The Supreme Court of South Carolina

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May 3, 2002

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The South Carolina Reports is published on a periodic basis averaging four or five volumes per year plus approximately five or six Advance Sheets per volume. Each volume contains approximately 650 pages. The State currently purchases 161 copies of each volume. Proposals should specify a per book price for the copies purchased by the State. The quoted price should include the Advance Sheets and delivery to Columbia, South Carolina. The publisher can market additional volumes to attorneys and the general public.

For a sample of the style and format to be used, see Volume 344 of the South Carolina Reports. The successful publisher must either obtain a copyright waiver from West Group to continue to include the West headnotes, or include in the proposal a detailed description of how it proposes to prepare headnotes for each case in the Reports which are comparable in functionality to those contained in the current Reports. Proposals should be submitted in writing on or before June 3, 2002. Proposals and any questions should be directed to the Clerk of the Supreme Court of South Carolina. The State reserves the right to reject any and all proposals.

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

May 6, 2002

ADVANCE SHEET NO. 14

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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The Supreme Court of South Carolina

State of South Carolina, Appellant,

v.

James Eugene Huntley, Respondent.

ORDER WITHDRAWING ORIGINAL OPINION,
SUBSTITUTING SUBSEQUENT OPINION,
AND DENYING PETITION FOR REHEARING

PER CURIAM: Opinion No. 25428, filed March 11, 2002, is hereby withdrawn and the following opinion is substituted. After careful consideration, the Petition for Rehearing is denied.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

I would grant the petition to the extent it raises issues related to my dissent.

s/Costa M. Pleicones J.

Columbia, South Carolina

May 6, 2002

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Appellant,

v.

James Eugene Huntley, Respondent.

Appeal From Lancaster County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 25428
Heard November 27, 2001 - Refiled May 6, 2002

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, and Assistant Attorney General Melody J. Brown, of Columbia; Solicitor John R. Justice, of Chester, for appellant.

Francis L. Bell, of Bell, Tindall & Freeland, of Lancaster, for respondent.

JUSTICE BURNETT: On May 27, 2000, Respondent James Eugene Huntley (Huntley) was arrested for driving under the influence. After the jury was sworn, Huntley moved to suppress the results of his breathalyzer test, arguing the test operator used a different simulator solution test level than that set forth by law. The trial judge agreed and suppressed Huntley's breathalyzer results. The State appeals.[1]

ISSUE

Did the trial judge err by suppressing Huntley's breathalyzer results?

ANALYSIS

In 1998, the General Assembly passed Act No. 434 (Act 434) which made various changes to provisions of the driving under the influence law. One change amended South Carolina Code Ann. § 56-5-2950(a) to specify that before a breath test is administered, "an eight one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.076 percent and 0.084 percent." Previously, § 56-5-2950(a) did not require a simulator test.[2] On June 29, 1998, the Governor

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[1]At the conclusion of the suppression hearing, Huntley stated he had no objection to a stay of the proceedings pending the State's appeal. See State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985) (pre-trial order granting suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976)).

[2]While the South Carolina Law Enforcement Division had a regulation which set forth an approved method for performing breathalyzer tests, the regulation did not specify the parameters governing simulator tests. 26 S.C. Reg. 73-2 (Supp. 1997).

approved Act 434. Subsequently, Act 434 was enrolled with the Office of the Secretary of State.

Months later, at the behest of the then Clerk of the Senate, the Code Commissioner amended Act 434. In relevant part, the amended version provides: "before the breath test is administered, a ten one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.095 percent and 0.105 percent." S.C. Code Ann. § 56-5-2950(a) (Supp. 1999).[3]

The parties disagree which version of Act 434 is applicable for purposes of Huntley's prosecution. The State argues the amended version of Act 434 applies; Huntley contends the original version of Act 434 applies.[4] We agree with Huntley.

One duty of the Code Commissioner is to "[c]ompile the public statutes of the State." S.C. Code Ann. § 2-13-60(1) (1986). Part of this duty includes preparing indices to the statutes, noting court decisions under appropriate statutory sections, and adding references to new acts and joint resolutions. S.C. Code Ann. § 2-13-60(2), (3), and (6). The Code Commissioner is only authorized to "[c]orrect typographical and clerical errors." S.C. Code Ann. §2-13-60(10). He is not authorized to make any other changes by way of addition or deletion to the existing laws.

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[3]At the time of Huntley's trial, the General Assembly had not adopted the 1999 Cumulative Supplement as official.

In 2000, the General Assembly revised Act 434 to provide a ten one-hundredths of one percent simulator test with a result between 0.095 percent and 0.015 percent. Act No. 390, 2000 S.C. Acts 3365.

[4]Prior to conducting Huntley's breathalyzer, the test operator ran a simulator test using a ten one-hundredths of one percent simulator test solution. Huntley claimed the test operator should have used an eight one-hundredths of one percent simulator test solution.

In amending Act 434, the Code Commissioner changed the simulator solution test level and its corresponding range of accuracy. In addition, the Code Commissioner increased the alcohol inference level throughout § 56-5-2950(b), increased the alcoholic concentration level at which a person must enroll in a safety program (§ 56-5-2951(B)), and increased the level of alcohol concentration at which an insurance penalty may be imposed (§ 56-1-288(U)). The Code Commissioner acted outside his statutory authority in making these substantive changes. Accordingly, we conclude the original version of Act 434 is the law applicable to Huntley's prosecution.

Even though the trial judge properly concluded the original version of Act 434 applied, we nonetheless conclude the trial judge erred by suppressing Huntley's breathalyzer results.

The purpose of a simulator test is to ensure the breathalyzer machine produces an accurate, reliable breath-alcohol reading, and ultimately, an accurate blood-alcohol analysis.

> The alcoholic breath simulator is a part of the breathalyzer devised for the purpose of providing a standard alcohol-air mixture. By mixing an amount of absolute alcohol with distilled water, a desired concentration of breath alcohol may be achieved. The breathalyzer operator, by pumping room air through the simulator solution, is able to determine whether the breathalyzer machine is functioning properly. For instance, if the simulator solution contains .10 of one percent alcohol, room air pumped through the simulator will result in a corresponding reading on the breathalyzer machine.

State v. Parker, 271 S.C. 159, 162, 245 S.E.2d 904, 905 (1978) (emphasis added); see 2 Richard E. Erwin Defense of Drunk Driving Cases § 18.04 (2001) (simulator test provides a known quantity of alcohol to the testing

device to determine the capability of the device to properly analyze a sample at the time of the subject test); see also State v. Squires, 311 S.C. 11, 426 S.E.2d 738 (1992) (public purpose behind implied consent law is to facilitate compilation of *reliable* evidence in drunk driving prosecutions).

The alcohol level in the simulator test is used to determine the reliability of the breathalyzer machine's test results; it neither calibrates the breathalyzer machine nor affects the capability of the machine to properly measure the subject's blood-alcohol level. See State v. Parker, supra. Accordingly, as far as reliability is concerned, it is irrelevant whether the simulator test is run using an alcohol level of .10 or .08 percent. What is relevant is that the machine accurately measures the percentage of alcohol in the simulator test solution so that it will, likewise, accurately measure the percentage of alcohol in the subject's breath.

Even if the breathalyzer operator did not use the simulator test solution at the alcohol concentration required by Act 434, Huntley was not prejudiced. There is no question the breathalyzer machine was operating properly and its results were reliable.[5] Consequently, the trial judge erred by excluding Huntley's breathalyzer test results. State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the [defendant] cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures."). Evidence the simulator test was not run in conformity with Act 434 goes to the weight, not the admissibility, of Huntley's breathalyzer results.

REVERSED.

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[5]As conceded by Huntley at trial and in his appellate brief, although the test operator ran a simulator test using a solution of .10 percent alcohol rather than .08 percent, the simulator results indicated the machine was operating properly.

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. I agree with the majority that the original version of Act 434 is applicable to Huntley's case. Unlike the majority, however, I believe that the failure to comply with the clear and unambiguous statutory language mandating a simulator test be run using "an eight one-hundredths of one percent" alcohol solution bars the use of the breath test results at trial. State v. Breech, 308 S.C. 356, 417 S.E.2d 873 (1992)(DUI statute strictly construed in favor of defendant).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Melvin E. Lanham, Respondent,

v.

Blue Cross and Blue Shield of South Carolina, Inc., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Larry R. Patterson, Circuit Court Judge

Opinion No. 25458
Heard March 5, 2002 - Filed May 6, 2002

AFFIRMED AS MODIFIED

Hoover C. Blanton and Ruskin C. Foster, of McCutchen, Blanton, Rhodes & Johnson, of Columbia, for petitioner.

James B. Richardson, Jr. and J. Layne Birdsong, of Richardson and Birdsong, of Columbia, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Lanham v. Blue Cross and Blue Shield, 338 S.C. 343, 526 S.E.2d 253 (Ct. App. 2000). We affirm as modified.

FACTS

We adopt the Court of Appeals' statement of facts, as follows:

> On February 13, 1986, Melvin Lanham went to his doctor for an annual physical. The physical exam revealed Lanham's liver was swollen. Lanham subsequently received a letter indicating a blood test had revealed a slight elevation in liver function tests. In the letter, the doctor stated "I do not feel that any further treatment or investigation is indicated at this point in time. I do think that you need a periodic evaluation of your liver function studies and would suggest that we obtain a blood test on you in about six months ." On September 11, 1986, Lanham returned for the follow-up blood test. The second test also indicated an elevated SGOT and SGPT level. Other values associated with liver function were normal. The doctor advised him to follow up with periodic blood tests.
>
> On April 26, 1988, Lanham returned for another annual physical. The doctor's report from that visit states: "The patient was followed by Dr. Harold Miller for a number of years and has been told in the past that he has had a slight elevation of his hepatic enzymes. He underwent extensive studies in reference to this. The exact studies are unknown by the patient whether he had a hepatitis profile, etc." After more blood tests, Lanham received a letter from his doctor stating: "Your liver function studies have markedly improved since last year and almost are back to completely normal . Your kidney

function is normal." The doctor told Lanham he "did not feel that he needed to have any further studies or tests done at that point in time."

On April 29, 1991, Lanham applied for health insurance coverage from Blue Cross. As part of his application, he completed an extensive questionnaire regarding his past medical history. On the questionnaire, Lanham checked yes beside the question regarding digestive system problems (including liver problems) and underlined gastritis, but did not provide additional information regarding his liver. On July 15, 1991, Blue Cross issued a policy to Lanham with a rider excluding coverage for a hip problem.

In November of 1991, Lanham had blood work done in connection with an unrelated application for life insurance. On November 6, 1991, he went back to his doctor and advised him that based on the lab work, he had been turned down for life insurance. The doctor repeated the blood work and discovered one of Lanham's enzymes had increased to a point requiring further investigation. He referred Lanham to a specialist and suggested Lanham consider having a liver biopsy.

In December of 1991, the specialist diagnosed Lanham with hepatitis C. In July of 1992, Blue Cross notified Lanham it had canceled his health insurance due to alleged fraudulent misrepresentations in his application. On November 4, 1992, Lanham filed suit asserting breach of contract and bad faith refusal to pay. Blue Cross answered and counterclaimed asserting it would not have issued the policy but for misrepresentations in the application. The suit was dismissed with leave to restore in 1994 and restored on March 2, 1995.

Blue Cross moved for summary judgment on January 21, 1997. On January 24, 1997, Lanham requested discovery of various items including Blue Cross's underwriting guidelines. Blue Cross

> moved to quash the discovery request asserting its underwriting standards are protected as trade secrets. On February 3, 1997, Lanham made a second motion to compel discovery.
>
> During the hearing on Blue Cross's motion for summary judgment, Blue Cross relied heavily on an unpublished opinion by this court. Blue Cross also presented an affidavit from an employee who stated the insurer would not have issued Lanham's policy had it known of Lanham's liver problems. Lanham argued he had not been allowed adequate discovery and the question of materiality was a jury issue. Lanham renewed his motion to compel discovery. Without ruling on Lanham's discovery motion, the court granted summary judgment in favor of Blue Cross.

338 S.C. at 345-346, 526 S.E.2d at 254-255. The Court of Appeals reversed the trial court's ruling, finding a genuine issue of material fact existed as to whether Lanham made a false statement with the actual intent to deceive; it also held that whether Lanham's application answers were material was a matter for the jury. Finally, the Court of Appeals remanded the issue of Lanham's motion to compel to the trial court.

ISSUES

1. Should the trial court have ruled on Lanham's motion to compel prior to ruling on Blue Cross' motion for summary judgment?

2. Did the Court of Appeals err in reversing the grant of summary judgment to Blue Cross ?

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is proper when there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. Id. Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

1. MOTION TO COMPEL DISCOVERY

Blue Cross moved for summary judgment on January 21, 1997. In support of its motion, it filed the affidavit of Sandra Laney, manager of underwriting for individual policies, to the effect that "[h]ad Blue Cross and Blue Shield . . . known of the liver condition, coverage would not have been offered. This condition and the Plaintiff's deceitful statement materially affects the acceptance of the risk." In response to the motion for summary judgment, Lanham filed a notice of taking the deposition of Blue Cross, and requests for production. In these motions, Lanham specifically advised Blue Cross that he was seeking:

> Defendant's underwriting standards, policies and procedures regarding the health disorders which the defendant contends would

have precluded the issuance of plaintiff's health insurance policy.

All policies of the defendant regarding the part played by an applicant's medical history in the decision to issue a family or individual health insurance policy.

All policies of the defendant concerning the investigation and review of the medical records or an applicant for health insurance.

All underwriting standards, policies, and procedures of the defendant concerning health disorders which the defendant contends would have precluded the issuance of plaintiff's health insurance policy.

Blue Cross responded with a motion for protective order or to quash, contending its underwriting standards, policies, and procedures were trade secrets. Lanham moved to compel Blue Cross's deposition and production of documents. The summary judgment hearing was held on March 24, 1998. The court declined to rule on plaintiff's motion to compel and granted Blue Cross summary judgment from the bench.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., supra. Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. Baughman v. American Tel. & Tel. Co., supra. This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Id.

Here, without being able to conduct further discovery, there was simply no way for Lanham to respond to Blue Cross's claim that his failure to divulge his elevated enzymes was material to its decision to accept the risk. Given that all standards, statistics, procedures, etc., relative to Blue Cross's decision to insure were within its sole possession, we find the trial court erred in ruling on the summary judgment motion without first ruling on Lanham's motion to

produce and motion to compel.[1] Accordingly, we affirm the Court of Appeals' remand of this issue.

2. SUMMARY JUDGMENT

The Court of Appeals reversed the grant of summary judgment to Blue Cross, finding a) there was a material question of fact whether Lanham intended to deceive Blue Cross, and b) that whether Lanham's answers on the application were material was a question of fact for the jury.

S.C. Code Ann. § 38-71-40 (2002) states:

> The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer.

It has long been the law of this state that in order to void a policy of insurance on the ground that fraudulent representations were made in the procuring of such policy, the burden of proof rests upon the insurer to show, by clear and convincing evidence, not only that the statements complained of were untrue, but in addition thereto that their falsity was known to the applicant, that they were material to the risk, were relied on by the insurer, **and** that they were made with intent to deceive and defraud the company. Smiley v. Woodmen of the World, 249 S.C. 461, 154 S.E.2d 834 (1967); Hood v. Security Ins. Co. of New Haven, 247 S.C. 71, 145 S.E.2d 526(1965); Small v. Coastal States Life Ins. Co., 241 S.C. 344, 128 S.E.2d 175(1962); Metropolitan Life Ins. Co. v.

[1] Blue Cross contends Lanham was required to file an affidavit pursuant to Rule 56(f), SCRCP, to the effect that he had insufficient information upon which to submit an affidavit. We find counsel's representation to the court that Lanham was in need of further discovery sufficient.

Bates, 213 S.C. 269, 49 S.E.2d 201(1948).[2] Accordingly, contrary to the Court of Appeals' ruling, to have been entitled to summary judgment, Blue Cross had to show both a false statement made with the intent to deceive **and** that the statement was material to either acceptance of the risk or the hazard assumed.[3] It failed to do so.

Sometime between 1979-1981, Lanham's family physician, Dr. Miller, took some blood and told him his liver enzyme count was either high or low; over the course of time, his tests returned to normal so Dr. Miller did not advise any further treatment. There are no medical records in the appendix from Dr. Miller. The only other physician Lanham saw prior to applying for health insurance with Blue Cross was Dr. Luce, whom he first saw in February 1986 when Dr. Miller retired. Dr. Luce advised Lanham there was a "very slight abnormality as far as [his] liver function studies" were concerned but that no further treatment or investigation was warranted at that time. Dr. Luce suggested a periodic evaluation of his liver function studies and suggested a blood test in about six months. Six months later, it appears Lanham's enzyme levels tested high for both SGOT (111) and SGPT (176). However, there is no indication in the record Lanham was ever advised of these results.[4] Two years

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[2] Although these cases were decided pursuant to earlier statutes, the predecessor statutes all contain language virtually identical to S.C. Code Ann. § 38-71-40.

[3] Pursuant to § 38-71-40, a false statement made with the intent to deceive may void a policy if it either materially affected the risk or the hazard assumed. However, whether any misrepresentation materially affected the hazard assumed in this case was not argued by Blue Cross at the summary judgment hearing; it argued only that Lanham had answered falsely and that the false answer was material to the risk. The Court of Appeals did not rule upon whether the omission was material to the hazard assumed. Accordingly, we need not address the issue here.

[4] Dr. Luce could not find any record in his file that he had corresponded with Lanham concerning the Sept. 1986 results.

later, on April 26, 1988, Dr. Luce advised Lanham his "liver function studies are markedly improved since last year and almost back to completely normal." Dr. Luce advised he did not feel any further studies or test were needed at this point in time.

Question 17D of Blue Cross's application asked whether Lanham had, in the past 10 years, had a "diagnosis of, advice for, indication of, symptoms related to,[5] treatment for, or accident or injury related to any of the following systems, diagnoses, disorders, diseases, conditions or symptoms?" Subsection D specifically referenced "liver," along with numerous other systems.

Viewing the evidence in the light most favorable to Lanham, it cannot be said, as a matter of law, that he made a false statement in his application with the actual intent to deceive. Given the fact that he was repeatedly told that there were only slight elevations, when coupled with the ambiguous language of Question 17D, we find the issue of whether he made a false representation with the actual intent to deceive presents a jury question. Accord Smiley v. Woodmen of the World Life Ins., 249 S.C. 461, 154 S.E.2d 834 (1967)(jury question as to whether life insurance applicant misrepresented his health with intent to deceive insurer notwithstanding insured's answering "no" to numerous questions regarding hospital treatment and medications, when insured had in fact been hospitalized for six days the year prior to his application).

In order to be entitled to summary judgment, Blue Cross would have to demonstrate that there is no genuine issue of material fact that Lanham made a false statement with the actual intent to deceive **and** that the statement materially affected either the acceptance of the risk or the hazard assumed. Given our holding that whether Lanham made a false representation with the intent to deceive is a matter for the jury in this case, Blue Cross was not entitled to summary judgment. Accordingly, we affirm the reversal of summary judgment.

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[5] Dr. Luce testified that Lanham had no other symptoms associated with underlying liver disease.

Lanham's motion to compel discovery is remanded to the circuit court.

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Jeffrey M. Thompson, Appellant.

Appeal From Laurens County
Gary E. Clary, Circuit Court Judge

Opinion No. 25459
Submitted March 21, 2002 - Filed May 6, 2002

AFFIRMED

Thomas J. Thompson, of Townsend & Thompson, of Laurens, for appellant.

Chief Counsel Buford S. Mabry, Jr., Deputy Chief Counsel Paul S. League, and Assistant Chief Counsel James A. Quinn, of South Carolina Department of Natural Resources, of Columbia, for respondent.

JUSTICE WALLER: Appellant Jeffrey M. Thompson was found

guilty in magistrate's court of trapping beaver out of season pursuant to S.C. Code Ann. § 50-11-2540 (Supp. 2001). The circuit court affirmed, and he appeals. We affirm.

FACTS

On March 11, 2001, appellant was discovered inspecting beaver traps which he had set on his mother's property. He was charged with trapping out of season. See § 50-11-2540. He had been issued a depredation permit pursuant to S.C. Code Ann. § 50-11-2570 (Supp. 2001), but the permit expired in January and had not been renewed.[1] Although appellant challenged the statutes' constitutionality, the magistrate found appellant guilty, and the circuit court affirmed.

ISSUE

Are § 50-11-2540 and § 50-11-2570 unconstitutional?

DISCUSSION

Appellant argues that sections 50-11-2540 and 50-11-2570 are unconstitutional because they infringe on the fundamental right to defend one's property and they violate the equal protection clauses of the United States and South Carolina Constitutions.

Section 50-11-2540 sets a two-month trapping season as follows:

> It is lawful to trap furbearing animals for commercial purposes from January first to March first of each year. The trapping season may not exceed sixty days each year under

[1]Apparently, the beavers were causing flooding to his mother's property, essentially converting it to swamp land. The beavers had also damaged timber located on the property.

> any circumstances. It is unlawful to trap any other times unless authorized by the department. It is lawful to take furbearing animals by other lawful means during the general open hunting seasons established therefor.

(Emphasis added). However, when a furbearing animal is causing damage to property, section 50-11-2570 provides the following:

> (A) The department may issue special permits, at no cost to the applicant, for the taking, capturing, or transportation of a furbearing animal or another game animal which is destroying or damaging private or public property, timber, or growing crops so as to be a nuisance or for scientific or research purposes.
>
> (B) The permit provided in subsection (A) is not required by the property owner or his designee when capturing furbearing animals or squirrels within one hundred yards of the owner's home when the animal is causing damage to the home or the owner's property. An animal captured pursuant to this subsection must be destroyed or with a department permit may be relocated.

(Emphasis added).

Thus, trapping out of season is permitted when the animal is causing damage to property. A person is allowed to trap either: (1) with a special depredation permit, or (2) when the animal is causing damage to the home or the owner's property, then the owner or her designee may trap within 100 yards of the owner's home without a special permit.

Appellant's argument is twofold. First, appellant contends that property owners enjoy a fundamental right to protect their property. Therefore, a property owner may protect her property from an animal causing damage even if the animal is protected by law. Second, appellant maintains that sections

50-11-2540 and 50-11-2570 operate unequally against different property owners who seek to exercise their fundamental right to protect their property. Consequently, appellant contends that the statutes violate equal protection. While we agree with appellant that property owners have a right to protect their property, we find the statutes are constitutional.[2]

1. Right to Protect One's Property

The South Carolina Constitution states: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. CONST. art. I, § 3. In other contexts, this Court has noted the "high regard for private property." Karesh v. City Council of City of Charleston, 271 S.C. 339, 342, 247 S.E.2d 342, 344 (1978) (discussing eminent domain). Indeed, the Court has stated that "the great and fundamental principle of all constitutional governments . . . secures to every individual the right to acquire, possess, and defend property." Young v. Wiggins, 240 S.C. 426, 435, 126 S.E.2d 360, 365 (1962) (internal quotation marks and citation omitted); see also Keane/Sherratt Partnership v. Hodge, 292 S.C. 459, 465 n.3, 357 S.E.2d 193, 196 n.3 (Ct. App. 1987) ("Property rights have long been regarded as fundamental in Western civilization."). These authorities support appellant's argument that the right to protect property is an important and fundamental one.

Moreover, other jurisdictions have found that the right to protect one's property from damage may be sufficient justification for killing wildlife

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[2]Initially, we note the State contends appellant has no standing to challenge the statutes because this was his mother's property. However, section 50-11-2570(B) specifically exempts "the property owner or his designee" from the permit requirement. It appears from the facts that appellant was acting on behalf of his mother, the property owner. Therefore, appellant, as his mother's designee, has standing to bring this constitutional challenge.

out of season. See, e.g., Cotton v. State, 17 So.2d 590 (Ala. Ct. App. 1944); State v. Rathbone, 100 P.2d 86 (Mont. 1940); State v. Burk, 195 P. 16 (Wash. 1921); Cross v. State, 370 P.2d 371 (Wyo. 1962). As stated in an annotation on this topic:

> The rule appears to be well established that the plea of justification is a valid defense to the charge of unlawfully killing a protected wild animal, where it can be shown that killing was reasonably necessary in order to defend property from damage or destruction by the protected animal.

Annotation, *Right to Kill Game in Defense of Person or Property*, 93 A.L.R.2d 1366, 1368 (1964).

While justification may be a defense, the courts have nevertheless noted that the State may infringe on private property rights if done so in a reasonable manner. The Supreme Court of Montana in Rathbone stated as follows:

> It is conceded that the construction to be given a right guaranteed to the individual by the Constitution must always be a reasonable one. The result of the operation of the police power is necessarily in most instances an infringement of private rights, but in the exercise of such power, property and individual rights may be injured or impaired only to the extent reasonably necessary to preserve the public welfare.

Rathbone, 100 P.2d at 92. In Cotton v. State, the Alabama Court of Appeals, adopting the Rathbone rule, held that:

> before the defendant can resort to force in protecting his property from wild animals, (1) he must have exhausted all other remedies provided by law; (2) the use of such force must be reasonably necessary and suitable to protect his property; and (3) he must use only such force and means as

> a reasonably prudent man would use under like circumstances.

Cotton v. State, 17 So.2d at 591.

The above-cited authorities specifically dealt with statutes that had a blanket rule against trapping out of season. The courts uniformly found that a defendant may utilize justification, based on the right to protect one's property, as a defense to killing wildlife out of season. In South Carolina, however, the Legislature has implicitly recognized the right to protect one's property from a furbearing animal causing damage. See § 50-11-2570. This statute provides a mechanism in the form of a special permit for a property owner to lawfully avoid depredation. § 50-11-2570(A) ("The department may issue special permits, at no cost to the applicant, for the taking, capturing, or transportation of a furbearing animal or another game animal which is destroying or damaging private or public property, timber, or growing crops so as to be a nuisance. . . ."). Under subsection 50-11-2570(B), a property owner, or her designee, is not required to have a permit if the trapping is done within 100 yards of the owner's home.

While a "landowner has . . . the right to hunt and fish" on her property, this right is "subject to reasonable governmental regulations." Rice Hope Plantation v. South Carolina Pub. Serv. Auth., 216 S.C. 500, 524, 59 S.E.2d 132, 142 (1950), overruled on other grounds, McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985). We find that section 50-11-2570 represents a reasonable limitation on the right to protect one's property. Furthermore, given that "game and fish are really the property of the State, and the preservation thereof is a matter of public interest," id., sections 50-11-2540 and 50-11-2570 do not unreasonably restrict a property owner's right to protect her property. As noted by the State, the Legislature has taken a balanced approach, allowing a property owner to trap without a permit within 100 yards of her home. Moreover, we note there is no fee for a depredation permit, and, according to the State, these permits are issued on the spot by wildlife officers once the damage

has been confirmed.[3]

Accordingly, we hold that sections 50-11-2540 and 50-11-2570 do not unconstitutionally infringe on a property owner's right to protect her property.

2. Equal Protection

Appellant argues that different property owners are treated unequally under section 50-11-2570, and therefore, the statute does not provide equal protection. Furthermore, appellant contends that because the right to protect property is fundamental, the statute must be reviewed pursuant to a strict scrutiny analysis. We disagree.

Initially, we must determine the appropriate standard to review appellant's equal protection argument. If there is no suspect or quasi-suspect class and no fundamental right involved, a statute should be tested under the "rational basis" standard. Bibco Corp. v. City of Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998). As discussed above, we agree with appellant that the right to protect one's property is, in certain contexts, a right which is fundamental in nature. In the equal protection context, however, we find it is not a "fundamental right" deserving strict scrutiny.

In Clajon Production Corp. v. Petera, 854 F.Supp. 843 (D. Wyo. 1994), aff'd in part, appeal dismissed in part, 70 F.3d 1566 (10th Cir. 1995), the

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[3]Indeed, given that appellant had received a depredation permit, he certainly has no claim that the Department of Natural Resources was not cooperating with him to rid his mother's property of the beaver. Appellant, however, allowed the permit to expire. Furthermore, the officer in the instant case issued him another depredation permit at the same time he issued appellant his ticket for the trapping offense. Thus, based on the facts of this case, it does not appear to be an onerous process to obtain a depredation permit under § 50-11-2570.

plaintiffs challenged a Wyoming regulation. The regulation provided that certain qualified landowners could apply for up to two additional hunting licenses by virtue of their status as landowners. The plaintiffs alleged the regulation violated the equal protection clause and the takings clause because it restricted landowners to no more than two licenses regardless of the size of their land holdings. The court found no equal protection violation. Significantly, the court found that the plaintiffs' claim was not entitled to strict scrutiny because property rights[4] generally are not recognized as "fundamental" for equal protection purposes. Despite its conclusion, the court stated the following:

> This analysis is not meant to degrade property rights or to say that they are not, in some sense, "fundamental." The point is, however, that property rights are not fundamental rights for purposes of deciding the appropriate level of constitutional scrutiny that must be given to state laws that may affect those rights.

Id. at 855 n.18. Affirming the district court on this issue, the Tenth Circuit stated: "Economic regulations – i.e., those burdening one's property rights – have traditionally been afforded only rational relation scrutiny under the Equal Protection Clause. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)." Clajon Production Corp. v. Petera, 70 F.3d at 1580.

In Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), cert. denied sub nom. Christy v. Lujan, 490 U.S. 1114 (1989), the plaintiff shot a grizzly bear because bears were attacking and killing his grazing sheep. He was subsequently assessed a civil penalty under the Endangered Species Act (ESA). He brought suit challenging the constitutionality of the regulations and arguing that the ESA infringed upon his right to protect his property. The Ninth Circuit

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[4]The specific property right asserted in Clajon was the right not to have one's property taken without just compensation. 854 F.Supp at 854.

recognized that certain state courts had found a state constitutional right to protect property from destruction from wildlife. Id. at 1329 (citing Cross v. State, supra). The Christy court, however, concluded that no such right existed under the federal constitution. In so holding, the court stated:

> We do not minimize the seriousness of the problem faced by livestock owners such as plaintiffs nor do we suggest that defense of property is an unimportant value. We simply hold that the right to kill federally protected wildlife in defense of property is not "implicit in the concept of ordered liberty" nor so "deeply rooted in this Nation's history and tradition" that it can be recognized by us as a fundamental right. . . .

Id. at 1330.[5] But see Lauri Alsup, Comment, *The Right to Protect Property*, 21 Envtl. L. 209 (1991) (criticizing the Christy court's decision); David S. Klain, Casenote, *Does the Endangered Species Act Deprive an Owner of Fundamental Constitutional Rights: Christy v. Hodel*, 12 Geo. Mason U. L. Rev. 421, 430 (1990) (arguing that the United States Supreme Court should acknowledge the existence of a fundamental right to defend one's property under the due process clause).

We are persuaded by these federal authorities that the proper equal protection analysis is not strict scrutiny, but rather rational basis. The fundamental rights which usually are protected by heightened scrutiny are personal rights such as the rights to vote, marry, procreate, etc., and these rights are very different from the right to protect one's property, which essentially is an economic right. See Clajon Production Corp. v. Petera, 854 F.Supp. at 855. This conclusion "is not meant to degrade property rights or to say that they are not, in some sense, 'fundamental.'" Id. at 855 n.18. As discussed above, there is ample authority stating that property rights are fundamental; however, these

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[5]The Christy court found that property rights were not fundamental for purposes of both due process and equal protection. 857 F.2d at 1329-1330, 1332.

statements were never made in the context of an equal protection challenge.[6]

Having determined that rational basis is the appropriate scrutiny, we turn to the merits of appellant's claim. To satisfy equal protection under rational basis review, three requirements must be met: (1) the classification must bear a reasonable relation to the legislative purpose sought to be achieved; (2) members of the class must be treated alike under similar circumstances; and (3) the classification must rest on some rational basis. E.g., Lee v. South Carolina Dep't of Natural Resources, 339 S.C. 463, 530 S.E.2d 112 (2000).

We hold that sections 50-11-2540 and 50-11-2570 survive this scrutiny. Clearly, the purpose of these laws is to preserve wildlife[7] and they reasonably relate to that goal. By limiting the trapping season, and placing a slight limitation on a property owner whose property is being damaged (i.e., the special permit requirement), the statutes protect these furbearing animals in a reasonable manner, while also balancing a property owner's right to protect property from destruction. Members of the class are treated alike under similar circumstances; that is, all property owners trapping within 100 yards of their residence are treated the same, and all property owners trapping further than 100 yards from their residence are treated the same.[8] Finally, the classification based

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[6]Indeed, none of the out-of-state authorities cited by appellant involves a case which holds an equal protection violation in a hunting scenario. These cases simply uphold the general rule that justification based upon the right to protect one's property may be a defense to a hunting violation.

[7]See Rice Hope Plantation v. South Carolina Pub. Serv. Auth., 216 S.C. at 524, 59 S.E.2d at 142 (the preservation of game and fish is a matter of public interest).

[8]Appellant presents a hypothetical in his brief that establishes 4 different classes of owners: (1) an owner who traps within 100 yards of the home (no permit required); (2) an owner who traps further than 100 yards of the home (permit required); (3) an owner who has a building on the property, but not a home (permit required); and (4) an owner who has no buildings on the property

on the distance from the owner's home is rationally based. As argued by the State, it is rational to allow owners to trap close to their home without a permit; otherwise, the Department of Natural Resources "would be swamped with permit requests." More importantly, it clearly is reasonable to allow a property owner to capture a damage-causing animal when it is that close to the residence without first requiring the owner to secure a permit. Accordingly, these statutes withstand rational basis review and do not violate equal protection.

CONCLUSION

We hold that sections 50-11-2540 and 50-11-2570 are constitutional.

AFFIRMED.

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

(permit required). Although this is an interesting hypothetical, appellant unfortunately defeats his own argument. These classes of owners are not similarly situated, and therefore not deserving of equal protection. Cf. State v. Thompson, 33 P.3d 213 (Idaho Ct. App. 2001) (where the court held that a gardener convicted of killing a deer out of season was not similarly situated to a rancher who is permitted to kill a predator without a permit if it is to protect his livestock; therefore, the court found no equal protection violation); see also TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 626, 503 S.E.2d 471, 479 (1998) ("In order to establish an equal protection violation, a party must show that **similarly situated** persons received disparate treatment.") (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Green, Petitioner,

v.

Gary D. Maynard, Commissioner, South Carolina Department of Corrections, and Charles M. Condon, Attorney General of South Carolina, Respondents.

ORIGINAL JURISDICTION

Opinion No. 25460
Heard January 9, 2002 - Filed May 6, 2002

RELIEF DENIED

John H. Blume, of Ithaca, New York; Desa A. Ballard, of West Columbia; and Teresa L. Norris, of the Center for Capital Litigation, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy

Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for respondents.

JUSTICE MOORE: We granted a stay of execution to consider petitioner's claim for habeas corpus relief on the ground our decision in his direct appeal violated his due process and equal protection rights. We find petitioner's argument without merit and deny relief.

FACTS

On November 21, 1987, petitioner approached Susan Babich's vehicle in the parking lot of a Charleston shopping mall and shot her in the head with a rifle. He took her purse and fled the scene. Based on an eyewitness's description, police apprehended petitioner in the mall vicinity within thirty minutes. A rifle and Ms. Babich's checkbook were found in his car. Petitioner subsequently admitted his involvement to police.

Petitioner was tried in September 1988. He was convicted of murder and armed robbery and sentenced to death. In March 1990, this Court affirmed his convictions and sentence, State v. Green, 301 S.C. 347, 392 S.E.2d 157, *cert. denied,* Green v. South Carolina, 498 U.S. 881 (1990). Petitioner's subsequent application for post-conviction relief was denied. He then commenced habeas corpus proceedings in federal court. The United States District Court denied relief and the Fourth Circuit Court of Appeals affirmed that decision. Green v. Catoe, 220 F.3d 220 (4th Cir. 2000), *cert. denied,* ___ U.S. ___, 121 S.Ct. 2002 (2001). Petitioner then filed this petition in our original jurisdiction.

Throughout petitioner's habeas proceedings, he has raised the issue of our 1990 decision refusing to grant him a new trial on the ground the trial judge improperly qualified Juror William Canty. In deciding the issue, we followed the United States Supreme Court's decision in Ross v. Oklahoma, 487 U.S. 81 (1988), and focused on the jurors actually seated. Because

petitioner exercised a peremptory strike against Juror Canty, who therefore was not seated, we found petitioner was not deprived of his right to a fair trial. Green, 301 S.C. at 352, 392 S.E.2d at 160.

On rehearing, petitioner protested that he had used all his peremptory strikes and, under existing state precedent, this was all that was needed to show reversible error in the improper qualification of a juror. We summarily denied the petition for rehearing.

Petitioner claims this decision applied new law and, further, it was law that was applied only to him in light of our subsequent decision in State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999). In Short, we held no actual prejudice need be shown to establish reversible error for the deprivation of a peremptory strike. Petitioner contends Short vitiates the prejudice analysis used in his direct appeal. He requests habeas relief from this Court on the ground our 1990 decision in his case was "a legal fluke" that violated his constitutional rights.

ISSUE

Has petitioner shown a denial of fundamental fairness that supports the grant of habeas corpus relief?

DISCUSSION

Standard for habeas relief

Habeas relief will be granted only for a constitutional claim rising to the level of "a violation, which in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Gibson v. State, 329 S.C. 37, 39, 495 S.E.2d 426, 428 (1998) (*citing* Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990)).

Break from precedent in petitioner's direct appeal

Our 1990 decision in petitioner's case sets out a three-step analysis on the issue of juror qualification. The defendant must first show he exhausted all of his peremptory challenges; if all peremptory strikes were used, we will consider whether the juror was erroneously qualified. If the juror was erroneously qualified, the defendant must then demonstrate he was deprived of a fair trial. We found Juror Canty should have been disqualified because voir dire indicated he was racially biased. We concluded, however, that petitioner failed to satisfy the third requirement for reversal – that he was deprived of a fair trial – because the erroneously qualified juror did not in fact sit on the jury. Petitioner therefore failed to show prejudice from Juror Canty's erroneous qualification.

Petitioner argues that before the decision in his case, we did not apply this third step of the analysis and would have reversed where the defendant demonstrated only the first two steps – that he used all his peremptory strikes and that the juror was erroneously qualified. He relies primarily on State v. Sanders, 103 S.C. 216, 88 S.E. 10 (1916). In Sanders, we reversed where a juror was erroneously qualified, the defendant struck the juror, and the defendant exhausted all his peremptory strikes. We essentially presumed prejudice from the defendant's exhaustion of his peremptory strikes.[1] Petitioner claims under this precedent, the fact Juror Canty did not sit should not have been considered.

The State, however, argues there is intervening precedent of this Court undermining the rule in Sanders by the time petitioner's direct appeal was decided in 1990. In State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981),

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[1]Following Sanders, in State v. Mittle, 120 S.C. 526, 113 S.E. 335 (1922), a concurring Justice agreed with the majority that a challenged juror was properly qualified but noted there would have been reversible error had the defendant been forced to strike a juror who should have been excluded for cause.

overruled on other grounds, State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998), we found the defendant had failed to show prejudice from the refusal to allow a belated peremptory strike because there was no showing of any juror bias. We relied on Plath in 1982 and held in State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), that where the defendant had suffered no "actual juror prejudice," his motion for additional peremptory strikes was properly denied. The State claims these cases indicate the deprivation of a peremptory strike would no longer be treated as reversible error *per se,* thus undermining the prong of the analysis for improperly qualified jurors that required no prejudice based on the exhaustion of all peremptory strikes.[2]

In any event, assuming our 1990 decision in petitioner's case broke from precedent and applied a new procedural rule, the question is: Does the overruling of precedent and the application of a new rule violate any constitutional right? The answer to this question is clearly no. The United States Supreme Court, for instance, in Payne v. Tennessee, 501 U.S. 808 (1991), overruled its own precedent and applied a new rule to the defendant's detriment allowing the admission of victim impact evidence in a death penalty case. The Court noted that stare decisis is not "an inexorable command." 501 U.S. at 828. Where the issue is a rule of procedure, the Court is even less constrained by precedent because a procedural rule does not serve as a guide to lawful behavior and does not alter primary conduct. Hohn v. United States, 524 U.S. 236, 251 (1998); United States v. Gaudin, 515 U.S. 506, 521 (1995); Payne, 501 U.S. at 828. No constitutional right is implicated where precedent is overruled in favor of the application of a new procedural rule.

In conclusion, even if our three-step analysis in petitioner's direct appeal overruled precedent and created a new rule, we violated no constitutional mandate in applying that rule to petitioner. The essential issue

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[2]The dissent cites State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986), as a later case applying the rule of Sanders. Our 1990 decision in Green, distinguished Cooper on the ground it did not reverse on the issue of juror qualification alone.

in this habeas proceeding is whether there has been a constitutional violation that amounted to a denial of fundamental fairness shocking to the universal sense of justice. We find no denial of fundamental fairness. Petitioner's constitutional right to a fair trial by an unbiased jury was in no way compromised. We find petitioner's argument on this issue without merit.

Effect of Short on the Green analysis

In State v. Short, we held no showing of actual prejudice is required to establish reversible error from the denial of a peremptory challenge. Petitioner relies on Short to argue that under the present state of the law, we would no longer apply the three-step analysis used in his direct appeal.

We recently reiterated this three-step analysis in a decision issued after the decision in Short. *See* State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).[3] In Council, we found no error in the juror's qualification and never reached the prejudice analysis. In citing Green, however, we implicitly acknowledged the continued viability of the three-step analysis. We now confirm that our Green analysis remains valid.

We begin by noting that other states with precedent similar to Short have reached the opposite result suggested by petitioner on the question whether a defendant need only show he used all his peremptory strikes to obtain reversal for the erroneous qualification of a juror who did not sit. These decisions follow the United States Supreme Court's recent opinion in United States v. Martinez-Salazar, 528 U.S. 304 (2000), which distinguishes the forced use of a peremptory strike from the denial of one.

The Martinez-Salazar case arose in the Ninth Circuit. That circuit has a well-settled rule that a party need not show prejudice from the denial of a

[3]Short was issued in January 1999; Council in April 1999.

peremptory strike. United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996).[4] Relying on this precedent in Martinez-Salazar, the Ninth Circuit Court of Appeals reasoned that the defendant's Fifth Amendment due process rights were violated because he had to use a peremptory strike to remove a juror who should have been excused for cause. United States v. Martinez-Salazar, 146 F.3d 653, 658 (9th Cir. 1998).

On appeal, however, the Supreme Court rejected this analysis, distinguishing the forced use of a peremptory strike from the denial of such a strike. It held: "[I]f the defendant elects to cure such an error [in juror qualification] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." 528 U.S. at 307. Thus, the Supreme Court has definitively rejected a federal due process claim based on the forced use of a peremptory strike.

Since Martinez-Salazar was decided, a majority of state courts considering the issue have interpreted their state constitutions to conform to its holding. *See, e.g.*, In re: Evans v. State, 794 So.2d 411 (Ala. 2000); State v. Manning, 19 P.3d 84 (Kan. 2001); State v. Entzi, 615 N.W.2d 145 (N.D. 2000); State v. Verhoef, 627 N.W.2d 437 (S.D. 2001); State v. Fire, 34 P.3d 1218 (Wash. 2001); State v. Lindell, 629 N.W.2d 223 (Wis. 2001).[5] Although we may afford more expansive rights under our state constitutional provisions than those conferred under the federal constitution, State v.

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[4]Annigoni was in fact cited in our decision in Short as support for the rule that prejudice need not be shown.

[5]Of the two courts rejecting Martinez-Salazar, one was an intermediate state appellate court which noted that it was bound to follow pre-existing state law the highest state court had not reconsidered since the Martinez-Salazar opinion, *see* State v. Ibanez, 31 P.3d 830, 834 (Ariz. App. 2001), leaving only one state that has authoritatively rejected the Martinez-Salazar analysis. *See* People v. Lefebre, 5 P.3d 295 (Colo. 2000) (declining to follow Martinez-Salazar on state law grounds).

Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), we decline to do so here. We have repeatedly stated that peremptory strikes implicate no constitutional right. State v. Potts, 347 S.C. 126, 554 S.E.2d 38 (2001); State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995); State v. Bailey, 273 S.C. 467, 257 S.E.2d 231 (1979). We adopt the Martinez-Salazar analysis and interpret our state constitution to find no due process violation from the forced use of a peremptory strike. Thus, we confirm the continued viability of the three-step analysis used in petitioner's direct appeal.[6] Petitioner's argument that our decision in his direct appeal was "a legal fluke" is without merit.

CONCLUSION

Petitioner has failed to demonstrate our decision in his direct appeal violated any constitutional right. There has been no denial of fundamental

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[6]We note that a statutory claim under Short is not incompatible with the Green analysis. A claim based on the denial of a strike may still be made if, after being forced to use a peremptory strike on an erroneously qualified juror, the defendant can demonstrate he was deprived of a subsequent strike he would have exercised, and to which he would have been entitled, but for the forced strike. Such a claim may be preserved by stating for the record an articulable objection to a subsequently presented juror.

Here, petitioner could not have shown reversible error even under this statutory analysis. We have examined the original transcript in his direct appeal which indicates only two jurors were presented after petitioner used his last peremptory strike. Petitioner voiced no objection to either of those jurors. His only objection was to an alternate juror for whom separate strikes were allocated as provided in S.C. Code Ann. 14-7-1120 (Supp. 2000). Because there is no basis in the record from which to conclude the strike used against Juror Canty effectively deprived petitioner of a peremptory strike he otherwise would have exercised, petitioner would not have been entitled to a new trial under a Short analysis.

fairness in this case. Accordingly, petitioner's request for habeas relief is

DENIED.

TOAL, C.J., WALLER and BURNETT, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the Court's decision in State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990), was a clear break from established precedent. See State v. Sanders, 103 S.C. 216, 88 S.E. 10 (1916). Neither State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981), nor State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), hold that a defendant must show prejudice where he has used a peremptory challenge to remove an otherwise disqualified juror.[7]

In a case involving the issue of juror disqualification, decided after Plath and Yates, the Court reaffirmed the rule in State v. Sanders, supra. State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986). In Cooper, the defendant challenged the trial court's refusal to disqualify a highway patrolman from the panel of jurors. In reversing the defendant's conviction, the Court did not undertake a prejudice analysis. Instead, the Court only considered whether the defendant had exhausted all peremptory challenges and whether the trial court should have disqualified the patrolman for cause. I read Cooper as an affirmation of the two-part test in effect prior to Green. In my opinion Green was a clear break from that precedent.

I do not suggest that this Court cannot overrule a previous decision in any given case. I am, however, of the opinion that when the Court chooses to do so, and when the change is a clear break from the law previously applied in a criminal prosecution, the new rule should not be applied to the detriment of the defendant in whose case the rule is changed. See e.g. State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997) (refusing to apply new rule overruling precedent to appellant's detriment). Application of the new rule to Green, in a setting where the State seeks to extract the ultimate penalty is, in my

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[7]As pointed out by the majority, the defendant in Plath appealed the trial court's refusal to allow the defendant to exercise a peremptory challenge after all the jurors had been presented and sworn. Yates addressed a defendant's challenge to the trial court's denial of the defendant's request for additional peremptory challenges after exhaustion of those allowed by statute. Neither decision addressed the issue of juror disqualification.

opinion, shocking to the universal sense of justice. See Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990) (writ of habeas corpus will issue where a violation, in the setting, constitutes denial of fundamental fairness shocking to universal sense of justice).

I would grant the petition for writ of habeas corpus.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Alfred Timmons, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Florence County
Joseph J. Watson, Circuit Court Judge

Opinion No. 25461
Heard March 21, 2002 - Filed May 6, 2002

AFFIRMED

Assistant Appellate Defender Tara S. Taggart, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy

Attorney General John M. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, of Columbia, and Solicitor Edgar L. Clements, III, of Florence, for respondent.

JUSTICE PLEICONES: We granted Alfred Timmons' petition for writ of certiorari to consider the Court of Appeals' determination that possession of cocaine is a lesser included offense of possession of crack cocaine. We affirm.

FACTS/PROCEDURAL HISTORY

Petitioner ("Timmons") was indicted for shoplifting, fifteenth offense, and possession of crack cocaine after police arrested him in the parking lot of a K-Mart store. A search of his person revealed that Timmons had two telephones in his pants, and accessories for the phones in his socks. He also had .02 grams of crack cocaine in his pocket.

Timmons pled guilty to shoplifting, fifteenth offense, and possession of cocaine. The court sentenced him to eight years, and two years, respectively. The sentences were concurrent. At the plea hearing, the solicitor explained that although an analysis of the substance found on Timmons was positive for crack cocaine, the State was accepting Timmons' guilty plea to possession of cocaine, as opposed to possession of crack cocaine, based on the minute amount of drugs involved.

Timmons appealed, arguing the trial court lacked subject matter jurisdiction to accept his plea to possession of cocaine where the indictment charged possession of crack cocaine.[1] The Court of Appeals affirmed and

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[1]Count Two of the indictment alleged:

That ALFRED TIMMONS did in Florence County on or about

held that possession of cocaine is a lesser included offense of possession of crack cocaine. State v. Timmons, 338 S.C. 287, 525 S.E.2d 906 (1999).

ISSUE

Did the trial court have subject matter jurisdiction to accept Timmons' plea to possession of cocaine?

ANALYSIS

The circuit court does not have subject matter jurisdiction to convict a defendant of an offense unless there has been an indictment which sufficiently states the offense; the defendant has waived presentment of the indictment; or the offense is a lesser included offense of the crime charged in the indictment. State v. Owens, 346 S.C. 637, 552 S.E.2d 727 (2001).

The test for determining if a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense. State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000). That test[2] is met here.

South Carolina Code Annotated Section 44-53-370 (c) (2002) makes it illegal for any person to knowingly or intentionally possess a "controlled

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> July 28, 1997, knowingly and intentionally possess a quantity of crack cocaine, a controlled substance under the provisions of Act No. 445, Acts of 1971, General Assembly of South Carolina, as amended (Sections 44-53-370 and 44-53-375), et. seq., 1976 Code of Laws of South Carolina, as amended), [sic] such possession not having been authorized by law.

[2]See State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001) (reiterating, despite certain anomalies, the continued validity of the elements test for determining whether an offense is a lesser included offense of the crime charged).

substance." The statutory definition of "controlled substance" includes "[c]oca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances . . . ." S.C. Code Ann. § 44-53-210 (b)(4) (2002). S.C. Code Ann. § 44-53-110 (2002), defines "crack cocaine" as "an alkaloidal cocaine or freebase form of cocaine, which is the end product of a chemical alteration whereby the cocaine in salt form is converted to a form suitable for smoking." Section 44-53-375 of the South Carolina Code provides harsher penalties for a defendant convicted of possession of crack cocaine than those provided in § 44-53-370 for possession of cocaine.

Construing the code sections cited above, before the State obtains a conviction for possession of crack cocaine it must prove that the defendant (1) knowingly or intentionally (2) possessed (3) a form of cocaine (4) in a smokable, alkaloidal state. A conviction for possession of cocaine only requires that the State prove the first three of these elements. Possession of cocaine, then, does not contain any element not included within possession of crack cocaine. Thus, it satisfies the elements test as a lesser included offense of possession of crack cocaine.

Moreover, there is precedent from this Court suggesting possession of cocaine is a lesser included offense of possession of crack cocaine. In State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989), the defendant was indicted for possession of crack cocaine after police found him in possession of a glass vial containing a substance resembling crack cocaine. At trial a SLED chemist testified that, because of the small amount retrieved, he could not determine whether the substance was crack cocaine. The chemist testified, however, that the substance tested positive for cocaine. The trial court granted the defendant's motion for a directed verdict of not guilty on the charge of possession of crack cocaine. The court submitted the offense of possession of cocaine to the jury, determining possession of cocaine was a lesser included offense of possession of crack cocaine. The jury found the defendant guilty of possession of cocaine. The defendant appealed, asserting the trial court's jury charge impermissibly commented on the facts of the

case.

We affirmed the conviction, concluding the judge's remarks were an explanation of his ruling on the defendant's directed verdict motion, rather than a comment on the facts of the case. We continued:

> Th[e court's] statement explained how and why the charge of possession was being reduced from crack cocaine to simple cocaine. According to the chemist's testimony, there was an insufficient amount of the substance to conduct an analysis for crack cocaine. Without any evidence of crack cocaine, Jackson could not be charged with that offense on the indictment in question. In contrast, there was testimony that there was a sufficient amount of the substance to conduct an analysis of cocaine. This explains how Jackson could be charged with *the lesser included offense*.

Id. at 526, 377 S.E.2d at 572 (emphasis supplied). While Jackson did not challenge on appeal the trial court's subject matter jurisdiction, Jackson clearly suggests possession of cocaine is a lesser included offense of possession of crack.

CONCLUSION

We affirm the result reached by the Court of Appeals. Pursuant to the elements test and State v. Jackson, supra, possession of cocaine is a lesser included offense of possession of crack cocaine. It follows that the indictment charging Timmons with possession of crack cocaine conferred upon the trial court subject matter jurisdiction to accept Timmons' plea of guilty to possession of cocaine. AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Riverwoods, LLC, North Bluff North Charleston, Limited Partnership, Brackenbrook North Charleston Limited Partnership, Arthur Booth, M.D. and Linda M. Booth, Respondents/Appellants,

v.

The County of Charleston, Peggy A. Moseley in her official capacity as Charleston County Auditor, and D. Michael Huggins in his official capacity as Charleston County Assessor, Appellants/Respondents.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 25462
Heard March 20, 2002 - Filed May 6, 2002

AFFIRMED

Samuel W. Howell, IV, of Howell & Linkous, LLC, of Charleston, County Attorney Joseph Dawson, III, and Assistant County Attorney Bernard E. Ferrara, Jr., of Charleston, for appellants/respondents.

G. Trenholm Walker, Andrew K. Epting, Jr., Clayton B. McCullough and Matthew D. Hamrick, of Pratt-Thomas, Epting & Walker, P.A., of Charleston, for respondents/appellants.

Burnet R. Maybank, III, of Nexsen Pruet Jacobs & Pollard, LLC, of Columbia, for amicus curiae, State Chamber of Commerce.

JUSTICE WALLER: Respondents-appellants (collectively "Taxpayers") brought this action against the County of Charleston, Peggy A. Moseley in her official capacity as Charleston County Auditor, and D. Michael Huggins in his official capacity as Charleston County Assessor (appellants-respondents, collectively "the County") challenging a county ordinance which grants a property tax exemption solely to owner-occupied primary residences. Taxpayers moved for summary judgment, which the trial court granted. The County appeals on the merits, and Taxpayers appeal from the trial court's denial of injunctive relief. We affirm.

FACTS

In November 2000, Charleston County adopted Ordinance 1163 ("the Ordinance"). The Ordinance grants an exemption from *ad valorem*

property taxation to owner-occupied primary residences where the property's value increased over 15 percent due to a county-wide reassessment.[1] The exemption imposes a tax cap on these properties such that they are not taxed on any increase in value over 15 percent.

The Ordinance was enacted pursuant to S.C. Code Ann. § 12-37-223A (Supp. 2001) ("the Enabling Act"). The Enabling Act states in pertinent part:

> As authorized by Section 3, Article X of the South Carolina Constitution, the General Assembly hereby authorizes the governing body of a county by ordinance to exempt an amount of fair market value of real property located in the county sufficient to limit to fifteen percent any valuation increase attributable to a countywide appraisal and equalization program conducted pursuant to Section 12-43-217. An exemption allowed by this section does not apply to:
>
> (1) real property valued for property tax purposes by the unit valuation method;[2]
>
> (2) value attributable to property or improvements not previously taxed, such as new construction, and for renovation of existing structures;
>
> (3) property transferred after the most recent countywide

[1]Every five years, real property in a county is reappraised and taxes are assessed on the newly appraised values. See S.C. Code Ann. § 12-43-217(A) (2000) (". . . once every fifth year each county or the State shall appraise and equalize those properties under its jurisdiction . . . .").

[2]According to Taxpayers, the only property valued by the unit valuation method is property of utility companies.

> equalization program implemented pursuant to Section 12-43-217; provided, however, at the option of the governing body of a county which is in the process of first implementing a countywide equalization program under Section 12-43-217, property transferred on or after January first of the year of implementation of the most recent countywide equalization program.

§ 12-37-223A(A) (emphasis added).

The County decided to enact the Ordinance pursuant to the Enabling Act; however, it chose to limit the exemption solely to owner-occupied primary residences. See S.C. Code Ann. § 12-43-220(c) (2000).[3] In the text of the ordinance, the County set forth several reasons for its decision to selectively grant the tax exemption to these residential properties only.[4]

Taxpayers are: (1) three corporate entities which each own an apartment complex in Charleston County; and (2) the Booths who are residents of Georgia but own a second home in Kiawah Island. Taxpayers are all taxed at a six percent assessment ratio. Due to the countywide reassessment completed in 2001, their properties increased in value anywhere from 31.8 percent to 138.4 percent.

Prior to the countywide assessment which was completed in 2001,

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[3]Property classified as owner-occupied primary residences under § 12-43-220(c) is taxed on an assessment equal to four percent of the fair market value of the property. Id. All other real property not specifically classified under section 12-43-220 is taxed at six percent. See § 12-43-220(e).

[4]For example, the Ordinance states that "County Council recognizes the rapid escalation of residential property values in many areas of Charleston County" and "the application of the exemption will encourage homeownership by mitigating the impact of rapidly escalating values on property taxation of owner-occupied homes."

the total value of all assessed real property in Charleston County was approximately $15.6 billion. For the 2001 tax year, the total value of all assessed real property in the County was approximately $25.4 billion. As a result of the Ordinance, $2.4 billion was exempted from taxation. Thus, the applicable millage rates for tax year 2001 were calculated, and taxes were assessed, based on approximately $23 billion worth of property. In addition to being excluded from application of the exemption, Taxpayers alleged that implementation of the exemption required the County to set higher millage rates resulting in higher taxes for them.

Taxpayers filed a complaint seeking a declaratory judgment that the ordinance was invalid. Although they alleged several causes of action in their complaint, Taxpayers moved for summary judgment to invalidate the ordinance based upon two grounds: (1) the ordinance violated the enabling legislation; and (2) the ordinance violated specific tax provisions of the South Carolina Constitution. As relief, Taxpayers requested an injunction if the trial court granted summary judgment, or, if their motion was denied, a preliminary injunction.

The trial court found in favor of Taxpayers on both grounds asserted. However, the trial court refused to grant their request for an injunction or a writ of mandamus. Instead, citing the hardship on the County and potential for reversal on appeal, the trial court issued a writ of supersedeas staying enforcement of the order. Taxpayers subsequently petitioned this Court for a writ of supersedeas to dissolve the supersedeas issued by the trial court. We denied Taxpayers' request. We granted the parties' joint motion to expedite the case.

ISSUES

The County's appeal raises the following two issues:

Did the trial court err in ruling that the Ordinance conflicted with, or exceeded the power granted by, the Enabling Act?

Did the trial court err in ruling that the Ordinance violated the South Carolina Constitution?

On cross-appeal, Taxpayers raise the following issue:

Did the trial court err in refusing to grant injunctive relief?

DISCUSSION

1. Does the Ordinance violate the Enabling Act?

The County argues that the Ordinance does not violate the Enabling Act. The County maintains that: (1) the Ordinance is a valid exercise of discretion as granted by Home Rule powers; and (2) the Enabling Act did not require the County to apply the exemption to all real property in Charleston or prohibit the County from applying the exemption to only certain classes of property. We disagree and find the trial court correctly concluded that the Ordinance exceeded the authority granted by the Enabling Act.

Determining whether a local ordinance is valid is a two-step process. The first step is to determine whether the county had the power to adopt the ordinance. If no power existed, the ordinance is invalid. If the county had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State. Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000).

At issue is whether the Ordinance is consistent with the Enabling Act, and this necessarily involves the statutory construction of the Enabling Act. The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature. E.g., Grant v. City of Folly Beach, 346 S.C. 74, 551 S.E.2d 229 (2001). The trial court found that if a county enacted an ordinance pursuant to the Enabling Act, then all property, except those properties specifically listed under subsections 12-37-223A(A)(1), (2) & (3), was intended to receive the exemption. We agree.

"The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). As we explained in Hodges v. Rainey: "'The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed.'" Id. at 87, 533 S.E.2d at 582 (quoting Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992)).

Citing West Virginia Pulp & Paper Co. v. Riddock, 225 S.C. 283, 82 S.E.2d 189 (1954), the trial court employed the principle of *expressio unius est exclusio alterius* to find that the Enabling Act granted only three exceptions to the application of the exemption. Thus, the trial court found that the County was unauthorized to enact an ordinance which, in effect, excluded all real property other than owner-occupied primary residences.

In Riddock, a manufacturer challenged Charleston County's demand for taxes levied for the servicing of county bonds. The manufacturer argued it was entitled to a statutory exemption from these taxes. The statute stated that an "[e]xemption from county taxes (but not from school taxes or public service district taxes) is hereby granted to [certain manufacturing plant construction]." Id. at 285, 82 S.E.2d at 189 (emphasis added). The trial court in Riddock applied the principle *expressio unius est exclusio alterius* and concluded that "the Legislature must have intended that the exemption should apply to taxes levied for all County purposes save for those purposes specifically excluded." Id. at 287-88, 82 S.E.2d at 189. In other words, except for school and public service district taxes (the express exceptions), the exemption applied, and taxes servicing county bonds were exempt for qualifying manufacturers. The Court agreed with the trial court and adopted its order as the opinion for the Court.

Likewise, the trial court in the instant case appropriately applied *expressio unius est exclusio alterius* and correctly decided that if a county chose to enact an ordinance granting the exemption, the Legislature intended for all

property, except the three enumerated exceptions listed in subsections 12-37-223A(A)(1), (2) & (3), to benefit from the exemption. Hodges v. Rainey, supra (the enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded); Riddock, supra (tax exemption statute specifically listing exceptions to exemption indicate all other cases intended for exemption). Here, however, the County enacted an ordinance which effectively created a fourth exception – all real property other than owner-occupied primary residences.

The County argues it had the discretion to enact the Ordinance in the manner it did due to principles of Home Rule. We disagree.

Article VIII of the South Carolina Constitution "mandates 'home rule' for local governments." Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 37, 530 S.E.2d 369, 373 (2000). Section 17 of Article VIII provides that "all laws concerning local government shall be liberally construed in their favor." S.C. CONST. art. VIII, § 17. Pursuant to S.C. Code Ann. § 4-9-25 (Supp. 2001), counties enjoy certain powers:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

(Emphasis added).

The County contends that section 4-9-25 grants it wide discretion

to decide how to apply the exemption. The County, however, misapprehends the issue before the Court. At issue is whether the Ordinance violated the enabling legislation.[5] It is clear from a plain reading of the Enabling Act that the only real discretion which was conferred upon the County was whether to adopt the ordinance. Once adopted, however, it must be consistent with the general law of the State, i.e., the enabling legislation. See Bugsy's, Inc. v. City of Myrtle Beach, supra (to be valid, an ordinance must be consistent with the Constitution and general law of the State); cf. Bostic v. City of West Columbia, 268 S.C. 386, 390, 234 S.E.2d 224, 226 (1977) ("enabling legislation is not merely precatory, but prescribes the parameters of conferred authority"). As discussed above, the Ordinance is inconsistent with the Enabling Act. Consequently, the County's assertions regarding Home Rule provide it no refuge.

In sum, we hold that the Ordinance conflicted with the Enabling Act because it effectively created an additional exception not intended by the Enabling Act.[6]

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[5]The Enabling Act was passed pursuant to Article X, Section 3 of the South Carolina Constitution: "In addition to the exemptions listed in this section, the General Assembly may provide for exemptions from the property tax, by general laws applicable uniformly to property throughout the State and in all political subdivisions, but only with the approval of two-thirds of the members of each House." S.C. CONST. art. X, § 3 (emphasis added).

[6]The trial court additionally held that the Ordinance violated the Enabling Act because in application it failed to "exempt an amount of fair market value of real property located in the county sufficient to limit to fifteen percent any valuation increase attributable to a countywide appraisal and equalization program." § 12-37-223A. Since we conclude the Ordinance violates the Enabling Act based on the principle of *expressio unius est exclusio alterius*, it is not necessary to address this alternative holding of the trial court.

2. Did the trial court err in ruling that the Ordinance violated the South Carolina Constitution?

The trial court also found that because the Ordinance resulted in the taxation of owner-occupied primary residences at less than their fair market value, the Ordinance violated Article III, § 29 and Article X, § 1 of the South Carolina Constitution.[7] The County argues that the trial court erred.

It is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required. E.g., In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001). Our holding in Issue 1, supra, is dispositive to this appeal; we therefore refrain from ruling on the constitutional questions raised. Id.

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[7]These sections provide as follows in pertinent part:

> All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax.

S.C. CONST. art. III, § 29 (emphasis added).

> The General Assembly may provide for the ad valorem taxation by the State or any of its subdivisions of all real and personal property. The assessment of all property shall be equal and uniform in the following classifications:
>
> . . .
>
> (3) The legal residence and not more than five acres contiguous thereto shall be taxed on an assessment equal to four percent of the fair market value of such property.

S.C. CONST. art. X, § 1 (emphasis added).

3. Did the trial court err in refusing to grant injunctive relief?

The trial court refused to order injunctive relief, and *sua sponte* issued a writ of supersedeas staying the enforcement of its order declaring the Ordinance unlawful. Taxpayers argue that the trial court erred in denying their request to issue a writ of mandamus or an injunction. We disagree.

The primary purpose of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created or imposed by law. Porter v. Jedziniak, 334 S.C. 16, 18, 512 S.E.2d 497, 498-99 (1999) (citing Willimon v. City of Greenville, 243 S.C. 82, 132 S.E.2d 169 (1963)). To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty of respondent to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. Id.

Taxpayers were not entitled to a writ of mandamus. Although they argue the County had a "clear ministerial duty" to include the exempted value in the calculation of taxes, it is patent that this duty was far from clear; indeed, the instant appeal attests to the fact that it was unclear as to whether the exemption was lawful or not. "When the legal right is doubtful . . . a writ of mandamus cannot rightfully issue." Willimon v. City of Greenville, 243 S.C. at 86, 132 S.E.2d at 170.

Taxpayers also contend that once the trial court declared the Ordinance invalid, they were entitled to an injunction. We find that because Taxpayers have an adequate remedy at law, the trial court correctly denied the injunction.

Although a taxpayer may enjoin the collection of an illegal tax if he is afforded no adequate legal remedy, see Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 58 S.E. 811 (1907), where there is a legal remedy by payment under protest, then an injunction is inappropriate. E.g., Textile Hall Corp. v. Riddle, 207 S.C. 291, 300, 35 S.E.2d 701, 704 (1945).

The County argues that Taxpayers have an adequate legal remedy by paying the taxes under protest. See S.C. Code Ann. § 12-60-2550 (2000) (allowing taxpayer to pay under protest 80 percent of challenged property tax). Taxpayers argue that every property owner in Charleston County paying *ad valorem* taxes is affected. They contend that, under these circumstances, paying taxes under protest is an unfair and impractical remedy and therefore an inadequate remedy.

Taxpayers are incorrect. While it may be true that by invalidating the Ordinance all property owners in Charleston County will be affected in future tax years, the instant case involves only four properties. Clearly, these Taxpayers have an adequate remedy provided under statute by paying their taxes under protest. Id.; Textile Hall Corp. v. Riddle, supra. Thus, the trial court did not err in denying injunctive relief.

Additionally, Taxpayers assert that an injunction remains a necessity even upon our invalidation of the Ordinance. According to Taxpayers, the County has demonstrated an unwillingness to eliminate implementation of the Ordinance, and Taxpayers fear the County will apply the selective exemption in tax year 2002. Taxpayers therefore implore this Court to issue an injunction or writ of mandamus requiring the County to not apply the exemption in tax year 2002 or other future tax years. However, given our decision that the Ordinance is unlawful, we are confident the County will act accordingly.

CONCLUSION

We affirm the trial court's decision that the Ordinance violated the Enabling Act and hereby declare the Ordinance invalid. In addition, we affirm the trial court's denial of injunctive relief.

AFFIRMED.

MOORE, A.C.J., BURNETT, PLEICONES, JJ., and Acting Justice George T. Gregory, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Charles Edward Watson, II, Appellant.

Appeal From Anderson County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 25463
Heard April 4, 2002 - Filed May 6, 2002

AFFIRMED

Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Jeffrey A. Jacobs, of

Columbia, and Solicitor Druanne White, of Anderson, for respondent.

JUSTICE PLEICONES: Appellant Charles Watson ("Watson") appeals his conviction for murder, contending the trial court erred in not instructing the jury on the lesser included offense of reckless homicide. We affirm.

FACTS

A police officer observed Watson driving a stolen automobile. The officer followed the vehicle, and turned on his blue light and siren to signal Watson to stop. Watson sped away and the officer pursued. During the three mile chase that ensued, Watson disregarded a number of traffic signals, and reached a maximum speed of about seventy miles per hour ("mph"). He failed to stop at a stop sign and struck another vehicle. According to the officer, Watson was traveling between sixty and sixty-five mph when the collision occurred. One of the five passengers in the vehicle, ten year-old Tiffany Addis, died as a result of injuries sustained in the wreck. Three of the other passengers received serious but non-fatal injuries.

Watson was indicted and tried on two counts of failure to stop when signaled causing great bodily injury, and one count each of failure to stop when signaled causing death, murder, possession of a stolen vehicle, and driving without a license. At trial, he requested the court charge the jury on the crime of reckless homicide[1] as a lesser included offense of murder. The trial court denied this request, but did charge the jury on the lesser included offense of involuntary manslaughter.[2] The jury found Watson guilty on all

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[1]S.C. Code Ann. § 56-5-2910 (Supp. 2001).

[2]We express no opinion whether the trial court's instruction on involuntary manslaughter was warranted under the evidence presented at trial. However, involuntary manslaughter is certainly a lesser included offense of murder. See State v. Burriss, 334 S.C. 256, 513 S.E.2d 104

counts, including murder. The court sentenced Watson to thirty-seven years imprisonment for the murder conviction. All other sentences were concurrent.

ISSUE

Did the trial court err in refusing Watson's request to instruct the jury on the crime of reckless homicide as a lesser included offense of murder?

ANALYSIS

The trial judge is to charge the jury on a lesser included offense if there is any evidence from which the jury could infer that the lesser, rather than the greater, offense was committed. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). The primary test for determining if a particular offense is a lesser included of the offense charged is the elements test. State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001). The elements test inquires whether the greater of the two offenses includes all the elements of the lesser offense. State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000). In a criminal case the trial court's subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses. See State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. McFadden, supra.

The elements of the common-law offense of murder are codified at S.C. Code Ann. § 16-3-10 (1985): "'Murder' is the killing of any person with malice aforethought, either express or implied." "Reckless homicide" is defined at S.C. Code Ann. §56-5-2910 (Supp. 2000).[3] Section 56-5-2910

(1999).

[3]The General Assembly amended the statute effective August 31, 2001.

provides that "[w]hen the death of a person ensues within one year[4] as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless homicide. . . ."

Reckless homicide requires proof that the defendant (1) operated an automobile (2) in reckless disregard for the safety of others; (3) the defendant's conduct proximately caused injury to the victim, and (4) within one year, the victim died as a result of these injuries.

Murder does not require the operation of an automobile. In addition, murder requires malice, either express or implied, whereas reckless homicide requires recklessness.[5] Strict application of the elements test leads to the conclusion that reckless homicide is not a lesser included offense of murder.

While the elements of murder do not include all elements of reckless homicide, State v. Elliott, supra, makes clear that the lesser included inquiry does not end with an application of the elements test. In Elliott we held that where an offense has traditionally been considered a lesser included offense of the greater offense charged, we will continue to construe it as a lesser included, despite the failure to strictly satisfy the elements test.

There is *dictum* in an opinion of this Court that reckless homicide is a lesser included of murder. In State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996), the issue before the Court was whether the trial court committed error in allowing the State to introduce evidence of the defendant's post- arrest silence and his lack of remorse. In reversing, we observed that

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[4]Section 56-5-2910, as amended, provides that the victim's death must occur within three years of the date of injury.

[5]While malice and recklessness obviously are not equivalent, extreme recklessness can lead to an inference of malice. See State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957) (malice may be inferred from an act so reckless as to manifest depravity of mind and disregard of human life).

> Reid was tried for the offenses of murder and ABIK. The *lesser-included offenses of reckless homicide*, involuntary manslaughter, and assault and battery of a high and aggravated nature (ABHAN) were also submitted to the jury. During deliberations, the jury twice requested clarification as to the differentiation between murder and reckless homicide. The only pertinent distinction between the greater and lesser offenses is the element of malice.

Id. at 78, 476 S.E.2d at 697 (emphasis supplied). With the exception of this isolated comment, nothing in the jurisprudence of this state indicates that reckless homicide is a lesser included offense of murder.

The instant case does not present an anomaly such as that in Elliott. Despite the above-quoted *dictum* in State v. Reid, supra, this Court has never held that reckless homicide is a lesser included offense of murder. We decline to do so. We instead adhere to the result dictated by the elements test for lesser included offenses, and hold that reckless homicide is not a lesser included offense of murder. To the extent State v. Reid, supra, may be read to indicate reckless homicide is a lesser included offense of murder, it is overruled.

CONCLUSION

Under the elements test, reckless homicide is not a lesser included offense of murder, nor is reckless homicide an offense that has traditionally been considered a lesser included of murder. We therefore AFFIRM the trial court's refusal to give Watson's requested jury charge on the offense of reckless homicide.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice George T. Gregory, Jr., concur.

The Supreme Court of South Carolina

In the Matter of William Jefferson McMillian, III, Respondent.

ORDER

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

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

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

make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

Costa M. Pleicones J.

FOR THE COURT

Columbia, South Carolina

May 1, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Leonard Brown,

Appellant.

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 3485
Formerly Unpublished Opinion No. 2002-UP-198
Heard December 4, 2001 - Filed March 14, 2002

REVERSED

Deputy Chief Attorney Joseph L. Savitz, III, of SC Office of Appellate Defense, of Columbia, for appellant.

Deputy Director for Legal Services Teresa A. Knox, Legal Counsel Tommy Evans, Jr., and Legal Counsel J. Benjamin Aplin, all of South Carolina Department of

Probation, Parole, and Pardon Services, of Columbia, for respondent.

SHULER, J.: Leonard Brown appeals the circuit court's decision to revoke his probation for failing to fulfill a special condition. We reverse.

FACTS/PROCEDURAL HISTORY

On January 13, 1992, an Aiken County grand jury indicted Leonard Brown on two counts of criminal sexual conduct with a minor, first degree. Brown subsequently pled guilty to both offenses and the trial court sentenced him to eight years imprisonment on the first count. On the second count, the court sentenced Brown to a concurrent twenty-year term, suspended upon the service of five years probation. In so doing, the court imposed additional conditions of probation including a requirement that Brown "[m]ust obtain treatment for problem." The sentencing sheet for this offense also reflected that Brown was to "get treatment" as part of his probationary sentence.

In August 1996, after serving four and one half years of his eight-year sentence, Brown was paroled and began his five-year probationary period. On February 4, 1998, the Department of Probation, Parole, and Pardon Services (DPPPS) referred him to Denmark Mental Health for sex offender counseling. Although Brown attended all scheduled therapy sessions, he refused to admit his guilt for the crimes to which he had pled guilty. Believing this refusal was hindering effective treatment, Brown's counselor consulted with his probation officer, Agent Heather Craven. As a result, Craven served Brown with a Probation Citation for violating Condition 12 of the standard probation form "and the special conditions ordered . . . ."

On April 7, Brown's counselor closed his case file with the following notation:

> The purpose of this session was to communicate with another agency about the [client] and his treatment. I spoke to Ms. Craven from Probation and Parole. We discussed the fact that Leonard had not wanted to work on the problem that he was sent in for. Because he had been dealing with the issue of being charged with CSC and served time for five years, his not admitting to the issues was not just a denial stage. *I wanted to finalize the decision to keep the chart open or to close it. [Craven] agreed that we would close it and let the courts decide if they want him to return.* It was noted that Leonard did attend all scheduled sessions[;] the issue was not that he was not coming in, just that we were not working on the issues that the courts sent him for. With this, the chart will be closed. (Emphasis added).

DPPPS held an administrative hearing the same day. The hearing officer found Brown violated probation but recommended the case be "**FORWARDED FOR JUDICIAL REVIEW AND CLARIFIATION OF SPECIAL CONDITION**." The hearing officer's justification summary also declared the "matter is referred to the Court for a clarification of the special condition requiring Brown to "obtain treatment for his problem[.]"

The circuit court held a revocation hearing on November 30, 1998. Upon learning Brown was indigent and not represented by counsel, the court appointed an attorney present in the courtroom, Norma Jett, and stated: "Ma'am, I would like to go ahead and do it this afternoon if you tell me you've had adequate time to talk to him." After a pause to consult with Brown and Theodore Weathersbee from DPPPS, Jett represented Brown during the hearing.

According to Jett, Weathersbee assured her prior to the proceeding that DPPPS was not seeking revocation, but merely wanted a clarification of the trial court's "vague probation order" because it was unclear whether the language "seek treatment for problem" required Brown to admit guilt as part of his

mandatory therapy. Indeed, Weathersbee initially stated on the record that "all that we would ask is the court for clarification of the special condition requiring Mr. Brown to obtain treatment for his problem." After further discussion, however, the circuit court revoked Brown's probation finding he did not do "that which is necessary to receive the proper mental health counseling for sex offenders," and reinstated seven years of his original twenty-year sentence.

The following day, pursuant to Jett's Rule 29, SCRCrimP motion, the court reheard arguments concerning the revocation. At that time, Weathersbee admitted speaking with Jett about the meaning of "[m]ust obtain treatment for problem":

> I did indicate to [Jett], your honor, that [the order] did not say must attend and successfully complete. I made the statement to Ms. Jet[t], you know, must obtain treatment for problem. Could that be one day, one week, one year, what did that entail. . . .
>
> Your honor, in the most ordinary circumstance most judges would say attend and successfully complete, that's been our history. This just says must obtain treatment for problem. . . .

In response, the court stated:

> And it just goes without saying, Mr. Weathersbee, that like I've ordered on several sentences this week, must obtain mental health *and follow all the advice*. I don't add onto that and successfully complete the program. That goes without saying. . . . That's inclusive of the order for mental health counseling. (Emphasis added).

The court then denied the motion and this appeal followed.

LAW/ANALYSIS

Although a decision to revoke probation generally rests within the circuit court's discretion, an appellate court should reverse when that decision is based on an error of law or lacks supporting evidence. See State v. Proctor, 345 S.C. 299, 546 S.E.2d 673 (Ct. App. 2001); State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999).

Here, the probation order unambiguously stated Brown was to "obtain treatment" for his problem; it did not specifically order him to *complete* treatment. Nor did it specify that Brown "must follow all advice" or anything of that nature. Moreover, even if the order were interpreted to mean Brown had to successfully complete a treatment program, it did not on its face require him to complete a particular sex offender program or admit his guilt in order to do so. Finally, the record reflects the order's vague directive to "obtain treatment for problem" clearly resulted in confusion among the complaining probation agent, Brown's mental health counselor, the DPPPS administrative hearing officer, and the DPPPS prosecuting officer, as demonstrated by the clinician's note, the DPPPS "Summary of Administrative Hearing," and Mr. Weathersbee's own statements at the revocation hearings.

Interestingly, the respondent's brief notes that "other jurisdictions have upheld probation violations . . . *provided the offender was on notice that his failure to admit guilt at his counseling sessions would be considered a violation*." (Emphasis added). Brown, of course, could not have been on such notice because everyone involved with his case sought *clarification* of the probation order from the circuit court. The cases cited by the respondent, therefore, are readily distinguished.

In State v. Webb, 673 A.2d 1345, 1345 (Me. 1996), the supreme court of Maine upheld a probation revocation under circumstances similar to Brown's, where one of the conditions of the defendant's probation was that he "undergo sex abuser counseling/treatment *to the satisfaction of the probation officer.*" (Emphasis added). Similarly, in People v. McGuire, 576 N.E.2d 391 (Ill. 1991), an Illinois appellate court affirmed the termination of court supervision when

McGuire refused to admit sexual misconduct. There, however, the court based its decision on the fact that McGuire had agreed to a negotiated plea conditioned upon "his seeking an evaluation *and following all recommendations made*." Id. at 394. As well, in State v. Peck, 547 A.2d 1329, 1331 (Vt. 1988), the Vermont supreme court affirmed revocation where the probation condition stated "attend and participate in mental health counseling, treatment and rehabilitation *as directed by [the] probation officer and complete it to the full satisfaction of the probation officer*." (Emphasis added). The order before us is clearly distinguishable on its face from these probation directives.

Finally, and most similarly, in State v. Woveris, 635 A.2d 454 (N.H. 1993), the New Hampshire supreme court affirmed a probation revocation *but only after the original probation order had been clarified and Woveris given a chance to conform*. In that case, pursuant to a negotiated plea Woveris agreed to "participate in sex offender treatment." Id. at 455. Thereafter, however, two treatment programs refused to admit Woveris because he continued to deny culpability for his offenses. The State pursued revocation arguing Woveris "had failed to meaningfully participate in the counseling." Woveris countered that meaningful participation, "while oftentimes required by a court order, was not clearly required by the terms of [his] particular sentencing order." Id.

Instead of revoking Woveris' probation, however, the court clarified the order and required Woveris not only to undertake treatment, but also to "meaningfully participate in same." Id. Although Woveris subsequently was accepted into a treatment program and attended fourteen counseling sessions, he continued to deny culpability even when admitting his own actions. Based on the counseling center's characterization of Woveris' behavior as a "failure to participate meaningfully in the program," the State sought revocation a second time. Woveris' probation was then revoked and his case affirmed by the supreme court. In its opinion, the court noted other jurisdictions allowed similar violations "where the defendant is not amenable to therapy for sexually deviant behavior due to his general denial of culpability, *so long as the defendant was sufficiently on notice of the need to admit and discuss behavior as a condition of probation*." Id. (emphasis added).

We believe the facts of this case mirror those in the initial Woveris proceedings. In our view, Brown was not sufficiently on notice of such a condition until his probation was in fact revoked. Although we agree with the circuit court's reading of the probation order, we find Brown should have been afforded an opportunity to comply with that interpretation, particularly in light of the fact that he otherwise complied with all aspects of his probationary sentence. The circuit court, therefore, abused its discretion in revoking Brown's probation.

REVERSED.

CURETON, J., concurs.

STILWELL, J., dissents in a separate opinion.

STILWELL, J. (dissenting): I respectfully dissent, solely because I believe the specific wording of the additional condition of his probation that Brown "must obtain treatment" is controlling.

The discussion centering on whether Brown must "complete treatment" or "admit guilt" in order to get treatment I submit totally misses the point. In my opinion, it was incumbent on Brown to do whatever was necessary to comply fully with the condition of his probation. If he was rejected at one facility, the burden was on Brown to go back to his probation officer and explain that he could not obtain treatment at that location and seek another source to "obtain treatment."

It is not appropriate to allow Brown to sit idly by in the hopes that his non-compliance would be tolerated and then ultimately excused.

I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Colonel Donald Hansen, Parent and Guardian and On Behalf of His Two Minor Children Donald Hansen and Katherine Hansen,

Appellant,

v.

United Services Automobile Association,

Respondent.

Appeal From Richland County
L. Henry McKellar, Trial Court Judge

Opinion No. 3486
Submitted April 8, 2002 - Filed April 29, 2002

AFFIRMED

John J. Johnson; and Eric C. Fosmire, of Collins & Lacy, both of Columbia, for appellant.

Robert Y. Knowlton and Franklin H. Turner, III, both of Haynsworth, Sinkler & Boyd, of Columbia, for respondent.

GOOLSBY, J.: Donald G. Hansen, acting on behalf of his two minor children, filed this action against his insurance carrier, United Services Automobile Association (USAA), seeking declaratory relief based on USAA's interpretation of the family member exclusion in Hansen's insurance policy. The trial court granted USAA summary judgment. Hansen appeals. We affirm.[1]

Facts

On May 31, 1998, while traveling from Ohio, Deborah S. Hansen and her two minor children were involved in a single-car accident in Laurens County, near Clinton, South Carolina. As a result of the accident, Ms. Hansen died and the two children sustained injuries.

At the time of the accident, the family's automobile was covered by a liability insurance policy issued by USAA. The policy provided a maximum limit of liability coverage for bodily injury by any one person of $100,000 and a limit of $200,000 for all bodily injury damages resulting from any one accident. The policy contained a family exclusion provision:

> We do not provide Liability Coverage for you or any **family member** for [bodily injury] to you or any **family member** to the extent that the limits of liability for this coverage exceed the limits of liability required by the Ohio financial responsibility law.

(bold in original). Immediately following the family exclusion provision, the policy contains an additional provision entitled "Out of State Coverage":

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

> If an auto accident to which the policy applies occurs in any state or province other than the one in which **your covered auto** is principally garaged, your policy will provide <u>at least</u> the minimum amounts and types of coverages required by law.

(boldface in original; emphasis added).

At the time of the accident, the minimum coverage required by South Carolina was $30,000 per accident.[2] The minimum required by Ohio was $25,000 per accident.[3] In February, 1999, USAA offered Hansen the amount of Ohio's minimum statutory requirement: $25,000 coverage for the two children. Four months later, USAA offered him $30,000 in compliance with South Carolina's statutory minimum.

On December 29, 1999, Hansen filed a complaint against USAA, seeking declaratory relief based on breach of contract, violation of the South Carolina Unfair Claims Practices Act, and bad faith arising out of USAA's refusal to provide coverage in excess of the statutory minimums. Relying on the family exclusion provision of the policy, USAA filed a motion requesting summary judgment on all the claims. On November 7, 1999, the trial court heard arguments. On December 12, 2000, the court granted USAA's motion for summary judgment. This appeal followed.

Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

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[2] S.C. Code Ann. § 38-77-140 (2002).

[3] Ohio Rev. Code Ann. § 4509.01(K) (Anderson 2001).

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4]

"Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact."[5] Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.[6] Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial.[7]

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment.[8] "The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment."[9]

Law/Analysis

I. Policy Interpretation

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[4] Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

[5] Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

[6] Id. at 115, 410 S.E.2d at 545.

[7] Rule 56(e), SCRCP; SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990).

[8] Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

[9] Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995).

Hansen contends the trial court erred in holding that the policy language is unambiguous and in granting summary judgment to USAA. We disagree.

An insurance contract is subject to the general rules of contract construction.[10] "The purpose of all rules of construction is to ascertain the intention of the parties to the contract."[11] Where the terms of a contract are clear and unambiguous, its construction is for the court; but where the terms are ambiguous, the question of the parties' intent must be submitted to the jury.[12] "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[13] Furthermore, "[a] contract is ambiguous only when it may fairly and reasonably be understood in more ways than one."[14] "[I]n construing an insurance contract, all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity."[15] "Where language used in an insurance contract is ambiguous, or where it is capable of

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[10] Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 421, 392 S.E.2d 460, 461 (1990).

[11] Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962).

[12] Holcombe v. Orkin Exterminating Co., 282 S.C. 104, 105, 317 S.E.2d 458, 459 (Ct. App. 1984).

[13] Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citations omitted).

[14] Universal Underwriters Ins. Co. v. Metropolitan Prop. & Life Ins. Co., 298 S.C. 404, 407, 380 S.E.2d 858, 860 (Ct. App. 1989) (citations omitted)

[15] Id.

two reasonable interpretations, that construction which is most favorable to the insured will be adopted."[16]

For accidents occurring in Ohio, Hansen concedes the policy limits coverage available to family members is the minimum limits required by Ohio law: $25,000 per accident.[17] For accidents occurring outside of Ohio, Hansen interprets the policy language as meaning that the insurance company will pay "at least" the mandatory out-of-state statutory minimums - $30,000 in this instance - and that the next level of coverage would be the $200,000 policy limits. In other words, Hansen argues, if the accident occurs out of state, the family member exclusion goes out the window altogether and the insured gets the face value of the policy. In the alternative, Hansen argues the policy is ambiguous and therefore is to be construed in his favor, again affording him the policy limits.[18]

For accidents occurring outside of Ohio, USAA maintains the policy limits coverage to out-of-state statutory minimums and the phrase "at least" does not imply the policy will pay the policy limits. USAA also contends the "at least" phrase does not create any ambiguities. Thus, USAA maintains its exposure in this accident is capped at the mandatory minimum liability insurance required in South Carolina: $15,000 per person or $30,000 per occurrence.

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[16] Poston v. National Fid. Life Ins. Co., 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990) (citations omitted).

[17] Ohio Rev. Code Ann. section 4509.01(K) (Anderson 2001) provides $25,000 minimum amount of liability coverage per accident.

[18] See Quinn v. State Farm Mut. Auto. Ins. Co., 238 S.C. 301, 304, 120 S.E.2d 15, 16 (1961) (citations omitted) ("[W]here the words of an insurance policy are ambiguous or where they are capable of two reasonable interpretations, that interpretation will be adopted which is most favorable to the insured.").

Hansen's interpretation of the policy is not a fair one. The situs of the accident should not produce such disparate results: $25,000 in Ohio versus $200,000 out-of-state.[19] Hansen offers no explanation for such disparity. On the other hand, to interpret the Hansen policy as limiting the family coverage to the minimum limits of South Carolina is fair and reasonable and gives effect to all relevant policy provisions.

Western States Insurance Co. v. Zschau[20] examines a policy provision that is similar to the Hansen policy. The pertinent part of the Zschau "out-of-state" clause reads as follows:

> A. If the state or province has:
>
> ***
>
> 2. A compulsory insurance or similar law requiring a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage.[21]

(emphasis added). The Zschau court opined, "[W]e do not believe that the 'out of state' coverage provision operates to expand any of [the insurer's] coverage obligations under the policy."[22] The court concluded that any additional

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[19] See Bruce v. Blalock, 241 S.C. at 161, 127 S.E.2d at 442 (citations omitted) ("All contracts should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results.").

[20] 698 N.E.2d 198 (Ill. Ct. App. 1998).

[21] Id. at 200.

[22] Id. at 204.

coverages, such as underinsured motorist protection, were a matter of contract between the parties.[23]

None of the other courts construing similar "out of state" coverage clauses have found the language to be ambiguous or vague.[24] "Rather, each of these courts has found that the plain language of this provision requires that an insured who is subject to compulsory financial responsibility laws of another state must be provided coverage up to the minimum required amount."[25]

Hansen argues, in particular, that the "at least" phrase creates coverage in the amount of the policy limits. A similar argument was litigated in Atkins v. Hartford Casualty Insurance Co.,[26] a case with the following policy provision:

> If an auto accident to which this policy applies occurs in any state or province other than the one in which your covered auto is principally garaged, we will interpret your policy for that accident as follows:

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[23] Id. at 203; see Sotirakis v. United Servs. Auto. Ass'n, 787 P.2d 788, 791 (Nev. 1990) (holding that it was unlikely the insureds expected the family exclusion clause to be void while they traveled out of state, and USAA probably had no expectation of having its family exclusion clause rendered void when its insureds left the state; it appeared both parties bargained for an insurance policy which contained a family exclusion clause); Jarrett v. Pennsylvania Nat'l Mut. Ins. Co., 584 A.2d 327, 329 (Pa. Super. Ct. 1990) (holding that a policy that contained an "out-of state" clause with "at least" language provided only the level of coverage required by the situs state of non-resident owners; the court noted the insurer could have contracted to provide more coverage than was required but did not).

[24] Zschau at 203.

[25] Id.

[26] 801 F.2d 346 (8th Cir. 1986).

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> 2. A compulsory insurance or similar law requiring a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, your policy will provide at least [the required] minimum amounts and types of coverage.[27]

(emphasis added). In Atkins, the appellant argued "[t]he phrase 'at least' implies the possibility of more coverage if more is provided for in the policy."[28] The court held no policy provision provided other coverage; thus, the phrase "at least" was of no consequence in that instance.[29]

In the Hansen policy, the "at least" phrase merely anticipates the possibility of coverage "in addition to the minimum amounts and types of coverage required by law." Any additional coverage provided Hansen would have to be a matter of contract between him and USAA. Because Hansen did not bargain for any such additional coverage, the "at least" phrase, as in Atkins, is of no consequence.

Insurers have the right to limit their liability and to impose whatever conditions they desire upon an insured, provided they are not contravening a statute or public policy.[30] The premium charged reflects the exclusions contained in the policy.

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[27] Id. at 347.

[28] Id. at 348.

[29] Id.

[30] Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984).

The majority of compulsory insurance jurisdictions have invalidated household exclusions clauses only to the extent of the statutorily prescribed mandatory minimum liability coverage.[31] In United Services Automobile Ass'n v. Markosky, South Carolina aligned itself with the majority view: "Reasonable exclusionary clauses which do not conflict with the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes are permitted."[32] We therefore hold USAA owes no further coverage under the policy.

II. Bad Faith and Unfair Insurance Practices

Hansen argues the trial court erred in granting summary judgment on the issues of bad faith and unfair insurance practices; he contends further development of the facts is necessary. We disagree.

A.

Bad faith refusal to pay benefits under a contract of insurance includes (1) the existence of a mutually binding contract of insurance between the plaintiff and defendant; (2) a refusal by the insurer to pay benefits due under the contract; (3) the refusal is the result of the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) the refusal to pay causes damage to the insured.[33] Generally, if there

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[31] Van Horn v. Atlantic Mut. Ins. Co., 641 A.2d 195, 207 (Md. 1994); see also Powell v. State Farm Mut. Auto. Ins. Co., 585 A.2d 286, 294 (Md. 1991) (aligning itself with majority view that "exclusions in liability insurance policies are valid and enforceable as to amounts exceeding coverage required in financial responsibility laws").

[32] 340 S.C. 223, 226, 530 S.E.2d 660, 662 (Ct. App. 2000) (citations omitted).

[33] Howard v. State Farm Mut. Auto. Ins. Co., 316 S.C. 445, 451, 450 S.E.2d 582, 586 (1994).

is a reasonable ground for contesting a claim, the denial of the claim does not constitute bad faith.[34]

Hansen argues he bargained for and paid the premiums for liability insurance coverage far greater than the mandatory minimum he is receiving. Our disposition of the policy interpretation negates this bad faith claim; he is getting exactly what he bargained for - nothing more, nothing less.

B.

Hansen alleges USAA engaged in unfair insurance practices under S.C. Code Ann. section 38-59-20(6).[35] USAA attempted to settle the Hansen claim for the Ohio minimum limit of $25,000 but later offered the South Carolina limit of $30,000. Hansen asks for further development of the issues to ascertain whether this low initial offer is a continuing practice of USAA. Hansen failed to raise this argument to the trial court; thus we find this argument is not preserved.[36]

Conclusion

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[34] Cock-N-Bull Steak House v. Generali Ins. Co., 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996).

[35] S.C. Code Ann. section 38-59-20(6) (2002) lists the following as an improper claims practice: "Offering to settle claims, including third-party liability claims, for an amount less than the amount otherwise reasonably due or payable based upon the possibility or probability that the policyholder or claimant would be required to incur attorneys' fees to recover the amount reasonably due or payable."

[36] Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 306, 529 S.E.2d 45, 56 (Ct. App. 2000) (holding that an argument is not preserved for appeal where it has not been raised to or ruled upon by the trial court).

The court notes this is indeed a tragic case; however, "[t]he Court cannot exercise its discretion as to the content of such contract or substitute its own construction for the agreement clearly entered into between the parties."[37]

AFFIRMED.

ANDERSON, J., and THOMAS, A.J., concur.

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[37] Bruce v. Blalock, 241 S.C. at 161, 127 S.E.2d at 442 (citations omitted).