# The Supreme Court of South Carolina

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# N O T I C E

## IN THE MATTER OF JACK L. SCHOER, PETITIONER

Jack L. Schoer, who was definitely suspended from the practice of law for a period of two (2) years, retroactive to March 22, 2006, has petitioned for reinstatement as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, January 20, 2012, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

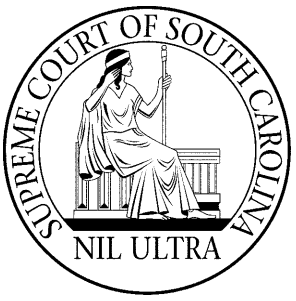
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

Columbia, South Carolina

December 5, 2011




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 44**
**December 12, 2011**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Emerson Electric Co., and Affiliates, Appellant,

v.

South Carolina Department of Revenue, Respondent.

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Appeal from Richland County
Deborah B. Durden, Administrative Law Judge

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Opinion No. 27073
Heard September 21, 2011 – Filed December 12, 2011

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**AFFIRMED**

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John C. von Lehe, Jr., and Bryson M. Geer, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Adam N. Marinelli, Sean G. Ryan, and Milton G. Kimpson, of the South Carolina Department of Revenue, of Columbia, for Respondent.

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**JUSTICE KITTREDGE:** This is a direct appeal in a tax case from the Administrative Law Court (ALC). The ALC upheld the South Carolina Department of Revenue's (DOR) disallowance of certain expense deductions claimed by Appellant Emerson Electric Company (Emerson). We affirm.

## I.

Our standard of review is governed by the Administrative Procedures Act. S.C. Code Ann. § 1-23-380(5) (Supp. 2010). The Court may affirm the ALC's decision, remand the matter, or reverse or modify it

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

Id.

## II.

Emerson raises two issues on appeal.

(1) Where South Carolina law provides that a non-resident corporation's dividend income is, in all cases, statutorily excluded from South Carolina taxable income, does South Carolina law further allocate the interest expenses related to those excluded dividends to the non-resident corporation's principal place of business?

(2) If South Carolina law does allocate the interest expenses related to the excluded dividends to the corporation's principal place of business, is the South Carolina income allocation statute constitutional as applied to Emerson?

## III.

Emerson is a publicly traded, Fortune 500 company engaged in worldwide manufacturing activities. Its principal place of business is near St. Louis, Missouri, but it conducts business worldwide, including in South Carolina. Emerson conducts much of its business through hundreds of foreign and domestic wholly-owned subsidiaries, from which Emerson receives dividends.

Emerson and its subsidiaries timely filed consolidated income tax returns for South Carolina in fiscal years 1999 through 2002. The periods at issue are tax years 1999, 2000, and 2001 (license tax years 2000, 2001, and 2002). In its initial returns, Emerson did not claim deductions for expenses related to its receipt of dividends from subsidiary corporations. Emerson later filed amended returns, claiming the deductions and seeking a refund.[1] Emerson's claimed entitlement to the deductions on its South Carolina returns is the question before the Court.

### A.

To understand Emerson's claim concerning the expense deductions, it is necessary to understand the income side of the ledger, together with South Carolina's "matching principle." Emerson properly excludes from its taxable income dividends received from its wholly-owned subsidiaries. This is so because, for both federal and South Carolina income tax purposes, dividends received by a parent corporation from a wholly-owned subsidiary generally will not be subject to income tax. See I.R.C. § 243 (2006); S.C. Code Ann. § 12-6-40 (2000) (incorporating the Internal Revenue Code by reference); S.C.

[1] Emerson does not identify the precise source of the dividend income or the origin of the related expenses.

Code Ann. § 12-6-1110 (defining South Carolina taxable income by reference to federal taxable income). This is referred to as the "Dividends Received Deduction," (DRD) and the statute technically allows a one-hundred percent deduction against qualifying dividend income. The result is that such qualifying dividend income is not taxable. Here, it is stipulated that Emerson's claimed expenses are related to dividend income qualifying for the DRD. Thus, for the years in question, the DRD permitted Emerson to claim no taxable income for federal or South Carolina purposes as a result of the dividends it received from its wholly-owned subsidiaries.

Emerson argues the ALC erroneously determined that, pursuant to S.C. Code Ann. § 12-6-2220(2) (2000), certain expense deductions of Emerson must be allocated to its principal place of business (Missouri), and therefore Emerson could not use those deductions for South Carolina income tax purposes. We disagree.

A multistate corporation that conducts its business partly within South Carolina is subject to state income tax based on the portion of its business conducted in the state. See S.C. Code Ann. § 12-6-2210(B) (Supp. 2010). The portion of a corporation's total income that is taxable in South Carolina is determined through a statutory scheme, which distinguishes between the business and non-business income of a multi-jurisdictional enterprise.

A corporation's *business income* is apportioned among the states in which it conducts business. South Carolina levies tax upon only the percentage of the taxpayer's total business which is conducted within the state. See S.C. Code Ann. § 12-6-2210(B) (2000); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 164 (1983) ("Under both the Due Process and the Commerce Clauses of the Constitution, a state may not, when imposing an income-based tax, tax value earned outside its borders.") (internal quotations omitted); U.S. Steel Corp. v. S.C. Tax Comm'n, 259 S.C. 153, 156, 191 S.E.2d 9, 10 (1972) ("The statutory policy is designed to apportion to South Carolina a fraction of the taxpayer's total income reasonably attributable to its business activity in this State.").

In contrast, a multi-jurisdictional enterprise's *non-business income* is not apportioned among various states. Rather, non-business income is allocated to or deemed to be earned in a particular state depending on its form.[2] If non-business income is not allocated to South Carolina, both the income and related expenses are disregarded in the computation of South Carolina income tax. See S.C. Code Ann. §§ 12-6-2220 to -2230 (Supp. 2010).

During the relevant time period, South Carolina's allocation statute provided:

> The following items of income must be *directly allocated* and *excluded* from the apportioned income and the apportionment factors:
>
> . . . .
>
> (2) Dividends received from corporate stocks owned, *less all related expenses*, are allocated to the state of the corporation's principal place of business . . . .

S.C. Code Ann. § 12-6-2220 (emphasis added).[3]

Regarding expense deductions, South Carolina follows the "matching principle." Succinctly stated, where income is taxable in South Carolina, the expenses incurred in generating that income may be matched against it as a deduction in South Carolina. See Dalton v. S.C. Tax Comm'n, 295 S.C. 174, 179, 367 S.E.2d 459, 462 (Ct. App. 1988) ("The principle of matching

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[2] Allocation formulas vary by state. In South Carolina, certain types of non-business income, such as interest income, are allocated on the basis of the corporation's principal place of business; however, other types of non-business income, such as gains or losses from the sale of real property, are allocated on the basis of situs. S.C. Code Ann. § 12-6-2220.

[3] This subsection was amended effective June 7, 2005, to state, "Dividends received from corporate stocks *not connected with the taxpayer's business*, less all related expenses, are allocated to the state of the corporation's principal place of business." S.C. Code Ann. § 12-6-2220(2) (Supp. 2010) (emphasis added).

income not taxable in South Carolina . . . with the expenses that generated that non-taxable income is firmly established as the law in South Carolina."). Conversely, where income is not taxable in South Carolina, as is the case here, the expenses incurred in generating that income may not be matched against it as a deduction in South Carolina.

As concerns the construction of section 12-6-2220(2), although we granted Emerson's motion to argue against precedent, we adhere to Avco Corp. v. Wasson, 267 S.C. 581, 230 S.E.2d 614 (1976).[4] Avco construed the predecessor to section 12-6-2220 to require that if dividend income was allocated out-of-state, the expenses related to that allocable dividend income must also be allocated out-of-state. For purposes of applying this statute, we reject Emerson's contention that allocation of related expenses is triggered only in the presence of taxable income from the receipt of a dividend. Avco spoke to the issue of allocation of related expense where no dividend was received: "Although [section 12-6-2220(2)] refers to the allocation of 'Dividends received . . . , less all related expenses,' the actual receipt of a dividend from each stock purchased is not required before the interest expenses . . . are to be allocated." Id. at 586, 230 S.E.2d at 616.

Avco properly construes section 12-6-2220(2).[5] Accordingly, we find Avco supports DOR's determination to allocate Emerson's related expenses to

[4] Having carefully reviewed Avco, we adhere to its construction of legislative intent concerning the predecessor to section 12-6-2220(2). Application of the plain meaning of section 12-6-2220(2) requires that Emerson's claimed expenses be allocated to the state of its principal place of business.

[5] We further note that, in light of the constitutional prohibition against a state taxing income that lacks a sufficient nexus with the state, taxation of certain non-business income may, in some instances, be unconstitutional. See Container Corp., 463 U.S. at 165-66 ("The Due Process and Commerce Clauses of the Constitution do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there is a 'minimal connection' or 'nexus' between the interstate activities and the taxing State, and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'"). This observation is made in light of Emerson's failure to identify the precise source of the dividend income or the origin of the related expenses. We are left to speculate whether these dividends or related expenses have any nexus to South Carolina.

its principal place of business, Missouri. We turn now to Emerson's constitutional challenge to section 12-6-2220(2).

**B.**

Emerson argues in the alternative that section 12-6-2220(2), as applied, discriminates against non-resident taxpayers in violation of the Commerce Clause of the United States Constitution.[6] We disagree and reject Emerson's premise that a disparate tax effect on two geographically diverse taxpayers, viewed only in the context of one taxpayer's geographic domicile, constitutes unconstitutional discrimination. The constitutional challenge to section 12-6-2220(2) is made only because Emerson was not allowed the interest expense deductions in its home state of Missouri—a feature of Missouri law over which we have no control.[7] We reject the implication that the constitutionality of one state's allocation statute turns on the allowance of certain deductions in another state.

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[6] Emerson also argues section 12-6-2220 violates the Equal Protection Clauses of the Fourteenth Amendment and the South Carolina Constitution and the Privileges and Immunities Clause of the South Carolina Constitution. However, those claims are not properly preserved for review by this Court, and we do not address them. See Rule 208(b)(1), SCACR ("The brief of appellant shall contain . . . the particular issue to be addressed . . . followed by discussion and citations of authority."); Travelscape, LLC v. S.C. Dep't of Rev., 391 S.C. 89, 108-10, 705 S.E.2d 28, 38-39 (2011) (holding that issue preservation requirements are applicable in the context of Commerce Clause challenges to state tax laws); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding that where an appellant fails to provide arguments or supporting authority for his assertion, he is deemed to have abandoned the issue); Spivey v. Carolina Crawler, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005) (declining to consider issues not raised in appellant's initial brief because the reply brief may not be used to argue issues not raised in the initial brief).

[7] At the ALC hearing, an employee of Emerson testified that Missouri's allocation and apportionment scheme operates differently from South Carolina's and Emerson is not permitted to deduct the expenses in question from its Missouri income. Any differing tax consequences are merely a result of different apportionment and allocation schemes used by South Carolina and Missouri. See Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278-79 (1978) (acknowledging that variation in state income tax consequences for multi-state corporations does not inhere in a particular state's formula but instead is a product of the combination of different formulas). The constitutionality of a South Carolina statute does not hinge upon whether another state allows or disallows a tax deduction.

"When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." Home Health Serv., Inc. v. S.C. Tax Comm'n, 312 S.C. 324, 327, 440 S.E.2d 375, 377 (1994). "Accordingly, the burden is on the appellant to prove the unconstitutionality of the statute." Id. Emerson has not met that burden.

The record reveals Emerson availed itself of these same deductions numerous times against its taxable income in various other taxing jurisdictions.[8] We further point out that Emerson does not contend its non-taxable dividend income has any nexus with this state. Emerson neither claims section 12-6-2220 provides a direct commercial advantage to local businesses, nor contends that application of section 12-6-2220 results in any discrimination where a corporation's dividend income is taxable.[9] Rather, Emerson objects only to the application of section 12-6-2220 to deny interest deductions related to dividends that are not taxable in South Carolina because such an application results in disparate treatment of taxpayers based solely on residence.

The ALC correctly noted that section 12-6-2220 is an allocation statute, not a taxing statute. The United States Supreme Court has never found allocation itself unconstitutional. While allocation provisions are not immune from a successful Commerce Clause challenge, by nature allocation rules necessarily result in income and expenses being assigned to different geographic locations for similarly situated taxpayers. See 2 Richard D. Pomp & Oliver Oldman, State & Local Taxation 10-26 to -29 (5th ed. 2005). The Commerce Clause does not require any particular method of allocation or apportionment, nor does it prohibit variety in methods among states. See Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278 n.12 (1978) (describing disparate tax burdens alleged to be discriminatory as "simply a way of

[8] Emerson claimed these same expense deductions in other states. Some states, like South Carolina, denied the deductions altogether, some allowed Emerson to deduct only a portion of the expenses, and other states permitted 100% of the expense deductions.

[9] Emerson concedes that, in the presence of *taxable* dividend income, application of section 12-6-2220 does not discriminate against interstate commerce.

describing the potential consequences of the use of different formulas by [various] States"). Moreover, we find Shaffer v. Carter instructive. 252 U.S. 37 (1920). The United States Supreme Court in Shaffer upheld Oklahoma's denial of deductions for out-of-state losses to non-residents who were subject to Oklahoma's tax on in-state income. In rejecting the claim that Oklahoma's income tax act was discriminatory, the Supreme Court stated:

> The difference [between residents and non-residents], however, is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as unfriendly or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the state, and it accords to them a corresponding privilege of deducting their losses, wherever those accrue. As to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred.

Id. at 57. See Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 298-99 (1998) (affirming Shaffer's holding that a State may limit the deductions of non-residents to those related to the production of in-state income).[10]

South Carolina's allocation scheme generally, and section 12-6-2220 specifically, is internally consistent. The internal consistency is readily apparent when South Carolina's "matching principle" is considered, as

[10] We acknowledge that Shaffer and Lunding involved challenges under the Privileges and Immunities Clause; however, in the context of a discrimination claim, the United States Supreme Court has spoken of the "mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978) (relying on Commerce Clause decisions as support in the context of a Privileges and Immunities challenge).

discussed above. To adopt Emerson's position would be to reject South Carolina's evenhanded approach to apportionment and allocation of matching income and expenses. The allegedly disparate results complained of by Emerson do not demonstrate unconstitutional discrimination. We are persuaded that section 12-6-2220(2) satisfies the requirements of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (holding that a state tax does not violate the Commerce Clause if it is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state). See also Lung v. O'Chesky, 94 N.M. 802, 804, 617 P.2d 1317, 1319 (1980) ("If the state has no jurisdiction to tax the income from a particular source, there is no reason for it to extend exemptions and deductions to a non-resident based on that income.").

In sum, any disparate tax consequences, which Emerson has failed to prove, are not a result of the application of section 12-6-2220 but rather are the product of the laws of Missouri, over which we have no control. Therefore, the ALC properly found Emerson failed to carry its burden of proving that the application of section 12-6-2220 violates the Commerce Clause.

## IV.

We affirm the ALC and find that section 12-6-2220 applies. DOR properly disallowed Emerson's related expense deductions. Emerson's related expense deductions were properly allocated to the state of its principal place of business, Missouri. We further find the matching principle requires that, where categories of income are directly allocated, related expenses must also be allocated. Finally, we find section 12-6-2220 does not discriminate against interstate commerce and thus does not violate the Commerce Clause.

**AFFIRMED**.

**TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Michael B. Moseley and
Marsha H. Moseley, Respondents,

v.

All Things Possible, Inc. and
James H. Hampton, of whom
All Things Possible, Inc. is Petitioner.

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Lexington County
Deadra L. Jefferson, Circuit Court Judge

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Opinion No. 27074
Heard October 5, 2011 – Filed December 12, 2011

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**AFFIRMED**

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Robert J. Thomas, of Rogers Townsend and Thomas, of Columbia, for Petitioner.

S. Jahue Moore and William B. Fortino, Moore, Taylor and Thomas, both of West Columbia, for Respondents.

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**JUSTICE KITTREDGE:** We granted a writ of certiorari to review the court of appeals' decision affirming the trial court judgment against Petitioner All Things Possible, Inc., for fraud in connection with a real estate transaction case, where the truth was discoverable in the public records. Moseley v. All Things Possible, Inc., 388 S.C. 31, 694 S.E.2d 43 (Ct. App. 2010). We affirm.

## I.

Petitioner All Things Possible, Inc., (ATP) sold an undeveloped lot in the Secret Cove subdivision, located in Lexington County, to Respondents Michael and Marsha Moseley. The lot is burdened by an underground, surface-water drainage easement[1] running diagonally across the entire length of the property, essentially cutting the lot in half. ATP, through its agents, was aware of the Moseleys' desire to build a home on the lot. Real estate agent Loretta Whitehead presented to the Moseleys a copy of the plat, supplied by ATP, showing the lot in question.[2] The plat had been altered by removing the lines reflecting the existence and location of the drainage easement. Additionally, a square was drawn on the plat, indicating where a home could be constructed.

According to the Moseleys, they "absolutely" relied upon the falsified plat in purchasing the lot, together with assurances from ATP related to the Moseleys' ability to build on the lot.[3] As noted by the court of appeals, the

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[1] The parties have stipulated as to the existence of the easement.

[2] While there is evidence that ATP supplied the falsified plat with the intent that it be relied on, there is no evidence that Whitehead was personally responsible for its creation.

[3] The Moseleys are school administrators. Mr. Moseley's health situation required a home that, because of the easement, the lot could not accommodate. The lot, however, was "buildable."

Moseleys were induced to purchase the lot without obtaining an independent survey of the property. Conversely, the real estate contract contained standard provisions, including the right of the Moseleys to conduct a title examination and procure a survey of the lot.

The easement is not recorded in any deed within the chain of title; however, it is included on the recorded plat of the subdivision. The Moseleys retained an attorney, who in turn employed a title abstractor. The existence of the easement was not discovered in the title search.

At the closing James H. Hampton gave the Moseleys his ATP business card, which contained a Bible verse, *Proverbs* 11:25: "The generous man will be prosperous and he who waters others will himself be watered." The Moseleys stated they trusted Hampton because he "presented himself as a minister who dabbled in building."

After purchasing the lot, the Moseleys learned of the easement and the resulting inability to build a home suited to their needs. The Moseleys sued ATP and Hampton alleging multiple causes of action, including fraud. The matter was tried nonjury solely on the fraud claim. The trial court found that fraud had been established by clear and convincing evidence and awarded actual and punitive damages against Hampton and ATP. The court of appeals reversed the judgment against Hampton. The judgment against ATP was affirmed. ATP sought a writ of certiorari, which we granted.[4]

## II.

An action for fraud is an action at law. In an action at law, on appeal of a case tried without a jury, the findings of fact will not be disturbed if there is any evidence which reasonably supports the judge's findings. The judge's findings in such an instance are equivalent to a jury's findings in a law action. Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773,

[4] In its opinion, the court of appeals found the facts did not warrant relief against Hampton. That finding is the law of the case, for the Moseleys did not seek certiorari on that issue.

775 (1976). Our scope of review extends merely to the correction of errors of law. Temple v. Tec-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009).

## III.

### A.

ATP first argues there is no clear and convincing evidence that it engaged in fraud. Under the "any evidence" standard of review, the record contains evidence supporting the finding of fraud against ATP. That evidence consists of ATP supplying the Moseleys with the falsified plat and related assurances that a home suited to their needs could be built on the lot. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: Kiriakides v. Atlas Food Sys. & Servs., Inc., 343 S.C. 587, 594, 541 S.E.2d 257, 261 (2001) ("An appellate court's scope of review in cases of fraud, where the proof must be by clear, cogent and convincing evidence, is limited to determining whether there is any evidence reasonably supporting the circuit court's findings."); Harold Tyner Dev. Builders, Inc. v. Firstmark Dev. Corp., 311 S.C. 447, 429 S.E.2d 819 (Ct. App. 1993) (affirming a judgment pursuant to a claim of fraud because the evidence, when viewed in the light most favorable to the plaintiff, was sufficient for a jury to reasonably infer the alleged actions amounted to fraud); Gasque v. Voyager Life Ins. Co. of S.C., 288 S.C. 629, 344 S.E.2d 182 (Ct. App. 1986) (affirming the judgment pursuant to a fraud claim because the issue of whether the insured made false representations to obtain insurance was a question of fact for the jury).

### B.

ATP further argues that because the misrepresentation was discoverable in the public record, the fraud claim must fail as a matter of law. The specific element challenged is the "hearer's right to rely" on the misrepresentation.[5] ATP contends that because the existence of the easement

[5] In an action for fraud, a plaintiff must prove by clear and convincing evidence the following elements:

was discoverable in the public record, the Moseleys' reliance on the misrepresentation was not reasonable as a matter of law. We disagree and hold that a question of fact existed as to whether the Moseleys' reliance was justified.

ATP is correct in that, generally, "one cannot rely upon misstatement of facts, if the truth is easily within its reach." O'Shields v. S. Fountain Mobile Homes, Inc., 262 S.C. 276, 282, 204 S.E.2d 50, 52 (1974) (internal quotations omitted). ATP points to LoPresti v. Burry to support its contention that fraud cannot be actionable where the truth is discoverable in the public records. 364 S.C. 271, 612 S.E.2d 730 (Ct. App. 2005). In LoPresti, the purchasers of a home on a lake argued that removal of a dotted line depicting a floodplain from the recorded subdivision plat amounted to a misrepresentation by the seller. The court of appeals concluded the purchasers were on constructive notice of the floodplain because it was available in the public records. However, LoPresti does not stand for the bright-line rule ATP seeks to advance. The LoPresti court acknowledged there are instances in which a purchaser's reliance will be reasonable, notwithstanding constructive notice. The court noted that constructive notice is "inapplicable especially 'where the very representations relied on induced the hearer to refrain [from] an examination of the records.'" See id. at 277 n.12, 612 S.E.2d at 733 (citing Reid v. Harbison Dev. Corp., 285 S.C. 557, 561, 330 S.E.2d 532, 534-35 (Ct. App. 1985)).

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> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

The case of Slack v. James is instructive. 364 S.C. 609, 614 S.E.2d 636 (2005), *aff'g,* 356 S.C. 479, 589 S.E.2d 772 (Ct. App. 2003). In a real estate transaction, the seller informed the buyers that there were no easements on the property. After the parties entered into a written contract, the buyers learned there was a permanent sewer easement across the property. When the buyers refused to proceed with the purchase, the seller sued the buyers for breach of contract. The buyers counterclaimed for, among other claims, fraud. The trial court dismissed the fraud counterclaim on the basis that the buyers "failed to exercise reasonable diligence to protect their interests and had no right to rely on the real estate agent's alleged misrepresentation as to the existence of the sewer line easement." Id. at 612-13, 614 S.E.2d at 638. The court of appeals reversed. On certiorari we concurred. The court of appeals "found that, while Buyers could have ascertained the existence of the easement through investigation of public records, their failure to do so does not preclude them from asserting a tort claim for fraud or negligent misrepresentation. The court held the question of whether Buyers could reasonably rely on the statement at issue in view of the information entered upon the public record is for a jury, not the court, to determine." Id. at 613, 614 S.E.2d at 638. We held that the court of appeals "properly found a question of fact exists as to whether Buyers' reliance on the misrepresentation was reasonable although the falsity of the alleged misrepresentation could have been ascertained by examining the public records." Id. at 615, 614 S.E.2d at 639 (internal citations omitted).

Our jurisprudence reflects a preference for a case by case approach to the question of whether a hearer's reliance on misrepresentations as to matters in the public record is reasonable. That is so because "[f]raud . . . assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and all the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence." Conner v. City of Forest Acres, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002) (quoting Sullivan v. Calhoun, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921)).

While there may be cases in which a hearer's reliance on a misrepresentation that is a matter of public record is unreasonable as a matter of law, this is not one of those cases. This case presented a question of fact. We find ATP's fraudulent misrepresentations, when viewed in a light most favorable to the Moseleys, "'induced the [Moseleys] to refrain [from] an examination of the records.'" LoPresti, 364 S.C. at 277 n.12, 612 S.E.2d at 733 (citing Reid v. Harbison Dev. Corp., 285 S.C. at 561, 330 S.E.2d at 534). Whether the Moseleys' reliance on ATP's fraud was reasonable, given the easement was in the public record, was a question for the fact-finder.

Moreover, from a policy standpoint, we acknowledge the benefits flowing from the constructive notice doctrine in which one is charged with knowledge of matters in the public record. Yet that general rule must at times yield when confronted with fraudulent misrepresentations. The purpose of the recording act is, after all, to protect innocent purchasers, not fraudulent sellers. See Slack v. James, 356 S.C. at 483, 589 S.E.2d at 774 ("The purpose of the recording act is to protect one who buys a recorded title against one who acquires a paper title but fails to record it. The recording act is not intended to protect a seller who makes a false or misleading statement.").

**C.**

ATP also assigns error to the court of appeals for upholding the judgment against it after exonerating Hampton. According to ATP, the court of appeals improperly pointed to the real estate agent as ATP's agent. We disagree and affirm. The record supports the finding that the real estate agent was acting as ATP's agent. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); see also Kiriakides v. Atlas Food Sys. & Servs., Inc., 343 S.C. 587, 594, 541 S.E.2d 257, 261 (2001) ("An appellate court's scope of review in cases of fraud, where the proof must be by clear, cogent and convincing evidence, is limited to determining whether there is any evidence reasonably supporting the circuit court's findings.").

## IV.

We affirm the court of appeals.

**AFFIRMED.**

**TOAL, C.J., PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Peggy McMaster, d/b/a PJM Properties and Gray McGurn, Appellants,

v.

Columbia Board of Zoning Appeals, Christopher Barczak, Ernest W. Cromartie, III, Elaine Gillespie, Alvin Hinkle, Lowndes T. Pope, Charles Watson, and Elizabeth Webber-Akre, in their official capacities as members of the Columbia Board of Zoning Appeals and City of Columbia, Respondents.

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Appeal from Richland County
J. Michelle Childs, Circuit Court Judge

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Opinion No. 27075
Heard October 19, 2011 – Filed December 12, 2011

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**AFFIRMED**

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Henry Dargan McMaster, of Columbia, Lance S. Boozer, of Tompkins & McMaster, of Columbia, for Appellants.

Peter Michael Balthazor, of Columbia, for Respondents.

Danny C. Crowe and R. Hawthorne Barrett, of Turner Padget Graham & Laney, of Columbia, for Amicus Curiae Municipal Association of South Carolina, Marcus A. Manos, of Nexsen Pruet, of Columbia, and Thomas R. Gottshall, of Haynsworth Sinkler Boyd, of Columbia, for Amicus Curiae University Hill Neighborhood Association of Columbia.

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**PER CURIAM:** This case requires us to consider whether the City of Columbia Zoning Ordinance (hereinafter "the Ordinance"), which limits to three the number of unrelated persons who may reside together as a single housekeeping unit, violates the Due Process Clause of the South Carolina Constitution. We find it does not.[1]

## I.

The facts of this case are not in dispute. The property which is the subject of this appeal ("the property") is owned by Appellant McMaster and is located in the City of Columbia ("the City") in the immediate vicinity of the University of South Carolina. The property constitutes a single dwelling unit and is located within a RD-DP zoning district.[2] Pursuant to the

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[1] Although the freedom to select one's cohabitants could, under some circumstances, implicate the freedom of association guaranteed by the First Amendment of the United States Constitution, we emphasize that we address only the limited argument before us—namely the rights of a landlord vis-à-vis a due process challenge under the South Carolina Constitution.

[2] Districts designated as RD "are intended as one- and two-family residential areas with attached and detached units with medium to high population densities." Columbia City Code § 17-234. The DP designation, when appended to a basic district classification, is intended to further the purpose and intent of the Ordinance, including protecting and improving the quality of the environment of the City by encouraging "the identification, recognition, conservation

Ordinance, only one "family" may occupy a single dwelling unit. The Ordinance defines family as "an individual; or two or more persons related by blood or marriage living together; or *a group of individuals, of not more than three persons, not related by blood or marriage but living together as a single housekeeping unit.*" Columbia City Code § 17-55 (emphasis added).

At the time this dispute arose, the property was occupied by four unrelated individuals—Appellant Gray McGurn and three other young women, all of whom were undergraduate students at the University of South Carolina. The occupants were friends, shared meals and expenses, and operated as a single household.

After receiving a neighborhood complaint, the City's Zoning Administrator conducted an investigation and determined that more than three unrelated individuals were occupying the property, in violation of the Ordinance. The City sent McMaster a notice of zoning violation, directing that occupancy be reduced to no more than three unrelated persons within thirty days. McMaster appealed the violation notice to the City's Board of Zoning Appeals ("the Board"), arguing the Ordinance was not violated and, in the alternative, the Ordinance was unconstitutional. Following a hearing, the Board affirmed the zoning violation.

Appellants appealed the Board's decision to the circuit court pursuant to S.C. Code § 6-29-820, challenging the constitutionality of the Ordinance under federal and state law, which was narrowed to a challenge under our state constitution. Following a hearing, the circuit court found the Ordinance's definition of family did not violate the Due Process Clause of the South Carolina Constitution. Specifically, the circuit court found Appellants failed to meet their burden of proving the limitations set forth in the Ordinance were not reasonably related to any legitimate governmental interest. The circuit court further found the City had not acted arbitrarily or

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maintenance and enhancement of areas, sites, structures, fixtures and other features of the architectural, economic, social, cultural and political history of the City as well as its natural features; to encourage appropriate use of such features, areas, and sites, structures and fixtures; and to restrain influences adverse to such purposes, and by so doing to promote the public welfare." Columbia City Code § 17-251.

wrongfully in passing the Ordinance and, therefore, had not infringed upon Appellants' substantive due process rights under the state constitution.

Because Appellants challenge the constitutionality of the Ordinance, the matter was directly appealed to this Court. See S.C. Code § 14-8-200(b)(3) (Supp. 2010) (providing the right of appeal from a final judgment involving a challenge on state or federal grounds to the constitutionality of a municipal ordinance lies directly to the Supreme Court).

**II.**

An issue regarding interpretation of a legislative enactment is a question of law. City of Rock Hill v. Harris, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011). In a case raising a novel question of law, the Court is free to decide the question with no particular deference to the lower court. Id.

**III.**

Appellants argue that the Ordinance's definition of "family," which limits to three the number of unrelated persons who may reside together as a single housekeeping unit, arbitrarily and capriciously deprives them of a cognizable property interest in violation of the Due Process Clause of the South Carolina Constitution.[3] We disagree.

"A municipal ordinance is a legislative enactment and is presumed to be constitutional." Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). "[E]very presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no

[3] Appellants also raise equal protection and privacy challenges to the Ordinance. However, the circuit court's ruling did not specifically address those grounds, and Appellants failed to make a Rule 59(e), SCRCP, motion. Accordingly, those issues are not preserved for review, and we do not address them. See Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (finding a trial judge's general ruling was insufficient to preserve a specific issue for appellate review and where a trial judge does not explicitly rule on an argument raised and no Rule 59(e), SCRCP, motion was filed, an appellate court may not address the issue).

room for reasonable doubt that it violates some provision of the Constitution." Harris, 391 S.C. at 154, 705 S.E.2d at 55. "[T]he power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations." Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965).

"The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is founded in the police power." Id. In reviewing substantive due process challenges to municipal ordinances, a court must consider whether the ordinance bears a reasonable relationship to *any* legitimate interest of government. Denene, Inc. v. City of Charleston, 359 S.C. 85, 96, 596 S.E.2d 917, 923 (2004). The validity of a particular zoning ordinance must be considered not in the abstract, but in connection with the locality and surrounding circumstances. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926) (noting the line dividing valid and invalid zoning ordinances is not capable of precise delimitation but rather varies with the surrounding circumstances and stating that "[a] regulatory zoning ordinance, which would clearly be valid as applied to the great cities, might be clearly invalid as applied to rural communities").

"In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Denene 359 S.C. at 96, 596 S.E.2d at 923. "The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent upon [the challenger] to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." Id. "A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property." Harbit v. City of Charleston, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (Ct. App. 2009).

In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the United States Supreme Court considered the constitutionality of a similar zoning ordinance which prevented more than two unrelated persons from living together in the same household. Belle Terre charged the property owner with violating the zoning ordinance after he rented the home to six unrelated students from a local university. The Supreme Court found zoning ordinances which limit the number of *unrelated* people who may live together in one household do not implicate a fundamental right of association or privacy and are a valid exercise of a state's police power.[4] Id. at 7-9.

Although Belle Terre established that the federal constitution does not afford substantive due process protection in this instance, state courts are free to conclude that their respective state constitutions do provide such protection. Appellants argue the City's definition of "family" is arbitrary and capricious and bears no rational relationship to any legitimate state interest of government in violation of the South Carolina constitution.[5] Appellants also

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[4] Three years later, the United States Supreme Court found a zoning ordinance which restricted the categories of *related* individuals who could live together as a single housekeeping unit infringed upon the fundamental rights regarding "personal choice in marriage and family life." See Moore v. City of E. Cleveland, 431 U.S. 494, 496-500 (1977) (specifically distinguishing Belle Terre as not involving the fundamental freedom of personal choice in matters of marriage and family life).

[5] As Appellants note, four states have found similar zoning provisions limiting occupancy of unrelated individuals to be unconstitutional. Those states have done so, generally, because the ordinances preclude functional families from living together. Only California has determined that unrelated individuals possess a fundamental right to choose cohabitants. See City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980) (finding the right to choose one's unrelated cohabitants is encompassed within the fundamental right to privacy protected by the California Constitution and applying strict scrutiny in striking down the zoning ordinance). The remaining three states did not find the challenged zoning ordinances implicated a fundamental right; rather, those states found the zoning ordinances did not withstand rational basis review. See Delta Charter Twp. v. Dinolfo, 419 Mich. 253 (1984) (finding an ordinance limiting occupation of single-family residences to any number of related individuals and not more than one other unrelated person violated state constitution's due process clause because it was not rationally related to governmental objectives); State v. Baker, 81 N.J. 99 (1979) (construing state constitution and existing case law to require zoning restrictions to be accomplished "in the manner which least impacts upon the right of individuals to order their lives as they see fit"); McMinn v. Oyster Bay, 482 N.Y.S.2d 773 (1984) (noting the unique language of the Due

argue the Ordinance excludes many groups of individuals which should be permitted to reside together as a single housekeeping unit.[6]

However, as many other states have found,[7] we find the rationale of Belle Terre persuasive and find there is a rational relationship between the Ordinance's definition of "family" and the legitimate governmental interests the Ordinance seeks to further. See Belle Terre 416 U.S. at 8 ("[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."). Where the rational relationship standard is utilized, the law must

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Process Clause of the New York Constitution and the suburban evolution away from "child-centered family units" and finding a zoning ordinance restricting households to related persons was arbitrary and unreasonable and failed the rational relationship test).

[6] Appellants argue the Ordinance impermissibly excludes various household units comprised of unrelated people, including: two unrelated elderly people with two unrelated caretakers or a residence shared by four unrelated foreign exchange students, young professionals, nuns, judges or legislators. However, because Appellants are not included in any of these particular non-traditional family scenarios, they are not before us and we do not address them. See Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."); In the Interest of Amir X.S., 371 S.C. 380, 385, 639 S.E.2d 144, 146 n.2 (2006) ("The traditional rule of standing for facial attacks provides that one to whom application of a statute is constitutional may not attack the statute on grounds that it might be unconstitutional when applied to other people or situations.").

[7] The overwhelming majority of states that have considered the issue have found similar ordinances restricting the number of unrelated persons that may live together to be constitutional. E.g., Dinan v. Bd. of Zoning Appeals, 220 Conn. 61 (1991) (restricting the definition of family serves to provide an element of cohesion not to be found in occupancy of property by individuals with separate rental agreements and no common bond of significant duration); Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255 (Iowa 2007) (noting that many of the cases addressing similar ordinances involve college towns); State v. Champoux, 252 Neb. 769 (1997) (noting the fact that the City of Lincoln could have chosen to effectuate its objectives in a variety of other ways does not demonstrate any constitutional defect in the zoning ordinance restricting the definition of "family"); City of Brookings v. Winker, 554 N.W.2d 827 (S.D. 1996) (noting the unavoidable population density problems in college towns and finding party challenging statute failed to establish facts sufficient to overcome the ordinance's presumption of validity).

be upheld if it furthers any legitimate governmental purpose. Further, we must consider the Ordinance in the context of the surrounding area, including the fact that the City is home to several colleges and universities.[8]

With that in mind, we find the Ordinance is a valid exercise of the City's broad police power and that there is a rational relationship between the City's decision to limit to three the number of unrelated individuals who may live together as a single housekeeping unit and the legitimate governmental interests of controlling the undesirable qualities associated with "mass student congestion." Cf. Harbit, 382 S.C. at 395, 675 S.E.2d at 782 (finding that because the City of Charleston's zoning decision was reasonably founded and rationally related to its stated interests of preserving the area's residential character, the city's action in denying a rezoning application did not rise to the level of being arbitrary or capricious and thus did not violate the property owner's substantive due process rights). Because we find the Ordinance is rationally related to a legitimate governmental purpose, we find it does not violate the Due Process Clause of the South Carolina Constitution.

**AFFIRMED**.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

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[8] In finding the Iowa Constitution was not violated by a zoning ordinance of the town of Ames, home of Iowa State University, which restricted the number of unrelated persons who may live together to three, the Supreme Court of Iowa noted that "it cannot be ignored that Ames is a university campus city and therefore, experiences typical secondary effects of mass student congestion." See Ames Rental Prop. Ass'n, 736 N.W.2d at 261 ("Based on its experience with students living off campus, the Ames city council made a reasonable policy decision to limit to three the number of unrelated persons who may reside in a single-family dwelling in certain areas. It did so because groups of unrelated persons typically have different living styles in comparison to groups of related persons. . . . By limiting the number of unrelated persons who may live together, Ames's ordinance furthers the City's goal of creating family-oriented neighborhoods that are safe and quiet for young children.").

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Jose Lozada, Appellant,

v.

South Carolina Law Enforcement Division, Respondent.

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

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Opinion No. 27076
Heard November 1, 2011 – Filed December 12, 2011

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**AFFIRMED**

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Shawn M. Campbell, Kenneth P. Shabel, Campbell & Shabel, of Spartanburg, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General David Spencer, Office of the Attorney General, of Columbia, for Respondent.

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**JUSTICE HEARN:** Jose Lozada appeals the circuit court's order denying his petition for declaratory judgment seeking to be removed from the Sex Offender Registry. Lozada argues that the crime to which he pled guilty in Pennsylvania—unlawful restraint—is not a "similar offense" to the crime of kidnapping in South Carolina. He accordingly contends that he should not be required to register as a sex offender for unlawful restraint pursuant to Section 23-3-430(A) of the South Carolina Code (2010). We disagree and affirm.

## FACTUAL/PROCEDURAL BACKGROUND

In 1998, Lozada pled guilty in Pennsylvania to charges of indecent assault and unlawful restraint. He was sentenced to seven years' probation. Neither of these offenses required Lozada to register as a sex offender in Pennsylvania. In 2002, he requested a transfer of his probation to South Carolina, after which the Spartanburg County Sheriff's Department and the Department of Probation, Parole, and Pardon Services (DPPPS) informed him that he would have to register on the Sex Offender Registry for his conviction of indecent assault. Lozada complied and has been on the registry since 2002.

In September of 2007, Lozada brought a declaratory judgment action seeking to be removed from the registry, arguing that he erroneously had been required to register because a DPPPS agent had mistakenly interpreted indecent assault to be equivalent to rape. At the hearing, the South Carolina Law Enforcement Division (SLED) conceded that requiring Lozada to register for the crime of indecent assault was improper because there was no similar crime in South Carolina that required registering. However, SLED argued that Lozada's other conviction for unlawful restraint was similar to the crime of kidnapping in South Carolina and Lozada should be required to remain on the registry on that basis. The circuit court agreed, denying Lozada's petition for declaratory judgment and requiring him to remain on the registry for his conviction of unlawful restraint.[1] This appeal followed.

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[1]Despite the court's order, at the time of oral argument the registry still stated Lozada was registered for his indecent assault conviction. Spartanburg

## STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (citing *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006)). Whether an individual must be placed on the sex offender registry is a question of law. *See generally Noisette v. Ismail*, 299 S.C. 243, 247, 384 S.E.2d 310, 312 (Ct. App. 1989) ("Unless the cause of action and the relief sought in a declaratory judgment action are distinctly equitable, the action will be considered one at law."). When reviewing an action at law, our scope of review is limited to the correction of errors of law. *S.C. Dept. of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011).

## LAW/ANALYSIS

Lozada argues that he should not be required to register on the South Carolina Sex Offender Registry because unlawful restraint in Pennsylvania is not a "similar offense" to kidnapping in South Carolina. We disagree.

Under section 23-3-430(A), a person residing in South Carolina who pleads guilty in a comparable court in the United States to a crime similar to any offense which requires registration under section 23-3-430(C) must register on the South Carolina Sex Offender Registry. One of the offenses requiring registration is kidnapping. S.C. Code Ann. § 23-3-430(C)(15). In determining whether a crime is an "equivalent offense," we look at the conduct involved, the elements of the offense, and the public policy behind the enactment of the statutes. *In re Shaquille O'Neal B.*, 385 S.C 243, 253, 684 S.E.2d 549, 555 (2009).

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County Sheriff's Office, http://www.icrimewatch.net/offenderdetails.php?OfndrID= 650409&AgencyID=54288 (last visited November 10, 2011).

Under Pennsylvania law, a person is guilty of unlawful restraint "if he knowingly: (1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury, or (2) holds another in a condition of involuntary servitude." 18 Pa. C.S.A. § 2902(a) (2011). Unlawful restraint is a criminal act falling between the offense of kidnapping and false imprisonment[2] as it "cover[s] restraints which do not reach the magnitude of kidnapping but are somewhat more serious than false imprisonment." *Id.*, official cmt. (2000).

South Carolina does not have different levels of crimes involving deprivation of freedom. Instead, the crime of kidnapping in South Carolina is broad in scope. Under our statute, a person is guilty of kidnapping if he should "unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law." S.C. Code Ann. § 16-3-910 (2010). Furthermore, we have interpreted this statute to encompass restraint regardless of duration or whether the victim was moved. *See State v. Tucker*, 334 S.C. 1, 13-14, 512 S.E.2d 99, 105 (1999) (noting that the offense of kidnapping "commences when one is wrongfully deprived of freedom and continues until the freedom is restored" and further finding that proof of kidnapping existed where defendant had bound victim with duct tape in her home).

Examining the elements of the two crimes, it is clear that if the acts had occurred in South Carolina, Lozada would have been guilty of kidnapping. While unlawful restraint addresses the prohibited conduct with more specific language, this does not change the fact that the same conduct would constitute kidnapping in South Carolina. Furthermore, even though Pennsylvania lists three crimes to punish conduct which in South Carolina

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[2]In Pennsylvania, a person is guilty of kidnapping when he "unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation." 18 Pa. C.S.A. § 2901(a) (2011). A person is guilty of false imprisonment if he "knowingly restrains another unlawfully so as to interfere substantially with his liberty." 18 Pa. C.S.A. § 2903(a) (2011).

would all fall under kidnapping, the policies behind enacting the statutes are the same. Both criminalize conduct intended to deny a victim his liberty in some way. Although the South Carolina kidnapping statute does so with a broader framework, the desire to protect the public from and punish criminals for such acts drove the enactment of both these statutes.

This difference in scope also explains the disparity in punishment between the two crimes. Unlawful restraint is classified as a first degree misdemeanor, 18 Pa. C.S.A. § 2902(b). It is punishable by up to five years imprisonment, 18 Pa. C.S.A. § 106(b)(6). Conversely, kidnapping in South Carolina is classified as a felony and is punishable by up to thirty years imprisonment. S.C. Code Ann. § 16-3-910 (2003). Although the maximum punishment for kidnapping is six times the maximum for unlawful restraint, it does not follow that the actual punishments would have been different had Lozada been sentenced in South Carolina. Lozada did not serve any time in prison and was only sentenced to probation. The same could potentially have occurred in a South Carolina court. *See* S.C. Code Ann. § 24-21-410 (2010) ("After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge . . . may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation."). Thus, the mere fact that kidnapping allows for a greater punishment than unlawful restraint does not prove that the offenses are not similar because kidnapping includes significantly more culpable behavior.

Furthermore, the fact that a conviction for unlawful restraint does not require registration as a sex offender in Pennsylvania does not require us to find that the crimes are dissimilar. In South Carolina, a person guilty of kidnapping is required to register as a sex offender unless the court "makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense."[3] S.C. Code Ann. § 23-3-

[3] Lozada argues that because there is no finding that the crime was sexual in nature, he should not be required to register even if we conclude that kidnapping and unlawful restraint are similar offenses. The plain language of section 23-3-420(15) creates a presumption that the offender would have to

430(15). However, whether the defendant was required to register in the state where the offense occurred does not control the analysis of whether the offenses are similar, but is instead "an *alternative* basis for registration." *In re O'Neil*, 385 S.C. at 251, 684 S.E.2d at 554.

Thus, based on the similarity in public policy behind both statutes and the fact that all the conduct proscribed under unlawful restraint is proscribed under the kidnapping statute, we find Lozada was properly required to register as a sex offender in South Carolina.

## CONCLUSION

Accordingly, we affirm the circuit court's order requiring Lozada's continued registration on the Sex Offender Registry for his conviction of unlawful restraint.

**AFFIRMED.**

**TOAL, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.**

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register unless the court made a separate finding the crime was not sexual in nature. Thus, the onus is on the defendant to demonstrate to the court that the offense did not have sexual undertones. Although there was no cause to make such a finding in his original plea, Lozada could have presented such evidence in his declaratory judgment petition. *See Hazel v. State*, 377 S.C. 60, 65, 659 S.E.2d 137, 140 (2008). Moreover, when he pled guilty to unlawful restraint, Lozada also pled guilty to indecent assault arising out of the same incident. Indecent assault occurs when a person "has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant." 18 Pa. C.S.A. § 3126(a) (2011). Thus, he cannot properly argue his conduct was not sexual in nature.

# The Supreme Court of South Carolina

In the Matter of
James Stone Craven, Petitioner.

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ORDER

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By order dated October 19, 2011, the Court granted petitioner's Petition for Reinstatement, subject to certain conditions. One condition provided that, prior to reinstatement, petitioner shall pay Pete Reid, his former law partner, at least $1,000.00 towards the outstanding judgment owed Mr. Reid and submit proof of the payment to the Clerk of Court. Petitioner has now provided proof of payment of $1,000.00 to Mr. Reid and requests the Court reinstate him to the practice of law.

The petition is granted. Petitioner is hereby reinstated to the practice of law. He is reminded that he shall comply with the remaining conditions stated in the Court's October 19, 2011, order.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 6, 2011

# The Supreme Court of South Carolina

Re: Amendments to Rule 416, South Carolina Appellate Court Rules

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**ORDER**

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The South Carolina Bar has proposed a number of amendments to the Resolution of Fee Disputes Board Rules in Rule 416, SCACR. Specifically, the Bar has proposed amendments to Rules 2, 10, 11, 12, 13, 20, and 22 of Rule 416.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby adopt the Bar's proposed amendments to Rule 416, SCACR, with some further amendments to Rules 10 and 20 of Rule 416, as set forth in the attachment to this Order. The amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 6, 2011

## Amendments to Rule 416, SCACR

### RULE 2. JURISDICTION

The purpose of the Board is to establish procedures whereby a dispute concerning fees, costs or disbursements between a client and an attorney who is a member of the South Carolina Bar (the Bar) may be resolved expeditiously, fairly and professionally, thereby furthering the administration of justice, encouraging the highest standards of ethical and professional conduct, assisting in upholding the integrity and honor of the legal profession, and applying the knowledge, experience and ability of the legal profession to the promotion of the public good. As used in these Rules, "fee" is deemed to include a legal fee, costs of litigation and disbursements associated with a legal cause, claim or matter and "client" is defined as a person on whose behalf professional legal services have been rendered by an attorney who is a member of the South Carolina Bar. A dispute exists when the parties to an employment agreement between lawyer and client have a genuine difference as to the fair and proper amount of a fee. The amount in dispute, as used in these Rules, is the dollar amount of that difference. A dispute does not exist solely because of the failure of the client to pay a fee.

Under no circumstances will the Board participate in: (1) a fee dispute involving an amount in dispute of $50,000 or more; (2) disputes over fees which by law must be determined or approved, as between lawyer and client, by a court, commission, judge, or other tribunal. When an allegation of attorney misconduct arises out of a fee dispute other than as to the reasonableness of the fee, the Board, in its discretion, may refer the matter to the Commission on Lawyer Conduct. If the alleged misconduct does not arise out of a fee dispute, it shall be referred to the Commission on Lawyer Conduct.

If an attorney is suspended from the practice of law after a fee dispute has been filed with the Board, the Board shall retain jurisdiction over the dispute until the conclusion of the fee dispute process. This shall include all applicable appeals under Rule 20.

No fee dispute may be filed with the Board more than three (3) years after the dispute arose.

Jurisdictional issues shall be determined by the circuit chair.

## RULE 10. COMMENCEMENT OF PROCEEDINGS

All proceedings hereunder shall be commenced by filing an application in the Office of the Bar, on forms provided by the Bar. The application shall include a written statement of the facts and circumstances surrounding the dispute, furnishing complete names and addresses. If the client-applicant is not the person who paid for the lawyer's services, the third party payer, with the written consent of the client-applicant, may jointly file with the client-applicant, with both signatures affixed to the application. If the materials submitted exceed twenty-five (25) pages, the client-applicant shall submit three additional sets of the materials.

If the responding party is an attorney, the Bar shall forward the completed application, as filed, to the attorney by electronic mail, with confirmation of delivery. If the responding party is not an attorney, the Bar shall forward the completed application, as filed, to the responding party by certified mail, return receipt requested. A copy shall be sent by regular mail or email to the circuit chair in the circuit where the principal place of practice of the attorney is located. If the application involves attorneys in more than one circuit, a copy of the completed application shall be sent to the chair of the Executive Council, who shall designate which of these circuit chairs shall have jurisdiction and shall proceed with the matter.

If the amount in dispute exceeds $7,500, the circuit chair may appoint a hearing panel without assignment of the matter to an assigned member.

After the initial correspondence, all other correspondence will be sent by regular mail or, with the written consent of the client and lawyer, by email. Such written consent may be withdrawn by written notice served on all other parties or attorneys. If served by regular mail, correspondence will be deemed served upon deposit in the U.S. Mail with proper postage affixed. If served by email, service is complete upon transmission, unless the party making service learns that the attempted service did not reach the person to be served. All parties have the duty to inform the circuit chair of any change of address.

## RULE 11. INVESTIGATION BY ASSIGNED MEMBER

Upon receipt of the completed application, the circuit chair shall promptly appoint the assigned member. The assigned member shall conduct an investigation sufficient to enable the rendering of an informed recommendation. The assigned member's recommendation shall be written and contain the reasons for it. This report shall be submitted to the circuit chair, with a copy to the Bar office, as soon as possible and not later than ninety (90) days after appointment of the assigned member, unless the time is extended by the circuit chair pursuant to Rule 12. The circuit chair shall send a copy of the report to each of the parties and notification of the circuit chair's concurrence or nonconcurrence with the recommendations of the assigned member.

The attorney shall respond to the issues raised in the application within thirty (30) days of being contacted by the assigned member. The assigned member may extend the period for response once and by no more than 30 days.

The parties to the dispute and any witnesses on their behalves shall make themselves available for interview at a time and place designated by the assigned member within the time required for the assigned member to make a report. If a party or a witness cannot, for any reason, be present at the designated time and place, that witness or party shall submit a written response to the assigned member within fourteen (14) days of the date the assigned member designated as the interview date, unless the assigned member grants the party or witness an extension. The party or witness may also submit a statement in writing, provided such statement is delivered to the assigned member on or before the date designated for the interview of that party or witness. The response to questions along with the written statement, if any, together shall constitute the complete statement of the party or witness concerning the dispute. In the event a party fails to respond, then the assigned member must render a decision based upon the available materials.

The assigned member may encourage resolution of the dispute by compromise where the circumstances warrant such effort. Efforts at compromise may include mediation of the dispute by the assigned member. Compromise or consent agreements, whether written or oral, become the final decision of the Board

fifteen (15) days after the date of a letter from the circuit chair to the parties confirming the agreement.

If the amount in dispute does not exceed $1,000, in lieu of appointment of an assigned member, the circuit chair may assign the dispute to the staff of the Bar for an expedited investigation and recommendation. The staff in its discretion may make findings based on written submissions by the parties or on such other information as may be necessary to render an informed recommendation. In the event of such assignment, the staff shall have the same powers and be governed by the same duties and procedures as would an assigned member.

## RULE 12. SCHEDULE OF PROCEEDINGS

**(a)** All fee disputes should be resolved within six (6) months. The assigned member's report should be completed within thirty (30) to ninety (90) days after being forwarded by the circuit chair. A fee dispute may not exceed six (6) months without the written consent of the circuit chair for good cause shown. Any extension of time granted by the circuit chair must be for a specified period of time which shall be the least amount of time deemed necessary to resolve the dispute.

**(b) If an assigned member does not respond to reminders from the Bar office, the Bar office will notify the circuit chair.**

**(c)** If a fee dispute has been assigned and is pending, without an extension approved by the circuit chair,

**(1)** more than ninety (90) days, then the circuit chair may, at his or her discretion:

**(A)** reassign the fee dispute;

**(B)** if the amount exceeds $7,500, appoint a hearing panel, which shall schedule a hearing within thirty (30) days

**(2)** more than six (6) months, then the circuit chair shall, with the concurrence of the Executive Council Chair:

**(A)** reassign the fee dispute;

**(B)** if the amount exceeds $7,500, appoint a hearing panel, which shall schedule a hearing within thirty (30) days; or

**(C)** return all investigative notes and application to the designated Bar staff member for investigation as the assigned member.

In these events, the original assigned member shall immediately turn over notes and files to the circuit chair.

**(d)** If the circuit chair is delinquent, then the case may be reassigned to the Executive Council Chair or the Executive Council Chair's designee.

## RULE 13. PROCEEDINGS OF THE BOARD

If the amount in dispute is $7,500 or less, the decision of the assigned member or Bar staff, with the concurrence of the circuit chair, shall be the final decision of the Board.

If the amount in dispute is more than $7,500, the decision of the assigned member with the concurrence of the circuit chair shall be served on the parties by first class mail, with proper postage affixed, or by email, provided the parties have consented to services by email in accordance with Rules 10. The decision is final unless a written request for a hearing panel is made by filing such request with the circuit chair within thirty (30) days after the date of mailing written notification of the decision. (For Hearing Panel Decision, see Rule 17.)

If the chair does not concur with the decision of the assigned member, a hearing panel will be appointed.

## RULE 20. APPEALS

**(a)** A party aggrieved by the final decision of the Board may appeal the decision to the circuit court in the county where the principal place of practice of the attorney is located.

**(b)** To confer jurisdiction of an appeal on the circuit court, the appealing party must commence the appeal within thirty (30) days after the final decision is mailed to the appealing party, except that if based upon corruption, fraud, or other undue means, it must be commenced within thirty (30) days after such grounds are known or should have been known.

**(c)** In order to commence an appeal, the appealing party must:

**(1)** file with the clerk of the circuit court a notice of appeal along with a signed document certifying the names and addresses to which the appealing party mailed copies of the notice and the date the copies were mailed. The notice of appeal must contain (i) the names of all parties to the dispute, (ii) an indication that the appealing party is appealing from a final decision of the Resolution of Fee Disputes Board, (iii) a detailed statement of the grounds for the appeal and (iv) the name, current mailing address, and telephone number of the appealing party;

**(2)** pay the required filing fee to the clerk of court;

**(3)** mail each other party to the dispute a copy of the notice of appeal; and

**(4)** mail a copy of the notice to the South Carolina Bar Resolution of Fee Disputes Board.*

A notice of appeal is sufficient if it is in writing, is signed by the appealing party, and contains the information required in sub-paragraph (c)(1).

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* The current address of the Board is Post Office Box 608, Columbia, SC 29202.

**(d)** Filing an appeal does not stay the issuance of a Certificate of Non-Compliance. However, if, upon the filing of a notice of appeal, a party pays the disputed sum to the Bar to be held in trust pending resolution of the appeal, no Certificate of Non-Compliance shall be issued. The Bar shall remit the disputed sum to the prevailing party within ten (10) days of the final disposition of the dispute.

**(e)** The Board shall supply to the circuit court a record on appeal, which shall include such of the following materials as were involved in the proceedings of the Board: the application, the decision of the assigned member, the concurrence or non-concurrence of the circuit chair, and the decision of the hearing panel.

**(f)** The court shall affirm or vacate the final decision of the Board. The court may vacate only where:

**(1)** the decision was procured by corruption, fraud, or other undue means;

**(2)** there was evident partiality or corruption in an assigned member or hearing panel member, or misconduct prejudicing the rights of any party;

**(3)** the assigned member or hearing panel members exceeded their powers;

**(4)** the hearing panel members refused to postpone the hearing, if any, upon sufficient cause being shown therefore, or the assigned member or hearing panel members refused to hear evidence material to the controversy, or otherwise conducted the proceeding so as to substantially prejudice the rights of a party; or

**(5)** the hearing panel chair did not provide notice of the hearing as required under Rule 15.

**(g)** In vacating the final decision, the court may order a reconsideration by a new assigned member appointed by the circuit chair or, if vacating the decision of a hearing panel, a rehearing before a new hearing panel appointed by the

circuit chair. Any reconsideration or rehearing shall be *de novo*, and no reports or decisions of any prior assigned member or hearing panel shall be considered. When a final decision of the Board is vacated, any judgment which may have been entered pursuant to that decision also is vacated.

**(h)** The parties and the circuit court shall provide the Board notice of all proceedings on appeal and the final disposition of the appeal.

## RULE 22. AMENDMENTS TO RULES

Upon approval by the Bar's House of Delegates, amendments to these Rules shall be submitted to the Supreme Court of South Carolina for approval. Any amendment to these rules is effective as to any fee dispute filed after the date of approval by the Supreme Court.

# The Supreme Court of South Carolina

In the Matter of Sara Jayne Rogers, Respondent.

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ORDER

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

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

IT IS FURTHER ORDERED that Steven Goldberg, 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. Goldberg shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Goldberg 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 Steven Goldberg, 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 Steven Goldberg, 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.Goldberg'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/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina
December 9, 2011

# The Supreme Court of South Carolina

In the Matter of Dorchester
County Magistrate Arthur
Tuggle Bryngelson, Jr., Respondent.

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ORDER

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The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

IT IS ORDERED that the petition is granted and respondent is placed on interim suspension. Dorchester County is under no obligation to pay respondent his salary during the suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991). Respondent is directed to immediately deliver all books, records, bank account records, funds, property, and documents relating to his judicial office to the Chief Magistrate of Dorchester County. He is enjoined from access to any monies, bank accounts, and records related to his judicial office.

IT IS FURTHER ORDERED that respondent is prohibited from entering the premises of the magistrate court unless escorted by a law enforcement officer after authorization from the Chief Magistrate of Dorchester County. Finally, respondent is prohibited from having access to, destroying, or canceling any public records and he is prohibited from access to any judicial databases or case management systems. This order authorizes the Chief Magistrate for Dorchester County or any law enforcement official to implement any of the prohibitions as stated in this order.

This Order, when served on any bank or other financial institution maintaining any judicial accounts of respondent, shall serve as notice to the institution that respondent is enjoined from having access to or making withdrawals from the accounts.

II IS SO ORDERED.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

December 9, 2011

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Anthony J. Clark, Petitioner,

v.

State of South Carolina, Respondent.

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

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Opinion No. 4915
Heard October 20, 2011 – Filed December 7, 2011

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**REVERSED, GRANT BELATED REVIEW, AFFIRMED**

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Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley Elliott, Assistant

Attorney General Brian Petrano, all of Columbia, for Respondent.

**HUFF, J.:** Petitioner, Anthony Clark, was tried before a jury and convicted of murder. He now seeks review of the post-conviction relief (PCR) court's denial of his request for belated review of his direct appeal issue. He further seeks reversal of his conviction, asserting the trial court erred in denying his motion for directed verdict based upon the insufficiency of the evidence. We find the PCR court erred in denying Petitioner's request for a belated review, but affirm Petitioner's conviction for murder after review of his direct appeal issue.

## FACTUAL/PROCEDURAL BACKGROUND

Petitioner was convicted of murder and sentenced to life imprisonment. No direct appeal was filed from his conviction. Petitioner thereafter applied for PCR, which was denied by the PCR court. Petitioner then petitioned this court for a belated review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). By order dated November 23, 2009, we granted this writ of certiorari to determine whether the PCR court erred in denying Petitioner's request for a belated appeal.

## ISSUES

1. Whether the PCR court erred in failing to grant Petitioner a belated review of his direct appeal issue.

2. Whether the trial court erred in denying Petitioner's motion for directed verdict on the murder charge.

## STANDARD OF REVIEW

The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Simuel v. State, 390 S.C. 267, 269, 701 S.E.2d 738, 739 (2010). "On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record."

Id. at 270, 701 S.E.2d at 739. However, if there is no evidence to support the PCR court's ruling, the appellate court will reverse. Id.

## LAW/ANALYSIS

### I. Post-Conviction Relief Issue

In his application for post-conviction relief, Petitioner alleged trial counsel failed to file a direct appeal after he requested counsel do so. At the PCR hearing Petitioner testified that, after the trial, he informed his trial counsel that he wanted to appeal, but counsel failed to file the notice of appeal. On the other hand, trial counsel denied that Petitioner asked him to file an appeal. Counsel then stated, "As a matter of fact, after he expressed remorse to the victims at the time of sentencing, that's like the very end of the transcript, and we did not speak, actually, after that." When asked on cross-examination about the fact that counsel admittedly did not speak to Petitioner at the end of the trial such that he could have ascertained whether Petitioner wanted to appeal, counsel maintained that he explained the PCR and appeals process to Petitioner "before the trial ever started." He acknowledged, however, that he did not inform Petitioner about these things at the end of the trial, as he and Petitioner "did not speak after sentencing." Counsel further agreed he had no reason to doubt that Petitioner did want to appeal. The PCR court found Petitioner's testimony was not credible, but found trial counsel's testimony was credible, and denied Petitioner's application for PCR.

Petitioner argues he did not knowingly and intelligently waive his right to direct appeal. He notes that trial counsel testified he did not talk to Petitioner after he was sentenced, and admitted he had no reason to doubt that Petitioner did want an appeal. Petitioner maintains it is obvious in this case he did not knowingly and intelligently waive his right to a direct appeal.

The State argues the testimony indicates trial counsel did consult with Petitioner about the appeal process, there was no credible testimony Petitioner expressly instructed trial counsel to file an appeal, and there was credible testimony from trial counsel that Petitioner did not ask him to file an appeal. Accordingly, the State contends there is sufficient evidence to support the PCR court. Nevertheless, the State concedes that Petitioner may

be entitled to a belated direct appeal if this court does not interpret Petitioner's lack of request – after being advised of the appellate process – to be an "intelligent waiver" of his right to appeal.

"Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (emphasis added). Absent an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). Id. "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel, 390 S.C. at 271, 701 S.E.2d at 739-40 (quoting Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

Here, although there is evidence trial counsel explained the appeal process to Petitioner before the trial started, there is no probative evidence trial counsel informed Petitioner of his right to appeal following Petitioner's trial. Explaining an appeal process before a defendant has even gone to trial does not equate to making a convicted client fully aware of his right to appeal that conviction. Additionally, there is no probative evidence Petitioner made a knowing and intelligent decision not to pursue an appeal. Indeed, Petitioner testified he informed trial counsel after the trial that he wanted to appeal. Though trial counsel denied that he ever spoke to Petitioner at the end of the trial, this testimony shows that trial counsel could not have ascertained whether Petitioner wanted to appeal his conviction. Thus, even considering the PCR court's credibility findings, there is no probative evidence that Petitioner knowingly waived his right to direct appeal, or that trial counsel made certain Petitioner was fully aware of his right to appeal following the trial. Accordingly, we find the PCR court erred in failing to grant Petitioner a belated review of his direct appeal issue.

## II. Direct Appeal Issue

The State presented evidence that in the late evening of May 9, 2004 and running into the early morning hours of May 10, seventeen-year-old Roger Brown (Victim) was shot as he and his friend, Michael Hammond, were chased and then ran up some stairs toward Hammond's apartment. Victim thereafter died from his gunshot wound. According to Hammond, he

and Victim used to "hang out" with Petitioner, who was known as "Sanchez," but the two had a falling out with Petitioner. A couple of days before the shooting, some incidents took place involving Hammond, Victim and Petitioner. In particular, on one occasion a dispute arose when Hammond and Victim gave Petitioner money to put gas in a car, but Petitioner ran the gas out of the vehicle. Thereafter, an individual named Corey Cribb had some words with Hammond and Victim about the matter. A couple of days later, Petitioner "came up there with [Cribb]," and Hammond and Cribb got into a physical altercation. After that, Hammond used a B.B. gun to shoot out the window of a car belonging to Petitioner's girlfriend. A couple of days after that, on the evening of May 9, 2004, Hammond stated he and Victim went to a fast-food restaurant, and returned to the apartments. As they stood in the parking lot talking, Hammond saw Petitioner running from behind the building. Hammond and Victim ran to Hammond's building and, as they got up the steps, Hammond looked back to see a man aiming a gun up toward them. Once he got inside the home, Hammond heard a boom, and then Victim came in, saying he had been shot. Victim went into the bathroom and fell down. Hammond testified the man standing at the bottom of the stairs with the gun was Petitioner. Hammond admitted that he had been smoking marijuana the night of the shooting and he was "high" during the incident.

Cynthia Jacobs testified she was at the apartments that night, sitting outside on a porch, when Hammond called Victim over to him. Jacobs then saw Petitioner and Cribb "peeping out" from between some buildings. Thereafter, Jacobs heard Hammond tell Victim to run. Hammond and Victim ran all the way around a building and up to the front of a building, at which point Jacobs heard a shot. Jacobs then ran upstairs to her sister's apartment to inform her sister about the shooting in the building. When Jacobs came back downstairs, she saw Petitioner and Cribb running past the building exclaiming, "We got that m----- f-----." After she heard the shotgun blast, she saw Cribb with the gun in his hand. Jacobs further testified that she knew Petitioner, and that she was familiar with his appearance and his voice.

Timothy Scott was also at the apartments at the time the shooting occurred. Scott testified he was outside when he heard Hammond yell for Victim to come over to where Hammond was standing, and saw Victim head in Hammond's direction. Scott went inside his building and then heard a

gunshot. Scott headed back outside to check on what he heard, and as he got to the front of the house, he saw two silhouettes of people run by his window, who were laughing and saying, "We got that son of a b----." Both individuals were laughing, but he only heard one person say something. Scott thought he recognized that person's voice as Petitioner's. One of the people was wearing a do-rag or some type of head gear that was darker in color and could have been navy or black. Scott further testified that he had observed altercations between Victim and Petitioner, and stated it was obvious the two had "some kind of beef or argument with each other because for about a week it went back and forth tit for tat," with Victim doing something to Petitioner and Petitioner doing something to Victim.

Alfred Turnipseed testified he was at the apartments on the night in question talking to his sister when he heard a gunshot, and ran downstairs. He got to the doorway, and then saw Petitioner run by with another person. Turnipseed insisted he knew Petitioner when he saw him, and it was Petitioner that he saw running. Turnipseed also testified regarding problems that developed between Victim and Petitioner a couple of days to a week before the shooting. Turnipseed witnessed the end of a fist fight between Victim and Petitioner, and heard Petitioner say in reference to Victim, "Niggers that beef me don't live long."

Hammond gave a statement to Investigator Gray on May 10, 2004, identifying Petitioner as the shooter. When shown a photographic line-up, Hammond pointed out Petitioner as the person who shot Victim. On May 10, Petitioner also gave a statement to police about the incident, wherein he claimed Cribb had his grandfather's deer gun and said he wanted to shoot up in the air "to scare them," as Cribb would not let go of the fight that had occurred between them. According to Petitioner's statement, Petitioner went over to Hammond's with Cribb, noting Cribb was wearing a blue bandana at the time. Cribb peeked around the corner, Hammond and Victim saw Cribb, and Cribb ran after them with the gun. They ran to Hammond's, and Cribb chased them and shot one time. At the time of the shooting, Petitioner was beside the stairwell, looking up at the stairs, and Cribb was in the doorway, standing in front of Petitioner. The police obtained a search warrant for Petitioner's residence, where they recovered a blue bandana. Investigator Gray also testified that Scott gave a statement wherein he indicated he could

not identify the people, as he only saw silhouettes, but that he thought he saw a blue do-rag on the shorter person. According to Investigator Gray, Petitioner was the shorter of the two, standing at five feet eleven inches, while Cribb was about six feet and one inch tall. Cribb gave a statement to police, denying that he was at the location at the time of the incident.

At the close of the State's case, Petitioner moved for a directed verdict, arguing the State had produced only one witness to the shooting and that witness, by his own admission, was under the influence of marijuana and there was insufficient lighting for him to make a proper identification. The trial court found sufficient evidence had been presented and denied the motion.

Petitioner contends the trial court erred in refusing to grant his motion for directed verdict based upon the sufficiency of the evidence. We disagree.

It is well settled that, when a motion for a directed verdict is made in a criminal case, the trial court is concerned with the existence or nonexistence of evidence, not with its weight. State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). When reviewing the denial of a motion for directed verdict, an appellate court views the evidence, and all inferences therefrom, in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Although the accused is entitled to a directed verdict when the evidence merely raises a suspicion of guilt, it is the trial court's duty to submit the case to the jury if there is any evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which the accused's guilt may be fairly and logically deduced. State v. Pittman, 373 S.C. 527, 546, 647 S.E.2d 144, 153 (2007); Weston, 367 S.C. at 292-93, 625 S.E.2d at 648.

Viewing the evidence in the light most favorable to the State, including (1) Hammond's eyewitness testimony identifying Petitioner as the shooter, (2) Jacob's testimony she observed Petitioner and Cribb "peeping" around the building, saw the resulting chase and heard a gunshot, and then observed Petitioner and Cribb running past the building and exclaiming they "got that m----- f-----," (3) Scott's testimony that he saw two individuals running by his window after the gunshot, and his identification of Petitioner's voice laughing

and exclaiming, "We got that son of a b----," and (4) Turnipseed's identification of Petitioner as one of the two people he saw running by that night after hearing the gunshot, his testimony regarding problems that developed between Victim and Petitioner a couple of days to a week before the shooting, and his testimony concerning Petitioner's threat in reference to Victim, it is clear that the case was properly submitted to the jury. Though Petitioner points to discrepancies in the evidence raising doubt as to the identity of the shooter, the courts must look to the existence or nonexistence of evidence and may not make credibility determinations. See State v. Ham, 268 S.C. 340, 341-42, 233 S.E.2d 698, 698 (1977) (holding, where appellant asserted error in trial court's denial of his motion for directed verdict because of alleged inconsistencies between the trial and preliminary hearing testimony of one of the State's witnesses, thereby rendering the testimony of the witness incredible, the matter clearly presented issues of credibility for decision by the jury, and where the determination of guilt is dependent upon the credibility of the witnesses, a motion for a directed verdict is properly refused); State v. Strickland, 389 S.C. 210, 215-16, 697 S.E.2d 681, 684 (Ct. App. 2010) (noting a motion for a directed verdict of acquittal is properly refused where the determination of guilt is dependent upon the credibility of a witness, as this is a question that goes to the weight of evidence and is clearly for determination by a jury).

## CONCLUSION

For the foregoing reasons, we reverse the PCR court's denial of Petitioner's request for a belated review of his direct appeal issue. After a review of Petitioner's direct appeal issue, we affirm Petitioner's conviction.

**REVERSED, GRANT BELATED REVIEW, and AFFIRMED.**

**PIEPER and LOCKEMY, JJ., concur.**