# The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

Act No. 27 of 2005 amends S.C. Code Ann. § 34-31-20 (B) to provide that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. . . . For judgments entered between July 1, 2005, and January 14, 2006, the legal rate shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points." The Act also provides that the Supreme Court of South Carolina shall issue an order confirming the annual prime rate.

The Wall Street Journal for January 3, 2005, the first edition after January 1, 2005, listed the prime rate as 5.25%. Therefore, for judgments entered between July 1, 2005, and January 14, 2006, the legal rate is 9.25% compounded annually.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina

July 27, 2005

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Jennifer R. Cape, Appellant,

v.

Greenville County School District, Respondent.

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

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Opinion No. 26019
Heard June 15, 2005 - Filed August 1, 2005

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**AFFIRMED**

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Jeffrey Alton Phillips, of Phillips Law Firm, of Greenville, for Appellant.

Sean Ashley Scoopmire, of Clarkson Walsh Rheney & Turner, PA, of Greenville, for Respondent.

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**JUSTICE PLEICONES:** This is an appeal from a circuit court order holding that an employment contract for a definite term which contains an at-will termination clause is valid, and granting respondent (School District) summary judgment in this breach of contract suit brought by appellant (Cape), a fired teacher. We affirm.

## FACTS

On December 5, 2001, Cape signed a contract with the School District for the 2001-2002 school year to teach special education. This contract contained the following provision in capital letters:

> THIS IS AN AT-WILL EMPLOYMENT CONTRACT. IT MAY BE TERMINATED AT ANY TIME FOR ANY REASON OR FOR NO REASON BY EITHER EMPLOYER OR EMPLOYEE. EMPLOYEE AGREES THAT THERE EXISTS NO RIGHT TO CHALLENGE TERMINATION OF THIS CONTRACT BY EMPLOYER. EMPLOYEE FURTHER AGREES THAT THIS IS A NONRENEWABLE CONTRACT AND THERE EXISTS NO RIGHT TO CHALLENGE ANY FAILURE TO CONTINUE THIS CONTRACT BEYOND THIS TERM.

It is undisputed that Cape began teaching on January 2, 2002, and was terminated on February 8, 2002, with her last day in the classroom being February 22, 2002.[1]

## ISSUE

> Did the trial court err in granting School District summary judgment?[2]

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[1] Cape was hired for less than 152 days and was therefore not classified as a contract teacher. See S.C. Reg. 43-205.1 IX (Supp. 2004); compare S.C. Code Ann. § 59-26-40 (Supp. 2004) (different teacher contract levels explained).

[2] While Cape raises a number of issues on appeal, we address only this novel question. The rulings on the other issues are affirmed pursuant to Rule 220(b)(1), SCACR.

## ANALYSIS

The circuit court granted School District summary judgment, finding that under the express terms of her contract Cape was an at-will employee, and therefore had no breach of contract cause of action based on her termination. We agree.

Cape argues the judge erred in finding her contract was at-will. She correctly points out that decisions from this Court have indicated an employment contract for a specific term cannot also be at-will because these terms are mutually exclusively. E.g., Stiles v. American Gen. Life Ins. Co., 335 S.C. 222, 516 S.E.2d 449 (1999); Shivers v. John H. Harland Co., 310 S.C. 217, 423 S.E.2d 105 (1992); Young v. McKelvey, 286 S.C. 119, 333 S.E.2d 566 (1985). School District counters with the accurate observation that these decisions all involved contracts of indefinite duration that provided for pre-termination notice, and further observes that Cape's contract is not of indefinite duration but for a definite term, contains no such notice provision, and includes the "at-will" provision recited above. We agree with School District that none of our previous opinions have decided the precise issue presented here.

Cape relies heavily on this statement from Young v. McKelvey, which is a quote from a Maryland decision:

> An employment contract may be either for a stated term or at will. When the contract is at will, it may be terminated by either party at any time. However, when the contract is for a stated term, it may only be terminated before the end of the term by just cause….
>
> Chai Mgmt., Inc. v. Lubowitz, 50 Md. App. 504, 439 A.2d 34 (1982).

In Chai, the contract was of indefinite duration but included a provision that, "This contract can be terminated by either party with a written sixty day notice." Similarly, the contract at issue in Young v. McKelvey was for an

indefinite term, but contained a provision that it could be cancelled upon 60 days written notice by either party. The Court held this notice provision converted the contract from one terminable at will, that is, at anytime for any reason or no reason, to one of sixty days duration upon the giving of notice. Thus, the employee could not be terminated until 60 days after the giving of notice unless just cause for the termination existed. Young v. McKelvey, *supra*. The notice provision altered the parties' absolute right to terminate from "at will" to "upon the giving of notice."

The contract in Shivers v. John C. Harland, Inc. was also for an indeterminate period, but specifically provided for immediate discharge for cause, or for "voluntary termination" by either party upon 15 days written notice. This contract, like that in Young v. McKelvey, altered the right to terminate from at-will to upon the giving of the stated notice. The most recent decision, Stiles v. American Gen. Life Ins. Co., is instructive in that it refers to contracts such as those at issue in it and in Shivers as "at-will contracts with a notice [of termination] provision." These cases did not involve the type of employment contract at issue here: "a definite term contract with an at-will termination provision."

An employment contract for an indefinite term is presumptively terminable at will, while a contract for a definite term is presumptively terminable only upon just cause. These are mere presumptions, however, which the parties can alter by express contract provisions. For example, our employee handbook decisions have involved indefinite duration contracts where the at-will termination presumption has been altered by language used in the handbook. E.g., Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). In the three decisions cited by Cape, the parties had altered the at-will presumption by including a notice of termination clause. This case presents a similar situation: the parties have, by an express contract provision, altered the presumption that employment for a definite term is terminable only upon just cause, and replaced that presumption with an at-will termination clause. Cf., Prescott v. Farmers Tele. Co-op., Inc., 335 S.C. 330, 516 S.E.2d 923 (1999) ("Of course, an employer and employee may choose to contractually alter the general rule of employment at will and restrict their freedom to discharge without cause or to resign with impunity").

The judge correctly held this employment contract, while for a definite term, was terminable at will.

## CONCLUSION

The order granting School District's motion for summary judgment is

**AFFIRMED**.

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Willie May David and J.D. David, Appellants,

v.

McLeod Regional Medical Center, Dr. Ken Brusett, Individually, Pee Dee Cardiovascular Surgeons, Pee Dee Pathology, and Dr. H. K. Habermeier, Individually, Respondents.

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

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Opinion No. 26020
Heard February 1, 2005 - Filed August 1, 2005

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**AFFIRMED**

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Eduardo K. Curry and Carl B. Grant, both of Curry Counts & Huger, of Charleston; and Jayne G. Helm, of Mt. Pleasant, for Appellants.

J. Rene Josey and Tiffni D. Shealy, both of Turner Padget Graham & Laney of Florence; Marian H. Lee and Mark W. Buyck, Jr., both of Wilcox Buyck & Williams of Florence; and Robert H. Hood, D. Nathan Hughey, and Deborah H.

A final pathology report, issued three days after the surgery, concluded that the lesion was not cancerous, but rather, pulmonary endometrioma.[3]

Appellant filed an action alleging medical malpractice, claiming that she suffers from several ailments as a result of the surgery, including chest and back pain, shortness of breath, and anxiety.

Appellant named the following parties as defendants: (1) the hospital where the surgery took place (McLeod Regional Medical Center); (2) the thoracic surgeon who conducted the surgery (Dr. Brusett); (3) Dr. Brusett's practice group (Pee Dee Cardiovascular Surgeons); (4) the pathologist who provided the preliminary diagnosis of "probable pulmonary blastoma" (Dr. Habermeier); and (5) Dr. Habermeier's practice group (Pee Dee Pathology).

Respondents made three separate motions for summary judgment,[4] which the trial judge granted in favor of Respondents. Appellant now raises the following issues for review:

I. Did the trial court err in granting Respondents' motions for summary judgment?

II. Did the trial court err in holding that McLeod Regional Medical Center was not vicariously liable for Appellant's alleged damages?

## LAW/ANALYSIS

### I. Summary Judgment

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[3] Endometrioma is the irregular growth and hardening of tissue known as the endrometrius, which usually occurs in the lining of the uterus.

[4] Respondents' summary judgment motions were grouped in the same manner in which Respondents submitted briefs to this Court.

Appellant argues that the trial court erred in granting summary judgment in favor of Respondents.[5] We disagree.

When reviewing an order granting summary judgment, the appellate court applies the same standard applied by the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002).

As the trial court recognized, the rules of civil procedure dictate whether or not an affidavit establishes an issue of fact sufficient to defeat a motion for summary judgment. Rule 56(e), SCRCP provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show

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[5] Appellant argues that the affidavit of Dr. Frist creates an issue of fact. In the affidavit, Dr. Frist opines that the treating pathologist who diagnosed Appellant (Dr. Habermeier) and the treating surgeon (Dr. Brusett) were negligent for failure to properly communicate about Appellant's diagnosis. Initially, Appellant named only one expert in her response to interrogatories: Dr. Hossein Tirgan, an oncologist in the state of New Jersey. Dr. Tirgan, by way of affidavit and deposition, provided an opinion that all of the Respondents were negligent in some manner. However, because Appellant does not mention any of Dr. Tirgan's expert testimony or other allegations of negligence by Dr. Frist in her brief, we must assume Appellant has abandoned her argument that these additional expert opinions provide a genuine issue of material fact for which an order granting summary judgment may be overturned. *See State v. Hornsby*, 326 S.C. 121, 125, 484 S.E.2d 869, 871 (1997) (holding an issue not argued in the brief is deemed abandoned and precludes consideration on appeal). Therefore, we focus solely on Dr. Frist's affidavit to determine whether summary judgment was proper.

affirmatively that the affiant is competent to testify as to matters stated therein." Rule 56(e), SCRCP.

In a medical malpractice action, a plaintiff must provide the following to establish an issue of fact:

> (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendants' field of medicine under the same or similar circumstances; and (2) the defendants departed from the recognized and generally accepted standards.

*Pederson v. Gould*, 288 S.C. 141, 143-44, 341 S.E.2d 633, 634 (1986); *Cox v. Lund*, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985). In addition, the plaintiff must show that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages. *Green v. Lilliewood*, 272 S.C. 186, 193, 249 S.E.2d 910, 913 (1978).

A physician commits malpractice by not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing acting in the same or similar circumstances. *Durham v. Vinson*, 360 S.C. 639, 650-51 62 S.E.2d 760, 766 (2004). To create a question of fact in a medical malpractice case, the plaintiff must provide expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge, so that no special learning is required to evaluate the conduct of the defendant. *Peterson*, 288 S.C. at 143, 341 S.E.2d at 634.

In the present case, Appellant relies solely on the affidavit of pathologist Dr. Brian Frist as creating a genuine issue of material fact.[6] The

[6] Appellant named Dr. Frist as an expert only two days before the summary judgment hearing. Respondents had no opportunity to depose Dr. Frist. As a

trial court ruled that Dr. Frist's affidavit failed to establish that he is familiar with the standard of care from which the Respondents allegedly deviated. We agree.

We hold that the trial court properly found Dr. Frist's affidavit did not create a question of fact as to the alleged malpractice of Dr. Brusett and Pee Dee Cardiovascular. In his affidavit, Dr. Frist's sole opinion as to Dr. Brusett's alleged malpractice is that Dr. Brusett failed "to make sure that he communicated to the pathologist his thoughts for treatment, so that the pathologist was aware of the treatment plan of the surgeon."

First, Dr. Frist incorrectly relies on the assumption that the pathologist would have diagnosed Appellant's tumor differently had Dr. Brusett "communicated his thoughts for treatment" before Appellant's tumor was tested. Dr. Frist's affidavit fails to explain how Brusett's post-diagnosis treatment would have affected the pathologist's initial diagnosis of the tumor. As a result, there is no evidence that Dr. Brusett's failure to communicate Appellant's possible treatment options with the pathologist was the proximate cause of Appellant's injuries. The dissent asserts that had the pathologist been aware that Dr. Brussett intended to immediately remove the affected portion of the lung upon a diagnosis of pulmonary blastoma, then the pathologist *might* have qualified or sought to confirm his preliminary diagnosis. The dissent's argument disregards the necessity that a surgeon be able to rely upon inter-operative diagnoses to determine a patient's proper treatment. Moreover, the ruling argued by the dissent would set the precedent that a speculative hypothetical may serve as the standard of care in an action for medical malpractice.

Second, Appellant provides no evidence that her expert, Dr. Frist, is familiar with the standard of care that Dr. Brusett allegedly breached. Dr. Frist is a pathologist not a cardio-thoracic surgeon. Nothing in Dr. Frist's affidavit, or in the record, suggests it was unreasonable for Dr. Brusett to

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result, the only evidence that the trial court had to consider was Dr. Frist's affidavit.

extract the lesion after receiving a diagnosis of "probable pulmonary blastoma."

Third, we find that Dr. Frist's affidavit failed to establish that he is familiar with the standard of care that Dr. Habermeier and Pee Dee Pathology allegedly breached. According to his affidavit, Dr. Frist is board certified in anatomical and clinical pathology and is the Chief Medical Examiner for Cobb County Georgia. The affidavit, however, does not provide that Dr. Frist is familiar with the standard of care for inter-operative diagnoses. While we may infer that Dr. Frist is familiar with the standard of care a pathologist must exercise as a medical examiner, we cannot infer that every pathologist is familiar with the standard of care for every known caveat of pathology.

The dissent contends that this ruling requires that for a doctor to be qualified as an expert, the doctor must practice in the same sub-specialty as the defendant doctor. We disagree. A doctor need not practice in the particular area of medicine as the defendant doctor to be qualified to testify as an expert. *Creed v. City of Columbia*, 310 S.C. 342, 345, 426 S.E.2d 785, 786. (1993). However, regardless of the area in which the prospective expert witness practices, he must demonstrate to the court that he is familiar with the applicable standard of care for the medical procedure under scrutiny before he may be qualified as an expert witness. Again, despite Dr. Frist's qualifications, his affidavit does not provide that he is familiar with the standard of care he alleges was breached. Therefore, we hold that the trial court did not err in granting summary judgment in favor of Respondents, Brusett, Pee Dee Cardiovascular, Habermeier and Pee Dee Pathology.

## II. Liability of McLeod Regional Medical Center

Appellant argues that McLeod Regional Medical Center (hospital) had a nondelegable duty to provide competent pathology care to Appellant and therefore was vicariously liable for Dr. Habermeier's preliminary misdiagnosis that resulted in unnecessary surgery. Because we hold that the trial court properly granted summary judgment in favor of Dr. Habermeier and Pee Dee Pathology, this issue is moot. *See Rookland v. Atlanta & C. Air*

*Line Ry. Co.*, 84 S.C. 190, 192, 65 S.E. 1047, 1049 (1909) (a judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause because the principal's liability is predicated upon the agent's liability).

## CONCLUSION

For the foregoing reasons, we affirm summary judgment in favor of Respondents.

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

**JUSTICE PLEICONES**: I respectfully dissent from the majority's decision to affirm the grant of summary judgment to the Respondent doctors and their practices, but join the decision to affirm the grant to Respondent McLeod. The majority cites three reasons why Dr. Frist's affidavit was insufficient to establish the standard of care for purposes of summary judgment. As explained below, I find the affidavit adequate.

First, the majority contends that Dr. Frist did not explain how Dr. Brusett's treatment plan would impact Dr. Habermeier's diagnosis. As I understand the affidavit, the assertion is that if the pathologist had been aware that Dr. Brusett intended to immediately remove the affected portion of the lung if the intra-operative diagnosis was pulmonary blastoma, then Dr. Habermeier might have qualified or sought to confirm his preliminary diagnosis.[7] In my opinion, there is no proximate cause gap in the affidavit.

Second, the majority holds that there is nothing in the affidavit to suggest that it was unreasonable for Dr. Brusett to have removed part of the lung upon receiving the blastoma diagnosis. As I understand the Appellants' theory, however, they allege a deviation from the standard of care in the pre-operative communications between the surgeon and the pathologist, not in the surgical decision made upon receipt of the pathology report. In my opinion, this is not a basis upon which to uphold the grant of summary judgment.

Third, the majority holds that Dr. Frist's affidavit is insufficient because while Dr. Frist is a licensed pathologist board certified in Anatomical and Clinical Pathology, nothing in his affidavit states that he is familiar with the standard of care for intra-operative diagnoses. We have here-to-fore not required that medical experts practice in the same area in which they are testifying. E.g., Creed v. City of Columbia, 310 S.C. 342, 345, 426 S.E.2d 785, 786 (1993)("A physician is not incompetent to testify merely because he

[7] Specifically, Dr. Frist asserts Dr. Habermeier deviated from the standard of care, in part, by failing "to properly communicate appropriately to the surgeon his pathological diagnosis and thoughts, to the rareness of his findings, so that the diagnosis could be used for the proper treatment of the patient at that moment."

is not a specialist in the particular branch of his profession involved"). I do not join the majority's decision to require an expert's affidavit to assert expertise in all the specific procedures at issue in the case, but would hold that Dr. Frist's affidavit indicating proficiency in the specialty involved, coupled with the statement " It is my opinion, to a reasonable degree of medical certainty, that each of these Defendants deviated from the acceptable standard of care and were negligent . . . in the following particulars . . . ." is sufficient to establish that he is familiar with the standard of care.

In my opinion, the trial court erred in holding that Dr. Frist's affidavit did not demonstrate that he was familiar with the applicable standard of care. I would therefore reverse the order granting Respondent Brusett and Habermeier summary judgment. I would affirm the grant of summary judgment to McLeod, however, because there is simply no evidence in this record that the Appellants looked to the hospital rather than to individual doctors for Mrs. Davis's care. Osborne v. McLeod Reg. Med. Center, 346 S.C. 4, 550 S.E.2d 319 (2001) (in order to hold hospital vicariously liable for staff negligence, plaintiff must present evidence that she looked to the hospital for care).

**BURNETT, J., concurs.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The Island Packet, Petitioner,

v.

Marvin F. Kittrell, in his official capacity as Chief Judge, Administrative Law Court, Respondent.

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ORIGINAL JURISDICTION

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Opinion No. 26021
Heard March 15, 2005- Filed August 8, 2005

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**REVERSED AND REMANDED**

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Carl F. Muller, of Wyche, Burgess, Freeman & Parham, P.A., of Greenville; Jay Bender, of Baker, Ravenel & Bender, LLP, of Columbia; and John Carroll Moylan, III, of Wyche, Burgess, Freeman & Parham, P.A., of Columbia, for petitioner.

A. Camden Lewis, Keith M. Babcock, and Ariail E. King, of Lewis, Babcock & Hawkins, L.L.P., of Columbia, for respondent.

Clifford O. Koon, Jr., of Moses Koon & Brackett, PC, of Columbia, for the S.C. Department of Labor,

Licensing and Regulation, Board of Medical Examiners.
Robert L. Widener and Celeste T. Jones, of McNair Law Firm, P.A., of Columbia, for Anonymous Physician.

James M. Holly, of Hull, Towill, Norman, Barrett & Salley, P.C., of Aiken, for Amici Curiae The Associated Press, The State-Record Co., Inc., Evening Post Publishing Co., Inc., and the South Carolina Press Association.

William L. Pope, of Pope & Rodgers, of Columbia, for Amici Curiae The Reporters Committee for Freedom of the Press, American Society of Newspaper Editors, Radio-Television News Directors Association, and Society of Professional Journalists.

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**JUSTICE MOORE:** Petitioner, The Island Packet, commenced this action by filing a petition for original jurisdiction. The petition arose from three decisions by the Administrative Law Court (ALC). Island Packet contends the ALC engaged in closed, interlocutory reviews of the Board of Medical Examiner's (Board's) attempts to regulate a physician who may have a serious substance abuse problem. Island Packet requests we require the ALC to issue a written order explaining its decision to close a 2004 review of the Medical Board's order despite Island Packet's requests to be present and to be given an opportunity to object to any attempt to close the proceedings.

We accepted this matter in our original jurisdiction to determine the scope of the ALC's authority to review interlocutory orders in physician disciplinary proceedings and to determine whether the ALC is required to issue an order, making specific findings, to close physician disciplinary matters before the ALC.

## FACTS

The Board issued its first order of temporary suspension against Anonymous Physician[1] on July 31, 2001. In that order, the Board suspended Anonymous Physician's license to practice medicine because it found that since January 1996, the physician had been arrested and charged with driving under the influence on three occasions, leaving the scene of an accident on one occasion, driving to the left of center on one occasion, open container on two occasions, and no driver's license in possession on one occasion. Three days later, the ALC issued an order superseding the order of temporary suspension, finding the Board had not presented competent evidence of a substance abuse problem. The ALC found the affidavit submitted by the Board's investigator was insufficient evidence to support the finding the physician was a danger to the public or suffered an alcohol abuse problem because the charges against him had not resulted in convictions.

On August 15, 2001, the Board issued its second order concerning Anonymous Physician. The second order required the physician to participate in an evaluation to determine whether he suffered from a disability that would render his continued practice of medicine dangerous to the public. A few days later, the ALC held an emergency hearing and superseded the Board's second order based on the reasoning in its first order. In addition, on October 5, 2001, the ALC issued an order directing that all records be sealed until further order of the ALC. The ALC determined that the orders issued by the Board were not final orders and were, therefore, not subject to public disclosure pursuant to S.C. Code Ann. § 40-47-213 (2001).[2]

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[1]The Anonymous Physician has since been ordered to cease the practice of medicine. This order was made public on the Board's website. *See* http://www.llr.state.sc.us/pol/medical.

[2]Section 40-47-213 has since been amended by the Legislature by Act No. 150, § 2 (2005). *See* Note 6 *infra*.

Subsequently, the Board attempted to discipline Anonymous Physician again. On April 26, 2002, it issued a formal complaint against the physician citing his past and current alcohol problems. On May 24, 2004, the Board issued an order placing the physician on temporary suspension. This order was posted on the Board's web site the next day and was disseminated to the media. According to the order, the Board had received information that the physician had "appeared in the emergency room at Hilton Head Medical Center to treat a patient while [he] was impaired. . . . [he] was asked to leave the emergency room and another physician assumed the patient care. . . ."

The order also recites a letter to the Board from the Hilton Head Regional Medical Center's director. The letter advises that the physician was summarily suspended from the medical center on March 16, 2004, due to possible impairment while on call for the emergency department. The order further notes the physician had failed to comply with the recommendations of the Recovering Professionals Program (RPP) and concludes his addiction to alcohol rendered him unfit to practice medicine and that his refusal to cooperate and abide by his agreement with the RPP constituted a serious threat to the public's health, safety, and welfare.

During this time, Island Packet wrote the ALC to request the opportunity to be present at any hearing concerning Anonymous Physician and to object to any attempts to close such a hearing. Notwithstanding Island Packet's requests, by May 26, the order of temporary suspension was removed from the Board's website and replaced with the following statement: "No disciplinary action taken by the Board. This certifies that the above licensee is in good standing." The next day, Island Packet again wrote the ALC and requested production of any order issued by the ALC related to this matter. The ALC did not respond.

Ultimately, Anonymous Physician and the Board resolved the matter and entered into a Consent Order, which provided the Board would dismiss the formal complaint and order of temporary suspension of May 24, 2004. This consent order was approved and signed by the ALC and issued on June

17, 2004. The consent order provided that it was not a final order and that all records were to remain under seal.

## ISSUES

I. What is the scope of authority of the Administrative Law Court to review interlocutory orders in physician disciplinary proceedings?

II. Is the Administrative Law Court required to issue an order setting forth specific findings regarding closure of physician disciplinary proceedings?

## DISCUSSION

### I

Island Packet argues the ALC does not have the authority to review interlocutory matters in physician disciplinary proceedings. We find the Board's orders of temporary suspension and the 2001 order requiring Anonymous Physician to undergo an evaluation were not "final orders" and were not immediately appealable to the ALC.

The 2004 order states, "Respondent's license to practice medicine in this state is hereby temporarily suspended, effective immediately, pending hearing and until further Order of the Board." (Emphasis added).[3] The 2001

[3]The order of temporary suspension is analogous to an order of interim suspension in the attorney and judicial disciplinary contexts. *See* Rule 17(b), RLDE, of Rule 413, SCACR ("Upon receipt of sufficient evidence demonstrating that a lawyer poses a substantial threat of serious harm to the public or to the administration of justice, the Supreme Court may suspend the lawyer . . . pending a final determination in any proceeding under these

order of temporary suspension states similar language. The language of the orders clearly indicates they are not final.

Further, the Board's description of its disciplinary procedures posted on its website[4] states: "After the required hearings and a review of all evidence, the Board issues a Final Order." Under the heading, "Appeals from Orders," the Board states: "The State or the licensee may appeal a final order of the Board within thirty days. All appeals are first taken to the Administrative Law Judge Division." Therefore, a required hearing must be held before an order is final. This is further evidence that the order of temporary suspension is not final in this case given that the Board indicated there would later be a hearing and a further order of the Board. While the orders were not final, the question remains whether the orders are appealable to the ALC.

S.C. Code Ann. § 1-23-600(D) (2005) states: "An administrative law judge also shall preside over all hearings of appeals from final decisions of contested cases before professional and occupational licensing boards or commissions within the Department of Labor, Licensing and Regulation, or as otherwise provided by law, pursuant to Section 1-23-380." (Emphasis added). Pursuant to S.C. Code Ann. § 1-23-380 (2005), the ALC has the authority to review final decisions of the Medical Board.

Section 1-23-380(A), under the chapter entitled, "State Agency Rule Making and Adjudication of Contested Cases," provides:

> A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is

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rules.") and Rule 17(b), RJDE, of Rule 502, SCACR (same except substituting "judge" for "lawyer"). In those contexts, the order of interim suspension is public. Rule 17(d), RLDE, of Rule 413, SCACR, and Rule 17(d), RJDE, of Rule 502, SCACR.

[4]*See* www.llr.state.sc.us/pol/medical/index.asp?file=Disc%20Procedure.htm

> entitled to judicial review under this article, Article 1, and Article 5. . . . A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(Emphasis added).[5]

The language of § 1-23-380(B) clearly allows the ALC to review a "final" decision of the Board. However, pursuant to subsection (A) of § 1-23-380, which is incorporated into subsection (B) by reference, the language is also clear that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Therefore, a physician has the ability to appeal an interlocutory disciplinary decision by the Board if a review of the final decision would not provide an adequate remedy. We conclude the temporary suspension orders were not immediately reviewable because review of the final agency decision would provide an adequate remedy for Anonymous Physician.

We note that one day after the Board issued the 2004 order of temporary suspension, the Board placed the order on its website and disseminated the order to the media. This order not only stated that the Anonymous Physician was suspended but also detailed the underlying facts of the complaint against Anonymous Physician. One day later, the Board removed the information. Regarding this publication, if the Board had refused to remove the information from its website, then Anonymous Physician could have requested the ALC order the Board to remove the

[5]Section 1-23-380(B) provides that "[r]eview by an Administrative Law Judge of a final decision in a contested case decided by a professional and occupational licensing board within the Department of Labor, Licensing, and Regulation[, of which the Medical Board is a part,] shall be done in the same manner prescribed by (A) for circuit court review of final agency decisions . . . ."

publicized information. In that particular case, the review of a final decision by the Board would not provide an adequate remedy for the publication of Anonymous Physician's discipline. However, because the Board quickly acted to remove the offending information, Anonymous Physician was no longer an aggrieved party because he received the relief he desired without having to seek relief from the ALC.[6]

The 2001 order, requiring that Anonymous Physician undergo a mental or physical examination, also was not immediately appealable to the ALC and the ALC should not have superseded this order. Awaiting a final decision in that matter would not prevent the physician from receiving an adequate remedy as envisioned by the statute.

Therefore, the temporary suspension orders and the evaluation order were not immediately appealable to the ALC. We refrain from stating a general rule that any interlocutory order by the Board is or is not immediately appealable to the ALC. The language of § 1-23-380(A) indicates that whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis, *i.e.* whether a review of the final decision would not provide an adequate remedy.

**II**

Island Packet and the Medical Board argue the ALC erred by not issuing an order setting forth specific findings regarding its decision to close these proceedings. We conclude the ALC is required to issue an order that states findings which explain the balancing of the interests involved and the need for closure of the proceeding.

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[6]We note that Section 40-47-213 has since been amended by the Legislature by Act No. 150, § 2 (2005). *See* Note 6 *infra*. Under current law, a proceeding before the Board becomes public once a formal complaint is made regarding allegations of misconduct. Once the formal complaint becomes available for public inspection, subsequent records and proceedings, such as the issuance of a temporary suspension, must be open to the public, subject to certain limitations.

Section 1-23-600(A) provides: "Proceedings before administrative law judges are open to the public unless confidentiality is allowed or required by law . . . The decisions or orders of administrative law judges are not required to be published, but are available for public inspection unless the confidentiality thereof is allowed or required by law." (Emphasis added). Therefore, to decide whether the ALC proceedings were properly sealed, we must determine whether confidentiality is required by other law.

South Carolina Code Ann. § 40-47-213 (2001) provides:

> No person . . . may mention the existence of the complaint, investigation, or other proceeding, disclose any information pertaining to the complaint, investigation, or other proceeding, or discuss any testimony or other evidence in the complaint, investigation, or other proceeding, except to persons involved and having a direct interest in the complaint, investigation or other proceeding, and then only to the extent necessary for the proper disposition of the complaint, investigation, or other proceeding. . . . Nothing contained in this section may be construed so as to prevent the board from making public a copy of its final order in any proceeding as authorized or required by law.[7]

[7]Section 40-47-213 has since been amended by the Legislature. *See* Act No. 150, § 2 (2005). Regarding public disclosure of a proceeding before the Board, section 40-47-213 (2005) now provides:

> . . . (B) When a formal complaint is made regarding allegations of misconduct, the formal complaint and an answer must become available for public inspection and copying ten days after the filing of the answer or, if no answer is filed, ten days after the expiration of the time to answer. Once the formal complaint becomes available for public inspection

and copying, subsequent records and proceedings relating to the misconduct allegations must be open to the public except as otherwise provided in this section.

(1) Patient records and identities shall remain confidential unless the patient or legal representative of the patient consents in writing to the release of the records.

(2) If allegations of incapacity of licensee due to physical or mental causes are raised in the complaint or answer, all records, information, and proceedings, relating to those allegations of incapacity must remain confidential; provided, however, any order relating to the licensee's authorization to practice must be made public, but the order must not disclose the nature of the incapacity.

(C) Once a proceeding becomes public as provided in this section, there is a presumption that any hearing, other proceeding, or record must remain public unless a party to a proceeding makes a showing on the record before the board, hearing officer, or panel that closure of the hearing or the record, in whole or in part, is essential to protect patients, witnesses, or the respondent from unreasonable disclosure of personal or confidential information. Public notice must be given of the request or motion to close any portion of a hearing or record, and the board, hearing officer, or panel shall provide an opportunity for a person opposing the closure to be heard prior to the decision on closure being made.

South Carolina Reg. 81-20 and S.C. Reg. 81-26 both elaborate on the privacy of physician disciplinary proceedings. Reg. 81-20 states: "all proceedings and documents relating to formal complaints and hearings thereon and to proceedings in connection therewith shall be private." Reg. 81-26 likewise provides: "All proceedings and documents relating to formal complaints and hearings thereon and to disciplinary proceedings in connection therewith shall be private . . . . All proceedings and records pertaining to any disciplinary proceedings, except final orders of the Board . . . shall be the private records of the Board . . . ."

Pursuant to former § 40-47-213 and the regulations, it is clear that physician disciplinary proceedings are confidential until a final order is issued or unless the physician requests that the proceedings be made public.[8] Therefore, the ALC did not err by sealing the records involved in this case given the Board had not issued a final order.[9] However, the manner in which

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> (D) Subject to the right of public access and utilizing the procedure regarding closure described in this section, a witness in a proceeding or a patient whose care is at issue in a proceeding may petition the board, hearing officer, or panel for an order to close the hearing or record, in whole or part, to protect the witness or patient from unreasonable disclosure of personal or confidential information . . . .

[8]In contrast to the former law, in the attorney and judicial disciplinary contexts, once formal charges (analogous to the formal complaint in the physician disciplinary context) are filed, the formal charges and any answer become public 30 days after the filing of the answer or, if no answer is filed, 30 days after the expiration of the time to answer. Rule 12(b), RLDE, of Rule 413, SCACR, and Rule 12(b), RJDE, of Rule 502, SCACR.

[9]The Board argues the statutes and regulations are limited to matters before the Board. However, this ignores the fact that the ALC's review occurred after a temporary suspension and not after a final decision by the Board. Pursuant to the then-existing statutes and regulations, the proceedings

ALC is still required to make specific findings on the record, especially given the fact Island Packet had directly requested an opportunity to be present and privy to the proceedings. The ALC should have engaged in an analysis that balanced the interests of the physician and the public and should have explained the need for closure. Therefore, the ALC could not seal the records until after specific findings, as to why closure was necessary, were made on the record. Because the findings were not made, this matter is remanded to the ALC for that purpose.

## CONCLUSION

We find, pursuant to § 1-23-380(A), the Board's temporary suspension orders and the evaluation order were not immediately appealable to the ALC. We further find the ALC is required to make specific findings, on the record, balancing the interests of the physician and the public and explaining the need for closure of the disciplinary proceedings. Therefore, the decisions of the ALC are

**REVERSED AND REMANDED.**

**TOAL, C.J., WALLER and BURNETT, JJ., and Mary E. Buchan, A.J. concur.**

# The Supreme Court of South Carolina

In the Matter of Scott L. Hood, Respondent.

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ORDER

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

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

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

# The Supreme Court of South Carolina

In the Matter of Harry E. Bodiford, Respondent.

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ORDER

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Respondent was suspended on June 6, 2005, for a period of thirty (30) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

BY s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

August 4, 2005

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

| | |
|---|---|
| Christopher Longshore, | Appellant/Respondent, |
| v. | |
| Saber Security Services, Inc., and Named Individual Marc A. Shafer, Defendants, Of Whom Saber Security Services, Inc., is, | Respondent/Appellant, |
| and Named Individual Marc A. Shafer is, | Respondent. |

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Appeal From Laurens County
James W. Johnson, Jr., Circuit Court Judge

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Opinion No. 4019
Heard February 8, 2005 – Filed July 25, 2005

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**AFFIRMED IN PART AND REVERSED IN PART**

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Karl Bryant Allen, of Greenville, and Max Thomas Hyde, Jr., of Spartanburg, for Appellant-Respondent.

R. Hawthorne Barrett, of Columbia, for Respondent-Appellant.

**STILWELL, J.:** This case arises from a shooting incident at the Laurens National Guard Armory. While breaking up a fight, Marc A. Shafer, a security guard for Saber Security Services, Inc., shot Christopher Longshore causing serious injuries. Longshore brought actions for negligent use of deadly force, negligent hiring, training, and supervision, and assault and battery. The jury returned an inconsistent or incomplete verdict on the negligent use of deadly force claim, a verdict for Saber and Shafer on the assault and battery action, and a substantial verdict for both actual and punitive damages against Saber on the negligent hiring, training, and supervision cause of action. Saber and Longshore appeal. We affirm in part and reverse in part.

## FACTS

### The Incident

In December 1996, Longshore attended a party at the National Guard Armory in Laurens County. Saber provided two security guards for this event, one of whom was Shafer. As the party was winding down, Shafer and the other security guard were directing traffic when a fight broke out. A crowd gathered around the scene, and someone pulled out a pistol and fired three shots into the air. After briefly taking cover, the security guards began working their way through the crowd checking on the safety of those leaving the party. The security guards stopped two people and searched for weapons, but found none. They then observed a vehicle containing three or four individuals, two of whom were fighting. They saw an individual, later identified as Derrick Bluford, fire four shots into the crowd wounding two people.

Shafer testified he ran up to the car and ordered the shooter to drop his weapon and get on the ground. After initially balking, the shooter eventually complied. Shafer disarmed him and handed the weapon to the other security guard.

law at that time, security guards could work but could not carry a weapon until receipt of a license.

## The Verdicts

The first cause of action, negligence, was submitted to the jury on the direct negligence of Shafer and vicarious negligence of Saber, on the theory that Shafer was Saber's agent. The jury found both defendants negligent and that their negligence proximately caused Longshore's injuries. The jury additionally found, however, that Longshore was also negligent and that his negligence proximately caused his injuries. Fault was allocated 50% to the defendants and 50% to Longshore. The jury then awarded zero damages.

In the second cause of action, negligent hiring, training, and supervision, the caption of both the complaint and the verdict form referred only to Saber, omitting any reference to Shafer. However, the allegations of the complaint realleged and incorporated all of the preceding allegations relating to negligence on the part of both Shafer and Saber. Also, the first question on the verdict form required the jury to find if "the defendants were negligent and [whether] such negligence proximately caused the plaintiff's injuries." That question was answered in the affirmative, but the jury found no comparative negligence on the part of Longshore as to this cause of action. The jury awarded Longshore $800,000 in actual damages and $200,000 in punitive damages on this cause of action.

The third cause of action, assault and battery, was submitted to the jury against both Saber and Shafer, and resulted in a defense verdict.

## Post Verdict Events

Saber moved for JNOV on the second cause of action, negligent hiring, training, and supervision, based on lack of proximate cause. In the alternative, Saber argued the verdict in the negligent hiring, training, and supervision action should be reduced because the jury concluded Longshore was 50% negligent in the negligence cause of action. Saber further moved for a new trial absolute or for a new trial nisi remittitur. Finally, Saber

negligent hiring, training, and supervision action by his comparative negligence found by the jury in the negligence action.

## I. Denial of Saber's JNOV Motion

Saber argues the trial court should have granted its JNOV motion because the jury found Longshore negligent in the first cause of action and returned a defense verdict on the assault and battery claim. Saber argues the combination of these two findings precludes a finding that Saber proximately caused Longshore's injuries. Underlying Saber's argument is its contention that the jury determined Shafer's act of shooting Longshore was justified and such a determination, of necessity, absolves Saber of any liability based on the theory of negligent hiring, training, or supervision. We find no error by the trial court in denying Saber's JNOV motion.

When reviewing the denial of a motion for directed verdict or JNOV, the evidence and the reasonable inferences that can be drawn therefrom must be viewed in the light most favorable to the non-moving party. Daves v. Cleary, 355 S.C. 216, 229, 584 S.E.2d 423, 429 (Ct. App. 2003). The appellate court will reverse the trial court only where there is no evidence to support the ruling. Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 28, 602 S.E.2d 772, 782 (2004).

Neither current statutory law nor jurisprudence in this state has specifically required a plaintiff, in an action against an employer for negligent hiring, training, and supervision, to prove the employee committed an actionable tort. However, there is authority to support the proposition. See Sabb v. South Carolina State Univ., 350 S.C. 416, 431-33, 567 S.E.2d 231, 238-39 (2002) (Pleicones, J., dissenting). In this case, we are not required to address the issue because, as previously noted, the action for negligent hiring, training, and supervision against Saber also included allegations of negligence by Shafer, and the verdict form required the jury to determine whether the "defendants" were negligent.

Furthermore, the jury's verdict for the defendants on the claim for assault and battery can be harmonized with the verdicts in the negligence and

negligent hiring, training, and supervision actions. Assault and battery is generally classified as an intentional tort, as contrasted with a tort based on negligence. See generally State Farm Fire & Cas. Co. v. Barrett, 340 S.C. 1, 10, 530 S.E.2d 132, 137 (Ct. App. 2000); F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 389-97 (2d ed. 1997). We find no inconsistency in these verdicts. The jury's findings, as a whole, indicate the jury concluded the shooting was the result of negligence.

For instance, although the jury found Longshore 50% at fault in the negligence cause of action, the jury could reasonably have concluded that, as to negligent hiring, training, or supervision, Saber's negligence was the sole proximate cause of Longshore's injuries. Longshore had nothing to do with Shafer's hiring, training, or supervision. These responsibilities were within the exclusive domain of Saber. "It is enough if the negligent act complained of is at least one of the causes without which the injury would not have occurred." Shepard v. South Carolina Dep't of Corrs., 299 S.C. 370, 375, 385 S.E.2d 35, 37 (Ct. App. 1989). On this cause of action, the jury absolved Longshore of any comparative negligence.

We cannot agree with Saber's argument that the only inference to be drawn from the jury verdicts taken as a whole is that Saber's actions could not have been the proximate cause of Longshore's injuries. Accordingly, we hold the trial court did not err in denying Saber's motion for JNOV.

## II. Reduction of Damages—Longshore's Comparative Negligence

Longshore argues the trial court erred in applying the jury's finding of his own 50% comparative negligence, found by the jury in the negligence action, to the damages awarded in the negligent hiring, training, and supervision action. Longshore also argues the consequent 50% reduction of actual damages in the negligent hiring, training, and supervision action constitutes error. We agree.

The trial court cited no authority or precedent for its determination that a jury's finding of comparative negligence in one cause of action should apply to another cause of action, and we have found no South Carolina cases

directly on point. Complicating the analysis is the admittedly inconsistent or incomplete verdict in the first cause of action. When the jury assesses liability to a defendant but awards zero damages, the verdict is facially inconsistent and contrary to South Carolina law. Stevens v. Allen, 342 S.C. 47, 53, 536 S.E.2d 663, 666 (2000). "[T]he proper and most consistent approach of treating such verdicts is to require, upon request, the trial court to re-submit the matter to the jury. If the jury cannot reach a consistent verdict, the trial court may then order a new trial nisi or a new trial absolute." Id. However, the law imposes no duty upon the trial judge to reject an inconsistent verdict in the absence of an objection by either party. Id. at 50, 536 S.E.2d at 664.

Neither party moved the trial court to resubmit the matter to the jury, and the trial court had no authority or duty to do so in the absence of such a motion. Neither the parties to the litigation nor the court should be required to guess what the jury sought to accomplish. Daves, 355 S.C. at 231, 284 S.E.2d at 430. However, it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found. Id. (holding where two verdicts are inconsistent, the court may not speculate as to which verdict was valid and which was not).

We find at least one logical way to reconcile the verdicts. As previously discussed, although the jury found Longshore 50% at fault in the negligence cause of action, the jury could reasonably have concluded that, as between Longshore and Shafer during the shooting incident, both parties were at fault. The jury could also have concluded that as between Longshore and Saber, regarding negligent hiring, training, or supervision, Saber's negligence was the sole proximate cause of Longshore's injuries. Thus, we hold the trial court erred in reducing the amount of actual damages returned in the negligent hiring, training, and supervision verdict. The negligence of both Saber and Shafer was submitted to the jury in both causes of action, and both were determined to have been liable to Longshore in each cause of action. However, the two causes of action are separate and distinct requiring different kinds and quantities of proof. Longshore was not found to be comparatively negligent in the cause of action in which the jury returned a verdict. Because the verdict on the first cause of action, negligence, is

essentially a nullity, we perceive no difficulty in ascertaining at least one rationale for the jury's verdicts and affirming its award of actual damages in the negligent hiring, training, and supervision cause of action. We therefore find the trial court erred in reducing the verdict by 50%.

## III. Punitive Damages

Saber lastly argues the punitive damages award should be reversed. We agree.

Punitive damages are quasi-criminal in nature and are imposed to punish a wrongdoer and to deter like conduct. Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). Although appellate review of an award of punitive damages is limited to the correction of errors of law, an award of punitive damages must be proven under a significant burden of proof: clear and convincing evidence. Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310, 594 S.E.2d 867, 873 (Ct. App. 2004); Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 311, 529 S.E.2d 45, 59 (Ct. App. 2000).

Furthermore, the plaintiff must prove the defendant's misconduct was willful, wanton, or in reckless disregard of his rights. Id. "[T]rial judges in this state have long been required, as a threshold matter, to assess the culpability of a defendant's conduct to determine whether punitive damages are available in a given case (i.e., whether the issue should be submitted to the jury)." South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc., 324 S.C. 149, 152, 478 S.E.2d 57, 58 (1996).[3]

[3] Once the trial judge determines a punitive damage award is warranted under the facts of a case, the amount to be assessed has historically been measured by the jury against the character of the wrong committed, the punishment to be applied, and the ability of the defendant to pay. Id. at 152, 478 S.E.2d at 58. See also Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) (enumerating factors to consider when reviewing amount of punitive damages awarded).

Upon review, we find no clear and convincing evidence that Saber's conduct in negligently hiring, training, or supervising Shafer was willful, wanton, or in reckless disregard of the rights of others. The evidence at most establishes that Saber was negligent. Saber did fail to comply with some of its internal policies. However, it hired Shafer based on a favorable reference. Because Shafer was already licensed, Saber was not required to re-train him, but Saber did ensure that Shafer read its weapons policy. Saber committed an administrative violation by allowing Shafer to work as an armed security guard before his license transfer had been processed by SLED. However, this had no bearing on Shafer's training in the use of a firearm. There is no evidence that the purpose of the license transfer regulation was to prevent incidents such as the one in this case. The trial court specifically found that there was no evidence that either party knew it was impermissible for Shafer to work as an armed guard before his license transfer was accomplished. Furthermore, there is no evidence that Saber's negligence was anything other than a one time occurrence.

We therefore find that the trial court erred in submitting the issue of punitive damages to the jury. Longshore has failed as a matter of law to demonstrate, by clear and convincing evidence, that Saber's negligence in hiring, training, and supervising Shafer was willful, wanton, or in reckless disregard of his rights.

## CONCLUSION

We affirm the trial court's denial of Saber's motion for JNOV due to the inconsistency of the verdicts. We reverse the trial court's decision to reduce the award of actual damages. We likewise reverse the award of punitive damages.

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**AFFIRMED IN PART AND REVERSED IN PART.**

**GOOLSBY and HUFF, JJ., concur.**

**WILLIAMS, J.:** LeafGuard USA, Inc. appeals a partial grant of summary judgment in favor of Englert, Inc. concerning the possession of a gutter-fabricating machine. We affirm.[1]

## FACTS / PROCEDURAL HISTORY

In 1993, Jerry Dan Vickory entered into a sub-license contract with Englert, Inc. on behalf of his company, Seamless Gutters of Socastee, Inc. ("Seamless Gutters"). Seamless Gutters was in the business of manufacturing and installing roof gutters. The agreement granted Seamless Gutters the right to manufacture, sell, and install Englert's product, the LeafGuard Gutter System (a patented gutter system which protects against blockage caused by leaves and debris), in a pre-determined sales territory. The agreement also called for the purchase of a gutter-fabricating machine ("the Machine") to produce the Englert gutters. Seamless Gutters was required to pay a $5,000 deposit on the Machine and pay the remaining $21,000 balance upon its delivery. The contract also included the following buy-back provision:

> Upon termination of this Agreement, Englert shall purchase, and Sub-Licensee shall sell, the Englert LeafGuard Gutter Machine, subject to normal wear and tear and pay Sub-Licensee at a price equal to the greater of:
>
> (i) the depreciated value of the Englert LeafGuard Gutter Machine, based on a depreciated rate of 20% per year on the original price; or
> (ii) $1.00

Upon the Machine's delivery, Seamless Gutters paid the full purchase price and began to manufacture, sell, and install the Englert Gutter System in its contractual sales territory.

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

In 1994, Vickory incorporated a second company, LeafGuard USA, Inc.,[2] which engaged in the same business as Seamless Gutters in the same sales territory. The incorporation of the new business essentially constituted the mere renaming of Seamless Gutters; however, Seamless Gutters remained an incorporated entity. Pursuant to Seamless Gutter's 1993 contract with Englert, Leafguard USA utilized the Machine for the manufacturing and sale of the Englert LeafGuard Gutter System.

In 1999, Vickory renewed the 1993 contract with Englert, this time acting on behalf of the more recently created LeafGuard USA, Inc. The 1999 contract is essentially identical to the 1993 contract, granting LeafGuard USA the right to sell Englert's product in the territory defined by the 1993 agreement. The 1999 contract also contains identical language regarding the purchase of an Englert gutter-fabricating machine. However, because LeafGuard USA already possessed the Machine purchased under the 1993 contract, no gutter-fabricating machine was actually purchased under the 1999 contract.

The 1999 contract, similar to that of 1993 (as later amended), set a "sales target" of 15,000 lineal feet of product per year. LeafGuard USA agreed to pay Englert royalties on at least 15,000 feet per year, regardless of whether they met the quota. The contract contained the following language regarding termination:

> The term of this Agreement shall initially be for a two-year period from January 1, 1999 through December 31, 2000 . . . and shall, if Licensee has materially complied with all of the provisions of this License, continue in full force and effect for additional one year periods thereafter, unless either party, upon 30 days written notice to the other party . . . elects to terminate this Agreement.

[2] The 1993 contract granted Seamless Gutters the right to use Englert's trademarks, namely the "LeafGuard" brand name, in association with the sale of its gutter system.

. . . .

> Should Sub-Licensee be in default on its payment obligations to Englert for 60 days, Englert may, at its option, terminate this license immediately and/or seek any other options open to Englert, including taking over or repossessing Sub-Licensee's Englert LeafGuard Gutter Machine . . . .

According to Englert, the total footage of product ordered by LeafGuard USA in 2000 was 3,940 feet, which was 11,060 feet short of LeafGuard USA's contractual sales target and obligatory royalty payments. Englert claims no royalties were paid on the 2000 shortfall. On March 15, 2001, Englert faxed Vickory a letter notifying LeafGuard USA that Englert was terminating its sub-licensing agreement pursuant to the contractual language quoted above. Englert sought to exercise its contractual buy-back option regarding the Machine, which, after over six years of possession, was valued at $1.00 according to the depreciation schedule agreed upon in both the 1993 and 1999 contracts.[3] LeafGuard USA refused to return the Machine and, in July 2001, Englert commenced the present action seeking its immediate possession and monetary damages.

On June 17, 2002, the circuit court denied a preliminary motion by Englert for possession of the Machine, ruling that LeafGuard USA was entitled to its possession until a decision on the merits. In March 2003, Englert filed an amended complaint, which added an additional cause of action. LeafGuard USA answered the amended complaint, asserting several affirmative defenses as well as counterclaims for violations of South Carolina's Unfair Trade Practices Act, breach of contract, and fraud, inter alia. Englert then filed motions for 1) summary judgment on the issue of the Machine's possession, 2) dismissal of LeafGuard USA's counterclaims, and 3) temporary injunctive relief. After consideration of submitted materials from both parties, the circuit court refused to dismiss LeafGuard USA's counterclaims and denied Englert's requested injunctive relief. Englert's

[3] LeafGuard USA believes the Machine's current value to be approximately $10,000, but offers no evidence supporting this assertion.

motion for partial summary judgment, however, was granted. The circuit court found no issue of fact as to the contract's termination and that the contract's unambiguous terms allowed Englert to repurchase the Machine upon termination of the parties' relationship. Accordingly, it ordered LeafGuard USA to sell the Machine to Englert for the agreed upon price of $1.00. LeafGuard USA's subsequent motion for reconsideration was denied. This appeal followed.

## STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When 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. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

## LAW / ANALYSIS

LeafGuard USA bases its argument on appeal on the spurious corporate formality that it was Seamless Gutters who initially purchased the Machine and not LeafGuard USA. It contends that LeafGuard USA owns no gutter-fabricating machine; thus, the relief granted to Englert was erroneous because Seamless Gutters is not a named party in the present lawsuit. We are not persuaded by this argument.

We begin with restating the basic fact of this case that Vickory incorporated LeafGuard as a direct result of Seamless Gutters 1993 contract with Englert. The corporate name itself makes use of the Englert brand name "LeafGuard" and, from the corporation's inception until 1999, it functioned wholly under the rights granted it from the 1993 agreement between Seamless Gutters and Englert. Adoption of the position that Seamless Gutters and LeafGuard USA are completely distinguishable entities, alike "only in ownership," not only ignores the readily apparent facts of this case,

but also exposes LeafGuard USA, when viewed as a separate entity, to possible liability for over five years of trademark and patent infringement. If LeafGuard USA was conveyed no possessory right in the Machine by the 1993 contract, neither was it conveyed the right to manufacture, sell, and install the Englert LeafGuard gutter system or to make use of the Englert brand names and trademarks, which the company most certainly did from 1994 to 1999.

Despite Vickory's vague assertions to the contrary,[4] the fact that LeafGuard USA currently possesses the Machine and that it and Seamless Gutters are essentially the same entity is acknowledged throughout the record. For example, in its answer to Englert's amended complaint, LeafGuard USA stated, "the value of the gutter machine rightfully owned and possessed by [LeafGuard USA] exceeds Ten Thousand and 00/100 (10,000.00) Dollars." (emphasis added). Similarly, although Seamless Gutters was the listed party to the 1993 contract, LeafGuard USA states in its appellate brief that the 1999 contract "served to continue the territory of the franchise sold under the 1993 agreement." In his 2003 deposition, Vickory testified he had been the vice president and owner of LeafGuard USA for approximately twenty years, even though prior to 1994 the business only existed as Seamless Gutters. LeafGuard USA's arguments on appeal and below, which assert simultaneously that LeafGuard USA owns no gutter-fabricating machine, yet the act of repossessing its gutter-fabricating machine would destroy the business, also reflect this inconsistency.

In 1992, this court, faced with very similar arguments heavily relying on corporate technicalities, held as follows:

> A corporation may be known by several names in the transaction of its business. If it is sued in a name under which it transacts business, the process will ordinarily be sufficient to bring it before the court. The misnomer of a corporation has the same effect as the misnomer of an individual. If it later appears that

[4] Vickory stated that, although both companies install gutters, "[o]ne is LeafGuard and one is not a LeafGuard."

> the true name of the corporation is different from the name under which it was sued, the misnomer is properly a subject of amendment. However, failure to correct the corporate name does not invalidate the process or the judgment where the misnomer causes the corporation no prejudice.

Griffon v. Capital Cash, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992) (internal citations omitted). Accompanying this statement of law, the court included the following chiding remarks, which we believe worth repeating here:

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Id.

In the present case, the parties to both the 1993 and 1999 contracts were the same, save for Vickory's use of a different corporate name. The record clearly reflects that the parties were aware that LeafGuard USA was using the same gutter-fabricating machine sold to Seamless Gutters in 1993 and that they considered the 1998 agreement a continuation of the prior contract. We find no prejudice to the appealing company, whether called Seamless Gutters or LeafGuard USA, in Englert's failure to employ all of its corporate designations in the present lawsuit. LeafGuard USA, who is admittedly in possession of the Machine, is therefore required, under the unambiguous terms of the 1993 and 1999 contracts and regardless of the future success of its counterclaims, to sell the Machine to Englert for the agreed upon price.[5]

[5] Because the trial court granted summary judgment only as to the repurchase of the Machine, the other issues LeafGuard USA argues on appeal have yet to

For the foregoing reasons, the circuit court's grant of partial summary judgment is

**AFFIRMED.**

**ANDERSON and STILWELL, JJ., concur.**

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be ruled upon by the trial court; thus, we do not address them here. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Department of Social Services, Respondent,

v.

Sheila Phillips; Ray Berry; Shonna Nichole Phillips, a minor child born January 20, 1987; Mick Cherokee Dayne Phillips, a minor child born September 22, 1995; and Brea Marie Phillips, a minor child born July 15,1998, Defendants,

of whom Sheila Phillips is the, Appellant.

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Appeal from Spartanburg County
Georgia V. Anderson, Family Court Judge

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Opinion No. 4021
Heard June 7, 2005 – Filed August 8, 2005

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**AFFIRMED**

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Ruth L. Cate and David M. Collins, Jr., both of Spartanburg, for Appellant.

Kenneth Philip Shabel, of Spartanburg, for Respondent.

**KITTREDGE, J.:** Sheila Phillips appeals the family court's termination of her parental rights to two of her three children. We affirm.

## FACTS

Sheila Phillips is the mother of three children: Shonna, Mick, and Brea, ages 16, 8, and 5, respectively, as of the date of the final hearing in December 2003. This appeal arises from the family court's termination of Phillips' parental rights as to Mick and Brea on February 23, 2004, for failure to remedy the conditions that caused removal and failure to support Brea for a period of six months prior to the commencement of the termination of parental rights proceedings.[1]

On July 19, 2001, the Department of Social Services (DSS) took the children into emergency protective custody under an ex parte order. The family court subsequently issued a formal order of removal, which included Phillips' stipulation that she physically neglected her children and that Brea had been sexually abused by an unknown perpetrator. The family court also approved an agreed-upon treatment and placement plan for reunification. Following a judicial review hearing in July 2002, the family court returned the children to Phillips. The family court order required Phillips to continue compliance with the treatment plan and imposed a continuing obligation on DSS and the guardian ad litem to monitor the family.

The children were again removed from Phillips' custody in December 2002. The family court granted removal because "returning the minor children to the home of the Defendant Sheila Phillips would . . . be contrary

[1] Brea's father is Ray Berry, who was a co-defendant in the underlying action, but Berry was in default and did not appeal the family court's decision as to termination of his parental rights. The biological father of Mick and Shonna is deceased.

> following grounds and a finding that termination is in the best interest of the child:
> . . . .
>
> (2) The child has been removed from the parent pursuant to Section 20-7-610 or Section 20-7-736, has been out of the home for a period of six months following the adoption of a placement plan by court order or by agreement between the department and the parent, and the parent has not remedied the conditions which caused the removal;
> . . . .
>
> (4) The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child
> . . . .

S.C. Code Ann. § 20-7-1572 (Supp. 2004) (emphasis added). Phillips argues there was an insufficient basis for the family court's determination as to all three of these findings. We disagree. For the reasons set out below, we find there is clear and convincing evidence to support the family court's finding that Phillips failed to adequately remedy the conditions which caused the removal. Because our affirmance of this finding constitutes a sufficient statutory ground for termination, we need not reach the family court's additional finding concerning Phillips' failure to support Brea. We further find clear and convincing evidence to support the family court's finding that termination was in the best interest of the children.

## I. Failure to Remedy Conditions

Phillips raises two specific arguments in claiming the family court erred in finding she failed to remedy the conditions that caused the removal of Mick and Brea. First, she claims the family court's February 5, 2003, Order for Removal was unenforceable because it failed to set forth the conditions which caused the removal and failed to include necessary

information regarding the treatment plan as required by statute. Second, Phillips claims that, even if the order were enforceable, she had effectively remedied the conditions DSS asserted as the cause for removal. We address these arguments separately below, finding neither meritorious.

### A. Sufficiency of the Order for Removal

We reject Phillips' challenge to the sufficiency of the family court's February 5, 2003, Order for Removal, finding: (1) the challenge is procedurally barred, and (2) in any event, the order complied with the prescribed statutory requirements in all necessary particulars.

First, we note that Phillips' argument concerning the sufficiency of the removal order is procedurally barred as untimely. After the Order for Removal was filed by the family court, Phillips raised no objection to the treatment plan it set out or any of its other findings. Phillips, in fact, consented to the plan. Once the family court has conducted a merits hearing and ordered a treatment plan, failure to object to the sufficiency of a plan or the process by which a plan was developed waives the right to raise such an objection in a subsequent termination of parental rights action. S.C. Code Ann. § 20-7-764(H) (Supp. 2004) (providing that "[f]ailure to request a hearing or to enter an objection at the hearing constitutes a waiver of the objection" and that "[t]he sufficiency of the plan or of the process for developing the plan may not be raised as an issue in a proceeding for termination of parental rights . . ."); see also Hooper v. Rockwell, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999) (noting that "any order issued as a result of a merit hearing, as well as any later order issued with regard to a treatment, placement, or permanent plan, is a final order that a party must timely appeal"). Accordingly, Phillips has waived her right to object to the sufficiency of the Order for Removal in the present appeal.

Second, even if this challenge were properly before us on the merits, we find the Order for Removal satisfied the statutory requirements and was therefore fully enforceable. In the present case—as is typical—the Order for Removal included a placement and treatment plan designed to aid in the reunification of the parent and children. The formulation and adoption of these plans are governed by South Carolina Code section 20-7-764 (Supp.

2004). "The placement plan shall include, but is not limited to . . . the specific reasons for removal of the child from the custody of the parent or guardian and the changes that must be made before the child may be returned . . . ." § 20-7-764(B)(1). The placement plan should also include "the financial responsibilities and obligations, if any, of the parents or guardian for the support of the child during the placement." § 20-7-764(B)(4). Finally, the placement plan "shall state the conditions necessary to bring about return of the child and the reasonable efforts that will be made by the department to reunite the child with the child's family." § 20-7-764(C).

We find the removal order sufficiently complied with the requirements set forth by section 20-7-764. The children were removed from the home because Phillips stipulated to abuse and neglect of the children, and the guardian ad litem recommended the removal. According to the plan, Phillips had to cooperate with counseling until released by her counselor, obtain an assessment and complete any recommended drug programs, refrain from using illegal drugs and from abusing alcohol, submit to random drug and alcohol screens, submit to an evaluation to address her ability to obtain employment, transfer Shonna and Mick's social security benefit checks to DSS, and pay child support for Brea in the amount of $15 per week. The family court was principally concerned with Phillips' drug use, need for counseling, and employment.[3]

### B. Phillips' Failure to Correct the Conditions that Warranted the Children's Initial Removal

We now turn to the substance of the family court's finding that Phillips failed to remedy the conditions that caused the removal of Mick and Brea. As set out above, section 20-7-1572(2) provides for termination of parental rights if "[t]he child has been removed from the parent . . . has been out of the home for a period of six months following the adoption of a placement plan by court order or by agreement between the department and the parent, and the parent has not remedied the conditions which caused the removal."

[3] These are the same concerns echoed by the family court in the earlier April 2002 order for removal.

(emphasis added). "[T]he statute allows for termination of parental rights where the parent has not remedied the conditions causing removal. This does not suggest that an attempt to remedy alone is adequate to preserve parental rights. Otherwise, the statute would be couched in such terms. The attempt must have, in fact, remedied the conditions." Dep't of Soc. Servs. v. Pritchett, 296 S.C. 517, 520, 374 S.E.2d 500, 501 (Ct. App. 1988) (emphasis in original).

We recognize that Phillips showed some progress in her treatment plan, but she fell short in actually remedying the conditions causing the removal, namely ending her drug use, continuing counseling, and finding employment. Phillips tested positive for methamphetamines in December 2002. She also refused to take the drug screens offered in March and April 2003, which constituted positive drug screens according to the court order. Phillips tested positive for opiates at the methadone drug clinic in May 2003. Once she consented to a DSS drug test that same May, she tested positive for cocaine. Significantly, despite her ongoing battle with the drugs, Phillips failed to seek treatment until May 2003, three months after the removal order. Furthermore, she did not seek alcohol and drug counseling until July 2003, nearly five months after the removal order.

Concerning the counseling requirement, although Phillips cooperated initially, she discontinued her counseling sessions in October 2003. As of the date of the termination hearing, Phillips had still not resumed counseling, thereby failing to successfully complete her counseling as required by the placement plan.

Turning to the issue of Phillips' employment, despite the family court's admonishment for her to seek an evaluation for employability, Phillips failed to do so. Phillips began the GED program, waiting until two months prior to the termination hearing to do so. At the time of the termination hearing, she apparently had no income, although the record demonstrates she was capable of regular employment.

In sum, Phillips failed to meaningfully address her drug addiction problem over an extended period of time. In addition, her efforts at remaining in counseling and finding employment were spotty and

ineffective. Therefore, we find clear and convincing evidence that Phillips failed to remedy the conditions that caused the removal.

## II. Best Interest of the Children

Phillips claims the family court erred in finding clear and convincing evidence that termination of her parental rights was in the best interest of Mick and Brea. We disagree.

Assuming that the asserted termination ground enumerated within section 20-7-1572 has been established, the family court must also make a finding that the termination of parental rights is in the best interest of the child. S.C. Code Ann. § 20-7-1572 (Supp. 2004) ("The family court may order the termination of parental rights upon a finding of one or more of the following grounds and a finding that termination is in the best interest of the child. . . ."). Our supreme court has emphasized the courts of this state have for many years, consistent with the expressed desire of our Legislature, decided "all matters involving the custody or care of children in 'light of the fundamental principle that the controlling consideration is the best interests of the child.'" Hooper, 334 S.C. at 295, 513 S.E.2d at 366 (quoting In Re Doran, 129 S.C. 26, 31, 123 S.E. 501, 503 (1924)).

Brenda Lipe, an expert in the field of child therapy, testified that continued contact between the children and Phillips would not be in the children's best interest. She also testified Brea was exposed to inappropriate sexual behaviors between Phillips and Ray Berry when Brea and Mick returned home in July 2002. This is of particular concern because the family court had strictly prohibited contact between the children and Berry in a previous order. The guardian ad litem and Phillips confirmed violation of this provision. Brea then acted this sexual behavior out with another child in her foster home.

Significantly, according to Lipe, "[t]herapeutically, [the children] are wonderful. They are flourishing. They are thriving." Mick's grades have drastically improved, and "[h]e is less anxious and withdrawn." Lipe stated that Mick was always "withdrawn and sullen" after visiting with his mother, anxieties that arose again shortly before the termination hearing because

Mick was concerned "he was going to have to go home." In Lipe's expert opinion, returning the two children to Phillips "would devastate them."

The guardian ad litem also recommended termination of Phillips' parental rights as to Mick and Brea. The guardian was specifically concerned with Phillips' failure to work on her treatment plan for drug abuse and pay child support. She testified that while Brea and Mick "love [Phillips] as a mother and recognize her as their mother, . . . their family now is with the Browns."

The termination of parental rights is often a difficult and unpleasant process and experience for all concerned, and this case is no exception. In undertaking this unenviable task, our courts face competing, yet mutually vital considerations. On the one hand, we must seek to uphold the Legislature's express public policy that children be reunited with their parents whenever possible. See S.C. Code Ann. § 20-7-20(D) (1985) (providing that "[i]t is the policy of this State to reunite the child with his family in a timely manner, whether or not the child has been placed in the care of the State voluntarily"); Hooper, 334 S.C. at 296, 513 S.E.2d at 366 (noting "[t]he public policy of this state in child custody matters is to reunite parents and children"). This policy goal stems from the recognition that the interest of the natural parents in the care and nurture of their child does not vanish simply because they have been less than model parents or have lost temporary custody of their child to the State. Yet, this desire to preserve the natural family bond must be balanced by the always paramount—"controlling"—concern that the best interest of the child be protected and advanced. In this case, the preference for family reunification must give way to the clear and convincing evidence that the best interests of the children are served by terminating Phillips' parental rights to Mick and Brea.

## CONCLUSION

We find Phillips failed to remedy the conditions set out by the placement plan in the February 2003 removal order and find the best interests of the children are served by terminating her parental rights. Because these findings are sufficient to uphold the family court's order, we do not reach Phillips' additional assignment of error concerning the family court's finding she willfully failed to support Brea. Therefore, the family court's decision to terminate Phillips' parental rights as to Mick and Brea is

**AFFIRMED.**

**GOOLSBY and HUFF, JJ., concur.**