurisdiction to review his grievance. We agree.

[1] According to Furtick, DOC guards entered his cell and seized numerous items of property, including his typewriter, various office supplies, and bleach. It appears the possession of contraband rule infraction was based on the possession of bleach.

Through statute, the State provides that an inmate is "entitled to a deduction from the term of his sentence" if he "faithfully observe[s] all the rules of the institution … and has not been subjected to punishment for misbehavior." S.C. Code Ann. § 24-13-210(A) (2007). However, "[i]f a prisoner … violates one of the rules of the institution during his term of imprisonment, all or part of the good conduct credit he has earned may be forfeited in the discretion of the Director of the Department of Corrections." Id. § 24-13-210(D).

In Wolff v. McDonnell, 418 U.S. 539 (1974), the United States Supreme Court explained that inmates have certain due process rights when good time credits are at issue:

> It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison…. [The State] may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing 'in every conceivable case of government impairment of private interest.'… But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Id. at 557 (citation omitted); see also Sandin v. Conner, 515 U.S. 472, 483-84 (1995) (the States may, under certain circumstances, create liberty interests which are protected by the Due Process Clause); Henderson v. Comm'rs of Barnstable County, 730 N.E.2d 362, 370 (Mass. App. Ct. 2000) ("The entitlement to statutory good time credit is a liberty interest.").

The USSC noted in Wolff that punishment in the form of "the forfeiture **or withholding** of good-time credits" affects the term of

confinement. Wolff, 418 U.S. at 547 (emphasis added). Additionally, in Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 454 (1985), the USSC specifically stated the following: "Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily."

In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), we acknowledged that "[t]he statutory right to sentence-related credits is a protected 'liberty' interest under the Fourteenth Amendment, entitling an inmate to minimal due process to ensure the state-created right was not arbitrarily abrogated." Id. at 370, 527 S.E.2d at 750 (citing Wolff, supra). We held in Al-Shabazz that the DOC's disciplinary and grievance procedures are consistent with the due process standards outlined by the USSC in Wolff. See id. at 372-73, 527 S.E.2d at 751-52 (for extensive discussion on the DOC's procedures for major disciplinary hearings). Moreover, we also held that an inmate generally could not raise a non-collateral claim, such as one involving the forfeiture of good-time credits, via the Post-Conviction Relief Act. Id. at 367-68, 527 S.E.2d at 749.

We held, however, that an inmate could pursue **review** of certain grievance decisions made by the DOC by filing an action in the ALC pursuant to the Administrative Procedures Act (APA). The Al-Shabazz Court stated that when an inmate challenges a disciplinary outcome, calculation of sentence-related credits, custody status, or other condition of imprisonment, he could bring "a contested case" under the APA. Id. at 375, 527 S.E.2d at 753. Thus, the ALC "sits in an appellate capacity to review" these types of decisions. Id. at 377, 527 S.E.2d at 754.

Furthermore, "[a]n inmate is entitled to judicial review of the final decision in a non-collateral or administrative matter, which includes a disciplinary hearing." Id. at 377-78, 527 S.E.2d at 754. We explained that judicial review must be available to determine "whether prison officials have acted arbitrarily capriciously, or from personal bias." Id. at 381, 527 S.E.2d at 756-57.

We emphasized in Al-Shabazz that any judicial review would be of a "limited nature" and that the courts of this State would adhere to a "hands off" doctrine when reviewing the decision from a major disciplinary hearing in which an inmate has a protected liberty interest due to the potential loss of sentence-related credits. Id. at 382, 527 S.E.2d at 757. Finally, the Al-Shabazz Court recognized that most of these matters would be resolved without either ALC or judicial review, but nonetheless held that such review "must be available." Id. at 383, 527 S.E.2d at 757.[2]

Several subsequent decisions have reiterated Al-Shabazz's holding that the ALC has subject matter jurisdiction over an inmate's appeal when the claim sufficiently "implicates a state-created liberty interest." Sullivan v. S.C. Dep't of Corrections, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003), cert. denied, 540 U.S. 1153 (2004); see also Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs., 352 S.C. 594, 598, 576 S.E.2d 146, 149, cert. denied, 539 U.S. 932 (2003) (in deciding whether Respondent was entitled to **review** of the Department's parole eligibility decision, the Court evaluated whether Respondent had a liberty interest in gaining access to the parole board); Steele v. Benjamin, 362 S.C. 66, 606 S.E.2d 499 (Ct. App. 2004) (the ALC's subject matter jurisdiction depends on whether there is a sufficient, state-created liberty interest implicated).

Furthermore, in Slezak v. S.C. Dep't of Corrections, 361 S.C. 327, 605 S.E.2d 506 (2004), cert. denied, 544 U.S. 1033 (2005), we clarified that the ALC has jurisdiction over **all** inmate grievance appeals that have been properly filed; the ALC, however, is not required to hold a hearing in every matter. We stated in Slezak that summary dismissal would only be appropriate "where the inmate's grievance does not implicate a state-created liberty or property interest." Id. at 331, 605 S.E.2d at 508. Thus, where a

[2] As to the facts of the petitioner's claims in Al-Shabazz, they involved his custody status and the loss of good-time credits incurred as a result of a major disciplinary proceeding. We held that these claims were non-collateral or administrative matters that could not be raised in a PCR application, but could be reviewed under the APA after the DOC reached its final decision. Al-Shabazz, 338 S.C. at 383, 527 S.E.2d at 757.

matter clearly implicates a loss of statutory sentence-related credits, the ALC may not summarily dismiss the action.[3]

Turning now to the instant case, we reiterate that the State of South Carolina clearly has created a liberty interest in good-time credits by enacting section 24-13-210. Without a doubt, these credits for good behavior may be withheld or revoked as punishment when an inmate commits an offense while incarcerated or otherwise violates the rules of the institution. S.C. Code Ann. § 24-13-210(D). Nonetheless, such a loss of good-time credits is reviewable by the ALC pursuant to Al-Shabazz and its progeny. The matter is reviewable because the loss of good-time credits sufficiently "implicates a state-created liberty interest." Sullivan, 355 S.C. at 443, 586 S.E.2d at 127. When a state-created liberty interest is implicated, the inmate is entitled to certain due process rights. Wolff, supra. While the DOC's disciplinary policies comport with those due process requirements, the purpose of allowing review is to ensure that due process was, in fact, accorded to the inmate and the inmate's right to the statutory credit was not "arbitrarily abrogated." Wolff, 418 U.S. at 557; accord Al-Shabazz, supra.

We emphasize, however, that inmate litigation itself must comport with certain standards. If a court finds a prisoner has: (1) submitted a malicious or frivolous claim, or one that is intended solely to harass the party filed against; (2) testified falsely or otherwise presented false evidence or information to the court; (3) unreasonably expanded or delayed a proceeding; or (4) abused the discovery process; then the "prisoner shall forfeit all or part of his earned work, education, or good conduct credits in an amount to be determined" by the DOC. S.C. Code Ann. § 24-27-200 (2007); see also Al-Shabazz, 338 S.C. at 381, 527 S.E.2d at 756.

In this case, Furtick sought review from the ALC and such review was denied by both the ALC and circuit court. Accordingly, we reverse and

[3] Regarding Slezak's grievance which asserted that the prison's practice of "triple celling" constituted a security and health hazard to inmates, the Slezak Court remanded to the ALC for a hearing because it "adequately state[d] a violation of appellant's liberty interest." Slezak, 361 S.C. at 333, 605 S.E.2d at 508-09.

remand to the ALC to hold a hearing on the denial of Furtick's grievance claim.

REVERSED.

MOORE, BURNETT and PLEICONES, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the majority's holding today ignores the legislative intent expressed by the clear and unambiguous language of S.C. Code Ann. §§ 24-13-210 and -230. Further, I believe the majority discards our Court's long-standing "hands-off" approach to judicial supervision of internal prison disciplinary matters which do not amount to a violation of constitutional dimensions. In adopting its position, the majority has interjected our courts into every prison disciplinary matter which may result in an inmate's lost opportunity to earn sentence-related credits including a multitude of minor disciplinary infractions which, but for today's decision, would not otherwise trigger due process protections. Therefore, I would affirm the circuit court's decision finding that an inmate has no constitutionally significant interest in the loss of the opportunity to earn certain sentence-related credits. However, I would modify the circuit court's decision to reflect that the ALC has subject matter jurisdiction to review such inmate grievance matters and that the ALC may summarily decide these appeals without a hearing.

Under our statutory law, Furtick does not have any protected liberty interest in the loss of the opportunity to earn sentence-related credits. The United States Constitution does not provide an inmate with a guarantee of sentence-related credit for good behavior while incarcerated. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). However, in some instances, a state may create a liberty interest which is protected by the Due Process Clause of the Fourteenth Amendment. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). A state creates a liberty interest in sentence-related credits only where an inmate has a legitimate expectation of receiving such credits. *See Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987) (citing *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 11 (1979)). However, a liberty interest in sentence-related credits cannot be predicated on the unilateral expectation or hope to be released before the expiration of one's term. *See Montgomery v. Anderson*, 262 F.3d 641, 645 (7th Cir. 2001). An inmate may obtain relief for the deprivation of sentence-related credits if he can demonstrate that "the State's action. . . inevitably affect[ed] the duration of his sentence." *Sandin*, 515 U.S. at 487. Generally, an inmate is not entitled to due process protection for State action that may only speculatively affect the duration of his sentence. *Id.*

S.C. Code Ann. § 24-13-210(A) provides:

> A prisoner convicted of an offense against this State, except a "no parole offense" as defined in Section 24-13-100, and sentenced to the custody of the Department of Corrections including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-30, whose record of conduct shows that he has faithfully observed all the rules of the institution where he is confined and has not been subjected to punishment for misbehavior, is entitled to a deduction from the term of his sentence beginning with the day on which the service of his sentence commences to run, computed at the rate of twenty days for each month served.

In *Busby v. Moore*, this Court found that the legislature intended § 24-13-210(A) to reward inmates with good-time credits only after they exhibit good behavior. 330 S.C. 201, 204, 498 S.E.2d 883, 884 (1998), *overruled in part on other grounds by Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (1999). Additionally, this Court found that a prisoner's entitlement to good-time credits pursuant to § 24-13-210(A) did not vest until the prisoner had served the appropriate amount of time and actually earned the credits. *Id.* at 204, 498 S.E.2d at 885.

In this case, Furtick was reprimanded for the violation of prison rules. A collateral result of this reprimand was that Furtick was ineligible to earn his good-time credits during the month in which he was reprimanded. Because Furtick did not lose any earned good-time credits as a result of the reprimand, in my view, we cannot say that the reprimand inevitably effected the duration of his sentence.

A myriad of considerations affect whether an inmate is released before the conclusion of the original sentence. In my view, Furtick's situation is markedly different from the situation where an inmate has already earned good-time credit and, by virtue of some punishment, is required to forfeit that credit. In that case, the inmate no longer possesses merely a unilateral hope

of a sentence reduction, but actually possesses a vested right to the good-time credit and reduction in sentence. As we stated in *Al-Shabazz*, the withholding or forfeiture of earned good-time credit directly implicates a protected liberty interest. 338 S.C. at 370, 527 S.E.2d at 750. In contrast, the loss of the opportunity to earn good-time credit as a result of a prison rule violation does not implicate the same interest.

Because the statute grants inmates good-time credit only after inmates demonstrate good behavior, no inmate is guaranteed or has a vested right in the maximum accrual of good-time credit. Accordingly, I would find that an inmate does not have a legitimate expectation that he will receive good-time credits, but merely possesses only the hope that his behavior and observation of prison rules will be sufficient to entitle him to a reduction in his sentence. Based on the language in § 24-13-210(A) and our previous interpretation of the statute, I would hold that an inmate does not have a protected liberty interest in unearned good-time credits. To hold otherwise would clearly frustrate the purpose and intent of the legislature in enacting the statute.

An analysis of § 24-13-230(A) reveals a similar conclusion. The statute provides:

> The Director of the Department of Corrections may allow any prisoner in the custody of the department, except a prisoner convicted of a "no parole offense" as defined in Section 24-13-100, who is assigned to a productive duty assignment or who is regularly enrolled and actively participating in an academic, technical, or vocational training program, a reduction from the term of his sentence of zero to one day for every two days he is employed or enrolled. A maximum annual credit for both work credit and education credit is limited to one hundred eighty days.

S.C. Code Ann. § 24-13-230(A).

Like §24-13-210, I would find that § 24-13-230(A) is clear and unambiguous. In my opinion, the legislature's use of the word "may" indicates its intention that any reduction in sentence pursuant to § 24-13-

230(A) be left to the discretion of DOC. *See Carolina Power & Light Co. v. Pageland*, 321 S.C. 538, 543, 471 S.E.2d 137, 140 (1996) (holding that when a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning). Stated differently, there is no mandatory requirement that any inmate receive a reduction in sentence under this statute. In fact, despite an inmate's participation in the programs outlined in the statute, DOC has the discretion to award no sentence reduction at all. Accordingly, I believe that any sentence reduction allowed pursuant to § 24-13-230(A) is not an unfulfilled entitlement, but is completely discretionary. *See Skipper v. South Carolina Dept. of Corrections,* 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006). Because an inmate is not entitled to earn credit at a particular level, in my view, an inmate has no protected liberty interest in maintaining a specific work credit level for sentence reduction purposes. *Cf. Altizer v. Paderick*, 569 F.2d 812, 813 (4th Cir. 1978) (finding that classifications and work assignments are discretionary matters for prison administration and "to hold that they are 'within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business'" of the judiciary) (internal citations omitted).

Therefore, I would hold that the circuit court did not err in finding no implication of protected liberty interests in the loss of the opportunity to earn sentence-related credits pursuant to S.C. Code Ann. §§ 24-13-210 and -230.

Finally, while I agree with the majority that the circuit court erred in holding that the ALC lacked subject matter jurisdiction, I would find that no hearing was required under these circumstances. Pursuant to this Court's decision in *Slezak v. South Carolina Dept. of Corrections*, 361 S.C. 327, 331, 605 S.E.2d 506, 508 (2004), the ALC has jurisdiction over all properly perfected inmate appeals. However, the ALC may summarily decide those appeals that do not implicate an inmate's liberty or property interest and decline to hold a hearing. *Id*.

DOC does not dispute that Furtick has properly perfected his appeal. Therefore, in my view, the ALC erred in dismissing Furtick's case on the

basis of lack of subject matter jurisdiction. *See State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 499 (2005) (noting that subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong). Because I would find that Furtick has no protected liberty interest in unearned sentence-related credits pursuant to S.C. Code Ann. §§ 24-13-210(A) and -230(A), I believe the ALC may have summarily decided his appeal without a hearing. Therefore, I would hold that the ALC's improper dismissal of Furtick's claim constitutes harmless error.

The federal courts have recognized that, for many prisoners, prolific litigation is a costless pastime. With today's decision, this Court unnecessarily throws open the door to judicial review of most any conceivable prison administrative matter virtually assuring this pastime will rapidly become all the more treasured.

Thus, with the modification described above, I would affirm the circuit court's decision.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James W. Smiley, Petitioner,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, and Wild Dunes Community Association, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 26365
Heard April 5, 2007 – Filed July 30, 2007

REVERSED AND REMANDED IN PART;VACATED IN PART

James S. Chandler, Jr., and Amy E. Armstrong, both of Pawleys Island, for Petitioner.

Carlisle Roberts, Jr., of Columbia, and Evander Whitehead, of Charleston, for Respondent SC Department of Health and

Environmental Control and Kenneth C. Krawcheck, of Krawcheck & Davidson, of Charleston, for Respondent Wild Dunes Community Association.

JUSTICE PLEICONES: We granted certiorari to review a Court of Appeals' decision upholding a finding that petitioner (Smiley) lacked standing to challenge a permit issued by respondent DHEC's Office of Ocean and Coastal Resource Management (OCRM) to respondent Wild Dunes. [1] Smiley v. S.C. Dep't of Health and Envt'l Control, Op. No. 2005-UP-160 (S.C. Ct. App. filed March 7, 2005). We reverse and remand the matter to the Administrative Law Court Division (ALCD).

FACTS

OCRM issued a permit allowing Wild Dunes to periodically excavate sand from the public intertidal beach at the Isle of Palms, if and when erosion occurs, and to transport the sand to Wild Dunes' private property. This "beach sand scraping" permit allows Wild Dunes to remove up to 25,000 cubic yards each month from November through April for five years, with the possibility of five-year extensions. The permit limits the depth of scraping to 18 inches: according to calculations in the record, if the maximum amount of sand were extracted, it would affect over ten acres of beach per month. Put another way, if the intertidal beach is assumed to be 300 feet wide, then a "full monthly scraping" would extend over a space more than 1,400 feet long by 300 feet wide, to a depth of 1 ½ feet.

Following the issuance of the Wild Dunes permit, Smiley requested a contested case hearing before an administrative law judge (ALJ), relying upon S.C. Code Ann. § 48-39-150 and 23A S.C. Code Ann. Regs. 30-6(A). At that time, § 48-39-150 provided:[2]

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[1] Wild Dunes and OCRM have filed a joint brief in this matter. We will refer to the respondents as OCRM in the opinion.

[2] The statutory scheme was substantially altered in 2006 to conform to the new ALJ/Court of Appeals appellate review scheme. See 2006 Act No. 387.

> Any person adversely affected by the [OCRM's] staff's initial permitting application decision has the right to file a request for a contested case hearing before an administrative law judge.

OCRM filed a motion to dismiss alleging Smiley lacked standing. The ALJ granted the motion, and her ruling was upheld by the Coastal Zone Management Appellate Panel, the circuit court, and the Court of Appeals.

ISSUE

> Whether the Court of Appeals erred in concluding Smiley lacked standing to contest the Wild Dunes permit?

ANALYSIS

The "irreducible constitutional minimum of standing" has three components:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly…trace[able] to the challenged action of the defendant, and not…th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (internal citations omitted) (Lujan); Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001) (Sea Pines).

The ALJ's conclusion, affirmed by the appellate tribunals, that Smiley lacks standing to maintain this action is predicated upon a finding that he cannot meet the first Lujan/Sea Pines element: that he "has suffered an '"injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized…and (b) "actual or imminent," not 'conjectural' or 'hypothetical.'" Lujan, *supra*; Sea Pines, *supra*. In this setting, 'particularized' means Smiley must be affected in a personal and individualized way by the permitting decision. Id.

Smiley alleged the following facts by affidavit to meet his burden of demonstrating standing:

> I am partially disabled with paralysis of muscles in both legs as a result of a spinal cord injury in 1979. After my release from the hospital in late 1979, I began a course of rehabilitation which continues today and involves jogging on the flat hard public beach on the Isle of Palms. I use the beach in area[s] where sand will be excavated and which is the subject of this proceeding on an almost daily basis. My uses of this beach are for recreation and rehabilitation, including walking, jogging, nature-watching and similar pursuits. Additionally, as an ardent conservationist, responsible citizen and professional biologist, I feel a duty to do my part in preserving and protecting [the] beach/dune system of the Isle of Palms.
>
> The intrusion of heavy equipment into the public beach and the consequent excavation of sand from the intertidal zone will make it impossible to jog on the beach in the affected area and it will reduce my enjoyment of the beach. FrontEnd [sic] Loaders excavating sand from the beach and bulldozers pushing the sand up onto private property all have a detrimental effect on my aesthetic, conservational and recreational interest and values and will reduce or make impossible my ability to use the beach.

1. "Actual or imminent"

The Court of Appeals held that Smiley failed to meet the requirement that the injury be actual or imminent because while the permit has been issued, no sand has yet been scraped. The court cited its decision in Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001) (Beaufort Realty) as authority for the holding that until the permit was acted upon, Smiley lacked standing. Smiley contends Beaufort Realty was misapplied. We agree.

In Beaufort Realty, the zoning administrator examined plats filed by Beaufort Realty, and determined that by virtue of the size of the lots and the ingress/egress requirements outlined in the plats, the properties were exempt from a subdivision ordinance. The Court of Appeals held that the conservation group challenging the zoning administrator's decision to exempt the properties lacked standing as it alleged no injury as a result of the exemption, but instead merely alleged its members would suffer injuries if the properties were someday developed. The conservation group lacked standing as the alleged harm was neither "actual nor imminent," it was merely "hypothetical or conjectural." In addition to finding the conservation group could not meet the first Lujan/Sea Pines prong, the Beaufort Realty court held the conservation group could not meet the second standing requirement since there was no causal connection between the mere filing of the plats and the alleged potential future harm. Beaufort Realty at 306, 551 S.E.2d at 590.

Smiley argues, and we agree, that to read Beaufort Realty as denying standing to an individual unless and until the "injury" has been inflicted ignores the "actual or imminent" requirement of Lujan/Sea Pines and elevates dicta in Beaufort Realty over its two holdings: that the environmental group was asserting speculative concerns rather than injury, and had failed to demonstrate a causal connection. See e.g. Commander Health Facilities, Inc. v. DHEC, 370 S.C. 296, 634 S.E.2d 664 (Ct. App. 2006) (characterizing Beaufort Realty as requiring either a direct injury or the immediate danger of direct injury). We hold that Smiley has adequately demonstrated that his

injury is "actual and imminent" for purposes of standing. The Court of Appeals' holding that his challenge to the Wild Dunes permit is premature is reversed.

B. "Injury in fact"

In a rather confusing paragraph, the Court of Appeals first states that "Smiley has failed to demonstrate how the proposed project will prevent his enjoyment of the beach," apparently a finding Smiley has failed to allege "a concrete and particularized invasion" of a legally protected interest. The averments in Smiley's affidavit that he recreates and views nature on the beach on an almost daily basis is a sufficient allegation of a "concrete and particularized invasion." As the United States Supreme Court held:

> "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote,…a $5 fine and costs,…and a $1.50 poll tax…. [W]e see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved."
>
> U.S. v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (SCRAP).

Following the statement that Smiley failed to demonstrate how his enjoyment of the beach would be affected, the Court of Appeals went on to say "Smiley's use and enjoyment will be only temporarily altered" in that "his injury, at best, will be a temporary detour in his jogging route and does not compare to the permanent injury in [citation omitted]…However, even a permanent injury does not assure a plaintiff will have standing [citing Sea

Pines][3]…petitioner's temporary inconvenience does not give rise to standing." This is apparently a finding that Smiley failed to allege a sufficient "injury in fact."

We are unaware of any legal basis for the Court of Appeals' distinction of a temporary injury from a permanent injury. Moreover, OCRM presented no evidence in opposition to Smiley's affidavit. There is simply nothing in this record to support the Court of Appeals' conclusion that any inconvenience will be merely temporary. The court is then critical of Smiley's averments of injury characterizing them as a temporary detour in his jogging route and ignoring the other "use and enjoyment" claims made in the affidavit. Interference with Smiley's enjoyment of the beach, and his inability to use it for his rehabilitative jogging for at least six months a year for at least the next five years, are sufficient allegations of a "stake in the outcome" to permit Smiley standing to challenge the permit. SCRAP, *supra*.

We reverse the Court of Appeals' holding that Smiley merely alleged "temporary inconvenience," and that his allegations are insufficient. Smiley's affidavit demonstrates that he has a direct stake in the permitting decision, and therefore he sufficiently alleges standing. Lujan, *supra*; Sea Pines, *supra*.

The Court of Appeals went on to discuss the Public Trust Doctrine and beach renourishment statutes, and conclude that "The excavation of sand does not substantially impair the public interest and is within the State's policy of preserving and restoring its beaches, thus [Smiley] has failed to

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[3] We note that Sea Pines did not involve a finding of permanent injury with a concomitant denial of standing. Rather, the Court held the plaintiffs presented no evidence that their interest in viewing wildlife would be diminished by the permits, and thus failed to demonstrate "any particularized harm." Sea Pines, at 606, 550 S.E.2d at 292. Moreover, the Court held that, assuming the Sea Pines plaintiffs had shown an injury, they "failed to present evidence the injury would be redressed by a favorable decision…," Id., that is, they failed to meet the third Lujan standing requirement as well as the first.

demonstrate how the permit would violate these protections." We vacate, in its entirety, this speculative ruling on the merits of Smiley's claims, which are not germane to the standing issue.

CONCLUSION

We reverse the Court of Appeals' decision affirming the rulings that Smiley lacked standing to challenge the Wild Dunes permit, and remand the matter to the ALCD for further proceedings.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Levell Weaver, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Williamsburg County
Howard P. King, Circuit Court Judge

Opinion No. 26366
Heard February 13, 2007 – Filed July 30, 2007

AFFIRMED AS MODIFIED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of Columbia, for petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for respondent.

JUSTICE MOORE: Petitioner was convicted of murder and possession of a weapon during commission of a violent crime. He was sentenced to concurrent imprisonment terms of thirty years for murder and five years for possession of a weapon during a violent crime. His convictions and sentences were upheld on direct appeal by the Court of Appeals. State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004). We affirm as modified.

FACTS

On June 23, 1999, Marion McKnight was shot thirteen times outside a club and died at the scene. Investigator Sandy Thompson arrived up to an hour after the shooting occurred. Thompson spoke with witnesses still at the club and his investigation led him to search for petitioner.

Thompson received information that petitioner was at the home of his cousin, Arnold Weaver. Thompson and other investigators arrived at Arnold's home and found the Jeep, which petitioner was driving earlier that night, in the back yard. Arnold testified petitioner had been at his home, and had asked for a change of clothes, some bleach, and a garbage bag. He left Arnold's home less than an hour later.[1]

Upon finding the Jeep, Thompson and another officer testified Thompson opened the door of the Jeep. After finding the inside of the Jeep was wet and smelled of bleach, Thompson shut the door. The investigators found "a bag of wash" that smelled like bleach on a pump house near the Jeep. Based on this evidence, the Jeep was impounded and towed to the county jail.

After the Jeep had been impounded, a SLED agent processed the Jeep. The agent testified he found blood in the Jeep in several places, including the interior of the driver's side door, just below the rear window on the driver's side, on a chamois cloth found on the back seat of the car, on a keychain

[1]Petitioner turned himself in during the early morning hours of June 24.

found in the ignition, and on the gear shift. The blood matched that of the victim. Further, the rear cargo area was wet and smelled of bleach. This area was positive for blood as well but could not be tested.

Prior to trial, defense counsel moved to suppress the evidence taken from the Jeep. The State noted officers obtained a search warrant before searching the Jeep for blood evidence but after it was impounded in a secure location. However, the return was never made on the warrant as required by S.C. Code Ann. § 17-13-140 (2003). The State indicated they were not relying on the search warrant, but were instead contending it was a valid warrantless search. Therefore, the trial judge analyzed the question of the propriety of the search of the Jeep as if no warrant had been obtained. The trial judge preliminarily ruled the seizure of the Jeep was proper without a warrant, that the search was lawful, and that the evidence was admissible.

Prior to the introduction of Agent Lambert's testimony regarding the blood evidence, an *in camera* hearing was held to revisit the admissibility of the testimony. Following the hearing, the judge denied petitioner's motion to suppress. He stated there was no requirement that a warrantless search occur contemporaneously with the seizure for the automobile exception to the Fourth Amendment to apply. Because he found the warrantless search was proper, the trial judge refused to rule as to whether the officers' failure to provide a return rendered the search warrant ineffective. The Court of Appeals affirmed.

ISSUE

Did the Court of Appeals err by upholding the trial court's refusal to suppress evidence found in the vehicle petitioner was driving?

DISCUSSION

Petitioner argues the evidence found in the Jeep should have been suppressed. He contends the automobile exception to the Fourth Amendment warrant requirement is inapplicable in this case and, therefore, the State was

required to obtain and properly execute a search warrant prior to obtaining evidence from the Jeep. Petitioner states that because the State did not produce a return as required under S.C. Code Ann. § 17-13-140 (2003), the search warrant was invalid and the search of the Jeep was unlawful. In addition, he argues the search violated his rights under Article 1, § 10, of the South Carolina Constitution, because that section provides greater protection than that provided by the Fourth Amendment of the United States Constitution.

When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial judge's ruling if there is any evidence to support the ruling. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004). The appellate court will reverse only when there is clear error. *Id.*

A. Was the warrantless search of the Jeep proper pursuant to the automobile exception?

Evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005), *cert. denied*, __ U.S. __, 126 S.Ct. 2287 (2006). Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. *Id.* However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement. *Id.* One such exception is the automobile exception. State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981). The burden is upon the prosecution to establish probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches. State v. Freiburger, *supra*.

Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained. Maryland v. Dyson, 527 U.S. 465 (1999). The automobile exception to the search warrant requirement is based on: (1) the ready mobility of automobiles and the potential that evidence may be lost or

destroyed before a warrant is obtained and (2) the lessened expectation of privacy in motor vehicles which are subject to government regulation. State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986). The automobile exception does not contain a separate exigency requirement. Maryland v. Dyson, *supra*. If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more. Pennsylvania v. Labron, 518 U.S. 938 (1996).

In the instant case, there was probable cause to conduct a warrantless search of the Jeep. Investigators knew that petitioner, a suspect in McKnight's murder, had been seen driving the Jeep around the time of the murder. Upon finding the Jeep, it seemed apparent there had been an attempt to destroy evidence given the Jeep's interior was wet and smelled of bleach. Therefore, upon finding the Jeep, the investigators could have conducted the search at that time; however, they chose to impound the vehicle.

The fact investigators chose to wait to search the Jeep after it had already been impounded does not affect the propriety of the warrantless search because there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure. United States v. Johns, 469 U.S. 478 (1985) (upholding warrantless search that occurred three days after seizure). *See also* Florida v. Myers, 466 U.S. 380 (1984) (warrantless search of vehicle, which was impounded and in police custody, conducted several hours after valid initial search conducted at time of defendant's arrest, was proper); Cooper v. State of California, 386 U.S. 58 (1967) (it is no answer to say the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable). The justification to conduct such a warrantless search does not vanish once the car has been immobilized. United State v. Johns, *supra*.

Accordingly, the warrantless search meets the automobile exception to the Fourth Amendment. However, before concluding the evidence recovered from the Jeep is admissible, we must examine petitioner's argument that our state constitution provides him with greater protection.

B. Does the State constitution provide greater protection than the United States Constitution?

Petitioner argues that the search and seizure of the Jeep violates the state constitution because of the location of the Jeep when it was seized, *i.e.* in the back yard of a private residence. He argues the invasion of his privacy was not reasonable based on that fact.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The South Carolina Constitution also provides a safeguard against unlawful searches and seizures. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) (citing S.C. Const. art. I. § 10). The relationship between the two constitutions is significant because "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *Id.* (quoting State v. Easler, 327 S.C. 121, 131, n. 13, 489 S.E.2d 617, 625, n. 13 (1997)). Therefore, this Court may interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution. *Id.*

In addition to language that mirrors the Fourth Amendment, S.C. Const. art. 1 § 10 contains an express protection of the right to privacy: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ." State v. Forrester, *supra* (emphasis added). By articulating a specific prohibition against "unreasonable invasions of privacy," the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution. *Id.* Accordingly, the South Carolina

Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment. *Id.*

The question is whether this privacy provision goes so far as to require a warrant before the search and seizure of a vehicle located in the back yard of a private residence. We find there is no meaningful distinction to be made between vehicles parked in public and private places.[2] *See* State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986) (finding seizure of shotgun from trunk of murder defendant's vehicle, which was parked in yard of his house at time of search, was valid under automobile exception to warrant requirement). The focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy in the vehicle to be searched. Once the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met. We find the invasion of petitioner's privacy was reasonable because the officers had probable cause to search where petitioner had apparently used the Jeep to leave the scene of a murder and attempted to destroy evidence of the crime that was located inside the Jeep. Accordingly, the search of the Jeep satisfied the requirements of the South Carolina Constitution.

C. Was the Search Warrant Valid?

Because the automobile exception applies in this case and the warrantless search of the vehicle was proper, it is unnecessary to address

[2]The concurrence asserts that search and seizure cases analyzed under the Fourth Amendment have made distinctions between vehicles parked in public and private places. However, there has never been a clear statement by the United States Supreme Court that a warrant is required before a vehicle is searched in a private place. In fact, the Fourth Circuit has stated there should not be a bright-line rule that the automobile exception may never apply when a vehicle is stationed on private, residential property. United States v. Brookins, 345 F.3d 231, 237 (4th Cir. 2003).

whether the warrant was invalid because a return was not made. However, we address this issue to correct the Court of Appeals' ruling on this issue.

South Carolina Code Ann. § 17-13-140 (2003) requires search warrants to be executed and return made within ten days after the date of the warrant.[3] The failure to observe the ten-day requirement for the execution and return of a warrant, a ministerial requirement, does not necessarily void the warrant. State v. Wise, 272 S.C. 384, 252 S.E.2d 294 (1979). The warrant will be invalidated only if the defendant can show he was prejudiced by the failure. *Id.* *See also* State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995) (failure to comply with inconsequential ministerial requirements of the statute does not require suppression in the absence of prejudice to the defendant).

The Court of Appeals held the State's failure to produce a return constituted more than a ministerial error. We find the Court of Appeals erred because petitioner did not show he was prejudiced by the State's failure to comply with the return requirement. *See* State v. Wise, *supra* (warrant not voided where appellant failed to show he was prejudiced by State's failure to return warrant to issuing magistrate within ten-day period); State v. Mollison, *supra* (evidence not suppressed where appellants did not argue they were prejudiced in any way by the failure to return the warrant within ten days). Accordingly, the State's failure to comply with the statutory ministerial requirement does not void the warrant and the evidence can not be excluded on this ground.

[3]". . . Any warrant issued hereunder shall be executed and return made only within ten days after it is dated. The officer executing the warrant shall make and deliver a signed inventory of any articles seized by virtue of the warrant, which shall be delivered to the judicial officer to whom the return is to be made, and if a copy of the inventory is demanded by the person from whose person or premises the property is taken, a copy of the inventory shall be delivered to him. . . ." S.C. Code Ann. § 17-13-140 (2003).

CONCLUSION

We find that if the requirements of probable cause and ready mobility are met, then the search is permissible pursuant to the State constitution and the United States Constitution. Because we find the search was a proper warrantless search, it is unnecessary to determine whether the State's failure to make a return rendered the warrant ineffective. However, we note that where the defendant fails to argue he was prejudiced by the State's failure to comply with the return requirement, the warrant will not be voided and evidence cannot be excluded on that ground. Accordingly, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion in which TOAL, C.J., concurs.

JUSTICE PLEICONES: I concur in the majority's conclusion that the warrantless search and seizure in this case did not violate the Fourth Amendment of the United States Constitution or Article I, section 10 of the South Carolina Constitution which prohibits unreasonable invasions of privacy. I also agree that the State's failure to produce a return to the search warrant did not invalidate the warrant in this case. I write separately, however, because I disagree with the majority's analysis of the vehicle seizure under the South Carolina Constitution.

The automobile exception to the search warrant requirement of the Fourth Amendment of the United States Constitution is based on: (1) the ready mobility of automobiles and (2) the lessened expectation of privacy in motor vehicles which are subject to government regulation. California v. Carney, 471 U.S. 386 (1985). The South Carolina Constitution specifically prohibits "unreasonable invasions of privacy," and this Court has stated, as the majority recognizes, that our constitution "favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001).

In determining whether South Carolina's privacy provision requires a warrant before the search and seizure of a vehicle located in the backyard of a private residence, the majority focuses on one justification for the automobile exception: the inherent mobility of the vehicle. This analysis is incomplete. We must further analyze the impact of this provision on the second prong of a Fourth Amendment automobile analysis, that is, the expectation of privacy in a private automobile. A holding that "the inherent mobility of the vehicle is all that is required to satisfy the state constitution" implies a lower degree of protection than that provided by the Fourth Amendment when addressing warrantless searches and seizures. This conflicts with our prior cases. *See* Forrester, *supra*.

Furthermore, the majority's reliance on State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986), is, in my opinion, misplaced. The search and seizure issue in Cox was analyzed solely under the Fourth Amendment and did not discuss Article I, section 10 of the South Carolina Constitution. Moreover, search and seizure cases analyzed under the Fourth Amendment have made

distinctions between vehicles parked in public and private places. *See* G.M. Leasing Corp. v. U.S., 429 U.S. 338, 351-52 (1977) (holding the warrantless seizure of vehicles did not violate the Fourth Amendment because "[t]he seizures of the automobiles in this case took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy."); Florida v. White, 526 U.S. 559 (1999) (noting the distinction between a warrantless seizure in an open area and a seizure made on private premises and concluding that because the police seized respondent's vehicle from a public area, the warrantless seizure did not involve any invasion of respondent's privacy); and Binder v. Redford Tp. Police Dept., 93 Fed.Appx. 701 (6th Cir. 2004) ("Although probable cause suffices for the search or seizure of vehicles parked on public property [or even private property that is accessible to the public], no Supreme Court decision allows warrantless entry into areas of a home or business where the owner has a reasonable expectation of privacy simply because the police are in search of an automobile.") (citing G.M. Leasing Corp., *supra*).

Analysis of the facts of this case with our privacy provision in mind reveals no state constitutional violation. Although one's expectation of privacy in his automobile increases when that automobile is parked in the backyard of his private residence, the petitioner in this case was not the owner of the Jeep that was seized.[4] More importantly, the vehicle was not parked at petitioner's residence.

Our state constitution's provision protecting unreasonable invasions of privacy necessarily requires some analysis of the privacy interests involved when a warrantless seizure is made on private property. However, petitioner cannot show he had a reasonable expectation of privacy in the seized Jeep. Accordingly, I concur in the result reached by the majority.

TOAL, C.J., concurs.

[4] The record reveals that petitioner was one of several family members who had permission to use the Jeep.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Linda Mc Company, Inc., Respondent,

v.

James G. Shore and Jan Shore, Appellants.

Appeal From Lancaster County
William T. Moody, Special Referee
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 4279
Heard June 5, 2007 – Filed July 26, 2007

AFFIRMED

John Martin Foster, of Rock Hill, for Appellants.

James R. Snell, Jr., of Lexington, for Respondent.

KITTREDGE, J.: James and Jan Shore (the Shores) appeal the issuance of an order to execute and levy a judgment against them. The Shores contend the judgment was void, the judgment lacked active energy because it was more than ten years old, there was an accord and satisfaction of the debt, and the Linda Mc Company (the Company) should be estopped from denying the accord and satisfaction. We affirm.

I.

On December 8, 1994, the Shores agreed to give the Company a judgment by confession (the Judgment) as settlement of litigation over unpaid sales commissions. The Judgment was entered on June 2, 1995, and provided in relevant part as follows:

> 1. [The Shores] confess judgment to [the Company] in the amount of $110,000.00 and hereby authorize the Clerk of Court for Lancaster County, South Carolina, to enter judgment in favor of [the Company] against [the Shores], jointly and severally, for such amount, plus such costs and reasonable attorneys' fees incurred by [the Company] in enforcing the unconditional guaranty, a copy of which is attached hereto as Exhibit 1 (the "Guaranty"). . . .
>
> 2. [The Shores] agree that [the Company] may immediately, by affidavit through its attorneys, set forth the correct amount of this Judgment by adjusting the amount stated above for any credits previously applied by [the Company], and that [the Company] may apply to a court of competent jurisdiction for a judgment against [the Shores], jointly and severally, in the amount of the total sum due and owing hereunder, plus costs and reasonable attorneys' fees incurred by [the Company] in enforcing the Guaranty, without further notice to [the Shores] and without further authority from [the Shores]; provided, however, that in no event may said sum exceed $110,000.00, plus costs and reasonable attorneys' fees incurred by [the Company] in enforcing the Guaranty. [The Shores] authorize

> the entry of judgment for the amount due and owing as set out in the affidavit, which judgment will continue to bear interest at the highest legal rate permitted by law. The Judgment by Confession is not contingent upon any other considerations or proceedings and the Court is authorized to enter judgment for the amount set forth in the affidavit.

Sometime after the Judgment was entered, the Shores paid the Company $55,000. On February 20, 2004, the Company wrote a letter (the Agreement) to the Shores wherein it agreed to waive all post-judgment interest if the Company received the remaining $55,000 before May 7, 2004. The Shores paid the Company $26,750 by check dated May 13, 2004.

The sheriff sought to execute on the Judgment, but as is customary, the execution was returned nulla bona.[1] On July 29, 2004, the Company filed a petition for supplemental proceedings. The Company countered that the Shores possessed assets subject to execution on the Judgment. On August 3, 2004, the Shores issued a check to the Company in the amount of $28,500. The trial court granted the Company's petition for supplemental proceedings on August 9, 2004, and referred the matter to a special referee.

On October 1, 2004, the referee conducted a hearing to determine whether the Shores had any assets that could be used to satisfy the remaining balance on the Judgment. Prior to the hearing, the Shores filed a motion to dismiss under Rule 12(b)(1), SCRCP, asserting in part that the Judgment was void for lack of an affidavit. The motion was denied on December 1, 2004, as the referee concluded the Judgment was valid and enforceable.

On May 24, 2005, the referee conducted an additional hearing at which the Shores asserted the Agreement had been modified by a phone message Jan left at the Company's attorney's office. This phone message, according

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[1] Nulla bona is "a form of return by a sheriff or constable upon an execution when the judgment debtor has no seizable property within the jurisdiction." Black's Law Dictionary 1095 (7th ed. 1999).

to the Shores, constituted an accord and satisfaction of the debt. In particular, Jan testified that in May 2004 she left the Company's attorney two messages explaining the Shores were sending half of the amount due and "if there was any problem with that" to call her and she would "get the other half put together." In the message, she also stated she would pay the outstanding amount at the end of the next quarter, meaning July or August. Additionally, the Shores introduced their phone records showing a call lasting two minutes was placed to the Company's attorney on May 13, 2004. The Company's attorney testified that although his secretary checked and logged his messages, she would often not include the content of the messages. He recalled receiving a couple of phone calls from the Shores but did not know what they were about and never called the Shores back.

The Judgment was subject to execution and levy until June 2, 2005. On June 3, 2005, the referee issued its report to the circuit court finding there had been no accord and satisfaction. The referee also found the Shores owed interest outstanding from the entry of the Judgment to date, as well as costs and attorney's fees. On the same day, June 3, the circuit court issued an order to execute and levy. The Shores did not raise the matter of the Judgment's expiration in the trial court. On June 24, 2005, three weeks after the Judgment expired, the Shores filed a notice of appeal.

II.

A. Validity of the Judgment

The Shores argue that because the Company failed to follow the terms of paragraph 2 in the Judgment to fix the amount of Judgment by affidavit, its filing was void and the court was without jurisdiction. We disagree.

The Judgment complies with the statutory requirements of section 15-35-360 of the South Carolina Code (2005). This section provides:

> Before a judgment by confession shall be entered a statement in writing must be made and signed by the

> defendant and verified by his oath to the following effect: (1) It must state the amount for which judgment may be entered and authorize the entry of judgment therefor; (2) If it be for the money due or to become due, it must state concisely the facts out of which it arose and must show that the sum confessed therefor is justly due or to become due; and (3) If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and must show that the sum confessed therefor does not exceed the liability.

The Judgment sets forth that the Shores owe "$110,000, plus costs and reasonable attorney's fees incurred by Plaintiff in enforcing the Guaranty." The Judgment was made in writing and signed by the Shores and verified by their oath. Post-judgment interest accrued as a matter of law. The Judgment satisfies the statutory requirements.

The Shores' argument centers on the fact that the Company never filed the affidavit setting forth the amount of Judgment specified in paragraph 2 of the Judgment. The language pertaining to the affidavit, however, is permissive and not mandatory; it states an affidavit *may* be filed. Further, the failure to file the affidavit does not render the Judgment void as contemplated by Rule 60(b)(4), SCRCP. Rule 60(b)(4) provides the court may relieve a party or his legal representative from a final judgment, order, or proceeding if the judgment is void. "The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996). The absence of an affidavit has no bearing on the subject matter jurisdiction of the court. The referee properly concluded that the Judgment was not void.

B. Filing of Judgment Within Ten Years

The Shores argue because the ten-year period expired on June 2, 2005, section 15-39-30 deprives the Judgment of active energy, thereby rendering the June 3, 2005 order ineffective. This argument was not presented to the trial court, and we find the issue is not preserved for appellate review. See In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

Application of issue preservation principles may appear harsh under these circumstances, for the Shores' ability to challenge the ten-year limitation period did not arise until the statutory period ran on June 2, 2005. Yet the Shores had the opportunity to raise the defense in a motion to amend their pleadings or a motion to alter, amend or vacate and did not do so.

We believe this court's opinion in LaRosa v. Johnston, 328 S.C. 293, 493 S.E.2d 100 (Ct. App. 1997), requires us to dispose of this challenge on issue preservation principles.[2] In LaRosa, the judgment was entered on

[2] A Fast Photo Express, Inc. v. First National Bank of Chicago, 369 S.C. 80, 630 S.E.2d 285 (Ct. App. 2006), further buttresses our decision. In A Fast Photo Express, the judgment against the appellants expired on September 30, 2004. 369 S.C. at 86, 630 S.E.2d at 288. An order, however, was issued by the master on September 23, 2004. Id. Appellants filed their notice of appeal prior to the expiration of the judgment on September 27, 2004. Id. This court did not reach the merits, and held that because "the issue of whether the judgment had expired was never raised to the master prior to the filing of the [appellant's] appeal," and the appellants raised the issue for the first time on appeal, the matter was not preserved. Id.

March 11, 1986. 328 S.C. at 295, 493 S.E.2d at 101. Supplemental proceedings were instituted prior to the expiration of the ten-year period set forth in section 15-39-30; however, the trial court signed an order in connection with collection of the judgment on March 15, 1996. Id. at 296, 493 S.E.2d at 101. The clerk filed the order on March 18, 1996. Id. As we observed, "Starting on March 11, 1986, the judgment was good until March 11, 1996." 328 S.C. at 297, 493 S.E.2d at 102. Following the March 18, 1996 order, Johnston moved to "alter, amend, and vacate [the trial court's order], because LaRosa's judgment against Johnston expired on March 11, 1996—ten years after the judgment was filed." Id. at 296, 493 S.E.2d at 101. The trial court denied the motion and we reversed, holding the judgment expired on March 11, 1996. Id. at 300, 493 S.E.2d at 103.

It appears that LaRosa objected to the court considering a defense not included in the pleadings. We rejected LaRosa's argument: "When the judgment expired, Johnston acquired a statutory defense that had previously been unavailable. We are not going to penalize Johnston for failing to raise a defense which she could not have raised." Id. at 297, 493 S.E.2d at 102. The point is that Johnston *did* assert the statutory defense as soon as it became available by way of a motion to alter. Because the statutory defense was brought to the trial court's attention as soon as the defense became available, the trial court addressed the very issue that was subsequently challenged on appeal.

At oral argument, the Shores took the position that the expiration of ten-year time limit on judgments impacts subject matter jurisdiction. Thus, according to the Shores, this issue may be raised at any time—even for the first time on appeal. The Shores do not, however, cite authority for this argument. We can find no South Carolina case law to support the Shores' argument that this is an issue of subject matter jurisdiction, and this court in LaRosa and A Fast Photo Express certainly did not treat the ten-year time limit on judgments in section 15-39-30 as jurisdictional.

In our research, we have found that other jurisdictions treat enactments similar to section 15-39-30 as statutes of limitations on judgments. See 47 Am. Jur. 2d. Judgments § 781 (2006) ("A judgment creditor generally has the

right to bring an action on the judgment at any time after its rendition, until barred by an applicable statute of limitations."); see also, e.g., Elliott v. Estate of Elliott, 596 S.E.2d 819, 821 (N.C. Ct. App. 2004) ("North Carolina imposes a ten-year statute of limitations upon the enforcement of a judgment or decree of any court of the United States."); Allied Funding v. Huemmer, 626 A.2d 1055, 1060 (Md. Ct. App. 1993) (referencing the twelve-year "statute of limitations" on judgments); Cottrill v. Cottrill, 631 S.E.2d 609, 612-13 (W. Va. 2006) (holding the ten-year "statute of limitations" on the execution of judgments applies to child support cases). Moreover, we note that the statutory language in section 15-39-30 does not directly implicate the court's subject matter jurisdiction. We thus find our supreme court would likely conclude that the ten-year time period in section 15-39-30 operates as a statute of limitations. As such, the affirmative defense of statute of limitations constitutes a matter of avoidance under Rule 8(c), SCRCP, and must be raised in the trial court when the defense becomes available. The expiration of the ten-year limit did not deprive the court of subject matter jurisdiction.

In the case before us, the Shores never raised this statutory defense to the trial court by way of a motion to alter, amend, vacate or otherwise. Consequently, we conclude the Shores' newly asserted defense under section 15-39-30 is not preserved for appellate review. We understand that our ruling allows the underlying judgment to have active energy well beyond the ten-year statutory period, but our rejection of the Shores' subject matter jurisdiction argument and the concomitant application of issue preservation principles compel the result we reach today.

C. Accord and Satisfaction

The Shores maintain because the Company was aware of the Shore's proposal to modify the Agreement, the referee erred in finding there was no accord and satisfaction. We disagree.

An accord and satisfaction occurs when there is: (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or is entitled to receive; and (2) payment of the

consideration expressed in the new agreement. Tremont Constr. Co. v. Dunlap, 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct. App. 1992). Like any contract, an accord and satisfaction requires a meeting of the minds. Keels v. Pierce, 315 S.C. 339, 343, 433 S.E.2d 902, 905 (Ct. App. 1993). The debtor must intend and make unmistakably clear the payment tendered fully satisfies the creditor's demand and the creditor must accept payment with the intention that it will operate as a satisfaction. Tremont Constr. Co., 310 S.C. at 182, 425 S.E.2d at 793. Without an agreement to discharge the obligation there can be no accord, and without an accord there can be no satisfaction. Id.

The Shores contend the Agreement and subsequent cashing of the late check created an accord and satisfaction of the debt. They further maintain the phone messages left by Jan modified the Agreement to allow for the remaining payment to be late. The referee found there was no meeting of the minds. The referee further found the Shores did not comply with the terms of the Agreement because the Shores made the outstanding $55,000.00 payment after the date called for in the Agreement. As a result, the referee found there was no satisfaction. The referee's rejection of the purported accord and satisfaction was correct.

D. Estoppel

The Shores argue the Company had a duty to respond to the Shores' proposal to modify the Agreement and failing that duty the Company is estopped from denying the modification of the Agreement. This argument was neither presented to nor addressed by the trial court. Consequently, it is not preserved for review on appeal. In re Michael H., 360 S.C. at 546, 602 S.E.2d at 732; Lucas, 359 S.C. at 510-11, 598 S.E.2d at 715.

III.

For the reasons stated above, the order of the trial court is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kent E. Smith and Dorothy Smith, Respondents,

v.

Dr. Daniel Barr, Appellant.

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 4280
Submitted May 9, 2007 – Filed July 26, 2007

AFFIRMED

W. Grady Jordan, Olson, Smith, Jordan & Cox, PA, of Easley, for Appellant.

W. D. Yarborough, Jr., of Greenville, for Respondents.

WILLIAMS, J.: Defaulting taxpayers brought an action to set aside a tax sale of real property, arguing Greenville County did not follow the statutory requirements. The Master-in-Equity (the Master) issued an order

setting aside the tax sale. The purchaser of the property at the tax sale appeals. We affirm.

FACTS

In 1999, Kent Smith and Dorothy Smith (collectively the Smiths) purchased real property (the Property) located in Greenville County, South Carolina. At the time of the purchase, the Smiths resided in Taylors, South Carolina. Subsequent to this purchase, the Smiths moved to a new residence.

Mr. Smith testified he sent a letter to the Greenville County Tax Office (Tax Office) notifying it of his change of address. Mr. Smith further testified he instructed the Tax Office to send future tax notices regarding the Property to the new address.

The Tax Office either did not receive Mr. Smith's letter or failed to modify its records. As a result, the tax notices continued to be sent to the Smiths' old address rather than their new address. The Smiths failed to pay the real property taxes for 2001. Accordingly, the Tax Office allegedly posted a delinquent tax sale notice on the Property.

The Smiths assert the notice was not posted on the Property, or in the alternative, the notice was improperly posted. In either case, the taxes remained unpaid. Consequently, a delinquent tax sale was conducted. Dr. Daniel Barr acquired the Property at the sale for approximately $25,000.

The Smiths brought an action to set aside the tax sale and to quiet title. The Smiths argued the Tax Office failed to follow statutory requirements that control how a delinquent tax sale is to be conducted. Specifically, the Smiths argued the Tax Office failed to send the tax notices to their new address. In the alternative, the Smiths contended the Tax Office failed to properly post a delinquent tax sale notice on the Property.

The Master-in-Equity, following a trial (1) set aside the tax sale because the Tax Office did not comply with the relevant statutory mandates; (2) ordered the Register of Deeds for Greenville County to mark "cancelled

of record" on the deed given to Dr. Barr; (3) ordered the Smiths to reimburse Dr. Barr for any property taxes paid by the latter; (4) ordered Greenville County to reimburse Dr. Barr any amount Dr. Barr paid at the time of the tax sale; and (5) directed Dr. Barr to address any claim for interest on his bid to the Tax Office rather than to the Smiths. Dr. Barr appeals.

STANDARD OF REVIEW

Our scope of review for a case heard by a Master permits us to determine facts in accordance with our own view of the preponderance of the evidence. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990); see Folk v. Thomas, 344 S.C. 77, 80, 543 S.E.2d 556, 557 (2001) (An action to set aside a tax deed rests in equity. Thus, an appellate court may take its own view of the preponderance of the evidence.). If we choose to find facts in accordance with our view of the evidence, we must state such findings of fact and our reasoning for those findings. Dearybury v. Dearybury, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002).

However, we are mindful that this scope of review does not require us to disregard the Master's factual findings because the Master saw and heard witnesses and was in a better position to judge their credibility and demeanor. Godfrey v. Heller, 311 S.C. 516, 518, 429 S.E.2d 859, 860 (Ct. App. 1993).

LAW/ANALYSIS

Dr. Barr contends the Master erred in setting aside the tax sale. Specifically, Dr. Barr argues the Tax Office followed the statutory notice requirements of a tax sale. Dr. Barr also asserts equity favors a reversal of the Master's decision. Finally, Dr. Barr avers that even if the Master correctly set aside the tax sale, the Master erred by not requiring the Smiths to pay interest. We address each argument in turn.

A. Notification requirements

The sale of a defaulting taxpayer's real property is strictly governed by statute. F.C. Enters., Inc. v. Dibble, 335 S.C. 260, 263, 516 S.E.2d 459, 461

(Ct. App. 1999). The proper procedure for notifying a taxpayer of delinquent taxes before conducting a tax sale is set out in section 12-51-40 of the South Carolina Code (Supp. 2006). Section 12-51-40(b) authorizes the Tax Office to "take exclusive possession of the property necessary to satisfy the payment of the taxes . . . ." Among the acceptable means the Tax Office can employ to take possession, and the most relevant to this case, is by "posting a notice at one or more conspicuous places on the premises . . . ." § 12-51-40(c).

The rationale behind posting such a notice is to notify the defaulting taxpayer that delinquent property taxes are due. § 12-51-40. The failure to give the required statutory notice renders the tax sale invalid. Rives v. Bulsa, 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct. App. 1996).

Dr. Barr argues the Master erred in setting aside the tax sale. Specifically, Dr. Barr maintains the Master erred by shifting the burden of proof to require Dr. Barr to prove the tax sale conformed to the law. Dr. Barr's arguments are misplaced.

Generally, there are two types of burdens: burden of production and burden of persuasion. Burden of production refers to a party's responsibility to introduce sufficient evidence on a contested issue to have that issue decided by the fact-finder, rather than decided against the party in a preemptory decision such as directed verdict. Pike v. S.C. Dep't of Transp., 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000). Burden of persuasion is concerned with a party's obligation to sway the fact-finder to view the facts in a way that favors that party. Id.

In civil cases, the burden of persuasion rests with the plaintiff to prove his or her case, usually, by a preponderance of the evidence. In criminal cases, the burden of persuasion requires the state to prove the defendant's guilt beyond a reasonable doubt.

In the present case, the burden of production is of little concern because neither party moved for a preemptory decision. Conversely, the burden of persuasion is of interest. In this non-jury case, the Master was the fact-finder. Therefore, the Smiths shouldered the burden to prove to the Master, by a

preponderance of the evidence, that the Tax Office failed to properly post the required statutory notice on the Property. S.C. Code Ann. § 12-51-160 (Supp. 2006) ("In all cases of tax sale the deed of conveyance . . . executed to a private person . . . is prima facie evidence of good title in the holder, that all proceedings have been regular and that all legal requirements have been complied with."). There is ample evidence in the record that shows the Smiths met their burden. This evidence consists of testimony and the deed the Smiths acquired upon purchase of the Property.

Dorothy Smith worked in the subdivision where the Property is located. She testified she would frequent the Property or the land adjoining the Property at least once a week. She gave evidence that during those visits she never noticed a delinquent tax sign on the Property. Kent Smith also gave testimony that he did not believe a delinquent tax sign was posted on the Property. The Smiths' testimony may be viewed as self-serving, but Scott Rector's testimony substantiates it.

Scott Rector, the manager of the subdivision where the Property is located, testified on behalf of the Smiths. Rector's testimony speaks for itself.

> Q: All right, have you ever seen a delinquent sale sign on [the Property]?
>
> A: No, sir, I have not.
>
> Q: Do you know what a delinquent sale sign is?
>
> A: Yes, sir.
>
> . . .
>
> Q: All right, now, how many times would you say . . . you have gone by [the Property] or been involved with [it]?

A: Well, pretty well every lot [in the subdivision], I would kind of go by once every couple of weeks. . . . But during that period of time, there was purposes [sic] when we were in there every day. Like I say, we also have some materials actually stored on the [Property] that we use from time to time, some large boulders and things, so like I say, at least once a week to once every two weeks.

Q: And on those frequent visits, you never saw a delinquent sale sign on the [Property]?

A: No sir. No, sir.

Rector's testimony proves he was familiar with the Property due to his frequent visits. During these regular visits, Rector did not notice a delinquent tax sign on the Property, even though he could readily identify a tax sign. Additionally, the deed of conveyance confirms Rector's and the Smiths' account that the Tax Office failed to post a delinquent tax sign on the Property.

When the Smiths received title to the Property, the deed of conveyance listed an incorrect identification number. This deed listed the Property's tax map number as 0645.06-01-003.00.[1] This number corresponds to the lot that is located directly across the street from the Property. The Tax Office utilized, at least partly, the tax map number in determining on which lot to post the delinquent tax sign. Although this misnomer was corrected, the record is unclear as to whether the correction was accomplished prior to or subsequent to the tax sale.

The incorrect tax map number and the testimony of the Smiths and Rector provide a sufficient basis to conclude the notice was not placed on the Property. Thus, even if the Master improperly placed the burden upon Dr. Barr to demonstrate the tax sale complied with the requisite statutory requirements, based on our view of the preponderance of the evidence, we

[1] The correct number for the Property is 0645.06-01-001.00.

hold the Smiths met their burden to prove the Tax Office failed to post the mandatory notice on the Property as mandated by section 12-51-40.

B. The equity claim

Dr. Barr argues equity requires the tax sale be validated. We disagree.

The Master ordered Greenville County to reimburse Dr. Barr any amount he paid at the time of the tax sale. Additionally, the Smiths were ordered to reimburse Dr. Barr any property taxes paid by the latter. As such, Dr. Barr will recover the money he spent on purchasing the Property at the tax sale. We fail to see how this result is inequitable. Moreover, other considerations support our conclusion.

It is well known that equity follows the law. C & S Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 133, 149 S.E.2d 326, 327 (1966). In South Carolina, "all requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded mandatory and are to be strictly enforced." Donohue v. Ward, 298 S.C. 75, 83, 378 S.E.2d 261, 265 (Ct. App. 1989) (internal citations and quotations omitted). Additionally, the failure to give the required statutory notice renders the tax sale invalid. Rives, 325 S.C. at 293, 478 S.E.2d at 881.

As discussed above, the Tax Office failed to properly post the required statutory notice on the Property. As a result, the law mandates that we set aside the tax sale. Consequently, equity does not provide Dr. Barr relief because equity follows the law.

C. Interest payment

Dr. Barr's final argument is that if the tax sale is set aside, he is entitled to an interest payment on the purchase price from the Smiths. In support of this claim, Dr. Barr relies on section 12-51-90 of the South Carolina Code Section (Supp. 2006).

Section 12-51-90 provides that "[t]he defaulting taxpayer . . . may within twelve months from the date of the delinquent tax sale redeem each item of real estate by paying to the person officially charged with the collection of delinquent taxes, assessments, penalties, and costs together with interest . . . ." The plain language of the statute does not entitle Dr. Barr to recover interest payments from the Smiths.

CONCLUSION

Accordingly, the Master's decision is

AFFIRMED. [2]

STILWELL and SHORT, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

George Wigington, Appellant.

Appeal From Spartanburg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4281
Submitted June 1, 2007 – Filed July 26, 2007

AFFIRMED

Chief Attorney Joseph L. Savitz, III of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Harold W. Gowdy, of Spartanburg, for Respondent.

HUFF, J.: Appellant, George Wigington, was convicted of murder and possession of a firearm during the commission of a violent crime in the shooting death of his son, Scott. He appeals, asserting the trial judge erred in refusing to instruct the jury on (1) self-defense and (2) involuntary manslaughter. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Appellant and his son, Scott, Scott's two daughters, and Scott's girlfriend all lived together at the time of Scott's death. Jessica, Scott's daughter and appellant's granddaughter, testified to the events leading up to the shooting. On the night of June 26, 2005, Jessica and her father, Scott, engaged in a loud argument, discussing the matter for over an hour. Around 7:00 the next evening, Scott told Jessica he wanted to talk to her about what had happened the previous night. Jessica entered her father's bedroom and the two began talking. Scott was lying in his bed under the covers. During their discussion, appellant came home. At this time, Jessica and Scott were cutting each other off as they discussed the matter, and Jessica "squealed" because her father was not letting her talk.

Appellant entered the bedroom and Jessica was crying, saying her father would not let her talk. Appellant told them they could not both talk at the same time, then moved in front of Scott, who was still in his bed. Appellant and Scott began "hollering" at each other and the argument escalated. Appellant was crouched over Scott when Jessica heard her father yell that appellant had hit him; however, she did not actually see whether any punches were thrown. Scott stood up from the bed and walked into the hallway. Appellant pursued him, and the two stood on each side of a door, yelling. The argument continued as Scott went into the living room and sat in a chair.

Appellant walked into the living room and stood in front of Scott. At this point, Jessica observed appellant strike Scott in his head and

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

shoulders with three or four punches. Scott stood from his chair, but did not hit his father or physically defend himself. He walked to the hall and said to appellant, "if you hit me again I'll kill you." Appellant told Scott to sit down, and Scott complied, returning to the same chair. Appellant sat down as well, the two facing each other as they spoke. Appellant stated, "I thought you were going to hurt her," and Scott replied, "I haven't hurt her, but you have." Appellant then became increasingly upset and enraged. He leaned over a table between them, pointed his finger at Scott, and told Scott to shut up. Appellant then stood and walked out the side door to the carport, while Scott remained seated. As appellant was walking out the door, Scott stated, "you're gonna get your gun, aren't you." Appellant returned, standing where he stood before he left. Jessica was looking into her father's eyes when she heard a gunshot, saw blood coming from his eyes and face, and then saw her father slump over in the chair.

Jessica stated that at no point did her father hit, strike, kick at, or throw anything at appellant. She further testified that after her grandfather came back inside, as she was looking at her father, her father was not swinging or reaching. Right before she heard the gunshot, Scott sat with his hands in his lap, by his side.

Appellant took the stand in his defense. He testified that, on the night of the incident, he arrived home around seven o'clock. As he pulled into his carport, he heard a loud argument. He entered the house and determined the voices were coming from his son's bedroom. As he walked into the bedroom, he saw his granddaughter standing near the bed with tears running down her face as Scott berated her. Appellant told Scott, who was lying in his bed, to calm down and not be so loud. Scott sat up on the side of the bed and kept arguing loudly. Appellant left the bedroom and walked to the den. He was followed by Jessica, and then by Scott, who was still arguing. Appellant told Scott he was being too loud and that he needed to give Jessica a chance to talk. Appellant and Scott sat down, and the arguing continued. Appellant stood, walked over to Scott in his chair, put his hand on Scott's shoulder, and told Scott he needed to calm down and let Jessica talk. Scott immediately jumped up and stood beside his chair. Appellant

testified Scott "didn't advance on me," but that Scott stated, "if you put your hands on me again, I'll kill you."

Appellant testified he had been the victim of criminal domestic violence involving his son in 1998, and when his son made that statement, he did not know what would happen next. He feared for his and his grandchildren's safety and wanted to protect them and himself, so he walked out to his car and retrieved a pistol. He looked at the gun to ensure the safety was on and then put it in his pocket before walking back into the room. Scott remarked, "went and got your gun," and appellant stated, "yes, I did." Appellant told Scott it was getting out of control and they were going to have to "de-escalate" things. Appellant had the gun out in his hand, but was not pointing it at Scott, who was sitting in a chair. Scott grabbed appellant's hand with the gun in it. Appellant was concerned Scott was trying to get the gun out of his hand. He did not point the gun directly at Scott until Scott grabbed his hand, and then the gun was "more or less pointing at him." When asked if he pulled the trigger, appellant stated that he evidently did, but that he did not mean to pull it and was surprised because the safety was on the gun. When he saw the bullet had struck Scott, he told another granddaughter to call 911. Appellant denied that he ever hit Scott during the incident. He admitted, though, that Scott never hit him either.

Defense counsel requested the court charge the jury on self-defense. The trial court declined, finding appellant failed to meet two of the elements of self-defense: (1) that the defendant be without fault in bringing on the difficulty and (2) that he had no other probable way to avoid the danger of death or serious bodily injury than to act as he did under the circumstances. Defense counsel then stated, "if you were to charge self-defense, I believe we would be entitled to an instruction on voluntary manslaughter." The trial court responded it would deny the request for an involuntary manslaughter charge based on the reasons stated. After submission of the matter to the jury, appellant

was found guilty of murder and possession of a firearm during the commission of a violent crime.[2]

STANDARD OF REVIEW

The evidence presented at trial determines the law to be charged. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). If there is any evidence in the record to support self-defense, the issue should be submitted to the jury. State v. Burkhart, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002). Additionally, if any evidence exists to warrant a jury charge on the lesser-included offense of involuntary manslaughter, then the charge must be given. State v. Cabrera-Pena, 361 S.C. 372, 380, 605 S.E.2d 522, 526 (2004).

LAW/ANALYSIS

I. Self-defense

Appellant first contends the trial court erred in refusing to instruct the jury on the law of self-defense. We disagree.

If there is any evidence of record from which it can be reasonably inferred that an accused justifiably inflicted a wound in self-defense, then the accused is entitled to a charge on the law of self-defense. State v. Adkinson, 280 S.C. 85, 86, 311 S.E.2d 79, 80 (1984), *overruled on other grounds by* State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985). A jury charge on self-defense is not required unless it is supported by the evidence. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). In order to establish self-defense in South Carolina, the following four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent

[2] Although the charges are not contained in the record before us, appellant indicates in his brief that in addition to murder, the trial court instructed the jury on voluntary manslaughter and accident.

danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent person of ordinary firmness and courage would have entertained the same belief that he was actually in imminent danger and the circumstances were such as would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of his own life; and (4) the defendant had no other probable means of avoiding the danger. Id. at 344-45, 520 S.E.2d at 321-22.

In the instant case, appellant fails to meet at least two of the necessary elements of self-defense. First, appellant does not meet the requirement that he be without fault in bring on the difficulty. "'[O]ne who provokes or initiates an assault cannot escape criminal liability by invoking self defense . . . .'" Id. at 345, 520 S.E.2d at 322 (quoting Ferdinand S. Tinio, Comment Note: Withdrawal, After Provocation of Conflict, As Reviving Right Of Self-Defense, 55 A.L.R.3d 1000, 1003 (1974)). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id. In the very recent case of State v. Slater, Op. No. 26299 (S.C. Sup. Ct. filed April 9, 2007) (Shearouse Adv. Sh. No. 13 at 31), our supreme court determined Slater was not entitled to a self-defense charge because he failed to meet the requirement that he be without fault in bringing on the difficulty. There, the court noted Slater approached an altercation that was already underway with a loaded weapon by his side, and that such activity could be reasonably calculated to bring on the difficulty that arose. Id. at 34. Similarly, viewing the evidence from appellant's version of the events, the record in the instant case shows appellant injected himself into a verbal argument between Scott and Scott's daughter, removed himself from the presence of the controversy, and returned with a loaded gun. Thus, appellant's conduct could be reasonably calculated to bring about the difficulty that arose.

Appellant maintains, however, that he had the right to arm himself in his own home after he is threatened, and such cannot

constitute evidence he was at fault in bringing on the difficulty. Appellant relies on the following quotation from State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978): "A man arming himself on his own land in a legal manner after he has been threatened is not evidence of his being at fault in bringing on the difficulty." Id. at 659, 244 S.E.2d at 506. However, in Hendrix, the uncontroverted evidence showed the deceased, who had threatened Hendrix earlier in the day, advanced toward Hendrix on Hendrix's property. After Hendrix pointed his shotgun at the deceased and told him to "back off" three times, the deceased immediately went to his truck and returned with a shotgun to confront Hendrix. It was only after this that Hendrix shot the deceased. Id. at 660, 244 S.E.2d at 506. Unlike the situation in Hendrix, Scott did not approach appellant and did not confront appellant with a gun or any other type of weapon. Additionally, while the incident did occur in appellant's home, it was also the home of Scott.

Appellant cites the case of State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953) for the proposition that he was under no duty to retreat where he and the victim lived in the same home. In Grantham, the appellant, who was partially paralyzed from a stroke, testified that his wife had made repeated threats to kill him, that they had argued the night before, that at the time of the shooting he was seated on a couch, that she advanced upon him with a knife in hand, and that he fired his pistol when she was five or six feet from him. Id. at 43, 77 S.E.2d at 292. The court there noted as follows:

> A person need not retreat or seek to escape, even though he can do so without increasing his danger, but may lawfully resist even to the extent of taking life if necessary, where, being without fault in bringing on the difficulty, he is assaulted while in his own dwelling house. . . . However, the rule is predicated on the absence of aggression or fault on his part in bringing on the difficulty; the doctrine is for defensive, and not offensive, purposes.

Id. at 43-44, 77 S.E.2d at 292 (quoting 40 C.J.S. Homicide, § 130, Subsec. c., pp. 1015-1016) (emphasis added). The court there held

appellant was not burdened with the duty of retreating, that he was in his home lawfully occupied by him and because he was without fault in bringing on the difficulty, he was not bound to retreat in order to invoke the benefit of the doctrine of self-defense, but could stand his ground and repel the attack with as much force as was reasonably necessary; that under those circumstances of both the deceased and the appellant living in the home, the law imposed no duty upon him to retreat in order to avoid the deceased, but he might stand his ground if he was without fault in bringing on the difficulty. Id. at 45-46, 77 S.E.2d at 293.

Here there is no evidence appellant "lawfully resist[ed]" or that he was "assaulted" while in his own dwelling, or that there was any attack from Scott for him to repel. The evidence is uncontroverted that Scott never hit, struck, or threw anything at appellant or presented any weapon during the verbal argument. Although appellant testified Scott jumped out of his chair when appellant touched his shoulder and proceeded to verbally threaten appellant, he admitted Scott did not "advance" on him at that time. Appellant also agreed Scott was seated in his chair when appellant returned with his gun, and that appellant advanced close enough to Scott that Scott could grab his hand. In short, the evidence shows that there were no actions by Scott which appellant had the right to "lawfully resist," that appellant was at "fault in bringing on the difficulty," and that there was no "absence of aggression or fault" on appellant's part. Although appellant maintained Scott threatened to kill him, his words alone were insufficient to constitute legal provocation. While, depending on the circumstances, words accompanied by hostile acts may establish self-defense, Scott's words were never accompanied by any hostile act on his part. See State v. Santiago, 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct. App. 2006) (holding evidence did not support charge of self-defense because it did not support finding appellant was without fault in bringing on difficulty even though appellant maintained deceased verbally berated him, where words were never accompanied by hostile act); State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (noting law that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense"); State v. Harvey, 220 S.C. 506, 518,

68 S.E.2d 409 (1951), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) ("It is well settled in this State that where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation.").[3]

Further, we find appellant cannot satisfy the third prong of self-defense. Although appellant testified he feared for his safety, a reasonable, prudent person of ordinary fitness and courage would not have entertained the same belief that he was actually in imminent danger and the circumstances were not such as would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of his life. Although there was some evidence that appellant had been the victim of criminal domestic violence at the hands of his son in the past, the record shows this prior incident was at least six years earlier and appellant was comfortable enough with Scott's presence that he continued to live with him thereafter, and even moved into another home with him. Looking at the evidence in the light most favorable to appellant, during the verbal disagreement Scott stood from his seated position, but did not advance on appellant, and told appellant he would kill him if appellant touched him again. As previously noted, Scott did not advance toward the appellant, did not strike at the appellant and did not present any weapon before appellant walked out of the house, retrieved a loaded gun, returned with it and then shot Scott as he sat in a chair. No reasonable person would have feared serious bodily harm or loss of life from Scott's words and actions.

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[3] On appeal, appellant asserts that he had the right to arm himself after his son stood and threatened him because Scott had physically attacked him in the past. While appellant did testify that he had been the victim in a criminal domestic violence case involving his son, he admitted that the prior altercation occurred in 1998, some six or seven years before this incident, and that the prior incident occurred in another home and he and Scott had thereafter moved into another residence together. This evidence is simply insufficient to establish words accompanied by a hostile act.

II. Involuntary manslaughter

Appellant also contends the trial court erred in refusing to charge the jury on involuntary manslaughter. We disagree.

Involuntary manslaughter is defined as (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Crosby, 355 S.C. 47, 51-52, 584 S.E.2d 110, 112 (2003). "To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others." Id. at 52, 584 S.E.2d at 112. Further, "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Id.

Appellant maintains there is evidence of record that he was lawfully armed in self-defense at the time of the fatal shooting and that he did not intentionally discharge the weapon, thereby entitling him to an involuntary manslaughter charge. Defense counsel never argued below that appellant was lawfully armed in self-defense or that there was any evidence of criminal negligence. Counsel requested a charge of involuntary manslaughter only if the trial court determined a self-defense charge was appropriate. Counsel never stated any specific reason for his entitlement to the charge. Because we have affirmed the trial court's refusal to charge self-defense, appellant would not be entitled to a reversal on the only basis he raised below. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (holding arguments not raised to or ruled upon by the trial court are not preserved for

appellate review, and a defendant may not argue one ground below and another on appeal).

Based on the foregoing, Wigington's convictions are

AFFIRMED.

ANDERSON and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bradley C. Davis, Appellant.

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4282
Heard June 6, 2007 – Filed July 26, 2007

REVERSED

Joseph P. Cerato, of Charleston, for Appellant

John Benjamin Aplin, of Columbia, for Respondent.

SHORT, J.: Bradley Davis appeals the circuit court's decision to place him in the Sex Offender Registry (Registry). Davis argues the trial court was without authority to order his placement in the Registry and that because his placement in the Registry would continue for life, it would violate the five year maximum duration allowed for service of probation. We reverse.

FACTS

On May 12, 2004, Davis was indicted for "criminal sexual conduct with a minor in the first degree [for] engaging in sexual battery with a minor who was less than eleven years of age…." On January 6, 2005, in a plea agreement recommended by the State, Davis pled no contest to the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). The presiding judge, Judge R. Markley Dennis, accepted the plea and sentenced Davis to six years imprisonment suspended upon the service of two years probation.[1] Judge Dennis (the Sentencing Judge) further ordered special conditions as follows: "sex offender counseling with Bill Burke; not be required to register as a sex offender; such additional counseling as needed."

Davis attended counseling with Dr. Bill Burke, missing only those sessions where he was not permitted to participate because he could not afford the required fee. However, Dr. Burke expressed concerns that Davis was not meaningfully participating in treatment because he refused to admit his guilt. Consequently, Dr. Burke reported that Davis was not in compliance with the treatment plan, and Davis was brought before Circuit Judge Diane Goodstein (the Probation Judge) for a probation revocation hearing.

[1] The State's brief states Davis was convicted of two counts of ABHAN and sentenced to two six year terms to be served concurrently. The Sentencing Judge's order does not support this assertion. Further, the State declares that Davis pled guilty. This also is incorrect. The order clearly states a plea of nolo contendere.

Davis moved to have the probation revocation hearing transferred to the Sentencing Judge so that he could interpret his own order, but the Probation Judge denied this motion. At this June 30, 2005 hearing, Dr. Burke testified regarding what he believed to be Davis's non-compliance with the treatment plan and stated that because Davis was in denial, he posed an increased risk to the community. The Probation Judge revoked thirty days of Davis's probation and required that he serve this time on weekends. Further, she held the decision on whether to place Davis in the Registry in abeyance for thirty days to allow the parties to brief that issue.

On August 11, 2005, Davis was once again brought before the Probation Judge with the State seeking the revocation of Davis's probation for non-compliance with his treatment plan. On this occasion, Davis had failed to attend several of his counseling sessions, and although he had admitted his guilt, Dr. Burke doubted his sincerity. After hearing testimony and recommendations from Dr. Burke and Davis's probation officer, the Probation Judge revoked Davis's probation and converted his sentence to youthful offender status. Further, she "added" Davis's placement in the registry "as a condition of his probation."[2] This appeal followed.

LAW/ANALYSIS

I. Authority to Place on the Registry

Davis cites section 23-3-430(D) of the South Carolina Code to support his contention that the probation revocation court lacked the authority to require his placement in the Registry. This statute states:

> Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the **presiding judge**

[2] The Probation Judge found Davis violated his probation and added a new condition to his probation. Her statement that she could "add" placement in the registry as a condition of probation reflects her belief that it was not already a condition of probation.

> may order **as a condition of sentencing** that the person be included in the sex offender registry **if good cause is shown by the solicitor.**

S.C. Code Ann. § 23-3-430(D) (2007) (emphasis added). Davis argues this statute permits the presiding judge to order placement in the Registry as a condition of sentencing only when the solicitor has shown good cause. We agree and note a presiding judge cannot sua sponte place the person in the registry for a crime, such as ABHAN, which is not specifically listed in the statute as an offense requiring placement in the Registry. Davis further argues that because only the "presiding judge may order as a condition of sentencing that the person be included in the sex offender registry," the Probation Judge was without statutory authority to add him to the Registry at a later probation revocation hearing.

The Sentencing Judge's order indicates that the plea agreement is the result of a recommendation by the State and includes the language "not be required to register as a sex offender." One might endeavor to read the portion concerning Davis not being required to register as a sex offender to be conditioned on the adjacent language requiring him to undergo sex offender counseling with Dr. Burke. However, a clear reading of the order, which was signed by the solicitor, reveals assent by the parties to Davis not being registered as a sex offender. We read this assent as illustrating that the State did not show "good cause" why Davis should be placed in the Registry.

Further, Davis stated both in his brief to the Probation Judge regarding her authority to place him in the Registry and in his appellate brief to this court that his not being required to be placed in the Registry was a condition of the plea agreement. His brief to the Probation Judge further asserted that the solicitor agreed to this provision as was evidenced by the solicitor's oral statements to the Sentencing Judge in open court. The State did not deny the veracity of any of these assertions by Davis. In fact, the State's admission that Davis had not been evaluated prior to the plea hearing but that good cause was shown at the probation revocation hearing further enhances the notion that no good cause was shown at the plea hearing. With no good cause having been shown at the plea hearing, the Sentencing Judge would be

without the statutory authority to either sentence Davis to be placed in the Registry or to make it a condition of his probation.

It necessarily follows that once the Sentencing Judge's order became final, neither he, nor the Probation Judge would be permitted to alter the sentence he had handed down. See State v. Best, 257 S.C. 361, 373-74, 186 S.E.2d 272, 277-78 (1972) (noting, the court lacks subject matter jurisdiction to modify, change, or amend a sentence after adjournment of the term of court at which the court imposed the sentence.)[3] The Sentencing Judge, that is the presiding judge at the time of sentencing, had specifically ordered that Davis not be required to register as a sex offender. However, in requiring Davis to register as a sex offender, the Probation Judge stated that she was adding it as a condition of Davis's probation. Section 24-21-430 of the South Carolina Code provides the trial court with the right to modify the conditions of probation. However, this section does not grant jurisdiction for the trial court "to add, as a new condition of probation, a condition that the State expressly plea bargained away with court approval, particularly after the sentence, as here, has gone into execution and the term at which the sentence was imposed has ended." State v. Rhinehart, 312 S.C. 36, 38, 430 S.E.2d 536, 537 (Ct. App. 1993). The State is bound by the bargain that it made to obtain a defendant's guilty plea. Id. at 39, 430 S.E.2d at 537. "The trial court, having accepted the plea agreement, must honor it also." Id. at 39, 430 S.E.2d at 538. Further, because section 23-3-430(D) of the South Carolina Code states that only the "**presiding judge** may order **as a condition of sentencing** that the person be included in the sex offender registry," we find the Probation Judge, who was not the presiding judge at the time of sentencing, was without the statutory authority to add placement in the Registry as a condition of probation (emphasis added). See Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("If a statute's language is plain and unambiguous, and conveys a clear and definite

[3] We note Rule 29 of the South Carolina Rules of Criminal Procedure modifies this common law rule to allow ten days from the imposition of the sentence, regardless of the end date of the term of court, in which to file a post trial motion. This modification bears no impact under the facts of this matter.

meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."). The statute's plain language dictates that the court's authority for placing individuals in the Registry exists only as a condition of sentencing.

We reverse and find Davis must be removed from the sex offender registry. Due to our reversal under the first issue on appeal, we need not address the remaining issues on appeal.

CONCLUSION

We find the Probation Judge was without authority to place Davis in the sex offender registry. Accordingly, we reverse the circuit court and order that Davis be removed from the Registry.

REVERSED.

STILWELL, J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

HK New Plan Exchange Property Owner I, LLC, Respondent,

v.

Dale A. Coker and Bradley Coker, d/b/a Japan Karate Institute, Defendants,

of whom Bradley A. Coker is Appellant.

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

Opinion No. 4283
Heard April 3, 2007 – Filed July 26, 2007

REVERSED AND REMANDED

Jay T. Gouldon and R. Spencer Roddey, both of Charleston, for Appellant.

Kirby Gould Mason, and Robert Bates Lovett, both of Savannah, Georgia, for Respondent.

BEATTY, J.: In this breach of contract action, Bradley Coker appeals the trial court's grant of summary judgment to HK New Plan Exchange Property Owner I, LLC (HK New Plan) finding a lease renewal and amendment did not release Bradley from the original lease. We reverse and remand.

FACTS

Dale Coker, Bradley's father, provided martial arts lessons through his business, Japan Karate Institute (the Institute). Bradley worked at the Institute but was not an owner. The Institute's main location was in West Ashley. On December 28, 1998, Bradley and Dale entered into a five-year lease (the Original Lease) with Festival Centre, LLC (Festival) to rent a space at the Festival Shopping Center to house the North Charleston location of the Institute. The lease period began on March 1, 1999, and was to expire on February 29, 2004.

Around December 2001, the Institute began having problems with the floors at its North Charleston location due in part to termite damage. In April 2002, Bradley's wife, Roeman Coker, tried to mediate the problems between Dale and the leasing company. According to Roeman, the representative for the leasing company informed her that Dale would have to sign a long lease as a prerequisite to getting the floors fixed and Dale agreed to do so.

In July 2002, Bradley stopped working at the Institute. The Institute received the new lease Dale had agreed to sign. The lease arrived with Bradley's name on it. Roeman contacted the leasing company to have Bradley's name removed from the new lease and the Original Lease. After speaking with the leasing company's legal department, Roeman sent a letter

to Festival requesting it remove Bradley's name from the lease because he did not have an ownership interest and was no longer employed by the Institute.

Dale and Festival subsequently executed a "Standard Lease Renewal and First Amendment" (the Amendment). The relevant provisions are as follows:

3. Tenant's Legal Name:	Dale A. Coker
5. Tenant's Trade Name:	Japan Karate Institute
7. The Lease:	Originally dated on or about December 28, 1998 and entered into by Festival Centre, LLC, as Landlord, and Bradley Dale Coker as Tenant, to which Dale A. Coker, is successor in interest.
9. Revised Lease Term:	The term of the lease is hereby extended an additional period of five (5) years commencing March 1, 2004 and expiring February 28, 2009.

The Amendment further provided:

> This agreement is entered into by the Landlord and Tenant, as set forth above, and is intended to be an amendment of the Lease described above. Any provision of this amendment which is inconsistent with any provision(s) of the Lease shall supersede the provision(s) in the Lease. Also, any ambiguities and conflicts between this Amendment and the Lease shall be read in favor of the Amendment. Except as amended hereby, all other terms and conditions of the

> Lease shall remain in full force and effect, and the terms of this Amendment shall be fully incorporated into, and apply in addition to the terms of, the Lease.

The Amendment also stated, "This Standard Lease Renewal and Amendment shall be effective upon the execution by both Landlord and Tenant below . . . ." The tenant signature line only listed "Dale A. Coker," and he was the only party to sign as a tenant. Dale signed on September 5, 2002, and Festival signed on October 28, 2002. On December 12, 2002, Festival conveyed the shopping center to HK New Plan.

At some point, HK New Plan stopped receiving rent payments from Dale Coker. On January 25, 2005, HK New Plan filed a complaint against Dale and Bradley: alleging breach of contract for failure to pay rent; accelerating the rent due from July 1, 2003, through February 28, 2009, which amounted to $171,578.04; and requesting costs and attorney's fees. Bradley and Dale filed separate answers, and Bradley filed a motion for summary judgment. HK New Plan also filed a motion for summary judgment in which it recognized Bradley was not liable for the rent due during the renewal period, and HK New Plan reduced its claim against Bradley to only the rent owed for the period between July 1, 2003, and February 29, 2004.

The trial court found nothing in the Amendment released Bradley from his obligation under the Original Lease or modified the Original Lease. The court determined that Bradley was bound for the full period of the Original Lease, granted HK New Plan's motion for summary judgment, and denied Bradley's motion for summary judgment. This appeal followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP: summary judgment is

proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn must be viewed in a light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if evidentiary facts are not disputed, summary judgment should be denied where the conclusions or inferences to be drawn from the undisputed facts conflict. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Summary judgment is a drastic remedy that should be cautiously invoked in order not to improperly deprive a litigant of a trial of the disputed factual issues. Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001).

LAW/ANALYSIS

Bradley contends the Amendment created an ambiguity, and the interpretation of the Amendment was a material question of fact for the jury. We agree.[1]

Generally, the construction of a contract is a question of law for the court. Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997). Where a motion for summary judgment presents a question as to the construction of a written contract, if the language employed

[1] Bradley also alternately argues that the language of the Amendment is clear that the parties intended to release him from liability and that the court erred in failing to admit parol evidence if there was an ambiguity. Because we reverse based upon the ambiguity created in the Amendment, we need not reach the alternative issues on appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that the court need not rule on remaining issues when the disposition of a prior issue is dispositive of the appeal).

by the agreement is plain and unambiguous, the question is one of law. First-Citizens Bank & Trust Co. v. Conway Nat'l Bank, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984). "In such a case, summary judgment is proper and a trial unnecessary where the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself." Id.

However, summary judgment is improper where the motion presents a question as to the construction of a written contract, and the contract is ambiguous because the intent of the parties can not be gathered from the four corners of the instrument. Bishop v. Benson, 297 S.C. 14, 17, 374 S.E.2d 517, 518-19 (Ct. App. 1988). Where a contract is unclear, or is ambiguous and capable of more than one construction, the parties' intentions are matters of fact to be submitted to a jury. Wheeler v. Globe & Rutgers Fire Ins. Co. of City of N.Y., 125 S.C. 320, 325, 118 S.E. 609, 610 (1923). Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract. Penton v. J.F. Cleckley & Co., 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997). "However, if a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties." Koontz v. Thomas, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 1999). An ambiguous contract is a contract capable of being understood in more than one way or a contract unclear in meaning because it expresses its purpose in an indefinite manner. Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977).

We find the Amendment creates ambiguities. The Amendment lists only Dale as the tenant, refers to Dale as Bradley's "successor in interest," and has a signature line only for Dale. Despite language that any Amendment provision inconsistent with the Original Lease supersedes the Original Lease, the Amendment does not specifically state that Bradley is released from the Original Lease. Thus, a question is raised regarding the parties' intent, and the matter should be determined by a jury.

Further, the Amendment indicates that it becomes "effective" upon signing by the parties, but it also states that the revised lease term "commences" March 1, 2004. HK New Plan interprets the Amendment to

mean that Bradley was subject to the Original Lease until March 1, 2004, and Bradley interprets it to mean that he was released immediately upon the signing of the Amendment. Because even the parties have differing interpretations of the import of the "effective" and "commencement" dates, an ambiguity was created by the Amendment.

The Amendment does not specifically state that the parties intended to release Bradley from the Original Lease, nor does it specify whether the commencement date or the effective date was significant in making Dale the sole tenant. This court need not decide whether it favors Bradley's or HK New Plan's view of the Amendment at this juncture; we need only determine whether the provision is ambiguous. Gilliland v. Elmwood Props., 301 S.C. 295, 299, 391 S.E.2d 577, 579 (1990). We find the provisions in the Amendment created ambiguities that must be determined by a jury. Accordingly, the trial court erred in granting summary judgment.

CONCLUSION

Because the Amendment is ambiguous, the trial court erred in granting summary judgment in favor of HK New Plan. Accordingly, the trial court's decision is

REVERSED AND REMANDED.

HUFF and KITTREDGE, JJ., concur.

The Supreme Court of South Carolina
P. O. Box 11330
Columbia, South Carolina 29211