The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS

The South Carolina Bar has proposed the attached amendments to Rule 1.15, Safekeeping Client Property, regarding the disbursement of funds, and the Terminology Section and Rule 8.5, SCRPC, Rule 407, SCACR, regarding applicability of the Rules of Professional Conduct to the provision of non-legal services. Persons desiring to submit written comments regarding these proposals may do so by filing an original and seven (7) copies of their written comments with the Supreme Court addressed to the Honorable Daniel E. Shearouse, Clerk of Court, P.O. Box 11330, Columbia, South Carolina 29211. Any written comments must be received by the Supreme Court by Friday, August 2, 2002.

Columbia, South Carolina

May 30, 2002

PROPOSED ADDITION TO RULE 1.15, SCRPC, SAFEKEEPING CLIENT PROPERTY, RULE 407, SCACR.

(d) A lawyer shall not make disbursement of funds from an account containing the funds of more than one client or third person unless the funds are collected funds; provided, however, a lawyer may treat as equivalent to collected funds

(1) Cash, electronic funds transfers, other deposits treated by the depositary bank as equivalent to cash, government checks, certified checks, cashiers' checks, or other checks drawn by a bank, and insurance company checks;

(2) any instrument payable at or through a bank, if (i) the amount of such instrument does not exceed $5,000 and (ii) the lawyer has reasonable and prudent belief that the deposit of the instrument will be collected promptly.

As to such deposits described in (1) and (2), the disbursement is at the lawyer's own risk and, if collection does not occur, the lawyer shall, as soon as practical but in no event more than five working days after notice of noncollection, deposit replacement funds in the account.

PROPOSED ADDITION TO TERMINOLOGY, SCRPC, RULE 407, SCACR

TERMINOLOGY

AClient@ includes any person to whom a lawyer provides legal advice or services as well as any person who gives anything of value to receive advice, services, or products from an enterprise if the enterprise provides any of the advice or services through a lawyer whom the recipient contemporaneously knows to be a lawyer.

AFee@ includes anything of value given by a client for representation by a lawyer.

AFirm@ or Alaw firm@ denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, lawyers associated with an enterprise who represent clients within the scope of that association and lawyers in a legal services organization. See Comment, Rule 1.10.

ARepresent@ and Arepresentation@ used in the context of a lawyer serving a client denotes providing advice or services to that person.

PROPOSED AMENDMENT TO RULE 8.5, SCRPC, JURISIDICTION, RULE 407, SCACR

(a) A lawyer admitted to practice . . . .

(b) A lawyer giving advice or providing services that would be considered to be the practice of law if provided while the lawyer was affiliated with a law firm is subject to the Rules of Professional Conduct with respect to the giving of such advice or the providing of such services whether or not the lawyer is actively engaged in the practice of law or affiliated with a law firm. In giving such advice and in providing such services, a lawyer shall be considered to be representing a client for purposes of the Rules of Professional Conduct.

Comment:

The Rules of Professional Conduct apply to a lawyer giving advice or providing services that are not prohibited as the unauthorized practice of law when provided by a non-lawyer but are considered to be the practice of law when provided by a lawyer. For instance, an accountant giving tax advice to a client is not normally engaged in the unauthorized practice of law. However, if a lawyer gives the same advice, he or she is giving legal advice and is subject to the Rules of Professional Conduct, whether working for a law firm, an accounting firm, a consulting firm or another enterprise. Of course, this is also true if the lawyer is giving advice or providing services that would constitute the unauthorized practice of law by a non-lawyer. In giving both kinds of services, a lawyer is considered to be representing a client for the purposes of determining which of these Rules govern the lawyer=s conduct.

This rule does not permit lawyers to engage in activities that would otherwise violate Rules 5.4 and 5.5 or any other of the Rules of Professional Conduct.

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

June 3, 2002

ADVANCE SHEET NO. 18

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Isiah Rudy Loadholt, in his capacity as Sheriff of Hampton County, Petitioner,

v.

South Carolina State Budget and Control Board, Division of General Services, Insurance Reserve Fund, Respondent,

v.

Sherry Capers, Tounda Taylor, and Kim Davenport, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 25472
Heard May 14, 2002 - Filed May 28, 2002

Dismissed as Improvidently Granted

William T. Toal, of Johnson, Toal & Battiste, of Columbia, for petitioner Isiah Rudy Loadholt.

Joel D. Bailey, of The Bailey Law Firm, P.A., of Beaufort, for petitioners Capers, Taylor & Davenport.

Andrew F. Lindemann and William H. Davidson, II, both of Davidson, Morrison and Lindemann, P.A., of Columbia, for respondent.

Edward A. Frazier, of Law Office of Ed Frazier, of Lexington; and Alford Haselden, of Haselden, Owen & Boloyan, of Clover, for *Amicus Curiae* South Carolina Trial Lawyers Association.

PER CURIAM: After careful review of the appendix and briefs, we dismiss the writ of certiorari as improvidently granted.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry Morris and Leora M. Hall, Administrators for the Estate of Lizzette Goodly Morris, Limus Williams, Administrator for the Estates of Ollie and Carrie Williams, and Annie Ruth Gambrell, Appellants,

v.

Anderson County and Anderson County Sheriff's Department, Respondents.

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

Opinion No. 25473
Heard January 8, 2002 - Filed May 28, 2002

AFFIRMED

Robert E. Treacy, Jr., of Dunaway & Associates, of Anderson, for appellants.

J. Victor McDade and John M. O'Rourke, of Doyle, O'Rourke, Tate & McDade, of Anderson, for respondents.

JUSTICE PLEICONES: This is a negligence action against two governmental entities. Appellants appeal orders granting respondents summary judgment to the extent appellants' claims rest on alleged breaches of statutory duties. Further, appellants purport to appeal orders denying their summary judgment motions to declare the liability limits in the South Carolina Tort Claims Act (TCA)[1] unconstitutional. We agree that summary judgment on the statutory duty claims was proper, and decline to address the merits of the orders denying appellants' summary judgment. Accordingly, we affirm.

Facts

On August 8, 1995, the Anderson County Probate Court issued a detention order authorizing police officers to pick up Rodney E. Bowman (Bowman), who was alleged to be mentally ill. Bowman was not found. On August 20, 1995, Bowman was driving an automobile when he collided with a car in which four people were riding. As the result of this accident, three people died (Ms. Morris and Mr. and Mrs. Williams) and a fourth was seriously injured (Ms. Gamble). The administrators of the deceased victims' estates and Ms. Gamble (collectively appellants) brought these negligence actions against Anderson County and the Anderson County Sheriff's Department (respondents) alleging there was gross negligence in failing to pick up Bowman on the detention order.

---

[1]South Carolina Code Ann. §§15-78-10 et seq. (Supp. 2001).

Appellants and respondents filed cross-motions for summary judgment. Although two actions have been filed, one on behalf of the survivor and one on behalf of the deceased victims, nearly identical orders were filed by the circuit court. Appellants have filed a single brief with this Court, and we decide the issues raised therein together.

Issues

Appellants raise two issues on appeal:

(1) Whether the trial court erred in denying their summary judgment motions to declare the TCA liability caps unconstitutional?; and

(2) Whether summary judgment was properly granted to respondents on the basis of the "public duty rule"?

A. Denial of Summary Judgment

Under the TCA, a governmental entity's liability is capped at $600,000 per occurrence except in the case of medical or dental malpractice where the per occurrence cap is $1,200,000. Compare S.C. Code Ann. §15-78-120 (a)(2) with (a)(4) (Supp. 2001).[2] Appellants argued that the TCA's two-tiered caps are violative of equal protection and therefore unconstitutional. The circuit court denied appellants' motions for summary judgment seeking to 'raise' the limit in their cases to that for malpractice losses, and appellants have appealed those orders.

The denial of a motion for summary judgment is not directly appealable. Ballenger v. Bowen, 3313 S.C. 476, 443 S.E.2d 379 (1994). Although this Court may, as a matter of discretion, consider an unappealable

[2]These are the current caps. At the time of this accident, the caps were $500,000, and $1,000,000, respectively.

order along with an appealable issue where such a ruling will avoid unnecessary litigation, Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994), we decline to address the constitutional issue here. See also, e.g., Hedgepath v. AT&T, Op. No. 3418 (S.C. Ct. App. filed December 10, 2001) (Shearouse Adv. Sh. No. 43 at p. 60). Among other things, an advisory ruling at this juncture, on a constitutional issue which may never arise,[3] would violate our firm policy of declining to reach constitutional issues unless necessary to the resolution of the appeal before us. In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001).

B. Public Duty Rule

Appellants alleged that among the duties breached by respondents were those arising under S.C. Code Ann. §§44-17-430 et seq. (Supp. 2001). These statutes are part of an article establishing procedures for the emergency admission of individuals to psychiatric facilities. The circuit court held that these statutes[4] did not create a duty running to appellants under the 'special duty' exception to the public duty rule doctrine. We agree.

After the circuit court filed its orders, we issued an opinion defining the role of the 'public duty rule' and its relationship to the TCA. Arthurs v. Aiken County, 346 S.C. 97, 551 S.E.2d 579 (2001). We clarified that when the plaintiff's negligence cause of action is predicated on the governmental entity's breach of a **statutory** duty, whether that duty will support the claim is analyzed under the 'public duty rule.' When the duty alleged to have been

---

[3]The liability cap differential would affect appellants only were a jury to return a verdict in excess of the $500,000 cap.

[4]In brief and at oral argument appellants asserted additional statutory bases for a duty. It is well-settled that appellants cannot raise new arguments or change their grounds between trial and appeal. Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996). There is nothing in the record to suggest that these additional statutes were ever raised to or ruled upon by the trial court, and they are not properly before this Court. Id.

breached is based upon the common law,[5] however, the existence of that duty is analyzed as it would be were the defendant a private entity. Id. Thus, to the extent, if any, that appellants' claims rest on alleged breaches of common law duties, they are unaffected by these summary judgment orders which address only the impact of the 'public duty rule' on appellants' statutory duty theory.

As noted above, the trial court held §§44-17-430 et seq. did not create a 'special duty.' We agree.

The 'public duty rule' doctrine recognizes that, generally speaking, statutes which create or define the duties of a public office create no duty of care towards an individual member of the public. Arthurs v. Aiken County, supra. A 'special duty,' running to an individual, may be created by statute if the individual can meet a six part test. A special duty may be found where:

> (1) an essential purpose of the statute is to protect against a particular type of harm;
>
> (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
>
> (3) the class of persons the statute intends to protect is identifiable before the fact;
>
> (4) the plaintiff is a person within the protected class;
>
> (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and

---

[5]For example, the duty to warn. See Rogers v. South Carolina Dep't of Parole & Community Corrections, 320 S.C. 253, 464 S.E.2d 330 (1995).

(6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Id.

Appellants argue that the protected class is "all persons traveling on the highways of Anderson County." This 'class' is not found in the statutes but rather is the *post hoc* class created in light of this tragic accident. Appellants would have us read the class protected by these involuntary commitment statutes as all persons who may be harmed by the committee. Where, as here, the statutory duty is owed to the public as a whole, then the "public duty rule" bars an individual from maintaining a negligence action against the governmental entity involved. See, e.g., Steinke v. South Carolina Dep't of Labor, 336 S.C. 373, 520 S.E.2d 142 (1999); Jensen v. Anderson County Dep't of Social Services, 304 S.C. 195, 403 S.E.2d 615 (1991).

There is no "identifiable before the fact class" created by §§44-17-430 et seq. Because the statutes create no special duty running to the appellants, the trial court properly granted respondents' summary judgment on the statutory duty claims.

Conclusion

We decline to address the merits of the constitutional issue sought to be raised by appellants. We affirm the grant of summary judgment on appellants' §§44-17-430 et seq. claims on the ground they are barred by the public duty rule.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joan Caldwell Johnson, Bryce Anderson, Lorraine Witherspoon Baker, William Bell, Faye Blaylock, Sara Edell Boan, Mike Brewer, Mike Brown, Ronald Callahan, Sandra Coulter, Lisa Crum, Andreas Drutis, Darryl Bernard Epps, Buster Elfin Floyd, Deanna Kay Frans, William Joseph Harnett, Jr., George Henley, Loretta Jones, Margaret Locklear, Tammy Locklear, Linda McCleod, William McCormick, Hugh Meise, Patty Miller, Andrew Nobles, Gary Padgett, Mary Pinchback, Vardry Pittman, Albert J. Samra, Mason Skeenes, Danny Kay Smith, Amber Strickland, Charles Stubbs, Lonya Thigpen, James Thompson, Joseph Chester Walker, Jessie

Williams, Valerie Williams, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

Collins Entertainment Company, Inc., Ace Amusement, LLC, American Amusement Company, Inc., American Amusement of Aiken, Inc., B & J Amusement, Best Amusement Co., Broyles & Lutz, Inc., CBA Games, Inc., Carousel Amusements, Coley, Inc., Drew Industries, Fast Freddies, Great Games, Inc., Greenwood Music Co., Inc., H & J of South Carolina, Inc., Holliday Amusement Company of Charleston, Inc., Hoyts Music Co., Inc., Huckleberry Amusement, Inc., Ingram Investments, J. M. Brown Amusement Co., Inc., Joytime Distributors & Amusement, MHJ

Corporation, MHS Enterprises, Inc., Martin Coin Machine, Inc., McDonald Amusement Co., Midlands Gaming Corp., Pedroland, Inc., R. L. Jordan Oil Co. of North Carolina, Red Dot Amusements, Rosemary Coin Machines of Florence, Inc., Scott's Vending Inc. of Columbia, Sumter Petroleum Co., Tim's Amusement, Inc., Video-Matic Amusements, Inc., H. Hugh Andrews, II, Pamela A. Andrews, Dwayne I. Bohannon, J. M. Brown, Don E. Broyles, Grace E. Coley, Fred Collins, J. Samuel Cox, Kenneth G. Flowe, Carey Hardee, Scott G. Hogue, Lowell E. Holden, Patricia Holliday, Warren P. Holliday, Henry E. Ingram, Steven E. Lipscomb, Tim Mahon, Jimmy Martin, Jr., Cynthia McDonald, James McDonald, Allan

Schaefer, David R.
Simpson, Ron Simpson,
Mickey H. Stacks,
William Darwin
Wheeler, and Hershel L.
Williamson, Defendants.

On Certification from the United States District Court for the District of South Carolina
Joseph F. Anderson, Jr.,
United States District Judge

Opinion No. 25474
Heard December 11, 2001 - Filed May 28, 2002

CERTIFIED QUESTIONS ANSWERED

Lawrence Edward Richter, Jr., and David K. Haller, both of The Richter Firm, of Mt. Pleasant; R. Randall Bridwell, of Columbia; and Richard Mark Gergel, W. Allen Nickles, III, Carl L. Solomon and David E. Rothstein, of Gergel, Nickles & Solomon, of Columbia, all for Plaintiffs.

Dwight F. Drake, C. Mitchell Brown, B. Rush Smith, III, Zoe Sanders Nettles and R. Bruce Shaw, all of Nelson Mullins Riley & Scarborough; A. Camden Lewis, Mary Geiger Lewis and Mark W. Hardee, of Lewis Babcock & Hawkins, L.L.P., all of Columbia,

for Exhibit A Defendants.

Richard A. Harpootlian, of Richard A. Harpootlian, P.A., of Columbia, for Exhibit B Defendants.

J. Boone Aiken, III, of Aiken, Bridges, Nunn, Elliott & Tyler, of Florence; and James B. Richardson, Jr., of Richardson & Birdsong, of Columbia, for Defendant Pedroland, Inc.

CHIEF JUSTICE TOAL: We agreed to answer the following questions certified by the United States District Court for the District of South Carolina:

I. Does the ruling in *Video Gaming Consultants v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000), apply to the second phrase in S.C. Code Ann. § 12-21-2804(B) prohibiting the offering of "special inducements" or is that portion of the statute otherwise unconstitutional on its face?

II. Would S.C. Code Ann. § 12-21-2804(B) be unconstitutional as applied, if construed to prohibit the offering of cash payouts in excess of $125?

III. Is the special inducement prohibition in S.C. Code Ann. § 12-21-2804(B) applicable to persons who do not themselves "maintain a place or premises," but instead lease machines to others who "maintain a place or premises" on a basis which results in the sharing of profits and under circumstances in which the lessor is aware of the activities which violate section 12-21-2804(B) and, despite that knowledge, accepts profits from the operation of the machines at issue?

IV. Under the findings of fact set forth in the District Court's

Memorandum Opinion on Plaintiffs' Motion for Partial Summary Judgment, entered April 28, 1999, in which the facts were viewed in the light most favorable to the defendants, is the defendants' conduct in offering or allowing to be offered, the payment of sums in excess of $125 for credits accumulated on a video gambling machine subject to prosecution under S.C. Code Ann. § 12-21-2804(F) as the unlawful offering of a special inducement to gamble as prohibited by Section 12-21-2804(B)?

V. While the general operation of the devices at issue was authorized by law during all times at issue, and while South Carolina law generally exempts the operation of the devices at issue from statutory penalties under the state's criminal laws relating to gambling, would the activity alleged nonetheless become "a gambling business which is a violation of the law of [the] State" of South Carolina if defendants are proven to have routinely offered and made payouts in excess of that allowed by state law or to have created fraudulent records to disguise the making of such payouts?

VI. Does the availability of a remedy under S.C. Code Ann. §§ 32-1-10 and 32-1-20 for certain gambling losses preclude plaintiffs from seeking recovery under other state law theories for: (a) losses which are compensable under these sections if timely filed; or (b) losses which would not be compensable under these sections regardless of the time of filing?

VII. Under the findings of fact set forth in the District Court's Memorandum Opinion on Plaintiffs' Motion for Partial Summary Judgment, entered April 28, 1999, in which the facts were viewed in the light most favorable to the defendants, does the defendants' conduct constitute an unfair or deceptive act in the conduct of any trade or commerce, as a matter of law, under SCUTPA, S.C. Code Ann. § 39-5-10 *et seq.*?

FACTUAL/ PROCEDURAL BACKGROUND

In June 1997, plaintiffs[1] brought this suit in state court alleging that defendants participated in operating video poker machines in a manner which violated state law. The causes of action asserted by the plaintiffs arise under the Racketeer Influenced Corrupt Organizations Act (RICO), the South Carolina Unfair Trade Practices Act (SCUTPA), and S.C. Code Ann. §§ 32-1-10 and 32-1-20 (recovery for gambling losses in excess of $50.00 at any one time or sitting). Because one of the plaintiffs' claims involved federal law (RICO), the defendants removed the action to federal court. However, the District Court also had to deal with several state law issues. In 1998, the District Court certified the following question to this Court: "Do video poker machines violate South Carolina's constitutional ban on lotteries?" By a 3-2 vote, this Court held that video poker does not constitute a lottery. *Johnson v. Collins*, 333 S.C. 96, 508 S.E.2d 575 (1998).

In February 1999, plaintiffs moved for summary judgment against eight[2] of the defendants.[3] The District Court issued a Memorandum Opinion on April 28, 1999, granting plaintiffs' motion for partial summary judgment. The defendants' appealed. The Fourth Circuit Court of Appeals vacated the District

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[1]Plaintiffs are a group of habitual gamblers who filed this action in an attempt to recover the losses they sustained on video poker machines owned or operated by the named defendants. The District Court has denied plaintiffs' motions for class certification.

[2]Both plaintiffs' and defendants' briefs state the motion was made against eight defendants: Collins Entertainment Corp., Inc., Fred Collins, Jr., R.L. Jordon Oil Co., MHS Enterprises, Inc., Mickey Stacks, Pedroland, Inc., Ingram Investments, Inc., and Henry E. Ingram. The District Court Opinion, however, only refers to seven defendants.

[3]Although the motion was directed at only seven or eight defendants, the District Court permitted briefing and argument by all of the defendants in the case because of the potential consequences to them of an adverse ruling.

Court's Order. *Johnson v. Collins Entertainment Co.*, 199 F.3d 710 (4th Cir. 1999). The Fourth Circuit based its ruling on the federal courts' abstention doctrine established in *Burford v. Sun Oil Co.*, 63 S. Ct. 1098, 319 U.S. 315, 87 L. Ed. 1424 (1943), and determined the District Court improperly ruled on unsettled issues of state law. The Fourth Circuit remanded the case with directions to stay plaintiffs' damage claims until the state court system could address the unresolved issues of state law.[4]

LAW/ ANALYSIS

I. Does the ruling in *Video Gaming Consultants v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000), apply to the second phrase in S.C. Code Ann. § 12-21-2804(B) prohibiting the offering of *special* inducements or is that portion of the statute otherwise unconstitutional on its face?

The defendants argue plaintiffs cannot rely on S.C. Code Ann. § 12-21-2804(B) as a "predicate act" for their RICO claim because in *Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000), this Court declared *all* of section 12-21-2804(B) unconstitutional. We disagree. In *Video Gaming*, we limited our holding to the first clause of section 12-21-2804(B).

S.C. Code Ann. § 12-21-2804(B) provides as follows:

> No person who maintains a place or premises for the operations of machines licensed under § 12-21-2720(A)(3) may advertise in any manner for the playing of the machines nor may a person offer or allow to be offered any special

[4]The Fourth Circuit did not articulate which issues of state law it believed to be unsettled. Therefore, the District Court invited the parties to submit what they believed to be the material, unresolved issues of state law remaining in the case.

> inducement to a person for the playing of machines permitted under § 12-21-2720(A)(3).[5]

This section addresses two distinct topics. The first clause of the section provides for a ban on advertising the playing of gaming machines. The second clause of the section provides for a ban on the offering of "special inducements" to play video gaming machines. In *Video Gaming Consultants*, this Court addressed the constitutionality of section 12-21-2804(B). We identified the issue as follows: "Is the ban on advertising constitutional?" As we began our analysis, we quoted only the first phrase of the statute, observing: "This code section states: 'No person who maintains a place or premises for the operation of machines licensed under Section 12-21-2720(A)(3) may advertise in any manner for the playing of the machines.' " *Video Gaming Consultants*, 342 S.C. at 37-38, 535 S.E.2d at 644. This Court then analyzed the statute's constitutionality under the commercial speech test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Although this Court never made any reference to the second clause of subsection B, the defendants argue that the following statement which appeared at the end of our opinion indicates we declared the entire section unconstitutional: "In conclusion, we hold the statute does not meet the last two prongs in the *Central Hudson* test and thus the statute is unconstitutional." *Video Gaming Consultants*, 342 S.C. at 45, 535 S.E.2d at 648 (emphasis added). This is the basis for the Plaintiffs' claim that this Court's opinion in *Video Gaming Consultants* only addressed advertising, not the special inducement ban provided for in the second clause of section 12-21-2804(B). We agree with plaintiffs.

This Court did not discuss the special inducement clause of section 12-21-2804(B) in its opinion. Furthermore, the First Amendment analysis in *Video Gaming Consultants* has no application to the special inducement clause since that portion of the statute does not involve protected commercial speech. Even

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[5]This section was repealed effective July 1, 2000.

if payout offers and jackpot displays were considered a form of advertising, offers of illegal payouts in excess of $125 would not be protected under the analysis of *Central Hudson* since such offers do not concern lawful activity and are inherently misleading. "For commercial speech to come within th[e First Amendment], it at least must concern lawful activity and not be misleading." *Video Gaming Consultants*, 342 S.C. at 40, 535 S.E.2d at 645 (quoting *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351). Therefore, since payouts in excess of $125 to a single player in a 24-hour period are illegal under S.C. Code Ann. § 12-21-2791 and *Gentry v. Yonce*, 337 S.C. 1, 12-13, 522 S.E.2d 137, 143 (1999), the advertisement of such payouts is not protected speech.[6]

Furthermore, our decision in *Video Gaming Consultants*, declaring the advertising portion of § 12-21-2804(B) unconstitutional, has no effect on the remaining provisions of the statute since the unconstitutional provision can be severed from the remainder of the statute. This Court recently addressed severability in *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999) stating:

> The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that the legislature would have passed it

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[6]We agree with the language of Judge Anderson, as stated in his Order of Certification. "[T]he South Carolina Supreme Court addressed the constitutionality of at least certain aspects of S.C. Code Ann. § 12-21-2804(B) in *Video Gaming Consultants* . . . . The South Carolina Supreme Court quoted and expressly addressed only the first phrase in that section which relates to advertising, which it ultimately found to be unconstitutional. It did not discuss or address the second phrase which relates to special inducements. Further, the court's rationale as to why advertising of legal activity could not be banned would not appear to apply to that portion of the statute prohibiting 'special inducements,' at least to the extent the term 'special' is construed to include enticements otherwise prohibited by law."

> independent of that which conflicts with the constitution. "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision."

Id. at 649, 528 S.E.2d at 654 (internal citations omitted) (quoting *Dean v. Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959)). Section 12-21-2804 meets this test. The special inducement language is an independent clause. Neither provision depends on the other. In addition, the legislative intent behind South Carolina's Video Game Machines Act ("VGMA") was to limit gambling; therefore, this Court can presume the legislature would have passed the special inducement ban independent of the ban on advertising.

For the aforementioned reasons, we declare that in *Video Gaming Consultants*, this Court did not find all of section 12-21-2804(B) unconstitutional. Therefore, we affirmatively hold the following portion of the statute is not unconstitutional and was not affected by this Court's decision in *Video Gaming Consultants*: "nor may a person offer or allow to be offered any special inducement to a person for the playing of machines permitted under § 12-21-2720(A)(3)."

II. Would S.C. Code Ann. § 12-21-2804(B) be unconstitutional as applied, if construed to prohibit the offering of cash payouts in excess of $125?

The defendants argue Section 12-21-2804(B) would be unconstitutional as applied if a court construed the prohibition on special inducements to include offers of payouts in excess of the $125 limit. We disagree. The defendants argue section 12-21-2804(B) is ambiguous, vague, and offends due process. They argue the statute did not give them "fair warning" that their conduct in advertising jackpots over $125 would be considered a "special inducement," prohibited by the statute. They argue that until this Court's opinion in *Gentry v. Yonce* was published, they had no notice that jackpot displays could be

considered special inducements. They further contend that without notice their actions were in violation of the law, they cannot be held criminally responsible. Finally, defendants argue section 12-21-2804 violates procedural due process because the statute does not afford procedures for a finding of wilfulness or an opportunity for the accused to be heard on the question of wilfulness.[7] We find defendants' arguments are without merit.

"When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." *State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (citations omitted). This general presumption of validity can be overcome only by a clear showing the act violates some provision of the constitution. *Main v. Thomason*, 342 S.C. 79, 535 S.E.2d 918 (2000); *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994); *see also Westvaco Corp. v. South Carolina Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995).

A. Ambiguity and Vagueness

The established test for vagueness is whether the statute provides "fair notice to those to whom the law applies." *Main*, 342 S.C. at 92, 535 S.E.2d at 925. A statute is not vague if a "person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001). However, due process prevents courts "from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225, 137 L. Ed. 2d 432 (1997). This Court, in *Gentry v. Yonce*, did not announce a novel interpretation of section 12-21-2804(B) since the language of the statute gave sufficient notice to defendants

[7]Under section 12-21-2804(F), violations of subsection (B) are subject to prosecution only if the Department of Revenue (DOR) determines the violation was wilful.

that their conduct in offering jackpots in excess of $125 could be considered a "special inducement."

As noted previously, the relevant portion of section 12-21-2804(B) provides, "nor may a person offer or allow to be offered any special inducement to a person for the playing of machines permitted under section 12-21-2720(A)(3)." The term "special inducement" clearly prohibits offering players any form of enticement to gamble beyond the implicit attraction of providing a game with the potential for winnings not to exceed $125 per day. The modifier "special" describes any enticement to gamble on video poker machines beyond the prospect of winning up to $125 per day. Admittedly, the statute itself does not contain a separate definition of the term "special inducement." However, due process does not require every word in a statute to be defined. *Main*, 342 S.C. at 92-93, 535 S.E.2d at 925. The term "special inducement" has enough of a "common, ordinary meaning sufficient to proscribe conduct." *Curtis*, 345 S.C. at 572, 549 S.E.2d at 599.

Furthermore, although the statute itself does not define "special inducement," the regulations of DOR do clarify the term. 27 S.C. Code Reg. 117-190.1 provides:

> [A]ny attempt to influence a person to play video game machines is an inducement and is strictly prohibited by the statute. A location will be subject to the various civil or criminal penalties imposed by the statute for offering any of the following inducements:
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> 1. Free or discounted food or beverages,
> 2. Free or discounted games,
> 3. Prizes, either at the doors or through drawings or other means,
> 4. Coupons offering any of the above
> 5. Cash, or
> 6. Any other valuable consideration

> The above list of inducements is not all inclusive. Any other attempts to influence a person to play a video game machine will also be subject to the various civil or criminal penalties imposed by the statute.

Id. (emphasis added). Illegal payouts fall within the category of "other attempts to influence a person to play a video game machine."

In conclusion, our decision in *Gentry* was not a novel construction of a vague or ambiguous criminal statute so as to raise the due process concerns discussed in *United States v. Lanier*. In *Gentry*, this Court applied the straight-forward, plain meaning of section 12-21-2804(B) holding "advertising or offering of jackpots could be construed as a special inducement . . . ." *Gentry*, 337 S.C. at 11, 522 S.E.2d at 142. Therefore, defendants have not met their burden of showing the statute is unconstitutionally vague or ambiguous.

B. Procedural Due Process

Defendants argue that section 12-21-2804(F)'s wilfulness requirement offends procedural due process. We disagree. Section 12-21-2804(F) provides, in relevant part:

> A person violating subsections (A), (B), (D), or (E) of this section is subject to a fine of up to five thousand dollars to be imposed by the department. The department, upon a determination that the violation is wilful, may refer the violation to the Attorney General or to the appropriate circuit solicitor for criminal prosecution, and, upon conviction, the person must be fined not more than ten thousand dollars or imprisoned not more that two years, or both.

Defendants argue section 12-21-2804 is unconstitutional on its face because it does not afford procedures for a finding of wilfulness by the DOR nor does it provide the accused an opportunity to be heard on the question of wilfulness before the DOR makes its determination. A defendant has a full opportunity to

be heard on the issue of wilfulness, just as any criminal defendant may raise issues of intent: by the procedures provided by the South Carolina criminal justice system, which include indictment, preliminary hearings, and trial by jury. The determination of wilfulness by the DOR simply starts the criminal process, just as a solicitor's determination of criminal intent triggers a decision to prosecute.

III. Is the special inducement prohibition in S.C. Code Ann. § 12-21-2804(B) applicable to persons who do not themselves "maintain a place or premises," but instead lease machines to others who "maintain a place or premises" on a basis which results in the sharing of profits and under circumstances in which the lessor is aware of the activities which violate section 12-21-2804(B) and, despite that knowledge, accepts profits from the operation of the machines at issue?

Section 12-21-2804(B), in its entirety provides:

> No person who maintains a place or premises for the operation of machines licensed under § 12-21-2720(A)(3) may advertise in any manner for the playing of the machines nor may a person offer or allow to be offered any special inducement to a person for the playing of machines permitted under § 12-21-2720(A)(3).

The first phrase in S.C. Code Ann. § 12-21-2804(B), which was declared unconstitutional in *Video Gaming Consultants*, expressly applies to any "person who maintains a place or premises for the operation of machines licensed under Section 12-21-2720(A)(3)." The second phrase, which contains the inducement prohibition, refers only to "a person." The defendants, who lease machines to third parties but do not themselves "maintain a place or premises," argue the language in the first phrase precludes application of the statute to them, regardless of their knowledge of, involvement in, and acceptance of profits from the actual operation of machines. We disagree.

As discussed earlier, the two clauses of section 12-21-2804(B) are separate, independent clauses. The special inducement portion of the statute clearly states it apples to "a person" and does not contain the modifier "who maintain[s] a place or premises for the operation of machines" as does the earlier portion prohibiting advertising. Therefore, the lessor defendants are "a person" and are therefore prohibited from making or allowing to be made special inducements, even if the lessor defendants did not physically maintain or own the premises where the machines were located.

Furthermore, we agree with the following language from the District Court's Memorandum Opinion which held the lessor defendants responsible for the special inducement of jackpots and excessive payoffs because they programmed the machines and set the paytables to make the illegal offers. Judge Anderson wrote:

> As the facts clearly demonstrate, all defendants either operate the machines directly or through lease arrangements which result in the splitting of profits. For the "profits" to be determined, the lessor must know what cash amounts are paid out. This is determined either by blindly taking the word of the location operator, which no lessor suggests to be its practice, or by reconciling the machines' records which include, most significantly, what are alternately referred to as "payout tickets," "pay tickets" or "vouchers." Any reasonable review of these documents would demonstrate how payouts are being made. Thus, it is beyond dispute that the defendants who are lessors and who split profits with locations have the means of knowledge of how payouts are made at the locations and are chargeable with actual knowledge. Only willful blindness would prevent actual knowledge.
>
> In this regard, one lessor defendant suggested that its role was nothing more than the equivalent of an automobile manufacturer who designed a car capable of going 120 mph.

> This defendant argued that it was the location that decided how fast to go. This analogy must be rejected. It is this lessor who is responsible for all aspects of the machines' actual functioning including what jackpot is displayed and how payout tickets are produced. This defendant settles up with the location by determining profits which, in turn, are determined or confirmed using the machines' own records. In short, a better analogy would be that this defendant sets the cruise control at 120 mph, rather than merely designing a car capable of going 120 mph.

Therefore, even if this Court chose to interpret the second clause of section 12-21-2804(B) to include the modifier "who maintain[s] a place or premises for the operation of machines," the lessor defendants would still be liable under the "hand of one is the hand of all" theory. "When two or more persons aid, abet and encourage each other in the commission of a crime, all being present, each is guilty as a principal." *Yates v. Aiken*, 290 S.C. 231, 236, 349 S.E.2d 84, 87 (1986), *rev'd on other grounds*, *Yates v. Aiken*, 484 U.S. 211, 108 S. Ct. 534, 98 L. Ed. 2d 546 (1988) (*citing State v. Hicks*, 257 S.C. 279, 185 S.E.2d 746 (1971)); *see also State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999) ("Under [the hand of one, the hand of all] theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose."). As discussed in the District Court's Memorandum Opinion, the lessor defendants aided, abetted, and definitely encouraged the lessees of the machines to ignore the $125 limit and to advertise jackpots in excess of the limit. The defendants had exclusive control over how the machines were programmed and set up, such as setting the jackpot displays and printing multiple payout tickets. The defendants shared in the illegal profits with knowledge of the unlawful operation of the machines. Therefore, the lessor defendants would be liable under either interpretation of the statute.

In conclusion, this Court finds the special inducement provision of section 12-21-2804(B) applies to *any* person, not just a person who "maintains a place or premises" for the operation of the machines.

IV. Under the findings of fact set forth in the District Court's Memorandum Opinion on Plaintiffs' Motion for Partial Summary Judgment, entered April 28, 1999, in which the facts were viewed in the light most favorable to the defendants, is the defendants' conduct in offering or allowing to be offered, the payment of sums in excess of $125 for credits accumulated on a video gambling machine subject to prosecution under S.C. Code Ann. § 12-21-2804(F) as the unlawful offering of a special inducement to gamble as prohibited by Section 12-21-2804(B)?

The defendants argue that offering or allowing to be offered payouts in excess of $125 per day is not a "special inducement" as prohibited by section 12-21-2804(B), and therefore cannot serve as a predicate act under RICO. We disagree.

This Court already decided this issue in *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999), although the language used by the Court was not mandatory. This Court stated, "At this stage in the proceedings, we think that the advertising or offering of jackpots could be construed as a special inducement and thus could support a RICO claim." *Id.* at 10, 522 S.E.2d at 142. This Court's use of the phrases "at this stage in the proceedings," "we think," and "could be construed" was not an expression of equivocation or uncertainty but was merely in recognition of the procedural posture of the case. The circuit court in *Gentry* dismissed the case for failure to state a claim, and the plaintiffs appealed. Therefore, the case which came before this Court had not been developed factually before the lower court, and thus we were only asked to decide whether the plaintiffs had *stated* a claim, not whether they had *proved* their claim.

Furthermore, this Court made the following statement in *Gentry* about the exact case now before this Court: "The United States District Court held similarly in *Johnson v. Collins* . . . that the $125 payout limit is $125 per 24-hour period and alleged violations of §§ 12-21-2804(A) and (B) can serve as predicate acts in a RICO cause of action . . . . [T]he District Court's ruling and analysis on the above issues are consistent with our opinion." *Gentry*, 337 S.C. at 13, n. 18, 522 S.E.2d at 143, n. 18. This statement further shows that the

language used by this Court was not an expression of equivocation or uncertainty but merely in recognition of the procedural posture of the case.

We reaffirm our holding in *Gentry* that the offering or advertising of jackpots in excess of $125 is a special inducement in violation of section 12-21-2804(B), subject to prosecution under subsection F.

V. While the general operation of the devices at issue was authorized by law during all times at issue, and while South Carolina law generally exempts the operation of the devices at issue from statutory penalties under the state's criminal laws relating to gambling, would the activity alleged nonetheless become "a gambling business which is a violation of the law of [the] State" of South Carolina if defendants are proven to have routinely offered and made payouts in excess of that allowed by state law or to have created fraudulent records to disguise the making of such payouts?

Plaintiffs argue that, although video poker was a legal business in South Carolina, because defendants routinely violated the Video Gaming Machines Act, they were conducting an "illegal gambling business" in violation of the law of South Carolina for purposes of 18 U.S.C. § 1955 (RICO). We agree.

18 U.S.C. § 1955 provides, in relevant part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an *illegal gambling business* shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section - -
>
> (1) "*illegal gambling business*" means a gambling business which - -

(i) *is a violation of the law of a State* or political subdivision in which it is conducted
(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

Id. (emphasis added). Defendants argue that since video poker was, at all times at issue, a legal business in this state, they cannot be in violation of this statute.[8] We disagree. Even though video poker was a legal gambling business, it could *become* an illegal gambling business if it was operated in a manner which violated VGMA. Section 12-21-2710 makes gambling devices generally illegal, except for those video game machines "which meet the technical requirements provided for in sections 12-21-2782 and 12-21-2783." Therefore, if the video poker business did not fall within the express license of the law, it would *not* be "a legal gambling business." If a person operated his video poker machines in violation of the limits set forth in VGMA, and if those violations carried criminal penalties under South Carolina law, then that person has conducted an "illegal gambling business . . . [in] violation of the law of [South Carolina]."

If defendants are proven to have routinely offered and made payouts in excess of that allowed by state law or to have created fraudulent records to disguise the making of such payments, then they were operating an illegal gambling business in violation of the law of this state.

[8]Under defendants' reasoning, a pharmaceutical business could sell controlled substances to people without proper prescriptions but still be a "legal business" under state law.

VI. Does the availability of a remedy under S.C. Code Ann. §§ 32-1-10 and 32-1-20 for certain gambling losses preclude plaintiffs from seeking recovery under other state law theories for: (a) losses which are compensable under these sections if timely filed; or (b) losses which would not be compensable under these sections regardless of the time of filing?

Defendants argue S.C. Code Ann. §§ 32-1-10 and 32-1-20 [9] provide the exclusive remedy for gambling losses, and, therefore, the plaintiffs are precluded from seeking recovery under other state law theories. We disagree.[10]

The Court of Appeals correctly ruled on this issue in *Justice v. Pantry,* 330 S.C. 37, 496 S.E.2d 871 (Ct. App. 1998), *aff'd as modified*, 335 S.C. 572, 518

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[9]Sections 32-1-10 and 32-1-20 were originally adopted in 1712 as a part of the Statutes of Anne. Section 32-1-10 allows a person who has lost $50.00 or more gambling in one sitting to sue the winner to recover the losses, provided he brings suit within ninety days of the loss. If the person who lost money gambling does not bring suit within the ninety days, section 32-1-20 allows any person to bring suit against the winner for treble damages within one year of the date of the loss, provided the suit is brought without covin or collusion.

[10]Judge Anderson, in his Order of Certification made the following statement concerning this issue: "This court was initially inclined to deny certification of this question for three reasons. First, the strict liability under Sections 32-1-10 and 32-1-20 would appear to be intended only to expand relief otherwise available. Second, the remedy under SCUTPA is expressly made cumulative to any other available remedies. Third, the South Carolina Supreme Court's opinion in *Gentry v. Yonce*, while not addressing the question directly, is inconsistent with any interpretation of the statutory remedies to preclude other claims if their additional elements can be proven." We agree with Judge Anderson's initial hesitation to deny certification on this issue.

S.E.2d 40 (1999).[11] The Court of Appeals held:

> After careful consideration, we conclude section 32-1-20 was not impliedly repealed by enactment of the Video Game Machines Act, specifically section 12-21-2791, because these statutes are not repugnant to each other and are not incapable of a reasonable reconcilement. To the contrary, these statutes are consistent. Both statutes promote the same goal of limiting excessive gambling.
>
> Sections 32-1-10 and 20 promote "a policy which prevents a gambler from allowing his vice to overcome his ability to pay. The legislature adopted a policy to protect a citizen and his family from the gambler's uncontrollable impulses." . . . This policy is furthered by allowing a gambler to recover excessive gambling losses or another person to recover the losses if the gambler fails to do so. Likewise, the clear intent of section 12-21-2791 is to prevent excessive gambling by limiting the amount of cash payouts for winnings on video poker machines. Each advances the same policy of limiting excessive gambling losses through different means; sections 32-1-10 and 20 prevent excessive gambling losses and section 12-21-2791 prevents excessive gambling winnings.

Id. at 44, 496 S.E.2d at 875 (internal citations omitted). There is nothing in sections 32-1-10 and 20 to indicate the legislature intended to limit relief otherwise available. These statutes were passed in 1712, and we cannot hold that they were intended to pre-empt all future remedies for persons injured by unlawful gambling activities.

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[11]This Court affirmed as modified the Court of Appeals in this case. However, the relevant issue from *Justice* was not appealed to this Court, and therefore was not discussed in this Court's opinion.

With respect to plaintiffs' claims under SCUTPA, sections 32-1-10 and 20 do not have any preclusive effect. In fact, S.C. Code Ann. § 39-5-160 provides: "The powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law." Further, this Court's opinion in *Gentry* clearly envisions that both remedies would be available to the plaintiffs. In *Gentry*, this Court addressed sections 32-1-10 and 20 as well as other state law claims. Nothing in our opinion would indicate sections 32-1-10 and 20 were the sole causes of action available to plaintiffs.

VII. Under the findings of fact set forth in the District Court's Memorandum Opinion on Plaintiffs' Motion for Partial Summary Judgment, entered April 28, 1999, in which the facts were viewed in the light most favorable to the defendants, does the defendants' conduct constitute an unfair or deceptive act in the conduct of any trade or commerce, as a matter of law, under SCUTPA, S.C. Code Ann. § 39-5-10 *et seq.*?

We find the District Court judge, in his Memorandum Opinion, correctly interpreted South Carolina's Unfair Trade Practices Act. Therefore, since Judge Anderson correctly interpreted South Carolina law on this matter, the following analysis is quoted directly from the District Court's Memorandum Opinion. We adopt Judge Anderson's analysis.

> The South Carolina Unfair Trade Practices Act makes it unlawful to engage in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20 (1985). "An act is '"unfair" when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive.' " S.C. Law of Torts at 372 (*quoting Young v. Century Lincoln-Mercury, Inc.*, 396 S.E.2d 105, 108 (S.C. Ct. App. 1989) *affirmed in part, reversed in part, on other grounds*, 422 S.E.2d 103 (1992) (*per curium*)).

Private causes of action for violation of this statute are authorized by S.C. Code Ann. § 39-5-140 (1985), which provides for treble damages and "such other relief as [the court] deems necessary or proper" when willful violations are found and for actual damages and attorneys fees and costs in any case resulting in a finding of violation of the statute. The statute is not, however, applicable to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." S.C. Code Ann. § 39-5-40(a) (1985).

This "regulated industry" exception was addressed in *State ex rel McLeod v. Rhoades*, 267 S.E.2d 539 (S.C. 1980), which held that "[i]nitially, the burden is on the party seeking the exemption to demonstrate [that the transactions at issue are regulated]. Once the exemption is demonstrated, the complainant must then show that the specific act in question does not come within the exemption." *Rhoades*, 267 S.E.2d at 541 (finding securities transactions to fall within the exemption). This holding was later applied by the South Carolina Court of Appeals to exempt any transaction if the general activity was regulated. *See Scott v. Mid Carolina Homes*, 359 S.E.2d 291 (S.C. Ct. App. 1987) *overruled by Ward [v. Dick Dyer and Assoc., Inc.*, 403 S.E.2d 310 (1991)].

Because the industry at issue is regulated under the Video Game Machine Act, one group of defendants argued that any action for redress could only be brought by the South Carolina Attorney General who has, as noted above, now declined to pursue any ruling from this court, except as to the lottery issue. This argument appears to be based on the "general activity" analysis used in *Rhoades* and *Scott*.

The "general activity" test announced in *Rhoades* was, however, later rejected by the South Carolina Supreme Court in

Ward v. Dick Dyer and Associates, Inc., 403 S.E.2d 310 (S.C. 1991). That court explained as follows:

> After much research and consideration of the events concerning the regulation of businesses during the ten years since the *Rhoades* decision, we believe that a "general activity" test would not fulfill the intent of the Legislature in prohibiting unfair trade practices. We believe that the exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes. . . . [W]e believe that the intent of our Legislature was to exclude activities which would otherwise be allowed or authorized.

Ward, 403 S.E.2d at 312. Some of the defendants previously argued based on *Ward* that the allegedly wrongful conduct is not only strictly regulated by the State, but has also been specifically permitted by statute and the Department of Revenue. As discussed above in regard to the interpretation of Section 2791, there is no support for this contention. The law does not allow for the payment of more than $125 at the conclusion of play. While the cap may have been poorly enforced, there is no showing that any relevant state agency or authority has done anything to suggest that the law means anything other than what this court has concluded it means. Defendants cannot, therefore, find protection in the "regulated activity" exemption of the SCUTPA.

In this motion, plaintiffs assert that they are entitled to partial summary judgment that certain specified defendants' practices in regard to offering and making cash payouts in excess of those allowed by Section 2791 constitute unfair or deceptive practices as prohibited by SCUTPA. This court finds that these defendants' activities violate SCUTPA in various respects.

> First, because there is a statutory limit on the amount which can be paid out, the offering of "jackpots" in excess of this limit is inherently misleading unless clarification is provided. This is because the display of a jackpot without an equally clear and visible explanation of any qualification on payout suggests not only that the payment is perfectly legal but that it will be paid, if won, without further conditions.[12] To the extent any player learns of the illegality or conditions on payout at a later time, there is an inherent misrepresentation.
>
> Moreover, and perhaps more importantly, the payment of cash in excess of the statutory cap is necessarily a violation of the public policy of this state as expressed in the state's statutes. The operators also engage in unethical behavior by devising a variety of schemes to evade detection of the violations. This includes any device which purports to make payments over a series of days, the payment to proxies or to players under names known by the operator to be false, the use of facially invalid "trust" agreements, or any other scheme to evade the limit or detection. These attempts at evasion are made more, not less, egregious by some of the defendants' attempts to shift blame to the payees. The latter is accomplished by encouraging the players to sign documents that the defendants cannot in good faith believe to be true or valid.[13]

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[12]At least one defendant conceded that players have occassionally [sic] balked when asked to sign a form stating that the payout is not more than $125 over what was put in. It does not, however, appear that these players are among the moving plaintiffs.

[13]On this point, defendants suggest an *in pari delicto* defense. The translation ends the inquiry - - the phrase means "in equal fault." The operators and machines at issue are licensed to operate in a regulated area of the law. They should, therefore, be held to a greater knowledge and understanding of the laws than their customers, particularly where the laws are designed to protect the player from his or her own bad judgment. In any case, what the law prohibits

> The degree of repetition and thus "public impact" is extraordinary. The record suggests that these practices are engaged in daily by the defendants or others acting for the mutual benefit of the defendants and themselves.[14] At best, they argue ignorance. Defendants offer nothing to counter the evidence that violation of the law is the routine practice. Indeed, the suggestion is not that the practices are infrequent but that they are so frequent, common, and pervasive in that no operator can compete in this industry without violating the law. To the extent this may be offered as an excuse, any such defense is rejected.[15]
>
> There is evidence in the record that the present plaintiffs have suffered some harm as a result of these unfair trade practices. The degree of harm and level of causation is, however, particularly hard to define as each player was drawn to the machines initially for a variety of reasons and continued (or continues) to play for a variety of reasons. This court will not, therefore, make a determination as to the extent of damages or causation. That must be reserved for the jury. This does not, however, preclude the court from rendering

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is the *making* of the payouts in excess of the statutory cap. It does not directly address the *receipt* of the funds. Thus, while this court is not willing to suggest that the player who receives an excess payment is without fault, the fault or culpability is certainly not "equal."

[14]This court has reached this conclusion without deciding if the lessor defendants engage in "joint ventures" with their lessees. The clear evidence of involvement, knowledge and profit from the prohibited activity is enough to hold all defendants responsible for the resulting unfair and deceptive activities.

[15]This court cannot condone such a defense any more than it could condone a defense by a respected physician that it was necessary to "pad the medicare bills" or offer patients unnecessary narcotic prescriptions to remain competitive. What is necessary to compete can never be defined in terms of keeping up with competitors who are themselves in violation of the law.

> partial summary judgment on the legal issue whether the complained of acts constitute unfair trade practices. The practices are so flagrant and obviously violative of public policy and so fraught with deception and unfairness that this court cannot but conclude that they constitute unfair trade practices as a matter or law.

Certified Questions Answered.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justices George T. Gregory, Jr., and C. Victor Pyle, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Unisun Insurance,	Respondent,
v.	
Bruce Hawkins, Tony Hawkins and Ruby Hawkins,	Defendants,
Of whom Bruce Hawkins is	Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 25475
Heard May 14, 2002 - Filed June 3, 2002

DISMISSED AS
IMPROVIDENTLY GRANTED

Robert D. Moseley, Jr., of Leatherwood Walker Todd & Mann, P.C., and H. Brent Fortson, both of Greenville, for petitioner.

John F. Martin, of Martin Law Firm, of Charleston, for respondent.

PER CURIAM: This Court granted the petition for a writ of certiorari to review the Court of Appeals' opinion in Unisun Ins. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000). After careful consideration, we now dismiss certiorari as improvidently granted.

DISMISSED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Orangeburg County
Magistrate Derrick F.
Dash, Respondent.

Opinion No. 25476
Submitted May 7, 2002 - Filed June 3, 2002

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Senior Assistant Attorney General Nathan Kaminski, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Derrick F. Dash, of Elloree, Pro se.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction ranging from a letter of caution to a public reprimand. We accept the agreement and publicly reprimand respondent. The facts as set forth in the agreement are as follows.

Facts

Several motorcyclists, including complainant, appeared before respondent, a magistrate in Orangeburg County, after receiving traffic tickets. Since the motorcyclists were all ticketed during the same traffic stop, respondent separated the group into defendants pleading "guilty" and defendants pleading "not guilty." However, complainant's case was not called at that time.

One of the defendants pled "guilty." Respondent fined the defendant and sua sponte stated that the court was reducing the "points" to four[1] even though respondent had no jurisdiction to do so. Respondent did not state on the record the rate of speed for which the guilty verdict was imposed and which formed the basis for the imposition of the fine.

After handling the guilty plea, respondent consolidated the cases of the defendants pleading "not guilty." Complainant's case had still not been called. The police officer presented the State's case, which included a video tape of the traffic stop that was played for the court and entered into evidence. The defendants were allowed to cross-examine the officer and present testimony in their defense. Respondent found the defendants "guilty," and imposed a fine and "four points" for the violation. Respondent did not properly state on the record that he was rendering a guilty verdict or the rate of speed for which the guilty verdicts were imposed and which formed the basis for the fines.

The police officer then informed respondent that complainant's case had not been called. When the case was called, complainant indicated that he wanted to plead "not guilty" and offer testimony in his defense. The officer asked respondent if he wanted to watch the video tape again and

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[1]Respondent was referring to the point system used by the Department of Public Safety to evaluate driving records.

respondent declined to do so. Respondent then found complainant "guilty" without allowing him to present testimony, call witnesses, or offer any evidence in his defense.

In response to ODC's preliminary investigation, respondent admitted that he did not allow complainant to present any evidence because complainant was previously identified in the video tape and that he made a directed verdict of guilty. Magistrates in South Carolina lack the authority to make a directed verdict of "guilty" in criminal proceedings, and in his response to the Notice of Full Investigation, respondent stated that he now realizes that he erred in directing a verdict in complainant's case. Additionally, respondent failed to respond to the Notice of Full Investigation until approximately one year after it was served upon him.

Law

Respondent admits that his conduct violated the following canons set forth in the Code of Judicial Conduct, Rule 501, SCACR: Canon 2(A) (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3(B)(2) (a judge shall be faithful to the law and maintain professional competence in it); Canon 3(B)(7) (a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law); and Canon 3(B)(8) (a judge shall dispose of all judicial matters promptly, efficiently, and fairly). Respondent also admits that these violations constitute grounds for discipline under Rules 7(a)(1), and 7(a)(2), RJDE, Rule 502, SCACR.

Conclusion

We find that respondent's misconduct warrants a public reprimand. We therefore accept the Agreement for Discipline by Consent and publicly reprimand respondent.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former Sumter County Magistrate William Sanders, Respondent.

Opinion No. 25477
Submitted May, 7, 2002 - Filed June 3, 2002

PUBLIC REPRIMAND

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

John E. James, III, of Sumter, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. We accept the agreement and issue a public reprimand.[1] The

[1]Because respondent has resigned from his position as magistrate and agreed that he will not seek nor accept any judicial position or office in South Carolina without the prior consent of this Court, a public reprimand is the most severe sanction that can be imposed. See Matter of Metz, 345 S.C. 416,

facts as admitted in the agreement are as follows.

Facts

Respondent was a Sumter County magistrate for the past 19 years. During respondent's term of office, he consistently failed to comply with the record keeping and money handling requirements published by South Carolina Court Administration. Even after the Chief Justice issued an order advising magistrates of the record keeping and money handling requirements, respondent continued to fail to comply with the record keeping and money handling requirements.

A review of respondent's financial records reveals that respondent failed to report the necessary information required to be recorded in his magisterial receipt book. Respondent also failed to properly report, prepare, and document deposits made to his magisterial account. Furthermore, respondent failed to comply with the proper procedures for issuing checks from his magisterial account, and failed to report the necessary information required to be recorded in his magisterial checkbook after issuing a check.

Respondent also failed to properly reconcile his magisterial account. Disciplinary Counsel discovered that respondent had issued four checks in October 2001 drawn upon his magisterial account which were returned for insufficient funds. In addition, respondent's magisterial account reflected two negative balances in October 2001.

Finally, respondent failed to transfer the bond monies that he collected to the Clerk of Court and other magistrates in a timely fashion. Frequently, respondent would transfer such bond monies only after being informed that the specific bond monies were needed for upcoming proceedings.

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548 S.E.2d 219 (2001).

In response to inquiries from Disciplinary Counsel concerning the delay in the transmission of bond monies, respondent furnished Disciplinary Counsel with a list of all bond monies held by respondent. Respondent also reported he held several thousand dollars in his magisterial bank account; however, respondent was unable to identify the owner of the monies or which bonds the money represented.[2] Furthermore, sufficient funds were not available in respondent's magisterial bank account to transfer all of the reported bonds.[3] The missing money was, in part, used by respondent for purposes other than that for which it was intended. As a result, respondent was unable to transfer the bond monies to the appropriate recipients. In an attempt to deceive recipients of the bond monies into believing that he had already transferred the bond monies, respondent issued "replacement" or "duplicate" checks to the appropriate recipients informing them that he had already transferred the bond monies when, in fact, he had not.

Law

As a result of his conduct, respondent has violated the following canons set forth in the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 1(A) (a judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of

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[2]Respondent admits that he has commingled collected bond monies with his personal funds.

[3]Respondent estimated that the insufficient funds totaled no more than $13,000. Respondent subsequently deposited $12,911, which he represents as sufficient funds to compensate for the insufficient funds. Disciplinary Counsel is unable to determine whether this amount is sufficient, and respondent has agreed to fully cooperate with the appropriate authorities to determine the exact amount of insufficient funds.

the judge's activities); and Canon 2(A) (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

Respondent also admits that he violated Canon 3 (a judge shall perform the duties of judicial office impartially and diligently); Canon 3(A) (the judicial duties of a judge take precedence over all the judge's other activities); Canon 3(B)(2) (a judge shall be faithful to the law and maintain professional competence in it); Canon 3(B)(8) (a judge shall dispose of all judicial matters promptly, efficiently and fairly); Canon 3(C)(1) (a judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business); Canon 4 (a judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations); and Canon 4(D)(1)(a) (a judge shall not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position). These violations constitute grounds for discipline under Rules 7(a)(1), 7(a)(4), 7(a)(6), and 7(a)(6) RJDE, Rule 502, SCACR.

Conclusion

We find that respondent's actions warrant a public reprimand. We therefore accept the Agreement for Discipline by Consent and publicly reprimand respondent. Respondent shall fully cooperate with the appropriate authorities to determine the exact amount of insufficient funds. If there are any additional shortages in respondent's magisterial account due to respondent's conduct as set forth in this opinion, respondent shall promptly reimburse the account in the exact amount of the shortage.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Aiken County Magistrate
Joey L. Addie, Respondent.

Opinion No. 25478
Submitted May 7, 2002 - Filed June 3, 2002

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Senior Assistant Attorney General Nathan Kaminski, Jr., both of Columbia, for the Office of Disciplinary Counsel.

James E. Whittle, of Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. Respondent has also resigned his position and has agreed never to apply for a judicial office in South Carolina without the express written permission of the Supreme Court of South Carolina. We accept the agreement and publicly reprimand respondent, the most severe sanction we are able to impose in these circumstances. The facts as set forth in the

agreement are as follows.

Facts

Respondent served as a Magistrate in Aiken County from March 1989 until February 2001. In December 2000, Judge Roger E. Edmonds, the Chief Summary Judge for Aiken County, received a report that there had been shortages in respondent's daily office deposits. Edmonds was also informed that respondent failed to deposit cash payments for fines collected during bond/traffic court on November 13, 2000. As a result of this information, Edmonds and Terry Bodiford, Director of the Aiken County Finance Department, scheduled an audit/records check of respondent's office for December 15, 2000.

When the audit team arrived at respondent's office on the scheduled day, respondent was not present. The team could not locate the uniform receipt book used to record and maintain receipts for all money collected. At Edmond's direction, respondent's staff telephoned respondent at home, informed him that an audit was being conducted, and instructed respondent to bring the receipt book to the office.

When respondent arrived, he informed Edmonds that he made a "terrible mistake," which he discovered upon opening his briefcase and finding $1,000. Respondent stated that he had determined that the money was related to two receipts written on November 13, 2000, in connection with the cash payment of two fines. One receipt in the amount of $550 was for money received for a court fine paid on a case in respondent's court. The other receipt in the amount of $425 was for money received by respondent for another magistrate in payment of a fine.

From the $1,000, respondent counted out $975, the sum of the two undeposited receipts. He gave the money to Edmonds to be deposited in the office's bank account.

In the criminal investigation conducted by the South Carolina

Law Enforcement Division (SLED), respondent gave a written statement. In this statement, respondent admitted that he received fine money totaling $975 while working bond/traffic court and that he personally issued receipts and took the money because the court employee who normally handled those duties was not available. Respondent explained that he failed to deposit the money that day because, by the time he left the office, the bank was closed. Respondent further explained that, over the next several days, he simply forgot about the money.

In a later statement, respondent admitted spending forty to fifty dollars of the money on personal items. Respondent explained to SLED that he planned to replace the money from his next paycheck. Respondent further explained that, because of the holidays, he forgot about the money until the 8th or 10th of December and that he planned to replace the money on December 15. However, by this time, Edmonds had inquired about the missing money. Respondent told SLED that, as a result, he panicked, put $100 of his own money in with the court fine money, and returned the money, receipt book, and paperwork to Edmonds.

Respondent pled guilty to embezzlement of public funds and was sentenced to five years imprisonment, suspended upon probation for 30 months and 250 hours of public service employment.

Law

Respondent admits that his conduct violated the following canons set forth in the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 1(A) (a judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2(A) (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3 (a

judge shall perform the duties of judicial office impartially and diligently); Canon 3(A) (the judicial duties of a judge take precedence over all the judge's other activities); Canon 3(B)(2) (a judge shall be faithful to the law); Canon 3(C)(1) (a judge shall diligently discharge his administrative responsibilities and should cooperate with other judges and court officials in the administration of court business); and Canon 4(D)(1)(a) (a judge shall not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position).

Respondent admits that these violations also constitute grounds for discipline under the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (violating the Code of Judicial Conduct); Rule 7(a)(3) (being convicted of a crime of moral turpitude or a serious crime); and Rule 7(a)(7) (wilfully violating a valid court order).

Conclusion

We accept the agreement for a public reprimand because respondent is no longer a magistrate and because he has agreed not to hereafter seek another judicial position in South Carolina unless first authorized to do so by this Court. As previously noted, this is the strongest punishment we can give respondent, given the fact that he has already resigned his duties as a magistrate. Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Curtis L. Murph, Jr., Respondent.

Opinion No. 25479
Heard May 16, 2002 - Filed June 3, 2002

DISBARRED

Attorney General Charles M. Condon and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Curtis L. Murph, Jr., of Columbia, pro se.

PER CURIAM: In this attorney grievance matter, the Office of Disciplinary Counsel filed formal charges against respondent, alleging misconduct in eighteen different matters. Respondent did not answer the formal charges nor did he appear at the hearing before the sub-panel. The sub-panel and, thereafter, a full panel, found respondent in default and recommended disbarment.

Failure to answer formal charges or to appear when specifically ordered by the hearing panel shall constitute an admission of the factual allegations in the complaint. Rule 24(b), RLDE, Rule 413, SCACR. Because respondent failed to respond to the formal charges against him and failed to

appear at the hearing before the sub-panel, the following allegations set forth in the formal charges are deemed admitted:

1. On June 22, 2000, respondent entered into an Agreement for Pretrial Diversion with the United States Attorney pursuant to which he admitted making false statements to the Federal Bureau of Investigation and other law enforcement entities and providing false information to the Columbia Police Department about public officials and other persons he alleged were involved in criminal activities.

2. In sixteen matters, respondent failed to represent his clients diligently and/or failed to communicate with them adequately. In all but two of those matters, respondent also failed to respond to one or more communications from Disciplinary Counsel.

3. In three matters, respondent misrepresented to his clients the status of the matters he was handling for them.

4. In two matters, respondent failed to handle matters competently.

5. Respondent failed to return files in four matters and lost his client's file in another matter.

6. Respondent failed to receive permission to withdraw as counsel in one matter, had no written contingency agreement in another matter and asked his client to sign a document releasing him from liability in a third matter.

7. Respondent failed to earn or return fees in four matters. In another matter he failed to either refund the fee or provide an accounting as to the fee, although an allegation was not made that the fee was unearned.

8. Respondent undertook to represent a party at a loan closing

and appeared with the client at the loan closing even though he was on interim suspension at the time.

9. Respondent failed to cooperate with the attorney appointed to protect his clients' interests. An investigative panel issued an order dated October 20, 2000, directing him to cooperate with the appointed attorney.

10. Respondent accepted a fee to represent a client at a bond hearing when he was on interim suspension. Respondent failed to inform the client that he was suspended and failed to return the fee. Respondent failed to respond to letters from Disciplinary Counsel regarding this matter.

11. Respondent failed to maintain any bank accounts for either trust or office operation purposes. Respondent claimed he had not handled client funds; however, he accepted attorney fees from clients, failed to earn the fees paid, and neither refunded the fees nor maintained any funds in an account from which a refund could be made.

The sub-panel determined respondent committed misconduct in violation of the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to represent a client competently); Rule 1.2 (failing to consult with his client as to the objectives of the representation and the means by which they are to be achieved); Rule 1.3 (failing to act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (failing to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information); Rule 1.5(a) (charging an unreasonable fee); Rule 1.5(c) (failing to have a contingency fee agreement in writing); Rule 1.15 (appropriating clients' funds to his own use, failing to deliver promptly to a client or third person funds that the client or person was entitled to receive, and failing to render promptly a full accounting regarding property of the client or third person); Rule 1.16 (terminating representation without taking steps to protect client interests); Rule 4.1(a) (making a false statement of material fact or law to a third person); Rule 8.1(b) (failing to respond to a lawful demand for

information from a disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing criminal acts that reflect adversely upon his honesty, trustworthiness and fitness as a lawyer); Rule 8.4(c) (engaging in conduct involving moral turpitude); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

The sub-panel further determined that respondent violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law); Rule 7(a)(6) (violating the oath of office taken upon admission to the practice of law); Rules 30 and 34 (practicing law while under suspension). Finally, the sub-panel determined respondent failed to comply with the financial recordkeeping requirements of Rule 417, SCACR.

Because the factual allegations set forth in the formal charges are deemed admitted, the only issue before the Court is the appropriate sanction. *In the Matter of Kitchel*, 347 S.C. 291, 554 S.E.2d 868 (2001); *In the Matter of Thornton*, 327 S.C. 193, 489 S.E.2d 198 (1997). In *In the Matter of Hall*, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998), the Court stated the following:

> An attorney usually does not abandon a license to practice law without a fight. Those who do must understand that "neglecting to participate [in a disciplinary proceeding] is entitled to substantial weight in determining the sanction." *In the Matter of Sifly*, 279 S.C. 113, 115, 302 S.E.2d 858, 859 (1983). An attorney's failure to answer charges or appear to defend or explain alleged misconduct indicates an obvious disinterest in the practice of law. Such an attorney is likely to face the most severe sanctions because a central purpose of the disciplinary process is to protect the public from unscrupulous or indifferent lawyers.

In the case at hand, respondent's failure to answer the formal charges and appear at the hearing before the sub-panel, when coupled with his admission that he committed criminal acts, his failure to respond to Disciplinary Counsel, the fact that he practiced law on two occasions while on suspension, the fact that he has failed to earn or return over $7,000 in fees, and his failure to represent clients competently and diligently in numerous cases, warrants the severe sanction of disbarment. *See In the Matter of Hall*, 341 S.C. 98, 533 S.E.2d 588 (2000) (neglect of legal matters, practicing law while under suspension, and failure to respond to disciplinary authority warranted disbarment); *In the Matter of Wofford*, 330 S.C. 522, 500 S.E.2d 486 (1998) (disbarring attorney who failed to answer formal charges, appear at panel hearing or before Court; attorney in several cases failed to provide competent representation, keep clients reasonably informed, and promptly deliver funds to third person; attorney also misappropriated client funds and committed criminal acts); *In the Matter of Meeder*, 327 S.C. 169, 488 S.E.2d 875 (1997) (engaging in practice of law while under suspension, coupled with failure to provide competent representation, act with reasonable diligence and promptness in representing client, keep client reasonably informed about status of matter and promptly comply with reasonable requests for information, or cooperate with disciplinary investigation warranted disbarment); *In the Matter of Edwards*, 323 S.C. 3, 448 S.E.2d 547 (1994)(attorney disbarred for failing to keep clients informed, misappropriating or improperly using client funds, knowingly presenting false testimony, and failing to cooperate in investigation of disciplinary charges against him); *In the Matter of Sifly*, 279 S.C. 113, 115, 302 S.E.2d 858, 859 (1983)(disbarring attorney who failed to appear before the disciplinary panel or the Court; attorney mishandled two cases and wrote bad checks). Accordingly, respondent is hereby disbarred retroactive to the date of his interim suspension.[1]

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

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[1] Respondent was placed on interim suspension by order dated October 6, 2000. In the Matter of Murph, 342 S.C. 615, 538 S.E.2d 652 (2000).

DISBARRED.

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

The Supreme Court of South Carolina

In the Matter of Rodman C. Tullis, Respondent

O R D E R

On February 11, 2002, Respondent was suspended from the practice of law for a period of ninety days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY: Daniel E. Shearouse
Clerk

Columbia, South Carolina

May 30, 2002

The Supreme Court of South Carolina

In the Matter of Herbert
Altonia Addison, 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.

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 Clarence Davis, 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. Davis shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Davis 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 Clarence Davis, 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 Clarence Davis, 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. Davis's office.

Costa M. Pleicones J.

FOR THE COURT

Columbia, South Carolina
May 31, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Paul Dexter Dorman, II, and Charles R. May, III, M.D.

Respondents,

v.

South Carolina Department of Health and Environmental Control and Bureau of Ocean and Coastal Resource Management, and Frances Pate Adams,

Defendants,

of whom Frances Pate Adams is,

Appellant.

Appeal From Georgetown County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 3502
Heard April 17, 2002 - Filed May 28, 2002

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

David J. Gundling, and Jeffrey J. Galan, both of Pawley's Island, for appellant.

Howell V. Bellamy, Jr., and Douglas M. Zayicek, both of Bellamy, Rutenburg, Copeland, Epps, Gravely & Bowers, of Myrtle Beach, for respondents.

STILWELL, J.: Frances Pate Adams appeals the circuit court's order reinstating the Administrative Law Judge's (ALJ's) denial of a dock permit, which was overturned on appeal by the Coastal Zone Management Appellate Panel (the Panel) of the Bureau of Ocean and Coastal Resource Management (OCRM).[1] We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

LaFon LeGette[2] applied for a critical area permit to build a boat dock with a roof and floating dock. OCRM initially granted the permit, but the neighbors on both sides, Dorman and May, objected and requested a contested case hearing because the proposed boat dock would crowd too close to their existing docks and because the roof would impinge on their view. Adams' lot is pie-shaped, with only 33 feet of water frontage, so any dock configuration will necessarily cross the extended property lines of the neighboring lots.

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[1] The Panel was the governing board of OCRM at all times pertinent to this appeal.

[2] Appellant Adams is the land owner; LeGette was a potential buyer, but the contract of sale had a condition that the dock permit could be obtained. On appeal to the circuit court, LeGette sought to withdraw from the litigation, and Adams moved to substitute as a party. The circuit court denied the motion to substitute Adams for LeGette because it was made just before hearing. This court granted her motion, and no exception has been taken to that ruling.

The ALJ reversed the OCRM staff's determination and denied the permit because the dock (1) would obstruct navigation and create problems with May's floating dock, (2) would cross extended property lines and no justification was given for an exception to the general rule, (3) would rest on the mud bottom at low tide, and (4) would diminish the use and enjoyment of neighboring lots. He stated none of these grounds individually was significant enough to deny the permit, but cumulatively they posed a serious problem. He ruled Regulation 30-12.A(2)(o), which requires that a lot have minimum water frontage of 50 feet to qualify for a dock permit, was not applicable, since the lot was platted prior to 1993. He did not directly rule on the issue of whether the dock roof would seriously impact views, but his ruling as to diminishment and enjoyment of neighboring lots effectively did so. He balanced the factors under S.C. Code Ann. § 48-39-150(A) to be considered in granting or denying a permit, which was within his discretion.

On appeal, the Panel reversed the ALJ and reinstated the grant of the permit. The Panel made its own findings of fact, on which it based its legal conclusions that the purpose and policy of the Regulation would not be undermined by granting the permit. The Panel concluded the ALJ incorrectly interpreted "navigation" within the meaning of the regulations. "It is the position of OCRM that any navigational issues between docks is a private property owner issue. It is not the policy of OCRM to police navigational disputes that should be dealt with among the adjacent property owners." The Panel also found, based on its own review of the record below, that the dock would not rest on the creek bottom at normal low tide and that the dock as permitted would not diminish the enjoyment or value of adjacent land owners. Finally, the Panel held that OCRM was properly before it as a party on appeal.

The circuit court reversed the Panel, holding that it applied the wrong standard of review and improperly substituted its judgment for that of the ALJ. Alternatively, the circuit court held the petition for review was insufficient, and therefore the appeal should have been dismissed for lack of jurisdiction, and OCRM was not properly a party on appeal, since it did not appeal from the ALJ's order. The circuit court judge ruled the ALJ's interpretation of all subsections of Regulation 30-12.A(2) at issue were supported by substantial

evidence, except subsection (o), which he held prohibited lots with less than fifty feet of water frontage from having a dock. Thus, the circuit court reinstated the ALJ's order as modified.

LAW/ANALYSIS

Standard of Review: Substantial Evidence Standard

As the parties acknowledge, the crucial and perhaps dispositive issue in this appeal revolves around applying the correct standard of review.

> This case involves appearances before four tribunals and includes three levels of appellate review. . . . [T]he ALJ presided as the fact-finder . . . [and] was not sitting in an appellate capacity and was not restricted to a review of OCRM's permit decision. . . .
>
> The first appellate review . . . by the Board [was] under its limited scope of review set forth in § 1-23-610(D). The second appellate review [before] the circuit court . . . is [governed by the standard] set forth in § 1-23-380(A)(6). . . . Our scope of review is the same as that established for the circuit court. § 1-23-380(A)(6).

Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, __, 560 S.E.2d 410, 413 (2002). "[I]n environmental permitting cases, the ALJ presides as the finder of fact. § 1-23-600(B). . . . The Board, on the other hand, sits as a quasi-judicial tribunal in reviewing the final decision of the ALJ. § 1-23-610(A). As the 'reviewing tribunal,' the Board is not entitled to make findings of fact. . . ." Id. at 417; see also Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, Op. No. 3479 (S.C. Ct. App. filed Apr. 15, 2002) (Shearouse Adv. Sh. No. 11 at 46, 51-52).

On appeal, the standard for appellate review to the Panel is whether the ALJ's findings are supported by substantial evidence under S.C. Code Ann. §

1-23-610(D) (Supp. 2001).[3] "'The "possibility of drawing two inconsistent conclusions from the evidence does not present [the ALJ's] finding from being supported by substantial evidence."'" Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 130-31, 530 S.E.2d 643, 650 (Ct. App. 2000) cert. denied (June 13, 2000). Substantial evidence "is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached. . . ." Lark v. Bi-Lo, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The Panel cannot reweigh the facts or make findings of fact in accord with its own view of the evidence. The Panel can validly reverse the ALJ based on an error of law under this appellate standard or if his findings are not supported by substantial evidence. The Panel stated the ALJ misinterpreted navigation in the regulations to include issues between neighbors. Thus, that portion of the Panel's order on OCRM policy underlying navigation and construing its regulation was proper.

Adams cites the recent cases of McQueen and Guerard, both issued since the creation of the Administrative Law Judge Division (ALJD) for the proposition that the Panel retains essentially a de novo standard of review and may make its own findings based on its own review of the evidence. McQueen v. S.C. Coastal Council, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998), rev'd 340 S.C. 65, 530 S.E.2d 628 (2000), vacated and remanded by 533 U.S. __, 121 S. Ct. 2581 (2001) in light of Palazzolo v. Rhode Island, 533 U.S. __, 121 S. Ct. 2448 (2001). Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981). Initially, we note that the first is on dubious legal footing and the second was decided well before the creation of the ALJD.

Adams misapprehends the operative date in these decisions. The key date is not when the decisions were published but when the cases were heard below and what procedure they followed. The ALJD was created by the Restructuring

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[3] See also Jean Hoefer Toal et al., Appellate Practice in S.C. (1999) 56-57 ("The scope of review of final ALJ decisions is essentially identical to the scope of review established in section 1-23-380. This scope of review applies to the circuit court or the applicable board or commission.")

Act of 1993. 1993 Act No. 181, §§ 11-19 (eff. July 1, 1993), 1993 S.C. Acts 1407, 1433-1448 (codified as amended at S.C. Code Ann. §§ 1-23-310 to -660 (Supp. 2001).) Both of these cases, though decided after the creation of the ALJD, were heard in the first instance by the Board as a contested case, and hence retained the old standard of review.

Under the applicable standard of review in cases heard by the ALJ, the Board or Panel must affirm the ALJ if the findings are supported by substantial evidence, not based on the Panel's own view of the evidence. To hold otherwise would contravene the clear mandate of § 1-23-610(D) and render the ALJ process a superfluous nullity.

I. Interpretation of Regulation 30-12.A(2)

On appeal, Adams challenges the interpretation and application of several subsections of Regulation 30-12.A(2)[4] governing dock permits.

> (a) Docks . . . shall normally be limited to one structure per parcel and shall not impede navigation or restrict the reasonable public use of State lands and waters; . . .
> (n) Docks must extend to the first navigable creek . . . and floating docks which rest upon the bottom at normal low tide will not normally be permitted.
> (o) For lots platted and recorded after May 23, 1993, . . . [l]ots less than 50 feet wide are not eligible for a dock.
> (p) No docks . . . should normally be allowed to be built closer than 20 feet from extended property lines. . . . However, the Department may allow construction closer than 20 feet or over extended

[4] Regulation 30-12 was substantially rewritten, effective June 25, 1999. Judge Breeden's order is dated August 14, 1998. Because none of the changes are substantive but merely clarified the existing regulation, we have cited to the current version. The changes are set forth in 23 S.C. Reg., No. 6, 107 (June 25, 1999).

> property lines where there is no material harm to the policies of the Act.
>
> . . .
>
> (r) Roofs on private docks will be permitted on a case-by-case basis, with consideration given to the individual merits of each application. Precedent in the vicinity for similar structures will be considered as well as the potential for impacting the views of others. Roofs which have the potential to seriously impact views will not be allowed, while those that have minimal impact may be allowed. . . .

23A S.C. Code Ann. Regs. 30-12.A(2) (Supp. 2001)

Initially, we address the circuit court's ruling that reversed both the ALJ and the Panel's finding that Regulation 30-12.A(2)(o) is inapplicable to this case because the lot in question was platted before 1993. By its clear terms, this subsection is inapplicable to this lot and does not prohibit the issuance of a dock permit in this case. See Brown at 414 ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). We therefore reverse the circuit court on this issue.

Turning to the difference in the construction and interpretation of Regulation 30-12.A(2)(a), we note that while the ALJD is an independent entity, it still functions as an arm of the agency for purposes of according the agency deference in interpretation. "'[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.'" Id. Moreover, the Panel, in interpreting its regulations, may reverse the ALJ as a matter of law and is entitled to deference on appeal.

The ALJ denied the permit at least partially on the finding that the dock would obstruct navigation and create problems with the adjoining dock. The Panel, in interpreting its own regulation, held that navigation, as contemplated in the regulation, did not encompass problems between neighbors or conflict

with nearby docks but only applied to impediments to the general public's use of State waters.

Adams argues that because May's floating dock, which is the primary one that causes navigational problems, is not permitted, Adams' dock permit should be evaluated as if it were not there. The correct approach is to consider this dock permit in light of what is actually there, as did the ALJ. S.C. Code Ann. § 48-39-150(A) (Supp. 2001) provides that each permit must be considered on its own merits. The ALJ is confined to make his decision on the record before him, as are we.

> [J]udicial prudence dictates and our statute mandates that the record reflect accurately evidence which forms the basis of decisions independent of any consideration to contemplated remedial action, the result thereof, or the occurrence of any other future event. This requirement aborts the potential for continuing controversy spawned by litigation of this nature.

Weaver v. S.C. Coastal Council, 309 S.C. 368, 375, 423 S.E.2d 340, 344 (1992). Thus, the illegality of May's dock is an issue for another day.

Because the ALJ premised his denial on the confluence of factors, this case must be remanded to the ALJD to reconsider his findings based on the OCRM Panel's interpretation and application of its own regulations. Because we remand for reconsideration by the ALJD, we do not find it necessary to address the other subsections of the regulation pertaining to water access, resting on the mud bottom, extended property lines, or roofs and the impact on neighboring views.

II. Sufficiency of the Petition for Review

Adams argues the circuit court erred in holding the petition for review insufficiently set forth the legal grounds for appeal to confer jurisdiction. We agree. The applicable regulations for OCRM cases are 30-6 and 30-7, not 61-

72, which applies to DHEC matters.[5] 23A S.C. Code Ann. Regs. 30-6 & 30-7 (Supp. 2001). Regulation 30-6 requires only a bare bones petition of basically the party's name and permit number. Thus, this petition was sufficient. Obviously, the SCACR do not apply in proceedings before the Panel, and the appeal process is much more informal than court requirements.

Respondents argue correctly that Regulations 30-6 and 30-7 as currently written were not in effect at the time of this appeal.[6] However, the requirements under the prior version for the petition for review were substantively the same. Respondents argue that the S.C. Administrative Procedures Act (APA) trumps agency-specific statutes. See Pringle v. Builders Transp., 298 S.C. 494, 381 S.E.2d 731 (1989). This is true of pre-existing agency-specific statutes where the two conflict, but it is not true of statutes and regulations enacted since the APA. As Regulations 30-6 and 30-7 were substantially amended after the passage of the APA, we must presume some modification was intended and the action did not result in a futile act. See TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). "In interpreting a regulatory amendment, we presume a regulatory agency, in adopting an amendment to a regulation, intended to make a change in the existing law." Converse at 55. The minimal petition for review required under OCRM regulations is consistent with the purpose of providing notice of the appeal.

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[5] Regulation 61-72 sets forth procedures for contested cases, but the DHEC Board no longer hears contested cases. It has numerous conflicts with the ALJD Rules and is of questionable validity in light of the subsequent creation of the ALJD. The ALJs have generally held that 61-72 controls the time frames for appeal and related matters but that ALJD Rules control once the ALJD has jurisdiction. Cf. Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510, 548 S.E.2d 223, 225-26 (Ct. App. 2001) (ALJD Rules are applicable to proceedings before ALJ, not SCRCP.).

[6] Regulations 30-6 and 30-7 were substantially rewritten contemporaneously with Regulation 30-12.A, effective June 25, 1999, to reflect the modified procedure for appeal after the creation of the ALJD. See n. 2, supra.

III. OCRM as a Party on Appeal

Adams argues that because OCRM did not appeal the ALJ's order, it should not have been permitted to argue the agency's viewpoint or interpretation of its regulations before the Panel or the circuit court on appeal. Thus, Adams contends the Panel had no authority to interpret the meaning of "navigation" at the appellate hearing. We disagree.

While OCRM did not appeal the ALJ's order, the agency remains a party at all levels to represent the agency and its policy stance. While we do not hold that the OCRM staff is a necessary party on appeal, we find it clearly is a proper party. In Owen Steel, this court held that the agency was not a necessary party to the appeal and was not required to be made a party on appeal by statute. Owen Steel Co. v. S.C. Tax Comm'n, 281 S.C. 80, 84-85, 313 S.E.2d 636, 639 (Ct. App. 1984). "In considering whether there is a defect of parties, the distinction between necessary and proper parties is crucial." Id. However, the agency may be a proper party on appeal, and the APA requires an appellant to serve the agency with a copy of the petition for review to ensure it has notice of any proceeding. Id. at 85-86, 313 S.E.2d at 638. Upon notice, the agency may petition to be made a party to the appeal. "Except in unusual circumstances, we anticipate that such a motion would be granted as a matter of course." Id.

Similarly, our supreme court has held that "whether or not additional parties are proper to a controversy is left to the sound discretion of the Trial Judge subject to review by appeal." Robinson v. S.C. State Highway Dep't, 241 S.C. 137, 141, 127 S.E.2d 286, 287 (1962). Applications to bring in additional parties are ordinarily granted as a matter of course, especially where to do so will not injure the other parties. Id. at 141, 127 S.E.2d at 288. The Panel relies on reports of its staff. Clearly, the agency is charged with administering its permitting regulations and is charged with "insur[ing] consistent permit evaluations by the Department." S.C. Code Ann. Regs. 30-1.A(2)(b) (Supp. 2001). Thus, we find no error in the Panel's and circuit court's decisions to allow counsel for OCRM to present arguments as to the proper implementation and interpretation of those regulations the agency is charged with administering.

Adams argues that to define this term is beyond the Panel's statutory authority on appeal. We strongly disagree. Moreover, even if OCRM was not properly before the Panel on appeal, the Panel always has the ability to interpret and define terms within its own regulations consistent with its enabling statute. OCRM is charged with administering coastal zone permits and promulgating regulations governing construction in critical areas. S.C. Code Ann. § 48-39-50 (Supp. 2001). Thus, the Panel did not exceed its authority in interpreting "navigation" and correcting the ALJ for an error of law under the standard of review as set forth in S.C. Code Ann. § 1-23-610(D) (Supp. 2001).

IV. Constitutional Claims

Adams first raised the regulatory taking issue to the Panel and the due process and equal protection issues before this court. Because none of these constitutional arguments were presented to the ALJ, they are not preserved for appellate review and thus are not properly before us. Adams argues that she made repeated requests for equal treatment at every level. That is insufficient. The legal theory on which she seeks to prevail must be raised to and ruled upon by the ALJ.

> In reviewing the final decision of an administrative agency, the circuit court sits as an appellate court. Consequently, issues not raised to and ruled on by the agency are not preserved for judicial consideration. Likewise, issues not raised to and ruled on by the ALJ are not preserved for appellate consideration.

Brown at 417 (citations omitted). While it is true that ALJs cannot rule on a facial challenge to the constitutionality of a regulation or statute, ALJs can rule on whether a law as applied violates constitutional rights. "ALJs [cannot] rule on the validity of a statute. However, an agency or ALJ can still rule on whether a party's constitutional rights have been violated. . . . [M]erely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling." Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000) (also, claimant is not required to exhaust administrative remedies when challenging the constitutionality of a statute).

CONCLUSION

Because the ALJ's factual findings are supported by substantial evidence in the record, the Panel erred in making its own findings of fact and reweighing the evidence. Because the agency's interpretation of its regulations through the Panel and the ALJ is accorded deference, we adopt the Panel's interpretation of navigation. We hold that Regulation 30-12.A(2)(o) by its plain language does not apply. The petition for review was sufficient to confer jurisdiction under Regulations 30-6 and 30-7. OCRM remains a proper party before the Panel and the courts on appeal. Because the ALJ accorded significant weight to his interpretation of navigation under the regulations and stated that none of the subsections individually was a substantial enough reason to deny the permit, we remand this case to the ALJD for determination of whether the permit should issue in light of the Panel's interpretation of its own regulations.

The ALJ should evaluate the permit based on the records of the contested case hearing below but also has discretion to take any additional evidence necessary to this determination.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Benjamin Heyward,

Appellant.

Appeal From Charleston County
Daniel E. Martin, Sr., Circuit Court Judge

Opinion No. 3503
Submitted April 8, 2002 - Filed May 28, 2002

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Pachak, of S.C. Office of Appellate Defense, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General Caroline C. Tiffin, all of Columbia; and Solicitor David P. Schwacke, of N. Charleston, for respondent.

HEARN, C.J.: Benjamin Heyward appeals his conviction for assault with intent to commit first degree criminal sexual conduct (ACSC), contending the trial judge improperly charged the jury by defining the lesser included offense of assault and battery of a high and aggravated (ABHAN) as including the element of "sudden heat and passion upon sufficient legal provocation." We reverse and remand.[1]

FACTS

On March 29, 1997, the victim ("Victim") left her boyfriend's house between 11:00 and 11:30 p.m. to meet friends. While en route, she received a page from her boyfriend. Victim stopped at the nearest pay phone which was located between a store and a post office. The area was dimly lit so she kept her car lights on and parked within ten feet of the phone.

When Victim parked, Heyward was using the phone. Victim observed him for approximately two minutes as he used the phone. She also noticed a mint green Honda with a front license plate depicting a rose on a black background. Victim did not know Heyward. After Heyward finished using the phone, Victim tried to call her boyfriend, but received no answer. When she turned around, Victim saw Heyward sitting in her car holding the keys.

Heyward asked Victim if he could take her for a ride. When she declined, he pushed her to the ground and started beating her head and face, telling her to shut up and let him take her for a ride. Victim momentarily broke free from Heyward and tried to get back in her car, but Heyward grabbed her from behind and began to choke her. He then dragged her and forced her into his car, making her crawl from the driver's side to the passenger side. He told Victim he was taking her for a ride "to get some of [her] good stuff." As they started to drive away in Heyward's car, Victim continued to protest and

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

Heyward told her to shut up or he was going to kill her.

After traveling about seven-tenths of a mile, Victim remembered that her aunt lived nearby. She escaped by opening the car door and jumping from the car. She then ran to her aunt's house and called 911. A Charleston County Sheriff's deputy took Victim's statement about her assailant, his car, and the attack. Victim was bruised, her eye was swollen almost shut, and she had cuts and scratches under her eye and on her arms.

Another deputy stopped a green Honda around 1:15 a.m. The driver, Heyward, and the car fit the descriptions of the kidnapping earlier that evening. When he looked into the car, he saw a gold earring on the passenger's seat, a gold chain on the driver's seat, and another gold earring under the passenger seat.

On Monday, Victim identified Heyward as her assailant from a photographic line-up of six men. Victim later went to the Charleston County Sheriff's compound and identified the green Honda with the rose license plate. She also identified a necklace, a stud earing, and a hoop earring found in the car as jewelry she was wearing when abducted. Further investigation revealed that a blood sample found on Heyward's shirt matched Victim's blood type.

Heyward was indicted for ACSC and kidnapping. At trial, in addition to charging the law on ACSC, the judge also charged the jury on ABHAN. While defining ABHAN, the judge stated that "[a]ggravated assault is the unlawful and intentional infliction of injury upon a human being in sudden heat and passion upon a sufficient legal provocation or when accompanied by circumstances of aggravation." The jury convicted Heyward of kidnapping and ACSC. The trial judge sentenced Heyward to life imprisonment for the ACSC charge and thirty years for kidnapping. Heyward appeals the ACSC conviction.

DISCUSSION

Heyward contends the trial judge erred in defining ABHAN as including the element of sudden heat of passion upon a sufficient legal

provocation. We agree.

In State v. Pilgrim, 326 S.C. 24, 482 S.E.2d 562 (1997), our supreme court reversed a trial judge for equating ABHAN to voluntary manslaughter because the comparison improperly added an additional element of sudden heat of passion upon sufficient legal provocation. In this case, the trial judge stated that "[a]ggravated assault is the unlawful and intentional infliction of injury upon a human being *in sudden heat and passion upon sufficient legal provocation* or when accompanied by circumstances of aggravation." (emphasis added). Thus, the trial judge's charge was improper.

Furthermore, the improper charge was not harmless because an ABHAN charge was required given the evidence presented at trial. Our supreme court has held that ABHAN is a lesser included offense of ACSC. State v. Elliott, 346 S.C. 603, 607-08, 552 S.E.2d 727, 729-30 (2001). ABHAN requires an unlawful act of violent injury accompanied by circumstances of aggravation. State v. Sprouse, 325 S.C. 275, 286, n. 2, 478 S.E.2d 871, 877, n. 2 (Ct. App. 1996). A trial judge must charge a lesser included offense if there is any evidence from which it can be inferred that the defendant committed the lesser included of the crime charged. State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986).

The factual scenario presented in Drafts is strikingly similar to that presented here. Like Heyward, Drafts was also indicted for kidnapping and ACSC. The critical issue in Drafts was whether the trial judge erred in failing to issue an ABHAN charge. Drafts coerced the victim into going for a ride with him by showing her a knife. Once inside the vehicle, Drafts brandished the knife and asked if she would "give him a little bit" and then asked her to have oral sex with him. 288 S.C. at 33, 340 S.E.2d at 786. Drafts also kissed the victim, touched her breasts and between her legs, and tried to place his hands under her shirt. In his defense, although admitting taking indecent liberties with the victim, Drafts claimed he did not want to do anything with her. On these facts, the South Carolina Supreme Court reversed, stating: "If the jury had believed appellant 'did not want to do anything' with the victim, they [sic] could have concluded there was no attempted sexual battery and found him guilty of

ABHAN." 288 S.C. at 34, 340 S.E.2d at 786. Accordingly, the court held it was error for the trial judge to refuse to charge ABHAN.

The dissent would find the erroneous charge harmless because it believes Heyward's intentions, as expressed in the threat that he was going "to get some of [Victim's] good stuff"were to rape Victim. Even though it appears, based upon Heyward's allusion to Victim's "good stuff", that Heyward may have intended to sexually assault her, that does not vitiate his entitlement to the lesser included charge of ABHAN under the clear holding of Drafts. In Drafts, the intentions of the defendant were even clearer than Heyward's– in that case he asked the victim to "give him a little bit" and asked her to perform oral sex. Moreover, Drafts' alleged statements were not the only evidence of his intent. He also kissed the victim and touched her breasts. Nevertheless, the South Carolina Supreme Court found Drafts was entitled to an ABHAN charge. Therefore, under existing case law governing lesser-included offenses and most particularly under Drafts, we cannot isolate Heyward's single statement concerning Victim's "good stuff" to the exclusion of the evidence that Heyward was guilty only of ABHAN. As noted in State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999), to warrant eliminating a lesser included offense charge, it must "very clearly appear that there is *no evidence whatsoever*" tending to reduce the crime from the greater offense to the lesser. It is impossible on these facts to find that there was no evidence whatsoever tending to show ABHAN. Because Heyward was entitled to the benefit of an ABHAN charge, the trial judge's erroneous charge cannot be considered harmless. Accordingly, Heyward's conviction for intent to commit first degree CSC is reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.

HOWARD, J., concurs.

GOOLSBY, J., dissents in a separate opinion.

GOOLSBY, J. (dissenting): I respectfully dissent. I would hold any error committed by the trial judge in instructing the jury regarding assault and battery of a high and aggravated nature was harmless. Here, given the evidence, the appellant was not entitled to the charge in the first place.

The only reasonable inference that can be drawn from the evidence is that the assault that the appellant committed on the victim, a person whom he did not know, was solely for the purpose of subduing her and carrying her away for the purpose of raping her. His statement to her that he was taking her for a ride "to get some of [her] good stuff," together with the victim's understanding that he meant to rape her, are probative of this and this only. Indeed, there is no evidence otherwise.

And that is what distinguishes this case from State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986), the case that the majority views as controlling. There, the appellant testified in his own defense and claimed "he did not want to do anything" to the victim. Here, the appellant did not testify and thus offered no evidence about what he intended to do or not do to the victim.

I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Wilson,

Respondent,

v.

Charles Rivers,

Appellant.

Appeal From Charleston County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3504
Heard March 5, 2002 - Filed May 28, 2002

AFFIRMED

John L. McDonald, Jr., of Clawson & Staubes, of Charleston, for appellant.

Francis X. McCann, of Charleston, for respondent.

HEARN, C.J.: Joseph Wilson brought this action against Charles Rivers for injuries he allegedly sustained in a car accident. The jury returned a verdict for Wilson. Rivers appeals, arguing the trial judge erred in refusing to admit the deposition of his expert witness in biomechanics. We affirm.

FACTS

Wilson was a passenger in a vehicle driven by a co-worker, Deborah Ryan, which was stopped at a red light when Rivers' car struck them from behind. At the time of the impact, Wilson was wearing a seatbelt and was leaning forward to retrieve his keys from the car's floorboard.

Wilson brought this personal injury action. In his amended answer, Rivers admitted simple negligence "in allowing the front of his vehicle to bump the rear of the vehicle in which [Wilson] was a passenger" but asserted Wilson's claims of back pain and surgery were unrelated to the low-speed collision.

At trial, Wilson testified he did not call EMS or go to the hospital immediately following the accident. The next Monday, he went to a doctor, had x-rays made, and was diagnosed with "some soft-tissue damage." When Wilson failed to improve after several months, he was given an MRI and referred to an orthopedist who diagnosed him with a ruptured disk. The orthopedist recommended surgery after an epidural failed to provide Wilson relief. Wilson underwent a spinal fusion in December 1997. At the time of trial, Wilson's medical bills totaled $54,324.88, and he claimed lost wages of $8,872.47.

Wilson introduced the depositions of two of his treating physicians. The first testified that Wilson had a disk rupture with an annular tear and a herniated disk at L4-5 and "to a reasonable degree of medical certainty that the accident most probably did cause the injury that subsequently led to [Wilson's] necessity for surgery." However, he did note that Wilson had degenerative arthritis in his lower back that probably predated the accident. Wilson's orthopedic surgeon testified to the same injuries and stated they were consistent with being in a bent over position during an impact. Wilson testified he had no back pain prior to the accident.

In support of his contention that the accident did not cause Wilson's injuries, Rivers sought to introduce the depositions of a radiologist and Dr. Richard Harding, a purported expert in the field of biomechanics. The radiologist's testimony was admitted, and he testified that it is unusual for trauma of an acute nature to involve just one disk if there has been no fracture.

He believed this accident did not cause or aggravate Wilson's injuries. The thrust of Dr. Harding's testimony was that Wilson's injuries were not likely caused by the accident in question. After reading the deposition and conducting a lengthy colloquy on the matter, the trial judge refused to admit the deposition because he was concerned it would confuse the jury.[1]

The jury returned a verdict for Wilson for $103,500. The trial judge granted Rivers a setoff for the amount previously tendered to Wilson by the primary insurance carrier but denied his post-trial motions for a new trial absolute or new trial *nisi remittitur*. Rivers appeals.

DISCUSSION

On appeal, Rivers contends the trial judge abused his discretion in excluding Dr. Harding's videotaped deposition regarding the injuries reportedly sustained by Wilson. We disagree.

Rivers' argument focuses on Dr. Harding's qualification as an expert in the field of biomechanics. However, based on our review of the record, the trial judge did not specifically refuse to qualify Dr. Harding as an expert, but instead excluded the deposition under Rule 403, SCRE. Although he expressed concerns about Dr. Harding's qualifications, he ultimately found that the deposition was more prejudicial than probative and that the testimony would be confusing to the jury.

In evaluating proposed expert testimony, trial judges consider Rules 702 and 403, SCRE. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). Rule 403 provides for the exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." This analysis is subject to

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[1]In excluding the deposition, the trial judge said, "I don't think– I don't believe it will assist this Jury to understand the evidence in this case. I believe it would be more confusing than anything else and I would exclude it on that basis."

an abuse of discretion standard. State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). Moreover, "[a] trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" Hamilton, 344 S.C. at 357-58, 543 S.E.2d at 593 (Ct. App. 2001).

The trial judge found Harding seemed confused about the subject of his testimony and gave contradictory answers about the basis of his opinion. Based on our review of the deposition, we find there is evidence supporting the trial judge's decision to exclude Dr. Harding's deposition. For example, Harding testified that he made his determination about Wilson's injuries caused by the accident based on his determination of the change in velocity at impact which he reached by looking at the damage to the vehicles, but he then testified that the amount of property damage does not determine the extent of injury. Harding also testified that he did not know either the speed of Rivers' vehicle or Wilson's precise position at impact. From this evidence, we find the trial judge properly concluded that the jury would be unduly confused by the testimony. Although this is a close case, it is not an exceptional circumstance warranting reversal. Because we do not believe the trial judge exceeded his discretion in excluding the evidence under Rule 403, SCRE, we affirm his decision.

AFFIRMED.

CONNOR, J., concurs.

SHULER, J., dissents in a separate opinion.

SHULER, J., dissenting: Because I believe there is no evidence in the record to support the trial court's finding that Harding's proposed testimony would be confusing to the jury and therefore more prejudicial than probative, I respectfully dissent.

Rule 403, SCRE provides that evidence, even if relevant, "may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." (emphasis added). Although the trial court's decision on the admission of an expert's testimony is largely discretionary, "the exercise of this discretion will be reversed where an abuse of discretion has occurred." Payton v. Kearse, 329 S.C. 51, 61, 495 S.E.2d 205, 211 (1998).

The trial court's only reasons for deciding Harding's testimony would confuse the jury were that Harding "doesn't understand [biomechanics] himself" and that he "contradict [sic] himself on numerous cases [sic] as for the basis for his opinion." To the contrary, in my view Harding's proffered testimony clearly demonstrates his understanding of physics as it applies to the human body, and furthermore that his alleged contradictions are not contradictory at all.

Harding's deposition testimony was based on his expertise in medicine and biomechanics, "a branch of physics that deals with the understanding of what happens when people . . . are exposed to forces." In reaching his conclusions, he considered Wilson's medical records, the depositions of Wilson's treating physicians, the accident report, and photographs of and repair cost estimates for both vehicles, along with his knowledge of impact tests by Consumer Reports and the Insurance Institute for Highway Safety on the Mazda 626, the type of car in which Wilson was riding. As a result, Harding opined that, to a reasonable degree of medical certainty, the forces involved in the accident were not of a sufficient magnitude or direction to cause the disk herniating suffered by Wilson.

Harding further testified his conclusion was based on a measured calculation called the impact-related change in velocity, or "delta V," which he explained "represents the difference between the velocity of [Wilson's vehicle] before the accident to the velocity of [his] vehicle as a consequence of the accident." He stated that "the higher the delta V, the more likely it is to cause injury, because the change in velocity occurs over a very short period of time and, as such, imposes accelerations and therefore force on the individuals in the vehicle." Based on his review of the documentary evidence, Harding concluded

the delta V on the Mazda "was no greater than five miles an hour."

The majority proposes to affirm the trial court based on allegedly contradictory answers by Harding. As to the issue of the property damage, Harding testified that *one* factor he reviewed in evaluating the case was the damage to both vehicles; on cross-examination, he freely admitted he would not testify "that the amount of property damage to a car . . . determines the extent of injury [to] an occupant." Regarding the speed of Rivers' vehicle, Harding specifically stated it was not a relevant consideration in his analysis because the delta V is the *change* in speed of *Wilson's* vehicle. Finally, Harding's testimony evidenced an understanding of Wilson's position when the accident occurred. As Harding reviewed an illustration drawn by one of his medical artists showing an individual bent over by "about 45 degrees," the following exchange occurred:

> Q. [A 45 degree angle] wouldn't be a realistic example in this case because Mr. Wilson had his chest on his knees and his hands in the floorboard at the time of the wreck. Are you aware of that?
>
> A. Well, I know that's what he said on occasions. He's also just said he was leaning forward and couldn't recall precisely how he was postured at the time of the impact. But that he was leaning forward.
>
> Q. So you don't know what his position was at the time of impact yourself?
>
> A. Not precisely. That is correct.

In my opinion, there is nothing contradictory or remotely confusing about this testimony. In a recent case on similar facts, the Louisiana Court of Appeal held a trial judge improperly excluded testimony from a biomechanics expert. See Russell v. Roadrunner Towing & Recovery, 765 So. 2d 373 (La. Ct.

App. 2000). There, as here, the expert was asked to determine whether a low-speed collision could have caused the plaintiff's herniated disk based on a review of vehicle photographs, repair estimates, driver statements, and the plaintiff's medical records. Id. at 377. The court stated that "[a]ny alleged failure to visit the scene or supply specific facts in the analysis or conclusion provides a basis for attack [on] cross-examination." Id. More specifically, the court found the expert's references to "force vector and injury mechanisms at various speeds" supported his proffered opinion and would not prejudice or confuse the fact finder. Id.; see also Berkeley Elec. Co-op, Inc. v. S. C. Pub. Serv. Common, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991) ("Where the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value.").

Moreover, I would find the exclusion of Harding's testimony prejudiced Rivers, who offered it to support his defense that the low-speed, low-impact accident could not have caused Wilson's back injury, the major issue in dispute at trial. As noted by the Russell court, the relative importance of such expert testimony increases in low-speed collisions which involve serious injuries:

> As the force of impact in a collision lowers, and the seriousness of the injury rises, expert testimony becomes more relevant. An expert's commentary on speed, rate of acceleration, force of impact, and the correlation to injuries suffered as exemplified in reliable published studies would become an integral part of the defense or plaintiff's case. A plaintiff or defendant cannot be deprived of their right to offer a reasonable presentation of issues . . . .

Id. at 376.

For the foregoing reasons, I would hold the trial court abused its discretion in excluding Harding's testimony, and would therefore reverse and remand for a new trial. See Means v. Gates, 348 S.C. 161, 171, 558 S.E.2d 921, 926 (Ct. App. 2001) (finding the exclusion of expert testimony "not harmless

error as there was no equivalent testimony presented").