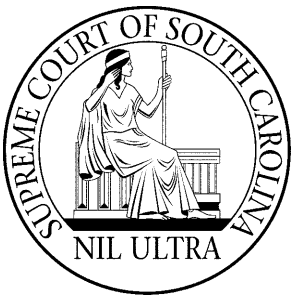

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
October 23, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State of South Carolina and the South Carolina Department of Revenue, Petitioners,

v.

County of Florence, Florence County Council, and the Florence County Registration and Elections Commission, Respondents.

Appellate Case No. 2013-001868

ON WRIT OF CERTIORARI

Opinion No. 27323
Heard October 1, 2013 – Filed October 17, 2013

RELIEF DENIED

Harry T. Cooper, Jr. and Milton Gary Kimpson, both of Columbia, for South Carolina Department of Revenue; Deputy Solicitor General Robert D. Cook and Deputy Solicitor General J. Emory Smith, Jr., of the Office of Attorney General, of Columbia, for Petitioners State of South Carolina and South Carolina Department of Revenue.

D. Malloy McEachin, Jr., of McEachin & McEachin, P.A., of Florence; John Carroll Moylan III, of Wyche, PA, of Columbia; and Wade Stackhouse Kolb III, and J. Theodore Gentry, both of Wyche, PA, of Greenville, for

Respondents County of Florence, Florence County Council and the Florence County Registration and Elections Commission.

Austin J. Tothacer, Jr., of Newberry, for Newberry County, South Carolina, Amicus Curiae.

Robert E. Lyon, Jr., John K. DeLoache and Jenna L. Stephens, all of Columbia, for South Carolina Association of Counties, Amicus Curiae.

CHIEF JUSTICE TOAL: This case is before the Court in its original jurisdiction. The State and the South Carolina Department of Revenue (DOR)[1] (collectively, Petitioners) request this Court declare a proposed tax referendum invalid under the Capital Project Sales Tax Act, sections 4-10-300 to -380 of the South Carolina Code (the Act),[2] and enjoin the County of Florence, Florence County Council, and Florence County Registration and Elections Commission (the Commission)[3] (collectively, Respondents) from placing the proposed referendum on the ballot at the November 5 county elections. We find Respondents actions valid pursuant to the Act, and deny Petitioners' request for an injunction, thereby permitting the tax referendum to go forward on November 5.

FACTS/PROCEDURAL BACKGROUND

On November 7, 2006, Florence County held a countywide referendum to approve the imposition of a one percent sales and use tax to raise $148 million for six road projects. Florence County voters approved the following referendum:

Must a special one percent sales and use tax be imposed in Florence

---

[1] DOR is the agency charged with administering and collecting the tax. S.C. Code Ann. § 4-10-350(A) (2013).

[2] S.C. Code Ann. §§ 4-10-300 to -380 (Supp. 2012).

[3] The Commission is charged with conducting the referendum. S.C. Code Ann. § 4-10-330(C) (2013).

> County for not more than seven (7) years to raise the amounts specified for the following purposes: $148,000,000.00 for the Florence County Road Project ('the Project') with the individual components of the Project to be funded in the following order of priority . . . .

The tax is scheduled to terminate on April 30, 2014.

Although the tax has been collected since 2006, Petitioners assert that only one of the road projects has been completed. According to Petitioners, as of January 31, 2013, only $35.6 million of the $447.6 million projected tax revenue had been expended on the project, and the remaining revenue will be insufficient to complete the projects.[4]

Florence County Council has now enacted an ordinance approving a referendum for a one percent sales tax to be placed on the ballot on November 5, 2013. The question posed by the proposed referendum is nearly identical to the 2006 referendum, except that Respondents seek to raise $145 million dollars for entirely different projects than those listed in the 2006 referendum and have not provided for the completion of those projects in the proposed referendum.

Petitioners filed a petition in the Court's original jurisdiction, seeking a

---

[4] Petitioners allege the total revenue from the tax will fall $50 million short of the cost to complete the remainder of the projects. To support this claim, Petitioners submitted the affidavit of a DOR employee who projects the 2006 referendum will collect $141,800,377.68 as of April 2014, falling short of the $148 million earmarked for the road projects in the 2006 referendum. Unexpended funds collected from the 2006 tax are escrowed in a separate interest bearing account. However, the affiant admits that her calculations did not include any interest accrued by the funds. Petitioners further allege that funding has been secured from the State Transportation Infrastructure Bank to complete the projects, but even so, there is still a funding shortfall. On the other hand, Respondents have submitted an affidavit from the Finance Director for Florence County indicating the tax approved in 2006, with interest, will raise at least $148 million by April 30, 2014, all of which will be devoted to the road projects listed in the 2006 referendum.

declaration that the proposed tax is invalid and to enjoin the referendum.[5]

This Court granted Petitioners' petition for writ of certiorari pursuant to Rule 245, SCACR.

ISSUE

Whether the Act permits Florence County to place the proposed tax referendum on the November 5, 2013, ballot?

ANALYSIS

I. Classification of the Tax as "New" or "Reimposed"

Petitioners contend the Act prevents Florence County from holding the referendum on November 5 because the referendum covers entirely new projects than those that were voted on in the 2006 referendum, which they claim are incomplete and have not been fully funded, and as such, the tax is "new" and not "reimposed." On the other hand, Respondents argue that they have complied with the express terms of the statute, in that the Act provides for the reimposition of the tax to continue funding for additional county projects without interruption.

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)); *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Scott*, 351 S.C. at 588, 571 S.E.2d at 702 (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). Therefore, "[i]f a statute's language is plain, unambiguous, and conveys a clear meaning 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the

[5] Petitioners initially sought a temporary injunction, which the Court denied in the order granting the writ of certiorari.

maxim that legislative intent must prevail if it can be reasonably discovered in the language used.") (citing *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)). The Court must construe statutory language in light of the intended purpose of the statute, and "[t]his Court will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Florence Cnty. Democratic Party*, 398 S.C. at 128, 727 S.E.2d at 420.

Pursuant to section 4-10-310,

> [T]he county governing body may impose a one percent sales and use tax by ordinance, subject to a referendum, within the county area for a specific purpose or purposes and for a limited amount of time. The revenues collected pursuant to this article may be used to defray debt service on bonds issued to pay for projects authorized in this article. However, at no time may any portion of the county area be subject to more than one percent sales tax levied pursuant to this article, pursuant to Chapter 37, Title 4, or pursuant to any local law enacted by the General Assembly.

S.C. Code Ann. § 4-10-310 (2013).

Section 4-10-330 sets forth the required content of a tax referendum ballot and describes the permitted purposes of such a tax raised under the Act. For example, subsection (A) requires that the ballot contain: (1) the contents of the enacting ordinance, which specifies the purpose of the tax and the permitted types of projects; (2) the maximum time for which the proposed tax will be imposed, not to exceed eight years from the date of imposition "or in the case of a reimposed tax, a period ending on April thirtieth of an odd-numbered year, not to exceed seven years, for which the tax may be imposed"; (3) whether the county proposes to issue bonds for the payment of any costs of the project and how the county proposes to repay those bonds; and (4) the maximum cost of the project. S.C. Code Ann. § 4-10-330(A). Moreover, the ordinance must set forth the priority of funds to be used for multiple projects. *Id.* § 4-10-330(B). Under subsection (C), a county election commission is charged with conducting a "referendum for imposition or reimposition of the tax" which "must be held at the time of the general election unless the vote is to reimpose a tax in effect on or before June 1, 2009, and in existence at the time of such vote, in which case the referendum may be held on a general election day or at a time the governing body of the county and

[DOR] determine necessary to permit the tax to be reinstated and continue without interruption." *Id.* § 4-10-330(C). The governing body of the county may select the timing of the election. *Id.* "However, a referendum to reimpose an existing tax . . . only may be held once whether or not the referendum is held on a general election day or at another time." *Id.* In addition, section 4-10-340 provides for the tax imposition and termination as follows:

> (A) If the sales and use tax is approved in the referendum, the tax is imposed on the first of May following the date of the referendum. If the reimposition of an existing sales and use tax imposed pursuant to this article is approved in the referendum, the new tax is imposed immediately following the termination of the earlier imposed tax and the reimposed tax terminates on the thirtieth of April in an odd-numbered year, not to exceed seven years from the date of reimposition. If the certification is not timely made to the Department of Revenue, the imposition is postponed for twelve months.
>
> (B) The tax terminates the final day of the maximum time period specified for the imposition.
>
> (C)(1) Amounts collected in excess of the required net proceeds must first be applied, if necessary, to complete a project for which the tax was imposed.
>
> (2) If funds still remain after first using the funds as described in item (1) and the tax is reimposed, the remaining funds must be used to fund the projects approved by the voters in the referendum to reimpose the tax, in priority order as the projects appeared on the enacting ordinance.
>
> (3) If funds still remain after first using the funds as described in item (1) and the tax is not reimposed, the remaining funds must be used for the purposes set forth in Section 4-10-330(A)(1). These remaining funds only may be expended for the purposes set forth in Section 4-10-330(A)(1) following an ordinance specifying the authorized purpose or purposes for which the funds will be used.

S.C. Code Ann. § 4-10-340 (2013).

In the instant case, Respondents have complied with the express requirements of the Act with respect to the tax's reimposition. However, based on the statutory language, Petitioners argue that the legislature has expressed its intent that a new tax and a reimposed tax "are not interchangeable or the same under the law." Moreover, Petitioners contend that these provisions, coupled with fact that the legislature amended the Act to allow for reimposition,[6] demonstrate that "a

[6] In 1997, the General Assembly authorized the imposition of the capital sales and use tax by enacting the Act. *See* Act No. 138, § 3, 1997 S.C. Acts. As originally constituted, the Act provided for the imposition of the tax for a limited time to collect a limited amount of money and to terminate at the earlier of the final date specified in the referendum or once the revenue collected by DOR exceeded the projected funds designated in the referendum. In 2002, the General Assembly sought to fix problems created by the failure of the Act to address a gap in funding where counties sought to continue to raise revenue. The 2002 amendments allowed for reimposition of an existing sales and use tax imposed pursuant to the Act. *See* Act No. 334, §§ 22.A–22.F, 2002 S.C. Acts. Petitioners contend that the 2002 amendments "authorizing reimposition[] and treating reimposition differently from initial imposition, clearly were designed to serve as a remedy for underfunding or unanticipated cost overruns which might be incurred in completing the initially approved projects." In 2009, the General Assembly again amended the Act to provide for a process to address excess funds raised by the tax. *See* Act No. 49, 2009 S.C. Acts. According to Petitioners, the 2009 amendments "mandate[] that, if voters approved reimposition, then only following completion of the initial projects, were the counties allowed to utilize surplus monies for any new projects in the reimposition referendum." Thus, Petitioners contend, Florence County has ignored the intent behind the reimposition amendments and has decided to abort funding for the original projects prior to completion, seeking to use the reimposition process to fund entirely new capital projects, which "is essentially imposing a new tax in a non-General Election year, but calling it a reimposition of the existing tax." While Petitioners' attempt to distinguish between the purposes of a new and reimposed tax makes logical sense, the wording of the Act does not support their interpretation. *See Scott*, 351 S.C. at 588, 571 S.E.2d at 702 (stating the plain language of the statute is the best indicator of legislative intent and where the statute's language is plain, a court should not resort to the rules of statutory construction). The Act does not speak to required purposes, other than to require a referendum to specify its purposes. Thus, the fact that the

reimposed or continued tax is one that continues the original tax including its purposes" and that "[t]he tax at issue does not do so and is a new tax rather than a reimposed tax."

The distinction that Petitioners attempt to draw between a new and reimposed tax is important only with regard to the timing of a proposed referendum, as the statute clearly distinguishes between the timing of the imposition of a capital sales tax and its reimposition at a later date. Thus, Petitioners place too much emphasis on semantics. In other words, a reimposition *is* a new tax, as it is scheduled to be levied following the initial tax and a county is only permitted to levy one tax at a time.

II. Completion of Original Projects

Petitioners further contend that, regardless of whether the Court classifies the proposed tax as new or reimposed, the Act, specifically section 4-10-340(C), precludes Respondents from seeking to continue the tax to fund new projects where the projects originally authorized have not been completed, the revenue raised by the original tax is insufficient to fund them, and the new tax is earmarked for a different set of projects. We disagree.

Section 4-10-340(C)(1) provides, "Amounts collected in excess of the required net proceeds must first be applied, if necessary, to complete a project for which the tax was imposed." S.C. Code Ann. § 4-10-340(C)(1). Moreover, "[i]f funds still remain after first using the funds as described in item (1) and the tax is reimposed, the remaining funds must be used to fund the projects approved by the voters in the referendum to reimpose the tax, in priority of order as the projects appear on the enacting ordinance." *Id.* § 4-10-340(C)(2).

Petitioners contend that subsections (C)(1) and (C)(2) must be read in progression to ensure that "counties must first finish what they started by funding what they began originally in going to the voters." In other words, this language can have no reasonable meaning other than that all net proceeds collected over the required amount submitted to the voters are earmarked first to complete the initial projects. Petitioners contend that the purpose of subsection (C)(1) is to require a

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legislature made changes to the Act over time does not influence how we interpret its provisions today.

remedial measure when the original project is not completed or is underfunded. Likewise, Petitioners argue that the clear language of subsection (C)(2) can only mean that "a county must complete initial projects first, and then must use 'remaining funds' for the items approved in the reimposition referendum—in the order of priority which the voters approved." On the other hand, Respondents contend that section 4-10-340(C) "governs one situation and one situation only—what to do when there are excess funds raised through a [tax] referendum."

We find subsection (C)(1) inapplicable in the instant case because that section expressly applies only when a county collects revenue *in excess* of the funds necessary to complete the projects approved in that referendum. This provision does not require the completion of those projects identified in a referendum, nor does it make completion a prerequisite for reimposition. Furthermore, subsection (C)(2) does not require a tax reimposition include the original projects, instead referring to the projects "approved by the voters in the referendum to reimpose the tax," which implies that a reimposition may have its own set of projects. Moreover, "remaining funds" refers to excess funds raised by the original tax, not to funds raised by the reimposition, and the subsection plainly requires those excess funds be applied towards projects identified in the reimposition referendum. Thus, contrary to Petitioners' assertion, section 4-10-340(C) does not require a county to apply funds raised by the reimposition of the tax towards completion of projects identified in the original tax.

Finally, we note that while the Act permits the original tax to be imposed for a maximum of eight years, *see* section 4-10-330(A)(2), the Act does not require the completion of the project described in a referendum within that period. Moreover, Petitioners have not presented evidence that the original projects will not be completed. In our view, the Act permits a county to reimpose the tax at each opportunity without ever completing the projects set forth in the previous referendum. If and when a county does not complete a project for which the voters approved a tax, then the voters may decide whether they wish to continue the tax to fund another project.

C. Election Date

One of the primary issues that Petitioners raise with respect to the proposed referendum is that they believe it is improperly scheduled concurrent with the November 5, 2013, county elections. Petitioners contend that Respondents may

not place the referendum on the ballot until the "general election" of 2014, as the tax is for new projects and not a reimposition of the tax to complete the original projects.

Section 4-10-330(C) provides that a

> referendum for imposition or reimposition of the tax must be held at the time of the general election unless the vote is to reimpose a tax in effect on or before June 1, 2009, and in existence at the time of such vote, in which case the referendum may be held on a general election day or at a time the governing body of the county and the Department of Revenue determine necessary to permit the tax to be reinstated and continue without interruption.

S.C. Code Ann. § 4-10-330(C).

In our view, Respondents seek to reimpose a tax that was instituted prior to 2009. Therefore, the referendum may be placed on the November 5 ballot, as that is the time for which the governing body of the county has deemed such vote necessary to continue the tax without interruption.

Regardless, we note that the November 5th election *is* a general election, not a special election.[7] The Act does not define "general election." Therefore, we turn to our general election statutes to inform its meaning. *See Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) ("It is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result."); *Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010).

Section 7-1-20(1) of the South Carolina Code provides, "'General election' means the election to be held for the election of officers to the regular terms of office provided by law, whether State, United States, county, municipal, or of any other political subdivision of the State, and for voting on constitutional amendments proposed by the General Assembly." S.C. Code Ann. § 7-1-20(1)

[7] Petitioners do not explain why the upcoming election is not a general election. It appears that Petitioners are classifying the upcoming election as a special election because it is not a federal election year.

(Supp. 2012). The general election occurs on the first Tuesday following the first Monday in November. *Willis v. Wukela*, 379 S.C. 126, 130, 665 S.E.2d 171, 173 (2008). Because the November 5 election is an election to vote on county offices, it is a general election; as such, Respondents are entitled to hold the referendum on November 5, 2013.[8]

CONCLUSION

We take no side with respect to the policy considerations at stake, as the parties present valid reasons for the opposing interpretations they seek. However, Petitioners ask us to augment the statutory language to include a requirement for completion of prior projects where the Act does not set forth such a requirement, and we are constrained to interpret the Act's provisions by their plain terms. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012) ("Nevertheless, the statute is unambiguous and we are confined to what the statute says, not what it ought to say, for we have no right to modify a statute's application 'under the guise of judicial interpretation.' In other words, when a statute is clear on its face, it is 'improvident to judicially engraft extra requirements to legislation' just because doing so may further the intent behind the statute.") (citations omitted). Thus, we find the Act does not prevent Respondents from putting the referendum to the voters now, even though Florence County cannot raise the funds necessary to complete the new projects until the tax for the original projects expires.

Based on the foregoing, Petitioners' request for an injunction is **DENIED**.

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

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[8] The requirement that an initial tax referendum be held at the time of a general election means a *special election* may not be held for a referendum under the Act unless it is for a reimposition of a tax, the date of which is selected by the governing body of the county. *See* S.C. Code Ann. § 4-10-330(C). The general election provisions define "special election" as "any other election including any referendum provided by law to be held under the provisions of law applicable to general elections." S.C. Code Ann. § 7-1-20(2).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Donald C. Austin, Respondent,

v.

Stokes-Craven Holding Corp., d/b/a Stokes Craven Ford, Appellant.

Appellate Case No. 2012-212843, 2013-000247

Appeal From Clarendon County
John C. Hayes, III, Circuit Court Judge
W. Jeffrey Young, Circuit Court Judge

Opinion No. 27324
Submitted September 16, 2013 – Filed October 23, 2013

AFFIRMED AND REMANDED

Andrew K. Epting, Jr. and Michelle N. Endemann, both of Andrew K. Epting, Jr., LLC, of Charleston, for Appellant.

Brooks Roberts Fudenberg, of Mt. Pleasant, and C. Steven Moskos, of Charleston, for Respondent.

JUSTICE BEATTY: The resolution of this case involves an interpretation of a narrow portion of our opinion in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). Specifically, the consolidated appeals are the result of a dispute over the Court's holding concerning Donald C. Austin's entitlement to trial fees under the South Carolina Regulation of Manufacturers,

Distributors, and Dealers Act [1] (the "Dealer's Act") and whether this Court's denial of Austin's motion for appellate costs under Rule 222 of the South Carolina Appellate Court Rules ("SCACR") has preclusive effect on his right to pursue appellate and post-appellate fees under the Dealer's Act. As will be discussed, we affirm the trial judge's award of trial fees to Austin and remand this matter to the circuit court to conduct a hearing to determine what amount of appellate and post-appellate fees should be awarded to Austin.

I. Factual/Procedural History

Austin filed suit against Stokes-Craven, an automobile dealership, after he experienced problems with his used vehicle and discovered the vehicle had sustained extensive damage prior to the sale. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). In his Complaint, Austin alleged the following causes of action: revocation of acceptance, breach of contract, negligence, constructive fraud, common law fraud, violation of the Dealer's Act,[2] violation of the South Carolina Unfair Trade Practices Act ("UTPA"), and violation of the Federal Odometer Act.[3] Based on these claims, Austin sought actual damages, punitive damages, prejudgment interest, and attorney's fees and costs. *Id.* at 35, 691 S.E.2d at 141-42.

The jury found in favor of Austin and awarded damages on the following causes of action: (1) negligence with an award of $26,371.10 actual damages and $144,000 punitive damages; (2) fraud with an award of $26,371.10 actual damages and $216,600 punitive damages; (3) constructive fraud with an award of $26,371.10 actual damages; and (4) a violation of the Dealer's Act with an award

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[1] The South Carolina Regulation of Manufacturers, Distributors, and Dealers Act is codified at S.C. Code Ann. §§ 56-15-10 to -600 (2006 & Supp. 2012).

[2] At the time Austin filed suit, section 56-15-40 of the Dealer's Act provided in relevant part, "It shall be deemed a violation of paragraph (a) of § 56-15-30 for any manufacturer . . . distributor, wholesaler . . . or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." S.C. Code Ann. § 56-15-40(1) (2006). We note the General Assembly amended this code section on June 7, 2013; however, this amendment does not affect the disposition of the instant case.

[3] The Federal Odometer Act, specifically titled "Motor Vehicle Information and Cost Savings Act," is codified at 49 U.S.C.A. §§ 32701- 32711 (West 2009).

of $26,371.10 actual damages. The jury also found Stokes-Craven had violated the Federal Odometer Act. Additionally, the jury found in favor of Stokes-Craven regarding Austin's claim under the UTPA. *Id.* at 35, 691 S.E.2d at 142. Following the verdict, Austin moved for attorney's fees in the amount of $49,936.50 pursuant to the Dealer's Act and the Federal Odometer Act.

In an order addressing the parties' post-trial motions, the trial judge ruled: (1) Austin was required to elect among his remedies; (2) the jury's finding that Stokes-Craven violated the Federal Odometer Act entitled Austin to a statutorily authorized award of $1,500 plus attorney's fees and costs restricted to those incurred in presenting the claim under the Federal Odometer Act and not the case *in toto*; (3) Austin was entitled to recover $4,500 in attorney's fees, as opposed to the requested $49,936.50, based on the violation of the Federal Odometer Act; (4) Austin was entitled to taxable costs in the amount of $602.26; and (5) Austin was not entitled to prejudgment interest. *Id.* at 36, 691 S.E.2d at 142. Austin elected to recover actual and punitive damages under his fraud claim. *Id.*

Stokes-Craven challenged the verdict alleging the trial judge committed several errors that warranted a new trial. *Id.* at 37-55, 691 S.E.2d at 142-152. In his cross-appeal, Austin contended the trial judge erred in requiring him to elect between his verdict for common law fraud and the violation of the Dealer's Act. *Id.* at 55, 691 S.E.2d at 152. Additionally, Austin claimed the trial judge erred in declining to award him prejudgment interest. *Id.* at 58, 691 S.E.2d at 153.

As to Stokes-Craven's appeal, the majority held: (1) there was no prejudicial abuse of discretion in admitting certain challenged testimony; (2) Austin offered proof of actual damages in the amount of $26,371.10; (3) Austin failed to prove Stokes-Craven violated the Federal Odometer Act with the requisite intent to defraud him as to the mileage of the truck; (4) the verdicts of fraud and violation of the UTPA were not inconsistent; and (5) there was evidence to support the jury's award of $216,000 in punitive damages. *Id.* at 59, 691 S.E.2d at 154.

In terms of Austin's cross-appeal, the majority held: (1) Austin was entitled to the entire amount of his request for attorney's fees and costs under the Dealer's Act, which amounted to $49,936.50; and (2) he was not entitled to prejudgment interest. *Id.* Ultimately, this Court remanded to the circuit court for "entry of judgment consistent with our decision." *Id.* at 59, 691 S.E.2d at 154.

Relevant to the instant appeal is an analysis of the Court's divided opinion regarding Austin's entitlement to attorney's fees and costs under the Dealer's Act.

In his post-trial motion, Austin sought to recover damages under all of the jury's verdicts in addition to attorney's fees and costs as statutorily authorized under the Dealer's Act and the Federal Odometer Act. *Id.* at 55, 691 S.E.2d at 152. The trial judge held Austin was required to elect one verdict from among the negligence, fraud, constructive fraud, and the Dealer's Act verdicts given Austin experienced one loss based on four different theories. *Id.* The judge also awarded Austin $1,500 in actual damages and a "reasonable attorney fee" in the amount of $4,500, which represented the time spent on recovering under the Federal Odometer Act. *Id.*

Because Austin was ordered to elect between the jury's verdicts, he contended on appeal that he was denied the statutorily authorized attorney's fees and costs under the Dealer's Act given he chose to recover for his fraud claim, which only yielded actual and punitive damages. *Id.* at 56, 691 S.E.2d at 152.

The majority opinion, which was authored by Justice Beatty and joined by Justice Waller, agreed with Austin. *Id.* at 56-57, 691 S.E.2d at 153. In so ruling, the majority recognized "the proposition that a plaintiff may recover attorney fees under a statutory claim in addition to punitive damages under a common law claim." *Id.* at 56, 691 S.E.2d at 153. The majority noted that "[t]he rationale for this position is that an award for both does not amount to double recovery for a single wrong given attorney's fees are intended to make such claims economically viable for private citizens whereas an award of punitive damages is designed to punish wrongful conduct and deter future misconduct." *Id.* Thus, because the recovery of attorney's fees under the Dealer's Act was not duplicative of the award of punitive damages, the majority found that a decision in favor of Austin would not violate "the election of remedies doctrine's prevention of double redress for a single wrong." *Id.*

Having found that Austin could recover attorney's fees and costs under the Dealer's Act, the majority next considered whether Austin should be awarded the entire amount of his request or should be limited to the fees incurred in establishing his claim under the Dealer's Act. *Id.* at 57, 691 S.E.2d at 153. Under the specific facts of the case, the majority concluded that Austin was entitled to the entire amount of his request as it would have been "difficult to dissect Austin's counsel's fee affidavit to ascertain how much time was spent on this particular claim given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud." *Id.* The majority found support for this conclusion in *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992), wherein this Court held that an award of attorneys' fees under the Dealer's Act was

warranted even though the fee affidavit did not differentiate between the time spent preparing the claim under the Act and the non-statutory cause of action. *Id.* at 57, 691 S.E.2d at 153. Specifically, the Court in *Taylor* stated, "We hold when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding." *Taylor*, 307 S.C. at 557, 416 S.E.2d at 622.

Justice Pleicones concurred in part and dissented in part. Although Justice Pleicones agreed with the majority that "a plaintiff who elects to receive damages awarded under a common law theory may also be entitled to recover statutory costs and attorney[']s fees to which he is entitled under a separate verdict," he found the issue was not preserved for the Court's consideration. *Austin*, 387 S.C. at 64, 691 S.E.2d at 157.

Based on the majority's ruling that Austin's Odometer Act claim failed, Justice Pleicones believed Austin's "claim for attorneys' fees and costs die[d] with it." *Id.* Justice Pleicones also found Austin failed to preserve any issue regarding the availability of Dealer's Act fees and costs. *Id.* Because the trial judge's post-trial order did not address an election by Austin between punitive damages and statutory fees, Justice Pleicones believed it was incumbent upon Austin to file a motion to alter or amend. *Id.* According to Justice Pleicones, Austin's failure to do so precluded him from raising any issue on appeal regarding his entitlement to fees under the Dealer's Act.[4] *Id.*

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[4] We note, however, that Austin filed a post-trial motion requesting attorney's fees and costs as statutorily authorized under the Dealer's Act and the Federal Odometer Act. In support of this motion, Austin filed a "Memorandum Regarding the Election of Remedies" stating in part, "Additionally, Mr. Austin is entitled to an award of attorney's fees under the Dealer's Act since that remedy is not available under any other claim." The judge denied Austin's claim under the Dealer's Act as he awarded Austin a reasonable attorney fee of $4,500 pursuant to the Federal Odometer Act. In so ruling, the judge stated that "[t]he amount of attorney's fees would be restricted to such amount as were reasonably and necessarily incurred relative to the Odometer Act and not include attorney fees and costs incurred *in toto* by [Austin] relating to the suit." Thus, the majority believed the issue was raised to and ruled upon by the trial judge. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot

Even assuming the issue was preserved, Justice Pleicones disagreed with the majority's holding that "pursuant to *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992), a plaintiff entitled to fees under the Dealers Act need not segregate the amount of attorney time and costs attributable to that claim and recover only these sums." *Id.* at 64, 691 S.E.2d at 157. Justice Pleicones also noted that "[n]owhere below did Austin specify he sought to recover fees and costs incurred in prosecuting the Odometer Act claim in addition to fees and costs incurred in pursuing the Dealers Act claim." *Id.* at 65, 691 S.E.2d at 157.

Justice Kittredge, who was joined by Chief Justice Toal, concurred in part and dissented in part. In his opinion, Justice Kittredge wrote:

> I join the well-written majority opinion of Justice Beatty save two exceptions. Concerning the trial court's failure to grant a directed verdict due to the lack of evidence of fair market value and the election of remedies issue, I join the dissent of Justice Pleicones. Additionally, regarding the reprehensibility prong of the punitive damages analysis, I believe Justice Pleicones is correct in rejecting any reliance on Stokes-Craven's practice of not showing titles to customers because the Federal Odometer Act claim fails as a matter of law. I nevertheless join the majority in affirming the punitive damages award. I believe there was ample evidence of Stokes-Craven's reprehensibility (which I do not view as "mild") beyond its

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be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); *see also Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citation omitted)).

Because the judge ruled on Austin's claim for recovery under the Dealer's Act, the majority believed it was unnecessary for him to file a Rule 59(e) motion. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25 n.5, 602 S.E.2d 772, 781 n.5 (2004) ("An aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to simply file and serve a timely notice of appeal."); *cf. id.* at 24 n.4, 602 S.E.2d at 780 n.4 ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

> failure to show titles to customers. I otherwise concur with the majority opinion's analysis regarding the punitive damages award.

Id. at 65-66, 691 S.E.2d at 158.

Following the issuance of this Court's opinion, Austin filed a motion seeking the costs of producing the briefs and record on appeal, filing fees, and the $1,000 attorneys' fee authorized by Rule 222, SCACR. He also sought attorneys' fees under the Dealer's Act, filed extensive briefing on his entitlement to the fees, and provided fee affidavits of his appellate counsel seeking 467 hours in fees. Stokes-Craven filed a return in opposition to the motion. In reply, Austin indicated the central dispute with respect to his entitlement to the requested attorneys' fees was whether the Court held he was entitled to attorneys' fees under the Dealer's Act. This Court summarily denied Austin's motion for fees pursuant to Rule 222.

Approximately two years later, Austin filed a motion in Clarendon County requesting trial, appellate, and post-appellate attorneys' fees of over $200,000 under the Dealer's Act. Circuit Court Judge John C. Hayes, III, who presided over the original trial, but is not a resident judge in Clarendon County, issued an order finding Justice Beatty's opinion is the opinion of the majority as to all issues and established the law to be followed in deciding Austin's motion for trial-level attorneys' fees. As a result, Judge Hayes awarded Austin $49,936.50 in trial-level attorneys' fees under the Dealer's Act, which, as this Court instructed, represented "the entire amount of his request for attorney's fees and costs under the South Carolina Dealer's Act."

Ultimately, Judge Hayes ordered the Clerk of Court for Clarendon County to enter judgment in favor of Austin against Stokes-Craven as follows: (1) actual damages of $26,371.10; (2) punitive damages of $216,600; and (3) trial-level attorneys' fees and costs of $49,936.50. However, he determined he did not have jurisdiction to hear Austin's motion for appellate attorneys' fees as he believed it was an issue for a judge sitting in the Third Judicial Circuit. Stokes-Craven filed a notice of appeal with the Court of Appeals.

Stokes-Craven then sought to have the remainder of Austin's motion heard in the Third Circuit. Austin, however, objected to the motion being heard on the ground the matter was stayed by the filing of the notice of appeal. Circuit Court Judge W. Jeffrey Young agreed and entered an order wherein he declined to rule on the portion of the motion requesting appellate and post-appellate attorneys' fees. Stokes-Craven appealed this order to the Court of Appeals.

Subsequently, this Court granted Stokes-Craven's motion to certify[5] and consolidate the appeals.[6] Because the disposition of the appeals was dependent upon this Court's interpretation of its earlier opinion in *Austin*, the Court dispensed with briefing and oral argument. The order also instructed that Stokes-Craven could "seek attorneys' fees as appropriate following the resolution of the appeals."

II. Discussion

A. Arguments

Stokes-Craven contends Judge Hayes erred in granting Austin's motion and entering judgment for the entire amount of his trial-level attorneys' fees and costs as this Court denied his request for relief in *Austin*. Specifically, Stokes-Craven argues that a three-Justice majority, which consisted of Chief Justice Toal, Justice Pleicones, and Justice Kittredge, held that Austin failed to preserve for appellate review the issue of attorneys' fees under the Dealer's Act and that Austin's fee requests "died" with his claim under the Federal Odometer Act. Based on its interpretation, Stokes-Craven avers that "the death of [Austin's] claim under the Dealer's Act is the death of all of his attorneys-fee claim[s], be they for trial fees, appellate fees, post-appellate fees, [and] 'fees about fees'." Stokes-Craven also notes that this Court's denial of Austin's claim for appellate fees and costs under Rule 222, SCACR is dispositive as to his current claim for these fees.

In his Return, Austin contends that "[i]n a manner devoid of any ambiguity, the Court stated its holding: "In terms of [Austin's] cross-appeal, we hold: (1) [Austin] is entitled to the entire amount of his request for attorney's fees and costs under the South Carolina Dealer's Act." Respondent asserts that Justice Pleicones, in his dissent, "was of the view that Mr. Austin had failed to preserve this question,

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[5] *See* Rule, 204(b), SCACR ("In any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion, on motion of any party to the case, on request by the Court of Appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals.").

[6] *See* Rule 214, SCACR ("Where there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order the appeal to be consolidated.").

and that even if he had preserved it, he must then segregate his fees and costs specific to the Dealers' Act from any other fees and costs." Austin maintains that "[o]ne could scarcely have been any more clear that his view was the dissent" as Justice Pleicones stated, "I disagree with the majority that we may award all fees and costs sought on this record," and "I also disagree with the majority's holding . . . a plaintiff entitled to fees under the Dealers Act need not segregate the amount of attorney time and costs attributable to that claim and recover only those sums."

Austin further contends that this Court's denial of his request for attorneys' fees and costs pursuant to Rule 222, SCACR was limited to a request under that rule and not the Dealer's Act; thus, this Court's prior decision as to Rule 222 attorney's fees is not dispositive.

B. Analysis

Initially, we note that Austin's requests for fees stems from those authorized by the Dealer's Act, which provides in relevant part:

> In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and *shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee*.

S.C. Code Ann. § 56-15-110(1) (2006) (emphasis added). Pursuant to this statute, Austin seeks to recover fees incurred at three separate judicial levels: (1) trial, (2) appellate, and (3) post-appellate.

A determination of Austin's entitlement to these fees may be answered through a series of sequential questions. First, did a majority of this Court in *Austin* find that Austin was entitled to trial-level fees pursuant to the Dealer's Act? If so, then the question becomes whether this Court's denial of Austin's motion for costs and fees under Rule 222 precluded him from seeking appellate and post-appellate fees in the circuit court pursuant to the Dealer's Act? As will be explained, we answer "yes" to the first question and "no" to the second question.

(1) Trial Fees

As a threshold matter, we find the circuit court had jurisdiction to rule on Austin's motions regarding his request for each level of fees as the "jurisdiction of the circuit court to hear matters after issuance of the remittitur is well established." *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 385, 559 S.E.2d 348, 351 (Ct. App. 2001). Specifically, "once the remittitur is issued from an appellate court, the circuit court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling." *Id.* at 385, 559 S.E.2d at 351-52. "Further, circuit courts are vested with jurisdiction to hear motions for statutory attorney fees and trial costs after the remittitur has been issued." *Id.* at 385, 559 S.E.2d at 352.

As to Austin's request for trial-level fees, we note that Stokes-Craven does not dispute the actual amount of fees. Instead, Stokes-Craven contends Austin is not entitled to any fees as the effect of this Court's decision in *Austin* amounted to a complete denial of trial-level fees. Thus, the analysis of Stokes-Craven's argument is based entirely on how the Court "tallies the votes" in *Austin*.

Upon review of our opinion, we find the Court voted 4-1 in favor of awarding Austin his request for trial-level fees. Clearly, Justices Beatty and Waller voted to award these fees. Although Justice Pleicones agreed that a plaintiff who elects to receive damages awarded under a common law theory may also be entitled to recover statutory costs and attorney's fees to which he is entitled under a separate verdict, he voted to deny the fees on error preservation grounds as he believed Austin did not challenge the trial judge's failure to explicitly rule on an award of fees under the Dealer's Act in the post-trial order. Justice Kittredge did not join in Justice Pleicones's error preservation analysis and expressed no opposition to the award of trial-level fees to Austin. Thus, by implication, Justice Kittredge and Chief Justice Toal voted to award the requested fees. Furthermore, at this juncture, Justice Kittredge and Chief Justice Toal have confirmed that this was their intention and they were in agreement with Justice Beatty's opinion. Accordingly, as previously mandated, we hold that Austin is entitled to an award of his request for trial-level fees.

Having found that Austin is entitled to trial-level fees, the question becomes whether the denial of Austin's request for appellate costs under Rule 222 precluded Austin from seeking appellate and post-appellate fees pursuant to the Dealer's Act.

(2) Appellate / Post-Appellate Fees

As we interpret Austin's motions, we believe he employed two avenues in an attempt to recover appellate-level fees. First, he filed a motion pursuant to Rule 222 to recover the "standard" appellate fees. Second, following this Court's issuance of the remittitur, he filed a motion to recover a "reasonable attorney's fee" under section 56-15-110. We find this approach was permissible as the authority of this Court to grant fees under Rule 222 and the circuit court's authority to grant fees under the statute are not mutually exclusive.

Notably, it is within this Court's discretion whether to award fees and costs under Rule 222. *See* Rule 222(a), (e), SCACR (identifying circumstances for which an appellate court may tax costs on appeal). In contrast, section 56-15-110(a) states that a party who prevails under the Dealer's Act "**shall recover** double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis added.) This is a fundamental distinction as a denial of fees under a discretionary rule cannot eliminate a statutory mandate. Thus, we hold that this Court's summary denial of Austin's request for attorney's fees under Rule 222 was not dispositive of his right to seek statutory fees in the circuit court.

Moreover, this conclusion is consistent with our jurisprudence interpreting Rule 222 wherein our appellate courts have found that a decision under this rule does not preempt an award of attorney's fees to which one is *otherwise entitled*, i.e., statutorily authorized. *See Taylor v. Medenica*, 332 S.C. 324, 504 S.E.2d 590 (1998) (awarding Respondents a $1,000 attorneys' fee and $81.66 for costs as allowed by Rule 222 and holding that Respondents could seek additional attorneys' fees in the circuit court under the UTPA, which provides for reasonable attorneys' fees and costs); *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (finding Appellant waived right to recover appellate costs and fees under Rule 222 as he failed to file an itemized statement of costs prior to the Court's issuance of the remittitur, but holding that Appellant could seek appellate costs in the circuit court based on his statutory right under section 29-5-10 (authorizing costs incurred for the enforcement of a mechanic's lien) as "Rule 222 does not preempt an award of attorney's fees to which one is otherwise entitled" (citation omitted)); *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991) (holding that an award of attorney's fees under Supreme Court Rule 38 (precursor to Rule 222) did not "preempt an award of attorney's fees to which one is otherwise entitled" and, thus, Appellant could seek an award of attorney's fees pursuant to section 15-77-300, which permits an award

of fees for a party prevailing in an action against a state agency); *see also Parker v. Shecut*, 359 S.C. 143, 597 S.E.2d 793 (2004) (recognizing, in a partition action, that whether Respondents were entitled to appellate attorney's fees pursuant to section 15-61-110 was a determination for the circuit court).

Accordingly, we find the Court's denial of Austin's Rule 222 motion had no preclusive effect on his attempt to seek statutory attorney fees in the circuit court, including appellate fees and the post-appellate fees incurred in enforcing the judgment against Stokes-Craven.

III. Conclusion

Based on the foregoing, we find that Judge Hayes properly entered judgment in favor of Austin for the entire amount of his requested trial-level fees as this decision was consistent with this Court's mandate in *Austin*. Furthermore, we hold this Court's denial of Austin's request for appellate costs under Rule 222 did not preclude him from seeking appellate and post-appellate fees. Accordingly, we affirm Judge Hayes's order and remand the matter to a circuit court judge in the Third Judicial Circuit to conduct a hearing to determine what amount of appellate and post-appellate fees should be awarded to Austin.

AFFIRMED AND REMANDED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William T. Jervey, Jr., Employee, Respondent-Petitioner,

v.

Martint Environmental, Inc., Employer, and General Casualty Insurance Company, Carrier, Petitioners-Respondents.

Appellate Case No. 2012-212027

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 27325
Submitted October 1, 2013 – Filed October 23, 2013

VACATED IN PART

E. Ross Huff, Jr. and Shelby H. Kellahan, both of Huff Law Firm, LLC, of Irmo, for Petitioners-Respondents.

Andrew N. Safran, of Columbia, for Respondent-Petitioner.

Stephen B. Samuels, of Samuels Law Firm, LLC, of Columbia, for Amicus Curiae Injured Workers' Advocates.

PER CURIAM: Petitioners-respondents (Martint) and respondent-petitioner (Jervey) each seek a writ of certiorari to review the Court of Appeals' decision in *Jervey v. Martint Envtl., Inc.*, 396 S.C. 442, 721 S.E.2d 469 (Ct. App. 2012). Martint maintains the Court of Appeals erred in holding Martint's claim that Jervey's injuries were not compensable was barred by the doctrines of laches and waiver because Martint did not assert compensability as a defense for more than 450 days after it began paying benefits. Jervey maintains the Court of Appeals erred in holding S.C. Code Ann. § 42-9-260 (Supp. 2012) did not operate as a statute of limitations to bar Martint's belated denial of compensability. Specifically, Jervey maintains section 42-9-260 provides that an employer may only raise compensability as a defense within the first 150 days after an injury if the employer begins paying benefits.

We deny Martint's petition for a writ of certiorari to review the Court of Appeals' decision as to the issues of laches and waiver. In light of the denial of Martint's petition for a writ of certiorari, we find it is unnecessary to address the issues raised by Jervey. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address any remaining issues if the disposition of a prior issue is dispositive). Nevertheless, because determination as to the issues of laches and waiver is dispositive, we grant Jervey's petition for a writ of certiorari, dispense with further briefing, and vacate that portion of the Court of Appeals' opinion addressing the import of section 42-9-260.

VACATE IN PART

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Team IA, Inc., Respondent,

v.

Cicero Lucas, George Lawson, IV and 5 Point Solutions, LLC, Defendants,

Of whom Cicero Lucas is, Petitioner.

Cicero Lucas and George Lawson, IV, Third-Party Plaintiffs,

v.

Brent Yarborough and Team IA, Inc., Third-Party Defendants.

Appellate Case No. 2011-203166

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 27326
Heard October 3, 2013 – Filed October 23, 2013

DISMISSED AS IMPROVIDENTLY GRANTED

Terry E. Richardson, Jr., Daniel Scott Haltiwanger, and Christopher James Moore, all of Richardson Patrick

Westbrook & Brickman, LLC, of Barnwell, for Petitioner.

Robert Fredrick Goings, of Goings Law Firm, LLC of Columbia, for Respondent.

PER CURIAM: After careful consideration of the Appendix and briefs, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael O'Brien Nelson, Respondent.

Appellate Case No. 2013-000964

Opinion No. 27327
Heard July 10, 2013 – Filed October 23, 2013

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Julie M. Thames, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

M. Dawes Cooke, Jr., of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension not to exceed nine (9) months. He further agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of a sanction and to complete the Legal Ethics and Practice Program Ethics School within nine (9) months of the imposition of a sanction. We accept the Agreement and suspend respondent from the practice of law in this state for six (6) months, retroactive to June 1, 2013, the last date of his employment with the Ninth Circuit Solicitor's Office. In addition, within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by

ODC and the Commission and, within nine (9) months of this opinion, shall complete and provide proof of completion of the Legal Ethics and Practice Program to the Commission. The facts, as set forth in the Agreement, are as follows.

Facts

At the time of the misconduct giving rise to this proceeding, respondent was employed as an assistant solicitor in the Ninth Circuit Solicitor's Office. On Sunday, July 8, 2007, respondent's cousin (Cousin) called respondent to tell him he had been summoned for jury duty. Cousin apparently asked respondent how to avoid serving on a jury. Respondent told Cousin to tell the court that he ran a business that could not open if he had to serve on a jury. Respondent also told Cousin to tell the court that his cousin was an assistant solicitor.

The following day, Monday, July 9, 2007, jury qualifications were held and a jury was selected for the criminal trial. During voir dire, Cousin did not inform the court that his cousin was an assistant solicitor. Cousin was selected to serve as a juror on a criminal case.[1]

The criminal trial proceeded with the State being represented by a deputy solicitor[2] and an assistant solicitor. On Tuesday, July 17, 2007, the State rested its case before the lunch break. After the lunch break, defense counsel informed the court that he had learned over the previous weekend that one of the jurors was a cousin of respondent who was an assistant solicitor. Prior to returning to the courtroom after the lunch break, defense counsel had asked respondent about the relationship and respondent admitted to defense counsel that his cousin was on the jury. Defense counsel related that respondent told him that he (respondent) had spoken to the assistant solicitor prosecuting the case before the jury was selected. Defense counsel also related that respondent said Cousin had called him after he was seated on the jury, but respondent refused to speak to him.

A break was taken. Defense counsel and the deputy solicitor spoke with respondent off the record. Defense counsel then informed the court that

[1] Respondent was not on the Solicitor's Office team prosecuting the defendant.

[2] The deputy solicitor was lead counsel for the prosecution.

respondent told defense counsel and the deputy solicitor that the trial judge had asked him to leave the courtroom because of his relationship with the juror. The trial judge replied that respondent had "just assumed that" and then he "just generally told [respondent] to leave the courtroom." Defense counsel related that respondent told defense counsel and the deputy solicitor that he believed that Cousin had reported to the court that he was related to respondent. Respondent stated he had been contacted several times by Cousin after the empanelling of the jury, but he did not respond or said he could not respond.

Defense counsel requested the trial judge dismiss Cousin and ask respondent about the situation. The trial judge stated he would dismiss Cousin; he also said he "was just joking when he told [respondent] to leave the courtroom if he had any connection to a juror." The trial judge noted that they had checked and determined that Cousin had not disclosed his relationship to respondent during *voir dire*.

Cousin was brought into the courtroom and questioned about his relationship with respondent. He admitted they were cousins and that he had failed to respond to "that question" during *voir dire*. Cousin explained that, during *voir dire*, another juror stood up and the judge asked if it would have any effect on the juror's impartiality. Cousin stated he knew his relationship with respondent would not have any effect on his impartiality so he did not disclose his relationship with respondent.[3] Cousin admitted he had spoken with respondent since the trial had begun but only about respondent's wedding. Cousin also stated he did not disclose his relationship with respondent to any of the jurors.[4] Cousin was excused from the jury.

The next morning, Wednesday, July 18, 2007, defense counsel brought the issue up again because he was concerned respondent had told him in the hall that he had not had any discussions with Cousin, but Cousin had told the court that they

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[3] According to the Agreement, the transcript of the trial reveals that, during jury selection, there were no questions about any juror's relationship with the Solicitor's Office that elicited a response from the jury panel and, therefore, Cousin could not have heard this question and answer previously.

[4] The jury panel was later polled and one of the jurors said Cousin told him his cousin worked in the Solicitor's Office. Another juror stated Cousin told her his cousin worked in the building.

discussed respondent's wedding. Defense counsel was concerned about the inconsistency between what Cousin told the court and what respondent told the court. He was also concerned about communications Cousin may have had with other members of the jury.

Respondent was called into the courtroom and questioned by the trial judge with regard to his contact with Cousin. Respondent stated under oath that Cousin called him Friday or Saturday night (over the weekend break during the course of the trial). Cousin had received respondent's invitation to respondent's engagement party and they spoke briefly about the party. Respondent said he told Cousin that he could not talk about anything else.

Respondent also said he received a telephone call from Cousin "yesterday at lunch," which would have been Tuesday, July 17. Respondent said he did not answer, but texted Cousin and told him he could not talk to him. Respondent stated, "[t]hat was pretty much it, Your Honor."

Respondent also stated he told his Cousin in the beginning that he could not talk to him about the case. However, respondent revealed there was more to the conversation than he originally admitted when the trial judge asked respondent if his cousin mentioned the case and respondent replied, "[s]aying he's on the jury and blah-blah-blah, not anything on the facts." Respondent said Cousin had called him before the trial asking him how to get off jury duty and then called him again after he was selected and told respondent he was on the jury. Respondent stated Cousin called him after he was selected for the jury and asked respondent to have lunch on Monday, July 9th. Respondent told Cousin he had gone home from work sick; they did not go to lunch.

The trial judge then asked when respondent told the other members of the Solicitor's Office that his cousin was on the jury. Respondent stated he did not remember if he spoke to the assistant solicitor assigned to the case before or after Cousin was picked but he remembered he told the deputy solicitor after. The trial judge asked respondent if it was before Cousin was selected or before qualifications. Respondent stated, "I'm not sure about before qualifications. I'm almost positive I told him after he was selected." Respondent was excused from the courtroom.

After further discussion, respondent was called back into the courtroom. The trial judge asked respondent exactly when he disclosed that his cousin was selected on the jury. Respondent said he was not certain, that he thought it was Monday morning,[5] but he did not remember. Although he had previously stated he was "almost positive" it was after his cousin was selected, respondent said he was talking about the jury qualifications, not the panel. Respondent then told the court that he did not mention Cousin's name "to anybody here" but that there were people in the office that knew Cousin and that he told them his cousin was on the jury. Respondent said the conversations were in passing but he thought he told these people that Cousin was on the jury after he was selected. Respondent stated the conversations were not important to him and he made no effort to ensure that the court was aware of the relationship.

Defense counsel asked respondent if he had told him in the hall that he had spoken to the assistant solicitor after the jury was selected and told the assistant solicitor that his cousin was on the jury. Again, respondent did not give a direct answer and said he was not sure.

During a post-trial motion, defense counsel offered a telephone log from SunCom demonstrating the numerous telephone and text contacts between respondent and Cousin between July 6 and July 18. The court accepted the log as an exhibit. The log provides the following information.

On Monday, July 9, the day the jury was selected, court recessed for the day at 12:00 p.m. The following contacts occurred on July 9, 2007:

Type	From	To	Time	Duration
Telephone	Respondent	Cousin	08:42:03	0:00:56
Text	Cousin	Respondent	08:46	
Text	Respondent	Cousin	10:08	
Text	Cousin	Respondent	10:40	
Text	Respondent	Cousin	10:41	
Text	Cousin	Respondent	10:42	
Text	Respondent	Cousin	10:47	
Telephone	Cousin	Respondent	10:47:44	0:01:05
Telephone	Cousin	Respondent	10:49:33	0:03:42

[5] This was the day of jury selection.

Telephone	Cousin	Respondent	12:05:52	0:00:07
Telephone	Respondent	Cousin	12:06:26	0:02:55
Text	Cousin	Respondent	14:33	
Text	Cousin	Respondent	14:43	
Telephone	Cousin	Respondent	16:25:30	0:00:31
Telephone	Cousin	Respondent	20:30:47	0:03:16
Telephone	Respondent	Cousin	20:35:04	0:00:21

On Tuesday, July 10, 2007, court did not convene. There were no confirmed telephone or text contacts between respondent and Cousin on that day.
Court reconvened at 2:00 p.m. on Wednesday, July 11, 2007, and recessed at 5:00 p.m. (17:00). The following contacts occurred on Wednesday, July 11, 2007:

Type	From	To	Time	Duration
Telephone	Cousin	Respondent	17:10:11	0:00:03
Text	Cousin	Respondent	17:14	
Telephone	Cousin	Respondent	17:15:20	0:00:29
Telephone	Respondent	Cousin	17:15:25	0:00:23

On Thursday, July 12, 2007, the court convened at 9:30 a.m. and recessed for lunch at 12:00 p.m. The court reconvened at 1:30 p.m. (13:30) and recessed for the day at 4:50 p.m. (16:50). The following contacts occurred on Thursday, July 12, 2007.

Type	From	To	Time	Duration
Telephone	Cousin	Respondent	12:04:36	0:00:08
Text	Cousin	Respondent	12:06	
Telephone	Cousin	Respondent	12:06:48	0:00:07

Court was in session on Friday, July 13, 2007. There are no confirmed contacts between respondent and Cousin on Friday, July 13. There are no confirmed telephone or text contacts between respondent and Cousin on Saturday, July 14, Sunday, July 15, or Monday, July 16, during which time court was not in session.

Court reconvened on Tuesday, July 17, 2007, at 9:30 a.m. The State rested on Tuesday, July 17, 2007, before the lunch break. The court recessed for lunch at 11:55 a.m. and reconvened at 1:30 p.m. (15:30). The court recessed for the day at

5:35 p.m. (17:35). The following contacts between respondent and Cousin occurred on Tuesday, July 17, 2007.

Type	From	To	Time	Duration
Telephone	Cousin	Respondent	12:05:06	0:00:20
Text	Respondent	Cousin	12:11	
Text	Cousin	Respondent	12:12	
Text	Respondent	Cousin	12:13	
Text	Cousin	Respondent	12:14	
Text	Cousin	Respondent	12:33	
Text	Cousin	Respondent	15:59	
Telephone	Cousin	Respondent	16:00:10	0:09:53

At an interview with ODC on August 1, 2012, respondent was asked if the trial judge had asked him to leave the courtroom during the trial or during jury selection. Initially, respondent replied "[n]o." However, respondent then remembered that he went into the courtroom during the trial and the trial judge texted him and told him to leave. Respondent stated the text occurred during a break in the trial. He explained that, in hindsight, he assumed the trial judge was "messing with" him. At the time, he thought the trial judge did not want him in the courtroom because he knew respondent's cousin was on the jury. Respondent said he and the trial judge were friends, and that texting with the trial judge was not uncommon.

During the ODC interview, respondent attempted to clear up the situation by stating that he now knows that he told the deputy solicitor and the assistant solicitor assigned to the case that his cousin was on the jury before selection, "before they went to jury qualifications." Respondent admits he gave different answers at different times to the same questions. Respondent stated he believed Cousin had disclosed the relationship during jury selection and, thus, the trial judge and the attorneys of record all knew of the relationship.

While going through the telephone and text records during the ODC interview, respondent stated he could not remember the specifics of any of the calls. Several of the calls were just seconds long and others were several minutes, but he could not recall the details of any particular conversation. When asked about the discrepancy between the number of actual contacts and the number of contacts

revealed to the trial judge, respondent replied he was nervous and had no excuse. He also stated he had no memory of the calls because they were short. [6]

Respondent admits he engaged in repeated *ex parte* contacts with Cousin throughout the trial until Cousin was excused after his relationship with respondent was disclosed. In addition to the Sunday evening telephone call before the trial, there were approximately thirty (30) other *ex parte* contacts between respondent and Cousin between Monday, July 9, 2007, the first day of trial, and Tuesday, July 17, 2007, when Cousin was excused. Respondent admits the *ex parte* contacts correlated closely with recesses and breaks during the trial.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 3.5 (lawyer shall not communicate *ex parte* with a juror during the proceeding unless authorized to do so by law or court order); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to the administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1), RLDE (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We accept the Agreement and suspend respondent from the practice of law in this state for six (6) months, retroactive to June 1, 2013, the last date of his employment with the Ninth Circuit Solicitor's Office.[7] Within thirty (30) days of

[6] Although the misconduct occurred in July 2007, the disciplinary matter was not considered by the Commission on Lawyer Conduct until the conclusion of the trial and appeal in the underlying criminal case.

[7] On May 29, 2013, respondent resigned his position with the Ninth Circuit Solicitor's Office effective June 1, 2013.

the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission and, within nine (9) months of this opinion, shall complete and provide proof of completion of the Legal Ethics and Practice Program to the Commission. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.
BEATTY, J., not participating.

The Supreme Court of South Carolina

In the Matter of Cynthia E. Collie, Respondent.

Appellate Case No. 2012-213164

ORDER

By order dated October 17, 2011, the Court required all lawyers admitted to the practice of law in South Carolina to log-on, verify, and update their contact information on the Attorney Information System (AIS) by November 18, 2011. The order specified attorneys "shall ensure that his or her contact information in the AIS includes a mailing address, an e-mail address, and a telephone or cell phone number, and that this information is current and accurate."

In the same order, the Court amended Rule 410, SCACR. In relevant part, Rule 410(g) provides that "[p]ersons admitted to the practice of law in South Carolina shall have a continuing duty to verify and update their information in the AIS, and must ensure that the AIS information is current and accurate at all times. At a minimum, the contact information must include a mailing address, an e-mail address and a telephone number." Rule 410(e), SCACR, states that the mailing and email addresses in AIS shall be used for notifying and serving the bar member.

On October 16, 2012, the Court heard oral arguments in Cynthia Holmes v. Haynesworth Sinclair Boyd. Respondent, a party to the appeal, was present in the courtroom.[1]

During the argument, respondent's counsel acknowledged that respondent is a regular member of the South Carolina Bar. Thereafter, the Chief Justice stated respondent was not properly registered with AIS and verbally directed counsel and respondent to update AIS to provide an operational email account for respondent.

Court records document that, on October 18, 2012, respondent contacted the AIS Help Center and was told that, pursuant to Rule 410, SCACR, respondent was

[1] The decision is pending.

required to provide an email address. By correspondence dated the same day, respondent's counsel advised the Chief Justice that respondent "is now taking steps to have [an email address] created for the purposes of complying with the rule."

In the meantime, in connection with a pending disciplinary matter against respondent, the Court issued an order on October 18, 2012, addressing issues in the disciplinary mater and directing respondent "to add a valid e-mail address" and confirm that her other contact on AIS was correct within five (5) days.[2]

Court records document that, on October 22, 2012, respondent verified her AIS contact information and provided an email address on AIS.

On October 25, 2012, respondent faxed a copy of a Petition for Rehearing of the October 18, 2012, order. By email dated October 26, 2012, the Clerk's Office notified respondent that a Petition for Rehearing is not considered filed until an original is received. The email was sent to respondent's email address on AIS: rule.410-retired@yahoo.com. An "auto response" was returned to the Clerk's Office stating "Rule 410 - retired. No reply. Please consult the current directory for contact information."

On October 31, 2012, the Court issued an order denying respondent's Petition for Rehearing and other matters. The Clerk of Court's cover letter forwarding the order directed respondent to remove the automatic message from her email and to start monitoring her email account. The Clerk requested respondent immediately notify his office in writing that she had removed the auto-generated message and was monitoring her email.

By letter dated November 5, 2012, respondent replied that her office does not have access to the Internet. The letter states "[w]e consulted AIS staff about this last year at the time when fees were paid. Your staff at AIS advised the use of Rule 410, RPC Rule 407, [sic] SCACR, retired and an AIS staffer manually entered the information at that time."

[2] When the time for respondent to file the answer to the formal charges expired on September 10, 2012, the formal charges became public on October 10, 2012, and all records and proceedings on or after that date are open to the public. Rule 12(b), RLDE, Rule 413, SCACR.

Subsequently, respondent filed a Second Petition for Rehearing of the October 18, 2012, order. By order dated January 11, 2013, the Court denied respondent's Second Petition for Rehearing. Shortly thereafter, respondent filed another motion; by order dated February 4, 2013, the Court denied the motion.

Between February 25, 2013, and April 26, 2013, respondent filed three separate motions. By order dated May 2, 2013, the Court denied each of the motions. The Court noted that the formal charges in the disciplinary matter allege respondent filed various frivolous actions and that the filings with the Court could be viewed as frivolous. The Court stated "we warn [respondent] that this Court and/or the hearing panel may place restrictions on her filings in this disciplinary matter if it is determined that she is making repetitive frivolous filings."

On May 22, 2013, the Court received respondent's Petition for Rehearing, Motion to Issue Rule to Show Cause (against counsel for the Office of Disciplinary Counsel), and Motion. By order dated June 19, 2013, the Court denied the Petition for Rehearing and the two motions. The Court held:

> Further, the Court previously warned [respondent] that repeated and vexatious submissions may result in restrictions being placed on her future filings. The Court finds this eighth filing since October 2012 and third attempt by [respondent] to address the merits of the underlying disciplinary proceeding constitutes abuse of legal process. Accordingly, the Court shall not accept any further filings by [respondent], including a petition for rehearing of this order, until the matter has been finally considered by the Commission. See Rule 21, RLDE, and Rule 27, RLDE. The Court directs the Commission to set this matter for hearing without delay.

Between July 3, 2013 and July 18, 2013, respondent filed three additional motions with the Court. The Clerk refused to accept the motions, citing the Court's June 19, 2013, order.

By letter dated July 30, 2013, Counsel for the Commission on Lawyer Conduct (the Commission) notified the Court that respondent refuses to provide a valid email address. Specifically, Commission Counsel stated the Commission has attempted to contact respondent through her e-mail address on AIS, but the emails were undeliverable. Commission Counsel provided a partial transcript from the pre-hearing conference in which respondent stated: "I don't have an email to use…So no, there's no email…I don't have an active email." According to

Commission Counsel, respondent's failure to provide an operational email account is interfering with the Commission's and Office of Disciplinary Counsel's ability to communicate with respondent.

By letter dated July 31, 2013, the Clerk of Court advised respondent that she must file a written response to the Commission's letter by August 12, 2013. The Clerk specifically directed respondent to answer the following:

1) whether the e-mail address currently shown for her in AIS, rule.410_retired@yahoo.com is a valid, working e-mail address;

2) whether the e-mail was a valid, working e-mail address when she last verified her information on AIS on October 22, 2012; and

3) what actions she is taking to monitor and timely respond to the email address provided in AIS.

The Clerk sent this letter via mail and email with the subject line "Response Required." The automated response generated by respondent's email provided the following statement: "Rule 410 - retired. No reply. This email is not active. Please consult the current directory for contact information."

On August 8, 2013, the Clerk of Court received a written response from respondent by mail. The response, dated November 5, 2012, is identical to the letter previously sent to the Court on November 5, 2012. The letter provides: "[w]e consulted AIS staff about this last year at the time when fees were paid. Your staff at AIS advised the use of Rule 410, RPC, [sic]Rule 407, SCACR, retired and an AIS staffer manually entered the information at that time."

Respondent sent additional correspondence by letter dated August 12, 2013, stating that because she has not had clients in more than thirty years, "we are exempt from Rule 412, SCACR, as well."[3] Respondent again enclosed a copy of her November 5, 2012, letter. By letter dated September 9, 2013, respondent again stated she is retired "as there have been no clients in over thirty (30) years" and she does not have Internet access.

[3] Rule 412, SCACR, addresses IOLTA accounts.

Although respondent may consider herself retired from the practice of law since she has not represented clients in many years, she is nevertheless classified as a regular member of the South Carolina Bar and, therefore, pursuant to Rule 410(g), SCACR, required to provide a valid email address. Even if she were eligible to elect to be a retired member of the Bar,[4] she would still be required to maintain an email address pursuant to Rule 410(g), SCACR.

Respondent has repeatedly refused to comply with the explicit directives, orders, and rules of this Court and of requests by the Clerk of Court by refusing to maintain and monitor an operational email account. Moreover, in spite of the Court's order of June 19, 2013, specifically prohibiting her from filing additional motions with the Court until the underlying disciplinary matter has been considered by the Commission, respondent has nevertheless attempted to submit further motions with the Court. As a result of her persistent refusal to comply with this Court's directives, the Court finds respondent poses a substantial threat of serious harm to the public and to the administration of justice. Therefore, pursuant to Rule 17(b) and (c), RLDE, Rule 413, SCACR, the Court places respondent on interim suspension. *See* Rule 17(b), RLDE ("[u]pon receipt of sufficient evidence demonstrating that a lawyer poses a substantial threat of serious harm to the public or to the administration of justice, the Supreme Court may place the lawyer on interim suspension pending a final determination in any proceeding under these rules); Rule 17(c), RLDE ("[u]pon receipt of sufficient evidence demonstrating that a lawyer …has failed to respond to …inquiries or directives of …the Supreme Court, the Supreme Court may place that lawyer on interim suspension."). Respondent's license to practice law in this state is suspended until further order of the Court.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

[4] In order to be eligible to elect retired status, a Bar member must be 65 years of age or older (or turn 65 years of age during the Bar license year in which the member elects retired status) or have a serious illness or total and permanent disability. Rule 410(h)(1)(G), SCACR.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

October 17, 2013