The Supreme Court of South Carolina

O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of magistrates and municipal judges who have not complied with the continuing legal education requirements of Rule 510, SCACR. These judges are hereby suspended from their judicial offices, without pay, until further Order of this Court.

s/ Jean H. Toal C.J.
For the Court

Columbia, South Carolina

October 6, 2006

The Honorable Richard L. Baird
Society Hill Municipal Judge

The Honorable Gordon M. Elliott
Nichols Municipal Judge

The Honorable Michael Evans
St. George Municipal Judge

The Honorable Clinton J. Hall, III
Calhoun Falls Municipal Judge

The Honorable Marion O. Hanna
Columbia Municipal Judge

The Honorable Rodney A. Kinlaw
Jasper County Magistrate

The Honorable Sheryl P. McKinney
Brunson Municipal Judge

The Honorable Perry L. Murray
Berkeley County Magistrate

The Honorable Henry H. Taylor
West Columbia Municipal Judge

The Honorable Lawrence D. Wiles
Fountain Inn Municipal Judge

Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

October 4, 2006

M E D I A R E L E A S E

Public Hearings have been scheduled to begin on **Tuesday, December 5, 2006,** commencing at **10:00 a.m.** regarding the qualifications of the following candidates for judicial positions:

COURT OF APPEALS

Seat 3	The Honorable John W. Kittredge, Greenville, S.C.
Seat 4	The Honorable Timothy L. Brown, Greenville, S.C.
	Lesley M. Coggiola, Columbia, S.C.
	The Honorable John C. Hayes, III, Rock Hill, S.C.
	The Honorable Robert N. Jenkins, Sr., Travelers Rest, S.C.
	J. Rene Josey, Florence, S.C.
	The Honorable Aphrodite Konduros, Greenville, S.C.
	The Honorable Paula H. Thomas, Pawleys Island, S.C.

CIRCUIT COURT

Fifth Judicial Circuit, Seat 1	The Honorable J. Ernest Kinard, Jr., Camden, S.C.
Seventh Judicial Circuit, Seat 1	The Honorable J. Derham Cole, Spartanburg, S.C.
Ninth Judicial Circuit, Seat 1	The Honorable Deadra L. Jefferson, Charleston, S.C.
Tenth Judicial Circuit, Seat 1	The Honorable J. C. Nicholson, Jr., Anderson, S.C.

FAMILY COURT

First Judicial Circuit, Seat 1	The Honorable Anne Gue Jones, Orangeburg, S.C.
Second Judicial Circuit, Seat 2	The Honorable Dale Moore Gable, Barnwell, S.C.
Third Judicial Circuit, Seat 2	The Honorable W. Jeffrey Young, Sumter, S.C.
Third Judicial Circuit, Seat 3	Gordon B. Jenkinson, Kingstree, S.C.
Fourth Judicial Circuit, Seat 2	The Honorable Jamie Lee Murdock, Jr., Hartsville, S.C.
Fifth Judicial Circuit, Seat 2	The Honorable Leslie K. Riddle, Irmo, S.C.
	Lillie C. Hart, Columbia, S.C.
Fifth Judicial Circuit, Seat 3	The Honorable Rolly W. Jacobs, Camden, S.C.
Sixth Judicial Circuit, Seat 1	The Honorable Brian M. Gibbons, Chester, S.C.
Seventh Judicial Circuit, Seat 1	The Honorable Georgia V. Anderson, Spartanburg, S.C.
Seventh Judicial Circuit, Seat 2	The Honorable James F. Fraley, Jr., Spartanburg, S.C.
Eighth Judicial Circuit, Seat 1	The Honorable Joseph W. McGowan, III, Laurens, S.C.
Eighth Judicial Circuit, Seat 3	The Honorable Billy A. Tunstall, Jr., Greenwood, S.C.
Ninth Judicial Circuit, Seat 2	The Honorable Paul W. Garfinkel, Charleston, S.C.
Ninth Judicial Circuit, Seat 4	The Honorable Wayne M. Creech, Pinopolis, S.C.

Tenth Judicial Circuit, Seat 1	The Honorable Barry W. Knobel, Anderson, S.C.
Tenth Judicial Circuit, Seat 3	The Honorable Tommy B. Edwards, Anderson, S.C.
Eleventh Judicial Circuit, Seat 2	Michael S. Medlock, Edgefield, S.C.
	Deborah Neese, Ridge Spring, S.C.
	Robert E. Newton, Lexington, S.C.
Eleventh Judicial Circuit, Seat 3	The Honorable Richard W. Chewning, III, Lexington, S.C.
Twelfth Judicial Circuit, Seat 1	The Honorable Mary E. Buchan, Marion, S.C.
Twelfth Judicial Circuit, Seat 2	The Honorable A. Eugene Morehead, III, Florence, S.C.
Thirteenth Judicial Circuit, Seat 2	The Honorable R. Kinard Johnson, Jr., Greenville, S.C.
Fourteenth Judicial Circuit, Seat 1	The Honorable Gerald C. Smoak, Jr., Walterboro, S.C.
Fourteenth Judicial Circuit, Seat 3	The Honorable Robert S. Armstrong, Seabrook, S.C.
Fifteenth Judicial Circuit, Seat 1	Joe M. Crosby, Georgetown, S.C.
	Anita R. Floyd, Garden City, S.C.
	Charles Reuben Goude, Hemingway, S.C.
	Jan B. Holmes, Georgetown, S.C.
Sixteenth Judicial Circuit, Seat 2	The Honorable Henry T. Woods, Rock Hill, S.C.

ADMINISTRATIVE LAW COURT

Seat 2	The Honorable John D. McLeod, Winnsboro, S.C.

MASTER IN EQUITY

Abbeville County	The Honorable Curtis G. Clark, Greenwood, S.C.
Aiken County	The Honorable Robert A. Smoak, Jr., Aiken, S.C.
Georgetown County	The Honorable Benjamin H. Culbertson, Georgetown, S.C.
Kershaw County	The Honorable Jeffrey M. Tzerman, Camden, S.C.
Lee County	Stephen B. Doby, Bishopville, S.C.

RETIRED

Court of Appeals	The Honorable Jasper M. Cureton, Columbia, S.C.
Court of Appeals	The Honorable C. Tolbert Goolsby, Columbia, S.C.
Family Court	The Honorable Stephen S. Bartlett, Simpsonville, S.C.
Family Court	The Honorable H. E. Bonnoitt, Jr., Georgetown, S.C.
Family Court	The Honorable C. David Sawyer, Jr., Ridge Spring, S.C.
Family Court	The Honorable R. Wright Turbeville, Manning, S.C.

Persons desiring to testify at public hearings shall furnish written notarized statements of proposed testimony. These statements must be **received by 12:00 noon on Friday, November 17, 2006.** The Commission has witness affidavit forms that may be used for proposed testimony. While this form is not mandatory, it will be supplied on request. Statements should be mailed or delivered to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, 104 Gressette Building, Post Office Box 142, Columbia, South Carolina 29202.

All testimony, including documents furnished to the Commission, must be submitted under oath. Persons knowingly giving false information, either orally or in writing, shall be subject to penalty.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

Questions concerning the hearing and procedures should be directed to the Commission at (803) 212-6092.

* * *

The Supreme Court of South Carolina

In the Matter of Thomas B. Hall, Respondent.

ORDER

On October 9, 2006, respondent was definitely suspended from the practice of law for nine (9) months. In the Matter of Hall, Op. No. 26212 (S.C. Sup. Ct. filed October 9, 2006) (Shearouse Adv. Sh. No. 38 at 36). Accordingly, we hereby appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

effectuate this appointment.

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

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Costa M. Pleicones C.J.
FOR THE COURT

Columbia, South Carolina

October 9, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 38

October 9, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2006-UP-332-Elizabeth B. McCullar and J.W. McCullar v. The Estate of Dr. William Cox Campbell et al.
(Richland, Judge Alison Renee Lee)

2006-UP-333-Manuel Robinson, as duly appointed personal representative of the estate of Brenda Doris Robinson, deceased v. Bon Secours St. Francis Health System et al.
(Greenville, Judge D. Garrison Hill)

2006-UP-334-Keith Sheppard v. South Carolina Department of Probation, Parole and Pardon Services
(Richland, Judge J. Ernest Kinard)

2006-UP-335-Donald Robinson v. City of Columbia
(Richland, Judge J. Mark Hayes, II)

2006-UP-336-The State v. Brian William Scott
(Greenville, Judge Edward W. Miller)

2006-UP-337-The State v. Tommy Lemel Watts
(York, Judge John C. Hayes, III)

2006-UP-338-The State v. Faith Draper
(Lexington, Judge Deadra L. Jefferson)

2006-UP-339-Eckartz v. Stone Creek Cove Homeowners Inc.
(Anderson, Judge Alexander S. Macaulay)

2006-UP-340-Wheeler M. Tillman v. Joe L. Grant
(Jasper, Judge J. Cordell Maddox, Jr.)

2006-UP-341-The State v. Tyrone Rouse
(Sumter, Judge James E. Brogdon, Jr.)

PETITIONS FOR REHEARING

4121-State v. Lockamy	Pending
4139-Temple v. Tec-Fab	Pending
4143-State v. Navy	Pending

4144-Myatt v. RHBT Financial	Pending
4145-Windham v. Riddle	Pending
4148-Metts v. Mims	Pending
4149-Guider v. Churpeyes	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-281-Johnson v. Sonoco Products et al.	Pending
2006-UP-285-State v. B. Scott	Pending
2006-UP-301-State v. C. Keith	Pending
2006-UP-313-Uzenda v. Pittman	Pending
2006-UP-314-Williams v. Weaver	Pending
2006-UP-315-Thomas Construction v. Rocketship	Pending
2006-UP-316-State v. T. Davis	Pending
2006-UP-317-Wells Fargo v. Holloway et al.	Pending
2006-UP-320-McConnell v. Burry	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3926-Brenco v. SCDOT	Pending
3929-Coakley v. Horace Mann	Granted 10/04/06
3940-State v. H. Fletcher	Pending

3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3956-State v. Michael Light	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3967-State v. A. Zeigler	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore	Pending
3978-State v. K. Roach	Pending
3981-Doe v. SCDDSN et al.	Granted 10/04/06
3982-LoPresti v. Burry	Pending
3983-State v. D. Young	Pending
3984-Martasin v. Hilton Head	Pending
3985-Brewer v. Stokes Kia	Pending
3988-Murphy v. Jefferson Pilot	Pending
3989-State v. Tuffour	Granted 10/4/06
3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Pending

3995-Cole v. Raut	Pending
3996-Bass v. Isochem	Pending
3998-Anderson v. Buonforte	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4004-Historic Charleston v. Mallon	Pending
4005-Waters v. Southern Farm Bureau	Pending
4006-State v. B. Pinkard	Pending
4011-State v. W. Nicholson	Pending
4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
4022-Widdicombe v. Tucker-Cales	Pending
4025-Blind Tiger v. City of Charleston	Pending
4026-Wogan v. Kunze	Pending
4027-Mishoe v. QHG of Lake City	Pending
4028-Armstrong v. Collins	Pending
4033-State v. C. Washington	Pending
4034-Brown v. Greenwood Mills Inc.	Pending
4035-State v. J. Mekler	Pending
4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry	Pending

4039-Shuler v. Gregory Electric et al.	Pending
4041-Bessinger v. Bi-Lo	Pending
4042-Honorage Nursing v. Florence Conval.	Pending
4043-Simmons v. Simmons	Pending
4044-Gordon v. Busbee	Pending
4045-State v. E. King	Pending
4047-Carolina Water v. Lexington County	Pending
4048-Lizee v. SCDMH	Pending
4052-Smith v. Hastie	Pending
4054-Cooke v. Palmetto Health	Pending
4058-State v. K. Williams	Pending
4060-State v. Compton	Pending
4061-Doe v. Howe et al.(2)	Pending
4062-Campbell v. Campbell	Pending
4064-Peek v. Spartanburg Regional	Pending
4065-Levine v. Spartanburg Regional	Pending
4068-McDill v. Mark’s Auto Sales	Pending
4069-State v. Patterson	Pending
4070-Tomlinson v. Mixon	Pending
4071-State v. K. Covert	Pending
4071-McDill v. Nationwide	Pending

4074-Schnellmann v. Roettger	Pending
4075-State v. Douglas	Pending
4078-Stokes v. Spartanburg Regional	Pending
4079-State v. R. Bailey	Pending
4080-Lukich v. Lukich	Pending
4082-State v. Elmore	Pending
4088-SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending
4091-West v. Alliance Capital	Pending
4092-Cedar Cove v. DiPietro	Pending
4093-State v. J. Rogers	Pending
4095-Garnett v. WRP Enterprises	Pending
4096-Auto-Owners v. Hamin	Pending
4100-Menne v. Keowee Key	Pending
4102-Cody Discount Inc. v. Merritt	Pending
4104-Hambrick v. GMAC	Pending
4109-Thompson v. SC Steel Erector	Pending
4111-LandBank Fund VII v. Dickerson	Pending
4112-Douan v. Charleston County	Pending
4113-Pirri v. Pirri	Pending
4115-Smith v. NCCI	Pending
4119-Doe v. Roe	Pending

2003-UP-757-State v. Johnson	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-653-State v. R. Blanding	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-152-State v. T. Davis	Pending
2005-UP-163-State v. L. Staten	Pending
2005-UP-174-Suber v. Suber	Denied 10/04/06
2005-UP-188-State v. T. Zeigler	Pending
2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Granted 10/04/06
2005-UP-195-Babb v. Floyd	Pending
2005-UP-197-State v. L. Cowan	Pending
2005-UP-219-Ralphs v. Trexler (Nordstrom)	Denied 10/04/06
2005-UP-222-State v. E. Rieb	Pending

2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-305-State v. Boseman	Pending
2005-UP-319-Powers v. Graham	Pending
2005-UP-337-Griffin v. White Oak Prop.	Denied 10/04/06
2005-UP-340-Hansson v. Scalise	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-348-State v. L. Stokes	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Pending
2005-UP-361-State v. J. Galbreath	Pending
2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. V. Mathis	Pending
2005-UP-422-Zepsa v. Randazzo	Pending
2005-UP-459-Seabrook v. Simmons	Pending
2005-UP-460-State v. McHam	Pending

2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-490-Widdicombe v. Dupree	Pending
2005-UP-517-Turbevile v. Wilson	Pending
2005-UP-519-Talley v. Jonas	Pending
2005-UP-530-Moseley v. Oswald	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-540-Fair v. Gary Realty	Pending
2005-UP-541-State v. Samuel Cunningham	Pending
2005-UP-543-Jamrok v. Rogers	Pending
2005-UP-556-Russell Corp. v. Gregg	Pending
2005-UP-557-State v. A. Mickle	Pending
2005-UP-574-State v. T. Phillips	Pending
2005-UP-580-Garrett v. Garrett	Pending
2005-UP-584-Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585-Newberry Elect. v. City of Newberry	Pending
2005-UP-590-Willis v. Grand Strand Sandwich Shop	Pending
2005-UP-595-Powell v. Powell	Pending
2005-UP-603-Vaughn v. Salem Carriers	Pending
2005-UP-604-Ex parte A-1 Bail In re State v. Larue	Pending

2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
2005-UP-635-State v. M. Cunningham	Pending
2006-UP-001-Heritage Plantation v. Paone	Pending
2006-UP-002-Johnson v. Estate of Smith	Pending
2006-UP-013-State v. H. Poplin	Pending
2006-UP-015-Watts Const. v. Feltes	Pending
2006-UP-022-Hendrix v. Duke Energy	Pending
2006-UP-025-State v. K. Blackwell	Pending
2006-UP-027-Costenbader v. Costenbader	Pending
2006-UP-030-State v. S. Simmons	Pending
2006-UP-037-State v. Henderson	Pending
2006-UP-038-Baldwin v. Peoples	Pending
2006-UP-043-State v. Hagood	Pending
2006-UP-047-Rowe v. Advance America	Pending
2006-UP-049-Rhine v. Swem	Pending
2006-UP-066-Singleton v. Steven Shipping	Pending
2006-UP-071-Seibert v. Brooks	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending
2006-UP-073-Oliver v. AT&T Nassau Metals	Pending

2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-079-Ffrench v. Ffrench	Pending
2006-UP-084-McKee v. Brown	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-115-Brunson v. Brunson	Pending
2006-UP-122-Young v. Greene	Pending
2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending
2006-UP-151-Moyers v. SCDLLR	Pending
2006-UP-158-State v. R. Edmonds	Pending
2006-UP-172-State v. L. McKenzie	Pending
2006-UP-180-In the matter of Bennington	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-211-Cunningham v. Mixon	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-230-Ex parte Van Osdell (Babb v. Graham)	Pending
2006-UP-237-SCDOT v. McDonald’s Corp.	Pending
2006-UP-243-Sun Trust Mortgage v. Gobbi	Pending
2006-UP-246-Gobbi v. Simerman	Pending
2006-UP-247-State v. Hastings	Pending

2006-UP-256-Fulmer v. Cain	Pending
2006-UP-268-DSS v. Mother	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Douglas E. Gressette and Mark E. Rudd, on behalf of other persons similarly situated, Appellants,

v.

South Carolina Electric and Gas Company (SCE&G), Respondent.

ORDER

Appellants petitioned this Court for rehearing. We deny the petition but withdraw our former opinion and substitute the attached opinion. The only changes are as follows.

The opinion currently states under the subheading "**FACTS**":

> On the motion to dismiss, the trial judge ruled that although the language of the easements does not allow third-party communications, the written easements are not determinative in light of this Court's precedent. . . .

This language is replaced with the following:

> For purposes of the motion to dismiss, the trial judge accepted as true the allegation that the language of the easements does not allow third-party communications, but found the written easements were not determinative in light of this Court's precedent. . . .

The opinion currently states under the subheading "**DISCUSSION**":

> Since the complaint alleges, and the trial judge found, that the language of the easements does not allow. . . .

This language is replaced with the following:

> Since we must presume as true the allegation that the language of the easements does not allow. . . .

IT IS SO ORDERED.

s/ James E. Moore A.C.J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

s/ James W. Johnson, Jr. A.J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Douglas E. Gressette and Mark E. Rudd, on behalf of other persons similarly situated, Appellants,

v.

South Carolina Electric and Gas Company (SCE&G), Respondent.

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

Opinion No. 26203
Heard May 23, 2006 – Refiled October 2, 2006

REVERSED

William L. Want, of Charleston, and Guyte P. McCord III, of McCord, Busbey & Ketchum. L.L.P, of Tallahassee, Florida, for appellants.

John M.S. Hoefer, Mitchell Willoughby, and Noah M. Hicks II, of Willoughby & Hoefer, P.A., of Columbia; John A. Massalon, of Will & Massalon, L.L.C., of Charleston; Stephen A. Spitz, of Charleston; and John M. Mahon, Jr.,

of SCANA Corporation, of Columbia, for respondent.

JUSTICE MOORE: Appellants (Landowners) commenced this class action against respondent (SCE&G) for trespass, unjust enrichment, an injunction, and declaratory judgment. Landowners claim SCE&G's conveyance of excess capacity on its fiber optic cables was an improper use of the electric easements granted by Landowners to SCE&G. The trial judge granted SCE&G's motion to dismiss under Rule 12(b)(6), SCRCP. We reverse.

FACTS

A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and we must presume all well-pled facts to be true. Overcash v. South Carolina Elec. and Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005). The complaint here alleges the following.

Landowners granted easements to SCE&G giving SCE&G "the right to construct, operate, and maintain electric transmission lines and all telegraph and telephone lines . . . necessary or convenient in connection therewith. . . ."[1] Sometime in the 1990's, SCE&G began installing fiber optic communications lines on its existing poles in these easements. Fiber optic lines do not carry electricity but transmit digital signals. After setting up this communications network,[2] SCE&G began conveying excess fiber optic capacity to third-party telecommunications companies without notice or compensation to Landowners.

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[1]Another easement, also annexed to the complaint, has slightly different language and provides "communication wires . . . deemed by [SCE&G] to be necessary. . . ."

[2]According to counsel at the motion hearing, SCE&G uses the fiber optic lines for communication between substations.

Landowners' complaint further alleges that the easements granted to SCE&G do not include the right to apportion any part of these easements to third parties for general telecommunications purposes. Landowners do not contest SCE&G's installation and use of the fiber optic lines for its own internal communications.

For purposes of the motion to dismiss, the trial judge accepted as true the allegation that the language of the easements does not allow third-party communications, but found the written easements were not determinative in light of this Court's precedent in Lay v. State Rural Electrification Auth., 182 S.C. 32, 188 S.E. 368 (1936), Leppard v. Central Carolina Tel. Co., 205 S.C. 1, 30 S.E.2d 755 (1944), and Richland County v. Palmetto Cablevision, 261 S.C. 222, 199 S.E.2d 168 (1973). The trial judge concluded these cases stand for the proposition that utility easements "confer a broad right to use the utility easement for additional purposes" and therefore SCE&G's conveyance was authorized as a matter of law.

ISSUE

Does the holder of a utility easement have the right to apportion part of its own use to third-parties as a matter of law and without reference to the written easements?

DISCUSSION

Our resolution of this case rests on our reading of Lay, Leppard, and Palmetto Cablevision. Since we must presume as true the allegation that the language of the easements does not allow SCE&G to convey use of its fiber optic cable to third parties, the issue is whether these cases allow apportionment of the use of a utility easement as a matter of law despite the language of the written easements.

In Lay, a 1936 case, we considered whether the placing of an electric line on a highway easement constituted an additional servitude. At issue was an Act of the General Assembly allowing the Rural

Electrification Authority to install electric lines in any public highway. The plaintiff landowners contended it was a taking without compensation to allow this additional servitude of the easements granted to the State "for highway purposes." We held the placement of electric lines in the highway easements did not constitute an additional servitude because communication was within the traditional use of a highway. There was no issue regarding whether the written easements in Lay prohibited an apportionment of use to third parties. We simply held the erection of electric lines was not an additional servitude to easements that were granted "for highway purposes."

In 1944, we decided the Leppard case which involved § 8531 of the 1932 Code, now S.C. Code Ann. § 58-9-2020 (1977). This section provides:

> Any telegraph or telephone company. . . may construct, maintain and operate its line . . . under, over, along and upon any of the highways or public roads of the State . . . .

The complaining landowner had previously conveyed "an unqualified right of way" to the State Highway Department. The issue was whether the erection of telephone lines in the highway easement was an additional servitude entitling the landowner to compensation. We followed our earlier decision in Lay and concluded the erection of telephone poles and lines within the highway easement was not an addition servitude and no compensation was due. Again, no restrictive language in the underlying easement was involved.

The third case, Palmetto Cablevision, was decided in 1973. Palmetto Cablevision did not involve private landowners but was an action by Richland County (County) essentially seeking to assert County's authority over cable television services. Cablevision had an agreement with a telephone company to use the telephone company's poles and rights-of-way and was required under the terms of that agreement to obtain consent from the State and private landowners, but not from County.

We found County's permission to use these easements was not required and, even if it was, the facts indicated such permission was actually given. 199 S.E.2d at 172. We held that the telephone company's easement was very broadly defined by statute and the stringing of additional cables for newly conceived communication uses was authorized without County's permission.[3] 199 S.E.2d at 173. In essence, we found the television cables did not constitute an additional servitude on the underlying telephone easements. Again, the case did not involve restrictive language in the easements.[4]

SCE&G would have us read these three cases as standing for the proposition that the use of a utility easement may be apportioned as a matter of law without reference to the language of the easement itself. We disagree.

First, Lay, Leppard, and Palmetto Cablevision, while settling the issue of an additional servitude, did not involve restrictions on the apportionment of an allowed use. As other courts have noted, the issue of apportionment is a slightly different issue from that of additional servitude. Where an easement is granted for some category of use, for instance "highway purposes," the question of an additional servitude addresses whether some new use fits within that category of allowed use, a question that may turn simply on an evaluation of the new use rather than an interpretation of the easement's language. Apportionment, on the other hand, involves the interpretation of a restriction on the easement holder's conveyance of part of its own allowed use to a third party. *See* Jackson v. City of Auburn, 2006 WL

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[3]Justice Littlejohn dissented from the majority's holding on this issue and would have held that County's permission was required because anyone wishing to use County's streets must first obtain a permit. 199 S.E.2d at 176.

[4] Nor did the case involve a challenge by private owners of the servient estates. As Justice Littlejohn noted in concurrence, County had no right to raise the issue of just compensation due to private landowners. 199 S.E.2d at 177.

893617 at 9 (Ala. App. 2006) (use of fiber optic line in electric easement may be apportioned when language in instrument indicates right to apportion and when apportionment is not additional servitude); City of Orlando v. MSD-Mattie, L.L.C., 895 So.2d 1127 (Fla. App. 2005) (use of fiber optic cable not an additional servitude but cannot be apportioned under language of instrument granting easement); McDonald v. Mississippi Power Co., 732 So.2d 893 (Miss. 1999) (same); *see also* Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist., 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003) (holding that language of easement restricted use of easement).

Here, there is no real issue of an additional servitude -- Landowners concede the fiber optic lines are within the use allowed under the terms of the easements. Rather the issue is whether SCE&G may apportion its allowed use to third parties. This is clearly an issue that cannot be resolved without construing the instruments granting the easements in question. It is well-settled that the rights of an easement holder depend upon the interpretation of the grant in the easement. Patterson v. Duke Power Co., 256 S.C. 479, 183 S.E.2d 122 (1971). Moreover, were we to read our earlier decisions as broadly as SCE&G suggests, the owner of a servient estate could never limit the grant of a utility easement, no matter how specific the language in the easement.

Further, SCE&G argues it can apportion its use of the easements to third parties because the easements in question are commercial easements in gross which are alienable as a matter of law. This is not entirely correct. Even with such an easement, the court will look at the language of the easement to determine whether there was an intention to attach the attribute of assignability by the use of such language as "to his heirs and assigns." Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965) (parties may make an easement in gross assignable by the terms of the instrument; commercial easement in gross assignable where language included "successors and assigns"); Douglas v. Medical Investors, Inc., 256 S.C. 440, 182 S.E.2d 720 (1971) (commercial easement in gross assignable where instrument included "his heirs and assigns"). Here, the easements attached to

Landowners' complaint do state a conveyance to SCE&G and "its successors and assigns." While this language indicates assignability, the language limiting the use of the easement to communications necessary to SCE&G's business appears to restrict that assignability. This ambiguity requires construction of the written easements themselves.

The trial judge's order dismissing Landowners' complaint is

REVERSED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice James W. Johnson, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert E. Lee, Respondent.

Opinion No. 26211
Submitted August 29, 2006 – Filed October 9, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Kevin M. Barth, of Ballenger, Barth & Hoefer, LLP, of Florence, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a public reprimand or definite suspension not to exceed two (2) years. We accept the Agreement and definitely suspend respondent from the practice of law in this state for one hundred and eighty (180) days. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent was admitted to the practice of law in South Carolina in 1991. He was employed as a shareholder in a law firm (the Firm) primarily engaged in representing clients insured by liability

insurance companies. The client in the cases mentioned hereafter was insured by an insurance carrier that paid the Firm the fees, costs, and expenses of the defense afforded to the insured client.

On approximately nineteen occasions between November 9, 2004, and August 13, 2005, respondent over billed the insurance carrier by including or causing to be included in its billing statement attorneys fees for traveling to depositions held out of town when, in fact, respondent knew he had participated in the depositions by telephone at the Firm's office. In addition, respondent over charged the insurance carrier for costs by billing the carrier for mileage for traveling to the depositions on approximately seventeen of the nineteen occasions.[1]

The overcharges came to light when respondent's secretary expressed concerns to the Firm's office manager who, in turn, reported the concerns to the Firm's senior partner. The senior partner confronted respondent about the overcharges. When confronted, respondent was immediately candid about the overcharges.

Upon discovering respondent's misrepresentation, the Firm reviewed its files and determined the overcharges had occurred in three files, all for the same client insured by the same insurance carrier. The Firm estimated the amount of fees and costs over billed by respondent were $10,279.40.[2] Thereafter, the senior partner made arrangements to meet with respondent, respondent's counsel, and ODC.

The next day, respondent, his counsel, and the senior partner met with ODC. Respondent reported his misconduct. Immediately upon returning to the Firm's office after the meeting, respondent wrote a personal check to the Firm in the amount of

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[1] ODC does not contend respondent personally benefited from the overcharge of the mileage expense.

[2] Respondent agrees this amount is correct.

$10,279.40 which was to be paid by the Firm to the insurance carrier to reimburse it for the overcharges.

With respondent's assistance, the Firm compiled a complete and thorough report documenting respondent's misconduct. Respondent and the senior partner signed the report, certifying it to be correct and accurate. The report was promptly furnished to ODC.

The following day, at respondent's expense, respondent and the senior partner traveled out of state to the home office of the insurance carrier. Respondent personally reported his misconduct and promised to provide the carrier with a copy of the report prepared for ODC.[3] The Firm paid the carrier $10,279.40 without any preconditions or requests for a release.

With knowledge of the foregoing, the insurance carrier has continued to refer files for defense of its insured to the Firm and to respondent for defense and, in fact, has given respondent permission to continue working on the three files in which the overcharging occurred and on new files. The Firm, however, has not allowed respondent to directly bill the insurance carrier and, instead, has had a shareholder review billing information complied by respondent prior to statements being submitted to the carrier.

Respondent has no previous disciplinary history. To the best knowledge, information, and belief of ODC, respondent has been fully forthcoming in responding to questions about his misconduct to the Firm, the insurance carrier, and Disciplinary Counsel and has fully cooperated with its investigation.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule

[3] The report was subsequently provided to the insurance carrier.

407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.5 (lawyer shall charge reasonable fees); Rule 4.1 (in the course of representing a client, lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 5.3 (with respect to a non-lawyer employee, lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with professional obligations of the lawyer); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(b) (lawyer shall not commit criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 8.4 (c) (lawyer shall not commit a criminal act involving moral turpitude); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(5) (lawyer shall not engage in conduct tending to bring legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (lawyer shall not violate the oath of office).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for one hundred and eighty (180) days. Prior to his readmission, the Committee on Character and Fitness shall determine whether respondent has the requisite character and fitness to practice law in this state. See Rule 32, RLDE, Rule 413, SCACR. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Thomas B. Hall, Respondent.

Opinion No. 26212
Submitted August 29, 2006 – Filed October 9, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael J. Virzi, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a definite suspension from the practice of law not to exceed nine (9) months. We accept the Agreement and impose a nine (9) month suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

In 1999, respondent began practicing law in the area of real estate transactions. By the end of 2001, he was conducting approximately two hundred closings per month and employed five lawyers as full-time employees and many more as independent contracting attorneys. The Hall Law Firm was located in Columbia and the closings took place in Columbia and other areas of the state. Approximately eighty percent of respondent's closings were refinancings conducted at borrowers' residences.

In April 2002, respondent sold the assets of the Hall Law Firm to Nations Holding, a Kansas corporation. Nations Holding is not a law firm but is affiliated with the Kansas law firm Likens & Blomquist. Upon selling the firm's assets, respondent became an employee of Nations Title Agency of the Carolinas, a North Carolina corporation which is a subsidiary of Nations Holding; Nations Title is not a law firm. Respondent was hired as a marketing executive with no intention of practicing law.

After the sale, Likens & Blomquist began doing business in South Carolina in association with Nations Title. All of the Hall Law Firm's non-lawyer employees became employees of Nations Title and all lawyers employed by the Hall Law Firm, except respondent, became employees of Likens & Blomquist. In Columbia, Likens & Blomquist shared office space with Nations Title and, until early 2004, the office door and exterior signs read only "Nations Title" with no indication of the law firm's presence.

While employed by Nations Title, the volume of business required respondent to act as supervising attorney for some closings. By supervising the closings, respondent recognizes he assisted Nations Title, a non-lawyer corporation, in the unauthorized practice of law. Following one such transaction, the borrower defaulted and the lender foreclosed, but the presiding Master-in-Equity declared the mortgage null and void and dismissed the foreclosure on the grounds that the transaction was tainted with

illegality due to respondent engaging in the unauthorized practice of law by closing the transaction as a title company employee.[1]

Nations Title's procedures for closing refinancing transactions included sending a lawyer to close the loan at the borrower's home when a lawyer was available and sending a non-lawyer notary to close the loan at the borrower's home when a lawyer was not available. When a non-lawyer conducted a closing, a lawyer in Columbia was available by telephone and the borrower would sign a form disclosing that the closing was performed by a non-lawyer and that a lawyer was available by telephone if needed.[2]

Nations Title's closing procedures also included instructing borrowers to provide a person to serve as the second witness to the closing, as only one lawyer (or non-lawyer "closer") would be sent to conduct the closing. In cases where no second witness appeared at the closing, the lawyer or closer would sign as the first witness to the execution of the mortgage then return it to Nations Title's office where an employee who was not present at closing and did not witness the execution of the mortgage would falsely sign the mortgage as the second witness.[3]

Approximately two months after the sale of his firm's assets to Nations Holding, respondent became an employee of Likens & Blomquist. He continued closing loans and supervising the Likens & Blomquist lawyers who closed loans. [4]

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[1] The case settled, accordingly, no issues were decided on appeal. Respondent was not a party to the foreclosure action.

[2] This had also become the Hall Law Firm's practice shortly before its sale to Nations Title.

[3] Respondent had disseminated an official office policy requiring a second witness at every closing, but admits this policy was generally disregarded until mid-2004.

[4] It is unclear if Likens & Blomquist's closing procedures were exactly the same as those of Nations Title. Nevertheless, respondent fully

Nations Title and Likens & Blomquist employed several non-lawyers to perform title work and other closing-related work. In addition to their regular salary, they were paid $75 per closing performed outside the office. Respondent now acknowledges that many borrowers received inadequate legal advice as a result of this practice.

In response to In the Matter of Lester, 353 S.C. 246, 578 S.E.2d 7 (2003), issued in March 2003, respondent attempted to bring office procedures into conformity with the requirement of attorney presence at all closings. Respondent admits it took several months for these efforts to be successful and approximately two hundred refinancings were conducted in borrowers' homes by non-lawyer employees during April, May, and June of 2003 with no lawyer present.

Respondent's immediate response to the Lester opinion was to require any non-lawyer closer to telephone a lawyer during the closing to explain the HUD-1, note, mortgage, and three-day right of rescission to the borrower. The borrower's disclosure was altered to reflect the telephone call. In the weeks following the Lester opinion, respondent sought advice from colleagues and ethics experts regarding his procedures and the impact of the Lester opinion, but obtained no definitive advice. By the summer of 2003, respondent states he had eliminated the practice of non-lawyer closings.

Likens & Blomquist experienced a high turnover rate for lawyer employees, with many leaving due to dissatisfaction with the lack of conformity with the requirements of the Rule of Professional Conduct and this Court's pronouncements regarding real estate transactions. In early 2004, in response to complaints from departing attorneys and threats of reporting Likens & Blomquist to the Commission on Lawyer Conduct, respondent again attempted to bring office procedures in conformity with

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accepts responsibility for real estate transactions which were conducted in violation of the Rules of Professional Conduct and the Court's precedent while he was employed by Likens & Blomquist.

applicable ethical rules, this time including ending the practices of false witnessing and in-house unsupervised out-of-state disbursement. Respondent obtained counsel to review his procedures. Respondent implemented the recommended changes, including physically separating the facilities of Nations Title from those of Likens & Blomquist. By way of mitigation and not as a defense, respondent states that he was not aware of all of the shortcomings or the extent of the problems, but he nonetheless accepts responsibility for them.

Respondent represents, and ODC does not dispute, that after June 2004, respondent made massive efforts to take control of Likens & Blomquist and wrestle authority from the Nations Title managers and from the partners and managers in Kansas. Ultimately, respondent left Likens & Blomquist in 2005 due to his inability to force the firm to conform to the Rules of Professional Conduct and the Court's pronouncements regarding real estate transactions.

Respondent recognizes that the actions of Nations Title and Likens & Blomquist constituted the unauthorized practice of law and that, as the senior South Carolina attorney in the combined offices, he was responsible. Nevertheless, although he was an employee of Likens & Blomquist, the most senior South Carolina lawyer, and the supervisor of all other firm lawyers in South Carolina, respondent remained a subordinate of the non-lawyer managers of Nations Title. As such, respondent did not have authority to countermand decisions regarding Likens & Blomquist's policies and procedures, including the closing procedures described above.

Respondent has fully cooperated with ODC's investigation into this matter.

LAW

Respondent admits that, by his misconduct, he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.4 (lawyer shall explain matter to extent reasonably necessary to permit client to make

informed decisions regarding representation); Rule 5.3 (lawyer shall be responsible for conduct of non-lawyer associates that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer); Rule 5.5 (lawyer shall not assist others in performing activities which constitute the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct). In addition, respondent admits that his actions constitute grounds for discipline under the Rule 7 (a)(1), RLDE, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine (9) months. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court demonstrating that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

In re: Amendments to Rule 2(q) and 3(g), RLDE,
Rule 413, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina

Constitution, Rule 413, SCACR, is hereby amended as follows:

Rule 2(q) is amended to read:

(q) Lawyer: anyone admitted to practice law in this state, including any formerly admitted lawyer with respect to acts committed prior to resignation or disbarment; any lawyer specially admitted by a court of this state for a particular proceeding; a lawyer not admitted in this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction; or anyone whose advertisements or solicitations are subject to regulation by Rule 418, SCACR.

Rule 3(g) is amended to read:

(g) Powers Not Assumed. These rules shall not be construed to deny any court the powers necessary to maintain control over its proceedings. Nothing in these rules shall limit the authority of the Supreme Court to enjoin and to punish as contempt of court any person who engages in the unauthorized practice of law.

These amendments shall take effect immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

October 4, 2006

The Supreme Court of South Carolina

In the Matter of T. Andrew Johnson, Respondent.

ORDER

Respondent pled guilty to one count of conspiracy to make false statements to a financial institution in violation of 18 U.S.C. § 371.

The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and to appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the interim suspension.

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

IT IS FURTHER ORDERED that Stephen D. Searcy, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr.

Searcy shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Searcy may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT
Pleicones, J., not participating

Columbia, South Carolina

October 4, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

EFCO Corporation, Appellant,

v.

Renaissance on Charleston Harbor, LLC, Estates Management Company, Bovis Lend Lease, Inc., Phoenix Contract Glass, LLC, National Grange Mutual Insurance Company, Harbor Sales, LLC, Point Sales, LLC, Edward Strom a/k/a Edward T. Strom, and Robert M. Mundy, Jr., Respondents.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4155
Submitted September 1, 2006 – Filed October 2, 2006

AFFIRMED

Clifford O. Koon, Paul D. de Holczer, and Mary Frances Gibson, all of Columbia, for Appellant.

Henry W. Brown and William D. Britt, Jr., both of Columbia, for Respondents Renaissance on Charleston Harbor, LLC, Estates Management Company, Harbor Sales, LLC, Point Sales, LLC, Edward Strom a/k/a Edward T. Strom, and Robert M. Mundy, Jr.

C. Allen Gibson, Jr. and James E. Weatherholtz, both of Charleston, for Respondent Bovis Lend Lease, Inc.

M. Baron Stanton, of Columbia, for Respondent Phoenix Contract Glass, LLC.

Francis Marion Mack, of Columbia, for Respondent National Grange Mutual Insurance Company.

GOOLSBY, J.: The circuit court dismissed EFCO Corporation's claim for a mechanic's lien against Renaissance on Charleston Harbor, LLC, and thereafter awarded Renaissance attorney fees and costs pursuant to section 29-5-10(a) of the South Carolina Code.[1] EFCO appeals the award of attorney fees and costs, arguing (1) Renaissance was not a prevailing party as required by the statute and (2) the amount of fees awarded was excessive. We affirm.[2]

FACTS

In August 2001, Renaissance hired a general contractor, Bovis Lend Lease, Inc., to develop a condominium project in Mount Pleasant, South

[1] S.C. Code Ann. § 29-5-10(a) (Supp. 2005).

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

Carolina. Bovis, in turn, hired multiple subcontractors, including Phoenix Contract Glass, LLC, to build various portions of the project. Phoenix purchased supplies and materials from EFCO for the construction of its portion of the project. EFCO is a manufacturer and supplier of architectural windows and framing systems.

On February 4, 2002, EFCO filed a mechanic's lien ("Lien One") in the amount of $772,841.00 on the condominium property for "materials and/or labor . . . furnished pursuant to an agreement with PHOENIX CONTRACT GLASS." Renaissance "bonded off" Lien One by filing a bond with the Charleston County Clerk of Court in April 2002.[3] EFCO did not immediately move to foreclose its lien. Instead, it commenced a debt collection action on Lien One in Richland County on January 8, 2003.

On June 10, 2003, EFCO filed a new mechanic's lien ("Lien Two") in Charleston County for the sum of $793,428.48 as a result of Phoenix's installation of additional EFCO product in the condominium project during March 2003. This sum allegedly included amounts due under Lien One. EFCO then filed a debt collection action on Lien Two in Charleston County on August 5, 2003 and also moved to foreclose Lien Two. EFCO's Richland County action was consolidated with this matter.

Renaissance filed a motion for summary judgment on October 24, 2003, alleging, among other things, that Lien One should be dissolved because EFCO failed to bring an action to foreclose this lien within six months as required by section 29-5-120 of the South Carolina Code.[4] The

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[3] See S.C. Code Ann. § 29-5-110 (Supp. 2005) (stating a property owner or anyone having an interest in the subject property may secure the discharge of the property from the lien by filing an appropriate bond; the bond then takes the place of the property to secure the lien).

[4] Section 29-5-120 provides as follows: "Unless a suit for enforcing the lien is commenced, and notice of pendency of the action is filed, within six months after the person desiring to avail himself thereof ceases to labor on or

circuit court agreed, finding EFCO did not timely file the foreclosure action, and granted Renaissance summary judgment as to Lien One; all other causes of action were allowed to proceed.

Renaissance thereafter filed a motion for attorney fees and costs. The circuit court found Renaissance was the "prevailing party" as required for an award of attorney fees under section 29-5-10(a)[5] and awarded Renaissance attorney fees and costs in the amount of $10,434.00. EFCO appeals.

STANDARD OF REVIEW

The foreclosure of a mechanic's lien is an action at law in South Carolina.[6] "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence reasonably supporting them."[7] "The judge's findings are equivalent to a jury's findings in a law action."[8]

LAW/ANALYSIS

I. Prevailing Party

EFCO first argues the circuit court erred in awarding Renaissance attorney fees and costs because Renaissance could not be deemed a "prevailing party" under the mechanic's lien statute. Specifically, EFCO

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furnish labor or material for such building or structures, the lien shall be dissolved." S.C. Code Ann. § 29-5-120 (1991) (emphasis added).

[5] S.C. Code Ann. § 29-5-10(a) (Supp. 2005).

[6] Adams v. B & D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989); Keeney's Metal Roofing, Inc. v. Palmieri, 345 S.C. 550, 548 S.E.2d 900 (Ct. App. 2001).

[7] Adams, 297 S.C. at 420, 377 S.E.2d at 317.

[8] Id.

contends (a) Renaissance prevailed in its motion for summary judgment as to Lien One based on a mere technicality, not the merits, and (b) Renaissance might not prevail on the other causes of action that are still pending. We disagree.

"The determination of who is a prevailing party for the purposes of an award of costs is committed to the sound discretion of the trial court."[9] "An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support."[10]

The general rule in South Carolina is that attorney fees are not recoverable unless they are authorized by contract or by statute.[11] There is no right under the common law to attorney fees.[12] It is undisputed that the mechanic's lien statute at issue here specifically authorizes the recovery of attorney fees and costs. Section 29-5-10(a) provides in relevant part as follows:

> A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate . . . shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated to secure the payment of the

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[9] 20 Am. Jur. 2d Costs § 11 (2005); see also 20 C.J.S. Costs § 126 (1990).

[10] Patel v. Patel, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004).

[11] Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993); Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978).

[12] Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990).

> debt due to him. The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party.[13]

Our supreme court has defined a "prevailing party" as "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered."[14] "[I]n a mechanic's lien action the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic's lien cannot be enforced against it."[15]

a. Merits of the Action

The definition of a prevailing party "clearly envisions a victory to some degree on the merits."[16] "Where the word 'merits' is used when referring to a case having been decided on the merits, it embraces a consideration of

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[13] S.C. Code Ann. § 29-5-10(a) (Supp. 2005) (emphasis added).

[14] Heath v. County of Aiken, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (alteration in original) (quoting Buza v. Columbia Lumber Co., 395 P.2d 511, 514 (Alaska 1964)); see also Seckinger v. The Vessel Excalibur, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997) (observing this definition of a prevailing party is applied in the context of statutes allowing attorney fees).

[15] Seckinger, 326 S.C. at 388, 483 S.E.2d at 778; see also Cedar Creek Props. v. Cantelou Assocs., 320 S.C. 483, 486, 465 S.E.2d 774, 776 (Ct. App. 1995) (finding a property owner who filed a complaint to dissolve a mechanic's lien was the prevailing party where the contractor filed a cancellation of the lien).

[16] Jasper County Bd. of Educ. v. Jasper County Grand Jury, 303 S.C. 49, 52, 398 S.E.2d 498, 500 (1990).

substance, not of form; of legal rights, not of mere defects of procedure or the technicalities thereof."[17]

In the current appeal, the circuit court granted summary judgment in favor of Renaissance as to Lien One primarily because EFCO did not bring a foreclosure action within six months of filing its lien as required by statute. "Statutes of limitations are not simply technicalities."[18] We find Renaissance was a prevailing party because it successfully defended the action based on EFCO's failure to comply with what, in essence, amounted to a statute of limitations.[19] This finding is in line with prior case law. For example, in

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[17] 26C Words and Phrases Merits 494 (2003) (referencing Columbia Parcar Corp. v. Arizona Dep't of Transp., 971 P.2d 1042 (Ariz. Ct. App. 1999)); see also id. ("As a technical legal term, 'merits' has been defined as a matter of substance in law as distinguished from matters of form, and as the real or substantial grounds of action or defense, in contradistinction to some technical or collateral matter raised in the course of the suit." (referencing Wolfe v. Ga. Ry. & Elec. Co., 65 S.E. 62 (Ga. Ct. App. 1909)).

[18] City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231, 599 S.E.2d 462, 465 (Ct. App. 2004) (citing 54 C.J.S. Limitations of Actions § 2, at 16-17 (1989)).

[19] Cf. Cedar Creek Props., 320 S.C. at 486, 465 S.E.2d at 775-76 (holding a property owner who took affirmative steps to dissolve a contractor's mechanic's lien was a prevailing party entitled to attorney fees and costs even though the contractor voluntarily cancelled the lien because the contractor did so only after the property owner instituted its action and it still had to defend against the lien until the issue was resolved; the court noted the legislative intent in allowing a prevailing party to recover attorney fees and costs stems from a desire to deter both wrongful filing of liens and unjustified refusal to pay debts subject to mechanic's liens); 33B Words and Phrases Prevailing Party 242 (2006) (referencing Cedar Creek Props. v. Cantelou Assocs., 320 S.C. 483, 465 S.E.2d 774 (Ct. App. 1995)).

Keeney's Metal Roofing, Inc. v. Palmieri[20] we held "a party may recover attorney's fees and costs under § 29-5-20(A)[21] as a 'prevailing party' even though the party obtained a dismissal via a procedural rule, provided the dismissal was not due to [a] mere technicality."[22]

We noted in Keeney that "although Appellants were dismissed pursuant to a procedural rule, the dismissal was not on a mere technicality. Instead, Appellants prevailed because, ***as a matter of law***, they could not be held liable for the damages Keeney sought under any circumstance."[23] Similarly, in the current appeal, Renaissance could not held liable because, as a matter of law, the time for enforcing the lien had already expired.

b. Other Pending Claims

To the extent EFCO further asserts the circuit court erred in finding Renaissance was a prevailing party because several causes of action are still pending, we find no error. Section 29-5-10(b) of the South Carolina Code provides in relevant part: "For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action."[24]

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[20] 345 S.C. 550, 548 S.E.2d 900 (Ct. App. 2001). In Keeney the mechanic's lien could not be enforced because a bond had been executed and, under section 29-5-110, the surety bond took the place of the property upon which the lien existed. Id. at 554-55, 548 S.E.2d at 902.

[21] Although the court in Keeney was analyzing section 29-5-20(A) instead of section 29-5-10(a) as in the present case, both sections provide similar rules for awarding attorney fees to the prevailing party. The only difference in the two sections is that the former concerns liens filed by subcontractors and suppliers, whereas the latter addresses liens filed by persons furnishing labor and materials and also addresses settlements to enforce liens.

[22] Id. at 556, 548 S.E.2d at 903.

[23] Id. at 555, 548 S.E.2d at 902-03.

[24] S.C. Code Ann. § 29-5-10(b) (Supp. 2005).

Under the mechanic's lien statute, a party who successfully defends a claim for a lien is entitled to recover attorney fees regardless of the outcome of any remaining causes of action.[25] The fees are limited, however, to those actually incurred in defending the lien.[26] Accordingly, we find the circuit court did not err in awarding attorney fees to Renaissance relating to its defense of the mechanic's lien claim.

II. Amount of Attorney Fees Awarded

EFCO next argues that, even if Renaissance was properly deemed a prevailing party, the circuit court abused its discretion in granting attorney fees to Renaissance because the amount of the award was excessive. We disagree.

The determination of the amount of attorney fees that should be awarded under the mechanic's lien statute is addressed to the sound

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[25] See Utils. Constr. Co. v. Wilson 321 S.C. 244, 249-50, 468 S.E.2d 1, 3-4 (Ct. App. 1996) (upholding an award of attorney fees to a property owner who successfully defended a contractor's claim for a mechanic's lien, even though the owner lost on the contractor's claims for unjust enrichment and breach of contract; we noted the trial court had directed a verdict on the mechanic's lien to the owner and, under the mechanic's lien statute, a party is entitled to recover attorney fees if the party prevails in defending the lien); 33B Words and Phrases Prevailing Party 242 (2006) (stating a "[p]arty need not be successful as to all issues in order to be found to be a 'prevailing party' for purposes of [an] attorney fee award" (referencing Seckinger v. The Vessel Excalibur, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997))).

[26] Cedar Creek Props., 320 S.C. at 487, 465 S.E.2d at 776 (stating the amount of attorney fees should be limited to those actions specifically involving the mechanic's lien); see also 20 C.J.S. Costs § 126 (1990) ("Where a party is successful on some claims but not others, he may be considered a prevailing party, but is entitled to an award only for fees generated in connection with the successful claims . . . ." (footnote omitted)).

discretion of the trial court.[27] The court's decision will not be disturbed on appeal absent an abuse of discretion.[28]

"[T]he court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services."[29] "[O]n appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor."[30]

In this case, the circuit court considered each of the requisite factors and the record supports the court's findings. Initially, we note Renaissance provided a detailed time sheet outlining the time spent on, and the tasks performed for, this case. We agree with the circuit court's determination that the total fee is reasonable in light of the nature of the work performed and the time it took to prepare the case. In addition, Renaissance obtained a beneficial result when the circuit court granted summary judgment to it and dissolved Lien One. Further, the circuit court considered the fees customarily charged in the locality and determined the award was reasonable for defending a lien of approximately $772,841.00 and was related solely to the defense of the mechanic's lien claim. The remaining factors were not in dispute. We therefore find the circuit court did not abuse its discretion in awarding Renaissance attorney fees and costs in the amount of $10,434.00.

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[27] Keeney's Metal Roofing, Inc., 345 S.C. at 553, 548 S.E.2d at 901.

[28] Id.; see also Zepsa Constr., Inc v. Randazzo, 357 S.C. 32, 40, 591 S.E.2d 29, 33 (Ct. App. 2004); 56 C.J.S. Mechanics' Liens § 436 (1992).

[29] Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (citing Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993)).

[30] Id.

CONCLUSION

Based of the foregoing, we hold Renaissance was the prevailing party under the mechanic's lien statute and the award of attorney fees and costs in the amount of $10,434.00 was not excessive. Accordingly, the order of the circuit court is

AFFIRMED.

BEATTY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dana Rae Rikard, Appellant.

Appeal From Lexington County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4156
Submitted September 1, 2006 – Filed October 2, 2006

AFFIRMED

Stephen Drew Geoly, of Greenwood, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

BEATTY, J.: Dana Rae Rikard appeals her plea of guilty to felony driving under the influence causing death and felony driving under the influence causing great bodily injury. She asserts the circuit court judge erred in refusing to allow her to withdraw her guilty plea. We affirm.[1]

FACTS

After spending the afternoon and evening at the I-20 Speedway in Pelion on April 6, 2002, Rikard drove home with her four-year-old daughter at approximately 11:15 p.m. While driving down US-178, Rikard collided with an on-coming vehicle driven by Stephanie Braithwaite. Rikard's daughter, who was not restrained by a seatbelt or a car seat, died at the scene after she was ejected from the vehicle. Braithwaite's four-year-old son was rendered unconscious as a result of the impact. Braithwaite, with the assistance of a passerby, was able to extricate her son from the vehicle before it caught fire. Braithwaite's son was immediately airlifted to Palmetto Richland Hospital where he spent several days to be treated for a subdural hematoma and a broken femur.

While investigating the accident, the officers called to the scene searched Rikard's vehicle. During this search, the officers observed the speedometer was "locked" around eighty miles per hour and found several empty bottles of Zima. According to the officers, Rikard admitted drinking eight Zimas prior to the accident. Three hours after the accident, Rikard's blood was tested at the hospital. Toxicology reports revealed Rikard's blood alcohol content was .11. As part of the SLED investigation, the toxicologist opined that Rikard's blood alcohol content would have been approximately .173 at the time of the accident.

On November 1, 2004, a Lexington County grand jury indicted Rikard for the following offenses: child endangerment, open container violation,

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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.

violation of the child restraint law, a seatbelt violation, felony driving under the influence (DUI) causing great bodily injury, and felony DUI causing death.

On April 4, 2005, Rikard pleaded guilty to the felony DUI charges.[2] During the plea colloquy, the circuit court judge inquired about Rikard's education level, marital status, and employment history. As to the specific charges, the judge informed Rikard that her plea would be a "straight-up" plea without any recommendations or negotiated sentence from the State. He further informed her of the maximum possible sentence for each offense and the constitutional rights she was waiving by pleading guilty. Upon hearing the judge's instructions, Rikard admitted she was guilty of the charged offenses and indicated that she wanted to plead guilty.

After determining that Rikard's guilty plea was freely and voluntarily given, the judge permitted the solicitor to give a recitation of the facts. At the conclusion of this presentation, the solicitor stated, "we would ask for the maximum sentence allowed under the law in this case." The judge accepted Rikard's guilty plea after hearing the factual basis for the plea.

In mitigation, Rikard's counsel stated that Rikard was remorseful and that she had two children who needed her at home. Counsel claimed Rikard's husband, from whom she was separated, was not notified in time to attend the plea proceeding. Counsel further challenged points in the accident investigation, specifically the alleged speed of Rikard's vehicle before the collision. Additionally, counsel stated that Rikard did not believe she was under the influence at the time of the accident even though she admitted to drinking some alcohol that night. He requested the court "be as merciful as possible in this case."

After hearing from Rikard and her mother, the judge sentenced Rikard to twenty-two years imprisonment and a $10,000 fine for felony DUI causing

[2] The solicitor dismissed the collateral traffic violations as a result of the plea.

death and fifteen years imprisonment and a $5,000 fine for felony DUI causing great bodily injury. The sentences were to be served concurrently.

Subsequently, Rikard filed a motion to withdraw her plea, or in the alternative, a motion to reconsider the sentence. In this motion, Rikard's counsel alleged prejudicial misconduct on the part of the State. Counsel submitted affidavits and letters from Rikard's family in support of this assertion.

In terms of the alleged misconduct, Rikard claimed the State acted improperly before and during the plea hearing. Specifically, Rikard's counsel contended the State failed to disclose during discovery: (1) that there was evidence Rikard's blood alcohol content was .173; (2) photographs of the scene depicting the deceased child; and (3) Rikard's alleged admissions regarding her consumption of alcohol prior to the accident. Additionally, counsel claimed the State failed to notify Rikard's husband and her two other children of the hearing pursuant to the Victim's Bill of Rights.[3] Rikard believed her family members could have offered evidence in mitigation.

With respect to the State's actions during the hearing, Rikard's counsel asserted the solicitor's representation of the facts, particularly the description of the deceased child's final moments after the accident and the cause of the accident, was exaggerated and rose to the level of misrepresentation. Counsel contended Rikard did not agree with this recitation of the facts. Rikard's counsel further argued the State failed to honor its representation that it would not make a recommendation regarding sentencing when the solicitor requested the maximum sentence during the hearing.

After a hearing, the circuit court judge denied Rikard's motion to withdraw her plea as well as the motion to reconsider the sentence. This appeal followed.

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[3] S.C. Const. art. I, § 24.

DISCUSSION

Rikard argues the circuit court judge erred in accepting her plea or refusing to allow her to withdraw her plea on the grounds: (1) she did not admit to the facts presented by the State; and (2) the State indicated on the sentencing sheet that it would make no recommendation regarding her sentence but then, during the plea hearing, requested the court impose the maximum sentence. We disagree.

A trial judge should not accept a guilty plea without an affirmative showing that it was intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238, 241 (1969). Additionally, to knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant has a full understanding of the consequences of her plea and the charges against her. Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995). Moreover, the record in a guilty plea proceeding must establish a factual basis for the plea. LoPiano v. State, 270 S.C. 563, 569, 243 S.E.2d 448, 451 (1978); State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). In accepting a guilty plea, "the trial judge is free to use any appropriate procedure for determining the accuracy of the guilty plea. The judge must be certain that the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea." Armstrong, 263 S.C. at 598, 211 S.E.2d at 891. "All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001).

"The withdrawal of a guilty plea is generally within the sound discretion of the trial judge." State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). An abuse of discretion occurs when a trial judge's decision is unsupported by the evidence or controlled by an error of law. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002). A determination the plea was voluntarily entered "will normally show the trial judge did not abuse his discretion." Riddle, 278 S.C. at 150, 292 S.E.2d at 796; see State v. Cantrell, 250 S.C. 376, 378, 158 S.E.2d 189, 191 (1967)("A

motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of a clear abuse of discretion, this court will not interfere.").

Although we will separately address each of Rikard's contentions, we find the circuit court judge did not abuse his discretion in denying Rikard's motion to withdraw her plea.

In terms of the factual basis for the plea, the judge properly allowed the solicitor to give a recitation of the facts on the record. Even though Rikard did not specifically acknowledge the accuracy of the State's factual presentation, she did not raise any objection at the hearing and, through her counsel, had the opportunity to challenge certain aspects of the State's factual presentation. Moreover, during the plea colloquy Rikard admitted she was guilty of the charged offenses for which she had been apprised of the elements. Because the solicitor provided a sufficient factual basis in the record to support each of the DUI charges, we find Rikard's argument to be without merit.

Next, we turn to Rikard's allegation that the State failed to abide by its representation on the sentencing sheet not to recommend a sentence. Rikard contends she was induced to plead guilty and would not have but for the State's representation that it would not recommend any particular sentence. Initially, we note Rikard concedes in her brief that the sentencing sheet did not constitute a formal plea agreement. Thus, we do not believe the same stringent requirements of plea agreements would apply to the instant case. However, even if we construe the sentencing sheet as rising to the level of a contractual obligation, we find the judge did not err in declining to allow Rikard to withdraw her plea. See Sprouse v. State, 355 S.C. 335, 338, 585 S.E.2d 278, 279 (2003)("[S]tate prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty." (citing Santobello v. New York, 404 U.S. 257 (1971))); State v. Thomason, 355 S.C. 278, 286, 584 S.E.2d 143, 147 (Ct. App. 2003)("Our supreme court has recognized a plea agreement rests on contractual principles.").

Rikard's reliance on the sentencing sheet is unavailing. The sentencing sheet offers three alternatives to designate the nature or status of the plea. Those alternatives provide that the plea is: (1) without negotiations or recommendation; (2) a negotiated sentence; or (3) a recommendation by the State. In this instance, the option of "without negotiations or recommendation" was selected by the solicitor, Rikard, and Rikard's counsel. It is axiomatic that the phrase "without negotiations or recommendation" means that the State and the defendant have not agreed on sentencing. Therefore, either party is free to request a favorable sentence.

During the plea colloquy Rikard acknowledged to the judge that she understood the charges, the maximum possible sentences, and that her plea was a "straight-up" plea without any negotiations or recommendations. Taking all of these considerations into account, the judge ultimately determined Rikard was freely and voluntarily pleading guilty. Finally, the judge exercised discretion when he declined to impose the maximum sentence on each charge and ordered the sentences to be served concurrently. See S.C. Code Ann. § 56-5-2945(A)(1), (2) (Supp. 2005) (establishing maximum term of imprisonment for felony DUI when death results as twenty-five years imprisonment and fifteen years for felony DUI causing great bodily injury); Brooks v. State, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997)("A trial judge is allowed broad discretion in sentencing within statutory limits."). Thus, we find no error in the judge's decision accepting Rikard's plea and refusing her request to withdraw her plea.[4] See State v.

[4] In support of her argument, Rikard relies on our supreme court's decision in Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). We find this case to be distinguishable from the instant case. In Jordan, appellant petitioned for post-conviction relief on the ground his counsel was ineffective for failing to withdraw appellant's guilty plea after the State reneged on a plea bargain. According to appellant, he only agreed to plead guilty when the assistant solicitor indicated the State would neither recommend nor oppose a probationary sentence for the charge of assault and battery with a deadly weapon. At the guilty plea hearing, another assistant solicitor appeared for the State and opposed a probationary sentence. Appellant's counsel did not request to withdraw the plea or point out to the judge that the State had

Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997) (finding no error in trial judge's refusal to allow appellant to withdraw guilty plea where appellant failed to object at any point before the judge accepted his guilty plea and judge: considered evidence presented by appellant, allowed appellant to testify about the nature of the guilty plea, and thoroughly questioned appellant during guilty plea).

Accordingly, Rikard's guilty plea and sentence are

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.

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changed the plea agreement. The trial judge declined to reconsider his sentence because he was not influenced by the assistant solicitor's opposition to probation. Our supreme court vacated appellant's sentence and remanded for either specific performance of the plea agreement and resentencing or for a new trial. The court found appellant's counsel erred in failing to protect appellant's right to enforce the plea agreement. Here, unlike in Jordan, the State did not promise anything in exchange for Rikard's plea. Rikard also acknowledged during the plea hearing that it was a "straight-up" plea without any negotiations.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth W. Sanders, **Respondent,**

v.

MeadWestvaco Corporation,
Self-Insured Employer, **Appellant.**

Appeal From Newberry County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 4157
Heard June 14, 2006 – Filed October 2, 2006

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Kirsten Leslie Barr, of Mt. Pleasant, for Appellant.

Ben C. Harrison, of Spartanburg, for Respondent.

CURETON, A.J.: In this workers' compensation action, MeadWestvaco Corporation (Westvaco) appeals the circuit court's order affirming the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) awarding Kenneth Sanders (Sanders) a 40% permanent partial disability to his lumbar spine and sacroiliac joint (SI joint). Westvaco also appeals the circuit court's failure to find it was entitled to credit for overpayment of temporary total disability from the date Sanders reached maximum medical improvement. We affirm in part, reverse in part, and remand.

FACTS

Sanders, a chip mill operator employed by Westvaco, was injured on March 16, 2001, when a front-end loader flung a piece of wood that struck Sanders in his knee. Sanders was taken immediately to the emergency room where he was treated for the injury.

Several months later Sanders began to complain about lower back pain that radiated into his right hip and buttock region. On August 27, 2001, Dr. Phillip Milner noted that Sanders was having a "palpable snap" of the right SI joint, occurring repetitively when he turned his leg or lifted his leg, which he described as a "very consistent and a noticeable finding." After an MRI scan showed a herniated disc at L4/5 with right L5 root involvement, Dr. Milner referred Sanders to Dr. Charles Hughes for an epidural injection.

Dr. Hughes attempted to treat Sanders' herniated disc with several epidural steroid injections, followed by a right SI joint block injection procedure. He believed, as did Dr. Jacquelyn Van Dam, who was consulted to perform an EMG study, that the herniated disc was not a reasonable source of Sanders' back pain and that surgery would not benefit him. When conservative treatment failed to make a notable difference, Dr. Hughes referred Sanders to Dr. William Felmly at the Moore Orthopedic Clinic for another surgical opinion.

After meeting with Sanders on a single occasion, Dr. Felmly concluded Sanders had a chronic SI joint problem but surgery was not warranted. Dr. Felmly opined Sanders had a 2% permanent partial impairment of the SI joint. After reviewing Dr. Felmly's report, Dr. Hughes found Sanders had reached maximum medical improvement (MMI) and had a 12% impairment of the SI joint and a whole person impairment of 2%. Further, Dr. Hughes believed, as did Dr. Felmly, that Sanders was limited by his own subjective complaints.

Sanders then saw Dr. Samuel Seastrunk. After an independent medical evaluation of Sanders, Dr. Seastrunk stated Sanders had: (1) an L4/5 disc herniation with significant involvement of the L5 nerve root and radiculitis, and (2) a complex problem with SI instability. Dr. Seastrunk, in sharp contrast with previous doctors, rated the impairment of the lumbar spine at 18%, and an impairment of 22% to the whole person.

On September 26, 2002, Westvaco filed a Form 21 Hearing Request seeking to stop payment of temporary total disability benefits. Moreover, Westvaco sought a credit for any overpayment beyond Sanders' date of MMI, which both parties stipulated occurred on August 21, 2002. Also, Westvaco questioned the compensability of Sanders' claim of anxiety and depression as well as the extent of his disability. Sanders contended he was permanently and totally disabled and sought additional medical care.

After a hearing, the single commissioner concluded Sanders did not meet his burden of proving his depression and anxiety were causally related to his work-related injury. The single commissioner also found that Sanders had a 13% loss of use of his right leg due to the accident. Further, the single commissioner found:

> After considering the opinion of Dr. Seastrunk and his impairment rating of 22%, and after considering the opinions of Dr. Hughes, Dr. VanDam, and Dr. Felmly suggesting that the Claimant's subjective complaints are out of proportion with his objective

> physical findings . . . and after considering the opinions [of all of the doctors] indicating that the Claimant did not need surgery or other invasive treatment as a result of the March 16, 2001 accident; and notwithstanding the Dr. Hughes's and Dr. Felmly's opinion that Claimant sustained only a 2% impairment, I find that the Claimant is credible and has a 40% loss of use of his lumbar spine and SI Joint as a result of chronic pain and a potential need for surgery to these areas.

Accordingly, the single commissioner found Sanders was entitled to future medical treatment "for medication, pain management, his TENS unit, and SI belt" to lessen his period of disability. The single commissioner granted Westvaco's request to terminate temporary total disability compensation but found Westvaco was only entitled to a credit for overpayment for the period after January 16, 2003, which was the day before the hearing.

The Appellate Panel affirmed the single commissioner, adopting the single commissioner's findings in full. Following a hearing on the matter, the circuit court affirmed the decision of the Appellate Panel, finding the decision was supported by substantial evidence in the record and that Sanders' testimony alone provided substantial evidence to support the finding that he had 40% loss of use of his back. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the Appellate Panel. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In workers' compensation cases, the Appellate Panel is the ultimate fact finder. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is specifically reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. Id.

On appeal from the Appellate Panel, this court may reverse or modify a decision if the findings or conclusions of the Appellate Panel are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). This court cannot substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Shealy, 341 S.C. at 455, 535 S.E.2d at 442. A finding is supported by substantial evidence "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." Lark, 276 S.C. at 136, 276 S.E.2d at 307.

LAW/ANALYSIS

I. Section 42-9-30 Analysis

On appeal, Westvaco first argues that section 42-9-30 of the South Carolina Code (1985) permits disability awards based on degrees of medical impairment to specified body parts, and the circuit court erred in affirming an award of benefits based upon impairment to functional units of the back, i.e., the lumbar spine and SI joint which are not scheduled for compensation under section 42-9-30. We disagree.

The Appellate Panel concluded Sanders was entitled to compensation under section 42-9-30 (19) for "permanent loss of use of the lumbar spine and SI joint." Section 42-9-30(19) provides for compensation for injury to the back as follows:

> For the total loss of use of the back, sixty-six and two-thirds percent of the average weekly wages during three hundred weeks. The compensation for partial loss of use of the back shall be such proportions of the periods of payment herein provided for total loss as such partial loss bear to total loss . . . .

In affirming the Appellate Panel, the circuit court interpreted the Appellate Panel's order to have awarded benefits based on injuries to the

back. The circuit court concluded "[a] review of the record reflects that these injuries and disabilities were clearly to the back." Westvaco's argument that because the Appellate Panel's order was too specific in identifying the regions of the back where Sanders' loss of use occurred and that these regions are somehow separate from the back itself is without merit.

Accordingly, even though the SI joint and lumbar spine are not specifically mentioned in section 42-9-30, we find no reversible error in the manner in which the Appellate Panel characterized Sanders' injuries.[1] A review of the Appellate Panel's order and the record reflects Sanders' injury and subsequent disability was clearly to his back. This approach is consistent with our policy of liberally construing the Workers' Compensation Act in favor of coverage. Schulknight v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002); see also Mgmt. Recruiters v. R.J.R. Mech., Inc., 304 S.C. 399, 401, 404 S.E.2d 908, 909 (Ct. App. 1991) (finding when construing a judgment, the determinative factor is the "intent of the officer who wrote it, as gathered not from an isolated part of the judgment, but from all parts thereof").

II. Impairment Rating

Next, Westvaco argues the evidence was insufficient to establish Sanders suffered a 40% loss of use of his back. Westvaco's contentions are twofold: (1) the medical testimony established, at most, a 22% impairment rating; and (2) the circuit court erred in affirming an award based upon the potential need for future surgery.

[1] We note the Appellate Panel's finding of impairment to the lumbar spine and SI Joint is premised on Dr. Seastrunk's impairment rating of 22% to the back which can be equated to the whole person. At oral argument, both Sanders and Westvaco agreed the whole person and the whole back are equivalent in terms of disability under the AMA Guidelines. Stated differently, both agreed that impairment to the whole back is equal to impairment of the whole person.

A. Evidence of Impairment

Westvaco argues Sanders is not entitled to benefits because the evidence was insufficient to establish he suffered a 40% loss of use of his back. Westvaco contends only the opinion of medical experts can be used to assess Sanders' impairment. We disagree.

Westvaco argues that since Sanders was awarded disability under § 42-9-30, Wigfall v. Tideland Util., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003), should be controlling regarding the impairment rating. After reviewing the Wigfall court's decision, we agree that this case falls within the Wigfall medical model encompassed in § 42-9-30. 354 S.C. at 107, 580 S.E.2d at 103. We do not agree that a determination of impairment under this section mandates that only medical evidence may be considered by the Commission in determining the degree of disability.

While an impairment rating may not rest on "surmise, speculation or conjecture . . . it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness." Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957) (citations omitted); see also Linen v. Ruscon Constr. Co., 286 S.C. 67, 68-69, 332 S.E.2d 211, 212 (1985) (finding that although expert testimony found claimant suffered from a 20-30% impairment to his back, testimony of vocational expert and claimant provided substantial evidence to affirm Appellate Panel's decision finding claimant's impairment exceeded 50%); Lyles v. Quantum Chem. Co, 315 S.C. 440, 445-46, 434 S.E.2d 292, 294-95 (Ct. App. 1993) (finding, pursuant to section 42-9-30, that while expert testimony suggested claimant suffered only a 35% impairment to his back, testimony of claimant and others provided substantial evidence that claimant's impairment exceeded 50%).

Further, the Appellate Panel is not bound by the opinion of medical experts and "may find a degree of disability different from that suggested by expert testimony." Lyles, 315 at 445, 434 S.E.2d at 295 (citations omitted). Expert medical testimony is merely intended to aid the Appellate Panel in coming to the correct conclusion. Corbin v. Kohler Co., 351 S.C. 613, 624,

571 S.E.2d 92, 98 (Ct. App. 2002) (citing Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999)). "Unless the question of the extent of partial loss of use under [section] 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible." Linen, 286 S.C. at 68, 332 S.E.2d at 212.

Although Dr. Seastrunk found Sanders' impairment was at 22% to the whole person, Sanders testified at length to the character and extent of his back injury and the restrictions the injury has placed on his physical activities. Sanders testified he has pain in the lower back shooting down into his right buttock and into his leg stopping just above his knee. He utilizes a TENS unit for pain as well as a sacroiliac belt that he wears daily. He has trouble sitting because he must constantly change positions to keep weight off his right buttock. He takes pain medication in order to walk normally. His pain affects his sleeping, allowing him to sleep only five hours a night. He can no longer walk up the steps in the front of his house and now must enter through the back. Sanders testified he used to play tennis three times a week and enjoyed fishing, hunting, and horseback riding. He even built his own home. He testified since his work-related accident, he is no longer an active person and cannot even tie his own shoes.

Although some of the medical evidence may suggest Sanders is not impaired by his back injury, "it is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another." Roper, 231 S.C. at 461, 99 S.E.2d at 57. That function belongs to the Appellate Panel alone. Id. Further, the Appellate Panel correctly considered both medical and lay testimony in arriving at its decision. See Linen, 286 S.C. at 68, 332 S.E.2d at 212.

A review of the Appellate Panel's order reveals it considered, in detail, all expert and lay testimony before making its ruling. Important to the Appellate Panel's decision was Sanders' testimony, which the Appellate Panel found credible. Accordingly, the circuit court did not err in affirming the Appellate Panel's consideration of both lay and medical testimony in arriving at its decision.

B. Award Based on Potential Need for Surgery

Although we agree with Sanders that the Appellate Panel may utilize lay testimony to reach an impairment rating higher than that testified to by the medical experts, we find that the Appellate Panel erred as a matter of law in basing its award of a 40% impairment of the back on a potential need for surgery.

As we stated in Bass v. Kenco Group, 366 S.C. 450, 467, 622 S.E.2d 577, 585 (Ct. App. 2005), "[m]aximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." (citations omitted). However, the fact that a claimant has reached MMI does not necessarily preclude a finding that additional medical treatment may be needed if the medical treatment would tend to improve the claimant's quality of life but not further improve the medical condition. See Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 398, 489 S.E.2d 219, 221 (Ct. App. 1997) (citing O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 459 S.E.2d 324 (Ct. App. 1995) ("Continued treatment of prescriptive medicine did not preclude a finding of maximum medical improvement, because the medication could temporarily alleviate claimant's symptoms but not further improve his medical condition.").

In the instant case, the parties stipulated Sanders reached MMI on August 21, 2002, and as such was entitled to future medical care that would tend to alleviate his symptoms but not further improve his medical condition. Moreover, Westvaco has not appealed the Appellate Panel awarding Sanders future treatment for pain as future medical care. However, the Appellate Panel incorrectly premised its award of 40% loss of use of the back on a potential need for surgery. Sanders has not pointed to any case law, statute or regulation that would allow the Appellate Panel to base an impairment rating under section 42-9-30 upon a potential need for surgery, where no evidence suggests that the surgery would be needed to alleviate Sanders' symptoms as opposed to further improving his medical condition. Accordingly, we reverse and remand to the Appellate Panel to determine how much of its award was

based upon its conclusion that Sanders may need surgery in the future and to recalculate, if appropriate, Sanders' degree of impairment.

III. Overpayment of Temporary Total Benefits

Westvaco argues the Appellate Panel erred in limiting its credit for overpayment to the period commencing the day preceding the hearing before the single commissioner. We agree.

Credit for overpayment of temporary total benefits is governed by section 42-9-210 (1985) of the South Carolina Code:

> Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title were not due and payable when made may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

In the case of Hendricks v. Pickens County, 335 S.C. 405, 414, 517 S.E.2d 698, 703 (Ct. App. 1999), we held that "[o]nce the [Appellate Panel] affirmed that (employee) had reached MMI, it was then appropriate to terminate TTD benefits in favor of either permanent partial or permanent total disability benefits, if warranted by substantial evidence in the record." (citations omitted). See also Smith v. S.C. Dept. of Mental Health, 335 S.C. 396, 399, 517 S.E.2d 694, 696 (1999) ("The rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award. Clearly, if an employee has reached MMI and remains disabled, then his injury is permanent . . . This is precisely the reason to terminate temporary benefits in favor of permanent benefits upon a finding of MMI.").

It is undisputed MMI was reached on August 21, 2002, and the hearing before the single commissioner was on January 16, 2003. The Appellate Panel found that due to the fact the hearing was rescheduled "several times," Westvaco was only entitled to credit for overpayments for the period after January 16, 2003. The Respondent admitted at oral argument that the hearing had been rescheduled twice, once at the request of the employer, and once at the request of Sanders. Under section 42-9-260, Westvaco was entitled to have its request to terminate temporary total benefits heard within 60 days of filing the request. Here, the delay in having a timely hearing falls squarely on both parties. Thus, we find no substantial evidence supporting the Appellate Panel's decision to overpay benefits to Sanders. Therefore, we remand this issue to the Appellate Panel for a determination as to the appropriate date for crediting Westvaco with overpayments.

CONCLUSION

The decision of the circuit court affirming the Appellate Panel is reversed and this case is remanded to the Appellate Panel for a determination of the degree of impairment Sanders suffered to his back as a result of his injury on March 16, 2001. We also remand for a determination of the appropriate period Westvaco should receive credit for the overpayment of temporary total benefits.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and GOOLSBY, J., concur.