OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

October 1, 2001

ADVANCE SHEET NO. 35

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gary P. Tench, as Conservator for Jason Shawn Tench, and Individually, Appellant,

v.

The South Carolina Department of Education, Respondent.

Appeal From Greenville County
Wyatt T. Saunders, Jr., Circuit Court Judge
James R. Barber, III, Circuit Court Judge

Opinion No. 25364
Heard May 23, 2001 - Filed October 1, 2001

REVERSED

Douglas A. Churdar, of Greenville, for appellant.

Darren S. Haley, of The Code Law Firm, of

Greenville, for respondent.

CHIEF JUSTICE TOAL: This appeal is from a trial court's Order granting relief under Rule 60(b)(1) and Rule 60(b)(5), SCRCP, and an Order granting summary judgment. The trial court found a father could not recover under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to 15-78-200 (Supp. 2000) (the "Act"), for medical expenses resulting from injuries to his son, who was the legal age of majority at the time of the accident.

FACTUAL/PROCEDURAL BACKGROUND

On October 6, 1994, eighteen year old Jason Tench ("Tench") was involved in an automobile accident with a school bus operated by the South Carolina Department of Education ("Department"). The school bus pulled in front of Tench's car, and he could not avoid driving underneath it. As a result, Tench suffered an almost fatal head injury, which left him with severe brain damage.

Tench was hospitalized and remained in a coma or a partial coma for six months. He currently lives at home where he needs constant and total care because he cannot take care of his basic needs. He cannot talk, eat, use the bathroom, dress, walk, or stand by himself. Tench spends his time either in bed or occasionally in a wheelchair. His condition is permanent, and he will never be able to care for himself. Without the care of his parents, Tench would have to live in a nursing home.

At the time of the accident, Tench was eighteen years old and had graduated from high school just four months earlier. He was attending Greenville Technical College and working part-time in his father's grocery store. He was dependent upon and supported by his parents. His father paid his college tuition and did not require Tench to pay rent.

Gary Tench ("Appellant") sued the Department as Tench's conservator,

asserting a claim on behalf of his son for personal injuries and loss of enjoyment of life. Appellant also asserted an individual claim for medical bills and other expenses he incurred and continues to incur as a result of Tench's injuries.[1] The Department did not contest liability and stipulated the medical bills for Appellant's treatment exceeded $250,000. The Department tendered $250,000, the statutory maximum under the Act at that time, for Tench's claim. What then followed was a procedural nightmare.

On July 9, 1996, the Department filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP on the grounds of failure to state a viable cause of action. The Department contended Appellant was not entitled to make an individual claim under the Act because Tench was eighteen at the time of the accident and emancipated as a matter of law. By stipulation, the parties agreed Appellant's claim would be resolved based upon the trial court's resolution of the Motion to Dismiss.

On September 20, 1996, the trial judge issued an Order which approved the $250,000 settlement for Tench's claims and denied the Department's Motion to Dismiss Appellant's claim. The trial judge ruled Appellant was entitled to make a claim under the Act for the recovery of medical expenses and loss of services resulting from injuries to Tench. The trial judge also held "the parties . . . argued substantially outside the pleadings and have agreed that this Order will dispose of the case as far as the Circuit Court is concerned . . . . The Court rules as if this is a Summary Judgment Motion." The effect of the circuit court's order was to grant summary judgment to Appellant, and to enter a judgment on his behalf in the amount of $250,000.

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[1]On October 9, 1996, Tench's mother filed a lawsuit pleading a negligence claim for her son, and a negligence claim for the medical expenses she was responsible for as Tench's mother. This lawsuit was dismissed by stipulation without prejudice.

The Department filed a "Motion for Reconsideration"[2] pursuant to Rule 59(e), SCRCP. On December 3, 1996, the Motion was heard and denied. Subsequently, on December 23, 1996, the Department filed its Notice of Intent to Appeal the September 20, 1996, Order.

On November 20, 1997, after the case was fully briefed, the Court of Appeals dismissed the appeal on the ground the September 20, 1996, Order was not appealable. Apparently, the Court of Appeals considered the Order to be merely the denial of a Motion to Dismiss, which is not appealable under *Woodward v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995). The Court of Appeals overlooked the fact the Order also rendered summary judgment for Appellant and, thus, was appealable. The Department did not file a Petition for Rehearing or a Petition for a Writ of Certiorari. The remittitur then went down and the case was again pending in the trial court for enforcement of judgment previously entered.

On March 10, 1998, pursuant to Rule 60(b)(4), SCRCP, the Department filed a Motion for Relief from the September 20, 1996, Order on the ground the judgment was void. The Department also filed another Motion for Relief under Rule 60(b), SCRCP, this time seeking relief under Rule 60(b)(1) and (5). On June 15, 1998, the trial court denied all the Rule 60(b) Motions.

Upon denial of its Rule 60(b) Motions, the Department filed a "Motion to Reconsider" pursuant to Rule 59(e), SCRCP on June 24, 1998. On September 16, 1998, the trial court granted the Motion to Reconsider and set aside Appellant's original judgment based on Rule 60(b)(1) and Rule 60(b)(5), SCRCP. Appellant then filed a Motion for Reconsideration on the ground Rule 60(b) did not provide a basis for relief from the September 20, 1996, Order. On December 8, 1998, the trial court denied Appellant's Motion for Reconsideration. The trial court instructed the parties to file opposing Motions for Summary Judgment. The Department's Motion for Summary Judgment was granted. Appellant appealed the Summary Judgment Order and the September

[2]This Motion is actually a Motion to Alter or Amend Judgment.

8, 1998, Order. The following issues are before this Court on appeal:

I. Should the trial court's Orders voiding Appellant's judgment and granting summary judgment in favor of the Department be reversed where the trial court had no basis under Rule 60, SCRCP, to provide the Department relief from the trial court's September 20, 1996, Order?

II. Does Appellant have an independent cause of action under the Act for the recovery of medical expenses and loss of services resulting from injuries to his eighteen year old son?

LAW/ANALYSIS

Appellant argues that the trial court's Order vacating the September 20, 1996, Order should be reversed. We agree.

The Court of Appeals erroneously construed the 1996 orders and dismissed the appeal because the denial of a Rule 12(b)(6), SCRCP, motion is not immediately appealable. *See Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995). Although the Department originally made a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, the trial court ruled as if the parties had made cross motions for summary judgment because the parties "argued substantially outside the pleadings and have agreed [the trial court's Order] will dispose of the case as far as the Circuit Court is concerned." The Department should have filed a Petition for Rehearing after the Court of Appeals erroneously found the Department was appealing from an Order denying a Motion to Dismiss and not from an Order granting Summary Judgment to Appellant.

Instead of pursuing its appellate rights, the Department sought the exact same relief by way of Rule 60(b), and the trial court ultimately granted the Department that relief under Rule 60(b)(1) and Rule 60(b)(5). Appellant contends this was error, and we agree. The 60(b)(1) motion was untimely since

it was filed in April 1998, well more than a year after the 1996 orders were filed. Rule 60(b), SCRCP (motion pursuant to Rule 60(b)(1) must be filed "not more than one year after the judgment, order or proceeding was entered or taken"). Further, we hold the circuit court erred in granting relief under Rule 60(b)(5). A party may not invoke this rule where it could have pursued the issue on appeal. *See Smith Companies of Greenville v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993) (finding relief from judgment is not a substitute for appeal from final judgment, particularly when it is clear party seeking relief could have litigated at trial and on appeal claims he now makes by motion). When the Department failed to petition the Court of Appeals for rehearing, it effectively abandoned its right to relitigate under Rule 60(b)(5) the issues raised in that appeal.

Because we decide the circuit court erred in granting the Department relief under Rule 60(b), we decline to address whether Appellant had an independent cause of action against the Department for the recovery of medical expenses and loss of services of his adult son.

CONCLUSION

We **REVERSE** the trial court's Order vacating the September 20, 1996, Order and reinstate the $250,000 judgment awarded Appellant.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Edward M. Clarkson, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 25365
Submitted September 18, 2001 - Filed October 1, 2001

REVERSED

Assistant Appellate Defender Robert M. Dudek, of South Carolina Office of Appellate Defense, of Columbia, for respondent.

Attorney General Charles Molony Condon, Chief Deputy Attorney General John W. McIntosh,

Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Thomas E. Pope, of York, for petitioner.

PER CURIAM: Respondent was indicted for assault with intent to commit criminal sexual conduct against a minor in the second degree (ACSC) and pled guilty to assault and battery of a high and aggravated nature (ABHAN). The Court of Appeals vacated his guilty plea. State v. Clarkson, 337 S.C. 518, 523 S.E.2d 817 (Ct. App. 1999). The State has filed a petition for a writ of certiorari seeking review of the Court of Appeals' opinion. We grant the petition for a writ of certiorari, dispense with further briefing and reverse the decision of the Court of Appeals.

Relying on its opinion in State v. Elliott, 335 S.C. 512, 517 S.E.2d 713 (Ct. App. 1999), the Court of Appeals determined respondent's guilty plea should be vacated because ABHAN is not a lesser-included offense of ACSC. This Court recently reversed the decision of the Court of Appeals in Elliott and held that ABHAN is a lesser-included offense of ACSC. State v. Elliott, Op. No. 25356 (S.C. Sup. Ct. filed September 4, 2001)(Shearouse Adv. Sh. No. 32 at 55). Accordingly, the Court of Appeals erred in vacating respondent's guilty plea.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Greenville County
Magistrate Ulysses J.
Thompson, Respondent.

Opinion No. 25366
Submitted September 11, 2001 - Filed October 1, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Assistant Attorney General Tracey C. Green, both of Columbia, for the Office of Disciplinary Counsel.

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

PER CURIAM: In this judicial disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, Rules of Judicial Disciplinary Enforcement (RJDE), Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. Respondent has also resigned his position and has agreed never to apply for a judicial office in South Carolina without the express written permission of the Supreme Court of South

Carolina. We accept the agreement. The facts as admitted in the agreement are as follows.

Facts

Respondent purchased items from a distraint sale conducted by his office. The items were seized from tenants to satisfy rental debts. Respondent purchased the items by personally bidding on some and by asking the property owner to bid on others for him.

Respondent also personally served documents on parties to actions pending in his court and falsified the affidavit of service on those documents. On one occasion, respondent personally served a summons and complaint on a defendant. Respondent also personally served five warrants of ejectment. In each of these cases, respondent indicated on the attestation of service that the documents were served by his constable.

Respondent also failed to respond to several circuit court orders requiring him to file returns in appeals from his court. Although these orders were issued as early as August 1999, respondent failed to take any action on these matters before January 2001.

Respondent also failed to monitor his official accounts, review his official bank statements, or supervise his clerks to ensure that they were properly executing their financial and accounting duties. As a result, his office is unable to account for approximately $9,500 in funds for which he is responsible.

Respondent also misplaced documents in a matter pending before him, causing an unreasonable delay in the disposition of the case.

Law

By his conduct, respondent has violated the following provisions

of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (failing to uphold the integrity and independence of the judiciary); Canon 2 (failing to avoid impropriety and the appearance of impropriety in all his activities); and Canon 3 (failing to perform the duties of office impartially and diligently).

Respondent has also violated the following provisions of the RJDE, Rule 502, SCACR: Rule 7(a)(1) (violating the Code of Judicial Conduct); Rule 7(a)(4) (failing to perform judicial duties or persistently performing judicial duties in an incompetent or neglectful manner); and Rule 7(a)(6) (failing to issue orders, decrees, and opinions in a timely manner).

Conclusion

We accept the agreement for a public reprimand because respondent is no longer a magistrate and because he has agreed not to seek another judicial position in South Carolina unless authorized to do so by this Court. Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND

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

The Supreme Court of South Carolina

In the Matter of Kenneth L. Mitchum, Respondent

O R D E R

Respondent was suspended on December 14, 1998, for a period of ninety days, retroactive to October 12, 1998. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY: s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

September 24, 2001

The South Carolina Court of Appeals

The State, Appellant

v.

Florence Robinson Evans, Respondent.

The Honorable Henry F. Floyd
Chesterfield County
Trial Court Case No. 1994-GS-13-380

ORDER

An opinion in this case was originally filed on June 12, 2000. Opinion No. 3187, appearing at 341 S.C. 219, 534 S.E.2d 10. On August 30, 2000, the Court of Appeals filed its order granting the petition for rehearing. Following the rehearing, the Court filed Opinion No. 3276, appearing at 343 S.C. 685, 541 S.E.2d 852. The petition to rehear this decision was denied on March 6, 2001.

On April 6, 2001, the Court issued an order clarifying that Opinion No. 3187 was withdrawn and that Opinion No. 3276 was substituted. The April 6, 2001, order was not published. Hence, this order recapitulates the decisional history and is to be published with the decisions of the Court of Appeals.

S/Kenneth A. Richstad
Clerk

Columbia, South Carolina
September 19, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Farm Bureau Mutual Insurance Company,
. . . . . Appellant/Respondent,

v.

S.E.C.U.R.E. Underwriters risk Retention Group,
. . . . . Respondent/Appellant

and Ralph Garrison, Mary Garrison, Garrison Pest Control, Inc., Jack C. Purvis, Susan Purvis, and Jordan Purvis, a minor under the age of fourteen (14) years,
. . . . . Respondents.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

ORDER WITHDRAWING AND SUBSTITUTING OPINION

PER CURIAM: Pursuant to both parties' Petition for Rehearing, and this Court's granting of said petitions, it is ordered that the opinion heretofore filed, Opinion No. 3263, filed November 27, 2000, be withdrawn and the attached Opinion be substituted therefore.

IT IS SO ORDERED.

Jasper M. Cureton, J.

C. Tolbert Goolsby, Jr., J.

M. D. Shuler, J.

Columbia, South Carolina

September 17, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Farm Bureau Mutual Insurance Company,
. . . . . Appellant/Respondent,

v.

S.E.C.U.R.E. Underwriters Risk Retention Group,
. . . . . Respondent/Appellant

and Ralph Garrison, Mary Garrison, Garrison Pest Control, Inc., Jack C. Purvis, Susan Purvis, and Jordan Purvis, a minor under the age of fourteen (14) years,
. . . . . Respondents.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 3263
Heard September 11, 2000 - Filed November 27, 2000
Refiled September 17, 2001

AFFIRMED

Louis D. Nettles, of Nettles, McBride & Hoffmeyer, of Florence, for appellant/respondent.

Carlton B. Bagby, of Columbia, for respondent/appellant.

CURETON, J.: In this declaratory judgment action, South Carolina Farm Bureau (Farm Bureau) and S.E.C.U.R.E. Underwriters Risk Retention Group (SECURE) sought to determine insurance coverage for injuries sustained by Jordan Purvis, a minor, resulting from a dog bite she sustained while on the premises of Garrison Pest Control, Incorporated. Jordan and her parents brought an action for damages against Ralph Garrison, Mary Garrison, and Garrison Pest Control, Inc. Farm Bureau and SECURE sought a declaration of the extent of their coverages. The circuit court determined both carriers had a duty to defend and indemnify the parties in the underlying personal injury action. The court also held Farm Bureau's coverage was primary and SECURE's coverage was excess. Farm Bureau appealed and SECURE cross-appealed the order. We affirm.

FACTS / PROCEDURAL HISTORY

Farm Bureau issued Ralph and Mary Garrison a homeowner's insurance policy for their home in Florence, South Carolina. The Farm Bureau policy provided personal liability coverage subject to certain provisions and exclusions. SECURE provided insurance coverage to Garrison Pest Control through a commercial general liability policy. Garrison Pest Control is owned by the Garrisons and Scott Newell.

On December 12, 1994, Jordan Purvis, a four-year-old girl, was bitten by the Garrisons' dog while lawfully on the business premises of Garrison Pest Control. The parties stipulated the dog was owned and kept by the Garrisons as their family pet, was not kept for security purposes, as a mascot, or in connection with the pest control business, and that Mary Garrison frequently brought the dog to Garrison Pest Control from the Garrison home when she did not have an alternative place to leave the dog when she came to the office.[1] The dog did not serve any function associated with the business of general pest control or extermination.

Jack and Susan Purvis are Jordan's parents. Jack, Susan, and Jordan made claims against Ralph Garrison, Mary Garrison, and Garrison Pest Control for

[1] Stipulation 3 of the Stipulation to Facts and Documents.

injuries Jordan sustained as a result of the dog bite. Insurance coverage was sought from both Farm Bureau and SECURE. Both carriers provided legal defenses under reservations of rights.

Farm Bureau filed this declaratory judgment action seeking a determination as to whether it had a duty to defend and indemnify its insureds, Ralph and Mary Garrison. SECURE counterclaimed and cross-claimed for similar relief. All parties stipulated to the relevant facts and the admissibility of certain documents, which are part of the record.

After a hearing, the circuit court found both Farm Bureau and SECURE had duties to defend and, if necessary, to indemnify the parties in the underlying personal injury action. The court further held Farm Bureau's coverage was primary and SECURE's coverage was excess. These appeals follow.

LAW / ANALYSIS

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). A suit to determine coverage under an insurance policy is an action at law. Therefore, this Court's jurisdiction "is limited to correcting errors of law and factual findings will not be disturbed unless unsupported by any evidence." State Farm Mut. Auto. Ins. Co. v. James, 337 S.C. 86, 93, 522 S.E.2d 345, 348-49 (Ct. App. 1999); see also Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

I. Duty to Defend and Indemnify

Both Farm Bureau and SECURE appeal the order of the circuit court finding they have a duty to defend and, if necessary, to indemnify the parties in the underlying personal injury action. Both carriers contend the other is solely responsible for the defense and indemnification of the parties. We disagree.

A. Farm Bureau's Appeal

Farm Bureau argues the circuit court erred in requiring it to defend and indemnify the Garrisons because (1) the incident occurred on premises which were owned by the Garrisons, but not described in Farm Bureau's policy, and (2) the incident arose from a business pursuit. We disagree.

Under the Garrisons' homeowner's policy, Farm Bureau agreed that:

> If claim is made or suit is brought against an insured for damages because of bodily injury . . . we will: 1. Pay up to our limits of liability for the damages which the insured is legally liable; and 2. Provide for a defense at our expense by counsel of our choice, even if the suit is groundless. . . .

Farm Bureau also agreed to "pay the necessary medical expenses that are incurred within three years from the date of an accident causing bodily injury." The policy applied to a person off the insured location if the bodily injury "[was] caused by an animal owned by or in the care of the insured." The policy excluded coverage where there was "bodily injury or property damage . . . arising out of business pursuits of an insured . . . [or] arising out of a premises . . . owned by the insured . . . that is not an insured location." Relying on these exclusions, Farm Bureau maintains the homeowner's policy excludes coverage for the dog bite in this case.

"[A]n insurer must show a causal connection between a loss and an exclusion before the exclusion will limit coverage under the policy." South Carolina Ins. Guar. Ass'n v. Broach, 291 S.C. 349, 351, 353 S.E.2d 450, 451 (1987). At the beginning of both policy exclusions relied on by Farm Bureau are the words "arising out of." In McPherson v. Michigan Mutual Insurance Co., 310 S.C. 316, 320, 426 S.E.2d 770, 771 (1993), our supreme court held that "for the purpose of construing an exclusionary clause in a general liability policy, 'arising out of' should be narrowly construed as 'caused by.'" Furthermore, "[w]here the words of a policy are capable of two reasonable

interpretations, that construction will be adopted which is most favorable to the insured." Id.

No South Carolina case specifically addresses whether a homeowner's policy provides coverage for a dog bite that occurs on a business premise away from the home. However, a Missouri court addressed this issue in Lititz Mutual Insurance Co. v. Branch, 561 S.W.2d 371 (Mo. App. 1977). In Lititz, a dog was taken from the residence to the business premises of a dairy where it was tethered. Subsequently, the dog bit a child. The homeowner's policy insurer filed a declaratory judgment action alleging it did not have a duty to defend and indemnify the insured. The policy exclusions in Lititz were very similar to those in this case. That policy excluded coverage for bodily injury or property damage arising out of business pursuits of any insured and injury or damage arising out of any premises, other than the insured premises, owned, rented or controlled by any insured. The Lititz court reasoned the dog bite was the result of personal tortious conduct and was not causally related to the business premises. The court stated:

> Liability for injuries caused by an animal owned by an insured arises from the insured's personal tortious conduct in harboring a vicious animal, not from any condition of the premises upon which the animal may be located.

Id. at 374.

We find this reasoning persuasive. Utilizing the definition of "arising out of" from McPherson, and the analysis from Lititz, we conclude the fact that the dog bite occurred on the business premises of Garrison Pest Control does not necessarily mean that it was "caused by" the business pursuits or business premises. Rather, the dog bite may have been caused by the alleged tortious conduct of bringing the family pet to the business premises.

We agree with the circuit court's conclusion that Farm Bureau's policy exclusions are thus inapplicable to the injury sustained by Jordan Purvis and

affirm the circuit court's determination that Farm Bureau has a duty to defend and, if necessary, indemnify the Garrisons in the underlying action.

B. SECURE's Appeal

SECURE contends that the circuit court erred in finding it has a duty to defend and, if necessary, indemnify the parties in the underlying action. We disagree.

1. Incident's Relationship to An "Insured" Under the Policy's Terms

SECURE argues the claims asserted in the underlying action do not relate to the duties of Ralph or Mary Garrison as officers or employees of Garrison Pest Control. SECURE maintains its policy does not provide coverage for this incident because the dog was personally owned by the Garrisons and their potential liability for the failure to supervise the dog was personal to them and did not originate with any risk connected with their employment. SECURE further argues Mary Garrison is not an insured under the policy because she was not an officer, director, or employee acting within the scope of her official duties when this incident occurred.

SECURE overlooks, however, the Garrisons' roles as owners of the business, who were actively engaged in operating the business. "One who controls the use of property has a duty of care not to harm others by its use." Nesbitt v. Lewis, 335 S.C. 441, 446, 517 S.E.2d 11, 14 (Ct. App. 1999) (quoting Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)). "The responsibility for an injury negligently caused by a defect or dangerous condition or activity in or on real property usually attaches to the owner or possessor, by virtue of his control thereof . . . ." 62 Am. Jur. 2d Premises Liability § 4, at 351 (1990).

Along with her husband, Mary Garrison owned sixty percent of the stock in Garrison Pest Control. Therefore, the Garrisons effectively controlled what took place on the premises of Garrison Pest Control. Garrison Pest Control, the named insured on the SECURE policy, through its owners and officers, allowed

the Garrison family pet on the business premises. Garrison Pest Control had a duty to use reasonable care to protect the public from any dangerous condition or activity that the keeping of the pet created on the premises. Therefore, SECURE had a duty to defend Garrison Pest Control, its named insured, because of its potential liability for the dog bite.

This holding is not inconsistent with our reasoning that Farm Bureau's policy does not exclude coverage because the dog bite was not caused by Garrison Pest Control's premises. As previously stated, "arising out of" is narrowly construed in policy exclusions to mean "caused by" the premises. SECURE's policy provides coverage for "'bodily injury'...*caused by an occurrence that takes place in the coverage territory* and *during the coverage period* ." (Emphasis added). The policy broadly defines the coverage territory as the United States of America (including its possessions and territories), Puerto Rico, and Canada and also includes international waters and air space. Therefore, the literal language of SECURE's policy covers all injuries sustained on the business premises unless the injury meets certain policy exclusions, none of which are applicable in this case.

Furthermore, a person may recover against a property owner for the personal tortious conduct of an employee or guest on the premises if the owner knows or has reason to know such conduct was occurring. See Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984); Burns v. South Carolina Comm'n for the Blind, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994). In such instances, the injury is not caused by the premises, strictly speaking, but damages are recoverable because the incident occurred on the premises and the property owner failed to adequately warn others or take precautions to avoid the injury. Id.

2. Premises Liability As A Covered Operation or Hazard Under the Policy

Additionally, SECURE argues its policy does not insure the duty to keep the business of Garrison Pest Control safe for the visiting public. SECURE bases this argument on the provision of the policy which states as follows:

> The coverage afforded by this policy pertains only to those operations identified on the signed S.E.C.U.R.E. application and in the Description of Hazards or Classifications pages (SEC-140) of this policy.

SECURE maintains the Description of Hazards and Basis of Premium included various potential hazards that relate only to the business of extermination. SECURE further asserts the presence of Jordan Purvis and the dog were not related to any of the covered hazards.

This issue is not preserved for appellate review. An issue must be raised to and ruled on by the trial court for an appellate court to review the issue. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). Although SECURE raised the issue of whether the SECURE policy affords coverage only for those operations which are identified on the list of classifications and in the description of hazards, it was never ruled on by the trial court and SECURE failed to file a motion to alter or amend. See Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e), SCRCP, motion to alter or amend the judgment). Accordingly, the issue is not preserved for appellate review.

II. Concurrent Coverage

Having determined that both insurers have a duty to defend and indemnify the Garrisons, we must also determine whether the policy coverages should be prorated or whether one policy should be treated as an excess policy. In South Carolina Insurance Co. v. Fidelity and Guaranty Insurance Underwriters, Inc., 327 S.C. 207, 489 S.E.2d 200 (1997), our supreme court stated that prior South Carolina precedents suggest if two or more policies insure the same entity against the same risk to the same object, the policies are concurrent and losses should be prorated between the insurers who issued the policies. The present case presents issues akin to this situation. Both policies: (1) provide coverage for bodily injury, (2) provide protection to the Garrisons' business interests (either directly or incidentally), (3) were in effect during the period of the occurrence, and (4) protect against liability for injury sustained without

limitation to particular premises. However, the fact that coverage is concurrent does not necessitate automatic proration of coverage. We must also determine whether the coverage contained in the policies is intended to be primary or excess by analysis of the policy language to glean the total insuring intent of the policies. Id.

III. Primary versus Excess Coverage

Farm Bureau argues the circuit court erred in finding that its policy provided primary coverage and SECURE's policy provides excess coverage. We disagree.

The circuit court relied on the "total policy insuring intent" rule in holding Farm Bureau's policy provided primary coverage in this case while SECURE's policy provided excess coverage. The "total policy insuring intent" rule is set out in Fidelity, 327 S.C. 207, 489 S.E.2d 200 (1997). In that case, our supreme court held courts apportioning liabilities among multiple insurers should look to the overall language of policies to ascertain whether primary or secondary coverage is intended. Under the "total policy insuring intent" rule, the relevant question is the overall intent of the parties as embodied in the policy. Id.

The circuit court determined the primary intent of SECURE's policy was to cover hazards associated with general pest control and extermination, whereas the Farm Bureau policy specifically provided coverage for household pets. Using this analysis, the circuit court determined the total insuring intent in the Farm Bureau policy more closely reflected the events at issue in this case, and held Farm Bureau's coverage should be primary. The "total policy insuring intent" rule applies where policies which concurrently cover a loss contain competing "other insurance" clauses. See Fidelity, 327 S.C. 207, 489 S.E.2d 200. The relevant provisions of the other insurance clauses in the insurance policies in the instant case read as follows:

FARM BUREAU'S POLICY

Other Insurance-Coverage E- Personal Liability. This insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

SECURE'S POLICY

Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies.
If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent on or any other basis:

(1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(2) That is Fire Insurance for premises rented to you; or

(3) If the loss arises out of the maintenance or use of aircraft, "autos", or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).

When this insurance is excess, we will have no duty under Coverage A or B to defend any claim or "suit" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method of Sharing.

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach, each insurer contributes equal amounts until it has paid its applicable limit of insurance or none

> of the loss remains, whichever comes first. If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

We find that the other insurance clauses of the policies in question are mutually repugnant in that SECURE's other insurance clause is a pro rata clause which purports to make SECURE liable for only a portion of losses covered by any other primary insurance. Although the general rule regarding the application of "other insurance clauses" under these circumstances mandates that the coverage be prorated as both policies are treated as primary coverage, "this rule should not apply when its use would distort the meaning of the terms of the policies involved." Fidelity, 327 S.C. at 215, 489 S.E.2d at 204 (citation omitted). In South Carolina, the total policy insuring intent of the parties always remains the central issue in determining the proper apportionment of coverage among multiple insurance carriers. Id. Therefore, we find that the trial court properly resorted to the "total policy insuring intent" rule in order to determine the proper apportionment of coverage under the policies.

The SECURE policy specifically provides that its coverage is primary "except for other insurance that is fire, extended coverage, builders risk, installation risk of similar coverage for 'your work' or; that is fire insurance for premises rented to you; or if the loss arises out of the maintenance or use of aircraft, autos, or watercraft." As SECURE's policy is specifically written to cover business activity it is axiomatic that this language is intended to apply in the instance of other policies relating to business coverage and in instances where ancillary activity related to the business may be covered by separate insurance policies. Because none of the conditions are present which would trigger application of the excess clause language, this clause is inapplicable and the language concerning sharing the loss with other insurance would apply. The Farm Bureau policy specifically provides coverage for the type of occurrence that was encountered by the Purvises at Garrison Pest Control. However, the Farm Bureau Policy also contains an excess clause which is in direct competition with the pro rata clause in SECURE's policy. This situation

requires South Carolina courts to resort to the "total policy insuring intent rule" which requires analysis of the language of the policy, together with other factors, to determine the intent of the parties.

Resorting to an analysis of all of the language of both policies, we find that the Farm Bureau policy contains a clause protecting the Garrisons from liability for animal injuries which does not limit the occurrence of bodily injury caused by an animal owned by the Garrisons to the premises of the residence. Likewise, SECURE's policy provides coverage for bodily injury which occurs within the broadly defined coverage territory during the coverage period. In the instant case, however, the injury sustained is the type of occurrence that was most likely within the anticipation of the parties when the Farm Bureau policy was written, as injury from animals was specifically mentioned in the policy language. Therefore, the circuit court's determination of primary and excess coverage is affirmed. We hold Farm Bureau must provide the parties in the underlying action with primary coverage and SECURE must provide excess coverage.

CONCLUSION

We affirm the circuit court's determination that both the SECURE and Farm Bureau policies provide coverage for the dog bite to Jordan Purvis and the determination that Farm Bureau's coverage is primary and SECURE's coverage is excess.

AFFIRMED.

GOOLSBY and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elizabeth M. Langehans and Faye Smith Brown,

Appellants,

v.

Flint P. Smith, Klaus D. W. Langehans, Michael L. Brown, Carol Schwarting Smith, South Carolina Employment Security Commission, Nationsbank, N.A., formerly known as Nationsbank, National Association (CAROLINAS), formerly known as NationsBank of South Carolina, N.A., as successor to the Citizens and Southern National Bank of South Carolina, Colleen H. Jolly and Willis L. Jolly, Ralph Morrell, Jr., Eva Gwaltney, Linda R. Myers, Darvin Lee, Leigh Ann Walker, Bennie H. Collins, The Anderson National Bank, The United States of America acting by and through The Internal Revenue Service, and The South Carolina Department of Revenue,

Defendants,

of Whom
Ralph Morrell, Jr., Eva Gwaltney, Linda R. Myers, and Leigh Ann Walker are,

Respondents.

Appeal From Bamberg County
E. T. Moore, Jr., Special Referee

ORDER WITHDRAWING AND SUBSTITUTING OPINION

PER CURIAM: Pursuant to Appellant's Petition for Rehearing, the court grants the Petition, dispenses with oral argument and orders the opinion heretofore filed, Opinion No. 3343, filed May 27, 2001, be withdrawn and the attached Opinion be substituted therefore.

IT IS SO ORDERED.

Kaye G. Hearn, C.J.

Jasper M. Cureton, J.

M. Duane Shuler, J.

Columbia, South Carolina

September 24, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elizabeth M. Langehans and Faye Smith Brown,

Appellants,

v.

Flint P. Smith, Klaus D. W. Langehans, Michael L. Brown, Carol Schwarting Smith, South Carolina Employment Security Commission, Nationsbank, N.A., formerly known as Nationsbank, National Association (CAROLINAS), formerly known as NationsBank of South Carolina, N.A., as successor to the Citizens and Southern National Bank of South Carolina, Colleen H. Jolly and Willis L. Jolly, Ralph Morrell, Jr., Eva Gwaltney, Linda R. Myers, Darvin Lee, Leigh Ann Walker, Bennie H. Collins, The Anderson National Bank, The United States of America acting by and through The Internal Revenue Service, and The South Carolina Department of Revenue,

Defendants,

of Whom
Ralph Morrell, Jr., Eva Gwaltney, Linda R. Myers, and Leigh Ann Walker are,

Respondents.

Appeal From Bamberg County
E. T. Moore, Jr., Special Referee

Opinion No. 3343
Heard March 5, 2001 - Filed May 21, 2001
Withdrawn and Substituted
Refiled September 24, 2001

AFFIRMED

W. D. Rhoad, of Rhoad Law Firm, of Bamberg, for appellants.

Robert F. McCurry, Jr., of Horger, Barnwell & Reid, of Orangeburg; and Richard B. Ness, of Early & Ness, of Bamberg, for respondents.

PER CURIAM: In this action to foreclose on a real estate mortgage, Elizabeth Langehans and Faye Brown appeal the special referee's ruling in favor of the intervening judgment creditors. We affirm.

FACTS

On November 9, 1988, Klaus Langehans, Michael Brown, and Flint Smith (Husbands) executed a promissory note in the amount of $50,000 to Citizens and Southern National Bank of South Carolina (NationsBank).[1] To

[1] Husbands originally executed this note and mortgage to Citizens and Southern National Bank of South Carolina. Through a series of mergers and

secure payment for this note, Husbands executed a mortgage encumbering real estate they owned. The mortgage contained a future advance clause, but limited the indebtedness secured by the mortgage to $50,000. Under the terms of the mortgage, Husbands were jointly and severally liable on the note and were obligated to make monthly mortgage payments to NationsBank. During the ensuing years, Husbands paid the monthly mortgage as various parcels were sold and released from the mortgage. At some point, however, Husbands stopped paying the monthly mortgage and defaulted under the terms of the note and mortgage. Upon learning that NationsBank planned to bring a collection action, Flint Smith and Michael Brown agreed to pay NationsBank $10,000 to forestall legal action against them. Pursuant to this agreement, Michael Brown paid NationsBank $5,000; however, Flint Smith never paid anything.

In October 1996, NationsBank filed suit on the note against Husbands. NationsBank did not seek foreclosure on the note, but expressly "reserve[d] and preserve[d] its right to later pursue any and all rights it ha[d] against the real estate collateral, including, but not limited to, the appointment of a receiver or foreclosure of the mortgage." Klaus Langehans demanded foreclosure and was subsequently dismissed from the lawsuit. NationsBank obtained a judgment against Michael Brown and Flint Smith in the amount of $23,764.25 plus interest. In his order, then circuit judge Costa Pleicones held that NationsBank "shall hereafter have the right to pursue any and all rights and remedies it has against the real estate collateral securing the note upon which this judgment is rendered . . . ." The rest of this sentence, which was crossed out and initialed by Judge Pleicones, states that NationsBank's rights and remedies "includ[e], but [are] not limited to, the right to appointment of a receiver and/or the right to foreclose upon the mortgage securing the note."

Shortly after the lawsuit, NationsBank purported to assign the note, mortgage, and judgment lien to Elizabeth Langehans and Faye Brown (Wives). In exchange for this assignment, Elizabeth Langehans paid NationsBank

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name changes, the note and mortgage came to be owned by NationsBank.

$10,694.35, and Michael Brown and Faye Brown paid NationsBank $10,694.35 from a joint account held in both their names. The sum of these payments, $21,388.70, was the negotiated amount of the total debt due to NationsBank.

After the assignment, Wives filed a foreclosure action against Husbands. In response to this foreclosure action, various judgment creditors of Flint Smith asked that their intervening judgments against him be afforded priority superior to that of Wives. The defendants individually answered asserting general denials and claiming the defense of election of remedies through accord and satisfaction of the note. A foreclosure hearing was held in May 1998.

At the hearing, the parties litigated the issues of the contractual assignment of the judgment and the defense of election of remedies. The special referee held that Elizabeth Langehans's payment to NationsBank was a gratuitous payment on her husband's behalf to satisfy his debt. The special referee also found that Faye Brown paid no consideration for the assignment and that Michael Brown's payment was for his own debt. Additionally, the referee denied Wives' foreclosure action, finding that the assignment of the note and mortgage was without effect, because the payments from Michael Brown and Elizabeth Langehans extinguished the debt secured by the mortgage. The special referee further found that it would be extremely inequitable to Flint Smith's judgment creditors to allow Wives to achieve priority status through their collusion with Husbands. The special referee did not make any rulings regarding equitable subrogation.

Wives moved for reconsideration or alternatively for a new trial, again arguing the contractual assignment of the note entitled them to foreclosure. The motion was denied and Wives appeal.

DISCUSSION

I. Issue Preservation

In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal. See Rule 208(b)(1)(B), SCACR; Silvester v. Spring Valley Country Club, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001). An appellate brief must be divided into as many parts as there are issues to be argued, and an issue is not preserved for appeal if appellant's brief does not conform to these requirements. See Rule 208(b)(1)(D), SCACR; Watson v. Chapman, 343 S.C. 471, 540 S.E.2d 484 (Ct. App. 2000). Further, it is error for the appellate court to consider issues not properly raised to it. First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513, (1994) (stating appellant must provide authority and supporting arguments for his issue to be considered raised on appeal); Tirado v. Tirado, 339 S.C. 649, 530 S.E.2d 128 (Ct. App. 2000) (holding that an issue which is not supported by authority or sufficiently argued is not preserved for appellate review).

Wives' appellate brief contains only one argument. The heading above that argument states:

> THE TRIAL COURT ERRED IN DENYING APPELLANTS' FORECLOSURE ACTION AND FAILING TO HOLD THAT THEY WERE EQUITABLY SUBROGATED TO THE RIGHTS OF NATIONSBANK BECAUSE APPELLANTS PURCHASED A VALID ASSIGNMENT OF NATIONSBANK'S JUDGMENT, NOTE, AND MORTGAGE, THEREBY SATISFYING MORE THAN BROWN AND LANGEHANS' PROPORTIONATE SHARES OF THE DEBT OWED.

In their argument, Wives cite sixteen cases. All sixteen cases are equitable subrogation cases and designated to support Wives' proposition that they are equitably subrogated to the rights of NationsBank. Wives cite no cases in their brief relating to their right to foreclose as contractual assignees of NationsBank, the argument litigated at trial. Further, all seven pages of Wives' argument focus almost entirely on equitable subrogation and their contention

that they meet the four factors required for equitable subrogation. Wives based their argument on appeal squarely on equitable subrogation. This court is therefore limited to addressing the single issue raised by Wives in their brief – equitable subrogation.

Our review of the record reveals, however, Wives did not raise this specific argument to the trial court. The parties litigated the effect of the contractual assignment of the note, mortgage and judgment. Wives failed to argue equitable subrogation at trial. Furthermore, the trial court never ruled on the issue and Wives failed to raise the issue in their motion to alter or amend. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review); Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant did not raise the issue in a Rule 59(e), SCRCP, motion to alter or amend the judgment). We find Wives' sole issue on appeal is not preserved for our review, and the order on appeal is accordingly

AFFIRMED.

HEARN, C.J., CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy D. Bryson,

Appellant/Respondent,

v.

Kathryn B. Bryson,

Respondent/Appellant.

Appeal From Sumter County
Ruben L. Gray, Family Court Judge

Opinion No. 3391
Submitted September 4, 2001 - Filed October 1, 2001

AFFIRMED IN PART, REVERSED IN PART

J. Mark Taylor, of Wilson, Moore, Taylor & Thomas, of West Columbia, for appellant/respondent.

Harry C. Wilson, Jr., of Lee, Erter, Wilson, Holler & Smith, of Sumter, for respondent/appellant.

GOOLSBY, J.: In this domestic action, Timothy Bryson appeals the family court's refusal to terminate his alimony obligation. Kathryn Bryson cross appeals the family court's order reducing Timothy's alimony obligation from $250 per month to $100 per month. We affirm in part and reverse in part.[1]

Timothy and Kathryn were married in 1961 and divorced in 1983. At the time of their divorce, the family court approved a settlement agreement providing for Timothy to pay alimony of $50 per month. By order dated October 25, 1985, the family court increased Timothy's alimony obligation to $250 per month.

In 1991, Timothy brought an action seeking to terminate alimony on the grounds that Kathryn was involved in a relationship with Roy Cagle, and that the relationship was tantamount to marriage.[2] At that time, Kathryn had been living with Cagle since approximately 1988. In an order dated February 10, 1992, the family court held the relationship was not one tantamount to a marriage but was one of "mutual financial assistance and companionship" and refused to terminate alimony. In an unpublished opinion dated August 2, 1993, this court upheld the family court's decision. The South Carolina Supreme Court denied certiorari on May 6, 1994.

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] See Croom v. Croom, 305 S.C. 158, 160, 406 S.E.2d 381, 382 (Ct. App.), cert. denied (Sept. 24, 1991) ("Since the State has a compelling interest in promoting marriage and discouraging meretricious relationships, such a rule [requiring alimony to continue when the supported spouse cohabits without marrying] is also illogical and offensive to public policy."); cf. H.R. 3823, introduced, read for the first time, and referred to the House Judiciary Committee on March 21, 2001 (providing alimony would be terminated upon the continued cohabitation of the supported spouse with a person in a relationship that is tantamount to marriage) .

On December 15, 1999, Timothy brought the present action alleging a change of circumstances warranting termination of alimony. In support of his argument, the following evidence was presented: (1) Kathryn and Cagle still resided together and had done so for the last twelve years; (2) they moved to Florida together; (3) they purchased a home together; (4) the home was jointly titled and a mortgage was taken out in both their names; (5) though they stayed in separate bedrooms within the home, they engaged in sexual relations; (6) they traveled together and stayed together when so doing; (7) Kathryn's grandchildren were allowed to call Cagle "Pa Pa"; and (8) Kathryn and Cagle signed a birthday card as "Grandma" and "Pa Pa."

The presiding family court judge opined the relationship between Kathryn and Cagle was tantamount to marriage, but ruled the 1991 action between the parties on the issue of alimony was the law of case. Accordingly, he reduced alimony but refused to terminate it.

LAW/ANALYSIS

Questions concerning alimony rest with the sound discretion of the family court.[3] An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support.[4]

Timothy first argues the family court erred in finding the law of the case prevented the termination of his alimony obligation. We agree.

"Changed conditions may warrant a modification or termination of alimony."[5] Thus, the doctrines of law of the case and res judicata do not apply to those family court actions that are modifiable based on changes in

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[3] Bannen v. Bannen, 286 S.C. 24, 331 S.E.2d 379 (Ct. App. 1985).

[4] McKnight v. McKnight, 283 S.C. 540, 324 S.E.2d 91 (Ct. App. 1984).

[5] S.C. Code Ann. § 20-3-170 (1976).

circumstances.[6] Accordingly, we find the family court erred in holding the law of the case precluded it from terminating Timothy's alimony obligation.

Timothy next argues his alimony obligation should have been terminated because Kathryn was involved in a relationship that was tantamount to marriage and thus constituted a substantial change in circumstances. We agree.

With regard to this issue, the family court found:

> [W]ith regard to the question of whether the Defendant and her live-in companion are involved in a relationship tantamount to marriage, this Court has great difficulty. These parties have lived together now for approximately twelve years. While they have separate bedrooms, they occasionally share the same bedroom and occasionally engage in sexual intercourse. They visit the children of the Defendant regularly and when they stay overnight, they share the same bedroom. They take some trips together. The Defendant's grandchildren are permitted to call her mate "Pa Pa." The parties have bought a home together in Florida, and as previously indicated, share the expenses of this home. The Deed to this property contains a "survivorship clause." This Court is unable to conclude that this arrangement does not contain all the features attendant to a marriage. The difficulty is that the living together existed when the matter went to the Court of Appeals, it was just for a shorter period. The sharing of expenses was present. The periodic sharing of the bedroom was present, and occasional sexual intercourse was present, and the Court called it a relationship for mutual financial assistance and companionship. That, too, is part of a marriage. What is new, perhaps, is that they were not buying

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[6] See Medlin v. King 294 S.C. 406, 365 S.E.2d 36 (Ct. App. 1988) (rejecting the argument that res judicata bars subsequent actions to modify alimony).

> a home together. . . . And, of course, the relationship has gone on longer.
>
> While this Court strongly holds the view that the nature of the relationship between the Defendant and her live-in companion has sufficient features and characteristics as to treat it as a marriage for purposes of terminating alimony, the law of the case in this particular is fixed.

It is clear from the family court's order that its decision not to terminate Timothy's alimony obligation was based solely upon its belief that it did not have the power to do so and not because it felt the circumstances did not warrant termination. As noted above, this was error.

In reviewing the record, we conclude termination of alimony is warranted. We find sufficient changed circumstances surrounding Kathryn and Cagle's relationship that make it tantamount to marriage.[7] First, the duration is significantly greater than it was in 1991, as the two have now been together for over 12 years. Second, Kathryn and Cagle moved to Florida and purchased a house together. Third, Kathryn and Cagle have continued to engage in sexual relations throughout their involvement. Finally, Kathryn's grandchildren have developed a relation with Cagle to the point they call him "Pa Pa." Accordingly, we hereby reverse the family court and order termination of Timothy's alimony obligation.

In view of our decision to terminate alimony, we do not address Kathryn's appeal of the family court's decision to reduce the payments.

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[7] This court has previously held that "[l]iving with another, whether it is with a live-in lover, a relative, or a platonic housemate, changes the wife's circumstances and alters her required financial support." Vance v. Vance, 287 S.C. 615, 617-18, 340 S.E.2d 554, 555 (Ct. App. 1986).

AFFIRMED IN PART, REVERSED IN PART.

HUFF and STILWELL, JJ., concur.

In The Court of Appeals

Tim Williams,

Appellant,

v.

Charles M. Condon, individually and as Attorney General of South Carolina, W. Barney Giese, individually and as Solicitor of the Fifth Judicial Circuit of South Carolina, Douglas A. Churdar, and Robert Cook,

Defendants,

of whom

Charles M. Condon, individually and as Attorney General of South Carolina and W. Barney Giese, individually and as Solicitor of the Fifth Judicial Circuit of South Carolina are,

Respondents.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 3392

Heard June 5, 2001 - Filed October 1, 2001

AFFIRMED

Francis T. Draine, of Columbia, for appellant.

Vinton D. Lide, of Lexington; and J. Emory Smith, Jr., of Columbia, for respondents.

ANDERSON, J.: Tim Williams sued Charles M. Condon and W. Barney Giese, individually and in their official capacities, seeking damages resulting from their alleged violations of 42 U.S.C.A. § 1983 and common law tortious conduct. Condon is the Attorney General of South Carolina. Giese is the Solicitor of the Fifth Judicial Circuit. Condon and Giese, asserting their immunity as prosecutors, moved pursuant to Rule 12(b)(6) for dismissal of Williams' action. The Circuit Court granted the motion and dismissed the case. We affirm.

FACTS/PROCEDURAL HISTORY

Williams was an employee of Premier Investigations ("Premier"), a Florida corporation. At the time the events giving rise to this dispute occurred, Premier's principal place of business was North Carolina with operations in South Carolina. Robert Cook, a North Carolinian, was Premier's chief executive officer. Williams, a resident of Richland County, sued Premier and Cook in South Carolina for unpaid wages and other compensation. Premier and Cook confessed judgment. Soon after, Cook accused Williams of sending a letter to other former employees of Premier that allegedly contained language inciting the recipients to also sue for back pay. Cook alerted Giese to the matter. Giese's office conducted an investigation of Williams' alleged activities. This investigation included interviewing Cook, Tim Belue, a former South Carolina

employee of Premier, and Belue's former wife, Candace Belue. Giese elected to prosecute Williams for barratry. The grand jury returned a direct indictment of Williams on this charge.

Giese called the case for trial; however, before proceedings began, the presiding circuit judge recused himself and suggested referral of the prosecution to the Attorney General. Condon assumed responsibility for the matter. At trial, the court found the State's evidence could not support a conviction and directed a verdict, sua sponte, in Williams' favor.

Following the trial, Williams brought a civil suit naming, among others, Condon and Giese as defendants in both their individual and official capacities. Regarding his action against Condon and Giese, Williams asserted claims for violations of his constitutional rights under § 1983, false arrest, malicious prosecution, and negligence.

Specifically, Williams **alleged**, inter alia, the following:

- Condon and Giese colluded with Cook and attorney Douglas A. Churdar in initiating criminal proceedings against Williams;

- Condon and Giese were driven by malice, ill will, or recklessness in initiating and maintaining their respective prosecutions against him;

- Condon and Giese breached their duty to Williams by failing to properly investigate the accusations against him before proceeding with their respective prosecutions;

- Giese obtained Williams' direct indictment with evidence Williams asserted was insufficient, untrue, nonexistent, or unreliable (i.e., the indictment was not supported by probable cause);

- Giese impermissibly deprived Williams of his procedural right to examine whether the State's charge was supported by probable cause;

- Giese unreasonably limited Williams' right to pretrial discovery by failing to respond to Williams' numerous requests and Rule 5, SCRCrimP motions for production of evidence demonstrating his guilt;

- Giese abused his power relating to the scheduling of criminal hearings and motions by refusing to set for oral argument Williams' Motion to Quash and Motion to Dismiss;

- Giese and Condon wrongly persisted in their respective prosecutions of Williams notwithstanding the fact Williams advised assistants of both Giese and Condon that the evidence gathered by the prosecution did not support a conviction;

- Condon unjustifiably refused Williams' request to intercede and protect Williams from Giese's prosecutorial abuse; and

- The Assistant Attorney General prosecuting the case on behalf of Condon harmed Williams by proceeding to trial and stating to the court that the State possessed evidence proving Williams' guilt beyond a reasonable doubt.

Giese and Condon responded to the complaint with a Rule 12(b)(6) motion to dismiss. The defendants sought dismissal pursuant to the defenses of prosecutorial immunity and the immunity afforded them under the South Carolina Tort Claims Act. The Circuit Court entertained oral argument regarding the motion and took the matter under advisement. In the interim, Williams attempted to conduct discovery. Condon and Giese moved for a protective order relieving them from the duty of responding to Williams'

discovery requests. The court did not make a ruling as to the prosecutors' request. Williams persisted with discovery and filed a motion to compel. The Circuit Court ultimately granted Condon and Giese's dismissal motion. Williams' motion, however, was not addressed.

Eleven days after the dismissal, Williams moved the court to vacate its order, which he claimed came "as a big surprise," because its issuance "must have been a clerical oversight or mistake" due to his outstanding motion to compel discovery.[1] In a form order, the circuit judge denied Williams' motion. Williams appeals.

ISSUE

> Did the Circuit Court err in dismissing Williams' suit on the basis that his causes of action were barred by the common law doctrine of prosecutorial immunity and the immunity provided to prosecutors by the South Carolina Tort Claims Act?[2]

STANDARD OF REVIEW

A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed "to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. Rule 12(b)(6), SCRCP. The trial court's ruling on a Rule 12(b)(6) motion must be bottomed and premised solely upon the allegations set forth by the plaintiff. Holy Loch Distribs. v. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (Ct. App. 1998), rev'd on

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[1] We disagree with the dissent in regard to the conclusion that this Court lacks subject matter jurisdiction. We find under **all** the circumstances in this case that the notice of appeal was timely served. Concomitantly, we address the merits.

[2] This one issue encapsulates all dispositive exceptions articulated by Williams in his brief.

other grounds, 340 S.C. 20, 531 S.E.2d 282 (2000); Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997). The motion will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997). The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987); Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999).

Dismissal of an action pursuant to Rule 12(b)(6) is appealable. S.C. Code Ann. §§ 14-3-330(1) & (2)(c) (Supp. 2000), cited in James F. Flanagan, South Carolina Civil Procedure 95 (2d ed. 1996) (footnote omitted). Upon review, the appellate tribunal applies the same standard of review that was implemented by the trial court. See O'Laughlin v. Windham, 330 S.C. 379, 382, 498 S.E.2d 689, 691 (Ct. App. 1998) ("The grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law.") (citing Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995)).

LAW/ANALYSIS

I. Civil Suits Against Prosecutors in Their Individual Capacities

American courts have long recognized the existence of immunity for public officers from personal liability for tortious acts committed while serving in an official capacity. It is a common law tradition with origins that can be traced to the ancient tribunals of England. The protections afforded by this doctrine extend to the prosecutors who act on behalf of the people.

A. Origins of Prosecutorial Immunity in the United States

"The function of the prosecutor that most often invites a [lawsuit] is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution." Imbler v. Pachtman, 424 U.S. 409, 421, 96 S. Ct. 984, 990, 47 L.

Ed. 2d 128 (1976).

The first case appearing in American jurisprudence devoted to the question of a prosecutor's amenability to civil suit for malicious prosecution is Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896). Imbler at 421, 96 S. Ct. at 990-91. Griffith and Mullins were referred to a grand jury for setting fire to a barn and attempting to defraud the insurance company that insured the structure. Slinkard was the prosecutor who presented the state's case to the grand jury. The panel voted against the indictment of Griffith. Nevertheless, Slinkard included Griffith's name in the indictment and it was "true billed." Consequently, Griffith was arrested and tried. He was ultimately acquitted. Griffith subsequently sued Slinkard for, inter alia, malicious prosecution.

The Indiana Supreme Court pursued a two-step analysis in considering whether Slinkard could be sued for his participation in Griffith's wrongful indictment. It initially gauged the prosecutor's place in the judicial system by asking: "Is a prosecuting attorney an officer intrusted with the administration of justice?" Id. at 1002 (citation omitted). The court concluded:

> He is a judicial officer, created by the constitution of the state. He is the law officer to whom is intrusted all prosecutions for felonies and misdemeanors. He is the legal adviser of the grand jury. We think he is an officer intrusted with the administration of justice. The prosecuting attorney, therefore, is a judicial officer, but in the sense of a judge of a court.

Id. (citations and quotation marks omitted).

The court then contemplated whether there were personal repercussions for a prosecutor who abused his responsibilities to justice. It reported:

> The rule applicable to such an officer is thus stated by an eminent author: "Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own

> judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. **If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it."** Townsh. Sland. & L. (3d Ed.) § 227, pp. 395, 396.

Id. (emphasis added).

The Griffith holding became the clear majority rule concerning prosecutorial immunity. Imbler, 424 U.S. at 422, 96 S. Ct. at 991. The issue was eventually presented to the United States Supreme Court in Yaselli v. Goff, which affirmed the Court of Appeals' holding, 12 F.2d 396 (2d. 1926), in toto, 275 U.S. 503, 48 S. Ct. 155, 72 L. Ed. 395 (1927).

The Yaselli Court began with an examination of judicial immunity:

> There are weighty reasons why judicial officers should be shielded in the proper discharge of their official duties from harassing litigation at the suit of those who think themselves wronged by their decisions and that injustice has been done. A defeated party to a litigation may not only think himself wronged, but may attribute wrong motives to the judge whom he holds responsible for his defeat. He may think that the judge has allowed passion or prejudice to control his decision. To allow a judge to be sued in a civil action on a complaint charging the judge's acts were the result of partiality, or malice, or corruption, would deprive the judges of the protection which is regarded as essential to judicial independence. It is not in the public interests that such a suit should be maintained; and it is a fundamental principle of English and American jurisdiction that such an action cannot be maintained.

Id. at 399.

The court then launched into extensive quotation of English and American authorities reciting the proposition that judges are immune from personal liability for their judicial acts. What followed would be a tremendous pronouncement of law:

> [T]he immunity which is extended to the judges is in like manner extended to the attorneys in the presentation of the client's case to the court or the jury.

Id. at 402.

Support for the application of immunity principles to the acts of a prosecutor ensued:

> In Munster v. Lamb, 11 Q.B.D. 588, an action was brought against a solicitor for damages arising out of defamatory statements alleged to have been falsely and maliciously made by defendant concerning the plaintiff while the defendant was acting as a solicitor for a client against whom criminal proceedings had been instituted by the plaintiff who was a barrister. The statements complained of were so untrue and improper as stated in the court's opinion that defendant "did not attempt to justify the expressions used by him. It was impossible to do so." The court held that the words spoken were irrelevant to the facts before the court, were uttered maliciously and without justification or excuse, but that nevertheless an action could not be maintained. In so holding the court said:
>
> > To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who

> is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.

Id. at 402.

> It has been said that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which has produced it. A public office is an agency for the state, the duties of which involve in their performance the exercise of some portion of the sovereign power, either great or small. **The rule of responsibility of a public officer, as held by the courts, is said to be that, if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an erroneous performance, is regarded as an injury to the public, and not as one to the individual. It is to be redressed in some form of public prosecution, and not by a private person who conceives himself specially injured**. Cooley on Torts (3d Ed.) vol. 2, p. 756. In Thibodaux v. Thibodaux, 46 La.Ann. 1528, 16 So. 450, it is said: **"Officials in the performance of a duty imposed by law cannot be held in damages for acts done strictly within the lines of official duty."**

Id. at 403-04 (emphasis added).

The court concluded:

> In our opinion the law requires us to hold that a [prosecutor],

> in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. **The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case**.

Id. at 406 (emphasis added).

Judge Learned Hand addressed the issue of a prosecutor's immunity from civil suit in Gregoire v. Biddle, 177 F.2d 579 (2d. Cir. 1949). Armand Gregoire was jailed by federal authorities during the Second World War. Gregoire was suspected of being a German and therefore an enemy of the United States. Gregoire asserted he was French. At a hearing before the Enemy Alien Hearing Board, Gregoire proved his claim. Gregoire, however, remained imprisoned. It was not until after the war that he was released. Gregoire subsequently sued two successive Attorneys General of the United States, two successive Directors of the Enemy Alien Control Unit of the Department of Justice, and the Director of Immigration at Ellis Island for false arrest.

The federal district court found the defendants had unlawfully incarcerated Gregoire and had been induced to do so by "personal ill-will." Id. at 579. Nevertheless, the trial court dismissed Gregoire's complaint, finding the defendants possessed an **absolute immunity** from personal civil liability. Id.

On appeal, the Second Circuit affirmed the district court's disposition. Judge Hand wrote the costs to the public interest and judicial economy were too great to permit a plaintiff alleging injury by a prosecutor to recover damages:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. **The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties**. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. **There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors**. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. **In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation**. Judged as res nova, we should not hesitate to follow the path laid down in the books.

Id. at 581 (emphasis added).

The court additionally delved into the issue of whether a prosecutor could lose his immunity from personal liability if it was determined his acts against a plaintiff, while within the scope of his duties and powers, were not exercised in the interest of his constituents. It determined that immunity continues to shield the prosecutor even when his motives for prosecution were less than pure:

> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. For the foregoing reasons it was proper to dismiss the [claim].

Id.

In the modern era, the tenets expounded in Griffith, Yaselli, and Gregoire have served as a theoretical foundation for judges as they have grappled to develop responses to the novel issues presented by plaintiffs in civil suits against prosecutors.

B. Application of the Prosecutorial Immunity Doctrine in Cases Arising Under § 1983

In 1871, Congress passed sweeping legislation that today is known as 42 U.S.C.A. § 1983. This section states, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

On its face, § 1983 admits no immunities. Tower v. Glover, 467 U.S. 914, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984). However, since its decision in Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), the Supreme Court has consistently recognized that substantive doctrines of privilege and immunity may limit the relief available in § 1983 litigation. Id.

In Tenney, at issue was the personal liability of legislators under § 1983[3] for tortious acts resulting from the performance of their official duties. After a comprehensive review of the history of the legislative immunity doctrine, the Court queried:

> Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity?

Id. at 376, 71 S. Ct. at 788.

The Court decided § 1983 did not invalidate the immunity traditionally enjoyed by legislators: "We cannot believe that Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." Id.

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[3] At the time of the Tenney decision, the language of the current § 1983 was located at 8 U.S.C.A. § 43. Nevertheless, in the interest of clarity and consistency, the above-quoted statutory language is characterized as "§ 1983" throughout this opinion.

The Tenney holding would help shape the Court's later decisions involving the status of prosecutorial immunity in § 1983 claims. The most important of these decisions is Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984 47 L. Ed. 2d 128 (1976). Imbler is also the first case decided by the Supreme Court involving the § 1983 liability of a state prosecutor. Id. at 420, 96 S. Ct. at 990.

Relying on the holdings of Griffith v. Slinkard and Yaselli v. Goff, the Court concluded state prosecutors were clothed with immunity. Next came an extensive analysis of whether this shield was in the form of **qualified or absolute immunity** under § 1983. The Court determined state prosecutors enjoyed **absolute** immunity:

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. Bradley v. Fisher, 13 Wall., at 348, 20 L. Ed. 646; Pierson v. Ray, 386 U.S., at 554, 87 S.Ct., at 1217. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Id. at 424-25, 96 S.Ct. at 992.

> Moreover, suits that survived the pleadings would pose

> substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and — ultimately in every case — the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials. Cf. Bradley v. Fisher, supra, 13 Wall., at 349, 20 L. Ed. 646.
>
> The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system. Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.

Id. at 425-26, 96 S. Ct. at 992-93 (footnotes omitted).

The opinion included a recitation of the rationale for prosecutorial immunity:

> The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to § 1983 liability. Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.
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> . . . .
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> …[Prosecutorial] immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. **But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice**.

Id. at 427-28, 96 S. Ct. at 993-94 (emphasis added) (footnotes omitted).

Perhaps the greatest legacy of Imbler is the Court's defining of the parameters of prosecutorial immunity (i.e., the Court delineated the tasks of a prosecutor that are encompassed within the doctrine's protection):

> We agree with the Court of Appeals that [Pachtman's] activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.

Id. at 430-31, 96 S. Ct. at 995 (emphasis added) (footnotes omitted).

> **We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.** A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. **These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence.** At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

Id. at 431 n.33, 96 S. Ct. at 995 n.33 (emphasis added).

Since Imbler, the Supreme Court has been presented with several cases that have required it to redefine the boundaries of prosecutorial immunity. The

Court's decision in Burns v. Reed, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991), expanded the Imbler analysis to matters pertaining to a prosecutor's participation in a probable cause hearing and giving advice to the police regarding permissible investigative tactics:

> The prosecutor's actions at issue here — appearing before a judge [at a probable cause hearing] and presenting evidence in support of a motion for a search warrant — clearly involve the prosecutor's "role as advocate for the State," rather than his role as "administrator or investigative officer," the protection for which we reserved judgment in Imbler, see id., at 430-431, and n. 33, 96 S. Ct., at 995, and n. 33. Moreover, since the issuance of a search warrant is unquestionably a judicial act, see Stump v. Sparkman, 435 U.S. 349, 363, n. 12, 98 S. Ct. 1099, 1108, n. 12, 55 L. Ed. 2d 331 (1978), appearing at a probable-cause hearing is "intimately associated with the judicial phase of the criminal process." Imbler, supra, 424 U.S., at 430, 96 S. Ct., at 995. It is also connected with the initiation and conduct of a prosecution ….

Id. at 491-492, 111 S. Ct. at 1942.

A prosecutor providing legal advice to police regarding proper investigative tactics, however, was not recognized by the Court as prosecutorial in nature:

> We do not believe … that advising the police in the investigative phase of a criminal case is so "intimately associated with the judicial phase of the criminal process," Imbler, 424 U.S., at 430, 96 S. Ct., at 995, that it qualifies for absolute immunity.

Id. at 493, 111 S. Ct. at 1943.

In Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993), the Court gave direction as to when the activities of a prosecutor

prior to his presentation of the case to the grand jury come under the construct of "advocate":

> The question, then, is whether the prosecutors have carried their burden of establishing that they were functioning as "advocates" when they were endeavoring to determine whether the bootprint at the scene of the crime had been made by petitioner's foot. A careful examination of the allegations concerning the conduct of the prosecutors during the period before they convened a special grand jury to investigate the crime provides the answer. See supra, at 2610, n. 1. The prosecutors do not contend that they had probable cause to arrest petitioner or to initiate judicial proceedings during that period. Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.
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> . . . .
>
> After Burns, it would be anomalous, to say the least, to grant prosecutors only qualified immunity when offering legal advice to police about an unarrested suspect, but then to endow them with absolute immunity when conducting investigative work themselves in order to decide whether a suspect may be arrested. That the prosecutors later called a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial. A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When the functions of prosecutors and detectives are the same, as they were here, the immunity that

protects them is also the same.

Id. at 274-76, 113 S. Ct. 2616-17.

Regarding a prosecutor's participation at a press conference, the Buckley Court came to the firm conclusion that this act was protected by qualified immunity only:

> The functional approach of Imbler, which conforms to the common-law theory, leads us to the same conclusion. Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor. At the press conference, Fitzsimmons did not act in "'his role as advocate for the State,'" Burns v. Reed, 500 U.S., at 491, 111 S. Ct., at 1941, quoting Imbler v. Pachtman, 424 U.S., at 431, n. 33, 96 S. Ct., at 995, n. 33. The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions. Statements to the press may be an integral part of a prosecutor's job, see National District Attorneys Assn., National Prosecution Standards 107, 110 (2d ed. 1991), and they may serve a vital public function. But in these respects[,] a prosecutor is in no different position than other executive officials who deal with the press, and, as noted above, supra, at 2612-2613, 2617, qualified immunity is the norm for them.

Id. at 277-78, 133 S. Ct. at 2618 (emphasis added).

C. Prosecutorial Immunity and the South Carolina Tort Claims Act

The leading case in South Carolina with regard to a government official's protection from civil suit via immunity and the South Carolina Tort Claims Act[4] is O'Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998). In

[4] S.C. Code Ann. §§ 15-78-10 to -200 (Supp. 2000).

O'Laughlin, this Court held the doctrines of immunity created within the common law were not supplanted by the Tort Claims Act:

> The Tort Claims Act expressly preserves all existing common law immunities. The Act was adopted to ensure "that the State, and its political subdivisions are only liable for torts within the limitations of this chapter and in accordance with the principles established herein." S.C. Code Ann. § 15-78-20(a) (Supp.1997). It states:
>
> > **The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved.**
>
> S.C. Code Ann. § 15-78-20(b) (Supp. 1997) (emphasis added). Therefore, the Act itself expressly preserves common law judicial immunity.
>
> A strong presumption also exists that the General Assembly does not intend to supplant common law principles when enacting legislation. Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1992). See also Frost v. Geernaert, 200 Cal.App.3d 1104, 246 Cal.Rptr. 440, 442 (1988) (holding that common law judicial immunity survived the adoption of the California Tort Claims Act, stating, "statutes should not be interpreted to alter the common law unless it is expressly provided they should do so; there is a presumption that a statute, does not, by implication, repeal the common law.").
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> . . . .

> …[T]he South Carolina Supreme Court's holding in Fleming v. Asbill[5] is instructive in determining the effect of the adoption of the Tort Claims Act. Id. In Fleming, the Court found that a guardian ad litem, while not an employee under the Tort Claims Act, was entitled to common law quasi-judicial immunity. Id. In so finding, the Court implicitly recognized that the common law principles of judicial immunity, in some form, survive the adoption of the Tort Claims Act.
>
> Based on the statutory language of the Tort Claims Act, the presumption of legislative intent to preserve common law principles, policy considerations, and the Supreme Court's holding in Fleming, we find that absolute judicial immunity, defined by common law, survives the adoption of the Tort Claims Act.

Id. at 383-85, 498 S.E.2d at 691-692 (italics in original) (emphasis added).

Prosecutorial immunity, like judicial immunity, is a common law principle. In light of this Court's holding in O'Laughlin, the Tort Claims Act should not be interpreted as displacing the protections guaranteed by the prosecutorial immunity doctrine.

II. Civil Suits Against Prosecutors in Their Official Capacity

A. Section 1983 Suits

A § 1983 suit for damages cannot be brought against a government official in his official capacity, as recently explained by the Maryland Court of Appeals in Okwa v. Harper, 757 A.2d 118 (Md. 2000):

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[5] 326 S.C. 49, 483 S.E.2d 751 (1997).

> Section 1983 permits a plaintiff to recover damages when an individual, acting under the color of state law, transgresses a federally created right of the plaintiff. See Howlett By and Through Howlett v. Rose, 496 U.S. 356, 358, 110 S. Ct. 2430, 2433, 110 L. Ed. 2d 332, 342 (1990). The text of the statute and cases analyzing § 1983 actions dictate that a defendant in a § 1983 action must be a "person." See Ashton [v. Brown], 339 Md. at 110, 660 A.2d at 466; Ritchie v. Donnelly, 324 Md. 344, 354, 597 A.2d 432, 437 (1991) and cases cited therein). A state public official, sued in his or her official capacity, is not considered a "person" when a plaintiff brings a § 1983 action for monetary damages. The purpose behind placing state officials sued in their official capacities out of range of a § 1983 claim is that such a suit, in essence, is a suit against the state, which is not a permissible defendant in a § 1983 action. See Howlett By and Through Howlett, 496 U.S. at 365, 110 S. Ct. at 2437, 110 L. Ed. 2d at 346. If the plaintiff prevails, the state treasury, not the state official personally, will be responsible for paying the assessed damages. See DiPino[v. Davis], 354 Md. at 46, 729 A.2d at 369; Ritchie, 324 Md. at 359-60, 597 A.2d at 439.

Id. at 135 (footnote omitted); see also, e.g., Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (holding that neither the state nor its officials acting in their official capacities are "persons" under § 1983, and therefore are not subject to suit under the statute in either federal or state court, except insofar as they are sued for prospective injunctive relief).

B. Tort Claims Act Suits

In 1985, our Supreme Court decided McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741. This case is significant because the Court largely abolished the doctrine of sovereign immunity. Certain exceptions to this holding, however, were carved out:

> [T]he abrogation of the rule will not extend to legislative, judicial and executive acts by individuals acting in their official capacity. These discretionary activities cannot be controlled by threat of tort liability by members of the public who take issue with the decisions made by public officials. We expressly decline to allow tort liability for these discretionary acts. The exercise of discretion includes the right to be wrong.

Id. at 246, 329 S.E.2d at 742.

When the General Assembly enacted the Tort Claims Act, it codified the McCall exceptions. See S.C. Code Ann. § 15-78-60(1)-(2) (Supp. 2000) (stating "The governmental entity is not liable for a loss resulting from (1) legislative, judicial, or quasi-judicial action or inaction; and (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature").

The duties of a prosecutor fall into the exceptions enumerated by McCall and § 15-78-60. The case law cited throughout this opinion clearly supports the proposition that a prosecutor's typical duties are "judicial" or "quasi-judicial" in nature. Accordingly, this Court finds a prosecutor, in his official capacity, is immune from a Tort Claims Act suit involving "judicial" or "quasi-judicial" acts, provided a defendant prosecutor raises the affirmative defense of sovereign immunity in his return. See Tanner v. Florence City-County Bldg. Comm'n, 333 S.C. 549, 511 S.E.2d 369 (Ct. App. 1998) (holding sovereign immunity is an affirmative defense that must be pled).

III. Application of the Law to the Instant Case

Imbler and its progeny identified those tasks or operations by a prosecutor that are absolutely immunized from civil litigation. Close examination of the record does not reveal any conduct by Condon or Giese that deviates from these protected duties. In the absence of proof, the Circuit Court correctly dismissed

the claims brought against Condon and Giese in their individual capacities. See Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), abrograted on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (recognizing that where a complaint articulates a § 1983 claim that is unquestionably protected by absolute immunity, the further development of facts is unnecessary and the trial court may dismiss the suit).

Furthermore, the O'Laughlin Court clearly stated that the provisions of the Tort Claims Act do not supplant common law immunity doctrines. Prosecutorial immunity is a common law immunity doctrine. Accordingly, we find that the Circuit Court properly dismissed the claims Williams instituted pursuant to this act against the prosecutors in their individual capacities.

Finally, the claims raised against Condon and Giese in their official capacities were impermissible. Section 1983 does not allow plaintiffs to initiate suits for damages against government officials in their official capacities. As well, because no proof exists that refutes the notion that Giese's or Condon's actions against Williams were "judicial" or "quasi-judicial" in scope, no cause of action brought under the Tort Claims Act can be allowed to proceed against either defendant in his official capacity.

CONCLUSION

We hold a prosecutor in the employ of this state is immune from personal liability under § 1983 or the South Carolina Tort Claims Act for actions relating to the prosecution of an individual as a criminal defendant — regardless of the prosecutor's motivation — provided the actions complained of were committed while the prosecutor was acting as an "**advocate**," as defined by Imbler v. Pachtman and its progeny.

Additionally, the law is clear that a prosecutor cannot be sued in his official capacity under either § 1983 for money damages or the Tort Claims Act when the acts complained of were "judicial" or "quasi-judicial" in nature.

For the foregoing reasons, the decision of the Circuit Court is

AFFIRMED.

HOWARD, J., concurs.

SHULER, J., dissents in a separate opinion.

SHULER, J., dissenting: Because I believe this Court does not have subject matter jurisdiction to hear Williams' appeal, I respectfully dissent.

Williams filed the instant action on August 11, 1999, and Respondents subsequently filed a 12(b)(6) motion to dismiss. The trial court granted the motion on May 25, 2000. On June 5, Williams filed a post-trial motion asking the court to vacate the dismissal, claiming it came "as a complete surprise" that "must have been a clerical oversight or mistake" in light of his outstanding motion to compel discovery. In a form order dated June 22, the trial court denied the motion. Williams served notice of this appeal on July 7, 2000.

Under our rules of appellate procedure, a party's notice of appeal must be served within thirty days "after receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR. However, when a party makes a timely motion for j.n.o.v., to alter or amend the judgment, or for a new trial, "the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion." Id.; see Canal Ins. Co. v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999).

On the other hand, motions made pursuant to Rule 60, SCRCP do not affect the finality of the judgment under attack and thus do not toll the time for appeal. See Otten v. Otten, 287 S.C. 166, 337 S.E.2d 207 (1985); Coward Hund Constr. Co., Inc. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999); see also, James F. Flanagan, South Carolina Civil Procedure (2d ed. 1996). Accordingly, because a Rule 60 motion does not have the tolling effect of other post-trial motions under Rules 50 and 59, SCRCP, the time for appeal "continues to run from the entry of the judgment" that the motion challenges. Coward Hund, 336 S.C. at 6, 518 S.E.2d at 59 (quoting 12 James W. Moore et al., Moore's Federal Practice ¶ 59.11[4][b] (3d ed. 1999)).

Although the title of Williams' motion to vacate the trial court's order cited both Rule 59 and Rule 60, the language and substance of the motion indicate Williams sought relief pursuant to Rule 60(a) and (b)(1), SCRCP. In particular, the motion stated: "The Plaintiff is informed and reasonably believes

this Court should vacate the dismissal Order due to the Plaintiff's outstanding Motion to compel the Defendants' appearance for depositions, because the issuance of this Order must have been a *clerical oversight or mistake by the court*." (emphasis added). Williams, therefore, did not ask the court to alter or amend the judgment based upon a legal or factual error in its order; rather, he requested relief because his motion to compel discovery was still pending.

A fair reading of Williams' motion to vacate clearly shows he relied solely on Rule 60 in averring the trial court committed a "mistake" in overlooking his outstanding motion to compel. In my view, as the body of the motion is squarely within the purview of Rule 60 only, we must treat it as such for purposes of this appeal regardless of the titular reference to Rule 59. See Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its "substance and effect" as opposed to how it was styled by plaintiff); Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (stating that it is the substance of the relief sought that matters "regardless of the form in which the request for relief was framed").

The trial court issued its order dismissing Williams' suit on May 25, 2000 and Williams admits the post office forwarded the order to him on May 30. Since a motion under Rule 60, SCRCP does not toll the time for appeal, Williams was required to serve his notice of appeal no later than June 29, 2000. Williams, however, served notice of this appeal on July 7, 2000; as a result, his appeal is untimely. Because timely service of a notice of appeal is a prerequisite to jurisdiction, I would find this Court lacks subject matter jurisdiction to entertain Williams' appeal and dismiss. See Canal, 338 S.C. at 5, 524 S.E.2d at 418 ("Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction

and results in dismissal of the appeal.").[6]

[6] Although Williams asserts he "timely" filed his notice of appeal on July 8, 2000, it is the *service* of an appellant's notice of appeal that must be timely. In any event, as the timeliness of an appeal involves a question of subject matter jurisdiction, it is the duty of this Court to ascertain that an appeal is timely regardless of the parties' assertions.