The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF DRENNAN, PETITIONER

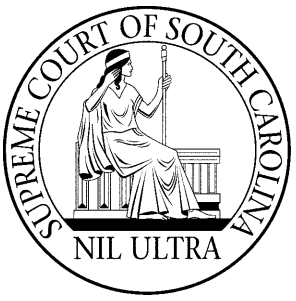
On February 9, 2009, Petitioner was definitely suspended from the practice of law for nine (9) months. In the Matter of Drennan, 381 S.C. 381, 673 S.E.2d 431 (2009). He has now filed a petition to be reinstated.

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

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

These comments should be received no later than September 9, 2009.

Columbia, South Carolina
July 7, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
July 13, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

Jack R. Bennett, Respondent,

v.

State of South Carolina, Petitioner.

ORDER

The opinion previously filed in this matter on June 1, 2009 is hereby withdrawn, and the attached opinion is substituted in its place.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

July 13, 2009

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jack R. Bennett, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26658
Submitted March 18, 2009 – Re-filed July 13, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen Ratigan, all of Columbia, for Petitioner.

Division of Appellate Defense, of Columbia, and Susannah Conyers Ross, of Ross & Enderlin, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: In this case, we granted a writ of certiorari to review the post-conviction relief (PCR) court's grant of Respondent Jack Randall Bennett's request for relief. The State argues that the PCR court erred in ruling that Respondent received ineffective assistance of trial counsel and appellate counsel. We find that Respondent's trial counsel and appellate counsel were not ineffective and reverse the PCR court's grant of relief.

FACTS/PROCEDURAL HISTORY

On the evening of October 13, 1998, Respondent was at the home of Robert Garland (the Victim) in Marietta, South Carolina. Also present were Lisa Ward (Ms. Ward) and Respondent's wife, Elizabeth Bennett (Ms. Bennett). Respondent and the Victim drank large quantities of beer and moonshine throughout the evening. Additionally, Respondent admits to ingesting multiple Valium pills. During the course of the evening, Respondent became violent with Ms. Bennett. The Victim and Ms. Ward ejected Respondent from the home. Breaking through the front door, Respondent re-entered the Victim's home and beat him severely.

In January 2001, Respondent was tried for assault and battery with intent to kill (ABWIK), possession of a weapon during the commission of a violent crime, and first-degree burglary. Ms. Bennett was not present for the trial but the trial court admitted her out-of-court statements.

Ms. Ward testified that while Respondent was assaulting the Victim, Ms. Bennett hysterically screamed, "He's going to kill me." Trial counsel objected to the admission of the statement on hearsay grounds. The trial judge ruled that Ms. Bennett's statement was an excited utterance, and thus admissible as an exception to the rule excluding hearsay testimony. Ms. Ward continued her testimony stating that as the two women were exiting the home, Ms. Bennett screamed, "[p]lease hurry, please hurry, because if he gets hold of me, he's going to kill me." Trial counsel did not renew his objection.

Next, the State presented Officer Keith Morecraft to read into evidence a statement he took from Ms. Bennett at the crime scene ninety (90) minutes to two hours after the crime had occurred. Trial counsel objected on both hearsay and Confrontation Clause grounds. The trial court overruled the objection and allowed Officer Morecraft to read the statement into evidence.

The jury found Respondent guilty and sentenced him to concurrent terms of eighteen (18) years for ABWIK, five (5) years for possession of a weapon during the commission of a violent crime, and eighteen (18) years for first-degree burglary. Appellate counsel filed an appeal pursuant to *Anders*,[1] which the court of appeals dismissed. *State v. Bennett*, Op. No. 2002-UP-452 (S.C. Ct. App. filed June 20, 2002). Respondent filed an application for PCR. After a hearing, the PCR court granted Respondent's request for relief. The PCR court found that trial counsel provided Respondent with ineffective assistance in failing to adequately object to the admission of Ms. Bennett's out-of-court statements. The PCR court also found that appellate counsel provided Respondent with ineffective assistance in failing to brief issues concerning the admission of Ms. Bennett's out-of-court statements.[2]

STANDARD OF REVIEW

In post-conviction relief proceedings, the burden of proof is on the applicant to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). If the PCR court's finding is supported by any evidence of probative value in the record, it

[1] Pursuant to *Anders v. California*, "if [appellate] counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." 386 U.S. 738, 744 (1967).

[2] The issue appellate counsel briefed in the *Anders* appeal was unrelated to the admission of Ms. Bennett's out-of-court statements.

should be upheld. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

LAW/ANALYSIS

The State argues the PCR court erred in granting relief on the grounds that trial counsel and appellate counsel provided ineffective assistance to Respondent. We agree.

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) counsel's performance was deficient,[3] and 2) he was prejudiced by counsel's deficient performance.[4] *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

I. Trial Counsel

The State argues that the PCR court erred in finding trial counsel ineffective. We agree.

We find that trial counsel's performance was not deficient and, therefore, his assistance was not ineffective. Trial counsel clearly objected on hearsay grounds to the admission of Ms. Ward's testimony

[3] In order to prove that counsel's performance was deficient, an applicant must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. *Cherry v. State*, 300 S.C. at 117-18, 386 S.E.2d at 625.

[4] In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

concerning Ms. Bennett's out-of-court statement. The trial court correctly ruled that the statements were admissible as excited utterances and overruled trial counsel's objection.[5] Trial counsel's decision not to renew his objection to Ms. Ward's continuing testimony as to Ms. Bennett's out-of-court statements did not constitute deficient assistance. The second statement offered by Ms. Ward was essentially identical to the first; therefore, because the trial court had already ruled on the issue, it was not necessary for trial counsel to renew his objection. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("so long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again.").

Additionally, trial counsel clearly objected to the admission of Ms. Bennett's out-of-court statement given to Officer Morecraft. Trial counsel made this objection on multiple relevant grounds and argued it forcefully. Because trial counsel unmistakably represented the interests of his client on this issue, his performance was not deficient.

We find that there is no evidence of probative value in the record to support the PCR court's finding that trial counsel's performance was deficient. Therefore, with respect to the PCR court's grant of Respondent's requested relief on the grounds of ineffective assistance of trial counsel, we reverse.

II. Appellate Counsel

The State argues that the PCR court erred in finding appellate counsel ineffective. We agree.

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 398 (1985). However, counsel is not required to raise every non-frivolous

[5] Additionally, Respondent's own defense that he was entering the home to protect Ms. Bennett opened the door to these statements.

claim, but may select among them in order to maximize the likelihood of a favorable outcome. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel.[6] *See Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance.

Even if appellate counsel's performance was deficient, we find that such performance did not prejudice Respondent. In order to show that he was prejudiced by appellate counsel's performance, a PCR applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Ms. Bennett's out-of-court statements admitted at trial were cumulative evidence and not necessary to prove Respondent's guilt. Appellate counsel's performance did not prejudice Respondent and was, therefore, not ineffective.

Accordingly, we find that the PCR court erred in finding that Respondent received ineffective assistance of appellate counsel.

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[6] Appellate counsel filed an *Anders* brief, as opposed to a brief on the merits. Even in this context, when analyzing a claim of ineffective assistance of appellate counsel, we apply the *Strickland* test. *See Smith v. Robbins*, 528 U.S. 259, 284 (2000) (finding that even where appellate counsel believes his client's appeal is without merit and thus files an *Anders* brief, the appellant may have been entitled to a merits brief and the challenge of appellate counsel's performance should be reviewed under *Stickland*.)

CONCLUSION

For the foregoing reasons, we hold that the PCR court erred in ruling that trial counsel and appellate counsel were ineffective, and we reverse the PCR court's order granting relief.

WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Terrence D. Terry, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Florence County
Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 26683
Submitted May 28, 2009 – Filed July 13, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General Karen C. Ratigan, all of Columbia, for Petitioner.

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: This Court granted the State's petition for a writ of certiorari to review the post-conviction relief (PCR) judge's order reversing Terrence Dimingo Terry's (Respondent's) plea of guilty to criminal sexual conduct (CSC) with a minor, first degree and two counts of lewd act upon a child. We reverse.

FACTUAL/PROCEDURAL HISTORY

After Respondent's nine-year-old stepdaughter disclosed to her mother that Respondent had sexually abused her in July 2004, Mother confronted Respondent about the allegations. During this confrontation, it was revealed that Respondent's two other stepdaughters, ages eleven and twelve years old, had also been sexually abused by Respondent.

Subsequently, a family court proceeding brought by the Department of Social Services was conducted wherein Respondent admitted to the allegations. As a result, a treatment plan was put into effect to address Respondent's conduct.

In February 2005, a Greenville County grand jury indicted Respondent for two counts of lewd act upon a child involving the older two stepdaughters and one count of CSC with a minor, first degree regarding the allegations of the nine-year-old stepdaughter.

The next month, Respondent pled guilty to each of the three indicted offenses. At the plea proceeding, the circuit court judge inquired about Respondent's background in terms of his age, education level, and marital status. In terms of his health, Respondent indicated that he was currently taking medication for hypertension but that he felt fine and had not taken any medication, drugs, or alcohol within the twenty-four hours before the proceeding. Respondent acknowledged that he had previously been treated for "drugs and psychiatric." He did not, however, elaborate on this treatment.

After the introductory questions of the plea colloquy, the judge informed Respondent of the offenses for which he was charged[1] and the maximum possible sentences for these offenses. Respondent indicated that he understood the charges and intended to plead guilty to each of the offenses. The judge then instructed Respondent that by pleading guilty he would waive the following constitutional rights: the right to a jury trial, the State's burden of proof, his right to cross-examine the State's witnesses, his right to present a defense, and his right against self-incrimination. Respondent stated that he understood these rights but had made the decision to plead guilty.

After admitting his guilt, Respondent indicated that he was satisfied with his counsel's representation and had been given ample time to review the State's evidence.

The solicitor then provided the following factual basis for Respondent's guilty plea, stating:

> On July 4th of 2004, [Respondent] put hair grease on his penis and on the victim's vagina and attempted to have sexual intercourse with her. When he was unable to do so he then penetrated her vagina with his finger and her anus with his penis. This victim was the [Respondent's] nine year old step-daughter.

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[1] The judge read excerpts from the indictments. In terms of the charge of CSC with a minor, first degree the judge informed Respondent that the indictment "alleges you did in Greenville County July 4, '04 engage in sexual battery with child-victim #3, less than eleven years of age."

As to one of the charges of lewd act upon a child, the judge stated that the indictment "alleges you did in Greenville County on or about - - between June 1st and June 25th, '04 being over the age of fourteen willfully and lewdly committed a lewd and lascivious act upon the body or its parts of child-victim #2, a child under the age of sixteen with the intent of arousing, appealing to, gratifying the lusts, passions, or sexual desires of yourself or the child." The judge reiterated this language as to the second count of lewd act upon a child with the exception that the date of the offense was May 31, 2004, and involved child-victim #1.

> In May and June, 2004 [Respondent] also committed numerous lewd acts on his other two step-daughters, eleven and twelve years old by kissing them on the mouth, rubbing their breasts, vaginal areas, and buttocks, and rubbing his body against theirs. All these incidents occurred while the family resided at 1 Woodmont Lane in Greenville County.
>
> The [Respondent's] wife, the mother of all three victims confronted the [Respondent] when the nine-year-old victim disclosed her abuse. And the [Respondent] stated that he did not know why he did it. The [Respondent] admitted guilt in the DSS family court proceedings.

Following the solicitor's recitation of the facts, the judge asked Respondent whether the solicitor's statements were true. Respondent stated that they were true. Respondent's counsel then informed the judge that Respondent had admitted his guilt, but had told him "only a crazy person would do something like that." Counsel clarified that Respondent was not insane but recognized the "terrible act."

Subsequently, the judge sentenced Respondent to twenty years imprisonment for CSC with a minor, first degree and fifteen years for each count of lewd act upon a child. The sentences were to be served concurrently.

Respondent did not file a direct appeal of his guilty plea. Eight months after the plea, Respondent filed an application for PCR. In his application, Respondent requested relief on the following grounds: prosecutorial misconduct, ineffective assistance of counsel, and the plea court's lack of subject matter jurisdiction. In an amended application filed by his PCR counsel, Respondent asserted the following additional grounds for relief: his plea was not knowingly, voluntarily, and intelligently made; his plea counsel did not make him aware of the "nature and crucial elements of the charge against him"; at the time of the plea he was under the influence of prescribed mental health medications that affected his ability to comprehend what he was

doing; and his plea counsel failed to inform him of the right to appeal his guilty plea.

On March 1, 2007, the circuit court held a hearing on Respondent's PCR application. At the start of the proceeding, Respondent's counsel outlined Respondent's bases for his request for PCR. Counsel primarily focused her argument on Respondent's allegations of ineffective assistance of counsel.

Specifically, PCR counsel alleged that plea counsel was ineffective in the following respects: (1) he failed to bring to the court's attention Respondent's mental health issues, particularly the fact that Respondent was housed in the mental health section of the Greenville County detention center for nine months prior to the plea proceeding and was taking "antipsychotic" medication; (2) he failed to evaluate the State's evidence in that he did not make a discovery request and he did not view the physical evidence or the "rape kit"; and (3) he failed to offer any mitigation evidence, such as the lack of physical evidence, the absence of the victims at the plea proceeding, the Respondent's lack of a prior record, and the Respondent's twelve-year military history. Additionally, PCR counsel emphasized that Respondent's plea counsel failed to review the meaning of "sexual battery" with Respondent prior to the plea. Counsel asserted that the failure to review a crucial element of the offense was particularly significant given Respondent's competency was in question.

PCR counsel then called Respondent as a witness. Respondent testified that he met with plea counsel only once, the day of the plea proceeding, for a ten-minute consultation. He further stated that plea counsel never provided or reviewed discovery with him. Because he did not review any discovery materials, Respondent claimed he was unaware of the SLED report stating that no physical evidence was found on the clothing of the nine-year-old victim. Although Respondent acknowledged that he pled guilty, he claimed that he did not understand the nature of the charges, particularly the meaning of "sexual battery." Respondent stated that his plea counsel did not

explain the meaning of this term. He further testified that had he known the definition of "sexual battery," he would not have pled guilty.

Throughout his direct examination, Respondent repeatedly emphasized that he was unable to adequately comprehend the plea proceeding due to his mental health issues and the medications he was taking to treat these issues. Respondent contended that he admitted to the truth of the solicitor's factual recitation at the plea proceeding because he lacked the ability to comprehend and adequately defend himself at that time.

Although Respondent specifically denied committing a sexual battery on the nine-year-old victim, he admitted there was inappropriate touching. Despite the State's assertion that Respondent admitted to committing a sexual battery during the family court proceeding, Respondent testified he could not recall such an admission. Respondent acknowledged that the family court's order included a treatment plan stemming from a finding of sexual abuse. Respondent, however, noted that there was no finding of sexual battery or CSC with a minor.

On cross-examination, Respondent maintained that he did not inform the plea judge of the extent of his mental health problems because the "psychiatric medication . . . rendered [him] incompetent to speak for [himself]." Although Respondent acknowledged that he was aware of the plea proceeding, he contended he did not want to plead guilty and only did so due to his diminished "mental capabilities."

Respondent's plea counsel was the second and final witness to testify. Counsel testified that he could not recall how many times he met with Respondent prior to the plea proceeding. He did remember that "he went over the materials [he] had in his possession." Plea counsel explained that he did not file a discovery motion because the solicitor had an open file policy and he copied the solicitor's file. Counsel, however, was not aware of the SLED report which indicated that there was no physical evidence found regarding the CSC with a minor offense. Counsel testified he was aware that Respondent had

gone to a family court hearing, but he did not appear with Respondent because he did not know about the hearing at the time it was conducted. Plea counsel further stated that prior to the plea proceeding he went over the allegations with Respondent who told him that "something happened." Plea counsel testified Respondent was evasive and remorseful but never said he was not guilty. Based on this discussion, plea counsel was "satisfied that it happened" but Respondent did not want to say he did it. When questioned whether Respondent appeared confused about the plea proceeding, plea counsel explained:

> The only thing that I would say that he—he wanted to admit without admitting that he did this act. You know. He danced around it but I'm going to plead guilty. You, know I'm going to plead guilty. But, you know, when you get into specifics as to what he did, he would kind of be evasive but something happened. And that's what he told me. I said, "Well you're going to plead guilty to it?" And he said, Yes.

On cross-examination, plea counsel testified that at the time he was appointed he was not aware that Respondent was being housed in the mental health section of the Greenville County detention center. He further stated that his file did not reflect that he had met with Respondent prior to the day of the plea hearing. In terms of the contents of his file, plea counsel testified that he had the "discovery package" provided by the solicitor's office. Counsel, however, acknowledged that this package did not include the SLED examination and he did not go to the law enforcement center to review the evidence. According to plea counsel, the package included the family court order in which there was a finding of sexual abuse. When asked why he did not object to the solicitor's statement that Respondent admitted his guilt in the family court proceeding, plea counsel stated, "To me it's all the same . . . sexual conduct. Misconduct. I didn't make that distinction." When specifically questioned as to whether sexual abuse is the same as sexual battery, plea counsel responded "It's all the same."

With respect to his pre-plea discussions with Respondent, plea counsel stated that he told Respondent what the allegations against him were and that Respondent understood the charges. Plea counsel admitted that he did not discuss the SLED report, the rape kit, or the victim's statement. Instead, counsel "talked about [Respondent] appearing in court to plead guilty and that he was guilty." Counsel believed he had enough time to go over the discovery, the plea judge's questions, and whether or not Respondent wanted to plead guilty. Counsel maintained that Respondent wanted to plead guilty.

By order dated March 26, 2007, the PCR judge granted Respondent's application and, in turn, reversed and remanded his convictions for CSC with a minor, first degree and two counts of lewd act upon a child. In so holding, the PCR judge found plea counsel was ineffective for failing to advise Respondent regarding the meaning of "sexual battery."[2] The judge noted that plea counsel "admitted that he did not review the meaning of sexual battery with the [Respondent] saying that lewd act and criminal sexual conduct with a minor are basically the same thing, messing with children." Based on plea counsel's testimony, the judge found counsel "demonstrated a lack of knowledge of the nature of the crimes for which he represented the [Respondent]." In light of this testimony and Respondent's testimony, the judge concluded that plea counsel did not advise Respondent of "the meaning of sexual battery and the significance of penetration as it relates to criminal sexual conduct with a minor in the first degree." The judge further found that plea counsel's error was not cured by the plea colloquy. Ultimately, the judge held that plea counsel's performance fell below reasonable and prevailing professional norms given counsel did not advise Respondent of the elements of CSC with a minor and did not ensure that Respondent understood the nature of the offense. Finally, the judge found that Respondent proved he was prejudiced by plea counsel's deficient performance given Respondent demonstrated that he would have insisted on going to trial had he known the definition of "sexual battery."

[2] The PCR judge found Respondent's remaining allegations of ineffective assistance of counsel, prosecutorial misconduct, and lack of subject matter jurisdiction to be without merit.

The PCR judge denied the State's motion to alter or amend the order. Subsequently, this Court granted the State's petition for a writ of certiorari to review the PCR judge's order.

DISCUSSION

The State argues the PCR judge erred in finding Respondent would not have pled guilty if plea counsel had explained the definition of a "sexual battery." Because plea counsel reviewed the pending charges and the discovery material with Respondent prior to the plea proceeding, the State contends counsel's failure to use the term "sexual battery" did not render counsel's performance deficient. Even if counsel's performance was deficient, the State claims that Respondent did not prove prejudice given he had admitted his misconduct and any error was cured by the plea colloquy. Ultimately, the State seeks a reversal of the PCR judge's decision to grant Respondent a new trial on all of his convictions.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert. denied, 128 S. Ct. 370 (2007).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases- i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58 (1985)).

"When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel." Burnett v. State, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 31, 528 S.E.2d 418, 420 (2000).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith, 369 S.C. at 138, 631 S.E.2d at 261. This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

Section 16-3-655 of the South Carolina Code outlines the crime of first-degree criminal sexual conduct with a minor as follows: "A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age." S.C. Code Ann. § 16-3-655(1) (2003).[3]

"Sexual battery" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2003).

[3] Because the alleged sexual misconduct occurred in July 2004, we cite to this version of the statute given there have been substantive changes made to section 16-3-655 in subsequent years.

In contrast to "sexual battery," "sexual abuse" has been defined as "(a) actual or attempted sexual contact with a child; or (b) permitting, enticing, encouraging, forcing, or otherwise facilitating a child's participation in prostitution or in a live performance or photographic representation of sexual activity or sexually explicit nudity; by any person including, but not limited to, a person responsible for the child's welfare, as defined in Section 20-7-490(5)." S.C. Code Ann. § 17-25-135(B)(2) (2003 & Supp. 2008).

The term "sexual abuse" has been used to generally describe conduct which precipitates a charge of CSC with a minor. See, e.g., State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) (affirming conviction for first-degree CSC with a minor and discussing victim's statement and medical evidence indicating victim's injuries were consistent with sexual abuse). This general use, however, has never equated "sexual abuse" with "sexual battery."

Clearly, a severe incident of child sexual abuse may constitute a "sexual battery" and, in turn, CSC with a minor. However, one who sexually abuses a child is not necessarily guilty of CSC with a minor. For example, an inappropriate touching of a child without penetration of the child's "genital or anal openings" would constitute sexual abuse, but would not necessarily rise to the level of a "sexual battery" and a charge of CSC with a minor. Instead, such sexual abuse would warrant a charge of lewd act upon a child. See S.C. Code Ann. § 16-15-140 (2003) ("It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child."). Thus, the terms "sexual abuse" and "sexual battery" are not synonymous.

In the instant case, plea counsel testified at the PCR hearing that he believed the terms were the same. Because plea counsel did not differentiate between the two terms or correctly explain them to Respondent, there is evidence to support the PCR judge's decision that plea counsel's performance was deficient. Given plea counsel did not

comprehend this distinction and did not inform Respondent of a crucial element of the offense of CSC with a minor, first degree, we agree with the PCR judge that counsel's representation fell below an objective standard of reasonableness.

We find, however, plea counsel's deficient performance was cured by the plea colloquy even though there was no specific discussion of the term "sexual battery." Notably, the PCR judge found that any allegations regarding Respondent's competency were not meritorious. In light of this decision, the PCR judge implicitly found that Respondent had the requisite mental capacity to comprehend the plea proceeding.

At the plea proceeding, the judge read the indictments and Respondent acknowledged that he understood these charges. The indictment for CSC with a minor, first degree identified the elements of the offense which included a reference to a "sexual battery." After Respondent affirmatively stated that he understood the charges and admitted his guilt, the solicitor gave a detailed factual basis for the charges. In his factual recitation, the solicitor identified conduct which would constitute the elements of first-degree CSC with a minor. Specifically, the solicitor conveyed that Respondent had penetrated the nine-year-old victim's vagina with his finger and her anus with his penis. Both of these acts clearly meet the definition of a "sexual battery." Respondent admitted that the solicitor's statement of facts was true. Therefore, we find Respondent knowingly and voluntarily entered a plea as to the charge of CSC with a minor, first degree. See Roddy, 339 S.C. at 33-34, 528 S.E.2d at 421 (recognizing that for a guilty plea to be voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him (citing Boykin v. Alabama, 395 U.S. 238 (1969)).

In view of our decision, we further conclude the PCR judge erred in granting Respondent a new trial for the two counts of lewd act upon a child. As previously stated, the PCR judge's primary reason for granting Respondent's petition for relief was plea counsel's failure to

correctly inform Respondent of "sexual battery," an element of CSC with a minor, first degree. Given a "sexual battery" is not an element of lewd act upon a child and Respondent admitted to inappropriately touching his stepdaughters, the two charges for lewd act upon a child should not have been affected by plea counsel's deficient performance with regard to the definition of a "sexual battery." Accordingly, we find there is no evidence to support the PCR judge's decision to grant Respondent's relief on these two convictions.

CONCLUSION

In terms of Respondent's conviction for CSC with a minor, first degree, we find any deficient performance by plea counsel was cured by the plea colloquy. As to the remaining two charges, we hold there is no evidence to support the PCR judge's reversal of the two counts of lewd act upon a child given any deficient performance by plea counsel regarding his failure to inform Respondent of the term "sexual battery" would not have affected Respondent's plea of guilty to the charges of lewd act upon a child. Accordingly, the decision of the PCR judge is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jeremiah Dicapua, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26684
Heard February 3, 2009 – Filed July 13, 2009

AFFIRMED

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Salley W. Elliott; Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

JUSTICE KITTREDGE: As a result of a videotaped sting operation, Jeremiah Dicapua was convicted and sentenced for distribution of crack cocaine and possession with intent to distribute crack cocaine. On the day following sentencing, the trial court *sua sponte* vacated the jury's verdict and ordered a new trial on the basis of perceived weaknesses in the videotape evidence, even though the tape was admitted without objection. Moreover, the trial court ruled that the videotape could not be admitted in evidence in the new trial. The State appealed, contending the *sua sponte* grant of a new trial constituted legal error warranting reversal.

Because Dicapua waived any direct challenge to the videotape by consenting to its admission, the court of appeals reversed the trial court's *sua sponte*, new trial order and reinstated the sentence. *State v. Dicapua*, 373 S.C. 452, 455-56, 646 S.E.2d 150, 152 (Ct. App. 2007). We granted a writ of certiorari. We affirm.

I.

The Horry County Police Department and the Myrtle Beach Police Department conducted a drug sting in a hotel. One hotel room was a control room where the officers observed the suspects and the informant. The adjoining hotel room served as the transaction room, which was set up with separate video and audio recording devices. On the day in question, the audio equipment malfunctioned.

The hotel room was initially searched by the police for drugs, and the informant was searched as well. The informant was given one hundred and eighty dollars in marked money by the police. The informant and another woman in the hotel room were arrested earlier that day for prostitution.

The informant briefly left the room and reentered with Dicapua. The informant counted out the money and placed it on the bed. Next, Dicapua counted the money and appeared to drop something on the bed. The informant then placed an unknown substance in her pocket. After the police

entered the transaction room, the police searched Dicapua and found drugs. The police also located drugs on the informant for a total of 2.4 grams of crack cocaine. Dicapua admitted the informant gave him one hundred and sixty dollars.

Dicapua was tried for and convicted of distribution of crack cocaine and possession with intent to distribute crack cocaine. At trial, Dicapua did not object to the admission of the videotape. Following the State's case, Dicapua made multiple motions: for a dismissal and a mistrial due to the lack of a link between the drugs found on the informant and Dicapua, for a directed verdict due to the "totality" of the State's case, and for dismissal due to entrapment. Notably, these motions did not refer to the admission of the videotape.

Following the jury's guilty verdicts, Dicapua moved to set aside the verdict as there was no evidence Dicapua intended to sell additional drugs and "the objections and request going back to the [informant], the chain, and all those things." Again, these motions did not implicate the admission of the videotape. The trial court sentenced Dicapua to thirty months for both charges to run concurrently.

The next day the trial court *sua sponte* ordered a new trial because of concerns about the videotape. The trial court additionally ordered, "it is the decision of this Court to suppress the introduction of the videotape in any new trial to be had on the charges."[1] The State served its notice of appeal. The trial court subsequently held a hearing to supplement the record and further explain its decision.[2]

The State appealed the trial court's *sua sponte* order. The court of appeals reversed. *State v. Dicapua*, 373 S.C. 452, 456, 646 S.E.2d 150, 152 (Ct. App. 2007). The court of appeals majority found an abuse of discretion

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[1] Counsel for Dicapua conceded at oral argument that it was error to preemptively suppress the videotape at a new trial.

[2] Because the filing of the appeal deprived the trial court of jurisdiction, we may not consider the trial court's post-appeal explanation.

by the trial court's granting of a new trial for a waived issue, the admission of the videotape. *Id*. at 455, 646 S.E.2d at 152. One panel member of the court of appeals concurred, addressing the matter of appealability. *Id*. at 457, 646 S.E.2d at 153. This Court granted Dicapua's petition for certiorari.

II.

We first address the threshold matter of appealability. "The State may only appeal a new trial order if, in granting it, the trial judge committed an error of law." *State v. Johnson*, 376 S.C. 8, 10, 654 S.E.2d 835, 836 (2007). To determine if an error of law occurred, it is necessary to examine the merits of the case. *Id*. at 11, 654 S.E.2d at 836. We find an error of law occurred when the trial court granted a new trial on the basis of evidence admitted with Dicapua's consent. Because of the error of law, the matter is appealable.

We now turn to the legal issue which resolves this case—may a trial court in a criminal case *sua sponte* order a new trial on a ground not raised by a party? We answered this question "no" in the context of a civil proceeding in *Southern Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) ("The sole issue is whether a trial judge *ex mero motu*[3] can grant a new trial on a ground not raised by a party. We hold he cannot.").[4] We hold the same result must follow in a criminal case.[5] Moreover, to affirm the grant

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[3] *Ex mero motu* is a synonymn for *sua sponte*. Black's Law Dictionary 596 (7th ed. 1999).

[4] As in the case at hand, in *Southern Railway*, Southern waived the ground on which the trial court *sua sponte* granted a new trial. 285 S.C. at 215-16, 329 S.E.2d at 737-38. Specifically, the trial court in *Southern Railway* stated that "[t]his new trial is not granted on the grounds as contended by [Southern] . . . ." *Id*. at 215, 329 S.E.2d 737. In reversing the *sua sponte* grant of a new trial, we held "Southern waived the right to claim the omitted charge was error by not objecting to its omission at the trial level. Therefore, the omitted charge was not properly before the trial court, the Court of Appeals, or this Court." *Id*. at 216, 329 S.E.2d at 737-38.

[5] We acknowledge Rule 59(d), SCRCP, allows a civil trial court to order a new trial within ten days of the entry of judgment for "any reason for which

of a new trial on a waived issue in a criminal case would lend this Court's imprimatur to a trial court's impromptu grant of post conviction relief.

By consenting to the admission of the videotape evidence, Dicapua waived any direct challenge to the admission of the evidence. Concomitantly, the trial court lacked authority to grant relief on the basis of a ground not raised by Dicapua. We hold the granting of a new trial *sua sponte* on a ground waived by a party is an error of law.

AFFIRMED.

TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.

[the trial court] might have granted a new trial on motion of a party." We further acknowledge that when a civil trial court exercises its discretionary right to sit as a thirteenth juror and grants a new trial when the verdict is contrary to the evidence, its decision will be upheld if there is any evidence to support it. *Southern Railway*, 285 S.C. at 216, 329 S.E.2d at 738.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ken Buffington, Louis Shepard, Mary E. Williams, Brian Meece and Shirley Jones, Respondents,

v.

T.O.E. Enterprises, A South Carolina General Partnership and T.O.E. Residential, LLC, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 26685
Heard April 22, 2009 – Filed July 13, 2009

AFFIRMED AS MODIFIED

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

J. J Wilkes, of Greenville, for Respondents.

CHIEF JUSTICE TOAL: Respondents filed an action seeking a declaratory judgment that in using their land for commercial purposes, Petitioners were acting in violation of the restrictive covenants. The trial court found that Petitioners were in violation of the covenants and issued an injunction prohibiting Petitioners from using two lots for commercial purposes. The court of appeals affirmed, *Buffington v. T.O.E. Enters.*, Op. No. 2007-UP-252 (S.C. Ct. App. filed May 24, 2007), and this Court granted a writ of certiorari to review that decision. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

Forest Acres is a subdivision located in Easley, South Carolina, which was developed in 1958. The restrictive covenants provide that, "[n]o lot shall be used except for residential purposes," but the covenants only apply to 62 of the 110 lots of the subdivision. Respondents own lots in Forest Acres, and Petitioners operate a Toyota dealership that borders the subdivision. In 2003 and 2004, Petitioners purchased lots 9, 10, 11, and 12 located across from the dealership and within the subdivision. Petitioners intended for the lots to be used for additional parking and began developing the land.

Respondents brought an action seeking to enjoin Petitioners from using lots 9, 10, and 12[1] for commercial purposes. The trial court found that lots 10 and 12 were subject to the restrictive covenants and thus could only be used for residential purposes.[2] The trial court ruled that Petitioners failed to show that they were entitled to use the property for commercial purposes under an equity theory and that Petitioners failed to show that a change of conditions

[1] Lot 11 is not subject to the restrictive covenants.

[2] The trial court found that lot 9 was not subject to the restrictive covenants. Respondents did not appeal this ruling.

existed to warrant the release of the restrictive covenants. Accordingly, the trial court issued an injunction prohibiting Petitioners from using the land for parking purposes. The court of appeals affirmed.

We granted a writ of certiorari to review the following issue:[3]

> Did the court of appeals err in holding that a court is not required to balance the equities before enforcing a restrictive covenant, but that even if it were to balance the equities, equity favored enforcement?

STANDARD OF REVIEW

An action to enforce restrictive covenants by injunction is an action in equity. *South Carolina Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). On appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). While this standard permits a broad scope of review, an appellate court will not disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990).

LAW/ANALYSIS

Petitioners argue that the court of appeals erred in holding that the equities favored the enforcement of the restrictive covenants. Respondents, on the other hand, argue that a court is not required to balance the equities in deciding whether to enforce restrictive covenants, but regardless, the equities favor enforcement.

A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be

[3] We denied certiorari to review the change of circumstances issue.

strictly construed, with all doubts resolved in favor of the free use of property. *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). Thus, courts tend to strictly interpret restrictive covenants, and to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain and unmistakable implication. *Id.*; *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 269, 363 S.E.2d 891, 894 (1987).

We first address whether courts must balance the equities in determining whether to enforce a restrictive covenant. In affirming the trial court's injunction against Petitioners, the court of appeals stated that, pursuant to *Siau v. Kassel*, 369 S.C. 631, 641, 632 S.E.2d 888, 893 (Ct. App. 2006) and *Houck v. Rivers*, 316 S.C. 414, 418, 450 S.E.2d 106, 109 (Ct. App. 1994), once the court finds that a restrictive covenant has been violated, it is not required to balance the equities of the parties before enforcing a covenant. However, a review of this Court's decisions on this issue reveals that this statement is contrary to our precedent.

In *Circle Square Co. v. Atlantis Dev. Co.*, 267 S.C. 618, 230 S.E.2d 704 (1976), the Court first determined that the defendant's proposed use of the land violated the restrictive covenants and then held that the plaintiffs were not barred from seeking an injunction pursuant to laches, waiver, or estoppel. In *Rabon v. Mali*, 289 S.C. 37, 344 S.E.2d 608 (1986), this Court engaged in an equitable analysis and found that the defendant established laches as a defense to using his land for commercial purposes in violation of the restrictive covenants. Finally, in *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992), the Court held that although the trial court erred in allowing the homeowners to offensively assert equitable defenses, the homeowners still prevailed under equitable considerations and thus the restrictive covenants could not be enforced against them.

Accordingly, while there is no formulaic balancing test, we find that this Court has consistently held that courts should consider equitable doctrines when determining whether to enforce a restrictive covenant and enjoin a landowner from using their land in a manner that violates the

covenant. Indeed, an action to enforce a restrictive covenant is an action in equity, and to hold that a court must issue an injunction as a matter of law upon a finding that a restrictive covenant has been violated is erroneous. We therefore hold that *Siau* and *Houck* are overruled to the extent they hold otherwise.

Turning to the merits of this case, we hold that the restrictive covenants are enforceable. Petitioners admitted that using the land for parking violated the restriction that the land may only be used for residential purposes. However, Petitioners testified that they have expended over $700,000 on improvements to the land, that Toyota will require them to relocate if they are not able to expand the business, and that using the lot for commercial purposes will not negatively impact Respondents' property value since lots 10 and 12 are located between unrestricted lots and other businesses are located in close proximity to the lots. Respondents testified that the commercial development of Lots 10 and 12 created additional light and noise pollution and adversely affected their property values.

We find that the Petitioner cannot prevail under an equity theory. In our view, it would be inequitable to consider Petitioners' financial loss in purchasing and improving the land since they were on notice of the covenants when they purchased the property. To find otherwise would indicate that any business could defeat a restrictive covenant by spending a significant amount of money developing the land. Moreover, Petitioners cannot show that Respondents have waived their rights or that Respondents may be estopped from enforcing the covenants. The lots have never been used for commercial purposes, and Respondents brought suit as soon as Petitioners began developing the lots. The record contains no evidence to support lifting the covenants based on equitable doctrines. In our view, to ignore the restrictive covenants in the absence of such evidence would eliminate a homeowner's justified reliance on property restrictions. Therefore, we find that equity does not weigh in Petitioners' favor and the restrictive covenants are enforceable.[4]

[4] Because we denied certiorari to review the court of appeals' decision as to changed conditions, we are not considering facts and arguments related to that issue in deciding this case.

Accordingly, we hold that, upon a finding that a restrictive covenant has been violated, a court may not enforce the restrictive covenant as a matter of law. Rather, the court must consider equitable doctrines asserted by a party when deciding whether to enforce the covenant.

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision as modified.

WALLER, PLEICONES, KITTREDGE, JJ., and Acting Justice James R. Barber, concur.

The Supreme Court of South Carolina

In the Matter of Sherry Bingley Crummey, Respondent.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) and (c), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Justin Kahn, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Kahn shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Kahn may make disbursements from respondent's trust

account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Justin Kahn, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Justin Kahn, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Kahn's office.

Mr. Kahn's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina
July 8, 2009

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Evan and Leslie Jones, Appellants

v.

SC Department of Health and
Environmental Control and
Arthur Moore, Respondents.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 4583
Submitted June 1, 2009 – Filed July 7, 2009

AFFIRMED

Cotton C. Harness, III, and Melinda A. Lucka, both of Mt. Pleasant, for Appellants.

Christopher Holmes, of Mt. Pleasant and Elizabeth Applegate Dieck, of Charleston, for Respondents.

HUFF, J.: This case involves an appeal from the granting of an amended dock permit to respondent Arthur Moore by the South Carolina Department of Health and Environmental Control (DHEC), Bureau of Ocean and Coastal Resource Management (OCRM). The Administrative Law Court (ALC) affirmed the issuance of the permit. This decision was affirmed by the Coastal Zone Management Appellate Panel, which was thereafter affirmed by the circuit court. On appeal, appellants Evan and Leslie Jones assert the granting of the dock amendment violates various code regulations. They further take issue with procedural aspects of the case, contending an initial letter denying the amendment was a final decision and that their due process rights were violated. We affirm.[1]

FACTUAL/PROCEDURAL HISTORY

On December 20, 1999, OCRM approved a dock master plan (DMP) for the Rivertowne Subdivision (Rivertowne) in Mount Pleasant, South Carolina. The DMP included proposed dock corridors for various properties within the subdivision. In August 2001, Moore and his wife purchased lot 39, and on July 8, 2004, the Joneses purchased lot 38 in Rivertowne. The DMP established the Joneses' dock corridor extended directly to the Wando River (Wando), while the Moore's dock corridor extended to a tributary of the Wando. The Joneses' lot is in two sections, consisting of a pie shaped landward portion connected by a bridge to an island, which has a dock on the Wando. Moore's lot is similarly shaped to the Jones's landward lot, and its property lines extend out partially over the Wando River and partially over marsh and a creek that runs off of the Wando. Thus, Moore has waterfront property to the Wando to a point.

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

In 2002, Moore applied for and received a dock permit within the boundaries of the original dock corridor approved in the DMP, allowing the construction of a dock to the creek running off the Wando. However, after receiving the permit, Moore began to explore the area and discovered it was difficult to get his boat to the permitted area unless it was very close to high tide. He experienced problems maneuvering his boat in the mouth of the creek and even ran aground on high tide because of a large shell bank. Realizing the difficulty of navigating around the shell bank and that there was minimal access available to this area on a day to day basis, in July 2004 Moore applied for an amendment to his dock permit, with a new proposed dock corridor extending to the Wando.

In August 2004, the Joneses notified OCRM they strongly opposed the proposed amendment submitted by Moore, noting they believed the modification would create a significant negative impact on their ability to navigate in the adjacent creek, would permanently block their access to the tidal creek, and would restrict their use of the waterway. Thereafter, the Joneses received a copy of a denial letter dated September 28, 2004, as well as a September 29, 2004 memorandum notice to all interested parties that Moore's amendment request had been denied. However, on November 23, 2004, DHEC's Office of General Counsel sent Moore's attorney a letter indicating OCRM's manager of critical area permitting, Curtis Joyner, intended to issue the permit requested. The letter noted that before Joyner was able to take any action in that regard, notice of a denial letter was mistakenly mailed to the adjacent property owners. It further stated the denial letter was only a draft, not intended to be the agency's final decision, and it was determined the agency could revoke the prior letter and reissue notice of the decision allowing the amended permit. On December 22, 2004, the Joneses received a letter from OCRM indicating Moore's amended permit authorizing a new dock alignment had been approved.

The Joneses appealed OCRM's decision to the ALC, which affirmed the grant of Moore's amended dock permit realigning his walkway to provide access to the Wando River, but imposed two additional conditions on the

permit.[2] The Joneses thereafter appealed to the Coastal Zone Management Appellate Panel, which found substantial evidence of record to support the ALC and affirmed the decision. The Joneses again appealed, and the decision to grant Moore's amended permit was thereafter affirmed by the circuit court. This appeal followed.

ISSUES

1. Whether the trial judge erred in finding 23A S.C. Code Ann. Regs. 30-12(A)(2)(n) was not violated.

2. Whether the trial judge erred in finding 23A S.C. Code Ann. Regs. 30-12(A)(2)(c) was not violated.

3. Whether the trial judge erred in finding 23A S.C. Code Ann. Regs. 30-12(A)(2)(d) was not violated.

4. Whether the trial judge erred in finding 23A S.C. Code Ann. Regs. 30-12(A)(2)(e) was not violated.

5. Whether the trial judge erred in finding 23A S.C. Code Ann. Regs. 30-12(A)(2)(h) was not violated.

6. Whether the trial judge erred in finding 23A S.C. Code Ann. Regs. 30-11(B)(10) was not violated.

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[2] These conditions included (1) that the walkway to the dock be elevated to five feet above mean high water at the point where it intersects with the area of marsh leading from the Joneses' bridge to the tributary and (2) the location of the pier, as shown by staking in the field prior to construction, may not be closer than twenty feet to the mouth of the tributary, and if the floating dock was closer than twenty feet to the mouth of the tributary, the floating dock would be relocated to the upstream side of the pier or in front of the pier.

7. Whether the trial judge erred in ruling the Joneses' due process rights were not violated.

8. Whether the trial judge erred in finding the Dock Master Plan was not violated.

9. Whether the trial judge erred in ruling the September 28, 2004 denial could be revoked.

10. Whether the reviewing circuit court judge erred in affirming the ALC.

STANDARD OF REVIEW

In a contested permitting case, the ALC presides as the fact finder. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). In reviewing the final decision of the ALJ, the Coastal Zone Management Appellate Panel sat as a quasi-judicial tribunal and was not entitled to make findings of fact. Dorman v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 159, 164, 565 S.E.2d 119, 122 (Ct. App. 2002). The Coastal Zone Management Appellate Panel could only reverse the ALC based on an error of law or if its findings were not supported by substantial evidence. Id. at 165, 565 S.E.2d at 122. The circuit court's review, as well as this court's, was governed by the prior version of section 1-23-380(A)(6) of the South Carolina Code, which provided the court could reverse a decision of an administrative agency if the agency's findings or conclusions were:

> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(6) (2005).

In determining whether the ALC's decision was supported by substantial evidence, this court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct. App. 2004). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Id. at 420, 604 S.E.2d at 707.

LAW/ANALYSIS

I. Violation of Reg. 30-12(A)(2)(n)

The Joneses first argue the ALC erred in failing to find Regulation 30-12(A)(2)(n) was violated by the amended permit. They argue, when considering the definition of navigability as defined in the regulations, the case law, and the testimony submitted, the "horseshoe" creek and the creek that connects the unnamed tributary to the area of their bridge are navigable and cannot be bridged. They further assert the regulations require the Moore dock to extend to the first creek that is the shortest distance from the Moore property. Accordingly, they contend this regulation precludes issuance of the amended permit.

Looking at the regulation in effect at the time of application and issuance of the amended permit in this matter, Regulation 30-12(A)(2)(n) provided in pertinent part as follows:

> Docks must generally extend to the first navigable creek, within extensions of upland property lines or corridor lines, that has a defined channel as evidenced by a significant change of grade

> with the surrounding marsh; or having an established history of navigational access or use. A creek with an established history of navigational use may also be considered as navigable. Such creeks cannot be bridged in order to obtain access to deeper water. . . . In exceptional cases, the Department may allow an open water channel to be bridged if current access is limited by other man made or natural restrictions or if site-specific conditions warrant such a crossing.

23A S.C. Code Ann. Regs. 30-12(A)(2)(n) (Supp. 2004).

In determining whether a waterway is navigable, "'[t]he true test to be applied is whether a stream inherently and by its nature has the capacity for valuable floatage, irrespective of the fact of actual use or the extent of such use.'" Hughes v. Nelson, 303 S.C. 102, 105, 399 S.E.2d 24, 25 (Ct. App. 1990) (quoting State ex rel. Medlock v. South Carolina Coastal Council, 289 S.C. 445, 449, 346 S.E.2d 716, 719 (1986)). The test of navigability is not whether a waterway is accessible at all times, but whether it is accessible at the ordinary stage of the water. Id. at 106, 399 S.E.2d at 26.

At the hearing before the ALC, the Joneses presented testimony on their use of the smaller tributaries near the bridge connecting their highland property to their island from which their dock extended into the Wando River. In particular, they testified regarding their use of a "horseshoe" shaped tributary off the main creek from the river that they traversed to get from their highland property near the bridge out to the larger tributary or out to the Wando. Jones testified to numerous times he had navigated in the smaller tributaries in his kayak and canoe. He stated he generally launched his canoe or kayak from the landward portion of his lot by the bridge to enter the tributaries, and would explore the wildlife in the area. He did not launch his canoe from his dock in the Wando because the river was too rough, and he could only do so on certain days if the water was agreeable. Additionally, Jones' son, Justin, testified he had used his smaller, twenty-foot motorized boat to retrieve and transport items from the landward portion of the property to the dock, navigating all the way up to the bridge on the highland. Justin stated he generally waited for the water to "come up nice and high" before he would make such a trip, that he would generally go at high tide, and while he

could not make it at low tide, it was possible to do around mid tide, depending on the tide change. In describing his navigation of his motorized boat at mid tide, Justin stated he could make the trip if it was a "good mid tide." Jones testified that if a dock walkway was constructed as proposed, there was no way it could avoid crossing over the horseshoe, and it would block his ability to traverse the horseshoe and get out to the Wando. Both Jones and his son believed that a dock positioned in the amended dock corridor could only avoid the horseshoe tributary if it crossed over into the Joneses' extended property lines.

Curtis Joyner testified that he was OCRM's manager of critical area permitting and the ultimate decision of whether to issue a critical area permit rested with him. Joyner viewed the area in question at the time the agency was considering the DMP for Rivertowne, and he did not notice anything in the general vicinity that would constitute a navigable creek. In preparation for the hearing in this matter, Joyner made another site visit to the area the day before the hearing, his main focus being to view the tributaries. Joyner found the tributary next to the bridge was only about a foot wide and hardly evidenced any change in grade, if any at all. Joyner described this area as a "mud flat" and "flat as a pancake." He concluded this area did not qualify as a navigable creek. He further testified he viewed the horseshoe tributary from a distance. Joyner described this tributary as "very small," and stated that it did not possess much width, and did not "really elevate itself." He did not believe the horseshoe tributary exhibited a significant change in grade. Joyner concluded the horseshoe tributary was not a navigable tributary either. Additionally, Joyner testified it was feasible for the proposed dock to reach the Wando without crossing the horseshoe. And further, while he did not believe the proposed dock would have to cross extended property lines, doing so would be permissible under the regulations as long as there was no material harm to the policies of the regulations. Finally, Joyner testified he was "pretty certain" the proposed walkway would not cross over any portion of the horseshoe, but assuming he was incorrect about the horseshoe tributary and it did exhibit a significant change of grade and the walkway infringed on the tributary, Moore would be required to move his walkway over some to avoid the horseshoe.

Respondent Moore testified that he walked the entire line of the marsh from his high ground property through the marsh out to the Wando. He stated he could construct a walkway to a pier from his high ground to the Wando that would cross neither the Joneses' extended property line nor the horseshoe tributary. Moore further testified he was amenable to elevating any portion of his walkway to accommodate Jones so he would have the ability to use his canoe in the area.

As to navigability, the ALC found the small tributaries branching from the main tributary and leading to the Joneses' bridge had little if any water in them at low tide, and concurred with OCRM's observations that the area next to the bridge was a mud flat and would not be considered navigable at mid tide or below by any craft other than boats requiring a minimal depth of water such as kayaks or canoes. The ALC similarly found the horseshoe was not navigable to any water craft other than kayaks and canoes and the tributaries near the bridge and in the horseshoe have no defined channels as evidenced by a significant change in grade with the surrounding marsh. The ALC noted Jones navigated the tributaries while paddling in craft which required no more than a few inches of water, and that Justin's navigation of the area occurred around high tide, or what Justin described as "a good mid tide." When weighing the testimony of Jones and his son based on their personal observations against the OCRM staff's observations and experience in applying Regulation 30-12(A)(2)(n), the ALC found the Joneses' evidence was not persuasive. The ALC determined the evidence did not demonstrate an established history of navigational use, as the use of a canoe or kayak in the area for a period of a few months did not constitute an established history of navigational use. The ALC also found Justin's limited use of the tributaries did not demonstrate an established history of navigational access or use. Accordingly, it concluded the proposed dock could be constructed to the Wando without violating this regulation's prohibition of bridging navigable creeks.

We find there is substantial evidence to support the finding of the ALC in this regard. The OCRM critical permitting manager specifically testified, based on his observations of the area, that neither the area next to the Joneses' bridge nor the horseshoe area exhibited a significant change in grade. Joyner concluded neither were navigable tributaries. He further testified it was

feasible for Moore's proposed dock to reach the Wando without crossing the horseshoe area, and while he did not believe the proposed dock would have to cross extended property lines, doing so would be permissible under the regulations as long as there was no material harm to the policies of the regulations. Additionally, if it was determined the horseshoe tributary did in fact have a significant change of grade so as to be considered navigable and the walkway did infringe on the tributary, Moore would be required to move his walkway over in order to avoid the horseshoe. We further find substantial evidence to support the ALC's finding that Jones' use of a kayak or canoe for a limited period of only a few months and Justin's limited use of the tributaries in question during high tide or a "good mid tide" did not demonstrate an established history of navigational access or use.

In regard to the regulation's requirement that the dock extend to the first navigable creek, the record reveals the amended dock permit would allow a 632 foot walkway with a dock accessing the Wando, while the original permit was for a 350 foot walkway with a dock on the main creek which runs off the Wando. The dock to the creek would clearly be a shorter distance than the dock permitted to the Wando. The ALC determined, however, that regulation 30-12(A)(2)(n) does not require that docks be built to the closest navigable creek. Rather, the court found the most reasonable interpretation of this regulation is that the dock must be placed in the first navigable waterway it reaches within the alignment of the dock, as long as the alignment complies with other regulatory provisions. We agree.

Regulation 30-12(A)(2)(n) does not simply state a dock must extend to the first navigable creek, but further provides it must extend to such a creek "within extensions of upland property lines or corridor lines." 23A S.C. Code Ann. Regs. 30-12(A)(2)(n) (Supp. 2004). Further, Joyner stated that his experience was that this particular portion of the regulation "speaks [only] to crossing a tributary to get to a larger body" of water. He testified that the interpretation that it required one to take the "closer shot" had been rejected, and it is only when one must cross a navigable creek to get to deep water that the dock must stop at the first channel.

The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the

statute's operation. Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Id. Further, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Id.

The regulation in question provides a dock must extend to the first navigable creek within extensions of upland property lines or corridor lines, not that it must extend to the closest navigable creek. Thus, under the plain and ordinary meaning of this regulation, as long as the dock extends to the first navigable creek within the permitted alignment, it will not run afoul of the regulation. Further, Joyner's testimony reflects the agency has construed this regulation to require that a dock not be allowed to cross a navigable creek within a dock alignment and rejected that a dock must be placed at the closest navigable creek to the property. We find no compelling reason to overrule this construction by the agency.

II. Violation of Reg. 30-12(A)(2)(c)

The Joneses argue "the dock size and extension does not comply with Regulation 30-12(A)(2)(c)." This section, effective at the time of this case, provided: "The size and extension of a dock or pier must be limited to that which is reasonable for the intended use." 23A S.C. Code Ann. Regs. 30-12(A)(2)(c) (Supp. 2004).

Under the original permit, the dock was allowed to be 120 square feet. Under the amended permit, the dock can be 600 square feet. The Joneses argue the original permit was sufficient for the intended use and that Moore's property is not in fact riverfront property. They contend this fact is evidenced by the substantial price difference between the Moore lot and their own. Although Moore may have paid considerably less for his lot, there is substantial evidence in the record that Moore's property lines extend out partially over the Wando River. According to Mary Theresa Rogers with OCRM, there is no question that Moore has waterfront property to a point to the Wando River. As the ALC found, there is no evidence that the proposed dock's size is unreasonable for the Wando River. Accordingly we find

substantial evidence supports the ALC's finding that the proposed dock does not violate Regulation 30-12(A)(2)(c).

III. Violation of Reg. 30-12(A)(2)(d)

The Joneses next contend the proposed dock is in violation of Regulation 30-12(A)(2)(d) which, at the pertinent time, provided "[d]ocks and piers should use the least environmentally damaging alignment." 23A S.C. Code Ann. Regs. 30-12(A)(2)(d) (Supp. 2004). Although they acknowledge that a longer walkway is not necessarily more environmentally damaging, they summarily assert "that the position that uses available access to the creek while preserving the navigation for the public is less impactful to the environment." The Joneses cite no case law nor point to any testimony in the record to support this position. Indeed, the record establishes that OCRM has become concerned with the impact of docks on small tidal creeks because of the boating activity attendant to such docks, resulting in "disturbing activity" to the highly productive fishery habitats. Thus, the impact of a dock on a smaller tributary is greater than that on a larger body of water such as the Wando. Accordingly, this portion of the regulations is not limited to the length of the walkway but can include consideration of the impact on a small tributary versus a larger body of water. OCRM therefore has been trying to "get out of the business of issuing [permits for] docks in very small creeks." Based on the foregoing, we find substantial evidence exists to support the ALC's finding that, at a minimum, the amended dock follows an alignment that is no more environmentally damaging than the original alignment, and "since a dock in the Wando River will not create the adverse impact on aquatic life as would the smaller dock in the tributary, it will have less of a detrimental impact upon the environment."

IV. Violation of Reg. 30-12(A)(2)(e)

The Joneses also assert a violation of Regulation 30-12(A)(2)(e), which provided as follows:

> All applications for docks and piers should accurately illustrate the alignment of property boundaries with adjacent owners and

> show the distance of the proposed dock from such extended property boundaries. For the purpose of this section, the extension of these boundaries will be an extension of the high ground property line. The Department may consider an alternative alignment if site specific characteristics warrant or in the case of dock master plans, when appropriate.

23A S.C. Code Ann. Regs. 30-12(A)(2)(e) (Supp. 2004). Specifically, they argue the dock application failed to accurately demonstrate the location of the dock in relation to navigable creeks or their property lines, and without information as to the distance of the pierhead from the mouth of the tributary, the distance of the proposed dock from their dock, and the location of the walkway, it was impossible to determine exactly where the proposed structure would be located.

In his application for the amended permit, Moore provided documents including a survey reflecting both the existing dock corridor as well as the proposed new dock corridor. The proposed dock corridor was fifty feet in width and showed an additional twenty foot buffer between the fifty foot wide corridor and the Joneses' extended property line. It reflected a four foot by 632 foot walkway connected to a twenty foot by twenty foot covered pierhead, with a ten by twenty foot floating dock attached to the pierhead by means of a four by twenty foot gangway. Curtis Joyner testified he could look at the submitted documents and determine the location of the pierhead as "right up the middle" of the corridor. When asked if he knew where the corridor would actually be on the ground he stated, "there are coverable bearings and distances on [the documents]" and he thought they "could certainly put it in that field." When asked if he could "say with a degree of certainty . . . exactly where the walkway is going to go, or where the pierhead is going to be located," Joyner replied, "yes." Joyner further testified that the survey submitted with the amendment request reflected a measurement of twenty feet between the dock corridor and the edge of the Joneses' island, and in looking at the survey, he could determine the location of the corridor on an aerial photograph of the area that was admitted into evidence. Finally, when asked why OCRM had not required a plat showing the exact location of the pierhead and walkway, Joyner stated they "felt pretty comfortable with what [they] had in the application." Additionally, Moore

testified concerning various measurements and the proposed alignment from his property to the Wando. He determined his pierhead would be about twenty feet from the mouth of the tributary.

A review of the submitted survey documents, along with the testimony of Joyner and Moore, convinces us the application was sufficient to accurately illustrate the alignment of Moore's property boundaries with that of the Joneses' and show the distance of Moore's proposed dock from the extended property boundaries. Further, there is evidence of the distance of the proposed pierhead from the mouth of the tributary in question and the location of the walkway. Additionally, it does not appear the Joneses raised any issue concerning the proximity of the proposed Moore dock to the Joneses' existing dock, and a review of the record before us does not indicate any problems associated with the proximity of the two docks. Also, as noted by the ALC, one of the conditions of the permit is that Moore stake the location in the field and have the location of the walkway and pier approved by OCRM prior to construction. Thus, this requirement will insure the pier and floating dock are located in accordance with the amended permit and in keeping with OCRM's regulations. Finally, one of the additional conditions placed on the amended permit by the ALC is that the location of the pier, as shown by staking in the field prior to construction, may not be closer than twenty feet to the mouth of the tributary, and if the floating dock is closer than twenty feet to the mouth of the tributary, the floating dock would have to be relocated to the upstream side of the pier or in front of the pier.

V. Violation of Reg. 30-12(A)(2)(h)

The Joneses argue the ALC erred in holding the dock alignment did not violate Regulation 30-12(A)(2)(h). This regulation provided in part:

> Developers of subdivisions and multiple family dwellings are encouraged to develop plans which include joint-use docks and/or community docks at the time of required dock master plans. Dock corridors on the approved Dock Master Plan must be shown with bearings or State Plane Coordinates on a recordable subdivision plat for the development, and recorded in the appropriate County Office of Deeds. Subsequent re-surveys

> or modifications to lots shall reference the dock corridors on the recorded subdivision plat. Reference to this DMP must be given in all contracts for lot sales. . . .

23A S.C. Code Ann. Regs. 30-12-(A)(2)(h) (Supp. 2004).

We fail to see how the permit amendment violates this regulation, which pertains to the creation and distribution of a DMP.

The Joneses additionally argue Moore should not be allowed to build a dock outside of the corridor that was set in the original DMP. Although the Joneses acknowledge the DMP has in fact been amended several times, they assert amendment is not warranted in this case.

A DMP is not set in stone and beyond amendment. In his letter approving the original DMP, Curtis Joyner cautioned that the plan was conceptual and was advisory only. The letter, which apparently follows the language of the Coastal Zone Management Plan Document, provided: "This master plan shall be presumed to take precedence over applications inconsistent with this plan unless new information is revealed in an application to address and overcome the concerns identified [in the dock master plan]." In addition, OCRM may consider "an alternate alignment if site specific characteristics warrant or in the case of dock master plans, when appropriate." 23A S.C. Code Ann. Regs. 30-12(A)(2)(e) (Supp. 2004).

Joyner testified that the corridors for the DMP were chosen by the developer, not the agency. The record includes evidence that after Moore received his original permit for the location set forth in the DMP, he experienced difficulty in getting his boat to the permitted area unless it was very close to high tide. He even ran aground on high tide because of a large shell bank. In addition, as noted above, OCRM has changed its policy and has been trying to "get out of the business" of issuing permits to docks in such small creeks because of the resulting disturbance to the highly productive fishery habitats docks cause on small tidal creeks. Accordingly, we find substantial evidence supports the ALC's finding that the agency's use of an alternative alignment in the amended permit was warranted under the facts of this case.

VI. Violation of Reg. 30-11(B)(10)

The Joneses next assert the ALC erred in finding that Regulation 30-11(B)(10) was not violated because the proposed dock affects their use and enjoyment as adjoining land owners. In particular, they argue it would affect Jones' enjoyment because he liked to put his kayak and canoe in the tidal areas and marshland, and allowing the proposed dock would block his navigation and access. They likewise assert the proposed dock would negatively impact their ability to get supplies to their dock as it would prevent their son from navigating his powerboat from their dock on the Wando to the edge of their lot, in order to transport the heavy supplies. Finally, they argue, while they do not have a prescriptive right to an unobstructed view of the marsh, it is a factor to be considered pursuant to this regulation.

Section 48-39-150(A)(10) of the South Carolina Code provides, in determining whether to approve or deny a permit application, OCRM is to base its decision on the individual merits of each application, the policies specified in South Carolina Code sections 48-39-20 and 48-39-30, and specified statutory general considerations, including "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code Ann. § 48-39-150(A)(10) (2008). South Carolina Code of Regulations section 30-11(B) includes the same general considerations as section 48-39-150 of the Code, with Regulation 30-11(B)(10) likewise providing OCRM must consider "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." 23A S.C. Code Ann. Regs. § 30-11(B)(10) (Supp. 2008). "After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the department finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit." S.C. Code Ann. § 48-39-150(B) (2008).

First, as previously noted, there is substantial evidence of record the proposed walkway will not cross any creeks considered navigable. While the Joneses may very well have been able to navigate though the smaller tributaries at higher water levels to their highland near the bridge leading to their island, some of this area has been described at times as a mud flat and as

being "flat as a pancake." While the Joneses may very well have been able to navigate through these tributaries at certain times, this alone does not make the tributaries navigable. In fact, there is testimony that on a spring tide, full moon tide, or even simply a high tide, one could navigate some type of watercraft in the majority of the marsh area, not just the small tributaries. Further, especially in light of the requirement that the proposed walkway be elevated to five feet above mean high water, it clearly will not restrict the Joneses' access by kayak or canoe to the smaller tributaries. Additionally, we agree with the ALC that Justin might also be able to maneuver his power boat under the raised walkway and, even assuming he could not, this limitation is more reflective of a lack of convenience than an inability to use the Joneses' property, as the amended permit will not impact their deep water access from their dock off their island. Finally, at the time of the hearing the Joneses had not even built a home on their property, and there is no evidence whatsoever that the amended permit would in any way obstruct the Joneses' view. As noted by the ALC, the extent to which the proposed use could affect the value and enjoyment of the adjacent landowners is but one of many factors to consider. We find substantial evidence of record supports the ALC's finding that the impact on the Joneses' use and enjoyment of their property is outweighed by the justification for granting the amended permit.

VII. Due Process

The Joneses also contend the ALC erred in ruling their due process rights were not violated in this matter. They complain that notice of the initial denial of the amended permit was sent to them, and two months later a letter was sent only to Moore's agent indicating the denial was a mistake and the permit was issued shortly thereafter. They argue OCRM had no authority to change its publicly noticed decision to deny the amendment with "no re-application, no notice and no procedure other than simply issuing the approval." The Joneses assert this lack of notice constitutes a violation of due process. We disagree.

In considering a similar issue in a dock permitting case, this court stated as follows:

> "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). Procedural due process requirements are not technical, and no particular form of procedure is necessary. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. Id. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. S.C. Dep't. of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). To prevail on a claim of denial of due process, there must be a showing of substantial prejudice. Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984).

Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 68-69, 663 S.E.2d 497, 503-04 (Ct. App. 2008). In Olson, we found no violation of the adjoining landowners' due process rights where they failed to receive direct notice of a dock permit amendment application considered by OCRM. Specifically, we noted the adjoining landowners appealed the agency's decision to issue the amended permit one month after it was issued, a full hearing was held before the ALC where the adjoining land owners challenged the permit, and the landowners participated extensively in the hearing, eliciting testimony, presenting evidence, and confronting witnesses. Id. As

with the adjoining landowners in the Olson case, the Joneses have likewise participated extensively in the hearing, thus receiving an opportunity to be heard at a meaningful time and in a meaningful manner. Furthermore, as in Olson, no prejudice resulted to the Joneses as they received sufficient notice of the actions of OCRM such that they were able to obtain a hearing before the ALC providing them the opportunities required by due process. Id. at 69, 663 S.E.2d at 504. Accordingly, the Joneses' due process argument also fails.

VIII. Appeal of Dock Master Plan decision of March 9, 2004

The Joneses next assert the ALC erred in finding the DMP was not violated. In making this argument, they do not explain how the ALC erred, but simply summarily contend there is no justifiable reason to move the corridor previously approved in the DMP.[3] We find the Joneses have abandoned this issue on appeal as their argument is conclusory and unsupported by authority. See Bennett v. Investors Title Ins. Co., 370 S.C. 578, 579, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting an issue is abandoned on appeal when the appellant fails to cite any supporting authority for his position and makes only conclusory arguments); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (deeming an issue abandoned because the appellant failed to provide pertinent argument or supporting authority).

IX. Finality of OCRM decision

The Joneses argue that when OCRM issued a letter in September of 2004 stating Moore's amendment request was denied, this operated as a final

[3] The Joneses spend the majority of their short argument on this issue maintaining this is a final agency decision which is contestable based upon a letter from OCRM dated March 9, 2004 regarding a previously requested revision of the DMP as related to lot 38. The record clearly demonstrates, however, that the ALC sustained Moore's hearsay objection to the document and admitted it solely as "evidence of what is in the Department's file." Accordingly, this letter is not proper evidence before this court for consideration in the manner the Joneses propose.

agency decision. They assert that when Moore failed to appeal the decision to the ALC within thirty days as provided by Rule 11, SCRALC, this decision became final and OCRM was without authority to reverse its decision.

Curtis Joyner testified that when he was considering Moore's permit amendment, he was undecided on what he was going to do so he drafted both a denial letter and an amendment letter. Moore's attorney contacted him and asked for him to refrain from making a decision and Joyner agreed to a delay. The denial letter, however, was mailed out inadvertently. OCRM's Office of General Counsel sent a letter to Moore's attorney explaining that although Joyner intended to issue the permit to Moore, a notice of denial letter was mistakenly mailed to the adjacent property owners. The General Counsel stated, "This denial letter was a draft and not intended as the agency's final administrative decision in this case."

It is evident from the record that the denial letter sent to the Joneses in September of 2004 was merely a draft and never was intended to constitute a final agency decision. Furthermore, as the ALC found, an agency may reconsider its decision when there is justification and good cause, which includes mistake. Bennett v. City of Clemson, 293 S.C. 64, 66-67, 358 S.E.2d 707, 708-09 (1987). Thus, under Bennett, OCRM may reconsider a decision that was based on a mistake. Accordingly, we hold OCRM acted within its authority in issuing the permit amendment approval in December 2004.

X. Circuit Court decision

Finally, the Joneses contend the circuit court erred "in finding there was no error of law in which to reverse the decision of [the ALC]," and that the arguments made on appeal demonstrate numerous errors.

As noted above, we believe there is substantial evidence of record to support the findings of the ALC and discern no errors of law committed by the ALC.

CONCLUSION

Based on the foregoing, the decision of the ALC is

AFFIRMED.

PIEPER, J., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Marion Wayne Oglesby, Appellant.

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

Opinion No. 4584
Heard June 10, 2009 – Filed July 7, 2009

AFFIRMED

Hemphill P. Pride, II, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, all, of Columbia; and Solicitor Kevin S. Brackett, of York, for Respondent.

WILLIAMS, J.: In this criminal case, Marion Wayne Oglesby argues the trial court erred in refusing to suppress evidence. We affirm.

FACTS

A confidential informant (the CI) met with law enforcement officers in Clover, South Carolina for the purpose of making a controlled purchase of crack cocaine from Oglesby. The CI called Oglesby to purchase fifty dollars worth of crack cocaine. An electronic listening device (the wire) was inserted in the lining of the CI's purse. The CI and Oglesby met at a location within half a mile of a community park. The CI gave Oglesby fifty dollars, and Oglesby gave the CI 0.41 grams of crack cocaine. Oglesby was charged with distribution of crack cocaine and distribution of crack cocaine within the proximity of a public park or playground.

During the trial, the State introduced the recording recovered from the wire. Oglesby objected to the entire recording, arguing segments of the recording were inaudible and the audible portions could be taken out of context. The trial court admitted the recording into evidence and allowed the jury to hear it. Oglesby was found guilty of both charges. The trial court sentenced Oglesby to twelve years imprisonment for each charge, the sentences to run concurrent. This appeal followed.

STANDARD OF REVIEW

Generally, the conduct of a criminal trial is left largely to the sound discretion of the trial court, and this court will not interfere unless it clearly appears the rights of the complaining party were abused or prejudiced in some way. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). As such, an appellate court sits to review errors of law only, and we are bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

Oglesby contends the trial court committed reversible error in denying his motion to suppress the recording in violation of his right to completeness

based on Rule 106, SCRE. Specifically, Oglesby argues the whole recording, including the audible and inaudible portions, should have been excluded. We disagree.

Initially, the State argues Oglesby's argument is not preserved for review. We disagree. During the pretrial hearing, Oglesby asked the trial court to exclude the recording because the audible portions could be taken out of context due to the fact the other portions of the recording were inaudible. Rule 106, SCRE, states, "When a . . . recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other . . . recorded statement which ought in fairness to be considered contemporaneously with it." The South Carolina Supreme Court has explained that Rule 106 is based on the rule of completeness and attempts to avoid the unfairness inherent in the misleading impression created by taking matters out of context. State v. Cabrera-Pena, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004). As such, Oglesby raised this ground to the trial court even though he failed to specifically cite to Rule 106, SCRE. See Pryor v. Nw. Apartments, Ltd., 321 S.C. 524, 528 n.2, 469 S.E.2d 630, 633 n.2 (Ct. App. 1996) (finding an issue preserved when the trial court implicitly ruled on and rejected the respondent's argument). The argument was raised to and ruled upon by the trial court, and we consider it preserved for review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."). Having determined the issue is properly before us, we now turn to the merits of Oglesby's argument.

The admission of evidence is within the sound discretion of the trial court. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. Id. Additionally, the admission of improper evidence is deemed harmless if it is merely cumulative to other evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

When interpreting a court rule, an appellate court applies the same rules of construction used in interpreting statutes. State v. Brown, 344 S.C. 302, 307, 543 S.E.2d 568, 570 (Ct. App. 2001). Thus, the language of a rule must be given its plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. Id.

As it relates to this case, Rule 106, SCRE, stands for the proposition that when a part of a recorded statement is introduced, the opposing party may require the admission of other portions to ensure the partial statements are not taken out of context. Cabrera-Pena, 361 S.C. at 379, 605 S.E.2d at 525. However, only that portion of the remainder of any statement which explains or clarifies the previously admitted portion should be allowed into evidence. Id. Rule 106, SCRE, seeks to avoid the unfairness inherent in the misleading impression created by taking a conversation out of context. Id.

In the present case, pursuant to Rule 106, SCRE, Oglesby was entitled to introduce the remainder of the recording so long as it was relevant to the portions of the recording the State introduced. Oglesby was not precluded from explaining the context of the recording. Rather, Oglesby argued the entire recording should be suppressed because of certain inaudible portions. According to Oglesby's reasoning, any time a portion of a recording is inaudible due to any interference, the entire recording should be excluded despite the quality of the remaining portion of the recording. We do not believe this was the purpose of Rule 106, SCRE. See U.S. v. Stone, 960 F.2d 426, 436 (5th Cir. 1992) (holding poor quality and partial unintelligibility do not render recordings from an electronic listening device between an undercover government agent and a defendant inadmissible unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy).[1]

[1] Two other issues were raised by Oglesby in his brief but were abandoned at oral arguments; thus, we do not address them. See Wright v. Strickland, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct. App. 2001) (not addressing an issue which was abandoned at oral arguments).

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Deborah W. Spence,
Individually, and on behalf of the
Estate of Floyd W. Spence, Appellant,

v.

Kenneth B. Wingate, Sweeny
Wingate & Barrow, P.A., Respondents.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4585
Submitted June 1, 2009 – Filed July 9, 2009

REVERSED AND REMANDED

A. Camden Lewis and Brady R. Thomas, both of Columbia, for Appellant.

Pope D. Johnson, III, of Columbia, for Respondents.

HEARN, C.J.: Deborah Spence (Wife) appeals from the circuit court's grant of partial summary judgment in favor of Kenneth Wingate, finding he did not breach his fiduciary duty to Wife regarding her husband's life insurance policy. We reverse.

FACTS[1]

On August 13, 2001, respondents Kenneth Wingate and Sweeny Wingate & Barrow, P.A. (collectively Wingate) commenced legal representation of Wife. The purpose of the representation was to negotiate an agreement between Wife and the four sons of her husband, Congressman Floyd W. Spence, concerning the division of Spence's probate estate. Wife and Spence's sons entered into an agreement on August 15, 2001. During the course of Wingate's representation of Wife, she consulted with Wingate concerning her husband's Federal Group Life Insurance Policy (the Policy). On August 16, 2001, Spence died. Either in mid-August or early September, Wingate became the attorney for Spence's estate.

Spence had named each of his four sons and Wife as equal beneficiaries under the Policy in 1988. However, prior to his death, Spence attempted to change the named beneficiaries to Wife only. After Spence died, the Members Services Office of the United States House of Representatives determined the benefits of the Policy should be paid equally to Wife and the four sons, and payment was made accordingly.

Wife brought an action against Wingate alleging, among other things, that he breached his fiduciary duty to her by failing to advise her to obtain another attorney, or in the alternative, by failing to file a declaratory judgment action on her behalf concerning the Policy. The circuit court granted Wingate's motion for summary judgment on the issue of whether Wingate owed a fiduciary duty to Wife regarding the Policy. The court based its ruling on the fact that Wingate, as attorney for the estate, did not owe a fiduciary duty to Wife as a beneficiary of the estate. Wife appeals this determination.

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[1] Based on our standard of review, the following facts are recited in a light most favorable to Wife. See Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001) (explaining evidence must be viewed in the light most favorable to the non-moving party when ruling on a motion for summary judgment).

STANDARD OF REVIEW

In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Nexsen v. Haddock, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct. App. 2002). Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c).

LAW/ANALYSIS

Wife argues a genuine issue of material fact exists as to whether Wingate breached a fiduciary duty owed to her based on Wingate's representation of Wife in a prior related matter.[2] We agree.

"A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." Moore v. Moore, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004). "An attorney/client relationship is by nature a fiduciary one." Hotz v. Minyard, 304 S.C. 225, 230, 403 S.E.2d 634, 637 (1991). "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." Smith v. Hastie, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005).

It is undisputed that Wingate represented Wife while negotiating an agreement between her and Spence's sons regarding the probate estate. During that representation, Wife alleges she informed Wingate of her status as sole beneficiary under the Policy. Only days after negotiating on behalf of

[2] This court initially held Wife's contention unpreserved for review, but was reversed upon grant of certiorari by the supreme court. See Spence v. Wingate, 378 S.C. 486, 663 S.E.2d 70 (Ct. App. 2008), reversed, 381 S.C. 487, 674 S.E.2d 169 (2009). Therefore, we will now address the merits of Wife's arguments.

Wife, Wingate assumed the responsibilities of attorney for Spence's estate; however, Wife alleges Wingate never severed their attorney-client relationship. In fact, Wife claims that when Wingate informed her he was going to be the attorney for her husband's estate, he told her that she no longer needed an attorney. Moreover, at a subsequent family meeting, Wife maintains Wingate suggested she give Spence's sons the entire amount due under the Policy, despite his knowledge that Spence had designated her as the sole beneficiary. Upon hearing this suggestion, Wife alleges she asked Wingate "to put his hat back on as [her] attorney and help [her]." According to Wife, Wingate refused to assist her.

Accepting Wife's allegations as true, as we must when reviewing an order granting summary judgment, Wingate, as Wife's former attorney, owed her certain fiduciary duties, and he arguably breached those duties to the detriment of his former client. See Hotz, 304 S.C. at 230, 403 S.E.2d at 637. These duties to a former client on a related matter are separate and distinct from any duties arising from Wingate's representation of the estate; therefore, the circuit court erred in finding section 62-1-109 of the South Carolina Code (Supp. 2007) absolved Wingate of any duty he owed to Wife. See Rule 1.9(a), RPC, Rule 407, SCACR ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."). While a jury may ultimately find Wingate committed no wrongdoing, the circuit court erred in making that determination as a matter of law. As a result, we find Wife's allegations sufficient to survive summary judgment.[3] Accordingly, the order of the circuit court is

[3] We note Wife's allegations also support damages caused by Wingate's breach of fiduciary duty. Specifically, Wife claims that as a result of Wingate's breach, the insurance benefits were divided five ways, among Wife and her husband's four sons, instead of being paid solely to her. Wife further claims that had Wingate not breached this fiduciary duty, and either helped her file a declaratory judgment or advised her to hire another attorney, she would not have suffered these damages.

REVERSED and REMANDED.

THOMAS, J., and KONDUROS, J., concur.