OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27

July 10, 2006
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2006-UP-296-The State v. Allen Marty Cornwell
(Horry, Judge John L. Breeden)

2006-UP-297-Employers Insurance of Wausau v. Robert J. Moran and Eric C. Hansen
(Georgetown, Judge James E. Lockemy and Judge Paula H. .Thomas)

2006-UP-298-The State v. Marcus K. Wilson
(Richland, Judge Clifton Newman)

2006-UP-299-John E. Kelley, Jr. and Mary V. Kelley v. Sandra P. Herman
(Laurens, Judge Wyatt T. Saunders, Jr.)

2006-UP-300-Emory Alvin Michau, Jr. v. J. Al Cannon, Sheriff of Charleston County and Henry McMaster, Attorney General of South Carolina
(Charleston, Judge R. Markley Dennis, Jr.)

2006-UP-301-The State v. Cornelius Keith
(Sumter, Judge Howard P. King)

2006-UP-302-Richard B. Erwin v. Ryan's Family Steakhouses, Inc.
(Greenville, Judge Larry R. Patterson)

2006-UP-303-The State v. Timothy Dinkins
(Richland, Judge Brooks P. Goldsmith)

2006-UP-304-John Phillip Bethards v. Mike Tenny d/b/a Synco Enterprise and Weather Shield
(Charleston, Judge Daniel F. Pieper)

PETITIONS FOR REHEARING

4040-Commander Healthcare v. SCDHEC	Pending
4043-Simmons v. Simmons	Pending
4104-Hambrick v. GMAC	Pending
4106-Kelley v. Kelley	Pending
4107-State v. R. Rice	Pending
4108-Middleton v. Johnson	Pending

4109-Thompson v. SC Steel	Pending
4111-LandBank VII v. Dickerson	Pending
4112-Douan v. Charleston Cty.	Pending
4113-Pirri v. Pirri	Denied 06/30/06
4114-Martin v. Rapid Plumbing	Pending
4115-Smith v. NCCI, Inc,	Denied 06/30/06
4118-Richardson v. Donald Hawkins Const.	Pending
4119-Doe v. Roe	Denied 06/29/06
4122-Grant v. Mount Vernon Mills	Pending
2006-UP-158-State v. R. Edmonds	Pending
2006-UP-191-State v. N. Boan	Denied 06/29/06
2006-UP-194-State v. E. Johnson	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-211-Cunningham v. Mixon	Denied 06/29/06
2006-UP-218-Luther Smith v. State	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-230-Ex Parte: Van Osdell In re: Babb v. Graham	Denied 06/30/06
2006-UP-235-We Do Alterations v. Powell	Denied 06/30/06
2006-UP-237-SCDOT v. McDonald's Corp.	Denied 06/30/06
2006-UP-238-SCDSS v. Hutson	Pending
2006-UP-239-SCDSS v. Glenn	Denied 06/30/06

2006-UP-243-SunTrust Mortgage v. Gobbi	Denied 06/29/06
2006-UP-245-Gobbi v. Peoples' Fed. Bank	Pending
2006-UP-246-Gobbi v. Simerman	Denied 06/29/06
2006-UP-247-State v. S. Hastings	Denied 06/29/06
2006-UP-249-State v. L. Fleming	Denied 06/29/06
2006-UP-251-Rabon v. SCDHPT	Denied 06/30/06
2006-UP-256-Fulmer v. Cain	Pending
2006-UP-258-SCDSS v. Smith	Denied 06/30/06
2006-UP-262-Norton v. Wellman	Pending
2006-UP-265-Brown v. Harris	Pending
2006-UP-267-Barnum v. Sto Corp.	Pending
2006-UP-268-DSS v. Mother et al.	Denied 06/29/06
2006-UP-270-Elgin v. Kelly	Pending
2006-UP-277-State v. Hunsucker	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-280-Ingram v. SCPPPS	Pending
2006-UP-281-Johnson v. Sonoco Products et al.	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3787-State v. Horton	Pending
3900-State v. Wood	Pending
3903-Montgomery v. CSX Transportation	Pending

3906-State v. James	Pending
3914-Knox v. Greenville Hospital	Denied 06/22/06
3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3926-Brenco v. SCDOT	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending
3935-Collins Entertainment v. White	Pending
3936-Rife v. Hitachi Construction et al.	Pending
3938-State v. E. Yarborough	Pending
3939-State v. R. Johnson	Pending
3940-State v. H. Fletcher	Pending
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. K. Miller	Pending
3956-State v. Michael Light	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3967-State v. A. Zeigler	Pending
3968-Abu-Shawareb v. S.C. State University	Pending

3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore	Pending
3978-State v. K. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
3982-LoPresti v. Burry	Pending
3983-State v. D. Young	Pending
3984-Martasin v. Hilton Head	Pending
3985-Brewer v. Stokes Kia	Pending
3988-Murphy v. Jefferson Pilot	Pending
3989-State v. Tuffour	Pending
3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Pending
3995-Cole v. Raut	Pending
3996-Bass v. Isochem	Pending
3998-Anderson v. Buonforte	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4004-Historic Charleston v. Mallon	Pending
4005-Waters v. Southern Farm Bureau	Pending
4006-State v. B. Pinkard	Pending
4011-State v. W. Nicholson	Pending

4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
4022-Widdicombe v. Tucker-Cales	Pending
4025-Blind Tiger v. City of Charleston	Pending
4026-Wogan v. Kunze	Pending
4027-Mishoe v. QHG of Lake City	Pending
4028-Armstrong v. Collins	Pending
4033-State v. C. Washington	Pending
4034-Brown v. Greenwood Mills Inc.	Pending
4035-State v. J. Mekler	Pending
4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry	Pending
4039-Shuler v. Gregory Electric et al.	Pending
4041-Bessinger v. Bi-Lo	Pending
4042-Honorage Nursing v. Florence Conval.	Pending
4043-Simmons v. Simmons	Pending
4044-Gordon v. Busbee	Pending
4045-State v. E. King	Pending
4047-Carolina Water v. Lexington County	Pending
4048-Lizee v. SCDMH	Pending

4052-Smith v. Hastie	Pending
4054-Cooke v. Palmetto Health	Pending
4058-State v. K. Williams	Pending
4060-State v. Compton	Pending
4061-Doe v. Howe et al.(2)	Pending
4062-Campbell v. Campbell	Pending
4064-Peek v. Spartanburg Regional	Pending
4065-Levine v. Spartanburg Regional	Pending
4068-McDill v. Mark’s Auto Sales	Pending
4069-State v. Patterson	Pending
4070-Tomlinson v. Mixon	Pending
4071-State v. K. Covert	Pending
4074-Schnellmann v. Roettger	Pending
4078-Stokes v. Spartanburg Regional	Pending
4079-State v. R. Bailey	Pending
4080-Lukich v. Lukich	Pending
4082-State v. Elmore	Pending
4085-Sloan Construction Co. v. Southco	Pending
4088-SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending
4091-West v. Alliance Capital	Pending
4092-Cedar Cove v. DiPietro	Pending

4093-State v. J. Rogers	Pending
4095-Garnett v. WRP Enterprises	Pending
4096-Auto-Owners v. Hamin	Pending
4100-Menne v. Keowee Key	Pending
4102-Cody Discount Inc. v. Merritt	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-487-State v. Burnett	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Granted 06/22/06
2004-UP-605-Moring v. Moring	Pending
2004-UP-606-Walker Investment v. Carolina First	Denied 06/22/06
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-617-Raysor v. State	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-653-State v. R. Blanding	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-018-State v. Byers	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending

2005-UP-054-Reliford v. Sussman	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-115-Toner v. SC Employment Sec. Comm'n	Pending
2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley County	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-152-State v. T. Davis	Pending
2005-UP-163-State v. L. Staten	Pending
2005-UP-165-Long v. Long	Pending
2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cnty. of Florence et al.	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-188-State v. T. Zeigler	Pending
2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-197-State v. L. Cowan	Pending

2005-UP-216-Hiott v. Kelly et al.	Denied 06/22/06
2005-UP-219-Ralphs v. Trexler (Nordstrom)	Pending
2005-UP-222-State v. E. Rieb	Pending
2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-305-State v. Boseman	Pending
2005-UP-319-Powers v. Graham	Pending
2005-UP-337-Griffin v. White Oak Prop.	Pending
2005-UP-340-Hansson v. Scalise	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-348-State v. L. Stokes	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Pending
2005-UP-361-State v. J. Galbreath	Pending
2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. V. Mathis	Pending

2005-UP-422-Zepsa v. Randazzo	Pending
2005-UP-425-Reid v. Maytag Corp.	Pending
2005-UP-459-Seabrook v. Simmons	Pending
2005-UP-460-State v. McHam	Pending
2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-490-Widdicombe v. Dupree	Pending
2005-UP-506-Dabbs v. Davis et al.	Denied 06/22/06
2005-UP-517-Turbevile v. Wilson	Pending
2005-UP-519-Talley v. Jonas	Pending
2005-UP-530-Moseley v. Oswald	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-540-Fair v. Gary Realty	Pending
2005-UP-541-State v. Samuel Cunningham	Pending
2005-UP-543-Jamrok v. Rogers	Pending
2005-UP-556-Russell Corp. v. Gregg	Pending
2005-UP-557-State v. A. Mickle	Pending
2005-UP-574-State v. T. Phillips	Pending
2005-UP-580-Garrett v. Garrett	Pending
2005-UP-584-Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585-Newberry Elect. v. City of Newberry	Pending

2005-UP-590-Willis v. Grand Strand Sandwich Shop	Pending
2005-UP-592-Biser v. MUSC	Pending
2005-UP-595-Powell v. Powell	Pending
2005-UP-603-Vaughn v. Salem Carriers	Pending
2005-UP-604-Ex parte A-1 Bail In re State v. Larue	Pending
2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
2005-UP-635-State v. M. Cunningham	Pending
2006-UP-001-Heritage Plantation v. Paone	Pending
2006-UP-002-Johnson v. Estate of Smith	Pending
2006-UP-013-State v. H. Poplin	Pending
2006-UP-015-Watts Const. v. Feltes	Pending
2006-UP-022-Hendrix v. Duke Energy	Pending
2006-UP-025-State v. K. Blackwell	Pending
2006-UP-027-Costenbader v. Costenbader	Pending
2006-UP-030-State v. S. Simmons	Pending
2006-UP-037-State v. Henderson	Pending
2006-UP-038-Baldwin v. Peoples	Pending
2006-UP-043-State v. Hagood	Pending
2006-UP-047-Rowe v. Advance America	Pending

2006-UP-049-Rhine v. Swem	Pending
2006-UP-065-SCDSS v. Ferguson	Pending
2006-UP-066-Singleton v. Steven Shipping	Pending
2006-UP-071-Seibert v. Brooks	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending
2006-UP-073-Oliver v. AT&T Nassau Metals	Pending
2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-079-Ffrench v,. Ffrench	Pending
2006-UP-084-McKee v. Brown	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-115-Brunson v. Brunson	Pending
2006-UP-122-Young v. Greene	Pending
2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charleston Trident Home Builders, Inc., Appellant,

v.

Town Council of Town of Summerville and Town of Summerville, Respondents.

Appeal from Dorchester County
Patrick R. Watts, Master-in-Equity

Opinion No. 26181
Heard March 21, 2006 – Filed July 10, 2006

AFFIRMED AS MODIFIED

Stephen P. Groves, Sr., R. Bruce Wallace, and Jeffrey S. Tibbals, of Nexsen Pruet, LLC, of Charleston, for appellant.

William H. Davidson, II, and Kenneth P. Woodington, of Davidson, Morrison & Lindemann, P.A., of Columbia for respondents.

JUSTICE MOORE: Appellant Charleston Trident Home Builders, Inc. (Trident) is a non-profit corporation whose members construct homes, and own and develop property within the town limits of respondent Town of Summerville (Town). Trident commenced this action challenging Town's development impact fee ordinance which was enacted in 2003 pursuant to the South Carolina Development Impact Fee Act, S.C. Code Ann. § 6-1-910 *et seq.* (2004) (the Act). We affirm.

FACTS

The Act defines a development impact fee as "a payment of money imposed as a condition of development approval to pay a proportionate share of the cost of system improvements needed to serve the people utilizing the improvements." § 6-1-920(8). The Act requires that the local planning commission conduct studies and make recommendations for a capital improvements plan and impact fees by service unit.[1] § 6-1-950. After notice and a public hearing, the capital improvements plan may then be adopted by the local government. § 9-1-960(A). A capital improvements plan is required before an impact fee ordinance can be enacted. § 6-1-930. The revenue from impact fees must be maintained in a separate account and used only for "the category of system improvements and within or for the benefit of the service area for which the impact fee was imposed as shown by the capital improvements plan." § 6-1-1010.

To comply with the Act, in February 2001 Town Council directed Town's planning commission to conduct studies for an impact fee. Town hired Tischler & Associates, Inc., a consulting firm, to prepare a feasibility analysis. Tischler issued its initial proposal recommending the imposition of the fees. A capital improvements plan was also drafted. Finally, in May 2002, Tischler issued an impact fee study (the "Tischler Report"), which detailed the proposed calculation of impact fees.

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[1] A service unit is a standardized measure of use or discharge attributable to an individual unit of development. § 6-1-920(20).

After several public meetings, the capital improvements plan was adopted in December 2002. The impact fee ordinance was subsequently adopted on January 8, 2003, incorporating by reference the capital improvements plan and the Tischler Report. The ordinance became effective February 1, 2003.

Trident commenced this action claiming the ordinance did not comply with the Act in several respects. The case was referred with finality to the master-in-equity who granted Town's motion for summary judgment on several grounds, including Trident's lack of standing, Trident's failure to exhaust administrative remedies, lack of an appropriate remedy, and the ordinance's compliance with the Act. Trident appeals.

ISSUES

1. Does Trident have standing to maintain this action?

2. Was Trident required to exhaust administrative remedies?

3. Does the capital improvements plan substantially comply with the Act?

4. Is the fee calculation in the ordinance proper?

DISCUSSION

1. Standing

The master found Trident had no standing to maintain this action. We disagree.

An 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. Sea Pines Ass'n for Protection of Wildlife, Inc. v. South Carolina Dep't of Nat. Resources, 345 S.C. 594, 550 S.E.2d 287 (2001). The three required elements to establish standing are: an

injury in fact, a causal connection, and likelihood that a favorable decision would give relief. *Id.* The record includes an affidavit by Frank Finlaw, president of Trident, stating he has paid more than $100,000 in impact fees since the ordinance was enacted. In the event the ordinance was invalidated, Town could be ordered to issue refunds which would be adequate redress. We conclude Trident has standing to maintain this challenge to the ordinance.

2. Exhaustion of administrative remedies

The master found Trident was required to exhaust administrative remedies before bringing this action. We disagree.

As required by the Act, Town's ordinance provides for administrative relief.[2] The ordinance provides that a refund will be issued if: (a) the fees are not expended within three years of the date they were scheduled to be spent under the capital improvements plan; or (b) a building permit was subsequently denied. This relief does not extend to the right to challenge the validity of the ordinance itself. A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body. Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000). We find Trident was not required to exhaust administrative remedies before bringing this action.

3. Capital improvements plan

a. Incorporation of Tischler Report

Trident complains that the capital improvements plan does not comply with the Act. The document entitled "Capital Improvements Plan" is simply a list of items with cost estimates for future years.

[2]Section 6-1-1030(A) provides: "A governmental entity which adopts a development impact fee ordinance shall provide for administrative appeals by the developer or fee payor."

commission. The commission's recommendations, however, "are not binding on the government entity, which may amend or alter the plan." § 6-1-960(A). Although the Tischler Report did not originate with the planning commission, it was included in the enactment of the ordinance and was subjected to public notice and hearing. Accordingly, we find the capital improvements plan was effectively amended by the Tischler Report.

b. Statutory compliance

Section 6-1-930(A)(1) provides:

> Only a governmental entity that has a comprehensive plan, as provided in Chapter 29 of this title, and which complies with the requirements of this article may impose a development impact fee. If a governmental entity has not adopted a comprehensive plan, but has adopted a capital improvements plan which substantially complies with the requirements of Section 6-1-960(B), then it may impose a development impact fee.

(emphasis added). Town has a comprehensive plan. Although § 6-1-930(A)(1) seems to delineate the appropriate standard of compliance for a capital improvements plan based on whether or not the local entity has a comprehensive plan, we will not read the statute to effect an absurd result. *See* Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (when construing a statute, the Court will reject meaning that would lead to an absurd result not intended by the legislature). A local entity with the added safeguard of a comprehensive plan must be subject to the same, and not a more stringent, standard than a local entity without such a plan. We conclude this section requires that a capital improvements plan be in substantial compliance with the requirements of § 6-1-960(B), regardless of whether there is a comprehensive plan in place. Accordingly, substantial compliance with the requirements for a capital improvements plan applies here.

c. Statutory requirements

Trident complains there is no general description of Town's existing facilities as required in § 6-1-960(B)(1). The Tischler Report references specific facilities for each of the three categories (parks and recreation, fire, and municipal). For example, a description of a facility under the Parks and Recreation category is: "an extensive trails system including four miles of hiker/biker trail improvements." This type of summary description is adequate as a general description.

Trident contends the Tischler Report failed to include "an analysis of total capacity, the level of current usage, and commitments for usage of capacity of existing public facilities" as required by § 6-1-960(B)(2). The Tischler Report does include evaluations of its existing facilities for each category of service and indicates fees are calculated to maintain the current level of service. Because Town's existing facilities are currently functioning at an acceptable level of capacity, the fees are calculated to continue this level of service by improvement at incremental stages. This evaluation substantially complies with these requirements for a capital improvements plan.

Trident contends the capital improvements plan fails to identify "all sources and levels of funding." The Tischler Report does note that some existing construction, such as the Public Safety Building, was purchased with the proceeds of bond issues, and calculates a credit for future bond payments. Joseph Christie, the Director of Planning and Development, states in his affidavit that other funding sources were too speculative to serve as a basis for planning. Although this evaluation should have been included in the Tischler Report, there is no evidence other funding was actually available but not considered.

Trident complains the capital improvements plan does not include estimated dates for commencing and completing construction. The document entitled "Capital Improvements Plan" states the "year needed" is indicated for each capital improvement on the list of items. Although there are no commencement and completion dates, this information provides an estimate of when the funds will be needed.

Trident complains the capital improvements plan includes items that cost less than $100,000 for equipment or have a useful life of less than five years in contravention of § 6-1-920(2) and (18)(g). The original document entitled "Capital Improvements Plan" includes such items, but they are not included in the Tischler Report which actually provides the figures used for the calculation of the impact fees. The fact that these items were included in the original document has no significance in the calculation of fees.

Trident contends the capital improvements plan lacks a proportionate share analysis as required by § 6-1-990. This section provides that "an impact fee imposed upon a fee payor may not exceed a proportionate share of the costs incurred by the governmental entity in providing system improvements to serve the new development." Proportionate share is defined as the cost attributable to the new development. Section 6-1-990(B) also lists specific factors to be considered including:

> (1) cost of existing system improvements resulting from new development within the service area or areas;
>
> (2) means by which existing system improvements have been financed;
>
> (3) extent to which the new development contributes to the cost of system improvements;
>
> (4) extent to which the new development is required to contribute to the cost of existing system improvements in the future;
>
> (5) extent to which the new development is required to provide system improvements, without charge to other properties within the service area or areas;

(6) time and price differentials inherent in a fair comparison of fees paid at different times; and

(7) availability of other sources of funding system improvements including, but not limited to, user charges, general tax levies, intergovernmental transfers, and special taxation.

The Tischler Report takes into account all these factors except (6), time and price differentials. The report, however, explains that all costs are given in current dollars with no assumed inflation rate, which negates the need for time and price differentials.

Although the capital improvements plan, as amended by the Tischler Report, does not comport with every criterion of the Act, we find it substantially complies with the statutory requirements.

4. Calculation of fees

The Act provides for the calculation of impact fees in several provisions. Section 6-1-940(1) requires that the ordinance include an explanation of the calculation of the fee. Section 6-1-930(B)(2) provides that the amount of the fee "must be based on actual improvement costs or reasonable estimates of the costs, supported by sound engineering studies." Section 6-1-990 limits the impact fee to a proportionate share of the cost of improvements. Finally, § 6-1-980 provides:

§ 6-1-980. Calculation of impact fees.

(A) The impact fee for each service unit may not exceed the amount determined by dividing the costs of the capital improvements by the total number of projected service units that potentially could use the capital improvement. If the number of new service units projected over a reasonable period of time is less than the total number of new service units shown by the approved land

use assumptions at full development of the service area, the maximum impact fee for each service unit must be calculated by dividing the costs of the part of the capital improvements necessitated by and attributable to the projected new service units by the total projected new service units.

(B) An impact fee must be calculated in accordance with generally accepted accounting principles.

In the Tischler Report, adopted by reference into Town's impact fee ordinance, fees were calculated as follows. First, the report identifies three categories of impact fees: parks and recreation; fire; and municipal facilities and equipment. Fees for each of these categories are calculated with the "incremental expansion method" which uses the current level of service provided by Town's facilities and assumes expansion in regular increments. This methodology essentially figures a "current replacement cost" at regular intervals to pay for the increase in demand affecting each of the three categories identified above.

For each category, the current replacement cost for each capital improvement is divided by Town's current number of demand units[3] to determine the "cost per demand unit." The impact fee is then calculated by multiplying the cost per demand unit by the "demand indicator" allocated to the type of development in question. For residential development, fees are assessed per housing unit; for non-residential development, fees are assessed per 1,000 square feet or per room for motels. As an example: A single family detached dwelling is assumed to have 2.87 demand units. The total cost per demand unit for parks and recreation is $179.27. The cost per demand unit ($179.27) is multiplied by 2.87 for a fee of $514 for a single family detached

[3]The report uses the 2002 population extrapolated from the 2000 census to determine demand units. A residential demand unit is per person; non-residential is employees per 1,000 square feet.

dwelling for parks and recreation. This calculation is done for each category and added together for a total fee.

Trident contends this calculation of fees does not comply with the requirements of the Act in the following particulars.

a. Actual costs or reasonable estimates

Trident claims the incremental expansion method does not use "actual costs or reasonable estimates supported by sound engineering studies" as required by § 6-1-930(B)(2). As noted above, the method used here is basically a current replacement cost approach. In determining cost, the Tischler Report refers to cost information from "Town staff" and the Marshall & Swift Valuation Service. References to Town staff refer to the Town engineer, Matt Halter, who is a "public engineer." Halter testified his cost estimates were "based on similar projects [Town] had done in the past or similar equipment [Town] had bought in the past, historic numbers typically." Halter stated he gave "engineering estimates" for items in the capital improvements plan. We find the calculation of fees was based on reasonable estimates as indicated by Town's engineer.

b. Sound engineering studies

Trident complains Town's cost estimates were not based on sound engineering studies as required under § 6-1-930(B)(2).[4] As noted above, Town's public engineer, Matt Halter, stated he gave "engineering estimates" for the projected costs of capital improvements. The Tischler Report also references the Marshall & Swift Valuation Service, a national provider of real estate costs.[5]

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[4]This section provides: "The amount of the development impact fee must be based on actual improvement costs or reasonable estimates of the costs, supported by sound engineering studies."

[5]Marshall & Swift is described on its website as follows:

The Act does not specify what constitutes an "engineering study." Since Town used its current facilities upon which to base estimated costs, engineering estimates are adequate. Further, Trident has provided no evidence indicating cost estimates would have been different had specific engineering studies been conducted. We find the use of "engineering estimates" and a widely accepted valuation service was adequate to meet the requirement of "sound engineering studies."

c. Effect of annexation

Trident complains that in recommending impact fees, the forecasted population growth in Tischler's initial feasibility study was skewed by growth through annexation. This factor does not affect the calculation of impact fees. The purpose of the feasibility study was simply to determine whether to consider enacting such fees.

d. Current level of service

Trident complains Town failed to evaluate the level of service for its existing facilities. "Level of service" is defined by statute as "a measure of the relationship between service capacity and service demand for public facilities." § 6-1-920(14). Generally, it is an evaluation of how well a given service meets the public's needs. Under

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> Marshall & Swift serves a vital role in the real estate industry as the leading provider of building cost data. Our acclaimed cost manuals, desktop applications, online solutions and education programs help professionals create accurate cost valuations of commercial and residential real estate in the U.S., U.S. territories, Canada and select foreign cities worldwide.

http://www.marshallswift.com/ms-about.aspx.

§ 6-1-930(B)(3)(b), an impact fee ordinance must "include a description of acceptable levels of service for system improvements."

Throughout the Tischler Report, the accepted level of service for projected capital improvements is the current level of service provided by Town. Joseph Christie, Town's Director of Planning and Development, testified the existing level of service was deemed adequate. This evaluation was based on citizen input. The Tischler Report specifically states Town's intent to "maintain the current level of service . . . to accommodate new residential development and not to replace or rehabilitate existing facilities/improvements." This description of the level of service for capital improvements as the current level of service satisfies the Act.

We find the calculation of fees in the ordinance sufficient. Further, we note Trident offers no analysis of the various factors challenged that would actually result in different fees.

CONCLUSION

We find that Trident had standing to maintain this action and did not have to exhaust administrative remedies. We conclude on the merits that Town's ordinance substantially complies with the statutory requirements set forth in the Act regarding the capital improvements plan and that the calculation of fees is proper. The master's order is

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Home Port Rentals, Inc., Petitioner,

v.

Roger Moore, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 26182
Heard June 8, 2006 – Filed July 10, 2006

AFFIRMED AS MODIFIED

M. Dawes Cooke, Jr. and Phillip S. Ferderigos, both of Barnwell, Whaley, Patterson & Helms, of Charleston, for Petitioner.

Thomas W. Bunch II and L. Jefferson Davis IV, both of Robinson, McFadden & Moore, of Columbia, for Respondent.

ACTING JUSTICE KING: This is a judgment-execution case. The circuit court granted summary judgment in favor of Roger Moore

(Respondent) against Home Port Rentals, Inc. (Petitioner), holding that South Carolina's ten-year limitations period for execution[1] is not tolled for time during which a judgment debtor is out of state. The Court of Appeals affirmed. Home Port Rentals, Inc. v. Moore, 359 S.C. 230, 597 S.E.2d 810 (Ct. App. 2004). This Court granted a writ of certiorari to review the Court of Appeals' opinion. We affirm as modified.

FACTS

On March 20, 1989, the United States District Court for the District of South Carolina entered judgment against Respondent and in favor of Petitioner. Petitioner thereafter tried to locate Respondent in order to execute on the judgment, but could not do so until January 1999.

On July 14, 2000, Petitioner filed an action for declaratory judgment in the circuit court. Petitioner sought a declaration that the 1989 judgment was still effective, arguing that the ten-year limitations period for execution had been tolled for the time during which Respondent was absent from South Carolina – the entire eleven-year period following entry of the judgment. The parties filed cross-motions for summary judgment, and the circuit court granted summary judgment to Respondent. The court held that the 1989 judgment was no longer valid because it was more than ten years old. The Court of Appeals affirmed.

ISSUE

Whether the Court of Appeals erred in holding that the 1989 judgment is no longer valid because it is more than ten years old.

ANALYSIS

The judgment of the federal district court was enrolled, and therefore became a South Carolina judgment, when it was entered on March 20, 1989.

[1] S.C. Code Ann. § 15-39-30 (2005).

Under the Uniform Enforcement of Foreign Judgments Act,[2] the 1989 judgment of the federal district court is a "foreign judgment." S.C. Code Ann. § 15-35-910(1) (2005). Ordinarily, a foreign judgment must be enrolled in this state in order to be effective as a South Carolina judgment. Under federal law, however, a judgment of the United States District Court for the District of South Carolina is effectively a South Carolina judgment. The United States Code provides:

> Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time.

28 U.S.C.A. § 1962 (West 1994).

Consequently, South Carolina law determines the date on which the federal court's judgment became a lien in South Carolina.

South Carolina Code section 15-35-810 applies the federal statute and provides that a judgment of the United States District Court for the District of South Carolina

> shall constitute a lien upon the real estate of the judgment debtor situate[d] in any county in this State in which the judgment or transcript thereof is entered upon the book of abstracts of judgments and duly indexed, the lien to begin from the time of such entry on the book of abstracts and indices and to continue for a period of ten years from the date of such final judgment ....

S.C. Code Ann. § 15-35-810 (2005).

[2] S.C. Code Ann. §§ 15-35-900 through -960 (2005).

As the Court of Appeals held, therefore, the district court's judgment became effective when it was entered on March 20, 1989.

As stated above, Petitioner filed this declaratory-judgment action on July 14, 2000, more than ten years after entry of the 1989 judgment. South Carolina Code section 15-39-30 provides:

> Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

This Court has consistently held that under the statute, a judgment becomes stale and a judgment lien is extinguished after ten years. See, e.g., Garrison v. Owens, 258 S.C. 442, 446-47, 189 S.E.2d 31, 33 (1972); Hardee v. Lynch, 212 S.C. 6, 46 S.E.2d 179 (1948). In so holding, the Court has reasoned, "A judgment lien is purely statutory, its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by statute, if such time expires before the action is tried." Garrison, 258 S.C. at 446-47, 189 S.E.2d at 33 (citations omitted).

According to Petitioner, the legislature has provided for the prolonging of the existence of the judgment and lien in at least one situation. Relying on South Carolina Code section 15-3-30,[3] Petitioner argues the ten-year period provided by section 15-39-30 may be tolled for time that a judgment debtor spends out of the state. We disagree.

Section 15-3-30 provides:

> If when a cause of action shall accrue against any person he shall be out of the State, such action may

[3] S.C. Code Ann. § 15-3-30 (2005).

> be commenced within the terms in this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside out of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

We agree with the Court of Appeals that the statute does not apply here. Unlike the Court of Appeals, however, we look no further than the language of section 15-3-30 to reach this conclusion. The plain wording[4] of section 15-3-30 provides that the statute applies to the accrual of a "cause of action" and the statutory time period within which to bring the action. The statute does not refer to the statutory time period within which to execute an already obtained judgment. Contrary to Petitioner's argument, the right to execute on a judgment does not constitute a cause of action. Indeed, execution is not initiated by bringing an action.

Consequently, section 15-3-30 cannot operate to toll the ten-year execution period. While the limitations period for bringing an action may be tolled if the defendant is absent from the state, the period for executing an already obtained judgment may not. The decision of the Court of Appeals is therefore

AFFIRMED AS MODIFIED.

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

[4] "Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2003).

The Supreme Court of South Carolina

In re: Amendment to Rule 402, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 402, SCACR, is hereby amended as follows:

Footnote 1 shall state:

> This fee is currently seven dollars and sixty cents ($7.60) and should be paid by check payable to "ACT."

This amendment shall take effect immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Moore, J., not participating

Columbia, South Carolina

July 6, 2006

The Supreme Court of South Carolina

In re: Amendments to the Commission's Regulations for Mandatory Continuing Legal Education for Judges and Active Members of the South Carolina Bar

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O R D E R

The Commission on Continuing Legal Education and Specialization has proposed amending the South Carolina Appellate Court Rules concerning audio-visual or media Continuing Legal Education seminars.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Regulation V(H)(2)(d) and (H)(3) of Appendix C to Part IV, South Carolina Appellate Court Rules, concerning audio-visual or media Continuing Legal Education hours per annual reporting period. Pursuant to the amendments, as set forth in the attachment to this Order, a member may now receive up to six (6) hours of Continuing Legal Education credit through audio-visual or media presentations. Telephone activities may now be accredited for the actual time spent up to a maximum of ninety (90) minutes per activity, and online educational activities, including webcasts, may be accredited up to a maximum of six (6) hours per activity.

The amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Moore, J., not participating.

Columbia, South Carolina
July 6, 2006

APPENDIX C
REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION
FOR JUDGES AND ACTIVE MEMBERS OF THE SOUTH CAROLINA BAR

. . .

V. Accreditation Standards

. . .

H. Audio-visual and Media Presentations.

. . .

2. In addition to meeting the standards of A through G, above, audio-visual or media presentations must:

. . .

(d) Telephone activities will be accredited for the actual time spent to a maximum of 90 minutes per activity, and on-line educational activities, to include live webcasts, will be accredited for the actual time spent to a maximum of 6 hours per activity; and

. . .

3. CLE credit earned through audio-visual or media presentations and applied to the annual 14 hour minimum requirement shall not exceed 6 hours of credit per annual reporting period.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

City of Beaufort, Respondent,

v.

Eddie Holcombe, Appellant.

Appeal From Beaufort County
Curtis L. Coltrane, Special Circuit Court Judge

Opinion No. 4134
Submitted June 1, 2006 – Filed July 10, 2006

AFFIRMED

Scott Wayne Lee, of Beaufort, for Appellant.

William B. Harvey and Caroline Meng, both of Beaufort, for Respondent.

GOOLSBY, J.: The Municipal Court of the City of Beaufort convicted Eddie Holcombe of failing to obtain a business license in violation of section 7-1001 of the Beaufort Municipal Code. Holcombe appealed to the circuit court, which upheld the conviction. Holcombe again appeals,

arguing the City's ordinance violates the Equal Protection Clauses of our federal and state constitutions. We affirm.[1]

At the time of this action, Holcombe owned a commercial building in downtown Beaufort that was divided into multiple offices. Holcombe operated his own optometry business (a professional association) in one of the offices. In addition, he received rental income from an unrelated, commercial tenant occupying another office within the building.[2] Holcombe admittedly paid no business license fee related to the rental of commercial property to either of these businesses.

On August 14, 2003, the City of Beaufort cited Holcombe for violation of section 7-1001, which requires all persons engaged in any business, service, occupation, or profession classified by the City to obtain a business license and pay an annual license fee.[3] The City contended Holcombe, as a commercial landlord, should have obtained a business license and paid fees based on the rental income generated from the property he leased to the third party. Although not expressly provided for in the ordinance, the City exempts a landlord from the license fee requirements when the landlord occupies rental property for his own use or pays rent to himself.

In October 2003, the Municipal Court of the City of Beaufort found Holcombe guilty of failing to obtain a business license. Acting Municipal

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

[2] In his brief, Holcombe states the building is divided into two offices and he rents the second office to an unrelated business. The City asserts Holcombe "receives substantial rental income from the multiple commercial tenants within the building."

[3] "Every person engaged, or intending to engage in any calling, business, service, activity, occupation or profession listed in the rate classification portion of this chapter, in whole or in part, within the limits of the city, is required to pay an annual license fee and obtain a business license as herein provided." Beaufort Municipal Code, Ordinance § 7-1001(a).

Judge James A. Grimsley, III noted that under the Beaufort Municipal Code, a license was required for "[l]essors of non-residential buildings (with gross rental income of $12,000.00 or more)."[4] The judge found Holcombe was the owner of real property in Beaufort and he had failed to obtain an annual business license based on the rental income he received on the property for the years 2000, 2001, and 2002.[5] Holcombe was sentenced to thirty days in jail, suspended upon the payment of a $750.00 fine plus all amounts due under the ordinance, to include administrative penalties for nonpayment as may be provided for in the ordinance.

On appeal, Holcombe challenged the constitutionality of the City's application of the ordinance. Specifically, he contested the City's determination that a property owner who leases property to himself (or an entity wholly owned by him) is not in the business of leasing so as to require the payment of a business license fee, whereas a property owner who leases property to third parties is in business and thus required to pay a business license fee. Holcombe argued the City's unwritten exemption for property owners who rented to themselves (or their alter-egos) violated his equal protection rights.

The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws.[6] This "simply means that no person, or class of persons, shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."[7]

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[4] This specific language does not appear in any portion of the ordinance appearing in the Record on Appeal, but the parties do not dispute its application here and raise no issue in this regard on appeal.

[5] The judge applied a three-year statute of limitations.

[6] U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3.

[7] Harrison v. Caudle, 141 S.C. 407, 416, 139 S.E. 842, 845 (1927).

In evaluating whether an enactment affords equal protection, we must first decide what level of scrutiny to apply.[8] "Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny."[9] "If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used."[10] Inherently suspect classifications include those based on factors "such as race, religion, or alienage."[11]

In this instance, we agree with the circuit court's determination that "landlords do not constitute a 'suspect' class, [so] the 'rational basis' test is used."[12] "To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis."[13]

Equal Protection Clauses are subject to a wide scope of discretion and legislative enactments are to be avoided only when they are without any

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[8] In re Luckabaugh, 351 S.C. 122, 147, 568 S.E.2d 338, 351 (2002).

[9] Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004); see also Clark v. Jeter, 486 U.S. 456, 461 (1988); 19 S.C. Juris. Constitutional Law § 85 (1993).

[10] Denene, 359 S.C. at 91, 596 S.E.2d at 920; see also Hendrix v. Taylor, 353 S.C. 542, 549, 579 S.E.2d 320, 323 (2003).

[11] Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 429, 593 S.E.2d 462, 469 (2004).

[12] Cf. Fraternal Order of Police v. South Carolina Dep't of Revenue, 352 S.C. 420, 574 S.E.2d 717 (2002) (applying rational basis standard, not heightened scrutiny, to equal protection challenge of revenue statutes dealing with bingo).

[13] Sunset Cay, 357 S.C. at 428, 593 S.E.2d at 469.

reasonable basis.[14] Only "irrational and unjustified classifications" are barred.[15]

"A municipal ordinance is a legislative enactment and is presumed to be constitutional."[16] "The burden is upon the taxpayer to prove unconstitutionality beyond a reasonable doubt."[17] The burden requires the attacker to negate every conceivable basis that might support it.[18] The reasonableness of an ordinance is a question of law for the court to decide unless there is a controversy about the facts of the case, which must be decided by a jury.[19]

In the current case, the City imposes a business license fee on "[l]essors of non-residential buildings (with gross rental income of $12,000.00 or more)." Thus, the City has created two classes of commercial landlords: (1) those utilizing commercial property for their own businesses, so that those businesses are their source of income, and (2) those who are renting property to third parties, so that the rental fees generated are their source of income.

In finding these two groups are not similarly situated and upholding the City's imposition of a business license fee on Holcombe's rental income, Special Circuit Court Judge Curtis L. Coltrane reasoned as follows:

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[14] Ward v. Town of Darlington, 183 S.C. 263, 274, 190 S.E. 826, 831 (1937).

[15] In re Luckabaugh, 351 S.C. at 147, 568 S.E.2d at 351.

[16] Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991).

[17] Id.

[18] Id.

[19] Ward, 183 S.C. at 270, 190 S.E. at 829.

> A business owner who rents his own property to himself is not in the business of renting property, but rather is in whatever business he operates from within the property. The business/property owner does not offer his property for rent in the general market. The business owner pays a business license fee on the business he actually operates. A commercial landlord, on the other hand, operates no business from within the property he leases, and pay[s] no business license fee on the businesses operated from within the property. The commercial landlord does pay a business license fee on the business he actually operates, that being the leasing of real property on the open market.

We agree with the circuit court's reasoning and conclude there is a rational and reasonable basis for the City's classifications. As noted by the circuit court, a property owner who uses commercial property for his own business is not in the "business" of renting commercial property, but rather, is in whatever business he actually operates on the property. In this case, Holcombe operated an optometry business on the premises he actually occupied. On the other hand, a property owner renting commercial property to third parties is in the business of renting commercial property. Commercial landlords renting to third parties, as a class, are treated alike and equally in these circumstances.[20] Based on the foregoing, we hold the challenged ordinance as applied is not plainly arbitrary and does not violate Holcombe's equal protection rights.[21]

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[20] See Ed Robinson Laundry & Dry Cleaning, Inc. v. South Carolina Dep't of Revenue, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003) ("A class may be constitutionally confined to a particular trade."); Pee Dee Chair Co. v. City of Camden, 165 S.C. 86, 162 S.E. 771 (1932) (stating "business," as used in ordinances requiring persons engaged in a "business" to obtain a license, implies continuity or custom).

AFFIRMED.

HEARN, C.J., and ANDERSON, J., concur.

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[21] See Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 576, 524 S.E.2d 404, 408 (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 any reasonable hypothesis to support it."); Eli Witt Co. v. City of West Columbia, 309 S.C. 555, 425 S.E.2d 16 (1992) (holding ordinance imposing business license tax upon the gross income of businesses did not contain an arbitrary classification where it exempted businesses paying a similar tax on that income to another city; all businesses paying a similar tax are treated alike and the classification is reasonably related to the purpose of avoiding duplicative taxation); see also Ponder v. City of Greenville, 196 S.C. 79, 12 S.E.2d 851 (1941) (noting legislation does not deny equal protection merely because it is specific or limited to a particular class and holding statute providing wholesalers delivering goods to retailers in any municipality shall not be charged a business license tax unless they maintain a warehouse within the municipality is not arbitrary and capricious as those operating within the municipality receive advantages and for such privilege they should pay a license tax).

ANDERSON, J.: Dan F. Williamson and Dan F. Williamson and Company (collectively, "Williamson") appeal from the trial court's award of attorney's fees to Alfred C. Middleton. Williamson argues that Middleton is not entitled to attorney's fees, or in the alternative, that the criteria for awarding attorney's fees were not met in this case. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

For several years, Middleton worked for Williamson as a commissioned salesman. When Middleton quit working for Williamson, he was due a commission for having sold yarn pallets to one of Williamson's customers. Middleton and Williamson disagreed as to the amount of commission due, and Williamson never paid Middleton any commission, even though it acknowledged owing him $906.62.

After leaving his employment with Williamson, Middleton began working for Peninsula Plastics, Inc., one of Williamson's pallet suppliers. Middleton continued to seek the commission Williamson owed him, and sought assistance from his present attorney. Middleton and his counsel are personal friends, and counsel previously had represented Middleton in less-complicated matters without charge. Middleton's attorney agreed to help with the claim for commission, and the two were to discuss a fee at the end of the case.

Williamson initially was represented by Jordan & Clardy, LLC. Middleton's attorneys informed Williamson that they had a complaint drafted and were ready to sue in order to recover the unpaid commission. Williamson's attorney requested that Middleton refrain from acting on the drafted complaint until he could speak with his client. Middleton agreed, and two days later, Williamson filed a complaint against Middleton, alleging causes of action for fraud, constructive fraud, breach of fiduciary duty, and violation of the South Carolina Unfair Trade Practices Act. Middleton filed an answer, denying the allegations and counterclaiming for commissions

owed and sanctions under the South Carolina Frivolous Proceedings Act. Approximately one month prior to trial, Williamson hired its current counsel.

Of Williamson's claims against Middleton, only the cause of action for breach of fiduciary duty went to the jury. The jury returned a verdict in favor of Middleton on that cause of action and found in favor of Middleton on his counterclaim for unpaid commission, awarding him $906.62 in actual damages.

The trial judge, Judge Pyle, ruled Middleton was entitled to attorney's fees, but asked the parties to attempt to determine the amount of attorney's fees themselves. In the event they could not agree to an amount, Judge Pyle explained he would set the amount for them. The parties could not come to a consensus on the amount of attorney's fees, and Middleton petitioned the court for assistance. Judge Miller awarded Middleton $35,000 in attorney's fees. In an unpublished opinion, Williamson v. Middleton, 2005-UP-011 (S.C. Ct. App. filed January 11, 2005), this Court found that Judge Pyle had retained exclusive jurisdiction over the matter. We therefore reversed Judge Miller's award and remanded the issue of attorney's fees for Judge Pyle's consideration.

At the hearing before Judge Pyle, Williamson argued Middleton was not entitled to attorney's fees because (1) he was not the prevailing party; (2) the bill Middleton's counsel presented documenting over $100,000 worth of work listed hours spent on claims other than the unpaid commission claim for which attorney's fees are allowed; and (3) the amount of fees Middleton's counsel requested, $35,000, far exceeded the $906.62 verdict. Williamson further maintained Middleton did not incur any fees because when Middleton's counsel was deposed, he admitted there was no fee agreement between him and Middleton.

Judge Pyle acknowledged that Middleton and his attorney had not entered into a formal, written fee agreement, but relied instead "on their long-standing personal relationship and mutual agreement to determine an appropriate fee for services at the conclusion of this matter." The judge found such an agreement did not preclude attorney's fees. Accordingly,

Judge Pyle awarded Middleton $35,000 in attorney's fees. Williamson filed a Rule 59(e), SCRCP, motion, which was denied.

STANDARD OF REVIEW

There must be sufficient evidence in the record to support each of the six factors analyzed for an award of attorney's fees. See Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998). "On appeal, absent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact." Blumberg v. Nealco, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993).

The interpretation of a statute is not a finding of fact. Thompson v. Ford Motor Co., 200 S.C. 393, 21 S.E.2d 34 (1942). "The issue of interpretation of a statute is a question of law for the court." Jeter v. S.C. Dep't of Transp., Op. No. 26168 (S.C. Sup. Ct. filed June 19, 2006) (Shearouse Adv. Sh. No. 23 at 43) (citing Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d (1991); see also Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005) ("The determination of legislative intent is a matter of law.") (citations omitted); Eldridge v. City of Greenwood, 331 S.C. 398, 417, 503 S.E.2d 191, 200 (Ct. App. 1998) ("[T]he interpretation of a statute is a matter of law."). See, e.g., Carolina Power & Light Co. v. Town of Pageland, 321 S.C. 538, 471 S.E.2d 137 (1996); Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996); Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996).

LAW/ANALYSIS

Williamson first argues Middleton is not entitled to attorney's fees because he does not meet the requirements of section 39-65-30 of the South Carolina Code. Specifically, Williamson points out that this statute only applies to sales representatives who seek to recover commissions on

"wholesale" sales, and the commission awarded to Middleton was from a sale made to the ultimate consumer. We find this issue is not preserved for our review.

Initially, we note that the arguments Williamson made to Judge Pyle on this issue are not reflected in the record on appeal. Williamson did not advance this argument at the hearing before Judge Pyle, and although Williamson's counsel refers to a memorandum she filed in opposition to Middleton's request for attorney's fees, that memorandum was not included in the record on appeal. See Taylor v. Taylor, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review."). We acknowledge, however, that Judge Pyle addressed the argument in his order awarding attorney's fees, suggesting the argument was set forth in Williamson's memorandum. In the order, Judge Pyle found Williamson's argument that Middleton was not entitled to attorney's fees and costs pursuant to section 39-65-30 came too late because during trial, Williamson never objected to the jury instructions referencing section 39-65-30, nor did Williamson challenge Judge Pyle's initial ruling that Middleton was entitled to attorney's fees.

In its brief to our court, Williamson argues that "[e]ven though the jury returned a verdict . . . that awarded Middleton $906.62 for unpaid commissions, this recovery was sought on alternate grounds, both pursuant to § 39-65-30 and § 41-10-10." In so arguing, Williamson implies the jury's award was based on a statute other than section 39-65-30. Williamson further contends that its argument on this issue is timely because "the request for attorney fees is predicated on entirely different factors than was the request for commissions." From the record before us, there is no indication this specific argument was ever made to the trial court, either prior to the order awarding attorney's fees or in Williamson's motion for reconsideration. Thus, the issue is not preserved for review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); see also Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct.

App. 2005) ("'Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'") (quoting I'On, L.L.C v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)); Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

Next, Williamson argues Middleton failed to prove the elements necessary to recover fees. We agree.

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (citing Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989); Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978); Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961)); accord Seabrook Island Property Owners' Ass'n v. Berger, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct. App. 2005). "In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees." Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001) (citing Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997); American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996); Blumberg, 310 S.C. 492, 427 S.E.2d 659; Baron Data, 297 S.C. 382, 377 S.E.2d 296; Dowaliby v. Chambless, 344 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001); Harvey v. South Carolina Dep't of Corrections, 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998); Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990)).

Section 39-65-30 provides:

> A principal who fails to comply with the provisions of Section 39-65-20 is liable to the sales representative in a civil action for:

(Emphasis added.)

Counsel's testimony admits there was no fee agreement with Middleton. Consequently, there is no obligation to pay, and no fees have been incurred.

Hopkins v. Hopkins, 343 S.C. 301, 540 S.E.2d 454 (2000), involved Father's action to recover overpayment of child support and attorney's fees. The court found Father was entitled to reimbursement of child support overpayments, but held he could not recover attorney's fees because his current wife represented him and they did not have a fee agreement. The court began its analysis by noting that Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000), held a pro se litigant could not recover attorney's fees because "a pro se litigant, whether an attorney or layperson, does not become 'liable for or subject to fees charged by an attorney.'" 343 S.C. at 306, 540 S.E.2d at 457. The Hopkins court declared:

> [H]ere, we find no evidence Father actually became "liable for or subject to" attorneys' fees for his attorney/wife's service. There is no contract or fee agreement in the record, nor is there any indication or testimony that Father's wife/attorney has attempted or intends to collect the fees from Father. Accordingly, Father did not prove that he became liable for the fees, such that the family court properly denied Father's request.

343 S.C. at 307, 540 S.E.2d at 457.

The rationale of Hopkins is equally applicable in the instant case. Both Calhoun and Hopkins focused on the litigants' lack of liability for attorney's fees. Here, Middleton's counsel admits Middleton "has no obligation at this point if there is no agreement." There is no agreement; therefore, Middleton owes no obligation to pay, and no fees were incurred. Under these facts the trial judge erred in awarding attorney's fees.

Because we reverse the award of attorney's fees on this ground, we need not address Williamson's arguments that Middleton was not the prevailing party and that the fees awarded were unreasonable.

CONCLUSION

We hold that in South Carolina there must be an agreement between counsel and client in order for a court to award attorney's fees. In the case sub judice, there is unequivocally no agreement to pay attorney's fees. Accordingly, the award of fees is

REVERSED.

CURETON, A.J., concurs.

HEARN, C.J., dissents in a separate opinion.

HEARN, C.J.: Because I believe a party can recover attorney's fees absent a formal agreement, I respectfully disagree with the majority's reversal of the $35,000 award of fees to Middleton. It is well-settled that "[w]here an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by *any* competent evidence." Baron Data Sys. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 296 (1989) (emphasis added). Here, there is evidence supporting the trial court's determination that Middleton and his attorneys had an informal agreement to "determine an appropriate fee for services at the conclusion of this matter." Therefore, I vote to affirm.

As the majority points out, Middleton's lead counsel stated in his deposition:

> [W]e don't have a fee agreement with Mr. Middleton. We talked about this with Mr. Middleton to begin with and we decided that we would try to help him

> collect the monies due him **and at the end of the case, we would talk about a fee**. So we don't have a fee agreement with him. But some day, he might pay us a fee. Right now, he has no obligation at this point if there is no agreement. He might feel a moral obligation. And when we talk at the end of the case, he will have the final say.

(Emphasis added.) While this testimony could be interpreted to mean Middleton would never be required to pay a fee, it also indicates that Middleton and his attorneys would discuss a fee at the end of the case. The trial judge adopted this latter interpretation, and based on our standard of review, I do not believe we can second-guess his conclusion.[1]

Because there was testimony evidencing counsel's intent to discuss a fee with Middleton, I believe this case is easily distinguished from Hopkins v. Hopkins, 343 S.C. 301, 540 S.E.2d 454 (2000). In Hopkins, the supreme court upheld the family court's determination that Husband was not entitled to attorney's fees when he was represented at trial by his attorney/wife. In so doing, the supreme court did not merely rely on a lack of a fee agreement, but also stressed there was no "indication or testimony that [appellant's] wife/attorney intends to collect the fees from [appellant]." Id. at 307, 540 S.E.2d at 457. Here, there was evidence Middleton and his attorney would discuss fees at the conclusion of the case.

The majority finds Middleton did not incur any attorney's fees because he and his attorneys did not have a fee agreement. However, the lack of a formal fee agreement does not preclude an attorney from collecting fees. See Singleton v. Collins, 251 S.C. 208, 210-11, 161 S.E.2d 246, 247 (1968) ("An attorney has a right to be paid for professional services rendered, and where there is no express contract, the law will imply one."). Although the Singleton case is procedurally different from the case at hand, its

[1] If the trial judge had refused to award Middleton fees in the present case, I would vote to affirm that determination also, as there is evidence in the record to support it.

determination regarding attorney's fees is instructive. In Singleton, an attorney filed an action to collect fees after rendering services to a client in a domestic relations action. Despite the lack of a formal contract, the trial court implied a contract and determined the amount of attorney's fees owed. Our supreme court upheld the trial court's decision, noting: "Whether the services were rendered, and their value, are matters of fact to be decided . . . by the court below, and no appeal lies therefrom if the findings of fact are supported by any competent evidence." Id. at 211, 161 S.E.2d at 247.

Although Singleton involves the collection of attorney's fees from a client rather than an opposing party, it illustrates that the lack of a formal agreement is not fatal to an attorney's claim for fees. Here, the trial judge was not precluded from awarding attorney's fees simply because Middleton and his attorneys lacked a written agreement. Rather, so long as there was evidence Middleton's attorneys intended to collect a fee, the trial judge had discretion to award the fee. Not only did Judge Pyle find there was such evidence, but Judge Miller, whose ruling was reversed for lack of subject matter jurisdiction, found an informal agreement existed as well. Because there is evidence in the record to support the findings of these two outstanding trial judges, I vote to affirm their determination that a fee had been incurred.

In addition to its argument that Middleton did not incur attorney's fees, Williamson also argues Middleton failed to prove the other elements necessary to recover fees, or in the alternative, that the fees awarded were unreasonably high. I disagree.

When awarding attorney's fees, the trial court must consider the following six factors: (1) the nature, extent and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. Baron Data Sys, Inc., v. Loter, 297 S.C. at 384-85, 377 S.E.2d at 297. "Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by *any* competent evidence." Id. at 384, 377 S.E.2d at 296

(emphasis added). Here, Judge Pyle made specific findings on each of the six elements, and there is evidence in the record supporting those findings.

Williamson also argues that even if we find Middleton was entitled to attorney's fees, the amount of attorney's fees awarded was unreasonable in light of the beneficial results Middleton received. However, "there is no requirement that attorney's fees be less than or comparable to a party's monetary judgment." Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998). Furthermore, although a $35,000 attorney's fee may initially seem high for a cause of action for unpaid commissions, especially when the action resulted in a $906.62 verdict, under the peculiar circumstances of this case, there was evidence in the record supporting the trial judge's finding that $35,000 was a reasonable amount to award. First and foremost, it is important to note that Middleton's attorney did not institute this lawsuit. Rather, in the best tradition of the profession, he attempted to settle this matter with Williamson, and at the specific request of opposing counsel, Middleton delayed bringing suit. However, within a matter of days, Williamson filed suit against Middleton. In order to litigate his cause of action for unpaid commissions, Middleton had to defend himself against Williamson's claim against him for breach of fiduciary duty, which is an affirmative defense for unpaid commissions. Additionally, Middleton submitted affidavits demonstrating how Williamson employed dilatory tactics prior to the trial of this case, such as persuading Middleton to withhold from filing its complaint so that it could be the first file a complaint, cancelling depositions on the afternoon before or the morning of their scheduled time, and submitting incomplete responses to Middleton's requests for discovery.[2] Based on the detailed bills submitted by Middleton's attorneys and the difficulties they faced in trying their case, I find competent evidence supports the trial judge's award of $35,000 in attorney's fees. Accordingly, I vote to affirm the trial court's order.

[2] Williamson's current counsel was not yet involved in this case when the complaint was filed, nor was she involved when these pre-trial delays occurred.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Diane Ardis & William David Ardis, Appellants,

v.

Edward L. Sessions, D.C., Respondent.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4136
Heard October 6, 2005 – Filed July 10, 2006

REVERSED AND REMANDED

Ellis I. Kahn and Justin S. Kahn, both of Charleston, for Appellants.

Charles E. Hill and R. Hawthorne Barrett, both of Columbia, for Respondent.

HEARN, C.J.: In this appeal of a chiropractic malpractice action, Diane B. Ardis and William David Ardis raise issues concerning the exclusion of evidence, jury instructions, and the trial court's refusal to strike the cross-examination of Diane Ardis's treating physician based on ex parte contact with the opposing side. We reverse and remand.

FACTS

In their complaint filed June 1, 2001, Diane and William Ardis (collectively "Ardis") alleged that Edward L. Sessions negligently injured Diane by performing spinal manipulations on February 19, 1996. Ardis claims Sessions's negligence caused a ruptured or herniated disk in Diane's back, an increase in the severity of her initial injury, and ultimately the need for back surgery. Sessions denied that he performed a manipulation on that date. His notes indicate Diane's disk was herniated when she fell from a ladder prior to coming to his office on February 19.[1] At trial, Sessions testified that instead of a manipulation that day, he used a less invasive treatment, which would have been insufficient to herniate Diane's disk.

At an in camera hearing, Sessions, who served as a municipal court judge for the City of Hanahan, moved to prevent Ardis from making an inquiry into his public reprimand by the South Carolina Supreme Court. In 2000, the Sessions was reprimanded for acts of judicial misconduct, which included making and directing the making of false entries in judicial records. See In re Sessions, 342 S.C. 427, 538 S.E.2d 1 (2000). Sessions also moved in limine to exclude any mention of his billing practices in regard to his different fee schedules for individuals and insurance carriers. The trial court granted Sessions's motions.

At trial, Ardis objected to the following instructions given by the trial court regarding the applicable standard of care:[2]

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[1] Ardis claims that she received spinal manipulations merely to limber up for an upcoming ski trip and that she mentioned falling off of a ladder in jest.

[2] Ardis also objected to additional elements of the charge and requested an additional charge on spoliation of evidence.

> The law does not require of him absolute accuracy either in his practice or his judgment . . . It does not even require of him the utmost degree of care and skill of which the human mind is capable.
>
> I instruct you that a physician is not an insurer of a cure or even of a beneficial result; thus, the mere fact that a treatment is not beneficial or that it is even harmful will not of itself raise a presumption of negligence . . . I instruct you that a bad result of the failure to cure is not by itself insufficient to raise an inference or a presumption of negligence on the part of a physician.
>
> I charge you that a physician is not ordinarily liable for making an incorrect diagnosis where it is made in good faith and there is reasonable doubt as to the nature of the physical conditions involved or as to what should be done in accordance with recognized authority in good current practice or where it is made in good faith on observation of the patient.

The jury returned a verdict for Sessions. The trial court denied Ardis's motion for JNOV, or in the alternative for a new trial. This appeal followed.

LAW/ANALYSIS

Ardis contends the trial court erred in instructing the jury regarding the applicable standard of care for a medical malpractice claim. Specifically, Ardis argues the instruction given by the trial court raised the standard to a subjective standard, meaning that Ardis's burden of proof would require a showing that any error of judgment was made in bad faith. We agree. [3]

[3] Because we reverse on this issue, we decline to address Ardis's remaining arguments. See Whiteside v. Cherokee County School Dist. No. One, 311

> A physician is not ordinarily liable for making an incorrect diagnosis where it is made in good faith and there is reasonable doubt as to the nature of the physical condition involved or as to what should be done in accordance with recognized authority and good current practice, or where it is made in good faith observation of a patient.
>
> A physician cannot be held liable for a mere error in judgment.
>
> When a physician exercises ordinary care and skill in keeping with recognized and proven methods he is not liable for the result of a mere mistake of judgment or for a bad result which does not occur because of any negligence on his part.

McCourt, 318 S.C. at 306, 457 S.E.2d at 606.

In affirming the refusal to give the charge requested, the supreme court stated that such a jury instruction impermissibly implied "to the jury that an error in judgment is actionable only if made in bad faith." Id. at 306, 457 S.E.2d at 606. The court reasoned that this would "impose an unrealistic burden on the plaintiff to prove the doctor's judgment was rendered with less than good faith." Id.

Like the proposed instruction in McCourt, the trial court's instruction in this case impermissibly implied to the jury that any error in judgment by Sessions would be actionable only if rendered in bad faith. Such an implication prejudiced Ardis because it imposed the same "unrealistic burden" disapproved of in McCourt.

CONCLUSION

For the reasons stated herein, the trial court's decision is

REVERSED and REMANDED.

SHORT, J. concurs.

BEATTY, J. dissents in a separate opinion.

BEATTY, J. (dissenting): I respectfully dissent. When reviewing a jury instruction for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Davis v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). "If the charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Id.

The majority rests its decision on a comparison of a small portion of the trial court's instructions to a substantial part of the requested instructions in McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995).

In McCourt, the trial court's decision not to give requested instructions was affirmed. Although the court did not identify any specific offending jury charge requested, the court noted that the requested charges may be confusing to the jury. The court stated, "Some of the charges imply to the jury that an error in judgment is actionable only if made in bad faith. Such an instruction would impose an unrealistic burden on the plaintiff to prove the doctor's judgment was rendered in less than good faith." McCourt, 318 S.C. at 306, 457 S.E.2d at 606. Although the phrase "good faith" was used in a requested charge on making a diagnosis, the phrase was never actually used in an "error in judgment" charge in McCourt. Rather, a specific charge on "error in judgment" implied that bad faith was required to find the doctor liable.[4] In my view, the McCourt decision is based upon the full

[4] This charge provided:

> Request # 5: A physician cannot be held liable for a mere error in judgment. Where, according to standard medical practice, the diagnosis and course

consideration of the jury instructions in total, not the mere use of the phrase "good faith."

Although similar, in part, the jury instruction here is significantly different from McCourt. Here, the trial court's "error in judgment" charge stated:

> I further charge you that when there is more than one recognized method of treatment, the physician is at liberty to follow any such recognized treatment. There may be more than one school of thought as to the proper treatment for a particular illness. In cases where there is a difference of opinion between competent medical authorities, a physician will not be liable if, in the exercise of his judgment, he followed a course of treatment supported by reputable, respectable and reasonable medical experts.

Moreover, considering the trial court's instructions here as a whole, they are substantially correct, reasonably free of error, and do not tend to confuse the jury as to what is required to establish liability. The trial court gave the following instruction:

> I instruct you that when a chiropractor undertakes to treat a patient, the law requires him to use reasonable care and diligence in the exercise of his skill and in

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> of treatment involved are matters to be subjected to the judgment of the physician, a physician must be allowed the exercise of that judgment and he cannot be held liable if in the exercise of the judgment he has made a mistake as to the course of treatment to be taken.

McCourt v. Abernathy, 318 S.C. 301, 306, 456 S.E.2d 603, 606 (1995).

the application of his learning to accomplish the purpose for which he was employed. The chiropractor is required by law to use his best judgment in exercising his skill and applying his knowledge. And the law would, therefore, hold a chiropractor liable for any injury to his patient resulting from want or lack of the requisite or required knowledge or skill or the omission to exercise reasonable care or the failure to use his best judgment. Therefore, a chiropractor's duty in treating his patients is to be measured by both his skill and diligence.

If, by lack of the required skill, a chiropractor fails to properly treat his patient so that the patient is injured thereby or his condition is made worse than it would have been otherwise, then the chiropractor would be liable for any injury proximately caused to the patient. He would also be liable if having the required or requisite skill, he negligently fails to use it or if he is not as careful and diligent in the treatment to the extent that he should be, which is to say as careful and diligent as a physician of ordinary prudence would have been under the same circumstances.

In a case such as this, negligence is the failure to do that which an ordinarily, careful and prudent chiropractor would do under the same circumstances; or, it is the doing of that which an ordinarily prudent chiropractor would not have done under the existing circumstances.

Negligence on the part of a chiropractor is not presumed, but must be affirmatively proved. I told you earlier that the burden of proof was on the

plaintiffs to prove their case by the preponderance or the greater weight of the evidence. In the absence of evidence to the contrary, it will be presumed that a chiropractor has fully discharged his duty to the patient.

The burden of proof of negligence, proximate cause and injury in a malpractice case is on the plaintiff throughout. In order to establish liability in a malpractice case, the plaintiff must prove by a preponderance of the evidence the following things: what the recognized and generally accepted standards, practices and procedures which would be exercised by competent chiropractors under similar circumstances: the physician in question negligently deviated from the generally accepted standards practices and procedures; such negligent deviation from the generally accepted standards, practices and procedures was a proximate cause of the plaintiff's injury; and that the plaintiff was injured.

I instruct you that a physician is not an insurer of a cure or even of a beneficial result; thus, the mere fact that a treatment is not beneficial or that it is even harmful will not of itself raise a presumption of negligence.

Injury and suffering are not alone sufficient to support a cause of action for malpractice unless it is shown by the greater weight of the evidence that the physician did not possess the degree of skill common to other physicians or that he failed to use such skill in the treatment of the patient.

I instruct you that a bad result or the failure to cure is not by itself sufficient to raise an inference or a

presumption of negligence on the part of a physician. Thus, if you find that the defendant in this case used due care and skill in treating the patient and that the physician followed recognized medical procedures and despite this, the patient suffered injuries, the fact of injury alone is not evidence of negligence and your verdict in such case should be for the defendant.

I instruct you, Madame Forelady and members of the jury, that you are not permitted to arbitrarily set up a standard of your own in determining whether the defendant's learning skill and conduct fulfilled the duties imposed upon him by law. The standard is that which I have already indicated, that is, did the chiropractor exercise that degree of knowledge, care and skill possessed by members of his specialty in good standing in the same or similar circumstances?

I further charge you that when the opinions of medical experts are relied upon to establish causal connection of negligence to injury, the proper test to be applied is that the expert must, with reasonable certainty, state that, in his professional opinion, the injuries complained of most probably resulted from the alleged negligence of the defendant.

Jurors are to apply the same standards of evaluation of expert witness testimony as applied to other witnesses. It is for the jury to judge the credibility of the expert witnesses, as well as any other witnesses, and to decide what weight, if any, is attached to the expert testimony, as well as the testimony of any other witnesses.

. . .

I further charge you that in considering whether a physician has exercised reasonable judgment in a given case, you must consider such judgment in relationship to the facts as they existed at the time the judgment was made and not in light of what hindsight may reveal.

I further charge you that a mistake in diagnosis of itself will not support a verdict in a malpractice suit. I charge you that a physician is not ordinarily liable for making an incorrect diagnosis where it is made in good faith and there is reasonable doubt as to the nature of the physical conditions involved or as to what should be done in accordance with recognized authority in good current practice or where it is made in good faith on observation of the patient and based upon physical evidences and symptoms which would warrant such diagnosis by a reasonably prudent and informed physician.

I further charge you that when there is more than one recognized method of treatment, the physician is at liberty to follow any such recognized treatment. There may be more than one school of thought as to the proper treatment for a particular illness. In cases where there is a difference of opinion between competent medical authorities, a physician will not be liable if, in the exercise of his judgment, he followed a course of treatment supported by reputable, respectable and reasonable medical experts.

I charge you that the question of whether a physician in making a diagnosis deviated from applicable standard of care either by not employing a particular procedure or by not ordering a particular test, is to be