The Supreme Court of South Carolina

IN THE MATTER OF RORY DIXON MORTIMER, PETITIONER

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 8, 1978, Rory Dixon Mortimer was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated May 30, 2001, Mr. Mortimer submitted his resignation from the South Carolina Bar. We accept Mr. Mortimer's resignation.

Mr. Mortimer shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Mr. Mortimer shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Rory Dixon Mortimer shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

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
July 18, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

July 23, 2001

ADVANCE SHEET NO. 26

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth E. Curtis, Individually and d/b/a Privacy Protection Services, Appellant,

v.

The State of South Carolina, The South Carolina General Assembly, Charles Molony Condon, as Attorney General for the State of South Carolina, Robert M. Ariail, as 13th Judicial Circuit Solicitor, The South Carolina Law Enforcement Division, and Johnny Mack Brown, as Sheriff for Greenville County, Respondents.

Appeal From Greenville County
Thomas J. Ervin, Special Circuit Court Judge

Opinion No. 25319

Heard October 4, 2000 - Filed July 17, 2001

AFFIRMED

Robert C. Childs, III and Laura W. H. Teer, both of Mitchell, Bouton, Yokel & Childs, of Greenville, for appellant.

Attorney General Charles M. Condon, Senior Assistant Attorney General Nathan Kaminski, Jr., and Assistant Attorney General Christie Newman Barrett, all of Columbia, for respondents.

CHIEF JUSTICE TOAL: Kenneth E. Curtis ("Curtis") appeals the trial court's denial of a temporary injunction concerning the enforcement of S.C. Code Ann. § 16-13-470 (Supp. 2000), which prohibits the selling of urine with the intent to defraud a drug screening test. We affirm.

FACTS/PROCEDURAL HISTORY

In 1996, Curtis started an internet business known as Privacy Protection Services.[1] Through this business, Curtis sells his own urine, which is certified as drug and adulterant free, along with a "urine test substitution kit." Each urine test substitution kit comes with Curtis' urine, a pouch, a tube, and a chemical hand warmer device. Because proper temperature is critical for acceptance at any urine testing site, each kit comes with "chemically reactive supplemental heat sources" and a temperature monitoring system that insures proper acceptance temperature. Furthermore, the kit can be easily concealed on the body and can be used in a natural urinating position, which means it cannot be

[1]Privacy Protection Services can be found at www.privacypro.com.

detected even if directly observed.[2] According to Privacy Protection Services' website: "Our complete urine test substitution kits allow anyone, regardless of substance intake, to pass any urinalysis within minutes."[3]

Based on his website and his June 17, 1999, affidavit, Curtis maintains his primary objection to urine testing by employers is they do not merely test for drugs, they also test for pregnancy, diabetes, cigarette smoking, hypertension, and other diseases or genetic traits. He believes this type of testing by employers constitutes an infringement on the privacy rights of prospective employees and leads to access of private information.

On June 11, 1999, the Governor of South Carolina signed Senate Bill 277, which amended S.C. Code Ann. § 16-13-470 "to provide that selling urine with the intent to defraud a drug screening is a felony." Under section 16-13-470, the penalty for the first offense is a fine of not more than five thousand dollars and imprisonment of not more than three years, or both. The penalty for a second or subsequent offense is a fine of not more than ten thousand dollars or imprisonment of not more than five years, or both. S.C. Code Ann. § 16-13-470 (Supp. 2000). Pursuant to the statute, intent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale. *Id.*

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[2]According to the website, each kit contains a small reservoir pouch (about the size of a pack of cigarettes) that has a small diameter tube that can be routed to the genital area. The tube has a flow/stop clip that makes dispensing easy and natural. The kit can be stored indefinitely or kept on hand in case of random testing. These complete kits provide everything needed for two urine testing procedures.

[3]In Curtis' Brief he maintains "he does not tout the product as a means to avoid detection of drug or alcohol abuse." However, the website describes how one can conceal the kit in any drug test. The website also includes a cartoon depicting a man urinating on a law enforcement officer. The cartoon is accompanied by the following quotation: "South Carolina law makers are pinching the weenie but can't stop the flow!"

On June 18, 1999, Curtis filed a Motion for an *Ex Parte* Temporary Restraining Order and a Motion for a Temporary Injunction. The trial judge granted the *Ex Parte* Temporary Restraining Order on June 18, 1999. On June 30, 1999, the trial court denied the Motion for a Temporary Injunction and issued a formal Order. Curtis' Motion for Reconsideration was denied and this appeal followed.

On September 20, 2000, the Attorney General filed a Motion to Dismiss Appeal as Moot and a Motion to Supplement Record on Appeal with Memorandum in Support Thereof. On August 18, 2000, the trial judge entered an order ruling on the merits of this case, holding section 16-13-470 constitutional and a legitimate exercise of the State's police powers. The Attorney General moves this Court to dismiss the appeal of the denial of a temporary injunction because the appeal is moot. According to the Attorney General's Motion, any order issued by this Court will be advisory and will have no practical effect on an existing controversy.

The following issues are before this Court on appeal:

I. Since the trial court has issued an order on the merits of this case, should this Court dismiss the appeal of the denial of a temporary injunction because the trial court's order renders the appeal moot?

II. Did the trial court err by holding Curtis is not entitled to a temporary injunction against the enforcement of section 16-13-470 when Curtis failed to establish that he will suffer irreparable harm or that he has no adequate remedy at law?

III. Did the trial court err in holding Curtis is not likely to succeed on the merits?

    A. Does section 16-13-470 create an impermissible presumption of guilt?

B. Is section 16-13-470 vague, overly broad, and ambiguous?

C. What legitimate public purpose does section 16-13-470 protect?

D. Does section 16-13-470 infringe upon First Amendment rights?

E. Does section 16-13-470 violate equal protection?

F. Does section 16-13-470 constitute cruel and unusual punishment?

G. Does section 16-13-470 impermissibly interfere with interstate commerce?

H. Does section 16-13-470 abridge the right to privacy?

I. Does section 16-13-470 violate the Fourth Amendment?

IV. Did the trial court err in reaching the merits on a motion for temporary relief?

LAW/ANALYSIS

I. Mootness

The Attorney General argues the appeal in this case is moot and any order issued by this Court will be advisory because the trial court has issued an order on the merits.[4]

[4]We granted the Attorney General's motion to supplement the Record on Appeal with the trial judge's order on the merits.

An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997). Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. *See* Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 122 (1999). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. *See generally Byrd v. Irmo High Sch.*, 321 S.C. 426, 468 S.E.2d 861 (1996); *Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc.*, 406 S.E.2d 65 (W. Va. Ct. App. 1991) (holding an appellate court could consider newspaper's appeal from trial court's injunction compelling newspaper to publish political action advertisement even though case was moot because issue was capable of repetition yet evaded review). Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. *See generally Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (the court recognized that questions of public interest originally encompassed in an action should be decided for future guidance however abstract or moot they may have become in the immediate contest). Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. *See* 5 AM. JUR. 2D *Appellate Review* § 649 (1995).

An order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4) (Supp. 2000); *Appeal of Paslay*, 230 S.C. 55, 94 S.E.2d 57 (1956) (appeal lay from the restraining order or temporary injunction). However, "[t]he

rule that an appellate court limits its review to the issues necessary to a proper disposition of the appeal, and will not consider immaterial or moot questions, applies when reviewing decrees and orders relating to injunctions." 42 AM. JUR. 2D *Injunctions* § 335 (2000). Where only injunctive relief is sought and the need for that relief has ceased to be a justiciable issue, an appellate court should not review the merits, or consider the granting of a new trial after it has become impossible to have a new trial in the case. *See generally State ex rel. Matthews v. Eastin*, 297 P.2d 170 (Kan. 1956).

Texas courts have held an appeal of a temporary injunction is moot where a trial court renders final judgment while the appeal is pending. *See Lowe v. Farm Credit Bank of Texas*, 2 S.W.3d 293 (Tex. Ct. App. 1999); *Save Our Springs Alliance v. Austin Indep. Sch. Dist.*, 973 S.W.2d 378 (Tex. Ct. App. 1998) (trial court's final judgment rendered the appeal of the temporary injunction moot). According to Texas case law, dismissing an appeal from a temporary injunction after it has been rendered moot by final judgment is necessary to prevent premature review of the merits of the case. *Isuani v. Manske-Sheffield Radiology Group, P.A.*, 802 S.W.2d 235 (Tex. 1991).

The trial judge's June 30, 1999, Order renders this case nonjusticiable because any decision by this Court will not have a practical legal effect on the temporary injunction. The sole object of a temporary injunction is to preserve the subject of the controversy in its condition at the time of the order until opportunity is offered for full and deliberate trial investigation. *Epps v. Bryant*, 218 S.C. 359, 62 S.E.2d 832 (1950). Temporary injunctions are interlocutory, tentative, and impermanent and are superseded by the final judgment rendered on the merits. 42 AM. JUR. 2D *Injunctions* § 294 (2000). Thus, temporary injunctions "remain in force only until, and expire upon, the entry of the final judgment and are not enforceable after the final judgment has been entered." *Id.*

Curtis has received a full investigation of his claim because the trial court has rendered a decision on the merits of this case. Therefore, the temporary injunction has expired and the issue is moot. However, we signed an Order taking the appeal on its merits from the Court of Appeals. We consolidated the

merits appeal with the temporary injunction appeal. For the sake of judicial economy, we address the merits.

II. Success on the Merits

This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid. *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996). "A possible constitutional construction must prevail over an unconstitutional interpretation." *Westvaco Corp. v. South Carolina Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995). Further, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt. *Id.* Because Curtis does not establish an infringement of a constitutional right, the trial court was correct in holding he is not likely to succeed on the merits of the following constitutional challenges.

A. Impermissible Presumption of Guilt

Curtis argues section 16-13-470 unconstitutionally shifts the burden of proof on the issue of criminal intent to the defendant. We agree. Specifically, section 16-13-470 states, "[i]ntent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale, giving, distribution, or marketing of urine or if instructions which provide a method for thwarting a drug-screening test accompany the sale, giving, distribution, or marketing of urine."

Section 16-13-470 unconstitutionally shifts the burden of proof to the criminal defendant because it states that "intent is presumed" when certain conditions are met. This language violates the United States Supreme Court's holding in *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) because it acts as a conclusive presumption. In *Sandstrom*, the United States Supreme Court held the defendant's due process rights were violated by a jury instruction on the issue of intent where the trial judge

instructed, "the law presumes that a person intends the ordinary consequences of his voluntary acts." According to the Supreme Court, the jury in *Sandstrom* may have interpreted the trial judge's instruction as a burden shifting presumption or a conclusive presumption. This jury instruction violates the Fifth and Fourteenth Amendment's due process requirement that the State prove every element of a crime beyond a reasonable doubt. In finding such a presumptive instruction unconstitutional, the Supreme Court found where intent is an element of the crime charged, it follows that the trial court may not withdraw or prejudge the issue by instructing the jury the law raises a presumption of intent from an act. *Sandstrom, supra.* This invades the fact finding responsibility of the jury.

A statute may be constitutional and valid in part and unconstitutional and invalid in part. *Thayer v. South Carolina Tax Comm'n*, 307 S.C. 6, 413 S.E.2d 810 (1992). We find the unconstitutional intent language is severable from the remainder of section 16-13-470. The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution. *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 648-649, 528 S.E.2d 647, 654 (1999) (citations omitted). "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision." *Id.* (quoting *Dean v. Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959)).

We find the unconstitutional intent language is severable from the remainder of section 16-13-470. The remainder of the statute outlines the different unlawful ways a person can attempt to defraud a drug and alcohol screening test, using general language to describe intent. The remainder of the statute is complete without the intent presumption language because it allows the jury to infer intent from the circumstantial evidence presented at trial. We presume the legislature would have passed section 16-13-470 regardless of

whether the presumption language was included. We, therefore, sever the unconstitutional presumption language from the rest of the statute.

B. Unconstitutionally Vague and Overbroad

Curtis argues section 16-13-470 is unconstitutionally vague and overbroad. We disagree.

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 472 (1993). The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies. *Huber v. South Carolina State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 446 S.E.2d 433 (1994). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. *Toussaint v. State Bd. of Med. Exam'rs*, 303 S.C. 316, 400 S.E.2d 488 (1991). One to whose conduct the law clearly applies does not have standing to challenge it for vagueness. *Id.*

Although some of the terms in section 16-13-470 are undefined, the intent of the statute is clear on its face. The statute makes it unlawful to "sell, give away, distribute, or market urine . . . with the intent to defraud a drug or alcohol screening test." A person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal. Curtis argues that section 16-13-470 is unconstitutionally vague because terms such as "foil," "spike," "defraud," "bodily fluids," and "adulterate" are not defined. However, all of these terms have common, ordinary meanings sufficient to proscribe conduct, and do not need to be specifically defined. *See State v. Hamilton*, 276 S.C. 173, 276 S.E.2d 784 (1981) (the fact that "force or coercion" was undefined by the statute did not render the statute vague or ambiguous because the words are of common, ordinary meaning and are

sufficiently specific to proscribe the conduct). Further, all the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices. *See State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965).

C. Legitimate Public Purpose

Curtis argues section 16-13-470 serves no legitimate public purpose. He argues there is no legitimate public purpose in helping "private industry do urine testing that doesn't even reflect accurately on their consumption of substances and which has no relation to impairment of safety." Curtis also argues the Attorney General fails to submit affidavits demonstrating how section 16-13-470 will serve to lessen drug use in the workplace or in any way promote the safety, health, or welfare of the citizens of South Carolina. We disagree.

As noted in the trial court's Order, the United States Supreme Court has held drug testing of employees through urinalysis is lawful and constitutional. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (testing railway employees for drugs and alcohol after a serious accident was constitutional). The General Assembly has passed several statutes that permit random drug testing to further the public policy of a drug-free work environment. *See* S.C. Code Ann. § 38-73-500 (Supp. 2000) (provides a workers' compensation credit for random drug testing to provide incentive for employers to prevent drug use and work-related accidents); S.C. Code Ann. § 41-1-15 (Supp. 2000) (authorizing an establishment of drug prevention program in the workplace which includes a substance abuse testing program).

A statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug-free workplace. Section 16-13-470 is a legitimate exercise of the State's police powers in regulating public safety and welfare. Furthermore, the public purpose of creating safety in the workplace outweighs any legitimate interest, if any, of Curtis in doing business.

D. First Amendment Rights

Curtis argues section 16-13-470 violates his right to free speech because it directly prohibits the expression of ideas relative to urine testing. We disagree.

Along with his urine, Curtis provides literature with instructions on how to defeat a drug test and literature regarding his political beliefs on drug testing. Section 16-13-470 does not prohibit Curtis from dispensing literature regarding his political beliefs on urine testing. Furthermore, we sever the provision from section 16-13-470 which states that intent will be presumed if "instructions which provide a method for thwarting a drug-screening test" accompanies the sale of his urine. We find the remaining statute does not infringe on Curtis' right to free speech.

E. Equal Protection

Curtis argues section 16-13-470 violates the Equal Protection Clause because it differentiates urine sales from the sale of herbal supplements and other products sold to mask drugs in one's urine.[5] We disagree.

The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A classification does not violate the Equal Protection Clause if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 524 S.E.2d 404 (1999). The determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is a reasonable hypothesis to support it. *Id.* "The

[5]For example, Curtis argues the sale of water is not prohibited even thought it is the primary adulterant used to defeat urine tests.

fact that the classification may result in some inequity does not render it unconstitutional." *Id.* (citing *Davis v. County of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994)).

This case does not involve a suspect classification or a fundamental right, so the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose. *Casbah, Inc., v. Thone*, 651 F.2d 551 (8th Cir. 1981) (citing *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976)). We find the classification of an individual who sells urine or an adulterant to defeat a drug test is rationally related to the legitimate state purpose of promoting a safe work environment. First, the classification is reasonably related to the legislative purpose of insuring the safety of the workplace through the protection of drug testing programs. Second, all people who constitute the class are treated similarly. The classification rests on a reasonable basis and includes any person who sells a product intended to adulterate urine or other bodily fluid sample for the purposes of defrauding a drug or alcohol screening test. S.C. Code Ann. § 16-13-470(A)(5). Curtis' equal protection claims fails because all individuals who engage in conduct prohibited by section 16-3-470 are treated alike, regardless of whether they adulterate urine samples with herbal supplements or chemicals.

F. Cruel and Unusual Punishment

Curtis argues the sentence proscribed by section 16-13-470 constitutes cruel and unusual punishment in violation of the Eighth Amendment because the sentence is grossly disproportionate to the severity of the crime. We disagree.

The Eighth Amendment only prohibits sentences which are grossly out of proportion to the severity of the crime. *Yeargin v. South Carolina Dep't of Highways & Pub. Transp.*, 313 S.C. 387, 438 S.E.2d 234 (1993) (citations omitted). Pursuant to section 16-13-470, the punishment for a first offense misdemeanor conviction is a fine not more than five thousand dollars or imprisonment of not more than three years, or both. A second, or subsequent,

conviction is a felony punishable by a fine not more than ten thousand dollars or imprisonment not more than three years, or both. This punishment is not inhumane or disproportionate to the severity of the crime. The trial court has discretion as to the amount of the fine or length of imprisonment. Moreover, section 16-13-470 does not preclude the sentencing authority from considering mitigating and aggravating circumstances in fashioning an appropriate sentence.

G. Interstate Commerce

Curtis argues section 16-13-470 prohibits the flow of interstate goods and impermissibly burdens interstate commerce. We disagree.

First, this case does not involve the commerce clause, it involves the legislature's exercise of its police powers to prohibit commerce that is intended to defraud South Carolina employers and create an unsafe work environment. Furthermore, section 16-13-470 does not unduly burden interstate commerce because it does not ban the sale of urine and other bodily fluids. It simply makes it unlawful for someone to sell, give away, distribute, or market urine with the *intent* to use the urine to defraud a drug or alcohol screening test.

H. Right to Privacy

Curtis argues he has a constitutional right to sell his urine. He also argues that South Carolina has placed itself in the unlawful position of monitoring urine testing. We disagree.

First, section 16-13-470 does not involve an act of surveillance by the State, it involves the commercialization of urine to defraud drug tests. Second, Curtis does not have standing to assert section 16-13-470 unconstitutionally invades the privacy rights of those who are subject to urine testing. *See Stone v. Salley*, 244 S.C. 531, 537, 137 S.E.2d 788, 790 (1964) *overruled on other grounds by R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000) (holding a plaintiff "cannot obtain a decision as to the

invalidity of [an] Act on the ground that it impairs the rights of others."). Finally, the statute does not prohibit Curtis from doing what he wants with his urine. He could even sell his urine for other purposes as long as he does not intend to defraud a drug or alcohol screening test.

I. Fourth Amendment

Curtis argues section 16-13-470 violates the Fourth Amendment. We disagree. In essence, Curtis attempts to assert the Fourth Amendment rights of his customers against drug testing in the workplace. First, Curtis does not have standing to assert the constitutional rights of his customers. *See Stone, supra.* Second, section 16-13-470 does not mandate drug testing, it simply makes it a crime to sell urine or other adulterants with the intent to defraud a drug test.

III. The Merits

Curtis argues the trial court erred in reaching the merits on his Motion for Temporary Relief. We disagree.

In determining whether a temporary injunction should issue, the trial judge should not consider the merits of the case, except as they may enable the trial court to determine whether a prima facie showing has been made. *Transcon. Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969). When a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. *Id.* However, when a plaintiff's prima facie case depends on an allegation that a statute in unconstitutional, the trial judge must consider the matter in determining the reasonable necessity for a temporary injunction. *Hutchison v. York County*, 86 S.C. 396, 68 S.E. 577 (1910). In order to reverse the refusal of a temporary injunction in such a case, this Court must review the constitutional question. *Id.*

A trial court may consider a case's merit to the extent necessary to determine whether a temporary injunction should issue. *Roberts v. Union*

County Bd. of Sch. Trs., 284 S.C. 299, 326 S.E.2d 163 (Ct. App. 1985). The trial court in this case found Curtis was not likely to succeed on the merits because he had not established a valid infringement upon a fundamental constitutional right. Although the trial judge ruled on the merits of Curtis' constitutional arguments, it was necessary to determine the likelihood of success on the merits. Furthermore, according to *Hutchison, supra*, it was proper for the trial judge to consider the merits because Curtis' prima facie case depended on an allegation that section 16-13-470 was unconstitutional.

CONCLUSION

We sever the unconstitutional presumption language from section 16-13-470, affirm the trial court's order upholding the constitutionality of the remainder of section 16-13-470, and find section 16-13-470 is a valid exercise of the State's police powers.

MOORE, WALLER, BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marianne Osborne, individually, and as Guardian ad Litem for Matthew Connor Osborne, a minor, Petitioner,

v.

R. Stephen Adams, M.D., B. Edward O'Dell, M.D., Adams, O'Dell, Davidson and Lusk, OB/GYN, P.C., Evelyn H. Melnick, M.D., J.E. Harlan, Jr., M.D., Pee Dee Neonatal Associates, P.A., and McLeod Regional Medical Center, Defendants,

of which, McLeod Regional Medical Center is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 25320
Heard May 9, 2001 - Filed July 23, 2001

REVERSED

Edward L. Graham, of Zeigler and Graham, of Florence, for petitioner.

John S. Wilkerson, III, of Turner, Padget, Graham & Laney, P.A., of Florence, for respondent McLeod Regional Medical Center.

JUSTICE PLEICONES: Marianne Osborne's ("Osborne") son, Connor, was born prematurely and received care at McLeod Regional Medical Center ("McLeod") in its neonatal care unit. After Connor developed serious physical and mental ailments, Osborne brought suit alleging negligence on the part of the above-captioned defendants. The trial court granted McLeod's motion for summary judgment. The Court of Appeals, relying in large part on its decision in Simmons v. Tuomey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct. App. 1998) (hereinafter, "Simmons I"), affirmed. Osborne v. Adams, 338 S.C. 82, 525 S.E.2d 268 (Ct. App. 1999). We granted certiorari to review the Court of Appeals' decision, in light of our modification of Simmons I. See Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000) ("Simmons II"). We reverse.

ISSUE I

Did the trial court err in granting McLeod's motion for summary judgment?

ANALYSIS

In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

Based on its holding in Simmons I that a hospital's nondelegable duties are confined to emergency room care, the Court of Appeals affirmed the trial court's grant of summary judgment in favor of McLeod. The Court of Appeals expressed its opinion that Section 429 of the Restatement (Second) of Torts was not an accurate reflection of the law of this State, and therefore, Osborne could not rely on that section in maintaining a cause of action against McLeod.

However, in Simmons II, this Court adopted section 429,[1] and held that a hospital owes a common law nondelegable duty to render competent service to its emergency room patients such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation.

Although Simmons II involved emergency room physicians, we did not limit our decision to such physicians. The decision was limited, however, "to those situations in which a patient seeks services at the hospital as an institution, and is treated by a physician who reasonably appears to be a hospital employee." Id. at 52, 533 S.E.2d at 323. The holding did not "encompass situations in which a patient is admitted to a hospital by a private, independent physician whose only connection to a particular hospital is that he or she has staff privileges to admit patients to the hospital." Id.

In order to establish liability under section 429, a plaintiff must show that

> (1) the hospital held itself out to the public by offering to provide services; (2) the plaintiff looked to the hospital, rather than the individual physician, for care; and (3) a person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee. When the

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[1]Section 429, Restatement (Second) of Torts, provides:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

> plaintiff does so, the hospital will be held vicariously liable for any negligent or wrongful acts committed by the treating physician. The hospital may attempt to avoid liability for the physician's acts by demonstrating the plaintiff failed to prove these factors.

Id. at 51, 533 S.E.2d at 322.

We review each of these elements below.

Element 1: Holding out

In her complaint, Osborne[2] alleged that McLeod "holds itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical care." In an affidavit submitted in opposition to McLeod's summary judgment motion, Osborne stated that "[t]hrough McLeod's marketing efforts the representation was made to me that McLeod had first rate physical facilities, staff, equipment and supplies for its birthing center, including a Level 3 Neonatal Intensive Care Unit (hereinafter, "NICU"); that Dr. J. E. Harlan, Jr., was director of McLeod's NICU; and that the neonatologists were an integral part of McLeod's NICU team."

Further, Osborne submitted a three-part article appearing in McLeod Magazine[3] extolling McLeod's facilities and referring to "McLeod

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[2]Osborne was employed as a pharmacist at McLeod at the time of her delivery. Nothing in the record, however, indicates that she had knowledge of the fact that the neonatologists at McLeod were employed as independent contractors.

[3]There appears to be some dispute as to whether McLeod Magazine is an advertising vehicle aimed at attracting patients to McLeod, or a professional recruitment tool designed to attract healthcare providers to the hospital.

neonatologists." The article depicts Dr. Harlan standing in front of what appears to be medical equipment with his arm outstretched, and refers to Harlan as McLeod's Neonatal Intensive Care Unit Director. The article lauds the excellent facilities and care available to newborns and expectant mothers at McLeod.

Element 2: Plaintiff looked to hospital, rather than individual physician

In her affidavit, Osborne stated: "I selected McLeod as the hospital where I planned to have my delivery, and obtain any incidental medical services related to my pregnancy, labor, delivery and newborn care." She continued: "[a]t no time did I select these neonatologists to care for my baby. Rather, I selected McLeod as the hospital to provide any and all healthcare needs which might arise incident to my labor and delivery and the newborn care for my son. . . . I had no knowledge that these neonatologists were employed by their own professional association, as opposed to being employed directly by McLeod. To my knowledge they were the only neonatologists working at McLeod. . . . I thought all of my son's health care [sic] services at the McLeod NICU were being provided by McLeod, and did not realize the neonatologists were independently employed."

Element 3: Reasonable belief that service is being provided by hospital

In addition to the McLeod Magazine article mentioned in the discussion of Element 1, above, Osborne stated in her affidavit that "I had been exposed to [the McLeod Magazine] articles early in my pregnancy, and they reinforced my belief that the neonatologists were not separately employed, but were an integral part of McLeod's professional NICU team. I do not recall any marketing materials about McLeod's NICU making a distinction between the nurses/technicians being hospital employees and the neonatologists being independently employed."

Viewing this evidence in the light most favorable to Osborne, she has made a *prima facie* showing of the elements required in Simmons II. The McLeod Magazine article is evidence that McLeod held itself out as

providing top-notch neonatal services; Osborne avers in her affidavit that she believed the neonatologists were McLeod employees; and, in light of the magazine article, and the other evidence adduced, a finder of fact could infer that her belief was reasonable.

We are not convinced by McLeod's argument that this case is distinguishable from Simmons II due to the fact that all hospitals are required to have emergency rooms while they are not mandated to have NICUs. The rule announced in Simmons II contains no requirement that the service be mandated by law before a plaintiff can recover based on section 429. We decline to add such a requirement.[4] We note that although McLeod was not mandated by law to maintain a NICU, the hospital sought and acquired a Level III designation from the South Carolina Department of Health and Environmental Control. In order to achieve this designation, McLeod was required to have the services of a neonatologist available. See 24A S.C. Code Ann. Regs. 61-16 § 608.3 (1992).

ISSUE II

Should the holding in Simmons II apply prospectively only?

ANALYSIS

Osborne's recovery against McLeod might yet be foreclosed if we decide, as McLeod urges, that the holding in Simmons II should apply prospectively only. "[T]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. . . . Prospective application is required when liability is created where formerly none existed." Toth v.

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[4]We stress that the decision we announce today only finds that Osborne has presented some evidence that McLeod had a nondelegable duty as defined in Section 429 of the Restatement (Second) of Torts. We intimate no opinion as to whether Osborne will prevail after a full airing of the facts.

Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989) (internal citations omitted). "Other cases which have held prospective application to be appropriate include those in which immunities have been dissolved." Id. at 9, 377 S.E.2d at 586.

In Toth, the Court had to determine whether its earlier holding in Small v. Springs Industries, Inc., 292 S.C. 481, 357 S.E.2d 452 (1987), should apply prospectively only. In Small, the Court held that employee handbooks were admissible as evidence of a contract of employment. The Toth defendants, employers being sued by former employees for breach of contract, argued that Small created new contractual obligations, and therefore, should apply prospectively only. The Court declined to so limit Small. It reasoned that the Small holding recognized no new right or cause of action, nor did it abolish any previous immunities. The Court continued:

> Small involved an action for breach of contract. It is elementary that a cause of action for breach of contract is not a new one. Respondent argues that Small "substantially altered the doctrine of employment at-will to create contractual obligations . . . where none had existed before." We do not agree that a new contractual obligation has been created. The companies themselves previously created the contractual obligations through promises made in employee handbooks. . . . Employers cannot now be allowed to retract their promises and ignore handbooks they have drafted.

Toth, 298 S.C. at 9, 377 S.E.2d at 586.

By analogy, Osborne's claims sound in negligence – hardly a novel cause of action. She alleges that McLeod represented that the neonatologists were hospital employees, not independent contractors. She argues, in essence, that now McLeod seeks to retract its representation and shield itself from liability for the neonatologists' negligence.

Furthermore, Simmons II did not abolish an immunity, it merely

clarified the common law of this State. The Court framed the issue in that case as whether "the Court of Appeals err[ed] in holding that hospitals have a nondelegable duty **under the common law** to render competent service to the patients of their emergency rooms[.]" Simmons II, 341 S.C. at 38, 533 S.E.2d 315 (emphasis added).

A portion of that opinion explains that

> [t]his Court and the Court of Appeals have applied the nondelegable duty doctrine in several situations. An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control. A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs.
>
> A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load. A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees. A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs.
>
> Tuomey Regional mentions some of the above cases and argues they are distinguishable because in this case it is the independent-contractor physician – not the hospital – who controls a patient's medical treatment. Tuomey Regional also contends regulations promulgated by the state Department of Health and Environmental Control do not impose such a duty.

> We find Tuomey Regional's arguments unpersuasive. The cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.

Id. at 42-44, 533 S.E.2d at 317-18 (internal citations omitted).

Here, if we apply the Simmons II rule retroactively, Osborne will only recover against McLeod if she proves the neonatologists' negligence proximately caused harm to her son. Applying the rule to McLeod in this case would be no different than applying the rule to the defendant-hospital in Simmons II.

Because Simmons II did not create a new cause of action or abolish any existing immunity, but merely recognized a new remedy to vindicate existing rights, we apply the rule articulated in that case retroactively.

CONCLUSION

Osborne has made a *prima facie* showing of the existence of a genuine issue of material facts, and because the rule of Simmons II applies retroactively, the grant of summary judgment in favor of McLeod was error. We therefore REVERSE the opinion of the Court of Appeals.[5]

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

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[5]We recognize that neither the trial court which granted summary judgment, nor the Court of Appeals was guided by our decision in Simmons II at the time they rendered their decisions in this case.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Curtis Brown, Petitioner,

v.

Jerry N. Theos, Arthur G. Howe, and Coming B. Gibbs, Jr., Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Roger M. Young, Special Circuit Judge

Opinion No. 25321
Heard May 9, 2001 - Filed July 23, 2001

AFFIRMED

Harry L. Devoe, Jr., of New Zion, for petitioner.

Allan R. Holmes, of Gibbs & Holmes, of Charleston,

for respondent Coming B. Gibbs, Jr.

James E. Reeves and Andrea H. Brisbin, of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for respondents Jerry N. Theos and Arthur G. Howe.

CHIEF JUSTICE TOAL: This Court granted Curtis Brown's ("Brown") request for certiorari to review the Court of Appeals' decision in *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999).

FACTUAL/ PROCEDURAL BACKGROUND

In 1993, Brown was indicted for trafficking in cocaine and three counts of distribution of cocaine. A jury convicted Brown in December 1993, and Brown was sentenced to confinement for a period of twenty-five years and fined $50,000.00 for trafficking in cocaine, and fifteen years and fined $25,000.00 for distribution of cocaine. At trial, Brown was represented by Jerry N. Theos ("Theos") and Arthur G. Howe ("Howe"). Theos, Howe, and Coming B. Gibbs ("Gibbs") (hereinafter collectively referred to as "Attorneys") represented Brown on direct appeal. Brown's convictions and sentences were affirmed by this Court on direct appeal. *State v. Brown*, Op. No. 95-MO-200 (S.C. Sup. Ct. filed May 19, 1995). Brown then filed an application for post-conviction relief ("PCR"), alleging ineffective assistance of counsel. After a hearing, the trial court found counsel ineffective, and granted Brown a new trial. Thereafter, Brown entered a plea of no contest to one count of trafficking cocaine and three counts of distribution of cocaine. He was sentenced to eight years confinement.

After entering the no contest plea, Brown brought a legal malpractice action against Theos and Howe alleging that but for their grossly negligent representation, he would have fared better at trial and would not have been convicted through a plea of no contest or otherwise. Against all Attorneys, Brown alleged but for their grossly negligent representation in his direct appeal, his convictions would have been reversed, and he would not have entered a no contest plea to the charges or otherwise been convicted. The trial judge granted

the Attorneys' motions to dismiss pursuant to Rule 12(b)(6), SCRCP, despite Brown's assertion his no contest plea could not be used against him in a subsequent civil proceeding. The Court of Appeals affirmed.

This Court granted Brown's petition for certiorari with respect to Question II only. The issues now before this Court are as follows:

> I. In an action for legal malpractice, did the Court of Appeals err in holding Brown's *nolo contendere* plea broke the chain of causation and that Brown is not entitled to relief based on any theory of the case following such a plea?
>
> II. Should this Court overrule *In re Anderson*, 255 S.C. 56, 177 S.E.2d 130 (1970)?

LAW/ ANALYSIS

Brown argues the Court of Appeals erred in holding he had no cause of action for legal malpractice because his no contest plea broke the chain of causation, and the plea, not his Attorney's negligence, was the cause of Brown's incarceration.

In order to prevail in this action for legal malpractice, Brown must prove: (1) Attorneys' were negligent; (2) Attorneys' negligence proximately caused his injuries; and (3) damages. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). Brown must show he "most probably would have been successful" in the action if Attorneys had not committed the alleged malpractice. *Summer, supra*; *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988). Attorneys will not be liable where, notwithstanding the attorney's negligence, the client had no meritorious defense to the suit in the first place. *Floyd v. Kosko*, 285 S.C. 390, 329 S.E.2d 459 (Ct. App. 1985).

This Court has not addressed the proximate cause question in a criminal case. For several reasons, we find Brown has no cause of action for legal malpractice.

The trial court's order and the Court of Appeals' opinion correctly notes that in an action for legal malpractice based on conviction of a crime the general standard is the plaintiff must show innocence of the crime in order to establish liability. *See* 3 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, § 25.3 (4th ed. 1996). Brown has not alleged he is innocent or even that he would have been acquitted if his Attorneys' had not committed the alleged malpractice. Brown's complaints do not allege facts that purport to show he is innocent of all the criminal charges filed against him. Therefore, Brown's failure to plead innocence is fatal to his cause of action.

"A plea of *nolo contendre* literally interpreted means 'I do not wish to contend.' For all practical purposes it is a plea of guilty in so far as the consequences in the particular case in which it is pled." *Kibler v. State*, 267 S.C. 250, 254, 227 S.E.2d 199, 201 (1976). South Carolina courts have recognized there are collateral benefits to a plea of no contest and such a plea cannot be used as an admission of guilt against a defendant in civil litigation. *Kibler, supra*; *In re Anderson*, *supra* (a no contest plea may not be used as substantive evidence of guilt in a subsequent civil proceeding). However, a no contest plea may be used as a record of conviction for impeachment purposes in a subsequent proceeding. *State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981) (recognizing a no contest plea is equivalent to a conviction and has many similarities to a plea of guilty).

In the context of a legal malpractice case, we find a claimant's plea of no contest to the same charges (or charges arising from the same conduct) should operate as a bar to a legal malpractice action against the attorney who originally represented the claimant.[1] Brown's no contest plea, not his Attorneys'

[1]Some Federal courts have held that a plea of nolo contendere in a state criminal action may have collateral estoppel effect in a later federal civil action brought by the criminal defendant because the defendant in the criminal action had a reasonable and fair opportunity to litigate the criminal charges, and because the nolo plea constituted an admission of the truth of the facts underlying the criminal charge. 47 Am. Jur. 2d. *Judgments* § 735 (1996);

negligence, caused his incarceration. Because a no contest plea is a conviction, and, for all practical purposes, it is a guilty plea so far as the consequences are concerned, we find public policy is not offended by forbidding a client from bringing a legal malpractice action against his criminal attorney after the client has pled no contest to the charges.[2]

Walker v. Schaeffer, 854 F.2d 138 (6th Cir. 1988) (finding an exception to FRE 410); *see also Delong v. State*, 956 P.2d 937 (Ok. Ct. App. 1998)

[2]Rule 410, SCRE provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere; . . .

Rule 410, SCRE.

We find this rule of evidence does not contemplate the type of proceeding at issue in this case and is therefore inapplicable. Here, Brown is the plaintiff, not a defendant. He seeks to use his no contest plea offensively for his own benefit. This is not a case where a party attempts to use a no contest plea in a criminal matter to prove a defendant liable in a civil proceeding. Instead, Brown as a plaintiff is litigating whether his Attorneys' adequately advised him during his plea negotiations. Rule 410, SCRE was never intended to cover this type of case. Furthermore, federal courts have found Rule 410 of the Federal Rules of Evidence does not bar use of pleas against a defendant who becomes plaintiff with respect to events in plea. *See also Walker*, 854 F.2d at 143 ("We find a material difference between using the *nolo contendere* plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which

We find persuasive the reasoning behind cases in other jurisdictions. For example, in *Gomez v. Peters*, 470 S.E.2d 692 (Ga. Ct. App. 1996), the client Gomez was convicted after a criminal trial in which attorney Peters represented him. Gomez then obtained new counsel and was granted a new trial after spending nine months in prison. Before the new trial, Gomez entered a guilty plea [3] for a lesser included offense, and was released on time served.[4] Gomez then filed a legal malpractice claim against Peters. The trial court dismissed the case on summary judgment. The Georgia Court of Appeals affirmed, stating:

> Gomez's damages were the result of his acknowledged guilt, and [therefore] he is unable to show any damage proximately caused by any alleged negligence of Peters.
>
> In other words, a client who has acknowledged guilt cannot assert that his attorney's poor performance caused his incarceration. . . . [T]his is true even in a situation like this one where the plaintiff pled guilty to a lesser included

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would preclude liability. Rule 410 was intended to protect a criminal defendant's use of the *nolo contendere* plea to defend himself from future civil liability. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the [defendant] police.")

[3]Entering a plea of no contest does operate as a conviction, as does a guilty plea. Furthermore, as the Court noted in *Lynn, supra*, a no contest plea is very similar to a guilty plea.

[4]Brown was also released shortly after pleading no contest to the charges, since he was credited with the almost eight years he had already served.

> offense, as long as his "damage" (i.e., the time he already served on the initial conviction) is no greater than what he would have had to sustain for the offense to which he pled anyway.

Gomez, 470 S.E.2d at 695.

The South Carolina Court of Appeals rejected Brown's argument below that there was a distinction between his no contest plea and a guilty plea in this instance. We agree with the Court of Appeals' statement, "Brown's plea of no contest was, for all practical purposes, a plea of guilty in the criminal matter against him, and the plea clearly was the cause of his incarceration." *Brown*, 338 S.C. at 236, 526 S.E.2d at 312.

In its opinion in the instant case, the Court of Appeals cited with favor *Fleming v. Gardner*, 658 A.2d 1074 (Me. 1995). We also find the Maine court's reasoning persuasive. In *Fleming*, client Fleming entered a guilty plea to all pending criminal charges against him while represented by the Gardners. The Gardners were relieved as counsel, and Fleming withdrew his guilty pleas. While represented by new counsel, Fleming entered new guilty pleas to the pending charges. The pleas were accepted. Thereafter, Fleming attempted to sue the Gardners for malpractice, alleging their negligence was the cause of his incarceration. The Maine Court upheld the trial court's grant of summary judgement to the Gardners, finding Fleming failed to make a claim there was any error in the lower court's acceptance of his second guilt plea. The Maine Court found Fleming was represented by new counsel when he entered the second guilty plea, and therefore the Gardners' allegedly negligent actions had not led to his current incarceration.

Therefore, for the reasons discussed above, we find Brown has no cause of action for legal malpractice. To the extent *In re Anderson*, 255 S.C. 56, 177 S.E.2d 130 (1970) conflicts with our holding in this case, it is overruled.

CONCLUSION

The decision of the Court of Appeals is **AFFIRMED**.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
The Care and Treatment of Johnny Matthews,

Appellant.

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

Opinion No. 25322
Heard March 20, 2001 - Filed July 23, 2001

AFFIRMED

Andrew D. Grimes, of Andrew D. Grimes, P.A., of Summerville, and John L. Drennan, of Joye Law Firm, L.L.P., of North Charleston, both for appellant.

Attorney General Charles M. Condon, Deputy Attorney General Treva Ashworth, Senior Assistant Attorney General Kenneth P. Woodington, and Assistant Attorney General Steven G. Heckler, all of Columbia, for respondent.

CHIEF JUSTICE TOAL: Johnny Matthews ("Matthews") appeals the trial court's order holding he was a sexually violent predator pursuant to the Sexually Violent Predator Act ("Act"). S.C. Code Ann. §§ 44-48-10 through 44-48-170 (Supp. 2000). We affirm.

FACTUAL/ PROCEDURAL BACKGROUND

At the time Matthews was charged with the offenses which led to the present proceeding, he was a custodian employed at North Park Village Head Start Program in North Charleston. Approximately 80 children between the ages of three and five were participating in the program. Matthews was charged with eight counts of committing lewd acts upon a child. Six charges were dropped, and Matthews pled guilty to two counts of committing lewd acts upon a child.[1] Matthews was sentenced to five years imprisonment.

With the expiration of Matthews' sentence approaching, a multidisciplinary team accessed Matthews' records pursuant to the Sexually Violent Predator Act. On October 1, 1998, the team found Matthews satisfied the definition of a sexually violent predator. By order dated May 6, 1999, the court below found probable cause and ordered Matthews into custody pending trial.

On July 16, 1999, a non-jury trial was held before the Honorable A. Victor Rawl in Charleston. Following the trial, the trial court entered a written order finding, beyond a reasonable doubt, Matthews was a sexually violent predator as defined by the Act and, therefore, should be committed for treatment. Matthews' constitutional arguments were rejected.

Matthews filed a notice of appeal in the Court of Appeals. The Court of Appeals transferred the case to this Court pursuant to Rule 204(a), SCACR, on the ground the principal issue on appeal would be a constitutional challenge to

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[1]These were pleas under *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

the Sexually Violent Predator Act. The issues before this Court are:

> I. Did the trial court have jurisdiction to hear the State's civil commitment case against Matthews where the trial was held more than sixty days after the probable cause hearing in violation of S.C. Code Ann. § 44-48-90 (Supp. 2000)?
>
> II. Did the trial court have jurisdiction over this action when only four members, instead of the five listed in S.C. Code Ann. § 44-48-50 (Supp. 2000), reviewed Matthews' records?
>
> III. Did the trial court err in denying Matthews' motion for a directed verdict on the ground the evidence was insufficient to show he was a sexual predator?
>
> IV. Does South Carolina's Sexually Violent Predator Act violate the Double Jeopardy Clauses of the Federal[2] and State[3] Constitutions?

LAW/ ANALYSIS

I. S.C. Code Ann. § 44-48-90

Matthews argues the trial court lacked jurisdiction because the State failed to bring the case to trial within the sixty day time period set forth in section 44-48-90 without having the trial court issue a continuance.[4] We agree the State

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[2]U.S. CONST. amend. V.

[3]S.C. CONST. art. I, § 12.

[4]Although Matthews did not challenge the trial court's subject-matter jurisdiction, Matthews can raise the issue for the first time on appeal. *See, e.g.*, *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998) ("Lack of subject matter jurisdiction can be raised at any time, can be

was statutorily required to bring Matthews' case to trial within sixty days of the probable cause hearing. However, we disagree the State's failure to do so resulted in the trial court losing jurisdiction to hear the case.

We have stated, "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist*, 314 S.C. 235, 237-238, 442 S.E.2d 598, 600 (1994) (citations and internal quotations omitted). In *Gold Kist* we found, "the statute grants the court of common pleas throughout the State subject matter jurisdiction to hear [the litigants' case]." *Id.* at 238, 442 S.E.2d at 600. In the instant case, the Act provides:

> Within sixty days after the completion of a hearing held pursuant to Section 44-48-80 [probable cause], *the court* shall conduct a trial to determine whether the person is a sexually violent predator . . . . The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and only if the respondent will not be substantially prejudiced.

S.C. Code Ann. § 44-48-90 (Supp. 2000) (emphasis added). The definition section of the Act provides: "*Court* means the court of common pleas." S.C. Code Ann. § 44-48-30 (7) (Supp. 2000) (emphasis added). Therefore, the language of the statute clearly vests subject matter jurisdiction over cases brought pursuant to the Act with the court of common pleas.

Even though we find the court of common pleas had subject matter to hear Matthews' case, we do find the legislature's use of the term "shall" in section 44-48-90 indicates the holding of a trial within sixty days of the probable cause hearing is mandatory. *See, e.g., South Carolina Police Officers Retirement Sys.*

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raised for the first time on appeal, and can be raised *sua sponte* by the court.").

v. Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990) ("shall" is considered mandatory under principles of statutory interpretation); *South Carolina Dep't of Highways & Pub. Transp. v. Dickinson*, 288 S.C. 189, 191, 341 S.E.2d 134, 135 ("Ordinarily the use of the word 'shall' in a statute means that the action referred to is mandatory."). The language of the Act does allow a trial to be held outside the sixty day period, but only under certain conditions.

It is not a significant burden on the State or the trial court to require the issuance of a continuance, or even a notation in the record, indicating: (1) the trial cannot be held within sixty days; (2) good cause for the delay; and (3) the respondent will not suffer prejudice. Furthermore, the fact that the legislature set forth the terms under which a trial could be held outside the sixty day period is further evidence of the legislature's intent to require strict adherence to the mandated time frame.

However, we find the sixty day time period set forth in the Act is not a jurisdictional requirement. Matthews should have filed a motion to dismiss when the State failed to bring the case to trial within sixty days without asking for a continuance. By failing to make a motion to dismiss, Matthews waived his right to challenge the State's failure to comply with the requisite time period.

Therefore, we hold the State's failure to comply with the time period set forth in the section, when a proper continuance has not been issued, does not deprive the court of subject matter jurisdiction to hear the case. When the sixty day period has passed, and no continuance has been granted, the proper procedure for a respondent to follow is to file a motion to dismiss.

II. S.C. Code Ann. § 44-48-50

Matthews argues the trial court lacked jurisdiction over this action because he was not properly evaluated. He contends that the court's jurisdiction is predicated on the multidisciplinary team's conclusion he was a sexually violent predator. He asserts that the action of the multidisciplinary team was *void ab initio* because the make-up of the multidisciplinary team did not comply with the

requirements of S.C. Code Ann. § 44-48-50 (Supp. 2000).[5] We disagree.

Before an action is commenced under the Act, the Director of the Department of Corrections appoints a multidisciplinary team to review the records of the alleged predator. S.C. Code Ann. § 44-48-50 (Supp. 2000). The team assesses whether or not the person meets the definition of a sexually violent predator. *Id.* If the team determines the person is a predator, the case is then referred to the prosecutor review committee. The Act provides:

> Membership of the [multidisciplinary] team *must* include:
>
> (1) a representative from the Department of Corrections;
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> (2) a representative from the Department of Probation, Parole, and Pardon Services;
>
> (3) a representative from the Department of Mental Health who is a trained, qualified mental health clinician with expertise in treating sexually violent offenders;
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> (4) a retired judge appointed by the Chief Justice who is eligible for continued judicial service pursuant to Section 2-19-100; and
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> (5) the Chief Attorney of the Office of Appellate Defense or his designee.

S.C. Code Ann. § 44-48-40 (Supp. 2000) (emphasis added).

This section is written in mandatory language. *See South Carolina Police*

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[5]State's Exhibit One shows the multidisciplinary team which reviewed Matthews' records did not include a representative from the Office of Appellate Defense.

Officers Retirement Sys., *supra* ("must" is considered mandatory under the principles of statutory construction). The statute requires the multidisciplinary team to *consist* of five members. However, it does not require all five members of the team to be present at all meetings. The normal rules which govern the proceedings of a governmental body should apply.

"In the absence of any statutory or other controlling provision, the common-law rule that a majority of the whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum." *Garris v. Governing Bd. of the State Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 58 (1998) (citations omitted). Section 44-48-50 contains no special provision requiring all members of the team to be present, nor does it contain a requirement that the decisions of the team be unanimous or made by any majority other than a simple majority. Here, four members of the team met and unanimously decided Matthews qualified as a sexually violent predator under the provisions of the Act.

We hold the plain language of the statute indicates the team must consist of five members, but does not require that all be present to issue the report. A majority decision by a quorum of the team was made in this case, and, therefore, Matthews' arguments regarding this issue are without merit.

III. Directed Verdict

Matthews argues the trial court erred in denying his motion for a directed verdict on the ground the evidence was insufficient to show he was a sexually violent predator. We disagree.

On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999). In ruling on a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. *State v. Cooper*, 334 S.C. 540, 551-552, 514 S.E.2d 584, 590 (1999).

S.C. Code Ann. § 44-48-30 (1)(b) defines "sexually violent predator" as someone who "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." Subsection 9 goes on to say "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9) (Supp. 2000). "Mental Abnormality" is defined in the Act as a "condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. § 44-48-30(3). We find more than sufficient evidence in the record to support the conclusion Matthews suffers from uncontrollable behavior. Matthews' arguments concerning the evidence simply go to the weight of the evidence not its sufficiency.

Dr. Elin Barth Berg testified on behalf of the State. Dr. Berg conducted a three hour interview with Matthews, and spent four hours reviewing the records supplied by the Attorney General. Dr. Berg testified Matthews suffers from pedophilia. She stated Matthews has a "probable risk of recidivism of sexually violent acts in the community," and it was "more likely than not" that Matthews would re-offend. Dr. Berg further described a pedophile's urges as "irresistible . . . a response to a irresistible impulse." She stated, in her medical opinion, Matthews was at "above average risk" to re-offend. She concluded, "he is -- and I'm offering my opinion based on educational and clinical experience -- at this time a better candidate for in-patient treatment. And the reason is he still expresses that he does not believe that he has a problem. . ."[6] After hearing the testimony, the trial court concluded "beyond a reasonable doubt . . . [Matthews] suffers from a mental defect or personality disorder which makes him likely to engage in further acts of sexual violence if he is not confined for long-term control, care, and treatment."

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[6]There is other testimony by Dr. Berg which supports the trial judge's decision not to grant a directed verdict. However, in light of the standard of review, these few excerpts provide enough evidence to show the trial judge did not err in his refusal to grant the directed verdict.

We find sufficient evidence in the record to support the trial judge's denial of Matthews' motion for a directed verdict.

IV. Double Jeopardy Challenge

Matthews argues the trial court erred in concluding the Act does not violate the Double Jeopardy Clauses of the Federal[7] and State[8] Constitutions. We disagree.

A. Federal Constitution

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

The Double Jeopardy Clause protects against multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). However, the Double Jeopardy Clause is implicated only in criminal proceedings. U.S. CONST. amend. V; S.C. CONST. art. I, § 12; *In the Matter of Chastain*, 340 S.C. 356, 532 S.E.2d 264 (2000). As the United States Supreme Court recently reiterated, the determination whether a statute is civil or criminal is primarily a question of statutory construction, which must begin by reference to the act's text and legislative history. *Seling v. Young*, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001). Where the legislature has manifested its intent that the legislation is civil in nature, the party challenging that classification must provide "the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the [legislature's] intention." *Id.* Our Act specifies the purpose of the Act is **civil** commitment. *See* S.C. Code

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[7]U.S. CONST. amend. V.

[8]S.C. CONST. art. I, § 12.

Ann. § 44-48-20. Matthews, therefore, bears this heavy burden.

South Carolina's Act is modeled on Kansas' Sexually Violent Predator Act. The United States Supreme Court held Kansas' Act is a civil, non-punitive scheme. *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed. 2d 501 (1997). Matthews contends there are differences in the language of our Act and the Kansas Act, thereby effectively distinguishing the United States Supreme Court's holding in *Hendricks*. We find Matthews does not effectively distinguish the Kansas Act from our own. Therefore, we hold South Carolina's Act does not violate the Double Jeopardy Clause of the Federal Constitution.

The United States Supreme Court held the Kansas Act was civil rather than criminal based on numerous factors:

> (1) it did not implicate retribution or deterrence;
>
> (2) prior criminal convictions were used as evidence, but were not a prerequisite for commitment;
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> (3) no evidence of scienter was necessary for a commitment;
>
> (4) the Act was not intended to be a deterrent;
>
> (5) release is dependent upon the stated purpose of the Act, that is, once the person is no longer a threat to others;
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> (6) the provision of procedural safeguards similar to those found in criminal proceedings do not transform a civil proceeding into a criminal one;
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> (7) the lack of treatment for those deemed untreatable does not transform detention from civil to criminal; and
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> (8) confinement in a segregated unit within a prison is not dispositive because the person has been found a danger to the

> community, and the circumstances are essentially the same as for other involuntarily committed persons in mental hospitals.

Hendricks, supra; *Seling, supra*.

Applying these factors to the Act, we find the only distinction that can be made is South Carolina's Act defines a sexually violent predator as a person with a prior conviction for a sexually violent offense (factor 2, *supra*.). *See* S.C. Code Ann. § 44-48-30(1). The use of the word "conviction" is somewhat misleading, however, since under the Act it includes persons charged but found incompetent to stand trial, those found not guilty by reason of insanity, and those found guilty but mentally ill. S.C. Code Ann. § 44-48-30(6)(c),(d), and (e) (Supp. 2000). Therefore, we find this is a distinction without a difference.

Matthews attempts to distinguish South Carolina's Act and the United States Supreme Court's holding in *Hendricks* on three grounds. First, he argues the face of South Carolina's Act shows the General Assembly intended the Act to be punitive since: (1) it places upon the "prosecutorial arm" of the State the responsibility for bringing petitions under the Act; and (2) it was placed in the health section of the South Carolina Code. The fact the South Carolina Attorney General's office files the commitment petition does not effectively distinguish South Carolina's Act since the Kansas Act also directs the Attorney General's office to file the appropriate petition. *See* Kan. Code Ann. § 59-29a04. Furthermore, the Attorney General's office responsible for bringing these cases in South Carolina is a branch of the civil division. Finally, there is no logical connection between who brings the case and the degree to which the result is "punitive."

Matthews also argues South Carolina's Act is punitive on its face and is distinguishable from the Kansas Act since the General Assembly placed the Act into the health section of the Code instead of the probate section. This argument is without merit. The health section of the code also includes the provisions for involuntary commitment of the mentally ill. *See* S.C. Code Ann. § 44-17-410. Furthermore, simply because South Carolina's Act is placed in a title which provides for a few criminal offenses on unrelated topics is not evidence the Act

is "punitive."

Secondly, Matthews argues South Carolina's Act is "retributive." The United States Supreme Court in *Hendricks* specifically held the Kansas Act was not retributive. *See Hendricks*, 521 U.S. at 362. Matthews argues nothing that was not rejected in *Hendricks*. We agree with the United States Supreme Court's analysis and hold our Act is not "retributive."

Finally, Matthews argues he is subject to the conditions placed on state prisoners, and he will not receive treatment for his alleged disease. The conditions of confinement are not prescribed by the Act, but result from administrative decisions. Therefore, the conditions of confinement cannot be used to determine legislative intent. *Cf.*, *Myrtle Beach Hosp. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000) (executive agency policies are not evidence of legislative intent). Furthermore, the Act expressly provides, "The involuntary detention or commitment of a person pursuant to this chapter shall conform to constitutional requirements for care and treatment." S.C. Code Ann. § 44-48-170.

Matthews has failed to meet his burden of showing the Act is punitive in nature. *Seling, supra*. We find the United States Supreme Court's decision in *Hendricks* is controlling and, therefore, South Carolina's Act does not violate the Double Jeopardy Clause of the Federal Constitution.

B. State Constitution

Matthews also contends the Act violates the Double Jeopardy Clause of the South Carolina Constitution. We disagree.

We have expressly held the Double Jeopardy Clause of the South Carolina Constitution does not afford broader protection than its federal counterpart. *State v. Easler*, 327 S.C. 121, 132, 489 S.E.2d 617, 623 (1997) ("[T]he courts of this state have never interpreted the state double jeopardy provision independently of the Fifth Amendment. . . . [W]e decline to extend broader protection under our state constitution than that afforded under the federal

constitution."]. As discussed above, Matthews has not distinguished Kansas' Act from our own.

Therefore, we hold South Carolina's Act does not violate the double jeopardy provision of the South Carolina Constitution.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the decision of the trial court.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care
and Treatment of Donald
Lee McCracken, Appellant.

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

Opinion No. 25323
Heard March 7, 2001 - Filed July 23, 2001

AFFIRMED

Kenneth W. Gaines, of Columbia, for appellant.

Attorney General Charles M. Condon, Deputy Attorney General Treva Ashworth, Senior Assistant Attorney General Kenneth P. Woodington, and Assistant Attorney General Steven G. Heckler, all of Columbia, for respondent.

JUSTICE PLEICONES: Appellant was found to be a sexually violent predator (SVP) by a jury and committed to the Department of Mental Health (DMH) for control, care, and treatment pursuant to S.C. Code Ann. §44-48-100 (Supp. 2000). He has appealed, raising both trial errors and constitutional issues. We affirm.

A. Mootness

The first issue we address is the State's contention that appellant's release from DMH's custody during the pendency of this appeal renders it moot. Under the SVP Act,[1] (Act) a person who is committed pursuant to the Act is entitled to an annual review of his status, §44-48-110, or may be released at any time upon the petition of the Director of DMH. §44-48-120. There exists the very real possibility, then, that many SVP appellants will be released before their appeals can be concluded. Since most of the issues raised by appellant are 'capable of repetition but evading review,' we decline to dismiss the appeal on mootness grounds. Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996).

B. Civil or Criminal Statute

Appellant contends the Act is violative of his double jeopardy and ex post facto rights because, although nominally civil in nature, it is in fact punitive. At trial,[2] he did not attempt to distinguish our SVP Act from the Kansas Act upon which it was modeled, and which the United States Supreme Court has held is a civil, non-punitive scheme. Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed. 2d 501 (1997). Although appellant now argues on appeal that various features of our Act distinguish it from the Kansas Act, these claims were not raised below and, accordingly, are not properly before us now. E.g., Taylor v. Medenica, 324

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[1]S.C. Code Ann. §§44-48-10 to -170 (Supp. 2000).

[2]Appellant's appellate attorney was not his trial attorney.

S.C. 200, 479 S.E.2d 35 (1996). The only issue properly before us is whether the Act, on its face, constitutes additional criminal punishment.

We hold today in In the Matter of Matthews, Op. No. 25322 (S.C. Sup. Ct. filed July 23, 2001) Shearouse Adv. Sh. 26 at p. 45 that a side by side comparison of our SVP Act and the Kansas Act does not reveal any substantial differences. On this record, appellant has failed to meet his burden of showing "clearest proof" that the Act on its face is punitive rather than civil in nature. Id.

C. Constitutional Claims

Appellant contends that the conditions of his confinement demonstrate that he is being improperly punished as a criminal. We find his remedy for any such unconstitutional confinement would be by writ of habeas corpus,[3] and that in any case his release from DMH during this appeal renders moot this claim. We note that the Act provides that a person committed pursuant to it shall be kept in a secure facility, §44-48-100 (A), and that his commitment "shall conform to constitutional requirements for care and treatment." §44-48-170. If these requirements are not honored by the custodian, then relief lies with an action brought against that individual, and not with a facial challenge to the statute which does not prescribe the terms of confinement.

We decline to reach the merits of appellant's substantive due process claims made pursuant to the state[4] and federal[5] constitutions, finding they are

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[3]Seling v. Young, supra, was a habeas action brought by the SVP against the individual superintendent of Washington State's Special Commitment Center.

[4]S.C. Const. art. I, §3.

[5]U.S. Const. amend. V and XIV.

not preserved for our review. The record contains a single reference to a substantive due process claim, apparently made during the probable cause hearing. The reference, in its entirety, is:

> We believe that [the Act] violates the U.S. and South Carolina Constitution [sic] in that it denies [appellant] as applied to this case his due process rights under the 14th Amendment and, of course, article one, section three of the South Carolina Constitution.

There is no ruling on this conclusory allegation, and therefore it is not properly before the Court. Taylor v. Medenica, supra; cf., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (objection must state grounds).

Further, it is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required. Fairway Ford, Inc. v. County of Greenville, 324 S.C. 84, 476 S.E.2d 490 (1996). A constitutional claim must be raised and ruled upon to be preserved for appellate review. Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989). A bald assertion, without supporting argument, does not preserve an issue for appeal. Wilder Corp. v. Wilke, supra. We decline to reach appellant's federal and state due process claims.

D. Trial Errors

Appellant raises three trial errors, two of which are not preserved for appeal.

First, he claims the trial court erroneously denied his directed verdict and motion for a judgment notwithstanding the verdict (jnov) because the evidence was insufficient to establish that he was a SVP. At trial, appellant made only a general directed verdict motion, stating, "I think [the State has] failed to meet their burden of proof beyond a reasonable doubt." This motion, which stated no specific ground, preserved nothing for appellate

review. E.g., Connolly v. People's Life Ins. Co., 299 S.C. 348, 384 S.E.2d 738 (1989). Further, since only grounds raised in the directed verdict motion may properly be reasserted in the jnov motion, and since no grounds were raised in the directed verdict motion, no jnov claim is preserved for our review. E.g., Duncan v. Hampton County School District #2, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999), *cert. denied* Sept. 24, 1999.

Next, appellant argues that the State's closing argument was improper. Appellant interposed no contemporaneous objection to the argument and thus no issue regarding it is preserved for appellate review. The failure to make a contemporaneous objection can be excused only when the challenged argument constitutes abuse of a party or witness. Dial v. Niggel Associates, Inc., 333 S.C. 253, 509 S.E. 2d 269 (1999). The argument about which appellant now complains does not fall within the Dial exception, and therefore we decline to address the merits of this issue.

Appellant's third claim of trial error relates to the trial court's jury instructions. As explained below, we find no error.

Appellant first contends the trial judge committed reversible error in refusing his request to charge the "full expression" of legislative intent found in §44-48-20. He also contends the trial judge erred when he recharged the jury in response to its question. Finally, he argues that the jury charge violated equal protection.

I. §44-48-20

The trial judge, paraphrasing the statute entitled "Legislative Findings," §44-48-20, charged the jury:

> Now, I told you earlier that the State has brought this case under the Sexually Violent Predator Act of our Code of Laws. Our General Assembly has determined that those persons who are found to be sexually violent predators under the law will require involuntary civil commitment in a secure facility for

long-term control, care and treatment.

> In this case that usually means the Department of Mental Health or the Department of Corrections, depending on the circumstances. Additionally the General Assembly has determined that the existing civil commitment process is inadequate to address the special needs of sexually violent predators and has therefore determined that a separate involuntary civil commitment process is necessary for long-term control, care and treatment of sexually violent predators.
>
> Ladies and gentlemen, the intent of the legislature in passing this law does not in any way control your decision in this case. You and you alone must decide whether or not [appellant] is, in fact, a sexually violent predator under the law.

Appellant contends the trial judge committed reversible error in omitting from this paraphrase of §44-48-20 its first sentence, "The General Assembly finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists which require involuntary civil commitment in a secure facility for long-term control, care and treatment." Appellant argues the language should have been charged, because it would have permitted him to argue that the legislation was targeted to a discreet group of extremely dangerous sexual predators, and that he did not fit this category. We find no error.

There was no error in the general charge, which gave the jury the background of the issue they were being asked to decide, followed by a charge defining the terms which the State must prove beyond a reasonable doubt. Despite the expression of intent in §44-48-20, the actual burden on the State to show that an individual is a SVP does not require a showing of "extreme danger." See §§44-48-100; 44-48-30(1)(b); (3); (9). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Keaton ex rel. Foster v.

Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999) (internal citations omitted). The charge given was proper.

II. Recharge

In his initial charge, the trial judge told the jury that the "first element" that the State must show is that appellant had a prior conviction for a sexually violent offense. He then charged the jury:

> The second element the State must prove is that the Respondent suffers from a mental abnormality or from a personality disorder that makes him likely to engage in acts of sexual violence if he is not confined in a secure facility for long-term control, care and treatment.
>
> Now, in order for you to understand these elements a little bit better, I am also going to define a couple of the terms which I just used. We used the term mental abnormality. What do we mean by the term mental abnormality?
>
> That means a mental condition affecting a person's emotional or volitional capability that predisposes the person to commit sexually violent offenses.
>
> The term also we [sic] used was likely to engage in acts of sexual violence. What do we mean by that? That means this. It means a person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

There was no objection to this portion of the charge.

The jury later requested to be recharged on the "second element" of the law. The judge indicated he would remind them of the first element

(conviction of a sexually violent offense) and then recharge the second element. He did so. Following that charge, appellant objected to the "undue stress" placed on the definitions of "mental abnormality" and "likely to engage in acts of sexual violence." He argued that the judge should emphasize equally the portion of the statute "if not confined to a secure facility for long-term control, care and treatment." The judge declined to alter the charge.

The recharge did not emphasize two "elements" to the exclusion of the third. The jury was told it must find appellant "suffers from either a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if he is not confined in a secure facility for long-term control, care and treatment." This is the definition of sexually violent predator. §44-48-30(1)(b). The statute further defines "mental abnormality," §44-48-30(3), and the jury was recharged on that definition. The statute also specifically defines the term "likely to engage in acts of sexual violence," §44-48-30(9), and this statutory definition was charged. The judge then repeated the general definition of sexually violent predator, including the "long-term" phrase.

It is clear that the judge simply charged the statute, and where a specific term had a specific definition, charged that definition. He did not improperly emphasize any one part of the statute at the expense of another.

III. Equal Protection

In brief, appellant contends he was entitled to a new trial, a directed verdict, and/or a jnov because the jury instruction violated equal protection. This issue was neither raised nor ruled upon below, and therefore is not properly before the Court. Hoffman v. Powell, supra.

E. Funding

At the outset of his trial, appellant's attorney complained appellant's

due process and equal protection rights were being violated because there was no funding available for depositions. He did not specify whose deposition he would take were funds available.

On appeal, appellant argues that the lack of funds to depose the State's expert denied him his sixth amendment right to the effective assistance of counsel. We have determined that appellant has failed to show that this is a criminal proceeding, and therefore the sixth amendment is not implicated. The only right to counsel here is appellant's statutory right to the assistance of appointed counsel, a right which was honored. §44-48-90 (Supp. 2000).

Appellant has not shown any prejudice, much less a constitutional violation, in the denial of funds to depose unidentified individuals.

Conclusion

For the reasons given above, this appeal is **AFFIRMED**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Natural Resources, Respondent,

v.

The Town of McClellanville, a body politic, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 25324
Heard May 24, 2001 - Filed July 23, 2001

REVERSED

Frances I. Cantwell and Carl W. Stent, of Regan, Cantwell & Stent, of Charleston, for petitioner.

James A. Quinn, of South Carolina Department of Natural Resources, of Charleston; and Buford S. Mabry, Jr., Paul S. League, and Susan S. Quinn, of South Carolina Department of Natural Resources, of Columbia, for respondent.

JUSTICE BURNETT: This case involves the interpretation of a restriction contained in a deed of land from the Department of Natural Resources (DNR) to the Town of McClellanville (the town). The Court of Appeals held the town could not charge a permit fee for access to the property. South Carolina Dep't of Natural Resources v. Town of McClellanville, Op. No. 2000-UP-165 (Ct. App. filed Mar. 6, 2000). We reverse.

FACTS

In 1991, DNR deeded a 4.27 acre tract of land to the town. This transfer was part of a land swap between the state and federal governments to enable the town to qualify for federal funds to repair the town hall, which was damaged by Hurricane Hugo. The parcel included the town hall, a fire tower, a boat ramp, and a parking area. The deed contained a restriction providing that "the parking area and boat launching ramp shall remain accessible to and remain available for use by the public." At the time of the conveyance, no fee was charged for use of the boat ramp.

The town has a population of about 360 and an annual budget of less than $200,000, $75,000 to $80,000 of which is dedicated to the fire department. During the period after the town took title to the land, use of the boat ramp and parking area increased dramatically. In 1995, Charleston County Public Works, which had previously provided maintenance for the facilities, notified the town it was unable to continue to provide that assistance. The town commissioned a study of the facilities and a committee held public hearings to determine the best way to fund maintenance of the ramp.

In response to the committee's findings, the town enacted an ordinance requiring users of the boat launching ramp to obtain a permit. For $40.00 for town residents and $90 for non-residents, the holder of a permit receives 24-hour, 365-day use of the boat launching ramp and parking lot for one year. All revenue from the permits is placed into a restricted account to be used by the town "for the sole purpose of improving, operating and maintaining the boat ramp and related parking area . . . and for reasonable administrative costs associated therewith."

DNR sought an injunction to prohibit enforcement of the ordinance, claiming the boat ramp fee violated the restrictive covenant contained in the deed. In the short period of time between the ordinance's enactment and the issuance of a preliminary injunction enjoining its enforcement, the town issued permits to 88 residents and 304 non-residents.

The case was referred to the Master-in-Equity, who refused DNR's request for a permanent injunction. The Master ruled the ordinance did not violate the deed. The Master reasoned the deed did not address how the facilities were to be operated or maintained, but "merely requires that the public have access to these facilities." The Master refused to read restrictions into the deed which "DNR could have effortlessly written in itself." The Circuit Court affirmed, and the Court of Appeals reversed.

ISSUE

Did the Court of Appeals err in holding the town's ordinance establishing a boat launching permit fee violated the covenant in the deed by which the town acquired title?

DISCUSSION

The town argues the Court of Appeals erred in holding the town's ordinance establishing a boat launching permit fee violated the

covenant contained in the deed. The town asserts the language of the deed is ambiguous, and, even if unambiguous, the intent attributed to the parties does not comport with the language used. We agree.

An action to enforce restrictive covenants by injunction is in equity. Taylor v. Lindsey, 332 S.C. 1, 3, n.2, 498 S.E.2d 862, 864, n.2 (1998). On appeal of an equitable action tried by a Master, the Court can find facts in accordance with its own view of the evidence. Id.; Townes Assoc. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, a Master's findings, concurred with by the circuit court, will not be disturbed on appeal unless without evidentiary support. Townes Assoc., 266 S.C. at 86, 221 S.E.2d at 775-76.

We recently explained the rules for interpreting restrictive covenants in South Carolina:

> Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The court may not limit a restriction in a deed, *nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written*. It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and *all doubts resolved in favor of free use of the property*, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally

> capable of two or more different constructions that construction will be adopted which least restricts the use of the property. A *restriction on the use of property must be created in express terms or by plain and unmistakable implication*, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.

Taylor, 332 S.C. at 4-5, 498 S.E.2d at 863-64 (emphasis added) (internal quotations and citations omitted). In Taylor, we refused to enlarge a restrictive covenant beyond its plain language in order to prohibit the erection of mobile homes.

The deed at issue in this case contained the restriction that "the parking area and boat launching ramp shall remain accessible to and remain available for use by the public." The Court of Appeals held the word "remain" is unambiguous and means "to continue unchanged." According to the Court of Appeals, "[t]he only reasonable interpretation of the deed[] is that the public's access was to continue unchanged and the availability for use by the public was to continue unchanged." Thus, "[a]ny restrictions imposed by the Town on the public's access to the Landing or on the Landing's availability for use by the public are forbidden."

We agree with the Court of Appeals the covenant is unambiguous; however, we think the "only reasonable interpretation of the deed," would not prohibit the town from charging a permit fee. A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. Hawkins v. Greenwood Development Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 338, at 345 (1991)). It is a question of law for the court whether the language of a contract is ambiguous. Id. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. Id. The determination of the parties' intent is then a question of fact. Id. On the other hand, the construction of a clear and unambiguous deed is a question of law for the court. Gardner v. Mozingo, 293 S.C. 23, 25, 358

S.E.2d 390, 392 (1987).

Although the word "remain" read alone might be considered ambiguous, the covenant as a whole is not. Nothing in the plain language of the deed prohibits the town from requiring a permit or charging a fee to use the facilities. Furthermore, even if the covenant is ambiguous, the Court of Appeals' construction does not comport with the rules in Taylor. The Master stated, and we agree, that the construction urged by DNR requires the Court to focus on the definition of one word, "remain," to the exclusion of the covenant as a whole. The deed provides that the parking area and boat launching ramp are to "remain accessible" and "remain available for use by the public." DNR does not, and cannot, argue the parking area and ramp are no longer accessible and available for use by the public. Thus it focuses on the word "remain" alone and argues the scope of the public's access must remain unchanged from what it was before the town took title to the land.

The phrases "remain accessible" and "remain available for use by the public" do not equal "remain free and unrestricted."[1] The Court of Appeals' interpretation of the deed "enlarg[es the restriction] . . . beyond the clear meaning of its terms." Taylor, 332 S.C. at 4, 498 S.E.2d at 864. The Court of Appeals held "[a]ny restrictions imposed by the Town on the public's access to the Landing or on the Landing's availability for use by the public are forbidden" by the deed. We do not interpret the deed as prohibiting the town from imposing any restrictions whatsoever on the public's use of the ramp in response to unforeseen future needs. Under the Court of Appeals' interpretation, the town could never limit the hours of operation of the facilities, for example, in response to crime, or restrict the size of watercraft for safety purposes. Nothing in the plain language of the deed extinguishes the town's ability to manage its own property to protect the

[1]It might be possible for the town to charge a fee so exorbitant or impose restrictions so unreasonable that the facilities are arguably no longer accessible or available to the public. However, in this case, we find the permit fee is reasonable.

public welfare.

DNR relies on State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972), for the proposition that "[a] deed or grant by the State of South Carolina is construed strictly in favor of the State and general public and against the grantee." In Hardee, the Court was called upon to determine whether the State or the grantee held title to land below the high-water mark on a tidal navigable stream. Hardee has little application to the instant case. Hardee was a "public trust" doctrine case, dealing with very different issues than those presented here. In particular, Hardee did not concern the construction of a restrictive covenant. Moreover, Hardee involved rules specifically applicable when the State grants land to private individuals. Here, the land at issue is still publicly held. Finally, the rule in Hardee is based "on the ground that the grant is supposed to be made at the solicitation of the grantee, and the form and terms of the particular instrument of grant proposed by him and submitted to the government for its allowance." Id. (quoting State v. Pacific Guano Co., 22 S.C. 50 (1884)). Here, the deed and restrictions were drafted by DNR. This case does not present the type of situation contemplated in Hardee that would justify reversing the usual rules of construction. DNR asks this Court to read into a deed it drafted restrictions not "created in express terms or by plain and unmistakable implication." Taylor, 332 S.C. at 5, 498 S.E.2d at 864. We instead resolve all doubts "in favor of the free use of property." Id.

Finally, DNR suggests the town's reasons for enacting the ordinance are pretextual. We disagree. The town made extensive findings of fact concerning the need for the present ordinance. Even if the members of Town Council secretly harbor a hope that the permit fee will reduce the number of people who use the facilities, this subjective desire would not invalidate an otherwise valid ordinance. See Columbia Ry., Gas & Elec. Co. v. Carter, 127 S.C. 473, 121 S.E. 377, 379 (1924) (court cannot speculate as to motives of the Legislature); Pressley v. Lancaster County, Op. No. 3274 (Shearouse Adv. Sh. No. 1, p. 56) (S.C. Ct. App. filed Jan. 2, 2001) (courts should not inquire into motivation behind a governmental body's decision on the use of land). Moreover, the record does not support a finding the

ordinance has had a chilling effect on public use of the facilities.

DNR further suggests other means the town could employ to address the problems created by increased use of the facilities. These arguments go to the wisdom of the legislation, and are irrelevant to the issue of the proper construction of the deed. See Laird v. Nationwide Ins. Co., 243 S.C. 388, 395, 134 S.E.2d 206, 209 (1964) (responsibility for the wisdom of legislation rests with the Legislature). DNR's argument concerning its offer of funds to upgrade the facilities is similarly misleading. The availability of other means of funding is irrelevant to the issue of whether the town may impose a fee under the terms of the restrictive covenant.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Christopher Ramsey, Appellant.

Appeal From Kershaw County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 25325
Heard May 8, 2001 - Filed July 23, 2001

AFFIRMED

Assistant Appellant Defender Robert M. Dudek, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Jeffrey A. Jacobs, and Solicitor Warren B. Giese, all of Columbia, for respondent.

CHIEF JUSTICE TOAL: Christopher Ramsey ("Ramsey") was found guilty of murder and kidnaping and was sentenced to life imprisonment. He appeals his sentence and conviction. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

William Mobley ("Mobley") was the night cashier at the Flamingo video games parlor in the Liberty Hill section of Kershaw County, South Carolina. On March 21, 1997, Richard Bowers ("Bowers"), a newspaper delivery person, discovered Mobley's dead body on Spring Rock Road as he was delivering the morning paper. Mobley had been brutally beaten and murdered. His throat was slashed from ear to ear with a serrated knife.

The Flamingo is a tavern and video poker establishment located about a mile from where Bowers found Mobley's body. Mobley was the sole employee of the Flamingo from midnight until 8:00 a.m., and the doors were locked between those hours. He would only allow people he knew into the club between those hours. Police investigators learned Mobley knew Ramsey, and probably would have let him in the Flamingo that night.

At the crime scene, police investigators found signs of a struggle and footprint impressions. The investigators also found a trail of blood stretching 244 feet from Mobley's body. They took plaster casts of footprints and tire impressions found at the scene.

There were several pieces of evidence linking Ramsey to the crime. First, police investigators found a striped sweater with blood on it near the crime scene.[1] One of the hairs from the sweater was determined to be Mobley's. Several witnesses identified Ramsey as wearing the striped sweater on the night

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[1]The sweater is a distinctive gray, brown, and beige horizontally striped sweater.

of the murder. Tony Crolley testified he saw Ramsey driving in front of the Flamingo on the night of the murder wearing the striped sweater. He also stated he thought Ramsey wore a striped shirt or sweater with overalls most of the time. Truman Payne, who operated the Beaver Creek restaurant, testified Ramsey had been in the restaurant wearing a striped sweater on the night of the murder. Melissa Payne, who was also working at the restaurant that night, corroborated her husband's testimony concerning the sweater, and testified there "is not no doubt in my mind" Ramsey was wearing a striped sweater.

Furthermore, investigators showed photographs of the sweater to other police officers. Several police officers saw someone wearing the sweater at the Kershaw County Courthouse prior to the murder. The investigators prepared a photographic lineup that included a picture of Ramsey. Two officers, Deputies Patrick Boone and David Dowey, both identified Ramsey from the lineup as the person wearing the sweater several days before at the courthouse. In fact, Deputy Boone knew Ramsey and had a conversation with him outside the courthouse when he was wearing the sweater.

The second piece of evidence linking Ramsey to the crime was a bloody boot found by police investigators at Ramsey's trailer. Although the pattern on the sole of the boots was similar to the cast taken from the crime scene, the boots were larger than the cast.[2] Blood from the boot as well as the blood from the sweater were sent to SLED for DNA testing. SLED agents determined the blood on the sweater matched the DNA profile of Mobley. The blood from the boot was forwarded to a lab in Tennessee for more testing.

Michael Deguglielmo ("Deguglielmo") from the Tennessee lab determined, through a polymerase chain reaction ("PCR") analysis, that the blood from the boot contained a mixture of DNA from two people. Deguglielmo testified the blood was not contaminated, it was simply a mixed

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[2]Evidence was presented which indicated two people murdered Mobley. Ramsey was seen on the night of the murder with his roommate Joey "Clown" Connors.

sample. He further stated that mixed samples are a reality of life in forensic testing. Deguglielmo concluded he could not exclude Mobley as one of the persons whose blood was on the boot. Based on his testing, he determined the chance the DNA on the boot did not come from Mobley was one in 4,601 – a percentage greater than 99.9.

The third piece of evidence linking Ramsey to the murder was the tire impressions taken from the crime scene. Police investigators photographed the tires on Ramsey's blue station wagon in order to compare them with the casts of the tire tracks from the crime scene. The impressions and the tires appeared to be similar. The tire tracks at the scene indicated the car was moving from the site where Mobley's body was discovered toward the site where the sweater was discovered. Ramsey was seen in the blue station wagon on the night of the murder.

Finally, when police officers arrested Ramsey, they advised him of his Miranda rights, and he waived them verbally and by signing a Miranda waiver form. As Captain Tomley was transporting Ramsey to the Sheriff's Department, Ramsey stated, "I guess you guys are going to be arresting Joey [Conners], because he was with me that night."

Ramsey was indicted by the Kershaw grand jury for the offenses of murder, kidnaping, and armed robbery. On November 10, 1998, the jury found Ramsey guilty of murder and kidnaping, but acquitted him on the armed robbery charge. The trial judge sentenced Ramsey to life imprisonment for murder but did not sentence him on the kidnaping charge pursuant to S.C. Code Ann. § 16-3-910 (Supp. 2000). The following issues are before this Court on appeal:

I. Did the trial judge err in refusing to conduct an *in camera* hearing regarding the suggestiveness of an out-of-court identification?

II. Did the trial judge abuse his discretion by admitting expert testimony that the blood on the boot from Ramsey's trailer matched the blood of the victim?

III. Did the trial judge properly deny Ramsey's motion for directed verdict?

LAW/ANALYSIS

I. *In Camera* Hearing

Relying on *State v. Williams*, 258 S.C. 482, 189 S.E.2d 299 (1972), Ramsey argues the trial judge erred by refusing to hold an *in camera* hearing to challenge the suggestiveness of the photographic lineup identification made by Deputies Boone and Dowey. We disagree.

Where identification is concerned, the general rule is that a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation. *State v. Cash*, 257 S.C. 249, 185 S.E.2d 525 (1971). For example, in *State v. Simmons*, 308 S.C. 80, 417 S.E.2d 92 (1992), this Court remanded the case for an *in camera* hearing where a witness saw a suspect at a bond hearing prior to his in-court identification of the suspect. The witness may have gotten a "fix" on the suspect at the bond hearing because the suspect's name was called and she came forward for the judge to set bond. *Id.* An *in camera* hearing was needed to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the bond hearing. *Id.* The cases cited by Ramsey involve situations where an in-court identification is the product of an unlawful confrontation or lineup. These cases, however, are immaterial because the issue in this case is simply whether an out-of-court photographic lineup was impermissibly suggestive, not whether the subsequent in-court identification was tainted.

Defense counsel did not object to the manner in which the photographs in the lineup were presented to the officers. Ramsey's main concern is that after the sweater was discovered, and the police department identified him as a suspect, investigators asked the two officers whether they had seen anyone in the lineup wearing the striped sweater. Deputy Boone was able to identify

Ramsey with no problem. Deputy Dowey, however, recognized the sweater, but could not remember who he saw wearing it. He remembered Ramsey wore the sweater at the police station only after he saw the lineup. Defense counsel maintains the two officers would naturally "pick the big suspect in the big case for the Sheriff's Department at that time."

Even if the photographic lineup was impermissibly suggestive, any error in the trial court's refusal to conduct an *in camera* hearing was harmless. *See Simmons, supra* (noting that under certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, the harmless error rule is applicable). Even without the deputies' testimony, the State had the testimony of three witnesses who testified they had "no doubt" Ramsey was wearing a striped sweater on the day of the murder. Ramsey did not challenge this testimony, which is actually more probative than the deputies' testimony. Therefore, even if the admission of the deputies' testimony was erroneous, it was harmless error.

II. DNA Evidence

Ramsey argues the trial judge erred by admitting the "contaminated" DNA evidence from his boot. Ramsey also contends the DNA evidence was unreliable pursuant to Rule 702, SCRE. We disagree. This issue contains the following two distinct subparts: (1) whether the evidence was tainted and totally unreliable pursuant to *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990); and (2) whether Mr. Deguglielmo's expert testimony was based on unreliable scientific evidence which should be excluded pursuant to Rule 702, SCRE.

A. Tainted Evidence

According to Ramsey, the police investigators mishandled all of the evidence in this case and committed "classic violations of evidence preservation." Specifically, pieces of evidence were taken from one crime scene to another. For example, the blood evidence was taken from the murder scene, to the Flamingo, and finally to Ramsey's home. The police investigators also took the striped sweater from the murder scene to the Flamingo where they

removed hairs. Finally, the bloody footprint casts were taken from the murder scene to Ramsey's home where they were washed. According to Ramsey's expert witness, Donald Girndt ("Girndt"), a former SLED agent and crime scene investigator, the blood on the boot could have been contaminated because the victim's blood from the casts may have splashed onto the boot while they were being washed. Girndt maintained the evidentiary value of the blood on the boot under these circumstances was virtually zero.

DNA evidence may be admitted in judicial proceedings in this State in the same manner as other scientific evidence, such as fingerprint analysis and blood tests. *Ford, supra*. However, the admissibility of DNA evidence remains subject to traditional attack, such as attacks based on relevancy or prejudice. *Id.* According to this Court in *Ford*, "traditional challenges to the admissibility of [DNA] evidence such as the contamination of the sample or chain of custody questions may be presented. These issues relate to the weight of the evidence. The evidence may be found to be so tainted that it is totally unreliable and, therefore, must be excluded." *Id.* at 490, 392 S.E.2d at 784.

We find the DNA evidence in this case is not so tainted that it is totally unreliable. Two conflicting theories were offered at trial as to how the evidence was collected and its potential for contamination. Ramsey maintains the blood on the boot could be contaminated, while the police officers testified they were careful and complied with procedures. We find these issues relate to the weight of the evidence.

B. Admissibility Pursuant to Rule 702, SCRE

The proper standard for the admissibility of scientific evidence is outlined in Rule 702, SCRE. Pursuant to Rule 702, SCRE, in order for the evidence to be admissible, the trial judge must find the scientific evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.[3]

[3]Rule 702, SCRE, states:

The trial judge should determine the reliability of the underlying science by using the following factors: (1) the publication of peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. Council,* 335 S.C. 1, 515 S.E.2d 508 (1999). Further, even if the evidence is admissible under Rule 702, SCRE, the trial judge must determine if its probative value is outweighed by its prejudicial effect under Rule 403, SCRE. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate. *Id.*

Ramsey does not challenge the evidence based on any of the *Council* factors. Most importantly, he does not challenge the qualifications of the State's expert, Deguglielmo, or the reliability of the PCR procedure. He challenges only the means in which the police officers handled the evidence prior to the testing conducted by Deguglielmo.

The issue is whether Deguglielmo's expert testimony regarding the DNA evidence was unreliable pursuant to Rule 702, SCRE and, therefore, inadmissible. This Court reviews the admission of such testimony under an abuse of discretion standard. *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998).

The trial judge did not abuse his discretion by admitting Deguglielmo's expert testimony. First, Ramsey does not challenge the PCR procedure used by Deguglielmo to test the DNA samples. Even if the samples were mixed during collection, Ramsey does not demonstrate Deguglielmo's testing procedure was unreliable, much less so unreliable as to warrant exclusion. Second, the

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> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

testimony concerning the DNA evidence complied with the requirements as set forth in *Council*. Any evidence concerning contamination, therefore, went to the weight of the testimony, not its admissibility. Finally, the mixture of DNA evidence is not a basis for the exclusion of PCR evidence. *See Oregon v. Lyons*, 863 P.2d 1303 (Or. Ct. App. 1993) (finding the potential for DNA contamination presents an "open field" for cross examination at trial, but does not indicate the PCR method of DNA testing is inappropriate for forensic use). According to Deguglielmo, mixed samples are simply a fact of life in forensic science.

III. Directed Verdict

Ramsey argues the trial judge should have directed a verdict of acquittal because the DNA evidence should have been excluded.[4] Because we find the DNA evidence was admissible, it is unnecessary for us to address Ramsey's directed verdict motion.

CONCLUSION

Based on the foregoing, Ramsey's sentence and convictions are **AFFIRMED**.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

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[4]A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Brown*, 103 S.C. 437, 88 S.E. 21(1916). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilty of the accused, the Court must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 529 S.E.2d 526 (2000).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sea Pines Association for the Protection of Wildlife, Inc., Advocates Working for Animals and Respect for the Environment a/k/a AWARE, The Fund for Animals, Inc., Animal Protection Institute, and the Humane Society for the Prevention of Cruelty to Animals, Appellants,

v.

South Carolina Department of Natural Resources and Community Services Associates, Inc., Respondents.

Appeal From Richland County
James Carlyle Williams, Jr., Circuit Court Judge

Opinion No. 25326
Heard June 8, 2000 - Filed July 23, 2001

AFFIRMED

Harold W. Jacobs and J. Michelle Childs, both of Nexsen Pruet Jacobs & Pollard, LLP, of Columbia, for appellants.

Ester Haymond and James A. Quinn, of Columbia, for respondent South Carolina Department of Natural Resources; Stephen A. Spitz, of Columbia, and Roberts Vaux and Gray B. Taylor, of Vaux & Marscher, P.A., of Bluffton, all for respondent Community Services Associates, Inc.

CHIEF JUSTICE TOAL: Sea Pines Association for the Protection of Wildlife, Inc., Advocates Working for Animals and Respect for the Environment ("AWARE"), the Fund for Animals, Inc., Animal Protection Institute, and the Humane Society for the Prevention of Cruelty to Animals ("Appellants") challenge the South Carolina Department of Natural Resources' ("Department") issuance of permits to lethally eliminate a substantial number of white-tailed deer in the Sea Pines Public Service District ("Sea Pines") on Hilton Head Island.

FACTS/PROCEDURAL BACKGROUND

Sea Pines is a 5,280 acre private, suburban community located on the southern portion of Hilton Head Island, South Carolina. The South Carolina General Assembly established Sea Pines as one of eleven wildlife sanctuaries designated under S.C. Code Ann. § 50-11-880(1) (Supp. 2000). Sea Pines provides habitat for numerous species of wildlife, including the white-tailed deer.

Many Sea Pines residents enjoy observing, interacting, and photographing the deer and other wildlife in the sanctuary. However, over the past several

years, many residents and homeowners have become concerned with the growing number of deer. Residents of Sea Pines have complained about landscape damage, increased number of automobile collisions[1], and more frequent confrontations between deer and humans. In response, Community Service Associates, Inc. ("CSA")[2] embarked on a program designed to study the deer population. CSA hired both Todd Ballentine, a local naturalist, and also Dr. Robert Warren, a professor of Wildlife Ecology and Management at the University of Georgia School of Forest Resources, to conduct a study of the deer population problem.

Dr. Warren conducted an in-depth scientific analysis of the deer herd in Sea Pines. In conjunction with Dr. Warren's studies, six public meetings were held, the residents were surveyed, and two Master's theses were written. At the conclusion of his research, Dr. Warren issued a comprehensive report and a Project Proposal on May 14, 1998, which served as a basis for the issuance of the permits in this case. Pursuant to the Project Proposal, a scientific study would commence in July 1998, and continue into the year 2000. At the conclusion of the study, lethal techniques would be used to remove 100 to 200 deer, or approximately fifty percent of the herd, in the southern portion of Sea Pines where the concentration of deer was the greatest.

Appellants oppose the lethal reduction of the population of white-tailed deer. The lead Appellant, Sea Pines Association for the Protection of Wildlife, Inc. ("SPAPW"), an organization of Sea Pines residents or property owners, was formed for the specific purpose of promoting the use of non-lethal means of resolving conflicts between humans and wildlife. On August 25, 1998,

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[1]Mr. William Bloom, a statistician with the South Carolina Department of Public Safety, concluded that motorists within Sea Pines were 6.5 times more likely to have a deer/vehicle collision than motorists in South Carolina generally.

[2]CSA is an association of property owners in Sea Pines formed to hold and manage the common property in Sea Pines and to provide security. All Sea Pines property owners are mandatory, dues-paying members of CSA.

Appellants filed a Summons and Complaint seeking: (1) a temporary retraining order to restrain the Department from issuing any further permits for the taking or killing of deer within Sea Pines and to restrain CSA and the University of Georgia from acting on any existing permits; (2) a temporary injunction and permanent injunction against the issuance of permits by the Department to CSA without meeting the requirements of section 50-11-880; and (3) a declaratory judgment determining whether the Department complied with the requisite statutes, rules, and regulations relative to the issuance of permits in a wildlife sanctuary, and whether the Department violated the constitutional rights of the residents of Sea Pines by failing to afford them due process.

On September 10, 1998, the trial court denied Appellant's Motion for a Temporary Injunction. Appellants then filed a Petition for a Writ of Supersedeas with the South Carolina Court of Appeals. In a panel hearing on September 23, 1998, the Court of Appeals granted Appellant's petition, which reinstated the temporary restraining order until the trial of the case. On November 20, 1998, the Court of Appeals issued an order holding the appeal in abeyance pending the outcome of a trial on the merits of the case.

A non-jury trial was held from March 15, 1999 to March 17, 1999, where the trial judge vacated the temporary injunction and dismissed the action with prejudice, holding: (1) Appellants lacked standing to pursue the matters alleged in the Complaint; (2) there are no statutory or constitutional due process requirements for notice or opportunity to be heard concerning the issuance of the permits; and (3) the actions of the Department in the issuance of these permits has been in total compliance with the statutory laws of this State.

On March 10, 1999, the Department issued a permit to CSA and the University of Georgia to collect up to ten male white-tailed deer for a herd health check. On July 13, 1999, the Department issued a permit to CSA and the University of Georgia for the removal of up to one hundred deer in Sea Pines during the period between September 15, 1999 and January 1, 1999. Appellants filed a Petition for a Writ of Supersedeas with the trial court to prevent CSA or any of its agents from acting on the latter permit, which was denied. Appellants filed another Writ of Supersedeas with the Court of Appeals challenging the

latter permit, which was granted by order dated September 3, 1999.

On November 24, 1999, CSA file a Motion for Emergency Protection of the Public Health and Safety of Sea Pines Residents and Visitors. The Court of Appeals issued an order denying the Motion, but it noted the stayed permit expired on January 1, 2000, and there was nothing to prevent CSA from requesting another permit. The Department issued a permit to CSA to remove up to two hundred deer from Sea Pines on January 11, 2000. Appellants filed a separate suit on January 13, 2000, and requested a temporary restraining order that the trial court denied. The Court of Appeals issued an oral Writ of Supersedeas in this matter.

On March 13, 2000, this Court granted Appellant's Motion to Certify Case for Review. The following issues are before this Court on appeal:

I. Do Appellants have standing to challenge the Department's issuance of permits for the lethal elimination of deer in the Sea Pines' wildlife sanctuary?

II. Do Appellants, and other affected persons or organizations, have a right to notice and an opportunity to be heard prior to the Department's issuance of permits for the lethal elimination of deer in the Sea Pines' wildlife sanctuary?

III. Did the Department properly issue permits for the lethal elimination of deer in the Sea Pines' wildlife sanctuary by making proper factual and legal determinations under section 50-11-880 that the deer, due to size, disease, or other extraordinary factors, posed a threat to the health, safety, and welfare of the public, or to itself, or other species in or around the sanctuary?

IV. Did the Department properly issue permits under section 50-11-1050 and section 50-11-1090 for the taking of deer in a wildlife sanctuary?

LAW/ANALYSIS

I. Standing

Appellants argue the trial court erroneously determined they do not have standing. The trial court reasoned that because the deer are the property of the State of South Carolina and not its individual residents, Appellants do not have standing because they cannot allege a particularized harm as a result of the deer's termination. We agree with the trial court's ruling.

To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest. *Charleston County Sch. Dist. v. Charleston County Election Comm'n,* 336 S.C. 174, 519 S.E.2d 567 (1999). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id.* at 181, 519 S.E.2d at 571 (quoting *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)). A private person does not have standing unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Such imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public. *Id.* (citing *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)). When an organization is involved, the organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act. *Sierra Club v. Morton,* 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).

In *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), the United States Supreme Court enunciated a stringent standing test. *Lujan* set forth the "irreducible constitutional minimum of standing," which consists of the following three elements:

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and

> particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Id. at 559-61, 112 S. Ct. at 2136 (internal citations omitted); *see also Beaufort Realty Co. v. S.C. Coastal Conservation League*, Op. No. 3360 (S.C. Ct. App. filed June 25, 2001) (Shearouse Adv. Sh. No. 23 at 80). The party seeking to establish standing carries the burden of demonstrating each of the three elements. *Id.* at 561, 112 S. Ct. at 2136-37.

The first element requires the plaintiff to suffer an injury in fact, or a particularized harm. The Department argues that an aesthetic interest in wildlife is not a legally protected interest because under South Carolina law there is no protected interest in an individual wild animal, until that animal is reduced to possession. S.C. Code Ann. § 50-11-10 (Supp. 2000) ("All wild birds, wild game, and fish, . . . are the property of the State."). According to the United States Supreme Court, "The desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing." *Id.* at 562, 112 S. Ct. at 2137.[3] Furthermore, South Carolina case law has specifically recognized an injury to one's aesthetic and recreational interests

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[3]*See also Sierra Club, supra* ("Aesthetic and environmental well-being like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986) (holding plaintiffs alleged a sufficient injury in fact because whale watching and studying of their members will be adversely affected by continued whale harvesting).

in enjoying and observing wildlife is a judicially cognizable injury in fact. *See S.C. Wildilife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988) (holding environmental groups and League of Women Voters had standing because they suffered injuries as a result of decisions by the Coastal Council which affected the members' use and enjoyment of the fish and wildlife of the wetlands); *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision),* 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998) (holding property owners adjacent to wetlands had standing to challenge the issuance of a permit to fill the wetlands because the permit would adversely affect the property owners' use and enjoyment of the wetlands).

Nonetheless, according to *Lujan*, the Appellant's injury has to be actual or imminent, not conjectural or hypothetical. In order for the injury to be "particularized," it must affect the plaintiff in a personal and individual way. *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136; *see also Beaufort Realty, supra* (finding one must suffer an actual injury in fact, not a prospective concern of future harm, in order to satisfy the *Lujan* test). Appellants presented no evidence their opportunity to view and enjoy the deer would be diminished by the permits. The Appellant's injury is conjectural because it is not certain that reducing the size of the herd would decrease the number of deer actually viewed by the residents each day. Because deer population growth has remained constant on Sea Pines, the deer population decrease proposed by the Department may have little or no effect on the residents' ability to enjoy the deer.

Even if we assume Appellants have alleged a particularized harm, Appellants failed to present evidence the injury would be redressed by a favorable decision in this case. As the trial judge noted in his order, the goal of the Appellant's plan was to reduce the size of the deer herd. According to Gordon Stamler, the lead Appellant, their plan was to first use all necessary non-lethal means to reduce the deer population, including educational pamphlets, education of wildlife officers, using roadside reflectors, enforcing the speed limits, and electric fencing. If, after using these non-lethal means, the Department determines pursuant to section 50-11-880 that the deer herd needs to be reduced due to health or safety concerns, the Department would use immunocontraception, a form of birth control. Therefore, it is unlikely that the

alleged injury would be redressed by a favorable decision in this case because the Appellant's immunocontraception plan would cause the same injury – a reduction in the population of deer in Sea Pines.

In conclusion, although Appellants have an aesthetic interest in Sea Pines' deer and the environment, they are denied standing because they failed to satisfy the three-pronged *Lujan* test. Because we find Appellants lack standing, we decline to address the due process issue.

II. The Permits

Appellants argue the trial court erred in determining the Department complied with section 50-11-880 when it issued permits to kill deer in Sea Pines based on the presence of disease, overpopulation, and the number of deer/vehicle collisions. Appellants also argue the trial court erred in determining the Department may issue permits for the taking and killing of animals in a wildlife sanctuary under S.C. Code Ann. § 50-11-1050 and S.C. Code Ann. § 50-11-1090. We disagree.

This Court reviews the Department's permitting decisions pursuant to the standard articulated in the Administrative Procedures Act ("APA"). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Kearse v. State Health & Human Servs. Fin. Comm'n*, 318 S.C. 198, 456 S.E.2d 892 (1995). Under the substantial evidence rule, a reviewing court will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981) (citations omitted). Thus, a court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact, unless the agency's finding are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 466 S.E.2d 357 (1996). Substantial evidence is evidence which would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *See Miller by Miller v. State Roofing Co.*, 312 S.C. 452, 441

S.E.2d 323 (1994).

In section 50-11-880, the General Assembly designated eleven specific areas of the state as wildlife sanctuaries and provided that, within these areas, it is unlawful to "attempt to take or kill any wildlife." S.C. Code Ann. § 50-11-880 (Supp. 2000). The statute further directs the Department to monitor these sanctuaries and assigns to the agency the following discretionary rights:

> *If the department determines that, due to size, disease, or other extraordinary factors,* a particular population of a species located in, on, or around a sanctuary described above *constitutes a threat to the health, safety, and welfare of the public or to itself,* or other species in, on, or around the sanctuary, *it may authorize the taking of a sufficient number of species to reduce or eliminate the threat*. The wildlife must be taken by department personnel or other persons acting under their supervision and the authorization for the taking limits the number of animals taken and the days, times, and methods to be used.

S.C. Code Ann. § 50-11-880 (emphasis added).

We find the Department did not act *ultra vires* when it issued the permits in this case because there is substantial evidence in the record to support the Department's determination that the increase in the size of the deer population, the increase in deer/vehicle collisions, and the potential spread of *Ehrlichiosis*[4] by the deer[5] constitutes a threat to the health, safety, and welfare of the public.

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[4]*Ehrlichiosis* is a bacterial disease spread by infected ticks. Most infections are mild and can be treated with antibiotics. Severely ill patients can develop abnormally low numbers of white blood cells, abnormally low numbers of platelets, or kidney failure. The risk of severe illness and complications is highest in the elderly.

[5]Dr. Warren testified that the deer herd on Sea Pines may pose a threat to the public because the herd health surveys show that there is a very high

To refute the evidence presented by the Department, the Appellants relied on the testimony of their expert, Dr. Allen Rutberg, a senior scientist with the Humane Society of the United States. Dr. Rutberg testified that the deer population of Sea Pines was healthy and there is "no evidence . . . that the size of the deer population is in any way a threat to the deer." He also testified that he saw no justification for using lethal means to eliminate the deer at this time. However, he admitted he saw no evidence on the issue of deer population growth. He stated "I've seen no evidence at all that the population of deer at Sea Pines is growing or not growing." Dr. Rutberg's testimony does not discredit the findings of the Department because the health of the deer has nothing to do with the fact the deer population is growing at a rapid rate, dramatically increasing the number of deer/vehicle collisions in Sea Pines.

Between May 1998 and March 1999, the deer herd on Sea Pines increased by one hundred animals, from five hundred to six hundred. As set forth in the accident reports compiled by CSA security, there were 43 reported collisions in 1998, 29 in 1997, 39 in 1996, 33 in 1995, 40 in 1994, and 18 in 1993. Thus, the average of reported deer/vehicle collisions from 1993 to 1998 is 33.6 collisions per year. Charles Ray Ruth, the statewide deer project supervisor for the Department, stated that the deer/vehicle collision rate in Sea Pines is eight times the rate in the remainder of the State.[6] According to Mr. Ruth, the size of the deer population poses a health threat to other deer and to the public through increased vehicle collisions. Mr. Ruth's testimony and the other evidence of deer/vehicle collisions on Sea Pines provides substantial evidence to support the

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incidence of *Ehrlichiosis*. He states that the fatality rates for both types of *Ehrlichiosis* infections in humans is relative high, especially in elderly people. Dr. Warren would not agree that there is no unique health risk associated with *Ehrlichiosis* because one hundred percent of the deer he examined had been exposed to *Ehrlichiosis*.

[6]It is unclear whether this is the accurate rate of deer/vehicle collisions. In other sections of the record and in the briefs, the deer/vehicle collision rate is quoted as 6, 6.5, and 7 times greater on Sea Pines than in other parts of South Carolina.

Department's holding that the size of the deer population poses a definite threat to the health and safety of Sea Pines' residents.

Appellants also contend the Department has improperly issued permits for the taking of deer in Sea Pines under the auspices of statutes other than section 50-11-880. Specifically, the Appellants argue that sections 50-11-1050, 1090, and 1180 do not give the Department the authority to issue permits for the taking of deer in a wildlife sanctuary. However, wildlife sanctuaries are not specifically excluded from these statutes. Furthermore, section 50-11-880 is not a permitting statute. Once the Department makes a determination under section 50-11-880, another statute must be applied to issue the permits. Mr. Ruth, the Department's statewide deer project supervisor, was aware of the specific differences between the various sections, he explained during his testimony the basis and justification for each permit issued, and why he issued each permit pursuant to only certain code sections.

CONCLUSION

Based on the foregoing, we **AFFIRM** the trial court's order as modified, holding the Appellants do not have standing under *Lujan,* and the Department's issuance of permits for the lethal elimination of deer on Sea Pines was in compliance with the laws of this State.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael A. Devine,

Respondent.

Opinion No. 25327
Heard June 6, 2001 - Filed July 23, 2001

INDEFINITE SUSPENSION

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

Charles J. Hodge and Thomas B. Cabler, both of Spartanburg, for respondent.

PER CURIAM: In this attorney discipline matter, the panel recommends the Court indefinitely suspend Michael A. Devine ("Devine") from the practice of law to run from the date of his interim suspension on March 19, 1998 . The panel further recommends the Court require Devine to meet the following requirements before he is re-admitted: (1) attend a South Carolina Bar approved CLE program on office management; (2) provide satisfactory evidence of substance abuse counseling and treatment for the last twelve months; (3) file with the Clerk of the South Carolina Supreme Court medical statements

certifying his emotional and medical ability to practice law; and (4) make full restitution to the Client Security Fund for all sums paid to victims, or to the victim if not paid by the Client Security Fund, in the amounts set forth herein. We concur and impose the recommended sanction.

FACTUAL/PROCEDURAL BACKGROUND

Devine is a resident of Spartanburg County. On March 19, 1998, this Court placed him on interim suspension from the practice of law. *In re Devine*, 330 S.C. 36, 486 S.E.2d 870 (1998). The Court appointed William U. Gunn, Esq. to assume responsibility for Devine's client files, trust accounts, escrow accounts, operating accounts, and other law firm accounts. *Id.* Devine stipulated to the following facts.

I. Boswell Matter

Devine held $10,312.98 in trust for Christopher Boswell ("Boswell"). This sum represented the amount of money Boswell received from his father's estate. Boswell paid Devine $5,000 of these funds to represent him on the following three sets of criminal charges: (1) receiving stolen goods; (2) burglary; and (3) DUI 3rd, leaving the scene of an accident, and no seatbelt. Devine was then suspended. Boswell worked out the stolen goods and burglary charges with the Solicitor without the aid of an attorney. Boswell hired another attorney to handle the DUI and other related charges.

Prior to his suspension, Devine accepted another potential criminal matter for Boswell concerning a possible arson charge. Boswell agreed that $3,000 of the money from his father's estate could be used by Devine if he was ever charged with arson. Boswell was never charged, and Devine retained the $3,000.

The Client Security Fund paid Boswell $10,012.98 of his total claim of $11,012.98. Devine stipulates he misadvised Boswell concerning these matters. According to Devine, during this period he was experiencing multiple personal problems, including a divorce and a controlled substance abuse problem. He

claims he has received counseling for these problems and believes he has them under control.

II. Other Cases

Devine stipulates he received $16,015 in attorney's fees from clients when he did little or no work to earn these fees. He agrees that each of the following clients should receive a refund of their fees: Terry Bent Thomas, $1,750; Horace Steven Wall, $500; Lori Bright, $500; Robert Hammett, $2,070; Samuel Hutchins, $505; Woodson Keller, II, $5,000; Kenneth and Helen Gosnell, $200; Angela Nelson, $1,500; Charles and Gladys Murphy, $650; Diane Huey, $570; John Newman, $2,470; and Christina Lambert, $300.

III. Other Stipulations

Devine also stipulates to the following facts: (1) his trust account reflected negative balances and charges and overdrafts in 1996, 1997, and 1998; (2) he misadvised clients as to the status of their cases; (3) he misrepresented to a circuit court that a client wanted to withdraw an appeal from a magistrate's court decision when the client actually wanted to appeal; (4) he failed to appear in court for scheduled hearings; (5) he failed to communicate with numerous clients, including failing to return phone calls; (6) he at times operated without a license and kept his office closed without notification to clients on how to reach him; and (7) he failed to respond to communications from the Office of Disciplinary Counsel, including letters requesting responses to complaints and notices of full investigation.

On June 30, 1999, Devine was served with a Notice of Filing of Formal Charges and Formal Charges in this matter. Devine filed an Answer on July 26, 1999.

On September 8, 1999, a hearing was held before the sub panel. Devine and the Office of Disciplinary Counsel entered into two sets of Stipulations. The parties also agreed to receive into evidence a report of the payments made by the Client Security Fund in response to Devine's claims. On January 9,

2001, the full panel adopted the sub panel's report, which recommended an indefinite suspension. Neither party filed exceptions or briefs in response to the panel's report.

DISCUSSION

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. *In re Yarborough*, 337 S.C. 245, 524 S.E.2d 100 (1999). Although this Court is not, in an attorney disciplinary proceeding, bound by the findings made by the panel or by the Commission itself, these findings are entitled to great weight. *Id.* This Court may make its own findings of fact and conclusions of law in an attorney disciplinary proceeding. *Id.* Furthermore, an attorney disciplinary violation must be proven by clear and convincing evidence. *Id.*

Regarding all matters, the panel found Devine breached several Rules of Professional Conduct, Rule 407, SCACR, and Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. The panel found violations of the following rules: (1) Rule 1.15, Rule 407, SCACR, misappropriating client funds; (2) Rule 1.15, failing to deliver funds to a client or third person; (3) Rule 1.15, failing to render promptly a full accounting regarding property of the client or third person; (4) Rule 8.4(d), engaging in conduct involving dishonesty, deceit, and misrepresentation; (5) Rule 8.4(b), committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer; (6) Rule 4.1(a), making a false statement of material fact or law to a third person; (7) Rule 3.3 (a)(1), making a false statement of material fact or law to a tribunal; (8) Rule 1.3, failing to act with reasonable diligence and promptness in representing a client; (9) Rule 1.4(a), failing to keep clients reasonably informed and responding promptly with requests for information; (10) Rule 1.1, failing to represent clients competently; (11) Rule 8.1(b), failing to cooperate with disciplinary investigations; (12) Rule 8.4(a), violating the Rules of Professional Conduct; (13) Rule 8.4(e), engaging in conduct prejudicial to the administration of justice; (14) Rule 413, engaging in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute; (15) Rule 413, engaging in conduct demonstrating unfitness to practice law; and

(16) Rule 417, SCACR, failing to maintain appropriate financial records.

CONCLUSION

Based on Devine's rehabilitation and the panel's recommendation, we indefinitely suspend Devine from the practice of law. The commencement point for this suspension will be the date of Devine's interim suspension, March 19, 1998. In addition to the requirements of Rule 33(f), Rule 413, SCACR, Devine must meet the following requirements before he can be re-admitted to the practice of law: (1) attend a South Carolina Bar approved CLE program on office management; (2) provide satisfactory evidence of substance abuse counseling and treatment for the last twelve months; (3) file with the Clerk of the South Carolina Supreme Court medical statements certifying his emotional and medical ability to practice law; and (4) make full restitution to the Client Security Fund for all sums paid to victims, or to the victim if not paid by the Client Security Fund, in the amounts set forth herein. Furthermore, we find Devine responsible for $302.86, the costs incurred by the Commission in this matter. Devine shall file, within fifteen days of this opinion, an affidavit with the clerk of this Court stating he has complied with Paragraph 30 of Rule 413, SCACR.

INDEFINITE SUSPENSION.

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