OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

June 17, 2002

ADVANCE SHEET NO. 20

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolyn J. McCraw,
Employee, Respondent,

v.

Mary Black Hospital,
Employer, and PHT
Services, Ltd., Carrier, Petitioners.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal From Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25480
Heard April 16, 2002 - Filed June 17, 2002

AFFIRMED IN PART; VACATED IN PART; REVERSED IN PART; and REMANDED.

David Hill Keller, of Haynsworth Sinkler Boyd, P.A., of Greenville, for petitioners.

Danny R. Smith, of Spartanburg, and Deborah R.J. Shupe, of Columbia, for respondent.

JUSTICE WALLER: In this workers' compensation case, we granted a writ of certiorari to review the Court of Appeals' opinion. See McCraw v. Mary Black Hosp., 338 S.C. 478, 527 S.E.2d 113 (Ct. App. 1999). We affirm in part, vacate in part, reverse in part, and remand.

FACTS

Respondent Carolyn McCraw worked for petitioner Mary Black Hospital (the Hospital) as a nursing assistant from 1961 until November of 1992. From 1986 to September 1991, she worked in the endoscopy unit where her duties included assisting physicians, restocking the rooms, and disinfecting equipment. When disinfecting the endoscopes, McCraw used cleaners containing Glutaraldehyde, a chemical known to be a respiratory irritant. The cleaners burned McCraw's eyes, irritated her throat, and eventually caused chest tightness, congestion, wheezing, coughing, and breathing difficulty. Initially, her symptoms would abate when she left work, but by the time she left the endoscopy unit, McCraw's breathing problems continued when she was home.

Dr. Mary Lou Applebaum, a pulmonary specialist, worked with McCraw in the endoscopy unit and observed her breathing difficulties while working with the chemicals. Dr. Applebaum testified that she saw McCraw two or three times a week and McCraw consulted with her on an informal basis. Dr. Applebaum stated that during this time she was not seeing McCraw in the context of a doctor-patient relationship.[1] By 1991, McCraw realized her respiratory symptoms were related to her exposure to the chemicals and asked Dr. Applebaum if it would help for her to leave the endoscopy unit. Dr. Applebaum responded that she "certainly thought it was worth a try." In

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[1]However, Dr. Applebaum treated McCraw as a patient once in 1990 for sinusitis.

September 1991, McCraw transferred out of the endoscopy unit. Ultimately, McCraw was placed in the child care center of the hospital where she took care of employees' sick children. McCraw continued to have breathing problems and get respiratory infections after she left the endoscopy unit.

McCraw began seeing Dr. Applebaum regularly as a patient beginning in March 1992. From March to November 1992, Dr. Applebaum treated McCraw for asthmatic bronchitis, sinusitis and pneumonia. McCraw went for an office visit with Dr. Applebaum on November 19, 1992, and Dr. Applebaum told McCraw she had to stop work. That same day, McCraw was admitted to the hospital with diagnoses of asthma and pneumonia.

McCraw's last day of work at the Hospital was November 18, 1992. She submitted a long term disability claim to the Hospital, dated January 12, 1993, in which she stated her condition was related to her employment.[2] McCraw filed her workers' compensation claim on November 14, 1994.

At her deposition, Dr. Applebaum testified that exposure to Glutaraldehyde has been associated in medical literature with the development of occupational asthma. Dr. Applebaum stated that McCraw initially had a stable asthmatic condition which was mild in degree and allowed her to work on a regular basis, but the chemical exposure triggered a "severe progression" of the disease which was not reversible upon leaving that environment. To a reasonable degree of medical certainty, Dr. Applebaum believed McCraw's exposure to chemicals in the endoscopy unit and her work in the Hospital's child care center exacerbated McCraw's condition to the point McCraw is unable to maintain employment.

The Single Commissioner awarded McCraw benefits finding she sustained a compensable occupational respiratory disease, i.e., occupational asthma, caused by her exposure to Glutaraldehyde. The Commissioner found

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[2]McCraw indicated that she was getting respiratory infections from the children in the child care center.

McCraw was permanently and totally disabled as of November 19, 1992. In addition, the Commissioner found that McCraw's claim met the notice and statute of limitations requirements. In a 2-1 decision, the Full Commission reversed. The Commission made specific findings of fact that Dr. Applebaum diagnosed McCraw with lung disease, i.e., occupational asthma, in 1991 and that McCraw failed to file her claim within two years of receiving notice of this diagnosis.

The circuit court reversed the Commission's decision. Citing Bailey v. Covil Corp., 291 S.C. 417, 354 S.E.2d 35 (1987), the circuit court found the statute of limitations for an occupational disease claim is triggered by definitive diagnosis and total disability. Since total disability did not occur until November 19, 1992, the circuit court held that the November 14, 1994, filing of McCraw's claim was timely.

The Court of Appeals affirmed the circuit court's decision on the statute of limitations, but relied upon different reasoning. The Court of Appeals held the Commission's finding that McCraw was definitively diagnosed in 1991 was unsupported by substantial evidence in the record. Specifically, the Court of Appeals stated the following:

> There is simply no evidence Dr. Applebaum formally evaluated, let alone definitively diagnosed, McCraw with an occupational disease in 1991. Although Dr. Applebaum testified she could hear McCraw wheezing, she did not examine McCraw, test her, diagnose her, or treat her in 1991. McCraw knew in 1991 that her symptoms were related to the chemicals in the endoscopy unit, but there is no evidence that any physician had definitively determined that her exposure to the chemicals had triggered the progression of her pulmonary disease, much less notified McCraw of that fact. The confirmation that chemicals in the work environment should be avoided and were potentially related to breathing difficulties, even though relayed to the claimant by a qualified physician, do not under any view of the evidence constitute

> a definitive diagnosis of an occupational disease as contemplated by the statute. . . .
>
> The first plausible date supporting an argument Dr. Applebaum definitively diagnosed McCraw with an occupational disease occurred on November 19, 1992, when Dr. Applebaum took McCraw out of work and admitted her to the hospital. Even if we conclude this event amounted to a definitive diagnosis, McCraw applied for benefits on November 14, 1994, within two years of the designated definitive diagnosis.

McCraw, 338 S.C. at 485, 527 S.E.2d at 116-17 (citation omitted).

Moreover, the Court of Appeals disagreed with the circuit court that total disability is required to trigger the statute of limitations. Instead, the Court of Appeals held that the statute of limitations "begins to run for an occupational disease when the claimant receives notice of a definitively diagnosed occupational disease and suffers some compensable injury, that is, some disability." Id. at 488, 527 S.E.2d at 118.

As to petitioners' argument that McCraw failed to give timely notice of her claim, the Court of Appeals found that the crucial date regarding notice also would be November 19, 1992. The court further decided petitioners had not appealed the Commissioner's finding that McCraw gave timely notice, and therefore, it is the law of the case. Id.

Finally, the Court of Appeals reversed the portion of the circuit court's order which remanded the case to the Commission with instructions to award McCraw benefits. The Court of Appeals held that the circuit court erred in this respect because the Commission, as the ultimate fact finder, had not yet reached the merits of McCraw's claim which petitioners had also challenged in their appeal to the Commission. Therefore, the Court of Appeals remanded to the Commission for additional proceedings. Id.

ISSUES

1. Does the statute of limitations bar McCraw's claim?

2. Does the notice provision bar McCraw's claim?

DISCUSSION

1. Statute of Limitations

Petitioners argue that the Court of Appeals improperly made "its own determination of facts" by finding that respondent had not been definitively diagnosed in 1991, contrary to the specific finding of the Commission. We disagree.

This Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. E.g., Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Id. The Court may reverse the decision if the administrative findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Id.; S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2001).

The workers' compensation statute of limitations states in relevant part:

> The right to compensation under this title is barred unless a claim is filed with the commission within two years after an accident, or if death resulted from accident, within two years of the date of death. However, for occupational disease claims the two-year period does not begin to run until the employee concerned has been diagnosed definitively as having an occupational disease and has been notified of the

diagnosis.

S.C. Code Ann. § 42-15-40 (Supp. 2001) (emphasis added).

The Commission specifically found that Dr. Applebaum diagnosed McCraw in 1991. Petitioners argue that the evidence shows Dr. Applebaum diagnosed McCraw when she advised McCraw, during an informal conversation in the endoscopy unit, to leave the unit. Additionally, petitioners contend McCraw admitted she had been diagnosed because she testified that she knew in 1991 her asthma problems were related to her job.

We hold the Court of Appeals did not make its own factual findings, but instead, correctly determined that the Commission's finding was clearly erroneous and not supported by substantial evidence. The evidence established that Dr. Applebaum did not definitively diagnose McCraw while she worked in the endoscopy unit. Instead, the testimony clearly showed that these consultations were informal, undocumented, and not in the context of a doctor-patient relationship. Given that the statute of limitations requires that the employee be: (1) "diagnosed definitively as having an occupational disease," and (2) "notified of the diagnosis," the Court of Appeals properly reversed the Commission's finding that Dr. Applebaum diagnosed respondent in 1991. McCraw, 338 S.C. at 485, 527 S.E.2d at 116 ("The confirmation that chemicals in the work environment should be avoided and were potentially related to breathing difficulties, even though relayed to the claimant by a qualified physician, do not under any view of the evidence constitute a definitive diagnosis of an occupational disease as contemplated by the statute."). Considering the record as a whole, it simply is not reasonable to conclude that Dr. Applebaum's informal conversations with McCraw in the endoscopy unit constituted a definitive diagnosis, or that McCraw's understanding her asthma was affected by the workplace chemicals somehow constitutes notification of definitive diagnosis of an occupational disease. See Tiller v. National Health Care Ctr. of Sumter, 334 S.C. at 338, 513 S.E.2d at 845 (substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached).

Furthermore, we agree with the Court of Appeals that, based on the evidence in the record, the earliest possible date of definitive diagnosis occurred when McCraw was hospitalized on November 19, 1992; therefore, McCraw's November 14, 1994 filing for benefits was timely pursuant to § 42-15-40.

In its opinion, the Court of Appeals went on to discuss whether disability is required to trigger the statute of limitations. During this discussion, the Court of Appeals analyzed both workers' compensation statutes and applicable case law. McCraw, 338 S.C. at 485-88, 527 S.E.2d at 117-18. Petitioners maintain the Court of Appeals erred in holding that disability is a requirement of the statute of limitations.

The Court of Appeals' analysis of this issue was unnecessary given its dispositive holding that definitive diagnosis did not occur until November 19, 1992, at the earliest. In light of our decision affirming this holding, we decline to address petitioners' argument and vacate that portion of the Court of Appeals' opinion addressing this issue.

2. Notice

The Court of Appeals held petitioners failed to appeal the Commissioner's finding that McCraw gave timely notice of her claim to the Hospital, and therefore, it is the law of the case. Petitioners argue this was error. We agree.

Pursuant to S.C. Code Ann. § 42-15-20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing her claim. The Commissioner found that McCraw provided timely notice to the Hospital via a long term disability form filed on or about January 12, 1993. In their appeal to the Commission, petitioners alleged the Commissioner erred in finding that McCraw's claim was timely reported pursuant to section 42-15-20. The Commission, however, did not reach this claim because its decision rested solely on the statute of limitations issue. When McCraw appealed to the circuit court and when petitioners appealed to the Court of Appeals, petitioners continued to assert the notice issue.

Accordingly, the Court of Appeals clearly erred in finding petitioners had not appealed this issue.

In addition, petitioners continue to assert that McCraw knew she had an occupational disease in 1991, and therefore, she failed to give timely notice. However, as noted by the Court of Appeals, the record simply does not support a date for triggering notice earlier than November 19, 1992. Because McCraw filed the long term disability form in January 1993, there appears to be no merit to petitioners' argument. Nonetheless, we find that this issue has yet to be addressed by the Commission, and therefore it is remanded, along with the other issues raised by petitioners but not yet considered by the Commission. See Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995) ("The duty to determine facts is placed solely on the Commission and the court reviewing the decision of the Commission has no authority to determine factual issues but must remand the matter to the Commission for further proceedings."); Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989) ("the Full Commission, as the ultimate fact-finder, may make its own findings, adverse to those of the Single Commissioner").

CONCLUSION

The Court of Appeals' decision that the statute of limitations does not bar McCraw's claim because definitive diagnosis occurred, at the earliest, on November 19, 1992, is affirmed. We vacate the portion of the opinion which further discusses the statute of limitations issue. Finally, we reverse on the notice issue, and remand to the Commission for further proceedings.

AFFIRMED IN PART; VACATED IN PART; REVERSED IN PART; and REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ray Gilchrist, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenwood County
David H. Maring, Sr., Trial Judge
Rodney A. Peeples, Post-Conviction Judge

Opinion No. 25481
Submitted May 30, 2002 - Filed June 17, 2002

REVERSED

Assistant Appellate Defender Robert M. Pachak, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Attorney General Edgar R. Donnald, all of Columbia, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of post-conviction relief (PCR) to petitioner Ray Gilchrist. We reverse.

FACTS

Gilchrist was convicted of attempted common law robbery and sentenced to 12 years. On direct appeal, the Court of Appeals affirmed. State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998). As related in the Court of Appeals' opinion on direct appeal, the facts of the crime are as follows:

> On November 29, 1995 at approximately 9:00 p.m., Sandra Ginn (victim) was accosted while sitting in her car in the parking lot of Crosscreek Mall in Greenwood. Johnny Ethridge walked up to her window and when she rolled it down slightly, he stuck his hand inside and demanded her billfold. He told the victim he had a gun and would shoot her if she would not give the billfold to him. When she told him she did not have it, he began to choke her and threatened to kill her. She blew her horn in response and he fled. A witness exiting the mall heard the horn and saw a person walk away, and get into a slow-moving, white Mustang. The witness then saw the Mustang speed out of the parking lot.
>
> Shortly after midnight, Gilchrist was stopped while driving a white Mustang and asked to come to the Greenwood police department. Gilchrist admitted to police that he had picked someone up in the mall parking lot. He initially denied knowing the passenger's identity, but then said the passenger's nickname was Mandy or Brushawn. Gilchrist ultimately identified Ethridge from a photo line-up and told the police Ethridge's full name. Gilchrist consistently maintained his innocence, denying any part in the attempted robbery. He claimed he first knew of wrongdoing by his

passenger when they left the mall parking lot and Ethridge told him what he had done.

Ethridge pleaded guilty to attempted common law robbery and testified on behalf of the state. According to Ethridge, he, Gilchrist, and Gilchrist's cousin, Ervin Hackett, had driven around in Gilchrist's white Mustang. Ethridge was in the backseat. Gilchrist let Hackett out of the car after taking him to his girlfriend's house. Ethridge stayed in Gilchrist's car, getting in the front seat. Ethridge testified Gilchrist then offered him a "hit" of crack cocaine, which he accepted. He had not seen Gilchrist smoke any crack that day and he did not know whether Gilchrist was high or not.

According to Ethridge, Gilchrist told him that if they "[made] a lick," they could get some more crack. Ethridge testified a "lick" is a term meaning to "rip somebody off." Gilchrist also said, "Man, we get some more money, we can get some more of that," meaning crack. Although Ethridge did not respond, Gilchrist then drove to the mall.

Gilchrist parked the car in the mall lot and said to Ethridge, "Yo, man, there's one right there," pointing to the victim sitting in her car. Gilchrist then said "Damn man, if we had a gun." Gilchrist got out of the car, opened the trunk, and removed a metal lug wrench. Ethridge also got out of the car and went to the trunk. Gilchrist tried to hand him the wrench saying, "Yo, man, this will work real nice," but Ethridge refused to take it. Ethridge, who was still high from smoking crack cocaine, sat back down in the car for a few seconds, and then went over to the victim's car and attempted to rob her. After she blew the horn, he walked back towards Gilchrist's car, which was beginning to "creep up," and got inside. Gilchrist sped up as he left the mall and he dropped Ethridge near his girlfriend's house.

> Gilchrist's testimony contradicted Ethridge's account of the incident. First, Gilchrist said Ethridge got out of the car with Hackett. Gilchrist denied giving him a ride to the mall. Gilchrist said he went to the mall to visit his nephew and ran into Ethridge in the parking lot approximately an hour after he had dropped him off with Hackett. Once he got to the mall, Gilchrist decided not to actually go into the mall, but agreed to give Ethridge a ride, telling him to meet Gilchrist at the car. Gilchrist denied providing Ethridge with crack, hearing the victim's horn blow, or knowing Ethridge had committed a crime before he picked him up.

State v. Gilchrist, 329 S.C. at 624-25, 496 S.E.2d 425-26.

During opening argument, the State told the jury it intended to call Ethridge to testify on the State's behalf:

> The State will call Mr. Ethridge, who has tendered a plea of guilty to attempted strong-arm robbery. **And I'll say this from the bottom of my heart, that there is one soul, who was at one time unclean and is now clean.** It's that man there with his lawyer. He's clean today, and he will be cleaner still, because he is pleading – he is going to testify in the State of South Carolina's case with no guarantees of sentence for his plea of guilty of attempted strong-arm robbery in this case. He is at the point in his life where he wants to lay all the cards on the table and let the chips fall where they may. **That's good for the soul, and he is looking forward to this. As much as someone tragically is, he's at a point where he wants to be clean. That's really what it's all about. And there will be evidence in this case that Mr. Ethridge is wanting to let it all out. This is his day to let all these things fly. He's beyond that now. Hallelujah**. He's going to tell you that he's a drug addict. He's going to embarrass himself a little bit by laying out a

> resume of his conduct that pertains to his drug abuse and other misconduct and part of his life, but he will not run from it. He will salute, but he knows he's got a life. He's got a life and he's got a soul. . . .

(Emphasis added). Gilchrist's counsel did not object.

When Ethridge testified, he stated he had smoked crack provided by Gilchrist and, while high on the crack, had committed the attempted robbery at the suggestion of Gilchrist. He acknowledged he had prior convictions for distribution of imitation controlled substances, shoplifting, obtaining money under false pretenses, and forgery. On cross-examination, counsel highlighted how Ethridge had pled guilty to the attempted robbery, but had not yet been sentenced. When asked if he was hoping for leniency, Ethridge responded: "I'm not hoping, I'm praying."

At the PCR hearing, Gilchrist argued that trial counsel was ineffective for failing to object to the State's opening because it constituted impermissible vouching for Ethridge's credibility. Trial counsel testified that he "thought very seriously about making a mistrial motion and objection to all of that at the time. However, based upon the strategy of the case, [he] decided not to." Counsel did not elaborate on what the particular "strategy of the case" was.

As to this issue, the PCR court noted that although the State's opening was "passionate," it was not improper. The PCR court found that: (1) counsel had no reason to object; (2) counsel made a reasonable strategic decision not to object; and (3) there was no prejudice because of the trial court's standard instructions to the jury.[1]

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[1]For example, the PCR court noted that the trial court's preliminary remarks included that opening statements and closing arguments are not evidence, and the jury charge included instructions on the burden of proof and the juror's oath to base a verdict only on the evidence and the law.

ISSUE

Was counsel ineffective for failing to object to the State's opening?

DISCUSSION

Gilchrist argues his counsel was ineffective for failing to object to the State's opening comments about Ethridge because they improperly bolstered Ethridge's credibility. We agree.

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id. Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. E.g., Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. E.g., Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, the Court will not uphold the findings of a PCR court if no probative evidence supports those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

In State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, cert. denied, ___ U.S. ___, 122 S.Ct. 404 (2001), the Court explained that a solicitor:

> cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. . . . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness'

> veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. . . .

344 S.C. at 630, 545 S.E.2d at 818 (citations omitted). "Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility." State v. Kelly, 343 S.C. 350, 369, 540 S.E.2d 851, 861 (2001), rev'd on other grounds, 534 U.S. 246 (2002).

We hold the State improperly vouched for Ethridge's credibility in its opening statement. We find the following statement made by the solicitor particularly problematic: "And I'll say this from the bottom of my heart, that there is one soul, who was at one time unclean and is now clean." This statement amounts to a personal assurance of Ethridge's veracity because the solicitor emphatically stated that Ethridge was "now clean," i.e., worthy of belief. Since it is inappropriate for the State to assure the jury of a government witness's credibility, Gilchrist's counsel should have objected. See Shuler, supra; Kelly, supra. Moreover, the State's abundant use of the religiously-tinged language is also problematic and certainly enhanced the impropriety of the opening statement. The repeated references to Ethridge's soul and his expected testimony as his opportunity to cleanse his soul rise to the level of an assurance of Ethridge's credibility. See id.

Accordingly, counsel was deficient for failing to object to the opening statement and the PCR court erred in finding otherwise.[2]

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[2]Although the PCR court found counsel failed to object for strategic reasons, we note counsel never **articulated** any strategy at all. A blanket statement by counsel at a PCR hearing that he employed "strategy" does not automatically insulate the lawyer from being found ineffective. Consequently, there is no evidence to support the PCR court's finding that any valid strategic reason existed for the failure to object. Holland v. State, supra (the Court will not uphold the findings of a PCR court if no probative evidence supports those

As to the prejudicial impact of the failure to object, we find that prejudice clearly flowed from counsel's error. In the instant case, Ethridge was the State's key witness, and therefore his credibility was crucial to the government's case. Indeed, because Gilchrist essentially presented a "mere presence" defense, believing Ethridge was the only way the jury could convict Gilchrist.[3] We note further that because of Ethridge's admitted drug use at the time of the crime, his prior convictions, and his interest in providing favorable testimony for the State to obtain leniency in his own case, Ethridge's credibility clearly was questionable.

Accordingly, given Ethridge's obvious credibility problems, and the fact that Gilchrist's conviction is inextricably linked to Ethridge's credibility, counsel's failure to object to the State's improper vouching prejudiced Gilchrist's case.

CONCLUSION

The PCR court's order denying relief is

REVERSED.

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

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findings); Stokes v. State, supra (**where counsel articulates** a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel).

[3]While other witnesses' testimony placed Gilchrist at the scene (via his white Mustang), and Gilchrist himself admitted to being at the scene, only Ethridge offered direct evidence that Gilchrist aided and abetted the attempted robbery perpetrated by Ethridge, and that the plan for the crime originated from Gilchrist. Moreover, Ethridge's testimony provided the motive for the crime. Thus, Ethridge supplied the testimony necessary to convict Gilchrist.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex parte: John Martin Foster, Appellant,

In re: Thomas E. Pope as Solicitor, Respondent,

v.

Jonathan Edward Pate and One 1987 Nissan Sentra Automobile (VIN #1N4PB22S3HC871896); Seven Hundred Ninety-Six and 67/100 ($796.67) Dollars in U.S. Currency; One Arch Pager (Serial #1659257); One Alltel Mobile Phone (Serial #SWF1396E); and One Necklace - gold in color, Defendants,

of whom Jonathan Edward Pate is Respondent.

Appeal From York County
Henry F. Floyd, Circuit Court Judge

Opinion No. 25482
Heard February 7, 2002 - Filed June 17, 2002

REVERSED AND REMANDED

John Martin Foster, of Rock Hill, for appellant.

Assistant Solicitor Kevin Scott Brackett, of York, for respondent Pope.

Attorney General Charles M. Condon; Deputy Attorney General Treva G. Ashworth; and Assistant Deputy Attorney General J. Emory Smith, Jr., of Columbia, for The State, Intervenor.

Assistant Appellate Defender Aileen P. Claire, of Columbia, for respondent Pate.

Lucy London McDow, of Rock Hill, for York County Bar Association, Inc., *amicus curiae*.

JUSTICE PLEICONES: Appellant, a licensed attorney, appeals an order appointing him Guardian ad Litem (GAL) for respondent Pate, the defendant in a civil forfeiture action. Appellant contends the order contains insufficient factual findings to support the appointment. We agree, and reverse and remand.

At the time of the appointment, Pate was incarcerated and, although the

pleadings and orders make no reference to the rule, it appears the appointment was made pursuant to Rule 17(c), SCRCP:

> when a person is imprisoned in this state, and not a minor or incompetent, the court may, in its discretion appoint a guardian ad litem or order him to be brought personally to the trial to testify in accordance with Rule 43(a).

Rule 17(d)(2), SCRCP provides:

> **(d)(2) Who May Be Appointed.** The general guardian of a minor or incompetent person may be appointed guardian *ad litem*, if he has no interest adverse to that of the person whom he represents in the action. No other person may be appointed guardian *ad litem* of a minor or incompetent or imprisoned person unless he be fully competent to understand and protect the rights of the person whom he represents, has no interest adverse to that of the person whose interest he represents, is not connected or associated with the attorney or counsel of the adverse party, and is not the attorney for the adverse party. If the guardian *ad litem* is an attorney, it shall not be necessary that he be represented by an additional attorney; but the attorney of the adverse party shall not represent the guardian *ad litem*.

The initial order appoints appellant as Pate's GAL. Appellant petitioned for reconsideration and the order issued in response to that motion explicitly provides "the [appellant] shall have 60 days **to answer & investigate through the guardian ad litem**." (emphasis supplied). Appellant correctly asserts that he has been appointed Pate's *de facto* attorney as well as his *de jure* GAL, a practice countenanced by Rule 17(d)(2).

Issue

> Is an incarcerated defendant in a civil forfeiture action entitled to an appointed GAL or attorney?

Discussion

The rationale for appointing a GAL for a prisoner "is not mental deficiency, but the physical restraint of imprisonment." In re Bishop, 272 S.C. 306, 251 S.E.2d 748 (1979). When a prisoner is already represented by competent counsel, or when he "has made an informed decision not to contest the suit," the circuit court need not appoint a GAL. Gossett v. Gilliam, 317 S.C. 82, 452 S.E.2d 6 (Ct. App. 1994) *cert. denied* June 16, 1995. In Gossett, a civil forfeiture suit, the Court of Appeals held that under Rule 17(c), the appointment of a GAL for an inmate is "discretionary" if the judge determines it is more 'feasible' to bring the prisoner himself to trial. The Court of Appeals went on to hold that:

> where an adverse judgment against the prisoner will affect present or future property rights, the court should ensure either that a [GAL] is appointed or that the inmate is at least brought to court prior to entry of a default judgment against him for a determination of whether the appointment of a [GAL] is essential to the protection of the prisoner's rights. The spirit of the law demands no less.

Id. at 86, 452 S.E.2d at 8.

Appellant has been appointed as a *de facto* attorney, however, and not as a "mere" GAL. At the time this appointment was made, the factors to be considered in making such an appointment were outlined in Ex parte Dibble, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983). Appellant rightly complains that the orders here are devoid of any discussion of the Dibble factors. We therefore reverse and remand the appointment order for reconsideration.

On remand, the trial court shall apply Rule 608, SCACR which we adopted after this appeal was filed, and which now governs this appointment procedure. Rule 608(g) provides:

(1) The unnecessary appointment of lawyers to serve as

> counsel or GALs places an undue burden on the lawyers of this State. Before making an appointment, a circuit or family court judge must insure that the person on whose behalf the appointment is being made is in fact indigent. Further, a lawyer should not be appointed as counsel for an indigent unless the indigent has a right to appointed counsel under the state or federal constitution, a statute, a court rule or the case law of this State. Finally, except where the appointment of a GAL is mandated by the state or federal constitution, statute, Rule 17, SCRCP, other court rule or the case law of this State, circuit and family court judges should cautiously exercise their discretionary authority to appoint a GAL under Rule 17, SCRCP.
>
> (2) A lawyer should only be appointed as counsel under this rule when counsel is not available from some other source. For example, an appointment under the rule for a criminal defendant should not be made when there is a public defender available to take the appointment.
>
> (3) When available, the circuit and family courts should consider using non-lawyers as GALs. The family court in each county is expected to encourage and support the South Carolina Guardian Ad Litem Program, S.C. Code Ann. §§ 20-7-121 to -129. Effective use of this program will further reduce the burden placed on lawyers while insuring that competent GALs are provided for children in abuse and neglect cases.

On remand, in addition to the requirements of this rule, the circuit court shall consider the following issues in determining whether respondent Pate should be appointed a GAL, and if so, whether an attorney should be appointed to that position:

(1) Is respondent Pate indigent?

(2) Is the nature of this civil forfeiture action so complex that the fact of respondent Pate's incarceration will unfairly hamper his ability to defend his case?; and

(3) If a GAL is appointed, is she entitled to be compensated out of the proceeds of the forfeited property for her investigative costs and/or for her time as a "proper expense of the proceeding" under S.C. Code Ann. § 44-53-530(c)(Supp. 2001)?

We emphasize neither Rule 17, SCRCP, nor Rule 608, SCACR, require the automatic appointment of GALs for incarcerated persons. Rather, the trial court is to exercise its discretion in making these appointment decisions. Ordinarily, the inmate should be brought before the court prior to the appointment decision in order for the court to adjudicate the inmate's indigency status, and to allow the trial judge to assess the particular inmate's needs on an individual basis. If no GAL is appointed, then arrangements must be made to ensure the inmate's presence at the trial on the merits. Rule 17(c), SCRCP; Gossett v. Gilliam, *supra*. Further, it does not follow automatically from the conclusion that a GAL should be appointed that the appointment should be made from among the members of the Bar. There may well be a friend or family member of the inmate who can assist in the defense of the forfeiture suit.

The order appointing appellant as GAL in this matter is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Harry C. DePew, Respondent.

Opinion No. 25483
Submitted May 17, 2002 - Filed June 17, 2002

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Harry C. DePew, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction ranging from an admonition to a public reprimand. We accept the agreement and find that a public reprimand is the appropriate sanction. The facts as set forth in the agreement are as follows.

Facts

Respondent failed to diligently pursue several matters on behalf of his clients. In one matter, he delayed in preparing a proposed Final Decree of Divorce as requested by the family court. In a second matter he did not file suit on behalf of his client until a few days before the statute of limitations expired. In that same matter, he failed to advise his client of the value of her personal injury claim and failed to keep her informed about the status of the matter. In a third matter, he failed to file suit on behalf of his client before the statute of limitations expired. He also failed to keep the client informed about the status of the matter and failed to return her telephone calls.

In a fourth matter, respondent failed to complete necessary documents, failed to return documents to the client, and failed to respond to messages left by the client and the client's family.

In addition to engaging in a pattern and practice of failing to act diligently on behalf of his clients and failing to adequately communicate with them, respondent has also lost or been unable to locate documents relating to numerous matters, which indicates respondent is not properly safeguarding documents.

Finally, despite numerous statements and calls from a court reporter, respondent failed to pay the court reporter's bill until over a year after the first invoice was sent.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a)(a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule

8.4(a)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e)(it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5)(it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice). Finally, respondent failed to cooperate with Disciplinary Counsel's investigation. In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Troy Alan Burkhart, Appellant.

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

Opinion No. 25484
Heard December 13, 2001 - Filed June 17, 2002

REVERSED AND REMANDED

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Druanne D. White, of Anderson, for respondent.

CHIEF JUSTICE TOAL: Troy Alan Burkhart ("Appellant") appeals his convictions on three counts of murder and three counts of possession of a firearm during commission of a violent crime for which he was sentenced to death. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

On January 13, 1998, the grand jury for Anderson County indicted Appellant for the murders of Shane and Stacy Walters, half-brothers, and Sonya Cann. In addition to the three counts of murder, Appellant was indicted on three counts of possession of a firearm during the commission of a violent crime. Although Appellant admitted to shooting and killing Shane, Stacy, and Sonya, he pled not guilty, claiming he killed them all in self-defense.

After a two week trial beginning on March 6, 2000, the jury convicted Appellant on all three counts of murder and all three counts of possession of a firearm during commission of a violent crime. The following day, the jury recommended Appellant be sentenced to death, citing the murder of two or more persons pursuant to one scheme or course of conduct as the statutory aggravator. The trial judge affirmed their recommendation and sentenced Appellant to death.

According to the record, Appellant met the Walters brothers just a few days before they were killed. It all began when a mutual friend, Paul Zastrow, introduced Appellant and the Walters when they met by chance at Zastrow's house on Friday, November 14, 1997. Appellant did not know the Walters before that weekend and claims he did not know Sonya Cann at all. Appellant owned and managed a bar called Traditions, and the Walters set up mobile homes for a living.

A group of Clemson students had rented Appellant's bar for a private party that weekend, but Appellant was having trouble with his septic tank. Zastrow suggested that the Walters might be able to help fix it. Appellant accepted the offer and Zastrow and both Walters arrived at Traditions Friday evening, November 14, to work on the septic tank. They built a bonfire and

spent the night working on the septic tank, drinking, doing drugs (methamphetamine and marijuana), and talking about deer hunting. An impromptu party developed as several other friends showed up and joined them.

Although Burkhart often carried a sidearm (because, he testified, "I deal with money and liquor and I'm in a secluded location")[1], he had never been hunting, but had become interested in learning to hunt in the weeks preceding these events. After the party broke up, Appellant, Shane, Stacy, and another friend drove around in the woods with their guns looking for deer. Apparently, the group saw and startled a deer at some point before deciding to go home. Shane took Appellant home and told him he could help him again with the septic tank on Saturday if necessary.

The next day, Saturday, November 15, went much like the previous evening. Appellant picked up Shane at Paul Zastrow's house around 9:00 p.m. and they drove to Traditions to work on the septic tank. Many of the same people from the night before returned, and the group drank alcohol and did drugs until the bar closed, just as they had on Friday night. Apparently, Shane and Appellant agreed to go hunting the following morning. Appellant dropped Shane off and went home to prepare to go hunting. Appellant waited on Shane, but he never showed up. Appellant drove to Shane's house twice and knocked on the door, but got no answer. Assuming Shane fell asleep, Appellant drove to Paul Zastrow's house for coffee and then drove home to go to sleep.

That afternoon, Sunday, November 16, Shane and his wife Vicky had some friends over to watch car races on television. Appellant called Shane several times, and he and Paul Zastrow went over to the Walters' trailer around 4:00 p.m. Stacy came in from work a short time later. At some point, Shane, Stacy, and Appellant decided to go "four-wheeling" in Shane's truck. Appellant had his gun with him in case they went hunting, and Shane had his rifle. The three men were drinking and doing drugs at this time.

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[1]Appellant purchased a Colt .45 automatic - the gun he shot Shane, Stacy, and Sonya with - at a pawn shop a few years before this episode.

At some point after four-wheeling, the threesome drove over to Tammy Steele's house where they continued partying. According to Tammy, Appellant's wife called him on his mobile phone while he was there and, after speaking to her, Appellant said he did not want to go home that night. Tammy also testified that Appellant mentioned that his business was not doing well and thanked Shane and Stacy profusely for helping him with the septic tank. At some point, Tammy's sister, Danielle, came over. Some time later, Paul Zastrow contacted the group and asked if Appellant could bring him some beer from Traditions. Appellant agreed to do so, and he, Shane, and Danielle went by Traditions and then onto Zastrow's, where they did more drugs and drank with Zastrow and his girlfriend. While they were gone, Tammy testified that she and Stacy had sex and that the condom Stacy was wearing broke and they could not find it.[2]

Shane, Danielle, and Appellant returned to Tammy's house until the party disbursed sometime after 5:00 a.m. Shane, Stacy, and Appellant left Tammy's house in Shane's truck. After they left her house, Shane drove them to Sonya Cann's house to pick her up. Sonya sat in the front of the truck between Shane and Appellant and Stacy sat on the backseat of the truck, behind Appellant on the passenger side. They drove around for a little while, eventually going up to an isolated kudzu field known to everyone in the truck but Appellant.

From this point on, Appellant testified that the atmosphere in the truck changed dramatically. He related the ensuing events as follows:

> When we got to the top, we parked and I believe there was some beer opened and Sonya handed Stacy some, what I believed to have been some more

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[2]This testimony is relevant because Stacy's autopsy revealed he was wearing a condom at the time of his death which Appellant claims corroborates his story that Stacy threatened him with homosexual rape. The State refuted this evidence by arguing the condom was the same one he used with Tammy earlier in the night.

> methamphetamine. . . . Stacy was, was fixing it . . . on a CD case. And I said to Shane, I said, "Are there any deer here, where are the deer?" He didn't answer, but Sonya said, "There ain't no deer here, this is a scattering field.". . . I didn't know what to think of that. I guess I just let it go and didn't think much more about it. And I . . . started a conversation about the restaurant. Shane and I had talked about him knowing someone that could help me that wasn't a bank. And I asked him a little more about that. And he told me that he had that worked out and that I didn't have to worry about that. . . .That's when Stacy handed Shane a cassette case with some what I thought to be methamphetamine on it. . . . He held it for a moment and passed it to me. When I got it, it still had four lines or four piles of powder on it. . . . [O]n occasion when we had done drugs before, when I got it, there was only one line left on it. I thought it was strange that there were four and it had been passed through the other three. . . . As he passed it to me, he asked me if I had ever wronged anyone. And I said, "No, what do you mean by that?" Then he said, "Have you ever wronged your Uncle Ronnie?"

Appellant claims that this question "struck fear into [his] soul." Appellant and his father considered Ronnie, who had a reputation for being a somewhat ruthless drug smuggler, an enemy.[3] Appellant's testimony continued:

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[3]Ronnie Burkhart and his brother, Appellant's father, Warren Burkhart, hated each other so much, according to an attorney with first-hand knowledge of their relationship, that they could not be left alone in a courtroom together without getting into a fist fight. Ronnie seemed determined to ruin his brother financially and there were several lawsuits between the two brothers. Appellant's relatives referred to Ronnie as "very vicious" and as an "evil

> [Shane] said that he and Ronnie had this thing worked out, that he had gotten money from drugs in Florida. . . . [Shane] said all he had to do was take care of me . . . . Then [Shane] said, "it's time to get this over with." Then he pulled out the gun and told me to get the hell out of the truck. . . . Stacy had had [sic] me around the neck and had a knife in his hand and said, "we're going to make you squeal like a pig, boy." . . . Sonya said, "Yeah, baby, make him squeal like a pig." . . . I lunged for the gun and then the gun went off. . . . I was able to get the gun and I just shot. I just shot. . . . I couldn't say which direction. . . . I shot until it wouldn't shoot. . . . I opened the driver's door and . . . I pushed Shane and Sonya out of the truck. . . . I heard what sounded like another door slamming. . . . I looked on the seat and saw the other clip for the gun was there, and I put the other clip in the gun. . . . I couldn't get it to work. I couldn't get the bullet to go in. And I remember trying to get it to work and bullets coming out, and I remember it going off. Then I got out of the truck to see what it was that I may have heard, and I couldn't see anything. I went around and I pulled Stacy out of the truck. . . . I got in the truck and got the hell out of there. . . . I thought I was going to be raped and killed.

Shane Walters was shot six times, including one fatal wound to the back of the head. Stacy Walters was shot in the right temple and right cheek, either of which would have been fatal. Sonya Cann was shot three times, including fatal wounds to the right temple and through the left eye.

The State contended, contrary to Appellant's account, that the shots that killed Shane and Sonya were fired after they were already incapacitated, lying

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person."

on the ground outside the truck, and that Appellant had stomped Sonya and Stacy with his boot after he shot them. Still, the State's pathologist who advanced these theories could not rule out self-defense, particularly in view of the amount of drugs and alcohol consumed. A defense pathologist testified that the shootings could have occurred exactly as Appellant described.

On cross-examination, Appellant unequivocally denied the State's accusations. He testified, "I did not stomp anyone and I did not shoot anyone on the ground." Appellant described the episode as a five-second fight for his life against Stacy, Shane, and Sonya. According to Appellant, he had no choice but to kill them all in self-defense.

Once he was out of danger, Appellant claims he became concerned for the safety of his father and his wife. He left the kudzu field in Shane's truck and called his father from a cell phone. Appellant testified that he drove directly to his father's house, that he and his father got into his father's truck, and then drove to his own house to get his wife. Appellant told his wife that Ronnie had tried to kill him and that he had shot three people defending his life, describing it as a "scene out of *Deliverance*."[4] From his house, Appellant, his father, and his wife, drove to the Seneca Police Department.

Appellant claims to have told the police the same story he told at trial when he led them to the bodies later that morning, including the *Deliverance* "squeal like a pig" threat of homosexual rape. This is significant because Stacy Walters' autopsy later revealed he was wearing a condom at the time he was killed which Appellant could not have known when he took the police to the scene. The State speculated it was the same condom Stacy wore when he had sex with Tammy Steele earlier in the evening, but the defense argued this was

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[4]James Dickey, *Deliverance,* Boston: Houghton Mifflin, 1970. Dickey's best-selling novel, *Deliverance,* set on a white water river in the Georgia wilderness, has become famous, not only for its masterful prose, but for its vivid account of a sexual assault of a man by a group of rough and brutal men he and his three friends encountered while canoeing the river.

highly unlikely as hours had passed since he had sex with Tammy, and that this fact corroborated Appellant's self-defense claim.

At trial, the judge instructed the jury on murder, voluntary manslaughter and self-defense. Defense counsel submitted a number of written requests for the judge to charge concerning self-defense, two of which would have charged the jury that the State must prove the defendant did not act in self-defense *beyond a reasonable doubt*. Instead, in addition to the basic four element self-defense instruction from *State v. Davis,* 282 S.C. 45, 317 S.E.2d 452 (1984), the judge charged, "[t]he defendant, ladies and gentlemen, is not required to prove the defense of self-defense. All burdens of proof in this case are on the State and remain with the State."

The judge did not charge the reasonable doubt instruction submitted by the defense. Defense counsel objected that the charge given did not comport with *State v. Wiggins*, 330 S.C. 538, 500 S.E.2d 489 (1998)(requiring the State to disprove self-defense beyond a reasonable doubt). The judge refused to add to the charge, finding the charge he had given to be sufficient in light of present law relating to burden of proof and self-defense. After the jury found Appellant guilty, defense counsel moved for a new trial, based once again on the judge's failure to "to charge that the state has the burden of proving beyond a reasonable doubt the absence of the elements of self-defense," citing *Wiggins* for support. The judge denied defense counsel's motion, relying on his earlier ruling.

As discussed, Appellant was convicted on all three counts of murder and possession of a firearm during commission of a violent crime at trial and sentenced to death. On appeal, Appellant raises the following issue:

> Did the trial judge commit reversible error in refusing to charge the jury that the State bore the burden of disproving self-defense beyond a reasonable doubt?

LAW/ANALYSIS

Appellant argues the trial court committed reversible error when it refused

to charge the jury that the State bore the burden of disproving self-defense beyond a reasonable doubt. We agree.

If there is any evidence in the record to support self-defense, the issue should be submitted to the jury. *State v. Hill*, 315 S.C. 260, 433 S.E.2d 848 (1993). In general, the trial judge is required to charge only the current and correct law of South Carolina. *Cohens v. Atkins*, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998). A jury charge is correct if it contains the correct definition of the law when read as a whole. *Keaton v. Greenville Hosp. Sys.*, 334 S.C. 345, 514 S.E.2d 570 (1990). The substance of the law must be charged to the jury, not particular verbiage. *Keaton*. "Current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." *Wiggins*, 330 S.C. at 544, 500 S.E.2d at 493. Finally, to warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial. *Ellison v. Parts Distributors, Inc.*, 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

This Court recently clarified the State's burden when a defendant raises self-defense:

> In *Wiggins*, we specified for the first time, though not in the context of a jury charge, that the State has the burden of disproving self-defense. . . . When self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt.[5]

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[5]Nearly all state courts considering the prosecution's burden of proof have held the defendant is entitled to such a charge. *See, e.g., Williams v. State*, 538 S.E.2d 544 (Ga. 2000); *Miller v.State*,720 N.E.2d 696 (Ind. 1999); *State v. Osborne*, 775 So. 2d 607 (La. App. (4th Cir.) 2000); *Commonwealth v. Beauchamp*, 732 N.E.2d 311 (Mass. 2000); *State v. Plante*, 623 A.2d 166 (Me. 1993)*; State v. Cooper*, 561 N.W.2d 175 (Minn. 1997); *State v. Santamaria*, 756

State v. Addison, 343 S.C. 290, 293, 540 S.E.2d 449, 451 (2000).[6]

In this case, the trial judge charged the jury on the four elements of self-defense pursuant to *State v. Davis* and, additionally, charged that the defendant did not have to prove self-defense and that the burden remained on the State at all times. The State argues that this charge, coupled with the other charges given by the judge, complied with *Wiggins* by conveying to the jury that all of the evidence, including evidence of self-defense, must be considered in the jury's calculation of reasonable doubt.

We disagree with the State. We do not believe the trial judge's self-defense charge adequately conveyed that the State has the burden of *disproving* self-defense *beyond a reasonable doubt* as required under *Wiggins*. It is the substance of the law and not the "particular verbiage" of a charge that determine whether the charge is adequate, and, in this case, the trial judge's charge did not accurately communicate the "substance of the law" as pronounced in *Wiggins*. *Keaton.*

In *State v. Fuller*, this Court made clear that it did not intend *Davis* to be the *exclusive* self-defense charge. 297 S.C. 440, 377 S.E.2d 328 (1989). This Court removed the burden of proving self-defense from the defendant and placed it instead on the State in *Davis*. In *Wiggins*, this Court eliminated any

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A.2d 589 (N.H. 2000); *State v. Garcia*,18 P.3d 1123 (Utah App. 2001); *State v. Walden*, 932 P.2d 1237 (Wash. 1997).

[6]Because *Addison* was decided shortly after Appellant's trial, we do not rely on it alone in this case. *Wiggins*, by itself, is sufficient to support our analysis and ultimate decision in this case. *Addison* does, however, clarify what this Court stated in *Wiggins* and provides an instructive description of the *Wiggins* decision. The only change *Addison* makes is to place a limitation on when the charge must be given. After *Addison*, the charge set out in *Wiggins* is required only *if requested*. Presumably then, before *Addison*, the *Wiggins* charge must have been given whenever a self-defense charge was merited.

confusion lingering since *Davis* by enunciating the State's precise burden clearly: "current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." 330 S.C. at 544, 500 S.E.2d at 492.

Under *Wiggins* and now *Addison*, when self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt. *Addison; Wiggins.* The instruction regarding burden of proof in this case did not reference the beyond reasonable doubt standard, required arguably since *Davis*, and without a doubt since *Wiggins.* Further, the instruction did not include any language indicating that the State must *disprove* Appellant's self-defense claim or, conversely, that the State must prove Appellant did not act in self-defense.

There is a difference between the charge given in this case and the charge required by *Wiggins* and now, if requested, by *Addison*. Charging that the State must disprove Appellant's self-defense claim is a vastly clearer description of the burden of proof than simply charging that the defendant does not need to prove self-defense, as the trial judge charged in this case. Charging that the State must disprove self-defense or, that the State must prove the elements of self-defense are not present, clearly places the burden on the State, as this Court intended.[7] *Addison; Wiggins*. In our opinion, the trial judge erred by not charging under *Wiggins* as requested by defense counsel immediately after the

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[7]In the concurring opinion, it is argued that the *Wiggins* and *Addison* cases impose an impossible burden on the State and, therefore, should be reversed. As we observed in *Addison*, however, nearly all courts that have considered the state's burden of proof have held that when the defendant presents evidence of self-defense he is entitled to a charge that the state bears the burden of disproving self-defense beyond a reasonable doubt. *See Supra* n. 5 (providing citations of several state court opinions enunciating this rule); 43 A.L.R.3d 221 § 5(b) (Supp. 2001) (listing cases in support of rule that once self-defense is properly raised, the state has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense).

charges were given.

As noted, to warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *Keaton; State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000). The jury charge is to be read as a whole in considering whether it adequately covers the law. *Hughey*. Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues. *Orders Distributing Co., Inc. v. Newsome Carpets & Wallcovering*, 308 S.C. 429, 418 S.E.2d 550 (1992).

Appellant admitted to killing all three victims and relied entirely on self-defense at trial. In another case, the Court of Appeals found the judge's failure to give a requested charge to be prejudicial when the charge related to the "sole issue before the jury." *Ellison v. Parts Distributors, Inc.*, 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990). The *Ellison* court held prejudice resulted from the judge's failure to give a general charge on circumstantial evidence when the majority of evidence presented on payment, the sole issue in the case, was circumstantial. Because we consider the issue of self-defense versus murder to be the sole issue in this case, we find the trial judge's failure to properly instruct the jury on burden of proof to be prejudicial, warranting reversal.[8]

Although the trial judge did charge that the burden was on the State and remains on the State, we do not believe that charge was adequate. Similarly, the fact that defense counsel enunciated the proper burden in his closing argument, telling the jury, "you must find the defendant not guilty unless the State proves to you beyond a reasonable doubt that each of the elements of self-defense do not exist in this case" does not adequately convey the State's

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[8]Some courts find proper self-defense charges to be so important that prejudice is presumed if error is identified. "'A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.'" *State v. Walden*, 932 P.2d 1237, 1239 (Wash. 1997) (quoting *State v. LeFaber*, 913 P.2d 369 (Wash. 1996)).

burden. Clearly, the judge's instruction carries far more weight with the jury than defense counsel's word in his closing argument. We cannot assume the jury was able to connect the State's general burden to prove Appellant's guilt beyond a reasonable doubt to the trial judge's charge regarding self-defense when the judge failed to mention the reasonable doubt standard at all and only said the defendant did not have to prove self-defense. The trial judge's charge only implicitly placed the burden on the State, and that is not sufficient under *Wiggins* and *Addison*.

Self-defense was the most significant issue for the jury to decide. Appellant admitted to the killings on the stand at trial. His credibility and the relative burdens of proof surrounding self-defense were central to this case. In light of that conclusion, we find the trial judge's error was prejudicial to Appellant and constituted reversible error.

CONCLUSION

Based on the foregoing reasons, we **REVERSE** and **REMAND** this case for a new trial on each of Appellant's convictions.

MOORE and WALLER, JJ., concur. PLEICONES, J., concurring in result in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: I concur with the result reached by the majority. At the time Burkhart was tried, he was entitled to the charge he requested: That the State has the burden of disproving, beyond a reasonable doubt, his self-defense claim. Upon further reflection, however, I am convinced that this charge is confusing and imposes an impossible burden on the State.

In every criminal trial the burden is on the State to prove every element of the crime charged beyond a reasonable doubt. Instructions should focus the jury's attention on this fundamental principle. The charge mandated by Addison and Wiggins, in essence, requires the State prove, not an element of the offense, but rather a negative.

I agree with the following statement of the law taken from State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984): If, after considering all the evidence presented including the evidence of self-defense, the jury has a reasonable doubt as to the defendant's guilt, then the jury must find the defendant not guilty. On the other hand, if, after considering all the evidence including the evidence of self-defense, the jury has no reasonable doubt of the defendant's guilt, then it must find the defendant guilty.

In my view, this statement properly informs the jury of the State's burden to prove the defendant's guilt beyond a reasonable doubt.

I therefore concur in the result, and would prospectively overrule State v. Addison, 343 S.C. 290, 540 S.E.2d 449 (2000), and State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998).

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ocean Winds Council of Co-Owners, Inc., Plaintiff,

v.

Auto-Owner Insurance Company, Defendant.

On Certification from the United States District Court for the District of South Carolina

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Opinion No. 25485
Heard April 3, 2002 - Filed June 17, 2002

CERTIFIED QUESTION ANSWERED

W. Jefferson Leath, Jr. and Timothy W. Bouch, both of Leath, Bouch & Crawford, L.L.P., of Charleston; and W.H. Bundy, Jr., of Smith, Bundy, Bybee & Barnett, P.C., of Mt. Pleasant, for plaintiff.

Robert H. Hood, Robert H. Hood, Jr., and Deborah H. Sheffield, all of Hood Law Firm, L.L.C., of Charleston, for defendant.

JUSTICE MOORE: We accepted this certified question to interpret a property insurance policy providing coverage for "risks of direct physical loss involving collapse of a building or any part of a building."

FACTS

Plaintiff (Ocean Winds) seeks payment from defendant (Insurer) under collapse coverage in its policy which provides:

> 5. ADDITIONAL COVERAGES
>
> d. COLLAPSE
>
> We will pay for loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of the building caused only by one or more of the following:
>
> . . .
>
> (2) hidden decay;
>
> (3) hidden insect or vermin damage
>
> . . .
>
> Collapse does not include settling, cracking, shrinkage, bulging, or expansion.

Ocean Winds alleges its buildings have suffered "substantial structural impairment" from hidden decay as a result of water infiltration and termite damage although the buildings have not yet fallen to the ground. Insurer contends coverage is not triggered until the buildings have actually fallen to the ground. Ocean Winds commenced this action in federal district court which certified this question to us:

> In order to trigger coverage [under the policy quoted above], is it required: 1) that the building or part of the building fall to the ground or be reduced to flattened rubble; or 2) that the building manifest substantial structural impairment, but has not yet fallen to

the ground or been reduced to flattened rubble?

ISSUE

When is coverage triggered under the policy clause providing coverage for "risks of direct physical loss involving collapse?"

DISCUSSION

As noted by several authorities, the word "collapse" as used in property loss insurance policies has spawned much litigation. *See generally* Annot., What Constitutes "Collapse" of a Building Within Coverage of Property Insurance Policy, 71 A.L.R.3d 1072 (1976). The modern trend is to find the word "collapse" ambiguous and construe it to mean a "substantial impairment" of the building's structural integrity. Courts finding the word unambiguous, on the other hand, have generally construed it to mean "a falling in, loss of shape, or reduction to flattened form or rubble." *See, e.g.*, American Concept Ins. Co. v. Jones, 935 F. Supp. 1220 (D. Utah 1996); Fantis Foods, Inc. v. North River Ins. Co., 753 A.2d 176 (N.J. 2000); Rankin v. Generali – U.S. Branch, 986 S.W.2d 237 (Tenn. App. 1999) *and cases cited therein*. In light of this conflict, the federal district court asks this Court to decide which approach is appropriate.

First, it is important to note that most cases involve simply the use of the single word "collapse" and not the entire phrase at issue here: "risks of direct physical loss involving collapse." As noted by one of the few courts to construe this exact phrase, it is even more ambiguous than the use of the word "collapse" alone. Doheny West Homeowners' Ass'n. v. Am. Guar. & Liab. Ins. Co., 60 Cal. App. 4th 400, 405 (1997).

Courts construing this phrase have taken various approaches. Three have construed it to mean collapse must be imminent. Whispering Creek Condominium Owner Ass'n v. Alaska Nat'l Ins. Co., 774 P.2d 176 (Alaska 1989); Doheny West, *supra*; Fantis Foods, *supra*. "Imminent" means collapse is "likely to happen without delay; impending or threatening" and requires a showing of more than substantial impairment. Doheny West, 60 Cal. App. 4th

at 406. Two courts have construed the phrase to mean "substantial impairment," the most lenient standard, *see* Island Breakers v. Highlands Underwriters Ins. Co., 665 So.2d 1084 (Fla. App. 1995); Rankin, *supra*; and two have required actual collapse, the most stringent. Fidelity and Cas. Co. of New York v. Mitchell, 503 So.2d 870 (Ala. App. 1987); Heintz v. United States Fidelity and Guar. Co., 730 S.W.2d 268 (Mo. App. 1987).

In our view, to construe the phrase "risks of direct physical loss involving collapse" as requiring actual collapse is too narrow an interpretation. This phrase is more expansive than the word "collapse" and appears to cover even the threat of loss from collapse. *See* Doheny West, *supra.* Further, as noted by courts rejecting the actual collapse standard, such an interpretation encourages an insured to neglect repairs and allow a building to fall, which is economically unsound and contrary to the insured's duty to mitigate damages. *See* American Concept, *supra*; Royal Indem. Co. v. Grunberg, 553 N.Y.S.2d 527 (1990).

On the other hand, as courts rejecting the "substantial impairment" standard have noted, collapse coverage should not be converted into a maintenance agreement by allowing recovery for damage which, while substantial, does not threaten collapse. *See* Doheny West, *supra*; Clendenning v. Worcester Ins. Co., 700 N.E.2d 846 (Mass. App. 1998).

We find a requirement of imminent collapse is the most reasonable construction of the policy clause covering "risks of direct physical loss involving collapse." We define imminent collapse to mean collapse is likely to happen without delay. This construction protects the insured without distorting the purpose of the clause to protect against damage from collapse. The policy at issue therefore requires proof of imminent collapse for coverage to be triggered.

CERTIFIED QUESTION ANSWERED.

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

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the policy as written is unambiguous, and requires collapse of a building to trigger coverage.

"Collapse" means "1. to fall down or fall to pieces, as when supports or sides fail to hold; cave in; shrink together suddenly[.] 2. To break down suddenly; fail; give way . . . ." Webster's New World College Dictionary 286 (Michael Agnes ed., 4th ed, McMillan USA 1999). While there can be little doubt when a building or a part thereof has collapsed, in my opinion there could be considerable debate as to when "collapse is likely without delay." The majority's construction of the policy replaces the unambiguous coverage-triggering event, collapse, with the ambiguous phrase "collapse is likely without delay." I would opt for a dictionary definition of collapse, and require, as does the plain language of the policy, actual collapse to trigger coverage. Should an insured desire coverage for damage which substantially impairs the structural integrity of a building, but does not result in collapse, she can contract for such coverage.

The Supreme Court of South Carolina

In the Matter of Richard
F. Colvin, Petitioner.

ORDER

On June 12, 1995, petitioner was indefinitely suspended from the practice of law. In the Matter of Colvin, 318 S.C. 457, 458 S.E.2d 430 (1995). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends that the petition be granted. We agree and hereby reinstate petitioner to the practice of law in this state.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/Costa M. Pleicones J.

We would deny the petition for reinstatement.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

Columbia, South Carolina

June 13, 2002

The Supreme Court of South Carolina

In the Matter of
Margaret C. Tribert, Petitioner.

ORDER

On December 18, 2000, petitioner was suspended from the practice of law for one year, retroactive to July 9, 1999, the date of her interim suspension. In re Tribert, 343 S.C. 326, 540 S.E.2d 467 (2000). Petitioner has now filed a petition for reinstatement.

The Committee on Character and Fitness recommends the Court grant the petition for reinstatement under the condition that Robert J. Harte, Jr., Esquire serve as petitioner's mentor for one year and provide quaterly reports during that year to the Committee.

The petition for reinstatement is hereby granted subject to the condition set forth by the Committee. However, Mr. Harte shall provide

quarterly reports to the Office of Disciplinary Counsel instead of the Committee.

IT IS SO ORDERED.

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.

Columbia, South Carolina

June 13, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

BB&T of South Carolina, a/k/a Branch Banking and Trust Company,

Appellant,

v.

Lisa Smith Kidwell, William Brian Kidwell, d/b/a Signature Residential Mortgage, and John H. Franklin,

Defendants,

Of whom John H. Franklin is,

Respondent.

Appeal From Spartanburg County
Roger Couch, Master-in-Equity

Opinion No. 3514
Submitted May 6, 2002 - Filed June 10, 2002

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

J. William Ray, of Greenville, for appellant.

David G. Ingalls, of Spartanburg, for respondent.

HOWARD, J.: This is a mortgage foreclosure action in which two competing mortgagees, having simultaneously recorded mortgages which cover the same real property, each claim first lien status. Branch Banking and Trust Company of South Carolina ("BB&T") appeals the master-in-equity's order finding John H. Franklin's recorded mortgage constitutes a first lien on certain commercial property, which Brian and Lisa Kidwell (collectively "the Kidwells") purchased from Franklin, and awarding Franklin prejudgment interest. BB&T also appeals the master's failure to award it attorney fees. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

In 1999, the Kidwells applied for a loan with BB&T to finance the purchase of commercial property which the Kidwells had contracted to buy from Franklin for $135,000. The Kidwells executed a Buy and Sell Agreement ("Agreement") with Franklin, which listed the selling agent, David Allen, and indicated the only financing for the property would be "conventional." Following an appraisal of the property, BB&T approved a $100,000 loan. The Kidwells selected the closing attorney. BB&T then sent a letter to the closing attorney stating it required a first lien on the property as a precondition of the loan.

Prior to closing and without informing BB&T, Lisa Kidwell and Franklin executed an Addendum to the Agreement in which Franklin agreed to finance $85,000 of the $135,000 purchase price. Allen acquired a copy of the HUD Settlement Statement ("the Statement"), prepared in connection with the sale, several days prior to the closing and reviewed it for errors. The Statement denominated the Kidwells as "Borrowers" and BB&T as "Lender" and reflected BB&T's $100,000 mortgage on the property. In addition, the Statement showed

an $85,000 balance due to Franklin as "Seller." BB&T did not receive a copy of the Statement until pretrial discovery was conducted.

The closing occurred on November 5, 1999, with Franklin, Allen, and the Kidwells present. No one from BB&T attended. The Kidwells executed two mortgages, one to BB&T for $100,000 and one to Franklin for $85,000. According to the Statement, signed by Franklin and the Kidwells, Franklin received $45,102.65 in cash from the closing, in addition to a note and mortgage from the Kidwells for $85,000, and the Kidwells received $42,325.84 in cash from the BB&T loan proceeds. The Kidwells also purchased other property from Franklin.

Following the closing, the closing attorney provided BB&T with a Preliminary Title Opinion dated November 8, 1999. The opinion indicated the Kidwells now owned the property, listed no unexpected exceptions, and did not mention any other mortgage liens or judgments.

Both BB&T's mortgage and Franklin's mortgage were recorded in Spartanburg County at 1:07 p.m. on November 9, 1999, in REM Book 2277. However, BB&T's mortgage was indexed beginning at page 321, and Franklin's mortgage was indexed beginning at page 326.

In January 2000, the Kidwells procured a $25,000 business credit line from BB&T. Before approving the loan, BB&T required an update on the status of the property's title. The same closing attorney prepared a Preliminary Title Opinion dated January 28, 2000. The letter noted the property was encumbered by Franklin's $85,000 mortgage. The attorney subsequently provided BB&T with a Final Title Opinion dated March 15, 2000, certifying that BB&T's mortgage constituted a valid first lien on the property, subject only to the exceptions listed in the Preliminary Title Opinion dated November 8, 1999. Ultimately, BB&T issued the $25,000 credit line, obtaining a second mortgage on the commercial property as collateral.

The Kidwells did not make payments as required on either BB&T mortgage. In June 2000, BB&T accelerated both mortgages, demanding

payment, and then filed suit seeking foreclosure of its mortgages, claiming first and second lien positions.

BB&T named Franklin as a party-defendant. Franklin answered and counterclaimed, alleging his $85,000 mortgage constituted a first lien on the property. He also sought foreclosure, an award of attorney fees, and a deficiency judgment against the Kidwells. In reply, BB&T raised several equitable defenses including waiver, estoppel, and unjust enrichment.

Following a trial, the master concluded the Kidwells were liable to both BB&T and Franklin. The master found the Kidwells owed BB&T $106,065.24 for the purchase mortgage and $26,285.44 for the credit line mortgage, plus accruing interest, costs, and $3,500.00 in attorney fees. The master further determined the Kidwells owed Franklin $85,000 on his mortgage, an advance for taxes, plus $4,000 in attorney fees and costs. The master also held Franklin was entitled to prejudgment interest at the legal rate, beginning on August 1, 2000.

Although the master determined both BB&T and Franklin had properly secured their loans by executing mortgages on the Kidwells' property, he held Franklin's mortgage constituted the first priority lien. In reaching his decision, the master held the mortgage statute was "of no assistance in determining the priority" of the liens because both mortgages bore the identical time and date of recording. Therefore, he considered whether BB&T or Franklin had notice of the other's intent to obtain a first priority lien on the Kidwell's property.

The master held none of the documents executed by any of the parties provided Franklin with notice of BB&T's intent to obtain a first priority mortgage. He concluded the only persons involved in the transaction aware that both BB&T and Franklin sought first priority mortgages on the property were the Kidwells and the closing attorney. The master imputed the closing attorney's knowledge of Franklin's mortgage to BB&T on the theory that the closing attorney acted as BB&T's agent in the closing because the closing attorney prepared mortgage documents and rendered a title opinion for BB&T.

Therefore, the master concluded BB&T had notice of Franklin's lien, but Franklin did not have notice of BB&T's lien. Based on this conclusion, the master ruled Franklin's mortgage priority was superior to BB&T's. This appeal followed.[1]

STANDARD OF REVIEW

An action to foreclose a real estate mortgage is an action in equity. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). In an action in equity, this Court is not required to disregard the findings of the master or referee. However, this Court may take its own view of the preponderance of the evidence. Taylor v. Lindsey, 332 S.C. 1, 3 n.2, 498 S.E.2d 862, 863 n.2 (1998); Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Furthermore, this Court is not bound by the trial court's legal conclusions. I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000); see also S.C. Const. art. V, § 5 (providing this state's appellate courts have jurisdiction to correct trial court's erroneous legal findings in law and equity cases); S.C. Code Ann. §§ 14-3-320 & 14-8-200 (1976 & Supp. 2001) (providing this state's appellate courts have jurisdiction to correct trial court's erroneous findings of law in equity cases).

DISCUSSION

I. Priority Lien Status

On appeal, BB&T argues the master erred by finding Franklin's mortgage lien priority was superior to its own. We agree.

We note this is a novel issue in this State. This Court has not discovered, nor has either party to this appeal cited, any case in which the appellate courts

[1] After the master's order was filed, BB&T obtained an order staying the public sale of the property. Thus, the sale remains stayed and the debts remain unliquidated.

of this State have been asked to determine the priority of multiple mortgages, secured with the same property, at the same time, by different parties. Furthermore, although South Carolina Code Annotated section 30-7-10 (Supp. 2001) does not expressly address the particular facts and circumstances of this case, we do not agree with the master's conclusion that it is useless in determining priority between mortgages.

Section 30-7-10 provides, in relevant part:

> All . . . mortgages . . . are valid so as to affect the rights of subsequent creditors . . . without notice, only from the day and hour when they are recorded in the office of the register of deeds [for the county] . . . in which the real property affected is situated. In the case of a . . . subsequent lien creditor . . . without notice . . . the priority is determined by the time of filing for record.

In addition, South Carolina Code Annotated section 30-9-40 (Supp. 2001), governing the indexing of instruments filed for recording, provides:

> The register of deeds . . . shall immediately upon the filing for record of any deed, mortgage, or other written instrument of the character mentioned in Section 30-7-10 or Chapter 9 of Title 36 enter it upon the proper indexes in his office, which constitute an integral, necessary, and inseparable part of the recordation of the deed, mortgage, or other written instrument for any and all purposes whatsoever . . . .

The importance of proper recording practices as an integral part of providing notice to subsequent creditors has been previously addressed by our supreme court. In National Bank of Newberry v. Livingston, our supreme court held:

> The rule supported by the best authority is that the record [of a mortgage] is constructive notice to creditors . . . [as to] such facts as they would have learned from the record, if examined.

. . .

> A mortgage duly recorded is notice not only of the existence of the mortgage, but of all its contents . . . . It is notice not only to purchasers but to the subsequent creditors as well . . . . The record imparts notice of all the facts which could have been ascertained by an actual examination thereof, including not only those recited in the record, but also material matters suggested thereby, which might be disclosed by reasonable inquiry.

155 S.C. 264, 284, 152 S.E. 410, 417-19 (1930) (citations omitted).

The indexing of recorded mortgages is intended to provide notice to persons making subsequent inquiries. There is no evidence the register of deeds has not complied with the mandates of section 30-9-40 in recording these two mortgages. Therefore, the later indexing of Franklin's mortgage, established by the later page entry, is evidence that BB&T's mortgage was presented first for recordation and is entitled to priority as the first to be recorded. See Atlas Supply Co. v. Davis, 273 S.C. 392, 395, 256 S.E.2d 859, 860 (1979) (Littlejohn, J., concurring) (indicating lien priority is based on the time at which an instrument is recorded and that recording is accomplished when an instrument is indexed). This inference is especially proper where the same closing attorney controlled both documents and presented them for recordation.

The master held BB&T, through the closing attorney, had constructive notice of Franklin's mortgage. Conversely, the master concluded the attorney was not Franklin's agent, and Franklin had no such notice of BB&T's mortgage. We disagree with the conclusion that Franklin had no notice of BB&T's lien.

While the documents prepared and executed by or on behalf of BB&T do not expressly note its expectation of a first lien on the property, the record before us belies any assumption Franklin issued his mortgage without prior notice of BB&T's mortgage. The Agreement executed by Franklin and the Kidwells specifically conditioned the transaction on the Kidwells' ability to obtain "conventional" financing for the purchase. Both the Addendum executed

by Lisa Kidwell and Franklin, as well as the HUD Statement signed by Franklin, indicated "Seller" financing.

Furthermore, the closing statement fully informed Franklin that BB&T was extending a loan to the Kidwells in the amount of $100,000 to purchase property with a contractually established value of $135,000. The subsequent contract modification provided in excess of $42,000 to the Kidwells to facilitate their purchase of other property from Franklin, but in doing so, placed a combined indebtedness encumbering the property of $50,000 in excess of the value of the property. Under these circumstances, we do not share the master's belief that the bank was as informed as Franklin of this transaction. Thus, we deem any constructive notice BB&T may have had regarding Franklin's mortgage was no greater than Franklin's actual notice of BB&T's mortgage.

In light of the expressed gravity of the requirement that recorded documents be properly indexed and absent proof to the contrary, we presume the filing authority complied with the mandates set forth in section 30-9-40. Reading the requirements of section 30-7-10 in conjunction with the mandates of section 30-9-40 establishes that, in the case of documents recorded on the same date and at the same time, legal priority be given to document indexed first. We conclude from the contract, the Addendum, the closing documents, and the remaining transactions with the Kidwells, that Franklin was fully aware of BB&T's mortgage lien. Accordingly, we hold the master erred in giving Franklin's mortgage first lien priority.

II. Prejudgment Interest

BB&T next argues the trial court erred in awarding Franklin prejudgment interest on his mortgage because the mortgage agreement itself indicates a zero percent interest rate. We disagree.

"Prejudgment interest is allowed on obligations to pay money from the time when payment is demandable, either by agreement of the parties or by operation of law, if the sum is certain or capable of being reduced to certainty." Future Group, II v. Nationsbank, 324 S.C. 89, 101, 478 S.E.2d 45, 51 (1996).

The record clearly reveals Franklin's mortgage was for a sum certain and payable on August 1, 2000. These facts alone, irrespective of any interest rate chargeable prior to the demand date, entitle Franklin to prejudgment interest at the legal rate. Therefore, we find the master did not err in awarding prejudgment interest to Franklin.

III. Order Of Payment

Because we find BB&T has a first lien priority, its $100,000 mortgage and all associated costs and fees, including attorney fees according to the terms of the mortgage agreement, must be paid first from the proceeds of the property's sale. See Dedes v. Strickland, 307 S.C. 155, 160, 414 S.E.2d 134, 137 (1992) ("[W]here there is a contract providing for such, the amount of attorneys fees is governed by the contract."). Following the satisfaction of BB&T's mortgage, fees and costs, Franklin is entitled to any surplus funds sufficient to satisfy his mortgage, fees, and associated costs.

CONCLUSION

We remand this case to the master for recalculation of the total sums due BB&T and Franklin. Furthermore, we direct both BB&T's and Franklin's mortgages be foreclosed in accordance with this opinion. For the foregoing reasons, the master's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.[2]

HEARN, C.J., and HUFF, J., concurring.

[2] Because oral argument would not aid the Court in resolving any issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Robert Louis Garrett,

Respondent.

Appeal From Sumter County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 3515
Heard May 7, 2002 - Filed June 10, 2002

REVERSED & REMANDED

Assistant Appellate Defender Aileen P. Clare, of S.C. Office of Appellate Defense, for respondent.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor C. Kelly Jackson, of Sumter, for appellant.

HEARN, C.J.: Robert Garrett and Arthur Tyrone Davis were jointly indicted and tried for carjacking, possession of a firearm during the commission of a violent crime, criminal conspiracy, and two counts each of kidnaping, assault and battery with intent to kill (ABIK), assault and battery of a high and aggravated nature (ABHAN), and armed robbery. The jury found Garrett guilty of carjacking, two counts of kidnaping, two counts of ABHAN, possession of a weapon during the commission of a violent crime, and conspiracy. Davis was convicted of two counts ABHAN, possession of a weapon, and conspiracy. After reading the verdicts and hearing arguments, the trial judge granted Garrett's new trial motion. We reverse and remand for sentencing.

FACTS

In April 1997, Paul Anthony France and Joseph Michael Chiappone were stationed together at Shaw Air Force Base. One evening, they went to a car wash to install fog lights on France's car. While working on the car, Chiappone noticed a "blue or dark colored Bronco or Blazer" slowly passing the car wash. Shortly after that, a man appeared and pointed a gun at Chiappone, then pushed him to the ground. Chiappone's attacker went through his pockets and took several items, including his wallet. Chiappone did not see his attacker's face, but he noticed another set of feet on the other side of the car. As Chiappone was attacked, France was pulled from the car and pushed to the ground. An assailant placed his foot on France's neck and another rifled through his pockets, taking his wallet among other items.

After robbing Chiappone and France, the assailants forced them into the trunk of France's car. One of the assailants drove France's car away from the car wash, and the other got into a different vehicle. From inside the trunk, France used a lighter to manipulate his tail lights in an attempt to signal for help. Unbeknownst to France, the car behind them was the second assailant. The second vehicle then rammed into the back of France's car.

The individual driving France's car stopped in a field along with two other vehicles. The assailants questioned Chiappone and France about the tail lights. When neither of them responded to the questioning, they were forcibly removed from the trunk, separated, beaten by at least two assailants each, forced to remove their clothing, and then forced back into the trunk.

As they drove, the victims could feel France's car colliding with the other vehicles. France's car became disabled. The victims were again taken out of the trunk and forced to the ground. France heard several voices, and he guessed from the assailants' conversation that two of them wanted to leave immediately and one wanted to shoot them. The assailants urinated on the victims, then shot them in the buttocks. One of them threatened to return in five minutes to "finish off" the victims, and the assailants drove away in the sports utility vehicle. France and Chiappone found the keys to France's car and drove to a nearby home where a resident called the police and an ambulance.

Although neither victim could identify their assailants, police began an investigation and eventually identified Garrett as a suspect.[1] Garrett was tried with Davis as a co-defendant.

At trial, Desmond Cunningham testified he was with Garrett, Davis, and Andre China on the night of the crime. The four men were at Garrett's home and decided go out. Cunningham and Davis rode in a black Blazer. Garrett and China left in Garrett's car. Cunningham saw Garrett and China approach the victims and force them into France's trunk. As they left the car wash, China drove the sedan, Garrett drove France's car, and Cunningham and Davis followed in the Blazer. After Cunningham noticed the tail lights of

[1] During the same time period, Garrett's landlord began ejectment proceedings. An officer assisting in the ejectment entered Garrett's residence and saw materials connected with this crime. Police officials obtained a search warrant and recovered several compact discs later identified as having been stolen from France's car during the incident and a box containing bullets similar to the one recovered from France.

France's car go out, he signaled Garrett who pulled over and got out. China, who had driven ahead, returned and exited the car. Garrett and China then pulled the victims from the trunk and "started beating them." Cunningham testified Garrett had a gun in his hand. Davis got out of the Blazer and went into a field with Garrett, China, and the victims. The three assailants continued beating the victims, made them undress, then forced them back into the trunk.

As the group continued driving the three vehicles, Garrett began causing France's car to hit the Blazer. When France's car began smoking heavily, Garrett and the other assailants pulled over and stopped. Garrett got out of France's car carrying a handgun. Davis told Cunningham he was going to shoot the victims and exited the sports utility vehicle with a rifle. Cunningham drove away before any shots were fired.

Davis did not testify at trial; however, his redacted statement to law enforcement officials was offered into evidence. The statement, which implicated Davis, China, Cunningham, and "another guy" in the crime, was admitted over Davis's objection. Garrett did not initially object to the admission of the statement; however, he unsuccessfully moved for severance before the statement's publication to the jury.

Immediately after the statement was published to the jury, Garrett renewed his motion for severance and moved for a mistrial, asserting "it is readily apparent that we have conflicting defenses" and arguing the statement was inherently prejudicial because of the testimony implicating Garrett as the "other guy." Davis also sought a severance and joined in Garrett's motion for mistrial. The trial judge took the matter under advisement, but ultimately denied the motions.

After the verdicts, Davis moved for a new trial, arguing that the evidence was insufficient to sustain the jury's verdict and Davis was prejudiced by the court's failure to sever the trials because the testimony at trial implicated Garrett more strongly than Davis. Garrett adopted Davis's motion, stating that his most compelling argument was the refusal of the trial judge to grant the prior motion for severance and adding that the verdicts were "truly and ridiculously

inconsistent." The trial judge denied Davis's motion for a new trial, but granted Garrett's motion, reasoning in part:

> It's almost like [the jury] used the hand of one is the hand of all on Mr. Garrett, but they didn't use the same theory with Mr. Davis. . . . I think with Mr. Garrett, I don't have any choice but to give him the opportunity to have a new trial on the case because of the disparity of the results of the two defendants. As I indicated, Mr. Davis was convicted of matters facing as much as 30 years. And again, in essence, the jury did not convict him of matters of the two shootings, which would have been 40 years between those. And yet they did convict Mr. Garrett of offenses that would have been at least 70 or 80 or maybe 90 years. With that in mind, there's too much disparity between the two.

The trial judge also found that although the solicitor was "correct legally" on the motion to sever, the joint trial "caused Mr. Garrett to be prejudiced by some of the things the way they worked out." The State now appeals.

DISCUSSION

On appeal, the State argues the trial judge erred in granting Garrett's motion for a new trial because he relied on an incorrect legal theory. We agree.

Generally, the grant or refusal of a new trial is within the trial judge's discretion and will not be disturbed on appeal without a clear abuse of that discretion. State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." State v. Hughes, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001).

Here, the trial judge granted Garrett a new trial because "too much disparity" existed between the verdicts against Garrett and Davis. In so finding,

he ostensibly assumed a legal prohibition against inconsistent verdicts in criminal cases. Our supreme court has abolished the rule prohibiting inconsistent verdicts in criminal cases. State v. Alexander, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991). Moreover, these verdicts are not inconsistent. The jury simply found Garrett guilty of more offenses than his co-defendant Davis. The logic applied in Alexander contemplates inconsistent verdicts when multiple offenses are submitted to the jury, not when the jury returns disparate results for co-defendants. Because the grant of a new trial was controlled by an error of law, we reverse.

Even assuming, as Garrett urges in his brief, that the trial judge based the grant of a new trial not on a theory of inconsistent verdicts, but on a lack of evidence to support the verdicts, the ruling is nevertheless an abuse of discretion. If there is no evidence to support a conviction, we should uphold an order granting a new trial. State v. Smith, 316 S.C. at 55, 447 S.E.2d at 176. However, if competent evidence supports the jury's verdict, the trial judge may not substitute his own judgment for that of the jury and overturn that verdict. State v. Miller, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985).

Here, the testimony of France, Chiappone, and Cunningham, considered with Davis's redacted statement and the evidence police gathered from Garrett's apartment, presented ample evidence to support the jury's guilty verdicts. That the jury could have convicted Davis on all of these charges under the "hand of one is the hand of all" doctrine does not affect the sufficiency of the evidence to support the verdict against Garrett.

We also reject Garrett's contention that the trial judge's grant of a new trial should be affirmed because it was partially based on the earlier failure to grant a severance. He asserts the motion for severance should have been granted due to the prejudice created by Davis's statement and that a new trial was necessary to correct that prejudice. We disagree.

Motions for severance are addressed to the trial judge's discretion. State v. Nichols, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997). As co-defendants, Garrett and Davis were not entitled to separate trials as a matter of

right. State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001).

Generally, admission of a statement made by a non-testifying co-defendant and implicating the defendant violates the Confrontation Clause and is inadmissible. State v. Holmes, 342 S.C. 113, 118, 536 S.E.2d 671, 673 (2000). However, such a statement is admissible against the confessor in a joint trial if references to the co-defendant are redacted so as not to implicate the co-defendants. Id. at 119, 536 S.E.3d at 674. Davis's statement was redacted to omit specific mention of Garrett and was limited in scope to events occurring the night of the crime in question. Moreover, the trial judge issued a curative instruction in his charge that Davis's statement should only be considered against Davis. Because the statement was redacted and a curative instruction given, we find there was no violation of the Confrontation Clause even given the State's other evidence indicating Garrett was the "other guy". See State v. Evans, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994) (holding co-defendant's statement admissible because "the statement did not 'on its face' incriminate [defendant], although its incriminating import was certainly inferable from other evidence that was properly admitted against him").

For the foregoing reasons, we reverse the trial judge's grant of a new trial and remand for sentencing.

REVERSED AND REMANDED.

HUFF and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Francis Clark Antley,

Respondent,

v.

Nobel Insurance Company,

Appellant.

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 3516
Heard December 4, 2001 - Filed June 10, 2002

AFFIRMED

Beverly A. Carroll, of Kennedy, Covington, Lobdell & Hickman, of Rock Hill, for appellant.

Ellen McCloy and E. Alan Kennington, both of George Sink, P.A. Injury Lawyers, of North Charleston, for respondent.

SHULER, J.: Francis Clark Antley brought this declaratory judgment action to determine his right to recover uninsured motorist (UM) benefits under a policy issued to his employer by Nobel Insurance Company. The trial court reformed the policy to provide Antley up to $1,000,000 in coverage, offset by any recovery from workers' compensation, and Nobel appeals. We affirm.

FACTS/PROCEDURAL HISTORY

The trial court decided this case on the following stipulated facts. On February 7, 1995, Francis Antley, while operating a truck owned by his employer, Southern Bulk Haulers, Inc., was seriously injured in an accident caused by an unidentified vehicle in Savannah, Georgia. As a result, Antley filed a "John Doe" action in Georgia seeking coverage under the UM provision of his personal automobile insurance policy. Since the accident occurred during the course and scope of his employment, Antley also sought benefits under the UM provision contained in Southern's commercial policy issued by Nobel Insurance Company. On its face, this policy provided only the mandatory limit of $15,000 for bodily injury caused by an uninsured driver.

Antley subsequently filed a complaint for declaratory judgment asking the court to reform the policy's UM coverage limit because Nobel failed to make a meaningful offer of additional UM coverage to Southern.[1] In its answer, Nobel claimed Antley's exclusive remedy was workers' compensation, but in the event the trial court found otherwise, UM benefits should be limited to $15,000. On March 13, 2000 the parties specifically agreed: 1) that Nobel insured the vehicle driven by Antley under Policy # TAL 1002822, a renewal of Southern's original policy, which provided liability coverage up to $1,000,000; 2) that Nobel

[1] As the outcome of this action will determine the extent of Nobel's liability in the Georgia "John Doe" proceeding, that action has been stayed pending a final decision in the instant case.

offered optional UM coverage via an internally-generated form,[2] which Southern rejected, leaving the UM coverage limit at $15,000; and 3) that Antley eventually received $101,901.55, in workers' compensation benefits, including $13,201.53 for medical expenses.

On June 30, 2000, the trial court issued an order finding Antley was not excluded from pursuing coverage under the UM provision of the policy. The court further held that because Nobel failed to make a meaningful offer of additional UM insurance, Antley was entitled to recover up to the limits of Southern's liability coverage, or $1,000,000. Lastly, the court determined Nobel was entitled to a setoff against such coverage in the amount actually received by Antley from workers' compensation. This appeal followed.

LAW/ANALYSIS

Standard of Review

A suit for declaratory judgment is neither legal nor equitable per se; the nature of the suit, therefore, is determined by the underlying issue. See Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991); Horry County v. Ins. Reserve Fund, 344 S.C. 493, 544 S.E.2d 637 (Ct. App. 2001). As the issue below involved a determination of uninsured motorist coverage, the action is at law. Horry County, 344 S.C. at 497, 544 S.E.2d at 640; State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000). Furthermore, because stipulated or undisputed facts leave only a question of law for the trial court, on appeal this Court reviews "whether the trial court properly applied the law to those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000); see J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 519 S.E.2d 561 (1999).

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[2] Nobel further stipulated its form was neither "identical to the format outlined in" the Code nor "generated with any reference to" S.C. Department of Insurance Form 2006.

Discussion

Nobel asserts two grounds of error in challenging the trial court's ruling. First, Nobel claims Antley is not entitled to recover any UM benefits under Southern's policy, arguing workers' compensation is his sole remedy under both the relevant statutory provision and policy exclusions. Second, Nobel contends that even if Antley is entitled to benefits under the policy's UM provision, his recovery should be limited to $15,000 because Nobel made, and Southern rejected, a meaningful offer of coverage. We address each ground in turn.

I. Workers' Compensation as Exclusive Remedy

Nobel initially argues Antley's recovery of UM benefits is barred by § 42-1-540 of the South Carolina workers' compensation scheme. In relevant part, this section states that the redress available to an injured employee "shall exclude all other rights and remedies of such employee . . . *as against his employer*, at common law or otherwise . . . ." S.C. Code Ann. § 42-1-540 (1985) (emphasis added). Our supreme court previously has rejected the same argument now advanced by Nobel, finding that workers' compensation gives an employee "'the right to swift and sure compensation,'" while an employer in turn "'receives *immunity from tort actions* by the employee.'" Wright v. Smallwood, 308 S.C. 471, 475, 419 S.E.2d 219, 221 (1992) (quoting Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980)). In Wright, the court went on to reiterate that because UM coverage sounds in contract, not tort, "the exclusivity provision of [§ 42-1-540] does not operate to bar [a] contractual claim for UM benefits." Id. (footnote citation omitted).

Nobel further contends applicable language in Southern's policy limits Antley's recovery to workers' compensation. Specifically, Nobel points to exclusionary language in the "Truckers Coverage Form," which, as the parties stipulated, provides in relevant part:

> This insurance does not apply to [any of] the following:
>
> . . . .

> 3. WORKERS' COMPENSATION
>
> Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

In addition, although not referenced in the stipulation, the ensuing paragraph titled "EMPLOYEE INDEMNIFICATION AND EMPLOYER'S LIABILITY" clearly indicates an intention to exclude:

> "Bodily injury" to:
>
> a. An employee of the "insured" arising out of and in the course of employment by the "insured" . . . .

These exclusions purport to eliminate all coverage when the insured employer is liable to pay workers' compensation to an injured employee. Hence, Nobel argues Antley's prior receipt of workers' compensation benefits bars any attempt to recover under the Southern policy's UM provision. We disagree.

It is well settled that uninsured motorist coverage in specified minimum limits is mandatory in South Carolina.[3] Unisun Ins. Co. v. Schmidt, 331 S.C. 437, 503 S.E.2d 211 (Ct. App. 1998), rev'd on other grounds, 339 S.C. 362, 529 S.E.2d 280 (2000); White v. Allstate Ins. Co., 314 S.C. 167, 442 S.E.2d 195 (Ct. App. 1994). The governing statute expressly states:

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[3] Although it is now possible to register an uninsured vehicle in South Carolina, see S.C. Code Ann. § 56-10-510 (Supp. 2001), there has been no change in the law requiring minimum limits of uninsured motorist coverage to be included in every automobile insurance policy issued in the state. See § 38-77-150.

> (A) No automobile insurance policy or contract may be issued or delivered unless it contains . . . [an] uninsured motorist provision undertaking to pay the insured *all sums which he is legally entitled to recover as damages* from the owner or operator of an uninsured motor vehicle . . . .

S.C. Code Ann. § 38-77-150 (2002) (emphasis added). Thus, "[t]he obligation of the insurer under the terms of the statute is to pay an insured all sums which he is legally entitled to recover from the [uninsured] tortfeasor up to the limit of insurance provided." Nationwide Mut. Ins. Co. v. Howard, 288 S.C. 5, 12, 339 S.E.2d 501, 504 (1985).

"The uninsured motorist endorsement is the contract which the insurance company makes with the insured to protect him against the uninsured motorist." Ferguson v. State Farm Mut. Auto. Ins. Co., 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973). Although insurance policies are subject to the normal rules governing contracts, including the parties' right to agree to such terms as they deem appropriate, see B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 514 S.E.2d 327 (1999), the freedom to contract "is not absolute and coverage required by law may not be omitted." Jordan v. Aetna Cas. & Sur. Co., 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975). Since statutes mandating UM coverage are part of an insurance contract as a matter of law, to the extent policy language conflicts with an applicable statute, the statute prevails. See Ferguson, 261 S.C. at 101, 198 S.E.2d at 524 ("[T]he pertinent provisions of the [UM] statutes prevail as much as if expressly incorporated in the policy"); Schmidt, 331 S.C. at 440, 503 S.E.2d at 213 ("When the language of the policy conflicts with the mandate of the [UM] statute, the statutory language prevails.").

Applying this settled law, we find that to the extent Nobel's policy exclusions purport to bar Antley from pursuing UM coverage, they are void as against public policy and of no effect. As the supreme court stated in Ferguson:

> The public policy declared by our uninsured motorist statute imposes an obligation on insurers to

> provide protection to their insureds against loss caused by wrongful conduct of an uninsured motorist, and any limiting language in an insurance contract which ha[s] the effect of providing less protection than made obligatory by the statutes is contrary to public policy and is of no force and effect.
>
> . . . To permit [an insurer] . . . to exclude coverage where the insured is entitled to workmen's compensation for his injury or death would be a limitation upon the statutory coverage required by our uninsured motorist statutes.

Ferguson, 261 S.C. at 100-01, 198 S.E.2d at 524.

Nobel correctly asserts § 38-77-220 (regulating automobile insurance in general) and § 56-9-20(5) (the Motor Vehicle Financial Responsibility Act) each appear to permit such exclusions. Section 38-77-220 provides in pertinent part:

> The automobile policy need not insure any liability under the Workers' Compensation Law nor any liability on account of bodily injury to an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance, or repair of the motor vehicle . . . .

S.C. Code Ann. § 38-77-220 (2002). Similarly, § 56-9-20 defines a "motor vehicle liability policy" in relevant part as "[a]n owner's or an operator's policy of liability insurance . . . issued . . . to or for the benefit of the person or persons named therein as insured . . . ." S.C. Code Ann. § 56-9-20(5) (Supp. 2001). This definition is subject to several "special conditions," one of which contains language identical to that found in § 38-77-220. See id. at § 56-9-20(5)(c) (describing what an insurance policy need not cover in complying with the Financial Responsibility Act).

Our supreme court, however, has construed § 38-77-220 as permitting *offsets* for duplicate coverage, not outright exclusions of otherwise available coverage.[4] In Williamson v. U.S. Fire Ins. Co., 314 S.C. 215, 442 S.E.2d 587 (1994), an employee injured in the course of employment sought underinsured motorist coverage from his employer's policy. Pursuant to an offset provision in the policy, the insurer reduced the employee's benefits by an amount equal to his recovery under workers' compensation, and thereafter sought a judgment declaring it had fully satisfied its obligations under the policy. The trial court ruled the insurer was not entitled to a setoff as a matter of public policy and the supreme court reversed, interpreting § 38-77-220 to permit the reduction because "South Carolina law provides that automobile insurance policies need not cover liability under the worker's [sic] compensation law nor liability for bodily injury to an insured's employee." Id. at 219, 442 S.E.2d at 589.

In so holding, the court adopted the public policy-based reasoning of Manning v. Fletcher, 379 S.E.2d 854 (N.C. 1989), a North Carolina case interpreting "an almost identical statute," which held the N.C. Legislature intended to permit offsets to relieve an employer "of the burden of paying double premiums" and to deny "the windfall of a double recovery to the employee." Id. at 218, 442 S.E.2d at 588 (quoting Manning, 379 S.E.2d at 856). Quite significantly, we think, the court concluded:

> *As long as the employee is able to fully recover the damages sustained*, we believe the better public policy is to encourage employer voluntary coverage by not exposing employers to mandatory duplicative insurance premiums and by not allowing duplicative recoveries by employees. We therefore hold that [§ 38-77-220] allows an employer's automobile insurance carrier to *offset* workers' compensation benefits received by an employee. *The offset shall be applied against the total of damages sustained once the employee has been fully*

[4] Because § 56-9-20(5)(c) contains language identical to that found in § 38-77-220, the analysis applies equally to that section.

compensated for the injuries.

Id. at 219, 442 S.E.2d at 589.[5]

Lastly, Nobel claims workers' compensation is Antley's only remedy based on the following additional policy exclusion, found in the UM endorsement and titled "LIMIT OF INSURANCE":

> We will not make a duplicate payment under this Coverage for any element of "loss" for which payment has been made by or for anyone who is legally responsible.

In our view, this provision maximally prohibits Antley from recovering both workers' compensation and UM benefits *for the same loss*, and in no way dictates workers' compensation as an exclusive remedy where other elements of loss are recoverable.

The parties stipulated Antley was injured by an at-fault unidentified driver, thereby bringing the accident within the ambit of UM coverage. See S.C. Code Ann. § 38-77-30(14) (Supp. 2001) ("A motor vehicle is considered uninsured if the owner or operator is unknown."). As discussed above, the

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[5] Although Nobel also cites State Farm Mut. Auto. Ins. Co. v. N. River Ins. Co., 288 S.C. 374, 342 S.E.2d 627 (Ct. App. 1986) as authority for the argument that §§ 38-77-220 and 56-9-20(5)(c) are controlling, that case is inapposite. In North River, this Court upheld a policy provision excluding liability coverage for "any employee of an insured arising out of his or her employment," finding such language was "not inconsonant with" the nearly identical predecessor statutes to §§ 38-77-220 and 56-9-20(5). Id. at 374, 342 S.E.2d at 627. However, in a crucial distinction from the case at bar, North River concerned a negligence claim alleging wrongful death directly against the employer/insured, clearly prohibited by § 42-1-540, whereas here Antley seeks coverage for injuries caused by an uninsured motorist.

exclusions in Southern's policy at most only entitle Nobel to offset Antley's workers' compensation award against any benefits obtained in the John Doe action and cannot operate to foreclose his UM claim.[6] To hold otherwise would permit an employer/insured to enter into an insurance contract excluding uninsured motorist coverage for its employees as a matter of course in violation of well-established public policy.

In addition, we believe our decision comports with the underlying purpose and policies of both the uninsured motorist statutes and the law of workers' compensation. UM benefits substitute for those benefits Antley would have received from the motorist who caused his injuries, if known. Ferguson, 261 S.C. at 101-02, 198 S.E.2d at 525 ("'The general rule is that an insurer may not

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[6] The trial court in fact granted Nobel an offset equal to Antley's workers' compensation award. This may have been error, as such a limitation on UM benefits arguably is invalid as a matter of law. See, e.g., Williamson, 314 S.C. at 219, 442 S.E.2d at 588 ("In [Ferguson] we held that an insurer cannot offset workers' compensation benefits received by an employee, notwithstanding policy provisions to the contrary."); Ferguson, 261 S.C. at 101, 198 S.E.2d at 525 ("The general rule supported by the majority of the decided cases is that an uninsured motorist endorsement provision for the reduction of payments by amounts received by the insured under any workmen's compensation law has been held void or invalid and unenforceable, on the ground that such provision reduced the effective coverage below that required by the statute and was contrary to public policy."); State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 235, 530 S.E.2d 896, 897 (Ct. App. 2000) (stating Williamson permitted an offset "because the coverage was *voluntarily* provided by the employer; court noted "the linchpin of Ferguson is the mandatory nature of UM coverage" as opposed to the optional nature of UIM) (emphasis added). However, because Antley did not appeal the trial court's ruling in this regard, the holding is the law of the case and the issue may not be considered on appeal. See Unisun Ins. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000) (stating an unappealed ruling is the law of the case which the appellate court must assume was correct).

limit its liability under uninsured motorist coverage . . . because the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance.'") (citations omitted). On the other hand, workers' compensation is intended to provide, without consideration as to fault, sure and swift reimbursement to injured employees for medical expenses and lost wages while immunizing employers from direct tort liability arising from a workplace accident. See Wright, 308 S.C. at 475, 419 S.E.2d at 221. Moreover, under our workers' compensation scheme, an injured employee may sue a non-employer third-party tortfeasor for negligence, thereby obtaining additional monies for damages such as pain and suffering, loss of consortium, etc., subject only to an offsetting lien retained by the compensation carrier. See S.C. Code Ann. § 42-1-560(a) & (b) (1985).

We therefore find Antley is not precluded from pursuing a claim for uninsured motorist benefits under Southern's policy.

II. Meaningful Offer of Uninsured Motorist Coverage

Noble next argues that even if Antley is entitled to recover UM benefits under Southern's policy, coverage should be limited to $15,000. We disagree.

In addition to coverage mandated by law, automobile insurance carriers must offer the insured optional uninsured motorist coverage up to the liability limits of the insured's policy. S.C. Code Ann. § 38-77-160 (2002). This offer must be effective and "meaningful to the insured." Todd v. Federated Mut. Ins. Co., 305 S.C. 395, 398, 409 S.E.2d 361, 364 (1991); see State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987) (holding the insured must "be provided with adequate information, and in such a manner, as to allow [him] to make an intelligent decision of whether to accept or reject the coverage"). The sufficiency of the offer is a question of law for the court. See, e.g., Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 389 S.E.2d 657 (1990); Bower v. Nat'l Gen. Ins. Co., 342 S.C. 315, 536 S.E.2d 693 (Ct. App. 2000). When an insurer fails to make a meaningful offer, the insured is entitled to reform the policy to reflect optional coverage in an amount equal the insured's policy liability limits. Todd, 305 S.C. at 399, 409 S.E.2d at 364.

Our supreme court adopted the test used to determine whether an offer of optional insurance coverage is meaningful in Wannamaker: (1) the insurer's notification process, either oral or written, "must be commercially reasonable," (2) the insurer "must specify the limits of optional coverage and not merely offer additional coverage in general terms," (3) the insurer "must intelligibly advise the insured of the nature of the optional coverage," and (4) the insured "must be told that optional coverages are available for an additional premium." 291 S.C. at 521, 354 S.E.2d at 556. An insurer must meet all four elements of the test to render an offer meaningful. Ackerman v. Travelers Indem. Co., 318 S.C. 137, 144, 456 S.E.2d 408, 411 (Ct. App. 1995) ("The insurer must satisfy all four prongs [of Wannamaker] to prove there was an effective offer . . . and failure of any one . . . vitiates the offer and requires reformation of the policy . . . .").

The burden of proving a meaningful offer of optional coverage was made rests with the insurer. See Butler v. Unisun Ins. Co., 323 S.C. 402, 475 S.E.2d 758 (1996); Todd, 305 S.C. at 398, 409 S.E.2d at 364. S.C. Code Ann. § 38-77-350 (2002) grants an insurer who utilizes a properly executed and approved offer form that minimally complies with the statute a conclusive presumption "that there was an informed, knowing selection of coverage." Id. at § 38-77-350(B); see § 38-77-350(A) ("The form, at a minimum, must provide for each optional coverage required to be offered: (1) a brief and concise explanation of the coverage, (2) a list of available limits and the range of premiums for the limits, (3) a space for the insured to mark whether the insured chooses to accept or reject the coverage and a space for the insured to select the limits of coverage he desires, (4) a space for the insured to sign the form which acknowledges that he has been offered the optional coverages, [and] (5) the mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer."). Here, Nobel does not dispute it is not entitled to this presumption because its form does not minimally comply with § 38-77-350(A). The question, then, is whether Nobel met its burden of showing it made a meaningful offer to Antley's employer, Southern Bulk Haulers, Inc.

The record indicates Nobel's sole evidence of a meaningful offer was its "Rejection – Selection" form for UM and UIM coverage. Although Southern's

representative did sign a form purporting to reject additional uninsured coverage above the $15,000 required by South Carolina law, this fact is not dispositive as "a noncomplying offer has the legal effect of no offer at all." Hanover, 301 S.C. at 57, 389 S.E.2d at 659. In our view, the form provided by Nobel decidedly fails the "meaningful offer" test set forth in Wannamaker. Although Nobel's form states Southern was given the opportunity to purchase UM/UIM coverage "in amounts up to the automobile liability limits," the form reflects Southern was then limited to the following choices:

_____ 1. I hereby reject the property damage feature of the Uninsured/ Underinsured Motorists Coverage only.

_____ 2. I hereby reject Uninsured/Underinsured Motorists Coverage for limits in excess of the following specified limits:

Bodily Injury $15,000/$30,000

Property Damage $5,000

Combined Single Limit _____

_____ 3. I hereby accept Uninsured/Underinsured Motorists Coverage in its entirety, realizing that coverage will apply only for the motor vehicles which meet the definition of "owned automobiles" as provided in this policy.

Clearly Nobel, by limiting the insured to the three choices listed above, did not effectively offer *any* additional coverage, as it failed to list a single coverage amount accompanied by a corresponding premium. Nobel's form, which at most offers such coverage only in general terms, and neither apprises the insured of the nature of UM/UIM coverage nor relates that optional coverages are available for an additional premium, does not satisfy Wannamaker. See Ackerman, 318 S.C. at 144-45, 456 S.E.2d at 412 ("To be effective, the insurer must specify the limits of optional coverage and not merely offer it in general terms. . . . [Insurer] also failed to provide [insured] with a separately stated

premium amount for optional coverage at the specified limits. . . . This omission is also fatal and renders the offer ineffective. . . . To be effective, the offer must be explained in a format and language that allows the insured to make an informed decision to accept or reject the coverage . . . ."); Amer. Sec. Ins. Co. v. Howard, 315 S.C. 47, 51-52, 431 S.E.2d 604, 607-08 (Ct. App. 1993) ("Because it did not give the insured a choice of optional coverage limits, the form failed to make an effective offer. . . . [T]he form offered [optional] coverage without specifically stating the limits of the coverage. To be effective, the offer must specify the limits of the additional coverage in dollar amounts. If it fails to do so, it does not constitute a meaningful offer. . . . [T]he form does not provide the insured with a separately stated premium amount for coverage at the specified limits. This omission likewise renders the offer ineffective. . . . [T]he form fails to explain the nature of [optional] coverage and how it differs from other coverages. It omits any description that would allow the insured to make an informed decision to accept or reject the coverage. This omission also [is fatal].") (internal citations omitted), overruled on other grounds by Concrete Servs., Inc. v. U.S. Fid. & Guar. Co., 331 S.C. 506, 498 S.E.2d 865 (1998).

Nobel correctly contends it is not required to make a new offer of UM coverage where the policy renews an existing policy. See S.C. Code Ann. §38-77-350(C)(2002) ("An automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supercedes, or replaces an existing policy."). However, Nobel's contention overlooks the fact that it did make a new offer in this instance, although not required. In so doing, Nobel rendered application of §38-77-350(C) moot.

Moreover, Nobel's argument regarding renewal fails to recognize that it still bears the burden of demonstrating a meaningful offer of UM coverage was made at some point in the past. See McDonald v. S. C. Farm Bur. Ins. Co., 336 S.C. 120, 125, 518 S.E.2d 624, 626 (Ct. App. 1999) ("Where [§] 38-77-350(C) states the insured is not required to make a 'new' offer, it clearly envisions the circumstances where the insurer has already made an 'old' offer."); Ackerman, 318 S.C. at 142, 456 S.E.2d at 411 ("[T]he only reasonable way to interpret the language in § 38-77-350(C) is to recognize that the insurer may rely on the

effective past offers it has given to its insureds when these insureds continue coverage with the same insurer.") (emphasis added).

Here, the only evidence introduced by Nobel in support of its argument that Southern's policy had been renewed was the deposition testimony of Trudy Pearce Payne, Vice President of Lancer Insurance Company, which recently had purchased Nobel's Commercial Casualty Division. Payne stated she did not have a copy of the original policy, but that "[t]here would have been some type of uninsured, underinsured rejection form in each of those policies in the situation where they rejected coverage." She further testified she could not tell whether the UM/UIM rejection/selection form employed in this instance was the same form Nobel used when the policy initially was issued "[w]ithout looking at the [original] policy." Thus, as Nobel failed to offer *any* evidence tending to show it previously made a meaningful offer of UM coverage to Southern, it may not rely on § 38-77-350(C) to avoid reformation.

Because the record reveals Nobel failed to make a meaningful offer of UM coverage, the policy is reformed as a matter of law to include such coverage up to the liability limits of Southern's policy.

AFFIRMED.

CURETON, J., concurs.

STILWELL, J., dissents in a separate opinion.

STILWELL, J. (dissenting): I respectfully dissent. While I agree with the reasoning and result of issue I, I disagree with the analysis and conclusion of issue II.

The stipulation of facts entered into by the parties and by which they and this court are bound clearly indicates that this was a renewal of an existing policy. Section 38-77-350(A) mandates the form required to "be used by insurers for all <u>new</u> applicants." This is the form which Nobel is faulted for not using. However, the named insured of this policy was not a new applicant.

Subsection (A) therefore does not apply, and subsection (C) is invoked. My disagreement with the majority centers on the meaning and application of S.C. Code Ann. Section 38-77-350(C).[7]

To avoid the consequences of the application of the plain language of this subsection, the majority takes two tacks. First, the majority contends that even though Nobel does not have to make a new offer, it did so, thereby rendering the application of section 38-77-350(C) moot. However, that reasoning is faulty because the majority had already determined that since Nobel failed to make a meaningful offer, it had the legal effect of no offer at all. Second, the majority contends that subsection (C) may be invoked only if Nobel proves that a meaningful offer was made at some time in the past. This is a novel issue in this state.

The majority cites the case of McDonald v. S.C. Farm Bureau Ins. Co., 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999), for the proposition that when an insured is not required to make a "new offer", it clearly envisions a circumstance where the insured has already made an "old" offer. However, the facts involved and the issue raised in that case differ substantially from the circumstances here. In McDonald, a new named insured replaced the original insured and no offer of optional coverage was ever made to the new insured. The McDonald court ruled that under those circumstances a new policy was created with a new named insured who had never had the opportunity to accept or reject the optional coverage. Here, we have the same named insured in a renewal policy. Had the legislature intended the result reached by the majority, the statute easily could have been worded to accomplish that objective by prefacing the section with "where a complying offer was originally made." The statute, however, contains no such condition when an insurance policy is being renewed.

To hold in this case and on these facts that the policy must be reformed to

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[7] An . . . insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy. S.C. Code Ann. § 38-77-350(C) (Supp. 2001).

provide $1,000,000 uninsured motorist coverage renders section 38-77-350(C) meaningless. While I agree Antley is entitled to uninsured motorist coverage, he is limited to the minimum required by law, that is $15,000.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

City of Newberry,

Appellant,

v.

Newberry Electric Cooperative, Inc.,

Respondent.

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

Opinion No. 3517
Submitted May 6, 2002 - Filed June 12, 2002

REVERSED and REMANDED

Robert T. Bockman, of McNair Law Firm, of Columbia; and Eugene C. Griffith, Jr., of Rushing & Griffith, of Newberry, for appellant.

Thomas H. Pope, III, of Pope and Hudgens, of Newberry, for respondent.

SHULER, J.: The City of Newberry appeals a trial court order

denying its request for an injunction barring Newberry Electric Cooperative, Inc. from providing electric service to an annexed area. We reverse and remand.

FACTS/PROCEDURAL HISTORY

In February 1974, the City of Newberry annexed approximately 21.37 acres near state Highway 219 into its corporate limits. The area had been assigned in 1971 to the Newberry Electric Cooperative exclusively by the Public Service Commission (PSC) pursuant to the Territorial Assignment Act. Prior to 1991, however, the Cooperative never provided electric service to any customers in the area.

In 1999, construction began on a Burger King located in the annexed area. During construction, the City provided temporary electric service. As the restaurant neared completion, Roger Skeen, a co-owner, requested electric service from the Cooperative. Skeen, who previously had operated a Burger King within the city limits, knew the City's electric rates were approximately 40% higher than the Cooperative's.

In August 1999, a line supervisor informed Charles Guerry, the City's Utilities Director, that the Cooperative was attempting to connect service. Guerry visited the construction site and advised the Cooperative to stop the connection because the area was inside municipal limits. The Cooperative ignored Guerry's instruction and continued to connect service by dropping a line from one of its distribution poles that had been on the site for more than forty years.

The City brought this action in November 1999 seeking an order enjoining the Cooperative from furnishing electric power to the Burger King. The Cooperative answered and counterclaimed for, inter alia, a judgment declaring it legally entitled to provide service. On November 30, 2000, the trial court held a hearing. Relying on stipulated facts,[1] documentary evidence, and oral

[1] The relevant stipulated facts include: 1) the City annexed the area in 1974, 2) the PSC assigned the area to the Cooperative prior to annexation, 3) the City population estimate at the time was 10,542, 4) the Cooperative

testimony, the court denied the City's request for an injunction and instead issued a declaratory judgment finding the Cooperative had a legal right to supply electric service to the Burger King. This appeal followed.

LAW/ANALYSIS

The material facts of this case, agreed to by written stipulation, are undisputed. As a result, this Court will review "whether the trial court properly applied the law to those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000); see Duke Power Co. v. Laurens Elec. Co-op., Inc., 344 S.C. 101, 543 S.E.2d 560 (Ct. App. 2001).

The City argues the trial court erred in finding the Cooperative could lawfully provide electric service to Burger King without the City's consent. We agree.

The Legislature enacted the Rural Electric Cooperative Act (RECA) "for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas." S.C. Code Ann. § 33-49-210 (1990). As creatures of statute, rural electric cooperatives "only have such authority as the [L]egislature has given them." Duke Power, 344 S.C. at 104, 543 S.E.2d at 562. The RECA grants cooperatives the authority to supply electric energy only in rural areas, i.e., areas with populations less than 2,500 persons. See S.C. Code Ann. § 33-49-250(1) (1990); Carolina Power & Light Co. v. Town of Pageland, 321 S.C. 538, 471 S.E.2d 137 (1996). The City of Newberry, with a population over 10,000 residents, is nonrural.

The RECA, however, also "provides two exceptions permitting a rural co-op to serve customers within a nonrural area . . . ." Duke Power, 344 S.C. at 105, 543 S.E.2d at 562; see Carolina Power, 321 S.C. at 542, 471 S.E.2d at 139

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served no customers within the area prior to Burger King, 5) the City never consented to service by the Cooperative, 6) the Cooperative moved no poles prior to beginning service, and 7) the Cooperative maintained the poles and lines used to provide service both before and after annexation.

(stating § 33-49-250(1) was amended in 1963 to provide "two exceptions" to the requirement that cooperatives serve only rural areas). These exceptions, the annexation exception and the principal supplier exception, are found in the following language from the RECA:

> *[T]he act of incorporating or annexing into a city or town an area in which the cooperative is serving shall constitute the consent of the governing body of such city or town for the cooperative to continue serving all premises then being served and to serve additional premises within such area until such time as the governing body of the city or town shall direct otherwise* and such cooperative is empowered to so serve, but it shall not extend service to any premises in any other part of such city or town *unless the cooperative was the principal supplier of electricity in such city or town . . . .*

§ 33-49-250(1) (emphasis added); see Duke Power, 344 S.C. at 105, 543 S.E.2d at 562.

The purpose of the exceptions is to "prevent the ouster of co-ops from areas they have historically served due to population growth or annexation." Duke Power, 344 S.C. at 105, 543 S.E.2d at 562. The statutory language, therefore, "contemplate[s] [a] co-op's continued service" in an area to which an exception applies. Id. Neither party herein contends the Cooperative was the principal supplier of electricity in the annexed area. Accordingly, our sole concern is the application of the annexation exception.

The trial court found Burger King had the option to choose either the City or the Cooperative as its electric service provider. The court based the finding on its interpretation of S.C. Code Ann. § 58-27-670 (Supp. 2001) because, in supplying power to the Burger King, the Cooperative merely "dropped a line"

and did not use the City's "streets, alleys or other public ways."[2] Section 58-27-670 provides:

> The furnishing of electric service in any area which becomes a part of any municipality after the effective date of this section, either by annexation or incorporation, whether or not the area, or any portion of the area has been assigned pursuant to § 58-27-640, is subject to the provisions of §§ 58-27-1360 and 33-49-250, and any provisions of this article. *No poles, wires, or other facilities of electric suppliers using the streets, alleys, or other public ways within the corporate limits of a municipality may be constructed by an electric supplier unless the consent of the municipal governing body is first obtained*. Annexation may not be construed to increase, decrease, or affect any other right or responsibility a municipality, rural electric cooperative, or electrical utility may have with regard to supplying electric service in areas assigned by the Public Service Commission in accordance with Chapter 27 of Title 58.

§ 58-27-670 (emphasis added).[3]

The statute, therefore, declares that any electric service provider annexed or incorporated into a municipality after June 6, 1984, the date of enactment, must obtain the municipality's consent before using the "streets, alleys, or other

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[2] The parties agreed the Cooperative did not use the streets, alleys, or public ways of the City in providing electric service to Burger King.

[3] S.C. Code Ann. § 33-49-250 (1990) enumerates the powers of rural electric cooperatives, while S.C. Code Ann. § 58-27-1360 (Supp. 2001) permits, upon payment of just compensation, the ouster of an annexed or incorporated electric supplier whom the municipality determines is providing "inadequate, undependable, or unreasonably discriminatory" service.

public ways" to erect poles, wires or other business facilities. In reaching its conclusion, the trial court apparently employed reverse logic to find that the statute also inferentially permitted an annexed electric service supplier to provide new service without consent if it refrained from using the municipality's public property. This was error.

Initially, we note § 58-27-670 by its own terms is inapplicable under the facts of this case because the City annexed the area in question in 1974, a full ten years prior to the date of enactment. See City of Westminster v. Blue Ridge Elec. Coop., 295 S.C. 93, 97, 366 S.E.2d 611, 613 (Ct. App. 1988) ("[T]he Legislature intended the amended provisions of Sections 58-27-670 and 58-27-1360 to apply to areas annexed or incorporated after the effective date of the amendments (i.e. June 6, 1984)."). Moreover, our supreme court has interpreted § 58-27-670 to mean that a rural electric cooperative possessing a valid PSC territorial assignment to serve an area subsequently annexed is "permitted to *continue service* in that area to those premises being served as of the date of the annexation or incorporation," but "prohibited, without prior consent of the municipality, from *extending or expanding* service in that area by the use of any streets, alleys, public property or public ways after the date of annexation or incorporation." City of Abbeville v. Aiken Elec. Coop., 287 S.C. 361, 370-71, 338 S.E.2d 831, 836 (1985) (emphasis added).

Finally, § 58-27-670 expressly states it is subject to the terms of § 33-49-250, which clearly limit a cooperative's ability to provide service in an annexed or incorporated area without the municipality's express consent. The plain language of the annexation exception contained in § 33-49-250(1) provides that the act of annexation or incorporation by a municipality constitutes its implied consent for a cooperative "to continue serving all premises then being served . . . ." Thus, if a cooperative is serving *existing* customers, it has a statutory right to continue serving them even after annexation. See § 33-49-250(1); Carolina Power, 321 S.C. at 543, 471 S.E.2d at 140 ("[T]he intent of the [L]egislature in adopting the annexation exception was to permit co-ops to continue to serve existing customers and not require ouster of a co-op due solely to a city's annexation."). The Cooperative admits it had no customers in the annexed area prior to Burger King; hence, it does not fall within the category of cooperatives afforded the City's implied consent. See § 33-49-250(1); Duke Power, 344 S.C.

at 106, 543 S.E.2d at 563 (noting that where a cooperative is not serving any customers at the time of annexation a decision barring it from serving the annexed area does not result in an impermissible ouster).

Furthermore, although the annexation exception also implies consent for cooperatives to serve "additional premises," i.e., new customers, within an annexed area, the statute expressly limits a cooperative's authority to provide new or increased service by allowing it only "until such time as the governing body of the city or town shall direct otherwise . . . ." § 33-49-250(1). As the parties stipulated the City never consented to service by the Cooperative, and the record reflects the City in fact "direct[ed] otherwise" when Charles Guerry informed the Cooperative it needed to stop the installation of new service, this aspect of the annexation exception is similarly unavailing to the Cooperative.

For the foregoing reasons, we hold § 58-27-670 was an inappropriate basis for the trial court's ruling. The trial court erred in finding the Cooperative was authorized to provide electric service to the Burger King in the absence of the City's consent. Accordingly, we reverse the court's declaratory judgment in the Cooperative's favor, and remand for entry of an order enjoining the Cooperative from providing such service.

REVERSED and REMANDED.

CURETON and STILWELL, JJ., concur.