The Supreme Court of South Carolina

RE: Lawyer Mentoring Second Pilot Program

ORDER

The Chief Justice's Commission on the Profession requests that this Court adopt the attached second pilot mentoring program for lawyers. The request is granted.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
December 2, 2008

LAWYER MENTORING SECOND PILOT PROGRAM

1. DURATION OF PROGRAM.

The second pilot program will run from March 2009 until December 31, 2011 and include all qualifying lawyers admitted to the Bar between March 1, 2009, and January 1, 2011. The Program shall be administered by the South Carolina Bar.

2. MANDATORY PARTICIPATION.

The second pilot program is mandatory for all qualifying lawyers. Unless participation is delayed under Section 3 below, all lawyers must complete the mentoring program within the first full calendar year after admission to the South Carolina Bar.

3. QUALIFYING LAWYER DEFINED.

A qualifying lawyer is any lawyer admitted to the South Carolina Bar during the prescribed period if that lawyer (1) is a resident of the State of South Carolina or practices law in an office located in South Carolina on more than a temporary basis; and (2) has not previously practiced law actively in another jurisdiction for more than two years.

Special Circumstances:

a) A qualifying lawyer who is employed as a non-permanent, full-time clerk to a state or federal judge during the first year of admission to the South Carolina Bar may elect to participate in the mentoring program after the completion of his or her clerkship.

b) A qualifying lawyer who is not engaged in the representation of clients nor any other form of the active practice of law may request a waiver of this requirement by certifying that he or she is not engaged in the active practice of law in South Carolina and does not intend to do so for a period of at least two years. If that lawyer later

begins to actively practice law in South Carolina, he or she must then notify the South Carolina Bar and participate in the mentoring program for one year after beginning to actively practice law. [This last sentence will not apply to lawyers who begin to actively practice law in South Carolina after January 1, 2011, unless the mentoring program is made permanent.]

c) A qualifying lawyer who begins the mentoring program, but, prior to the completion of the program, moves his or her residency out of the state and no longer practices regularly in the state, is not required to complete the mentoring program. The new lawyer must provide notice to the South Carolina Bar of his or her move from the state as the basis for not completing the program. The new lawyer's license to practice law shall not be affected by the failure to complete the program in this circumstance. If that lawyer subsequently returns to South Carolina prior to having been engaged in the active practice of law as a member of another bar for at least two years, however, the new lawyer may be required to complete the mentoring program within the first full calendar year after returning to the state. [This last sentence will not apply to lawyers who return to the state after January 1, 2011, unless the mentoring program is made permanent.]

4. PURPOSE OF PROGRAM.

The purpose of the mentoring program is to provide assistance to the new lawyer in the following respects:

a) The mentor should assist the new lawyer in developing an understanding of how law is practiced in a manner consistent with the duties, responsibilities, and expectations that accompany membership in the legal profession. The mentor should provide guidance or introduce the new lawyers to others who can provide guidance as to proper law practice management, including the handling of funds, even if the new lawyer is not

currently in a setting that requires the use of those practices. Guidance should be given not only as to a lawyer's ethical duties, but also as to the development of a higher sense of professionalism based upon internalized principles of appropriate behavior consistent with the ideals of the profession.

b) The mentor should assist the new lawyer in developing specific professional skills and habits necessary to gain and maintain competency in the law throughout one's career and should assist the new lawyer in developing a network of other persons from whom the new lawyer may seek personal or professional advice or counsel when appropriate or necessary throughout their career. While a strong mentoring relationship (particularly if the mentor and new lawyer are in the same firm or office) may also include specific advice to or training of a new lawyer regarding substantive aspects of the law, such substantive legal training should not be required of a mentor in this program.

c) The mentor should assist the new lawyer in identifying and developing specific professional skills and habits necessary to create and maintain professional relationships based upon mutual respect between the lawyer and client; the lawyer and other parties and their counsel; the lawyer and the court, including its staff; the lawyer and others working in his or her office, including both lawyers and staff; and the lawyer and the public. The mentor should assist the new lawyer in understanding the appropriate boundaries between advocacy and overzealous or uncivil behavior and in developing appropriate methods of responding to inappropriate behavior by others.

d) The mentor should introduce the new lawyer to others in the lawyer's local or regional legal community and encourage the new lawyer to become an active part of that community.

5. STRUCTURE OF PROGRAM.

Mentoring shall be made available through either individual or group mentoring. Unless a different mentoring plan is approved under Section 6, each qualifying new lawyer is required to complete the mentoring tasks set forth in a standard mentoring plan prepared by the South Carolina Bar and approved by the Court. The standard plan may include a recommended schedule for completing the tasks, but that actual order and timing of completion of the tasks shall be within the discretion of the participants, provided that the full plan is completed as required in Section 2 above. In addition to completing the specific required tasks, it should be expected that, in an individual mentoring arrangement, the mentor and new lawyer will consult throughout the calendar year as either may deem necessary or appropriate.

The mentor and new lawyer may choose the method of communication that best suits their needs. However, if a mentor and new lawyer do not otherwise have regular in-person contact, they should schedule at least some periodic in-person discussions throughout the mentoring period. Each person should be cognizant of demands on the other's schedule and attempt to find a mutually acceptable time for these meetings. If there is a recurrent failure by either party to make time available for this purpose, or if other difficulties arise which cannot be resolved by the parties and which threaten the timely and effective completion of the mentoring program, the parties to the relationship (or either of them) should advise the South Carolina Bar of the situation and request the assistance of that office in resolving the matter.

a) Individual Mentoring.

Most new lawyers will have an individual mentor approved by the South Carolina Bar. Preference should be given to the appointment of a mentor selected by the new lawyer, who may be, but is not required to be, a lawyer working in the same firm or office as the new lawyer.

If a new lawyer does not select a qualified mentor, then one of the following options will apply:

1) if the new lawyer is employed and another lawyer in the same firm or office could serve as a mentor, the South Carolina Bar shall contact the firm or office and seek the voluntary agreement of a qualified lawyer in the firm or office to serve as the new lawyer's mentor;

2) if the new lawyer wishes to have an individual mentor and either no mentor is obtained under option (1) or the new lawyer is not employed in a firm or office able to supply a mentor, then the South Carolina Bar shall seek to recruit a qualified individual mentor from among the members of the South Carolina Bar. In this event, a reasonable effort should be made to designate a mentor from the same or a nearby geographic area with experience in a practice setting similar to that of the new lawyer; or

3) the new lawyer shall be assigned to participate in group mentoring.

b) Group Mentoring.

The South Carolina Bar will develop a program of group mentoring for those new lawyers not assigned an individual mentor. A group mentoring program should have some element of live contact with members of the mentoring group, but it may be a combination of live contact and electronic or other forms of distance mentoring as may be deemed sufficient by the South Carolina Bar. The preferred ratio of new lawyers to mentors in a group mentoring program shall be no greater than 3 to 1.

6. CERTIFICATION OF INTERNAL PROGRAMS.

A law firm or office (including, but not limited to, governmental agencies, corporate legal departments, state and local prosecutors, and public defenders) which has an internal mentoring program in place that it believes achieves all of the purposes of this program may apply to the South Carolina Bar to have its mentoring plan certified as compliant with the mentoring obligation under the pilot program. The

application for certification should include a detailed description of the internal program and a detailed showing of how each of the purposes of this program will be achieved under the internal program. If a program is certified, completion of that program by a qualifying new lawyer should be deemed to satisfy the mentoring requirement. The new lawyer and the lawyer responsible for the certified program should be required to file a statement for each new lawyer verifying that the new lawyer has completed all requirements of the program. Once certified, a program should remain certified throughout the duration of the pilot program unless it is materially altered.

7. GENERAL QUALIFICATIONS OF MENTORS

Mentors must be active members of the South Carolina Bar, or persons who have taken retired or inactive status within the preceding two years. Mentors must have at least five [5] years experience in the active practice of law. It is preferable that mentors have experience with the court system, although it is understood that not all mentors will have litigation experience. A lawyer without such litigation experience may nevertheless be an appropriate mentor if that lawyer has otherwise developed an understanding of appropriate behavior in a lawyer's relationship with the court.

Mentors should display, through their own conduct, an understanding of and commitment to ethical responsibilities and the prevailing expectations with regard to a lawyer's appropriate professional behavior. A mentor must have a good reputation for professional behavior and must have not been publicly reprimanded in any jurisdiction within the past 10 years or suspended or disbarred from the practice of law at any time.

Mentors should be able to assist the newer lawyer in developing a style of lawyering that is compatible both with professional expectations and with the personality of the newer lawyer.

8. APPOINTMENT OF MENTORS; EDUCATION AND SUPPORT OF MENTORS

A lawyer may serve as a mentor for purposes of this program only if first approved by South Carolina Bar. The prospective mentor

must submit an application to the South Carolina Bar in an approved form certifying that the lawyer meets the experience requirements for a mentor and has not been publicly reprimanded within 10 years, suspended, or disbarred from the practice of law.

Upon determining that a mentor applicant meets the threshold qualifications, the South Carolina Bar may conduct such further investigation of a prospective mentor's qualifications and reputation for professional behavior as it may deem appropriate. The South Carolina Bar has authority to appoint qualified lawyers as mentors or, in its discretion, to decline to appoint an applicant to serve as a mentor under this program.

An appointment shall qualify a lawyer to serve as a mentor in this program for five years, unless earlier removed as a mentor. A lawyer may be appointed to multiple consecutive terms as a qualified mentor. If at any time a lawyer appointed as a mentor is publicly reprimanded, suspended, or disbarred in any jurisdiction, the lawyer shall be removed immediately as an approved mentor. If the lawyer is serving as a mentor at the time that his or her name is removed from the list of approved mentors, the South Carolina Bar shall immediately appoint a new mentor for the lawyer being mentored.

A lawyer appointed as a mentor is not required to attend a training session, but will be provided access to materials gathered or prepared by the South Carolina Bar that will assist the mentor in carrying out his or her responsibilities. The South Carolina Bar will provide at least annually a voluntary mentor orientation program that will qualify for ethics MCLE credit. Mentors are encouraged to contact other mentors to discuss issues, the most effective approaches to be used in working with new lawyers, the most effective means of resolving problems that are encountered in the relationship, or other concerns that arise during the mentoring relationship.

9. MIGRATION OF A MENTOR OR A NEW LAWYER

From time to time, either a mentor or a new lawyer may change jobs during the mentoring year. It is expected that, whenever possible, the mentoring relationship, once established, will be maintained despite

such a move. When maintenance of the relationship is not possible because one of the parties to the relationship has moved to a distant location or because of other extraordinary circumstances, the mentor or new lawyer should notify the South Carolina Bar, and that office may assign a substitute mentor or take such other measures as are appropriate.

10. ADDRESSING SITUATIONS IN WHICH MENTOR IS IN POSITION OF AUTHORITY REGARDING THE NEW LAWYER

If a mentor participates in or has responsibility for any performance evaluations of the new lawyer being mentored, the mentor and new lawyer should set forth clearly at the outset of the relationship how information learned by the mentor during the mentoring relationship might be used in that evaluation process. If the role of the mentor as a supervisor or evaluator may conflict with the new lawyer's need for advice in some situations, the mentor should assist the new lawyer in making contacts with other lawyers who could provide advice in those situations.

11. CERTIFICATION OF PARTICIPATION; SANCTION FOR FAILURE TO COMPLETE

At the end of the first full calendar year after a new member is admitted to the Bar, if the new lawyer has completed all requirements of the mentoring program, he or she must file with the South Carolina Bar a document signed by the mentor certifying such completion. If the new lawyer has not completed all requirements of the mentoring program by that time or is otherwise unable to obtain a certificate from the mentor, the new lawyer shall report the specific reasons that a certificate has not been filed. The South Carolina Bar may, without requiring court approval, grant such additional time as is appropriate to file the certificate, or may recommend to the Court that other appropriate action be ordered.

Failure to complete all elements of the proposed mentoring plan during the pilot program will not result in sanction of the participants,

provided that the explanatory certificate set forth above is completed and filed in a timely manner.

12. ADVICE REGARDING SPECIFIC LEGAL ISSUES

In fulfilling his or her responsibilities as a mentor, a mentor may provide general advice and guidance to the new lawyer on how to resolve substantive or procedural legal issues. However, it is not the purpose of the mentoring program to provide specific legal advice to the new lawyer or to provide the new lawyer with co-counsel in a legal matter.

When a mentor is associated with the same law firm or office as the new lawyer, the mentoring relationship does not preclude the mentor from assisting the new lawyer in resolving a specific substantive or procedural legal issue. The extent to which such advice or supervision occurs should be determined by the policies of the law firm or office.

When a mentor is *not* associated with the same firm or office as the new lawyer, the mentor should instruct the new lawyer at the outset of the relationship about the duty of the new lawyer not to share with the mentor confidential information about any representation. If a new lawyer needs advice about a particular situation, the mentor may discuss with the new lawyer the general area of law at issue, without reference to the facts of a specific matter, and may direct the new lawyer to resources that may assist the new lawyer in finding the necessary information. **By virtue of acting as a mentor, the mentor does not undertake to represent the client of the new lawyer or assume any responsibility for the quality or timeliness of the work on a matter being handled by the new lawyer. The lawyer being mentored remains solely responsible for the client's matter.** If a mentor does consult with the new lawyer about a specific legal matter, however, both the mentor and the new lawyer must keep in mind that the same professional duties apply as would apply whenever two lawyers not in the same firm consult about a matter.

When appropriate, the mentor should assist the new lawyer in obtaining specific legal advice as may be necessary or appropriate with regard to the establishment or management of a law office.

13. SATISFACTION OF MCLE REQUIREMENTS

During any year in which a lawyer completes a full year as a mentor for one or more new lawyers, the mentor shall be deemed to have completed 4 hours of CLE credit, including two hours of ethics CLE. The mentor should not receive additional CLE credit for mentoring more than one lawyer in the same year.

ATTACHMENT A

UNIFORM MENTORING PLAN

OBJECTIVE A

To establish a clear understanding as to the expectations of both the mentor and the new lawyer.

ACTION STEPS

The two should meet in person as soon as possible to discuss their expectations as to how often they should communicate, how they will attempt to achieve the nine objectives of this plan including any appropriate revisions to these action steps, and what each hopes to gain from the relationship. They should discuss the extent to which communications will be kept confidential. If the mentor serves in a supervisory role over the new lawyer, they should discuss openly any limitations that might place on their discussions, and the mentor should make clear the extent to which information learned in the mentoring relationship might be considered in the mentor's supervisory capacity. The mentor should also assist and encourage the new lawyer in identifying other persons who may serve as additional informal career and personal mentors. This is especially important if supervisory duties or other factors may limit the mentoring relationship..

OBJECTIVE B

To introduce the new lawyer to other members of the legal profession and to other participants in the legal system.

ACTION STEPS

If the new lawyer works in a different office than the mentor, the mentor should introduce the new lawyer to other lawyers and staff at the mentor's office. If they work in the same office, the mentor should either provide introductions or ensure that they have already occurred.

Throughout the year, the mentor should introduce the new lawyer to other lawyers in the community, especially those with whom the new lawyer is most likely also to have professional contact. At least some of these introductions should be made in a lawyer's office or in a similar environment that permits significant interaction between the new lawyer and the lawyer to whom he or she is introduced. In addition, the mentor and the new lawyer should attend a meeting together of a local bar association or similar lawyer's organization and

discuss opportunities to participate in the work of local, state, or national bar organizations.

The mentor should escort the new lawyer on a tour of the local courts and, to the extent practicable, introduce the new lawyer to judges and court personnel.

If the new lawyer is likely to undertake any criminal defense representation, the mentor should escort or arrange for another lawyer to escort the new lawyer to the local jail and explain procedures for jail visits. The mentor should also introduce the new lawyer to local prosecutors and staff in the prosecutor's office. If the new lawyer is a prosecutor, the mentor should arrange for the new lawyer also to meet the local public defender and staff in the public defender's office.

The mentor should acquaint the new lawyer with the court appointment process, with pro bono expectations, and with various legal services organizations that provide services to indigent persons.

OBJECTIVE C

To ensure that the new lawyer has a thorough understanding of generally accepted professional values and standards of behavior, as well as an understanding of the need to regularly educate oneself throughout a professional career.

ACTION STEPS

The mentor and new lawyer should review together the Lawyer's Oath and the South Carolina Bar Standards of Professionalism and discuss how a lawyer should deal with any the practical challenges the lawyer may encounter in upholding the requirements and expectations of those documents. They should discuss the lawyer's role in the legal system and the lawyer's responsibilities to the client and to persons or institutions other than the client. If the new lawyer is a prosecutor, they should discuss the unique role and responsibilities of the prosecutor and appropriate interaction with victims. If the new lawyer is in-house counsel for a company or staff counsel for an agency, they should discuss the identity of the client and the duties owed to the entity.

The mentor should offer examples of practice situations that may place stress on a lawyer's relationship with other lawyers or with other parties and should discuss with the new lawyer ways to deal with those situations in a professional and civil manner. They should discuss client expectations, how to communicate with and involve a client effectively in a matter, and other steps that a lawyer should take to gain a client's trust and confidence in a manner consistent with the lawyer's professional obligations. They should discuss customs, unwritten rules, and other expectations of etiquette and behavior among lawyers and judges in the community.

The mentor should discuss with the new lawyer the importance of continuing education throughout a lawyer's career and provide the new lawyer with advice as to how best to remain informed of the latest developments in the lawyer's practice areas.

OBJECTIVE D

To ensure that the new lawyer is fully aware of a lawyer's ethical obligations and how to identify and deal with any ethical issues that may arise.

ACTION STEPS

The mentor and new lawyer should discuss the importance of developing a relationship with at least one other lawyer with whom possible ethical issues can be appropriately discussed. The mentor should assist the new lawyer in identifying other resources to resolve complicated ethical issues, including, when applicable, the process for consulting a law firm's ethics committee or the Bar's ethics advisory committee. They should discuss also how and when to address situations in which the new lawyer believes that another lawyer has committed an ethical violation or in which the new lawyer believes that he or she has been instructed to engage in unethical behavior.

OBJECTIVE E

To ensure that the new lawyer is fully aware of the proper practices for avoiding mishandling of other's assets, conflicts of interest, neglect of a matter and other common ethical and civil liability problems.

ACTION STEPS

The mentor should discuss with the new lawyer the most common reasons for which an ethics grievance or civil malpractice complaint is filed, especially the mishandling of funds, conflicts of interest, and negligence, and how to recognize and avoid common problems.

The mentor should discuss or arrange for another lawyer to discuss with the new lawyer all applicable rules regarding trust account management and emphasize the importance of keeping accurate records of property of others held by the lawyer. The discussion should include detailed advice as to when funds generally may be disbursed and a discussion of IOLTA accounts. Because of the possibility that the new lawyer could change jobs, this conversation should take place even if the new lawyer currently has no such responsibility for the funds of others. If the new lawyer works in a different office than the mentor, the mentor should advise the new lawyer to create appropriate trust accounts or to ensure that such accounts exist. If they work in the same office, the mentor should ensure that the new lawyer understands how the firm's trust accounts operate.

The mentor should discuss with the new lawyer practical situations in which unanticipated conflicts may occur and should emphasize the importance of identifying fully all possible interested persons or entities. If the new lawyer works in a different office than the mentor, the mentor should advise the new lawyer to ensure that his or her office has an appropriate system to identify potential conflicts of interest. If they work in the same office, the mentor should ensure that the new lawyer understands how the firm's conflict identification system operates.

The mentor and new lawyer should discuss time management skills and techniques as well as the desirable features of a calendaring or tickler system. They also should discuss timekeeping methods that provide accurate records of time spent on a client's matter.

They should discuss a lawyer's duties to supervise non-lawyer staff and discuss what activities a non-lawyer staff member or employee may engage in without undertaking the unauthorized practice of law.

They should discuss when and how it is appropriate to contact judges, especially to avoid impermissible contacts. They also should discuss the lawyer=s duty of confidentiality and common pitfalls regarding protection of the attorney-client privilege.

If the new lawyer is a prosecutor, the mentor should discuss the appropriate considerations in making charging decisions.

OBJECTIVE F

To help the new lawyer create and implement a successful career plan.

ACTION STEPS

The mentor and the new lawyer should discuss the new lawyer's long-term career objectives and how best to achieve them. If appropriate to the practice setting, also discuss the importance of developing a long-term business plan. If the new lawyer is uncertain as to his or her career goals, the mentor should help the new lawyer to identify those goals or guide the new lawyer to others who can provide that assistance.

They should discuss the most effective approaches for handling office politics so as to avoid harm to one's career. They should discuss how to deal most effectively with inappropriate or discriminatory behavior when it is encountered and how to develop appropriate support systems of persons with whom the lawyer can discuss problems when they arise. Toward this purpose, the mentor should assist the new lawyer in identifying other individuals who may provide additional informal mentoring support.

OBJECTIVE G

To assist the new lawyer in improving professional skills necessary for the effective practice of law.

ACTION STEPS

The mentor and new lawyer should discuss appropriate negotiation techniques, focusing on expectations of behavior during negotiations as well as the effectiveness of various approaches.

They also should discuss appropriate techniques for interviewing clients and witnesses to ensure that information is completely and productively obtained without prejudice to the rights of others.

They should discuss how to conduct an effective deposition, consistent with the purposes of the deposition. If a new lawyer participates in a deposition or court proceeding during the mentoring period, the mentor should either observe the new lawyer's performance or discuss the experience with the new lawyer afterwards to the extent permitted by rules of confidentiality and without harm to any applicable attorney-client privilege.

OBJECTIVE H

If the new lawyer is in private practice, to assist the new lawyer in developing a productive and effective law practice.

ACTION STEPS

The mentor and new lawyer should discuss how a lawyer can ethically and professionally make others aware of the availability of his or her professional services.

They should discuss how to evaluate a matter and decide whether to undertake a representation, and, if appropriate to the practice setting, how to set and memorialize a fee and how to talk with the client about the fee for a matter.

They should discuss when and how to retain additional counsel to assist in a matter.

They should discuss how to terminate a representation.

OBJECTIVE I

To help the new lawyer enjoy a healthy personal life while fulfilling his or her professional obligations.

ACTION STEPS

The mentor should provide advice to the new lawyer about the appropriate balance between one's personal and professional responsibilities. They should discuss the warning signs of substance abuse or depression and how to address those problems when they are manifested in oneself or in others. If the new lawyer has substantial educational loans or other debt, they should discuss practical ways to manage long-term debt.

ATTACHMENT B

SAMPLE LETTER TO LAWYER BEING MENTORED
[South Carolina Commission on the Profession Letterhead]

Dear _____,

As a newly admitted member of the South Carolina Bar, you will participate in a pilot South Carolina Lawyer Mentoring Program. The goal of this new program is to assist your transition into the legal profession and to provide you with a stronger understanding of its accompanying ethical and professional obligations and expectations.

Enclosed are materials describing the program as implemented by the Supreme Court of South Carolina. You should review those materials immediately. If you work in a law firm or office with other lawyers who meet the qualifications to be a mentor as set forth in those materials, you may seek a mentor from among those qualified lawyers. You should discuss the program with potential mentors and attempt to secure their consent to serve as a mentor. They should be made aware that completion of their work as a mentor would qualify for four hours of MCLE credit in the year in which the mentoring is completed. You may also work in an office or firm with an internal mentoring program that has been certified as compliant with the mentoring program. You should ask your employer if that is the case.

If you prefer, you may select a qualified mentor who does not work with you or you may request that a mentor be appointed for you. In any event, you must return the enclosed form to the South Carolina Bar within 30 days after your admission to the South Carolina Bar, indicating the name of a mentor who has consented to serve in that role or requesting appointment of a mentor.

Enclosed with this letter is a copy of the reporting form that you and your mentor will be required to submit at the end of your participation in the mentoring program. During the mentoring period, you will be expected to work with your mentor to achieve each of the objectives set forth in the Uniform Mentoring Plan or in your firm's mentoring plan if it has been approved. If any activities are not completed, you will be asked to explain the omission of those elements. A purpose of the pilot program is to ascertain which activities are feasible and appropriate to require, and your explanations will be important in that determination.

Sincerely,

ATTACHMENT C

SOUTH CAROLINA LAWYERING MENTORING PROGRAM
DESIGNATION OF MENTOR/REQUEST FOR APPOINTMENT OF MENTOR

For the Mentoring Period beginning _____, 20__ and ending _____, 20__.

Full Name of Newly Admitted
Lawyer to be Mentored: _____

South Carolina Bar Number: _____

Check the appropriate response:

_____ I have selected a mentor, who has agreed to serve in that capacity during the mentoring period. The name and address of my proposed mentor is

Name: _____

Mailing Address: _____

_____

_____

_____ I have not obtained a mentor and ask that one be appointed for me or that I be assigned to a group mentoring team.

Does your employer have an internal mentoring program that has been approved as satisfying the requirements of the S.C. Lawyer Mentoring Program?___Yes ___No

Signature: _____

Submit Completed Form within 30 days after admission to the South Carolina Bar to:

South Carolina Bar
Post Office Box 608
Columbia, South Carolina 29202

ATTACHMENT D

SAMPLE LETTER TO MENTOR AT BEGINNING
OF PROGRAM PERIOD
[South Carolina Commission on the Profession Letterhead]

Dear _____,

This letter confirms your agreement to participate in the pilot South Carolina Lawyer Mentoring Program as a mentor for _____. Your active participation is vital to the success of the program and the fulfillment of its goal of improving the transition of new lawyers into the profession, with a stronger understanding of the accompanying ethical and professional expectations. At the end of the one-year mentoring period, your comments and recommendations regarding this pilot program will be vital to subsequent evaluation of the program and a decision by the Supreme Court as to whether the program should be made permanent.

As a mentor, you will have available to you materials designed to assist you in carrying out your responsibilities as a mentor.

Enclosed with this letter is a copy of the reporting form that you will be required to submit at the end of the mentoring period. During the mentoring period, you will be expected to assist the lawyer being mentored in achieving each of the objectives of the mentoring program. Those objectives are set forth in the Uniform Mentoring Plan, attached to that form. If any activities are not completed, you will be asked to explain the omission of those elements. A purpose of the pilot program is to ascertain which activities are feasible and appropriate to require and your explanations will be important in that determination. Fulfillment of your mentoring obligations will also qualify for 4 hours of South Carolina MCLE credit in the year in which the mentoring is completed.

We thank for your participation as a mentor.

Sincerely,

ATTACHMENT E

CERTIFICATE OF COMPLETION
SOUTH CAROLINA UNIFORM MENTORING PLAN

Name of Lawyer Being Mentored (Print): _____

For the Mentoring Period beginning _____, 20__ and ending _____, 20__.

The undersigned participants in the South Carolina Lawyer Mentoring Program certify that, with the exceptions noted below, if any, they have completed their agreed upon mentoring plan, consistent with either the Uniform Mentoring Plan or a mentoring plan approved as compliant with the requirements of the South Carolina Lawyer Mentoring Program.

The following parts of the mentoring plan were not completed: _____
_____
_____.

Any recommendations or suggestions of the participants for changes in the Uniform Mentoring Plan or other aspects of the mentoring program are attached as Attachment C (Recommendations by Mentor) and/or Attachment D (Recommendations by Lawyer Being Mentored).

The undersigned Mentor (___does/ ___does not) work in the same office or firm as the undersigned Lawyer Being Mentored.

MENTOR	**LAWYER BEING MENTORED**
Signature: _____	Signature: _____
Print Name: _____	Print Name: _____
S.C. Bar Membership Number: _____	S.C. Bar Membership Number: _____
Date: _____	Date: _____

Submit Completed Form within 30 days after the end of the mentoring period to:

South Carolina Bar
Post Office Box 608
Columbia, South Carolina 29202

ATTACHMENT F

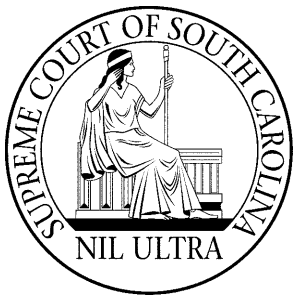
RECOMMENDATIONS AND COMMENTS BY MENTOR

(This form may be used by the Mentor to provide recommendations or comments to those evaluating the pilot mentoring program. Of particular interest to the evaluators are recommendations regarding the deletion or addition of elements in the Uniform Mentoring Plan.)

ATTACHMENT G

RECOMMENDATIONS AND COMMENTS BY NEW LAWYER

(This form may be used by the New Lawyer to provide recommendations or comments to those evaluating the pilot mentoring program. Of particular interest to the evaluators are recommendations regarding the deletion or addition of elements in the Uniform Mentoring Plan.)



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
December 8, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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(Richland, Judge J. Ernest Kinard, Jr.)

2008-UP-656-The State v. Danny Redden
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(Richland, Judge John C. Few)

2008-UP-658-The State v. Russell Trevor Quinn
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2008-UP-084-First Bank v. Wright	Pending
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lancaster County Bar Association, Petitioner,

v.

South Carolina Commission on Indigent Defense, Respondent.

Original Jurisdiction

Opinion No. 26568
Heard October 9, 2008 – Filed December 8, 2008

PETITION FOR MANDAMUS AND FOR INJUNCTION DENIED

Francis L. Bell, Jr. and Mitchell A. Norrell, both of Lancaster, for Petitioner.

James Hugh Ryan, III, of Columbia, for Respondent.

PER CURIAM: We granted petitioner Lancaster County Bar Association's (Lancaster Bar) request to hear this petition for mandamus and for injunction in our original jurisdiction. At issue is whether respondent's (Indigent Defense) construction of S.C. Code Ann. § 17-3-510(A) (Supp. 2007), which determines the membership of each circuit's Circuit Public Defender

Selection Panel, is correct. We find that it is, and deny Lancaster Bar's request for relief.

FACTS

The Sixth Judicial Circuit is composed of three counties: Chester, Fairfield, and Lancaster, and its Circuit Public Defender Selection Panel will have five members. § 17-3-510(A). Indigent Defense proposes to allocate the five members of the Sixth Judicial Circuit's Selection Panel as follows: 2 from Lancaster County, 2 from Chester County and 1 from Fairfield County. The Lancaster Bar challenges Indigent Defense's method of calculating the positions, contending that under the statutory formula the correct distribution is: 3 members from Lancaster and 1 each from Chester and Fairfield.

ISSUE

> Whether Indigent Defense has properly construed § 17-3-510(A)(1)?

ANALYSIS

Section 17-3-510(A) provides:

> (A) There is created in each judicial circuit in the State a Circuit Public Defender Selection Panel, the membership of which is composed of, and must be elected by, the active, licensed attorneys who reside within the counties of each judicial circuit. Each county in each judicial circuit must be represented by at least one member and the remaining members must be determined by equal weighting of county population based on the most recent decennial census and the most recent annual county appropriations to public defender operations according to the following formula:

> (1) percentage of distribution of population plus the percentage of distribution of appropriations for public defender operations divided by two and rounded to the nearest whole number;
>
> (2) the weighted values of each county multiplied by the number of remaining members in each Circuit Public Defender Selection Panel determines the number of additional members each county must have on the panel.
>
> Judicial circuits with three or less counties must have five members. Judicial circuits with four counties must have seven members. Judicial circuits with five counties must have nine members.

After assigning one seat to each county in the Sixth Circuit, two seats must be allocated under the statute's formula.

Lancaster Bar asks the Court to enjoin Indigent Defense from utilizing its interpretation of the statutory formula in § 17-3-510(A)(1) and to mandamus Indigent Defense to use the Lancaster Bar's interpretation instead.

The parties agree on the percentages to be used under the formula, and the method of calculation for the first two steps of the statute:

	Chester	Fairfield	Lancaster
Population:	28.7	19.7	51.6
plus			
Appropriations:	25.2	19.6	55.2
equals	53.9	39.3	106.8
divided by 2:	26.95	18.65	53.4

While both parties agree to this point, they disagree on the meaning of the requirement of § 17-3-510(A)(1) that following the division of the combined

percentage by two, the result be "rounded to the nearest whole number." Indigent Defense contends that this phrase requires that the percentages be rounded to the nearest whole number, thus Chester becomes 27, Fairfield 19, and Lancaster 53. Lancaster Bar contends, however, that the requirement that after the percentage for each county is obtained, it must be rounded to the next whole number results in the following: Chester 0; Fairfield 0; Lancaster 1.[1]

Although poorly articulated in the statute, we hold that Indigent Defense's interpretation of the statute is correct. If its view were not correct, then in any circuit in which one county has more than 50% of the combined population and funding, that county would automatically get all the "at large" members because the majority county's percentage would round up to 1, and all other counties in the circuit would round down to 0. Conversely, in any circuit where no county dominates, [2] then all counties will have percentages less than 50%, which under the Lancaster Bar's theory must be rounded down to 0. Under this interpretation, the "at large" members of the Circuit Panel could not be assigned since 0 times the number of "at large" members will always equal 0. To read the statute other than as Indigent Defense has would be to rewrite it to read: In any circuit where one county has more than 50% of the population and funding, it receives all the "at large" members. In any circuit where no county has at least 50% of the population and funding, then no "at large" members will be selected.

In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484 (2008). Since to read the statute any way other than has Indigent Defense leads to an absurd result, we hold that Indigent Defense has correctly interpreted § 17-3-510(A)(1). Accordingly, we deny Lancaster Bar's request for mandamus and injunction relief.

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[1]That is, Lancaster Bar first converts the percentages to decimals, and then rounds the decimal to the nearest whole number. Thus, .543 becomes 1 while .2695 and .1865 are rounded down to 0.

[2] E.g., the Fourth and the Eighth Circuits.

CONCLUSION

The petition for mandamus and for an injunction is

DENIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phillip Eugene Turner, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 26569
Submitted December 4, 2008 – Filed December 8, 2008

REVERSED AND REMANDED

LaNelle C. DuRant, South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Michelle J. Parsons, all of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from an order granting him a belated review of his direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). We grant the petition for a writ of certiorari, dispense with further briefing, reverse the order of the post-conviction relief (PCR) judge, and remand this matter for an evidentiary hearing.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *White v. State, supra.* In the absence of 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.* However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995).

Petitioner pled guilty to the charges against him. On PCR, petitioner did not allege he asked counsel to file a direct appeal, he had viable issues for appeal, or there were other extraordinary circumstances which would require him to be advised of his right to a direct appeal from his guilty plea. Petitioner's PCR application merely states counsel failed to inform him of his right to appeal and he did not know the law. The State agreed to allow petitioner a belated review of his direct appeal issues and petitioner agreed to withdraw his other PCR issues. There was no evidence at the PCR hearing that petitioner was entitled to be advised of his right to a direct appeal from his guilty plea and was not advised of that right, nor was there evidence petitioner requested counsel file an appeal.

The PCR judge found counsel did not advise petitioner of his right to appellate review and petitioner did not knowingly and voluntarily waive his right to a direct appeal. However, there was no evidence of extraordinary circumstances which would require counsel to advise petitioner

of his right to a direct appeal. Without evidence of extraordinary circumstances, the PCR judge erred in finding petitioner was entitled to a belated appellate review of his guilty plea. *Roe v. Flores-Ortega*, *supra*; *Weathers v. State*, *supra.* Accordingly, the order of the PCR judge is reversed and this matter is remanded for an evidentiary hearing. At this hearing, petitioner may present evidence on his allegation that he is entitled to belated appellate review of his guilty plea and any other allegations withdrawn at the original PCR hearing based on the State's agreement that petitioner was entitled to a belated review of his direct appeal issues.

REVERSED AND REMANDED.

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

The Supreme Court of South Carolina

In the Matter of
Ronald W. Hazzard, Petitioner.

ORDER

On May 5, 2008, petitioner was definitely suspended from the practice of law for one (1) year, retroactive to the date of his interim suspension, August 6, 2003, with conditions. In the Matter of Hazzard, 377 S.C. 482, 661 S.E.2d 102 (2008). Petitioner has now filed a Petition for Reinstatement.

After thorough consideration of the Petition for Reinstatement, the testimony presented at the hearing, and the entire record before the Court, the Court grants the Petition for Reinstatement subject to the condition that, during the period of his two-year monitoring contract with Lawyers Helping Lawyers, petitioner shall be required to attend bi-weekly treatment/counseling sessions with Patsy Alexander, MSW, LISW-CP.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

December 4, 2008

The Supreme Court of South Carolina

In the Matter of
W. James Hoffmeyer, Petitioner.

ORDER

On January 22, 2008, the Court definitely suspended respondent from the practice of law for nine (9) months. In the Matter of Hoffmeyer, 376 S.C. 221, 656 S.E.2d 376 (2008). Petitioner filed a Petition for Reinstatement which was referred to the Committee on Character and Fitness (CCF) pursuant to Rule 33(d), RLDE, Rule 413, SCACR. After a hearing, the CCF filed a Report and Recommendation recommending the Court grant the Petition for Reinstatement. Neither petitioner nor the Office of Disciplinary Counsel (ODC) filed any exceptions to the CCF's Report and Recommendation.

The Court grants the Petition for Reinstatement. Petitioner is hereby reinstated to the practice of law.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

December 5, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ernest Lee Paschal, Respondent/Appellant,

v.

Richard Price, d/b/a RAP Financial Services, Employer, and S. C. Uninsured Employer's Fund, Appellants/Respondents,

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

Opinion No. 4454
Submitted June 1, 2008 – Filed November 4, 2008
Withdrawn, Substituted and Refiled November 24, 2008

AFFIRMED

Clarke W. McCants, III and Amy Patterson Shumpert, both of Aiken and Stanford Ernest Lacy, of Columbia, for Appellants-Respondents.

Ann McCrowey Mickle, of Rock Hill and Thomas Roy Young, Jr., of Aiken, for Respondent-Appellant.

THOMAS, J.: This is a cross-appeal in a workers' compensation case. The single commissioner found the claimant, Respondent-Appellant Ernest Lee Paschal, sustained injuries in an accident that arose out of and in the scope of his employment with Appellant-Respondent Richard A. Price, d/b/a RAP Financial Services (Price) and awarded him compensation at the maximum rate for the year during which the accident occurred, plus lifetime medical benefits for permanent and total disability. These rulings were affirmed by the appellate panel of the South Carolina Workers' Compensation Commission and the circuit court. Appellants-Respondents Price and the S.C. Uninsured Employer's Fund[1] appeal (1) the determination that Paschal was Price's employee rather than an independent contractor, (2) certain aspects of the benefits awarded, and (3) the denial of a new hearing before a different commissioner because of concerns that remarks by Paschal's attorney may have tainted the proceedings. In his appeal, Paschal alleges Price's appeal to the circuit court was untimely and, therefore, the court erred by allowing it to proceed. We affirm.

FACTS AND PROCEDURAL HISTORY

In 1987, Price began collection work from his residence. This work led to the formation of RAP Financial Services (RAP), a sole proprietorship specializing in the recovery of collateral, typically automobiles, for banks and other lienholders. In addition to repossessors (known as "drivers"), RAP used clerks, skip tracers, and other office personnel to work with lenders to recover their collateral. Initially, each worker was paid a salary without deductions and received a 1099 form at the end of the year.

[1] The Uninsured Employer's Fund is a party to this action because Price did not have workers' compensation at the time of Paschal's accident. The name "Price" will be used interchangeably to refer to Richard Price, RAP Financial Services, the S.C. Uninsured Employer's Fund, or any combination thereof.

In 1996 or 1997, Price organized his drivers into teams. Under the team concept, Price paid all the expenses of a recovery as well as designated rates to each team member.

Paschal first applied to work as a driver with RAP in April 1998, filling out a preprinted form entitled "Application for Employment." The information Paschal provided on the form indicated that he was submitting an application on his own behalf and not as a principal of a business, desired work as a "repo man," and had previously held two similar positions for which he was compensated "per car." RAP accepted Paschal's application and assigned him to a team; however, Paschal worked as a driver for only a few weeks in 1998.

In the latter part of 1998, Price was audited by the Internal Revenue Service. As a result of the audit, RAP was reorganized so that its account representatives, skip tracers, secretaries, and other clerical personnel who worked within its office were compensated as employees and had taxes withheld from their paychecks. The team concept, however, was abandoned, and drivers continued to be compensated as independent contractors.

In January 1999, after Price discontinued the team concept, Paschal again began working as a driver for RAP. According to Price and other witnesses, Paschal also signed an independent contractor agreement; however, Paschal disputed this assertion and neither an original nor a copy of that agreement could be produced. Although Price maintained Paschal signed another independent contractor agreement on January 4, 2000, only a copy of the agreement could be produced at the hearing and Paschal's position was that the duplicate was a forgery.

As they did with other drivers, RAP representatives would fax, call, or personally deliver to Paschal information identifying and locating the vehicles to be repossessed. In addition, RAP instructed Paschal as to the most expedient order in which to take possession of the vehicles that he was responsible for recovering.

Usually, RAP would assign accounts to drivers based on the geographic location of the collateral to be repossessed. Paschal, however,

would also handle accounts outside South Carolina and was often referred to as the "clean-up man" because he would repossess cars that other drivers could not find in their respective locations.

Although Paschal initially used his own truck for his work, RAP loaned him money for the purchase of additional trucks for his use in the repossession business. RAP also provided Paschal with a beeper, a toll-free telephone number, a business card, and keys to facilitate access to many of the cars being repossessed. Price also allowed Paschal to use vehicles belonging to RAP when Paschal's truck was not operable. Although Paschal paid for fuel and maintenance, RAP wrote off the depreciation on the vehicles as a business expense. RAP also loaned Paschal interest-free money for the purchase of other equipment such as hydraulic lifts and tow packages, paying the providers directly and subtracting the reimbursement payments from whatever was due Paschal in a given week for the vehicles he had recovered. When Paschal was working away from his home, RAP provided financial assistance for gas money and lodging. In one instance, Price paid for a bus ticket for Paschal to go to Florida to pick up a car from another repossession facility.

During 2000, the last year he worked as a driver for RAP, Paschal was assigned more than six hundred accounts and worked seven days per week, averaging two repossessions per day. On an average day, RAP would page Paschal eight to ten times to provide instructions and obtain updates from Paschal on recovery efforts, even on vehicles he had already repossessed. At times, Paschal would return home at eight o'clock in the morning after working all night, only to be called an hour later by RAP and told to get up, come to the office, get more accounts, and go to work. Price would also call Paschal's mother's home in Charleston at inappropriate hours looking for Paschal. On one occasion, after Paschal returned home because he ran out of money, Price became angry and instructed Paschal that in the future he was to call RAP to have funds sent through Western Union.

The business card provided to Paschal was designed and paid for by RAP. It identified Paschal as a "field adjuster" and listed "RAP Financial Services" at the top in bold print. Moreover, RAP directed its staff not to mention to debtors that their vehicles were repossessed by independent

contractors. RAP required Paschal to give this card to the debtor when repossessing a vehicle or to leave the card at the debtor's residence.

RAP ultimately remained responsible to the lienholders for the recovery of the collateral and made arrangements for its drivers to store vehicles at designated facilities. It also provided Paschal with instructions on how to mark the vehicles for identification and required him to complete a "condition report," which RAP provided, describing wear and tear on the collateral as well as an inventory of the personal items in the car for RAP to give to the debtor.

On October 25, 2000, Paschal was severely injured when the repossessed vehicle that he was towing blew a right rear tire and began to swerve. Paschal lost control of his own vehicle, which turned sideways, swerved left into the median, and overturned. Paschal was not wearing a seatbelt and was thrown from his vehicle, which landed on him and crushed his spinal cord, paralyzing him from the waist down.

On November 15, 2000, less than a month after Paschal's accident, Price applied for a workers' compensation policy with Joe B. Babb & Co., Inc. In his application, Price indicated he did not use subcontractors.

After the accident, Paschal met with a vocational rehabilitation counselor who, with Paschal's input, set up a plan for his rehabilitation. Paschal, however, did not follow through with the plan. In July 2001, Paschal worked as a skip tracer for RAP, but that employment lasted only a few weeks. On April 4, 2002, during a deposition in a lawsuit unrelated to the present litigation, Paschal acknowledged he did not bring a workers' compensation claim for his injury and stated he was self-employed at the time of the accident.

On June 5, 2002, Paschal commenced this action by filing a Form 50 with the South Carolina Workers' Compensation Commission. Price filed a Form 51 admitting Paschal was injured in an automobile accident, but denying he was an employee.

The matter came before the single commissioner in December 2003 for three days and in January 2004 for one day. On February 17, 2005, the single commissioner issued an order in which he found Paschal was an employee of RAP, had become totally disabled from the accident, and was entitled to the maximum rate of compensation. Price appealed to the appellate panel of the South Carolina Workers' Compensation Commission.

On February 1, 2006, the appellate panel issued an order affirming the single commissioner's findings. On Thursday, March 2, 2006, Price mailed his notice of appeal to Paschal and the Clerk of Court for Aiken County (Clerk). Although the notice, along with the filing fee, was timely received on March 3, the Clerk did not clock it in because a civil cover sheet was not attached as required by an administrative order issued by the South Carolina Supreme Court. On or about March 8, the Clerk returned the notice of appeal to Price by mail with a form letter indicating a cover sheet was needed. Price again submitted the notice of appeal with the cover sheet the same day. The Clerk clocked in the notice of appeal on March 10, 2006, and assigned a case number to the matter. Price did not send Paschal another copy of the notice of appeal with the accompanying cover sheet.

On May 10, 2006, Paschal moved to dismiss Price's appeal as untimely. The following day, Price moved for a *nunc pro tunc* order designating the filing of the notice of appeal as March 2, 2006. The motion to dismiss came before the circuit court on May 31, 2006. At the hearing, counsel presented arguments on both Paschal's motion to dismiss and Price's appeal of the appellate panel's order.

On October 17, 2006, the circuit court issued an order affirming the decision of the appellate panel. Price filed a notice of appeal with this Court on November 15, 2006. Thereafter, on November 27, 2006, the circuit court issued an order denying Paschal's motion to dismiss. The court later denied a motion[2] by Paschal to alter or amend the denial of his motion to dismiss, and Paschal filed his notice of cross-appeal with this Court on February 23, 2007.

[2] The motion to reconsider and to alter and/or amend judgment does not address the circuit court's ability to issue a *nunc pro tunc* order in this

LAW/ANALYSIS

I. Appeal of Price and S.C. Uninsured Employer's Fund

A. Paschal's Status as an Employee

RAP first takes issue with the finding that Paschal was its employee rather than an independent contractor, arguing the facts of this case favor a contrary determination. We, however, hold RAP has not carried its burden to show the finding that Paschal was an employee was against the weight of the evidence.

In workers' compensation law, the existence of an employer-employee relationship is a jurisdictional question. Nelson v. Yellow Cab Co., 349 S.C. 589, 594, 564 S.E.2d 110. 112 (2002). If the factual issue before the commission involves a jurisdictional question, review by the appellate court is governed by the preponderance of the evidence standard. Id. Accordingly, the appellate court has the power to decide the issue of jurisdiction based on its own view of the preponderance of the evidence. Kirksey v. Assurance Tire Co., 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994). Nevertheless, "[w]hile the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel." Hernandez-Zuniga v. Tickle, 374 S.C. 235, 243-44, 647 S.E.2d 691, 695 (Ct. App. 2007). Furthermore, the appellant has the burden to show the circuit court's finding regarding jurisdiction is against the preponderance of the evidence. Gray v. Club Group, Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000).

The determination of whether a claimant qualifies as an employee for workers' compensation purposes is "a fact-specific determination reached by applying certain general principles." S.C. Workers' Comp. Comm'n v. Ray

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situation. Indeed, this Court is unable to find any signed *nunc pro tunc* order from the circuit court in the Record on Appeal.

Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995). Among these principles is "South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act." Dawkins v. Jordan, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000) (citing Spivey v. D.G. Constr. Co., 321 S.C. 19, 21, 467 S.E.2d 117, 119 (Ct. App. 1996)).

In determining whether a claimant qualifies as an employee for the purpose of eligibility for workers' compensation benefits, "[t]he general test applied is that of control by the employer." Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). "It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Id. (cited in Nelson, 349 S.C. at 594, 564 S.E.2d at 113). In determining whether an alleged employer's right of control is such that a claimant is an employee rather than an independent contractor, courts have looked to four factors: "(1) direct evidence of right to or exercise of control, (2) method of payment, (3) furnishing of equipment and (4) right to fire." Tharpe v. G.E. Moore Co., 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970). As to the relative weight to be accorded these factors, the supreme court, quoting a leading treatise has stated as follows:

> [F]or the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all.

Dawkins, 341 S.C. at 439, 534 S.E.2d at 703 (quoting 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 61.04 (2000)).

1. Right of Control

Regarding the right of control, we agree with Price that the actual exercise of control by a principal does not create an employment relationship. Still, direct evidence of the exercise of control is recognized as one of the

factors to which courts have looked to determine whether a claimant is an employee or an independent contractor. Tharpe, 254 S.C. at 200, 174 S.E.2d at 399; see also 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 61.05[3] (noting that there is often "no written or tangible document indicating the degree of control reserved" and that "[e]vidence of actual control exercised by the employer and submitted to by the employee becomes, in such cases, the best indication of what the parties understand the employer's right of control to be").

In affirming the finding of the appellate panel and single commissioner that Paschal was an employee of RAP, the circuit court noted the following as evidence of RAP's right to control the manner in which Paschal performed his duties: (1) RAP provided comprehensive information to Paschal regarding the location of the vehicles he was to repossess; (2) RAP determined the most expedient order in which to repossess cars; (3) RAP provided Paschal and other drivers with beepers and toll-free numbers in order to maintain contact with them; (4) RAP provided keys to its drivers so that they could gain entry to the vehicles they were attempting to repossess; (5) RAP required Paschal to complete certain forms with updated recovery information that RAP would provide to its clients; (6) Price paged Paschal as often as ten times per day, often at odd hours, to provide instructions and obtain current information on recovery efforts and would become upset when Paschal did not answer a page; (7) RAP sent money to Paschal while he was working away from his home "in order to keep him working"; (8) RAP paid for and designed a business card for Paschal to leave with debtors that identified Paschal as a "field adjuster" with the title "RAP Financial Services" listed at the top along with RAP's telephone numbers; (9) RAP gave its drivers specific instructions for completing appraisals and inventory reports, taking the recovered property to designated locations, and marking repossessed vehicles for identification; (10) Price made all the decisions and financial arrangements for the repossessed collateral; and (11) RAP, not its drivers, remained responsible for returning repossessed vehicles to the respective lienholders.

Although Price has taken issue with the implication of these findings, he has not challenged the findings themselves. Admittedly, some of these findings are more appropriately viewed as control necessary to obtain an

appropriate end result. Nonetheless, several of the findings support the conclusion reached by the prior tribunals hearing this matter that the control exerted by Price and RAP over Paschal exceeded what was necessary to ensure the recovery of delinquent collateral.[3] Moreover, we cannot ignore Paschal's informal designation as the "clean-up" man, which made his position different from that of other drivers in that he had to be available for assignments away from home at RAP's behest; thus, the frequent calls from Price and the provision of money to Paschal while he was working away from his home were more for the purpose of ensuring his availability for such assignments rather than enabling him to complete the assignments themselves.

2. Furnishing of Equipment

Price asserts error in the circuit court's finding that "RAP provided the vast majority of the equipment used by Paschal in the repossession of collateral," contending that he provided assistance in this regard either because of his generous nature or with the understanding that Paschal would reimburse him. We do not dispute that a number of the items that the circuit court listed as having been provided by RAP to Paschal for his work were either gifts from Price or obtained by Paschal with interest-free loans from Price; however, we also note RAP provided a number of other items of equipment to Paschal at its own expense that did not result from Price's largesse. These included a beeper, a toll-free telephone number, and transportation expenses. Moreover, consistent with the recognized principle that doubts regarding workers' compensation coverage are to be resolved in favor of inclusion, we hold Paschal's provision of his own equipment does

[3] We note the "Independent Contractor Agreement" that Paschal denied signing requires only that the contractor "utilize its best efforts" in recovering property and does not have any terms mandating quotas or deadlines for taking possession of delinquent collateral or requiring the driver be available at the behest of RAP for assignments; therefore, the agreement, even if valid, does not necessarily lend itself to supporting a finding that RAP's efforts in furtherance of productivity goals were measures to achieve a desired end result.

not override the control exerted by RAP over the details of his work. See Larson, § 61.07[1] (noting the claimant's furnishing of equipment may, if accompanied by other factors, indicate independent contractor status, "but in itself it is not necessarily fatal to a showing of employment based on other grounds").

3. Method of Payment

We agree with the circuit court that RAP's provision of a 1099 form rather than a W-2 form is not necessarily determinative of whether Paschal was an employee or an independent contractor at the time of his accident. See Nelson, 349 S.C. at 599, 564 S.E.2d at 115 (noting that the method of payment weighed in favor of the alleged employer but declining to view this factor as dispositive of whether the claimant was an employee). In keeping with our standard of review, we also decline to disturb the commission's finding that RAP set non-negotiable fees that drivers would receive for repossessions. Furthermore, consistent with Nelson, we note that, although the method of payment in this case may suggest Paschal was an independent contractor rather than an employee of RAP, the testimony of Paschal and others that Price determined the fee drivers would receive for a repossession suggests some degree of control on Price's part. See id. ("Although [the method of payment] weighs in favor [of] Yellow Cab, it had **some** degree of control over payment inasmuch as it dictated the amounts Nelson could charge fares . . . .") (emphasis in original).

4. Right to Fire

As required by our standard of review, we accept as valid the concerns expressed by the single commissioner and affirmed by the appellate panel and the circuit court about the authenticity of a written document that Price claimed Paschal had signed and purportedly contained the terms of an independent contractor agreement between Paschal and RAP. Furthermore, Paschal's testimony that, on one occasion when he was reluctant to repossess a vehicle, Price "[t]old me that I worked for him and that if I did it again I would be terminated" is evidence that Price himself viewed the parties' relationship as one between employer and employee. Finally, although Price argued on appeal that "it is apparent the relationship between Claimant and

Price could not be ended until Claimant delivered all vehicles he repossessed and Price paid Claimant for those services," he cited no evidentiary support for this assertion other than the independent contractor agreement that was discredited by the workers' compensation commission.[4]

B. Paschal's entitlement to lifetime benefits

RAP challenges the finding that Paschal was entitled to lifetime benefits, arguing Paschal failed to carry his burden to show his paraplegia resulted in permanent and total disability. We disagree.

Under section 42-9-10(A) of the South Carolina Code (Supp. 2007), an employee who suffers total disability from a job-related injury is entitled to certain specified benefits for a period not exceeding five hundred weeks. The limitation of the period to five hundred weeks is waived, however, for "any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage." Id. § 42-9-10(C). By statute, such a claimant "shall receive benefits for life." Id. As the supreme court has noted, the legislature has categorized these injuries as "*per se* disabling" such that "the claimant need not show a loss of earning capacity." Wigfall v. Tideland Utils., 354 S.C. 100, 105, 580 S.E.2d 100, 102 (2003). Here, it was undisputed that Paschal became a paraplegic as a result of a work-related injury; therefore, he did not have to show a loss of earning capacity because he was "presumptively totally disabled." Id.

[4] Moreover, although the purported agreement required "independent contractors" such as Paschal to supply proof of both garage liability insurance and their own workers' compensation insurance, Paschal never obtained either form of insurance and RAP never asked for proof of coverage. We therefore agree with Paschal that the agreement, even if authentic, did not reflect the true relationship between the parties.

C. Credibility Findings of Paschal and Price

RAP argues the circuit court erred in upholding the single commissioner's finding that Paschal was a more credible witness than was Price. It was largely in reliance on this finding that the single commissioner determined the allegation that Paschal had signed an independent contractor agreement, a copy of which was admitted into evidence, was false. We find no error.

In support of this argument, RAP contends the single commissioner, in assessing credibility, failed to give adequate consideration to documents in evidence, eyewitness testimony refuting several of Paschal's statements, and an admission by Paschal in a deposition that he considered himself to be self-employed when he was working as a driver for RAP. In our view, however, these are not sufficient reasons for this Court to deviate from the general rule that "[w]hile the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel." Hernandez-Zuniga, 374 S.C. at 243-44, 647 S.E.2d at 695. The reliability of the documents and witness statements themselves were matters of credibility for the appellate panel, which, in upholding the single commissioner's order, discounted the credibility of a number of witnesses testifying on behalf of RAP for various reasons, including their demeanor on the stand, biases, obvious fallacies in their statements,[5] and their failure to provide adequate documentation for their statements.

As to Paschal's statement during a deposition in a separate lawsuit that he had not yet filed a workers' compensation claim for his injuries because he was "self-employed," the single commissioner found that, at the time of the deposition, Paschal did not understand the difference between an employee and an independent contractor and referred to himself as both during that deposition. The single commissioner also noted that, in any event, what the

[5] For example, as the single commissioner noted, one witness for RAP "adamantly refused to admit that repossession of a car was an important part of RAP's business."

parties called their relationship would not be dispositive of what that relationship was. RAP has not given us any basis to rejct the reasons cited by the single commissioner, who was affirmed by both the appellate panel and the circuit court, for discounting Paschal's purported admission that he was an independent contractor rather than an employee.

D. Request for Criminal Prosecution

RAP further maintains the circuit court erred in upholding the single commissioner's decision not to grant a new hearing before a different commissioner after counsel for Paschal allegedly tainted the proceedings by requesting the single commissioner to refer Price to the South Carolina Attorney General for criminal prosecution. RAP argues the request gave Paschal a collateral advantage and was a deliberate, calculated, and planned effort to intimidate Price's testimony and to deter him from asserting a vigorous defense.[6] We find no reversible error.

Both the single commissioner and the circuit court noted the untimeliness of RAP's motion for a new hearing as a reason for denying it,[7] and RAP has not challenged this ground in its appellant's brief. Absent such a challenge, there is no reason for us to consider whether RAP was entitled to a new hearing based on its allegations that it was intimidated by the threats of criminal prosecution. See Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming the trial court's decision because the appellant appealed only one of the two independent grounds supporting it).

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[6] In her opening statement, counsel for Pascal advised the request for the referral for criminal prosecution resulted from concerns that Price had altered documents in the case.

[7] When Paschal's attorney made the request for criminal prosecution, counsel for RAP expressed his opposition, characterizing the request as a threat to scare Price into settling the case; however, he did not move at that time to have the matter heard by another commissioner.

E. Admissibility of Life Care Plan

RAP next takes issue with the admission into evidence of a life care plan prepared by Paschal's expert, arguing the plan was speculative and irrelevant in a workers' compensation case because benefits are set by statute. Because, however, we have already determined that Paschal is entitled to lifetime medical benefits as a matter of law, we hold any error in the admission or consideration of the life care plan is harmless.

F. Admission of IRS Agent's Testimony

RAP also alleges error in admitting testimony from a retired IRS agent regarding the factors used by the IRS to determine whether someone is an employee or an independent contractor, complaining the admission of such testimony allowed the record to be tainted with IRS standards. From our reading of the orders of the three tribunals that have reviewed this matter, however, it is our view that the determination that Paschal was an employee of RAP was based on South Carolina workers' compensation law and was in no way influenced by the IRS criteria. Assuming without deciding that the admission of the disputed testimony was error, we hold it did not prejudice RAP.

G. Reliance on Sellers v. Pinedale Residential Center

RAP also attempts to distinguish Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002), and contends the circuit court erred in relying on this case in determining whether the compensation rate set for Paschal was not excessive. We reject this argument.

The employee in Sellers was a teenager who had worked three part-time summer jobs and was rendered a paraplegic in a single-car accident. Noting the claimant had aspired to become a master electrician like his father and uncles, had a demonstrated work ethic, and had already made significant progress toward his career goal, this Court applied the "exceptional reasons" rule to provide for progressively higher wages based on probable future

earnings.[8] RAP argues that, in contrast to the employee in Sellers, Paschal was an adult who had already selected his trade and was a less deserving claimant in terms of his character.

Although the single commissioner and the circuit court cited Sellers in their orders, the compensation rate for which Paschal was deemed eligible was based on 2000 data of his earnings and expenses rather than on his anticipated future earning capacity. As such, we hold that, even if reference to Sellers in any of the prior orders in this case was incorrect, the error was harmless.

H. Reliance on Form 20

Finally, RAP contends the circuit court erred in upholding the single commissioner's reliance on an erroneous Form 20 that was formally withdrawn four months before the hearing. According to RAP, the Form 20 was erroneously based on Paschal's gross earnings rather than his net earnings, that is, his gross earnings less his expenses. We reject this argument.

The single commissioner found Paschal's compensation rate was $507.34, the same amount indicated on the disputed Form 20. In making this finding, the single commissioner found that "this result, regardless of the

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[8] The exceptional reasons rule in Sellers is based on section 42-1-40, which provides in pertinent part as follows:

> When for exceptional reasons the foregoing [definition of "average weekly wages"] would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

S.C. Code Ann. § 42-1-40 (1985 and Supp. 2007).

method that is used, most accurately reflects Paschal's earnings and is fair to both Price and Paschal." The circuit court, in affirming this finding, further noted "Pachal's average weekly wage and compensation rate was [sic] supported by many other documents in the record," and Paschal, in his respondent's brief, went to great lengths to provide supporting figures for this finding.[9] Considering that Price has not, in either his appellant's brief or his reply brief, challenged the evidence cited to support the weekly compensation awarded to Paschal, we fail to see how the Form 20, even if inaccurate, was prejudicial to RAP.

II. Cross-Appeal

As we have noted earlier, although Price's notice of appeal was timely received by the circuit court, the clerk of court returned it without clocking it in because it lacked an accompanying civil cover sheet. When counsel returned the notice with the cover sheet, it was clocked in after the filing deadline. Paschal filed a cross-appeal with this Court, arguing the circuit court should have dismissed Price's appeal as untimely. Specifically, Paschal argues the circuit court erred by finding the civil cover sheet was not required to file an appeal from the workers' compensation commission. We disagree.

On March 19, 2004, the South Carolina Supreme Court issued an order (Order) approving the use of Civil Cover Sheet, SCCA/234 (3/2004), (Cover Sheet) in the circuit courts of the state. The Order stated in pertinent part:

> For the purposes of administration, the attached form will be mandatory effective July 1, 2004, and required with all initial pleadings filed in the court of Common Pleas. Prior to the effective date of July 1, 2004, the civil coversheet is optional and not required in counties where Alternative Dispute Resolution is not mandated. This coversheet should be completed, in its entirety, by the attorney filing the action and

[9] In fact, Paschal submitted that, using his figures, his weekly compensation rate would be $515.70, which exceeds the rate he was awarded.

> served on the defendant with the Summons and Complaint. This coversheet shall remain as an attachment in order to document the nature of the action that is being filed and as proof of payment of the filing fee.

The Cover Sheet itself notes,

> The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

Aside from providing spaces for the caption, case number, and contact information for counsel, the Cover Sheet provides checkboxes to indicate "Nature of Action" and "Docketing Information," such as whether a jury trial is demanded. In the "Nature of Action" section, under the "Appeals" subheading, is a "Worker's Comp" checkbox.

Section 1-23-380 of the South Carolina Code (2005) sets forth the filing requirements for appeals of administrative decisions under the South Carolina Administrative Procedures Act prior to July 1, 2006.[10] Nowhere in that section or in section 42-17-60, which addresses procedures for appealing a workers' compensation award, is there any mention that a cover sheet is necessary when filing an appeal. In keeping with the supreme court's recent decision in Skinner v. Westinghouse Electric Corp., we decline to hold that a cover sheet, which is not required by statute, is essential to invoke the appellate jurisdiction of the circuit court. See Skinner v. Westinghouse Elec. Corp., Op. No. 26560 (S.C. Sup. Ct. filed Nov. 3, 2008) (Shearouse Adv. Sh.

[10] This statute was amended in 2006 to provide for review to an administrative law judge and appeal to this Court. 2006 S.C. Acts 387.

No. 41 at 22, 24) ("Our jurisprudence confirms that jurisdictional appealability issues are governed by statute, and not by the rules of civil procedure.").

In their briefs, the parties request this Court to find different purposes for the Cover Sheet. In deciding this question, we find the rules of statutory interpretation instructive. When interpreting a statute, all of the language must be read in a sense that harmonizes with its subject matter. Thompson ex rel. Harvey v. Cisson Constr. Co., 377 S.C. 137, 157, 659 S.E.2d 171, 181 (Ct. App. 2008). Here, the Order clearly states the Cover Sheet is required "for the purposes of administration." The Order refers to "initial pleadings" and states the Cover Sheet should be served with the Summons and Complaint, the initial pleadings in an action. The notion that the Cover Sheet is for administrative purposes only is further supported by language in the Order that the Cover Sheet is to be used "to document the nature of the action" and "as proof of payment of the filing fee." The Cover Sheet itself declares that it does not "supplement[ ] the filing and service of pleadings or other papers." In light of this language, it is our view that the Cover Sheet is at most a ministerial requirement.

In addition, the notice of appeal received by the Clerk on March 3, 2006, satisfied the applicable requirements of the South Carolina Administrative Procedures Act, the South Carolina Workers' Compensation Act, and the South Carolina Appellate Court Rules. Both this Court and the supreme court have held clerical errors in the notice of appeal do not destroy an appeal. See State v. Scott, 351 S.C. 584, 587, 571 S.E.2d 700, 701 (2002) (acknowledging that service of the notice of appeal is a jurisdictional requirement, but stating "non-prejudicial clerical errors in the notice are not detrimental to the appeal"); Weatherford v. Price, 340 S.C. 572, 577-78, 532 S.E.2d 310, 313 (Ct. App. 2000) (holding the incorrect reference in the notice of appeal to the motion for reconsideration rather than the final order did not deprive this Court of jurisdiction to hear the appeal and noting the appellant did attach a copy of the appealed order to the notice); Charleston Lumber Co. v. Miller Hous. Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 435 (Ct. App. 1995) ("Clerical errors in a notice of appeal do not destroy the appeal."). We see no reason not to apply these holdings to the present dispute.

Paschal further argues the circuit court erred by failing to find it was deprived of appellate jurisdiction after the Clerk of Court delayed filing Price's notice of appeal until after the thirty-day time limit[11] because it did not include a Cover Sheet. We disagree.

We are mindful of the fact that "[t]he acts of a court with respect to a matter as to which it has no jurisdiction are void." State v. Guthrie, 352 S.C. 103, 107, 572 S.E.2d 309, 312 (Ct. App. 2002). Here, we are not faced with an issue of subject matter jurisdiction but one of appellate jurisdiction. Quite simply, the procedural or administrative rule as to the cover sheet does not act to deprive the court of subject matter jurisdiction. See Skinner, Op. No. 25650 (S.C. Sup. Ct. filed Nov. 3, 2008) (Shearouse Adv. Sh. No. 41 at 22, 24)("Failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of appellate jurisdiction over the case, but does not affect the court's subject matter jurisdiction.") (citations omitted).

Paschal was timely and properly served when Price sent the notice of appeal on March 2, 2006; therefore, Paschal had notice of Price's appeal. Paschal does not allege any prejudice from the omission of a Cover Sheet from the notice, nor does he assert that he was unaware of Price's appeal

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[11] The thirty-day time limit was set forth in section 1-23-380, which, at the time Price appealed to the circuit court, provided in pertinent part as follows:

> "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, Article 1, and Article 5. . . . Proceedings for review are instituted by filing a petition in the circuit court within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision thereon."

S.C. Code Ann. § 1-23-380 (2005).

because of it. We therefore reject Paschal's effort "to take advantage of mere clerical error by which [he] was in no way prejudiced or misled." Charleston Lumber, 318 S.C. at 478, 458 S.E.2d at 436; see also Parissi v. Telechron, Inc., 349 U.S. 46, 47 (1955) (holding the inadvertent failure of the appellant to include the required filing fee did not vitiate the validity of the otherwise timely filed notice of appeal); Scott, 351 S.C. at 587-88, 571 S.E.2d at 702 (wherein the supreme court held it was "not deprived of subject matter jurisdiction" because of the citation of the incorrect county from which the appeal was taken); Weatherford, 340 S.C. at 578, 532 S.E.2d at 313 (holding that "[t]hough [the appellant] did not 'technically' appeal from the trial court's original order by referring to it in the Notice of Appeal," this failure did not warrant dismissal of the appeal because the omission was "of a clerical nature only"); Miles v. Miles, 303 S.C. 33, 36, 397 S.E.2d 790, 792 (Ct. App. 1990) ("This Court has long recognized an overriding rule which says 'whatever doesn't make any difference, doesn't matter.'") (citation omitted).

In the present case, the Clerk declined to clock and file the notice of appeal for reasons that did not affect the substance of the appeal or the notice given to Paschal. We recognize that courts of this State have refused to elevate form over substance and accordingly affirm the circuit court's denial of Paschal's motion to dismiss. See Matter of Ferguson, 313 S.C. 120, 124, 437 S.E.2d 72, 75 (1993) (holding in a judicial misconduct matter that the mere fact that the respondent was no longer a judge at the time of the proceedings were initiated against him was irrelevant); Gordon v. Busbee, 367 S.C. 116, 119-21, 623 S.E.2d 857, 859-60 (Ct. App. 2005) (holding the statutory requirement that a written statement must be "in the form prescribed by rule" "refers to the manner or 'procedure as determined or governed by regulation,' not to a specific 'document with blanks for the insertion of . . . information'") (citation omitted).

CONCLUSION

As to Paschal's cross-appeal, we uphold the circuit court's refusal to dismiss Price's appeal as untimely. As to the merits of Price's appeal, we affirm the denial of Price's request for a new hearing before a different hearing commissioner as well as the findings that Paschal was an employee

of RAP at the time of his injury and was entitled to lifetime benefits at the maximum rate of compensation.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Original Blue Ribbon Taxi Corporation, **Respondent,**

v.

South Carolina Department of Motor Vehicles, **Appellant.**

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 4461
Heard November 19, 2008 – Filed November 25, 2008

AFFIRMED

Frank L. Valenta, Jr., Phillip S. Porter, and Linda Grice, all of Blythewood, for Appellant.

Gerald M. Finkel and Robert B. Phillips, of Columbia, for Respondent.

ANDERSON, J.: The South Carolina Department of Motor Vehicles ("DMV") appeals the order of the Administrative Law Court ("ALC") reversing the DMV's denial of an application for a Self-Insurance Certificate. The DMV contends the applicant did not satisfy the requirements established in S.C. Code Ann. § 56-9-60. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The Original Blue Ribbon Taxi Cab Corporation ("Blue Ribbon") operates a fleet of taxi cabs in South Carolina and has been in operation for over seventy years. Blue Ribbon originally insured its vehicles with policies from various insurance carriers. However, due to soaring policy rates, Blue Ribbon sought and obtained a Self-Insurance Certificate from the DMV. In order to meet the requirements of a self-insurer, Blue Ribbon maintained a segregated claims account to pay judgments entered against it, relying on a letter of credit from the Sumter National Bank ("Bank"). The DMV accepted the letter of credit as complying with the statutory prerequisites.

On November 14, 2005, Blue Ribbon and the Bank renewed and amended the irrevocable letter of credit to limit claims to the minimum automobile insurance policy limits enacted by the General Assembly. In February 2006, the DMV denied Blue Ribbon's renewal application for the Self-Insurance Certificate in response to the new limitations provided for in the letter of credit. Blue Ribbon contested the decision before a DMV Senior Hearing Officer. In his order affirming the denial, the Senior Hearing Officer expounded:

> I conclude that the DMV was not satisfied that the Letter of Credit submitted by the Petitioner showed ability to satisfy any judgment against it. I conclude that this decision was in the discretion of DMV as afforded by Section 56-9-60, that the decision was not unreasonable and that it did not contradict state law.

Blue Ribbon further appealed to the Administrative Law Court. The ALC judge issued an order enunciating:

> I conclude that the Department's decision to deny Blue Ribbon's application warrants reversal. The Department's decision is premised on the assumption that the legislature intended for self-insurers to provide *greater* protection to the public than statutory liability policies provide. However, the Department's assumption is at odds with the way in which our Supreme Court has interpreted legislative intent with respect to the self-insurer statute.
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> . . .
>
> Furthermore, if the Department were able to deny self-insurer status in any case where it was dissatisfied that the applicant was able to pay *any* judgment that might be entered against it, then the Department could deny virtually all applications for self-insurer certification. Few, if any, South Carolina companies seeking self-insurer certification can show that they are able to satisfy *any* potential adverse judgment, no matter how large.

(emphasis in original). The ALC judge concluded Blue Ribbon had complied with the statutory requirements for self-insurer status and reversed the decision of the DMV.

ISSUE

Did the Administrative Law Court err in reversing the South Carolina Department of Motor Vehicles' denial of Blue Ribbon's application for a Self-Insurance Certificate under S.C. Code Ann. § 56-9-60?

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Envtl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). Section 1-23-610(C) of the South Carolina Code is applicable and efficacious in articulating the standard:

> The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner has been prejudiced because of the finding, conclusion, or decision is:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(C) (Supp. 2007).

The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. Olson, 379 S.C. at 63, 663 S.E.2d at 501 ("[T]his court can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion."); see S.C. Code Ann. § 1-23-610(C). The ALC judge's order should be affirmed if supported by substantial evidence in the record. See Whitworth v. Window World, Inc., 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008); Houston v. Deloach & Deloach, 378 S.C. 543, 550, 663 S.E.2d 85, 88 (Ct. App. 2008); McGriff v. Worsley Cos., Inc., 376 S.C. 103, 109, 654 S.E.2d 856, 859 (Ct. App. 2007). "However, the reviewing court may reverse or modify the decision of the ALC judge if the finding, conclusion, or decision reached is 'clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record' or is affected by an error of law." S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, Op. No. 4450 (S.C. Ct. App. filed Oct. 23, 2008) (Shearouse Adv. Sh. No. 40 at 71) (citing Olson, 379 S.C. at 63, 663 S.E.2d at 501; S.C. Code Ann. § 1-23-610(C)(d)-(e)); see also SGM-Moonglo, Inc. v. S.C. Dep't of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008) ("The court of appeals may reverse or modify the decision only if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law.")).

Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Administrative Law Court and is more than a mere scintilla of evidence. S.C. Coastal at 72 (citing Olson, 379 S.C. at 63, 663 S.E.2d at 501); see Whitworth, 377 S.C. at 640, 661 S.E.2d at 335; Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 605, 550 S.E.2d 287, 294 (2001); Jones v. Harold Arnold's Sentry Buick, Pontiac, 376 S.C. 375, 378, 656 S.E.2d 772, 774 (Ct. App. 2008); McGriff, 376 S.C. at 109, 654 S.E.2d at 859; Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005); Tennis v. S.C. Dep't of Soc. Servs., 355 S.C. 551, 558, 585 S.E.2d 312, 316 (Ct. App. 2003); Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 108, 576 S.E.2d 191, 195 (Ct. App. 2003);

Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Olson, 379 S.C. at 63, 663 S.E.2d at 501 (citing DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004)); accord Palmetto Alliance, Inc v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984); Tennis, 355 S.C. at 558, 585 S.E.2d at 316; Gattis, 353 S.C. at 108, 576 S.E.2d at 195.

LAW/ANALYSIS

The DMV avers the ALC judge committed error by reversing the Senior Hearing Officer's denial of Blue Ribbon's self-insurance application. The DMV maintains Section 56-9-60 grants the department discretion to deny self-insurer status to applicants with the apparent inability to satisfy any potential adverse judgments. We disagree.

The relevant statute, Section 56-9-60(A), directs:

> (A) A person or company who has more than twenty-five motor vehicles registered in his name may qualify as a self-insurer provided that the department is satisfied that the person or company is able to pay any judgments obtained against the person or company. Upon not less than ten days' notice and a hearing pursuant to notice, the department may cancel self-insurer status when the requirements for the status no longer are met. The person or company must submit the following information to the department for it to determine financial responsibility:
>
> (1) a copy of the applicant's latest financial statement prepared by a certified public accountant licensed to do business in South Carolina, indicating that the applicant has a positive net worth;

> (2) a current list of all vehicles registered in applicant's name;
>
> (3) the applicant's procedural guidelines for processing claims; and
>
> **(4) the applicant must have a net worth of at least twenty million dollars or the department may require the applicant to deposit in a segregated self-insured claims account the sum of three thousand dollars for each vehicle to be covered by the self-insurer's certificate.** Eighty percent must be cash or an irrevocable letter of credit issued by a bank chartered in this State or a member bank of the federal reserve system, and the remaining twenty percent may be satisfied by the "quick sale" appraised value of real estate located in the State, as certified by a licensed appraiser. The three thousand dollar a vehicle amount may not decrease more than thirty percent in any given certificate year.

S.C. Code Ann. § 56-9-60(A) (Supp. 2007) (emphasis added).

The central issue in the case at bar is whether Blue Ribbon met the statutory requirements to receive self-insurance status as required by the applicable law. The DMV does not contest Blue Ribbon complied with the requirements of the statute except for a single provision. The dispute centers on whether the limitations placed on Blue Ribbon's letter of credit constitute a failure to comply with Section 56-9-60(A)(4).

The principles of statutory construction offer guidance in interpreting the relevant legislation in this case. The cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. In re Campbell, 379 S.C. 593, ___, 666 S.E.2d 908, 911 (2008); Howell v. United States Fid. & Guar. Ins. Co., 370 S.C. 505, 509, 636 S.E.2d 626, 628 (2006); Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005); see also State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 105 (2008) ("In

interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature."). Legislative intent must prevail if it can be reasonably discovered in the language employed and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); State v. Morgan, 352 S.C. 359, 365-366, 574 S.E.2d 203, 206 (Ct. App. 2002). The plain language of the statute is the principal guidepost in discerning the General Assembly's intent. Cain v. Nationwide Prop. & Cas. Ins. Co., 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008); Grinnell Corp. v. Wood, 378 S.C. 458, 467, 663 S.E.2d 61, 66 (Ct. App. 2008); see also Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 597-598, 654 S.E.2d 284, 289 (Ct. App. 2007) ("With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute.")

Clear and unambiguous statutes require no statutory construction and must be applied according to the literal meaning of their terminology. State v. Sweat, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008); Neal v. Brown, 374 S.C. 641, 650, 649 S.E.2d 164, 168 (Ct. App. 2007). Words in the statute should be given their plain and ordinary meaning without resulting to forced or subtle construction. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008); Sonoco Prods. Co. v. S.C. Dep't of Revenue, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008). When statutes address the same subject matter, they are in pari material and must be construed together, if possible, to produce a single, harmonious result. Howell, 370 S.C. at 509, 636 S.E.2d at 628; Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001); Joiner ex. rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000); see also Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008) ("Moreover, '[a] statute should not be construed by concentrating on an isolated phrase.' "). " 'The legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense.' " S.C. Coastal at 77 (quoting Pee v. AVM, Inc., 344 S.C. 162, 168, 543 S.E.2d 232, 235 (Ct. App. 2001)); accord Purdy v. Moise, 223 S.C. 298, 304, 75 S.E.2d 605, 608 (1953); Powers v. Fid. & Deposit Co. of Md., 180 S.C. 501, 509, 186 S.E.

523, 527 (1936); see also Rorrer v. P.J. Club, Inc., 347 S.C. 560, 568, 556 S.E.2d 726, 730 (Ct. App. 2001) ("[The Court] should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statutes and the policy of the law.").

However, courts will reject an interpretation leading to an absurd result clearly unintended by the legislature. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Miller v. Lawrence Robinson Trucking, 333 S.C. 576, 582, 510 S.E.2d 431, 434 (Ct. App. 1998); see also Ray Bell Constr. Co. v. Sch. Dist. Of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 724, 729 (1998) ("However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature . . . ."). In this situation, the true purpose and intentions of the legislature will prevail over the literal import of the words. Browing v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); accord New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 310-311, 649 S.E.2d 28, 30 (2007). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998) (citing Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 888 (1993)); accord Moon v. City of Greer, 348 S.C. 184, 188, 558 S.E.2d 527, 529 (Ct. App. 2002).

South Carolina courts have addressed legislative intent with respect to the self-insurer statute on several prior occasions. In Southern Home Ins. Co. v. Burdette's Leasing Serv., Inc., 268 S.C. 472, 477, 234 S.E.2d 870, 872 (1977), our Supreme Court asseverated:

> The overall purpose of the [self-insurance statute] is to assure protection for the public for injuries and damages growing out of the negligent operation of motor vehicles on the roads of this State.
>
> . . .

> We think it was the intention of the legislature that a self-insurer provide the same protection to the public that a statutory liability policy provides. A self-insurer substitutes for an insurance policy **to the extent of the statutory policy requirements**.

(emphasis added).

In Wright v. North Area Taxi, Inc., 337 S.C. 419, 423, 523 S.E.2d 472, 474 (Ct. App. 1999), this Court instructed:

> Under South Carolina law, however, a company that has more than twenty-five motor vehicles registered in its name may be a self-insurer upon satisfying the statutory requirements. As a self-insurer, North Area Taxi, was required to provide the same minimum protections to the public as the minimum limits required by a statutory liability policy. Technically, a self-insurer is not an insurer at all; rather, a self-insurer provides a substitute for an insurance policy.

(citations omitted). In other decisions, South Carolina courts have required self-insurers to extend coverage to the extent provided for by statutory liability policies in respect to Uninsured Motorist Coverage (UM). See Wright v. Smallwood, 308 S.C. 471, 419 S.E.2d 219 (1992) (requiring self-insured city to provide UM coverage to employee injured while driving city vehicle); S.C. Elec. & Gas Co. v. Jeter, 288 S.C. 432, 343 S.E.2d 47 (Ct. App. 1986) (finding self-insured bus operator responsible for UM coverage of passenger injured in accident).

Juxtaposing the case law precedent and the plain language of Section 56-9-60, we find Blue Ribbon properly complied with the requirements for self-insurance status and affirm the decision of the ALC. Our courts have consistently held self-insurers are required to provide a substitute for an insurance policy to the extent of the statutory policy requirements. See Southern Home Ins., 268 S.C. at 477, 234 S.E.2d at 872. Blue Ribbon complied with the requirements established by Section 56-9-60(A) and

provided a segregated claims account in the form of a letter of credit containing the per vehicle sum mandated by the statute. The limiting language added to the letter of credit merely serves to ensure Blue Ribbon's substitute for a policy conforms to the statutory policy requirements ensconced in S.C. Code Ann. § 38-77-140 (Supp. 2007) (Currently, minimum statutory policy limits are set at twenty-five thousand dollars for bodily injury to a single person in a single accident, fifty thousand dollars for bodily injury to two or more people in a single accident, and twenty-five thousand dollars for property damage resulting from a single accident. This statute has been amended subsequent to the drafting of the letter of credit addressed in this case).

The plain language of Section 56-9-60(A) requires the applicant to prove to the department that "the person or company is able to pay **any judgments obtained** . . . ." (emphasis added). However, the determination of what constitutes the ability to pay any judgment is derived from the statute as a whole and the relevant case law. Our courts have concluded the legislature intended for self-insurers to conform to the statutory policy requirements. A literal reading of the "any judgments obtained" clause would be inconsistent with case law precedent and would lead to an absurd result clearly unintended by the legislature. This interpretation would allow the DMV exceedingly broad discretion to deny applicants who were unable to satisfy hypothetical judgments far greater than the statutory policy requirements necessary for other insured motorists. Therefore, Section 56-9-60 must be interpreted in conjunction with the minimum statutory policy requirements of Section 38-77-140. We find this to be the correct figure to look to when determining whether an applicant has the capacity to satisfy any adverse judgments.

Section 56-9-60 establishes four prongs to be followed by the DMV in determining the financial responsibility of the company. See S.C. Code Ann. § 56-9-60(A)(1)-(4). Blue Ribbon complied with all of these necessary qualifications. The limiting language in the letter of credit conformed with the statutory policy requirements mandated by Section 38-77-140. Therefore, Blue Ribbon's letter of credit satisfied all statutory prerequisites and the application for the Self-Insurance Certificate should have been granted.

CONCLUSION

Based on the foregoing, the order of the Honorable John D. McLeod, Administrative Law Judge, is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richland County, Respondent,

v.

Carolina Chloride, Inc., Appellant.

Appeal From Richland County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 4462
Heard October 9, 2008 – Filed November 25, 2008

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Edward D. Sullivan, Christian Stegmaier and Amy L. Neuschafer, all of Columbia, for Appellants.

Andrew F. Lindemann, William H. Davidson III and Michael B. Wren, all of Columbia, for Respondent.

PIEPER, J.: Carolina Chloride, Inc. appeals a directed verdict involving the zoning of real property in Richland County. We affirm in part, reverse in part, and remand.

FACTS

In November of 1996, Carolina Chloride purchased 7.67 acres of land in Richland County from IBM for $85,000. Prior to the purchase, Carolina Chloride's realtor contacted the Richland County Planning and Zoning Department ("County") to inquire about the zoning of the IBM property. Carolina Chloride required M-2 zoning for heavy industry because it planned to use the property for storing and distributing calcium chloride, a nonhazardous chemical used for ice or dust control on roads and for treating drinking water. In response to the inquiry, County allegedly informed the realtor of the property's M-2 zoning designation.[1]

The month after purchase of the property, Carolina Chloride's president, Robert Morgan ("Morgan"), went to County seeking a building permit. The Zoning Administrator, Terry Brown, told Morgan he believed the County zoned the property M-2, but there was a question about the tax map. The following day, the Zoning Administrator wrote Morgan a letter confirming County zoned the property M-2.

Over the ensuing six years, Carolina Chloride invested more than four hundred thousand dollars to improve the property, including building a mini-warehouse business. In order to build and maintain the businesses on the property, Carolina Chloride sought multiple licenses, certificates, and permits from County. Either the Zoning Administrator or other authorized County employees approved all such requests with each reflecting M-2 zoning.

In 2002, Morgan began negotiating the sale of the business with Allen, Johnette and Luke Watson ("the Watsons"). In pursuit of Carolina

[1] Carolina Chloride's realtor could not recall who told him of the property's M-2 zoning.

Chloride's purchase, the Watsons entered discussions with a bank to obtain financing, reviewed Carolina Chloride's financial records, and created a business plan for their intended expansion of the company. After continued discussions, Morgan agreed to sell Carolina Chloride and all its assets for 1.1 million dollars; however, Morgan and the Watsons never reduced the agreement to writing.

Thereafter, Carolina Chloride and the Watsons contacted John W. Hicks ("Hicks"), County's employee authorized to inform citizens whether their intended property use conformed to applicable zoning ordinances. Carolina Chloride sought County's approval for the Watsons' planned expansion of Carolina Chloride's property. On February 13, 2003, Hicks advised Carolina Chloride the property was zoned rural (RU). Hicks further advised that the current use of the property did not conform to the zoning ordinances; therefore, County would not permit any future expansion of the property. Hicks did state Carolina Chloride could continue its non-conforming use and could petition the Planning Commission to amend the zoning map to reflect M-2 zoning. As a result, the Watsons decided they did not want to purchase Carolina Chloride alleging RU zoning "totally killed the sale."

In August of 2003, Carolina Chloride petitioned to change the property's zoning from RU to M-2. On November 4, 2003, Richland County Council approved the request and amended the zoning map. Carolina Chloride subsequently filed suit against County alleging multiple causes of action associated with the unsuccessful sale of Carolina Chloride's property.

At trial, County denied all claims and asserted defenses under the South Carolina Tort Claims Act. During trial, the court refused to allow Carolina Chloride to read sections of Terry Brown's deposition to the jury because Terry Brown was no longer the Zoning Administrator. At the end of Carolina Chloride's case in chief, the trial court granted County's motion for directed verdict on all causes of action. Carolina Chloride filed a motion to reconsider, which the trial court denied. Carolina Chloride now appeals.[2]

[2] Prior to oral arguments, County filed a motion with this Court to strike materials Carolina Chloride designated for inclusion in the record on appeal,

ISSUES

I. Did the trial court err in excluding the testimony of the former Zoning Administrator?

II. Did the trial court err as a matter of law in finding Richland County did not owe a duty to Carolina Chloride?

III. Did the trial court err as a matter of law in finding the Tort Claims Act provided Richland County with immunity?

IV. Did the trial court err in finding no evidence of gross negligence by Richland County?

V. Did the trial court err in ruling as a matter of law there was no governmental taking by Richland County?

VI. Did the trial court err in ruling as a matter of law there was no deprivation of substantive due process by Richland County?

VII. Did Carolina Chloride waive its governmental estoppel and promissory estoppel arguments?

STANDARD OF REVIEW

When ruling on a motion for directed verdict, appellate courts apply the same standard as the trial court viewing evidence and all reasonable inferences in the light most favorable to the non-moving party. Gadson ex rel. Gadson v. ECO Servs. of South Carolina, Inc., 374 S.C. 171, 175-76, 648 S.E.2d 585, 588 (2007). A court should deny a motion for directed verdict "when the evidence yields more than one inference or its inference is in doubt." Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d

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including the depositions of Terry Brown, Carl Gosline, and Geonard Price. This Court denied the motion stating County was entitled to argue in its appellate brief whether the contested items should be considered on appeal.

231, 236 (2002). This court will reverse only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Law v. South Carolina Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006).

I. Deposition Testimony

The admission of evidence is within the sound discretion of the trial court. Gamble v. Int'l Paper Realty Corp. of South Carolina, 323 S.C. 367, 373, 474 S.E.2d 438, 442 (1996). The exclusion of evidence will not be reversed on appeal absent an abuse of discretion. Id.

The trial court prohibited Carolina Chloride from reading excerpts of the deposition of Terry Brown (the former Zoning Administrator) at trial based on Rule 32(a)(2), SCRCP. The rule provides, "[t]he deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent . . . may be used by an adverse party for any purpose." Rule 32(a)(2), SCRCP.

Carolina Chloride argues Brown qualified as an officer, director, or managing agent under Rule 32(a)(2), SCRCP. While Brown was no longer the Zoning Administrator for County when deposed, Carolina Chloride asserts he met the requirements of Rule 32(a)(2), SCRCP, as a current member of the Zoning Board of Adjustment. Carolina Chloride, however, has not demonstrated the trial court abused its discretion by excluding Brown's deposition testimony. Furthermore, Brown's current status as a member of the Zoning Board of Adjustment, in and of itself, does not require admission of the deposition under Rule 32(a)(2), SCRCP. Carolina Chloride did not lay any foundation as to why Brown's role on the Board qualifies under Rule 32(a)(2). If not admissible under Rule 32(a)(2), Carolina Chloride needed to demonstrate Brown was unavailable pursuant to Rule 32(a)(3), SCRCP, or alternatively, if Brown was available, Carolina Chloride should have called him as a witness at trial. Indeed, Carolina Chloride opined at trial that the application of Rule 32(a)(2), SCRCP, to the admissibility of Brown's deposition was "a weak argument." Consequently,

the trial court did not abuse its discretion in excluding Brown's deposition at trial in the absence of the requisite foundation.[3]

II. Public Duty Rule

The trial court ruled as a matter of law County owed Carolina Chloride no "special duty," warranting a directed verdict on Carolina Chloride's negligence claims. Carolina Chloride avers this was in error because the public duty rule does not apply to its negligence claims. We agree.

To establish liability in a negligence action, the claimant must show: (1) a duty of care owed by the defendant to the plaintiff; (2) breach of that duty; and (3) damages resulting from the breach. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998). Statutes, contractual relationships, property interests, and other special circumstances may give rise to an affirmative legal duty to act. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006). "When, and only when, the plaintiff relies upon a statute as creating the duty does a doctrine known as the 'public duty rule' come into play." Arthurs ex rel. Estate of Munn v. Aiken County, 346 S.C. 97, 103, 551 S.E.2d 579, 582 (2001).

In Arthurs, our state's supreme court analyzed whether the Tort Claims Act and the public duty rule were incompatible. Id. at 102, 551 S.E.2d at 581-82. While the court did confirm the viability of the public duty rule, the court clarified what types of situations could give rise to the rule. Id. at 105, 551 S.E.2d at 583. Accordingly, only when the plaintiff relies upon a statute as creating the duty does the public duty rule come into play. Id. at 103, 551 S.E.2d at 582. In other words, "where the duty relied upon is based upon the common law . . . then the existence of that duty is analyzed as it would be

[3] While Carolina Chloride also references Rule 801(d)(2), SCRE in its brief on appeal, this argument was not made to the trial court and is not preserved for our review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

were the defendant a private entity." Trousdell v. Cannon, 351 S.C. 636, 641, 572 S.E.2d 264, 266-67 (2002) (analyzing the implications of the holding in Arthurs) (internal quotations omitted).

Here, Carolina Chloride asserts a negligence claim based upon the common law duty to exercise reasonable care. Specifically, Carolina Chloride argues County breached its duty of reasonable care when County's authorized employee mistakenly informed Carolina Chloride the subject property was zoned for rural use rather than heavy industrial use. Carolina Chloride does not base its negligence claims on any statutory duty. Because Carolina Chloride relies on a common law duty and not a statutory duty, the trial court erred in applying the public duty rule. See Trousdell, 351 S.C. at 641, 572 S.E.2d at 267 (holding the public duty rule did not bar an alleged breach of the common law duty to exercise reasonable care).

Nevertheless, Carolina Chloride's claims may still be barred under an exception to the waiver of immunity enumerated in the South Carolina Tort Claims Act. See Madison, 371 S.C. 123, 142, 638 S.E.2d 650, 660 (stating "[w]hen a governmental entity owes a duty of care . . . under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity . . . asserted by the governmental entity."). Accordingly, we now address whether the exceptions County raised bar Carolina Chloride's negligence claim.

III. Sovereign Immunity

Carolina Chloride asserts the trial court erred in finding County immune from liability under Section 15-78-40 of the South Carolina Tort Claims Act.

The South Carolina Tort Claims Act ("the Tort Claims Act" or "the Act") constitutes the exclusive civil remedy for any tort committed by a governmental employee while acting within the scope of the employee's official duties. S.C. Code Ann. § 15-78-200 (2005). The Tort Claims Act does not create causes of action, but removes the common law bar of governmental immunity. Arthurs, 346 S.C. at 105, 551 S.E.2d at 583. The Act is a limited waiver of sovereign immunity. Steinke v. South Carolina

Dep't of Labor, Licensing, and Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999).

The trial court interpreted § 15-78-40 to require a private sector analogy for a governmental entity to be held liable under the Act. This section provides, "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005).

Recently, this court reversed an order of summary judgment where the trial court, relying on § 15-78-40, determined the government could only be held liable under the Tort Claims Act if a private individual could be held liable for similar conduct. Quail Hill, L.L.C. v. County of Richland, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008). This decision, however, did not hold our state's Tort Claims Act lacked a private analogy mandate; instead, this decision merely emphasized the summary judgment procedural posture of the case and the absence of state precedent supporting or opposing a private sector analogy requirement. Moreover, Quail Hill expressly acknowledged persuasive federal authority supporting the trial court's interpretation of § 15-78-40.

In United States v. Olson, 546 U.S. 43 (2005), the United States Supreme Court analyzed a provision of the Federal Tort Claims Act similar to § 15-78-40. The federal provision allows tort actions against the United States government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The Court noted the words, "'like circumstances' do not restrict a court's inquiry to the same circumstances, but require it to look further afield." Olson, 546 U.S. at 46 (internal citations omitted). The Court suggested a further inquiry to determine whether an analogous situation could exist in which a private individual could be found liable for the same conduct. Id. at 47. In essence, the Court concluded if a private citizen could be held liable for negligently performing a task, then the government could be held liable for negligently performing a similar task.

Here, we need not resolve the private analogy question. Carolina Chloride argues County negligently maintained its zoning records resulting in Carolina Chloride's injury. Even if a private analogy is required, this claim is analogous to allegations of negligence against a private hospital or private school for negligently maintaining an individual's records. For example, an analogy may be present where, as a result of negligently maintaining a patient's medical records, a hospital gives a patient his or her wrong blood type causing the patient harm. Similarly, an analogous situation may exist where a private school sends the wrong transcript to a former student's potential employer and, as a direct result, the employer does not hire the former student. In both instances, the private entities could be held liable for negligently maintaining an individual's records and thereby causing the individual's injury. Therefore, a private individual analogy does exist where a private individual or private entity could be held liable for similar conduct as alleged herein. Accordingly, the trial court erred in granting summary judgment against Carolina Chloride based on the absence of a private sector analogy.

In addition to finding Carolina Chloride's claims barred under § 15-78-40, the trial court alternatively found § 15-78-60(4) of the Tort Claims Act barred Carolina Chloride from relief. Carolina Chloride, however, argues the trial court erred because this Court is bound by our recent Quail Hill decision. We agree.

Section 15-78-60 of the Tort Claims Act contains affirmative defenses exempting the government from liability. The governmental entity bears the burden of establishing an affirmative defense under § 15-78-60. Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000). The exceptions listed in § 15-78-60 should be liberally construed to limit liability. Steinke, 336 S.C. at 396, 520 S.E.2d at 154. Section 15-78-60(4) provides that the government is not liable for injuries resulting from: "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." S.C. Code Ann. § 15-78-60(4) (2005).

County argues the trial court did not err because any alleged damage claimed by Carolina Chloride arose as a result of County's enforcement of the zoning ordinances for which § 15-78-60(4) specifically grants governmental immunity. Carolina Chloride, however, asserts its claims did not emanate from the County's enforcement of local ordinances. In support of this assertion, Carolina Chloride argues the "mistake" or injuries in this case are directly on point with the facts considered in Quail Hill.[4]

In Quail Hill, the petitioner purchased over seventy acres of land after a Richland County Planning Department staff member mistakenly advised him the land was zoned for his intended use. Quail Hill, 379 S.C. at 317, 665 S.E.2d at 195. After the petitioner purchased the property, another staff member informed him the property had a different zoning designation and he could not develop the land as he had intended. Id. At trial and on appeal, Richland County asserted § 15-78-60(4) as an affirmative defense arguing it was immune from liability for the incorrect zoning assessment because appellant's claims arose as a result of the enforcement of local zoning ordinances. Id. This court reversed summary judgment in favor of appellant opining the claims asserted were not connected to the enforcement of the zoning ordinance, but arose as a result of a Richland County staff member's mistaken advice to appellant. Id. Therefore, this court concluded Richland County was not immune from liability under § 15-78-60(4). Id.

Here, Carolina Chloride alleges County's mistaken zoning assessment resulted in the loss of a sale of real property and an associated business. Viewing the facts in the light most favorable to Carolina Chloride, the mistake allegedly occurred on February 13, 2003, when John Hicks, the employee authorized to inform citizens whether their property was appropriately zoned for their intended uses, informed Carolina Chloride the property at issue was zoned rural (RU) and was not zoned heavy industrial (M-2). Hicks made this determination in response to a proposal for the development of the property sent to County from the Watsons, the interested buyers. However, in the letter, Hicks rejected the Watsons' proposed plans

[4] Carolina Chloride supplemented the record pursuant to Rule 208(b)(7), SCACR, requesting the Court consider the Quail Hill decision.

because under RU zoning County could not permit the expansion of "the current . . . structural area."

Appellants in this case and in Quail Hill alleged a governmental entity negligently advised them of the zoning designations applicable to their properties. In Quail Hill, the mistake arguably resulted in the purchase of property that would not have been purchased had Richland County accurately advised the purchaser. On the other hand, in the case at bar, the mistake allegedly prevented the sale of property that would have been sold but for County's authorized employee mistakenly informing Carolina Chloride the property was zoned for rural use only. Regardless, both instances deal with tortious claims emanating from a governmental entity mistakenly advising someone of applicable zoning ordinances. Accordingly, since we are bound by this court's precedent, the trial court erred in ruling as a matter of law that § 15-78-60(4) barred Carolina Chloride's tort claims.

IV. Gross Negligence

Carolina Chloride argues the trial court erred in finding no evidence of gross negligence. Gross negligence is the failure to exercise slight care. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). Generally, gross negligence is a mixed question of law and fact best resolved by the jury. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002). If the evidence supports only one reasonable inference, then it is a question of law solely for the trial court. Worsley Cos., Inc., v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 661 (2000). In determining whether a directed verdict was proper, this Court must construe inferences arising from the evidence in the light most favorable to the non-moving party. Gadson, 374 S.C. at 175-76, 648 S.E.2d at 588.

In arguing the trial court erred in finding no evidence of gross negligence, Carolina Chloride references depositions not presented at trial as replete with evidence of gross negligence. "We are confined to the record in deciding issues on appeal." Timms v. Timms, 286 S.C. 291, 294, 333 S.E.2d 74, 75 (Ct. App. 1985) (refusing to review evidence of insurance coverage outside the record on appeal). As previously indicated, the trial court did not

abuse its discretion in excluding Brown's deposition in the absence of the requisite foundation; therefore, it was not part of the record. Additionally, Carolina Chloride did not attempt to include the Gosline or Price depositions in the record during trial and did not request that the record remain open in order to supplement the record. Consequently, these depositions were not in evidence and will not be considered on appeal.

Taking the evidence in the light most favorable to Carolina Chloride, the only evidence demonstrating County failed to exercise care was in Hicks' mistaken zoning designation of the property at issue. The presence of a mistake alone, however, is not sufficient evidence to conclude County failed to exercise slight care. Furthermore, the February 13, 2003, letter did state Hicks conferred with County's legal department prior to making determinations about the subject property suggesting Hicks, and therefore County, did exercise some level of care. Absent evidence to the contrary, the only reasonable inference to be drawn from these facts is County, at a minimum, exercised slight care. Accordingly, the trial court did not err in granting a directed verdict in favor of County on the gross negligence claim.

V. Inverse Condemnation

Carolina Chloride further alleges the trial court erred in granting a directed verdict in favor of County on its inverse condemnation claim. We disagree.

"An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property." Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). In essence, inverse condemnation is a governmental taking absent an eminent domain proceeding. Id. Successful inverse condemnation actions require a plaintiff to establish the government committed an affirmative, aggressive, and positive act causing damage to the plaintiff's property. WRB Ltd. P'ship v. County of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006).

The only time frame in which the alleged taking could have occurred would have been after County's February 13, 2003 letter. Prior to this event,

Carolina Chloride used the property in compliance with M-2 zoning and absent any alleged governmental interference. Furthermore, Carolina Chloride cannot allege a taking subsequent to County amending the property's zoning to M-2 on November 4, 2003, because M-2 zoning allowed all of Carolina Chloride's and the Watsons' intended uses. As such, the only taking, if any, occurred between February 13 and November 4, 2003.

The sole evidence Carolina Chloride presents of governmental action constituting an affirmative act is Hicks' mistaken assessment of the zoning ordinances applicable to Carolina Chloride's property. Even construing the facts under a favorable light analysis, this action is not an "affirmative, aggressive, positive act" damaging Carolina Chloride's property. See WRB Ltd. P'ship, 369 S.C. at 32, 630 S.E.2d at 481; see also Quail Hill, 379 S.C. at 322, 665 S.E.2d at 198 (finding no reported case holding "a mistake may rise to the level of an affirmative, aggressive, and positive act sufficient to constitute inverse condemnation."). Accordingly, the trial court properly granted a directed verdict in County's favor on the inverse condemnation claim.

VI. Due Process

Carolina Chloride argues the trial court erred in finding County did not deprive Carolina Chloride of substantive due process. Substantive due process prohibits the government from depriving a person of life, liberty, or property for arbitrary reasons. Worsley Cos., Inc., 339 S.C. at 56, 528 S.E.2d at 660. "To establish a substantive due process claim, a plaintiff must show he possessed a constitutionally protected property interest that was deprived by state action so far beyond the limits of legitimate governmental action, no process could cure the deficiency." Seabrook v. Knox, 369 S.C. 191, 198, 631 S.E.2d 907, 911 (2006). To prove a denial of substantive due process, the plaintiff must also show "he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 483, 636 S.E.2d 598, 615 (2006).

At trial, County and Carolina Chloride appear to have confused substantive and procedural due process. On appeal, however, Carolina

Chloride only makes a substantive due process claim. Specifically, Carolina Chloride asserts deprivation of substantive due process because it claims County arbitrarily and capriciously changed the zoning of the property. Even assuming Carolina Chloride had a property interest in the zoning designation of its property, Carolina Chloride fails to proffer any evidence County actually changed the zoning of the property. Carolina Chloride merely evidences apparent confusion within the zoning department as to the zoning designation of the property arguably resulting in a mistake. Accordingly, the trial court did not err in granting a directed verdict in favor of County on the substantive due process claim.

VII. Governmental Estoppel and Promissory Estoppel

Issues cannot be raised for the first time on appeal, but must be raised to and ruled upon by the trial court to preserve it for appellate review. Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733.

In Carolina Chloride's statement of the issues on appeal, it argues the trial court erred as a matter of law in finding no right to rely on government employees. While reliance is an element of several causes of action, Carolina Chloride avers a right to rely on County in the context of governmental estoppel. At trial, Carolina Chloride initially argued governmental estoppel and promissory estoppel. Nevertheless, Carolina Chloride is barred on appeal from asserting governmental estoppel since it subsequently expressly waived this argument during trial. Additionally, Carolina Chloride waives promissory estoppel having failed to argue this issue in its initial appellate brief. While Carolina Chloride extensively briefs governmental estoppel and why the issues of reliance and reasonableness are questions best resolved by a jury, it specifically failed to address promissory estoppel as an issue on appeal. As such, neither of these issues are preserved for our review.

Accordingly, we affirm the trial court's decision directing a verdict as to gross negligence and inverse condemnation and reverse the trial court's decision directing a verdict in favor of County on Carolina Chloride's

negligence claim and remand this negligence claim for trial.[5] The trial court's decision is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and THOMAS, JJ., concur.

[5] We note the dissent in Quail Hill focused on the fact the appellant therein had not dealt with the employee duly authorized to deal with zoning, i.e. the Zoning Administrator. Here, the facts are different. Carolina Chloride was interacting with the Zoning Administrator or a duly authorized employee throughout the time period involved. We also note, unlike Quail Hill, this decision does not reach the governmental estoppel argument because Carolina Chloride expressly waived the issue at trial.