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THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services, County of Siskiyou, and Debra J. Little, Plaintiffs, Of whom, S.C. Department of Social Services is, Respondent,

v.

Michael D. Martin, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenwood County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 26218
Heard September 20, 2006 – Filed November 6, 2006

AFFIRMED

C. Rauch Wise, of Greenwood; and Billy J. Garrett, Jr., of The Garrett Law Firm, of Greenwood, for Petitioner.

Holly C. Walker, of Columbia, for Respondent.

JUSTICE BURNETT: The family court issued a civil contempt order against Michael D. Martin (Petitioner) for failure to pay child support pursuant to a California support order. Petitioner filed a motion for reconsideration and the family court vacated its order. The Court of Appeals reversed. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner and Debra J. Little divorced in Siskiyou County, California. The California Superior Court issued a divorce decree in 1986, granting custody of the couple's daughter to Little and custody of the couple's son to Petitioner. The court also issued a child support order (the 1986 California order), requiring Petitioner to pay $303.00 per month for the support of his daughter. Thereafter, Petitioner moved to South Carolina and established his residence in Greenwood County.

In 1989, Siskiyou County and Little filed a summons and complaint in Greenwood County accompanied by a support petition pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA), S.C. Code Ann. §§ 20-7-960 to -1170 (1985). The petition sought support in the amount of $326.00 per month, as well as medical coverage and arrearages. A copy of the 1986 California order was attached to the petition.

Prior to the hearing, the parties reached an agreement which was incorporated into an order issued by the family court in 1990 (the 1990 South Carolina order). The 1990 South Carolina order required Petitioner to pay $30 per week for support of the couple's daughter and $10 per week toward the arrearage. It referred to the prior California order but did not explicitly nullify it.

In 2003, the family court found Petitioner in civil contempt for failure to pay support under the 1986 California order. Petitioner filed a motion for temporary relief asking the family court to stay prospective child support. South Carolina Department of Social Services (DSS) argued that Petitioner was responsible for the arrearage

under the 1986 California order because that order had not been extinguished by the 1990 South Carolina order. Petitioner argued that the 1990 order modified the 1986 California order. Because that agreement was not appealed, Petitioner argued that the 1990 South Carolina order became the law of the case.

The family court vacated its prior civil contempt order and held it did not have legal authority to overrule the final order of another family court judge. The family court determined it would not have issued the civil contempt order had it been aware of the 1990 South Carolina order.

DSS appealed the matter and the Court of Appeals reversed. The Court of Appeals held the family court erroneously determined the 1990 South Carolina order was final and terminated Petitioner's prospective California support obligations. Applying URESA, the Court of Appeals determined the family court had authority to modify and enforce the 1986 California order based on S.C. Code Ann. § 20-7-933 (Supp. 2003), which provides the family court has "the right to modify any such decree, judgment, or order for child support as the court considers necessary upon a showing of changed circumstances."

The Court of Appeals also relied on what is commonly known as the anti-nullification clause found in S.C. Code Ann. § 20-7-1110 (1985) (amended 1994): "A support order made by a court of this State pursuant to this subarticle does not nullify and is not nullified by … a support order made by a court of any other state … unless otherwise specifically provided by the court." The Court of Appeals held that the 1986 California order remained independently enforceable in South Carolina because the 1990 South Carolina order did not indicate it was intended to nullify the California order.

ISSUE

Did the Court of Appeals err in holding the 1990 South Carolina order did not nullify the 1986 California order?

STANDARD OF REVIEW

On appeal from the family court, this Court has the authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992). However, this broad scope of review does not require this Court to disregard the family court's findings. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). Questions concerning child support are ordinarily committed to the discretion of the family court, whose conclusions will not be disturbed on appeal absent a showing of an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002); Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003).

LAW/ANALYSIS

The applicable law governing the case is URESA, S.C. Code Ann. §§ 20-7-960 to 1170 (1985).[1] The purpose of URESA is to "improve and extend by reciprocal legislation the enforcement of duties of support." S.C. Code Ann. § 20-7-965 (1985). Section 20-7-933 (Supp. 2005) gives courts the authority to enforce orders regarding child support and the right to modify support orders upon a showing of changed circumstances. See, *e.g.*, Balestrine v. Jordan, 275 S.C. 442, 443, 272 S.E.2d 438 (1980) ("A decree of support may be increased, decreased or terminated due to a change in circumstances ….").
URESA allows orders issued in other states to be registered and enforced in South Carolina as if issued by a court of this State. S.C. Code Ann. § 20-7-1150 & -1155 (1985). URESA remedies "are in

[1] In 1994, URESA was replaced by the Uniform Interstate Family Support Act (UIFSA), S.C. Code Ann. § 20-7-960 to 1170 (Supp. 2005). URESA continues to apply, however, to the enforcement of rights, liabilities, duties, and forfeitures as they stood prior to 1994 under URESA. South Carolina Dep't of Soc. Servs. v. Hamlett, 330 S.C. 321, 498 S.E.2d 888 (Ct. App. 1998). The initial support obligation in this action arose in 1986, so URESA is controlling.

addition to and not in substitution for any other remedies." S.C. Code Ann. § 20-7-975 (1985).

Petitioner argues the 1990 South Carolina order modified the 1986 California order such that it extinguished his obligations under the prior order. We disagree.

In Carswell, the Court of Appeals held that a Washington support order remained extant and enforceable when South Carolina support orders recognized but did not specifically nullify the Washington order. SCDSS/Child Support Enforcement v. Carswell, 359 S.C. 425, 430, 597 S.E.2d 859, 861 (Ct. App. 2004). After Carswell moved to South Carolina from Washington, the family court modified the amount of support due under a Washington support order but never explicitly nullified the Washington order. *Id*. at 427, 597 S.E.2d at 860. Thereafter, DSS sought registration and enforcement of the Washington order in South Carolina pursuant to URESA. *Id*. The family court refused to enforce the Washington order and held that it had been modified by the South Carolina orders such that only one support order continued to exist. *Id*. Relying on Section 20-7-1110, the anti-nullification provision, the Court of Appeals reversed and held that both the original Washington order and subsequent South Carolina orders remained enforceable. *Id*. at 429-430, 597 S.E.2d at 861. Because the South Carolina orders merely recognized the Washington order, the orders did not rise to the level of a nullification and the Washington order remained valid and enforceable in South Carolina. *Id*.

In the instant case, the 1990 South Carolina order referenced the prior California order, but never explicitly nullified it. Like the order in Carswell, the 1990 South Carolina order did not rise to the level of nullification. Therefore, both the 1986 California order and the 1990 South Carolina order are independently enforceable. See also Hamlett, 330 S.C. at 326, 498 S.E.2d at 890-891 ("[A] South Carolina support order continues as an independently enforceable order regardless of its registration and modification in a foreign state unless specifically

nullified by the court pursuant to section 20-7-1110 [the anti-nullification clause].").

Petitioner argues the unappealed order from 1990 became the law of the case and the parties improperly "relitigated" the 1990 order in 2003. Petitioner's argument is without merit. The 2003 litigation concerned the 1986 California order which remained independently enforceable because the 1990 South Carolina order did not nullify it.

CONCLUSION

For the foregoing reasons, we affirm the Court of Appeals. The 1990 South Carolina order did not nullify the 1986 California order.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Interest of Amir X. S., a juvenile under the age of seventeen, Appellant.

Appeal from Greenwood County
John M. Rucker, Family Court Judge

Opinion No. 26219
Heard September 20, 2006 – Filed November 6, 2006

AFFIRMED IN PART; VACATED IN PART

Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R. J. Shupe, all of Columbia, and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

CHIEF JUSTICE TOAL: This case involves a constitutional attack on a statute defining the offense of disturbing schools. The family court

upheld the statute's constitutionality and subsequently adjudicated Appellant delinquent for violating the statute. We affirm in part and vacate in part.

FACTUAL/PROCEDURAL BACKGROUND

The State filed a juvenile petition in family court in October 2004 alleging that Amir X. S. ("Appellant") violated S.C. Code Ann. § 16-17-420 (2003) by willfully, unlawfully, and unnecessarily interfering with and disturbing the students and teachers at Southside Learning Center in Greenwood County, South Carolina.

Before trial, Appellant moved to quash the juvenile petition claiming that § 16-17-420 was unconstitutionally vague and overbroad in violation of the First Amendment of the United States Constitution. Section 16-17-420 provides in pertinent part:

> It shall be unlawful: (1) For any person wilfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon . . . ."

S.C. Code Ann. § 16-17-420(1).

At the hearing on Appellant's motion to quash, the State argued Appellant lacked standing to challenge the statute's constitutionality because Appellant's conduct plainly fell under its terms. The family court upheld the constitutionality of the statute and denied Appellant's motion. After hearing testimony from each party, the family court found there was sufficient evidence to adjudicate Appellant delinquent for the violation of § 16-17-420. The family court committed Appellant to ninety days in the custody of the Department of Juvenile Justice and imposed one year of probation.

Appellant filed this appeal pursuant to Rule 203, SCACR[1] and raises the following issues for review:

I. Is § 16-17-420 unconstitutional because it is overly broad and punishes a substantial amount of protected free speech in relation to the statute's plainly legitimate sweep?

II. Does Appellant have standing to challenge § 16-17-420 on grounds of vagueness; and if so, is the statute unconstitutional because it is written in terms so vague that a person of common intelligence must necessarily guess at its meaning?

LAW/ANALYSIS

I. Overbreadth

Appellant argues that S.C. Code Ann. § 16-17-420 is unconstitutional because it is overly broad and punishes a substantial amount of protected free speech in relation to the statute's plainly legitimate sweep. We disagree.

The First Amendment overbreadth doctrine is an exception to the usual rules regarding the standards for facial challenges. First, because the very existence of overly broad statutes may have such a deterrent effect on constitutionally protected expression, the traditional rule of standing[2] is

[1] An appeal involving "a challenge on state or federal grounds to the constitutionality of a state law . . . where the principal issue is one of the constitutionality of the law" is heard in this Court. Rule 203(d)(1)(A)(ii), SCACR.

[2] The traditional rule of standing for facial attacks provides that one to whom application of a statute is constitutional may not attack the statute on grounds that it might be unconstitutional when applied to other people or situations. *United States v. Raines*, 362 U.S. 17, 52 (1971).

relaxed for facial[3] overbreadth claims involving First Amendment rights. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Under this relaxed rule of standing, the party challenging a statute simply must demonstrate that the statute could cause someone else – anyone else – to refrain from constitutionally protected expression. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). In further recognition of the threat to First Amendment freedoms, any enforcement of a statute subject to an overbreadth claim is wholly forbidden until and unless a limiting construction or partial invalidation so narrows it so as to remove the seeming threat to protected expression. *Broadrick*, 413 U.S. at 613. These exceptions to the traditional rules of practice have been implemented out of concern that the threat of enforcement of an overly broad law may deter or "chill" constitutionally protected speech – especially when the overly broad law imposes criminal sanctions. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

In light of these exceptions to the traditional rules of practice, courts have been "sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). In developing the overbreadth doctrine, the United States Supreme Court has cautioned:

> . . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct[,] and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

Broadrick, 413 U.S. at 615.

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[3] A facial challenge in this context is a claim that the law is incapable of any valid application. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 494 n. 5 (1982).

In an effort to balance these varying interests, courts require that the alleged First Amendment overbreadth must not only be real, but also "substantial" in order to apply the overbreadth exception in a particular case. *Taxpayers for Vincent*, 466 U.S. at 799-800 (quoting *Broadrick*, 413 U.S. at 615). Therefore, the doctrine of overbreadth permits a court to wholly invalidate a statute only when the terms are so broad that they punish a substantial amount of protected free speech in relation to the statute's otherwise plainly legitimate sweep – until and unless a limiting construction or partial invalidation narrows it so as to remove the threat or deterrence to constitutionally protected expression. *Hicks*, 539 U.S. at 118-119.

Turning to the instant case, we first note that although conduct generally is not protected by the First Amendment, *expressive* conduct may be. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968). However, we do not find that § 16-17-420 prohibits the kind of clearly expressive conduct historically subject to overbreadth adjudication in the school context. Notably, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the United States Supreme Court declared unconstitutional a school board's actions suspending students for wearing black armbands to school in protest of the Vietnam War. In *Tinker*, the court held that wearing armbands as a "silent, passive expression of opinion" was protected symbolic speech regardless of the popularity of the opinion being expressed. Restricting this type of speech when it was "unaccompanied by any disorder or disturbance" could not be tolerated under the First Amendment. 393 U.S. at 508. Prior to that, in *Edwards v. South Carolina*, 372 U.S. 229 (1963), the United States Supreme Court held that breach of the peace convictions for high school and college students peaceably assembling and protesting on public grounds were unconstitutional as violative of the First Amendment.

An analysis of § 16-17-420 is more appropriately derived from cases analyzing statutes targeting conduct termed "disruptive" to schools, with no specific prohibition otherwise on First Amendment expressive conduct. *Grayned v. City of Rockford*, 408 U.S. 104 (1972) is the leading United States Supreme Court decision in that context. In *Grayned*, the petitioner was convicted under an Illinois antinoise ordinance for his part in a demonstration

in front of a school. He subsequently challenged the constitutionality of the ordinance which prohibited "any noise or diversion which disturbs or tends to disturb the peace or good order of a school" on grounds of vagueness and overbreadth. 408 U.S. at 108. Relying on *Tinker* as its touchstone, the court held that although the statute tended to target expressive conduct, such expressive conduct could be restricted in the school environment if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 118 (quoting *Tinker*, 393 U.S. at 513). The court distinguished the demonstration at issue in *Grayned* from the wearing of armbands in *Tinker* primarily on the grounds that the *Tinker* students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others." *Id*. (quoting *Tinker,* 393 U.S. at 514). It further noted the limited scope of the ordinance, which it construed to punish only conduct that disrupted normal school activities – a decision necessarily made on a case-by-case basis. *Id.* at 119. The *Grayned* court concluded by saying that the city's "modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools." *Id*. at 121. Such a reasonable regulation, it held, was consistent with the First Amendment and therefore the antinoise ordinance was not invalid on its face. *Id*. at 121.

More analogous to the case before this Court is *McAlpine v. Reese*, 305 F. Supp. 136 (1970), in which the federal district court in Michigan upheld the constitutionality of a Michigan ordinance similar to § 16-17-420 against facial attacks of vagueness and overbreadth. The Michigan ordinance at issue provided:

> No person shall wilfully or maliciously make or assist in making any noise, disturbance, or improper diversion by which the peace, quietude or good order of any public, private, or parochial school is disturbed.

305 F. Supp. at 138 (citing Detroit Muni. Code, § 39-1-57 (1954)). In *McAlpine*, the district court observed that the ordinance did not by its terms "prohibit any kind of gathering or expression save that which disturbs the

quietude of a school." *Id.* at 140. The court noted the "fundamental interest to our society . . . [of] the schools and their undisturbed operation" and determined that the only kind of conduct prohibited by the ordinance was not "free speech" but rather "free abuse of others." *Id.* at 141. Ultimately, the court rendered the ordinance unsuitable for overbreadth invalidation by concluding that the type of conduct prohibited could "not be tolerated in any ordered society." *Id.* The fact that free speech was intermingled with such conduct did not automatically call for constitutional protection. *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 559, 564 (1965). At the same time, the *McAlpine* court, like the *Grayned* court, was careful in its opinion to distinguish the scope of the Michigan ordinance from other prohibitions on expression that did not involve the disruption of schools, reiterating that the latter would be subject to constitutional protection. *Id.*

Similarly, in *S.H. B. v. State of Florida*, 355 So.2d 1176 (Fla. 1977), the Florida Supreme Court upheld the constitutionality of a statute prohibiting the willful interruption or disturbance of "any school." Fla. Stat. § 871.01 (1973). The plaintiff, convicted under the statute for behavior that included "running through the halls of a school in session, disobeying the lawful and reasonable requests of school officials, and repeated loud utterances," claimed the statute was overly broad on its face. *S.H.B.*, 355 So.2d at 1179. He asserted that an overbreadth analysis of the statute should be governed by cases defining the constitutional limits of breach of the peace statutes. The Florida court disagreed and held that the statute at issue only prohibited disturbances of lawful assembly (i.e. school gatherings) and therefore was limited in its application in a way that breach of the peace statutes were not. *Id.* at 1178. The court recognized that school gatherings are "fragile by their nature," *id.*, and comparing the school environment to a general public forum, the court noted that in schools, "a single individual may cause havoc in a situation in which hundreds of others have sought a common purpose." *Id.* The court emphasized that certain conduct – even if "expressive" – could disrupt the school environment even where it might not elsewhere. *Id.* The Florida court, like the *Grayned* court, condoned a case-by-case approach to weeding out overly broad applications of the statute and held that the statute was constitutional on its face. *Id*.

Applying these principles to South Carolina's disturbing schools statute, S.C. Code Ann. § 16-17-420(1), we find that it does not substantially prohibit First Amendment speech. By its terms, the statute does not apply to protected speech. Specifically, the disturbing schools statute does not prohibit spoken words or conduct "akin to 'pure speech.'" *Tinker*, 393 U.S. at 508. Nor does the statute broadly regulate conduct like a breach of the peace statute.[4] *Broadrick*, 413 U.S. at 616. Instead, § 16-17-420 criminalizes conduct that "disturbs" or "interferes" with schools, or is "obnoxious." S.C. Code Ann. § 16-17-420(1)(a) and (c). In applying the *Tinker* distinction between direct restrictions on silent, passive expression of opinion versus restrictions on expression when accompanied by disorder or disturbance of schools, § 16-17-420, like the regulations at issue in *McAlpine* and *S.H.B.*, clearly applies to the latter. Such conduct is not protected by the First Amendment and accordingly, we hold that § 16-17-420 is not a substantial threat to protected speech requiring overbreadth adjudication.

The overbreadth doctrine additionally provides that any threat or deterrence to constitutionally protected expression may be removed by a limiting construction on the challenged statute. *Broadrick*, 413 U.S. at 613. Analyzed from this perspective, § 16-17-420 is limited in its application by its own terms so as to remove any substantial threat to constitutionally protected expression. First, the statute specifically deals with the disturbance of students and teachers in South Carolina's schools, and not a disturbance in just any public forum. *See S.H.B.*, 355 So.2d at 1178. Furthermore, it does not explicitly prohibit any type of gathering or expression except those which disturb the learning environment in South Carolina's schools. Those who

[4] Breach of the peace statutes are generally attacked on grounds of overbreadth and vagueness because if not drafted with proper specificity, they have a strong potential for infringement on First Amendment rights in otherwise peaceable assembly. *See Coates v. Cincinnati*, 402 U.S. 611 (1971); *Cox*, 379 U.S. 536; *Edwards*, 372 U.S. 229. However, *Grayned* and its progeny clearly indicate that the constitutionality of statutes that specifically address a "breach of the peace" *in schools* are to be considered in light of the "special characteristics of the school environment." 408 U.S. at 116 (quoting *Tinker*, 393 U.S. at 506).

wish to engage in this type of "expression" are free to either do so elsewhere; or do so in the school environment in a way that does not disturb schools. *McAlpine*, 309 F. Supp. at 140. Finally, the statute is limited in the type of conduct that may be punished. The disturbance or interference is required to be done "wilfully" or "unnecessarily." S.C. Code Ann. § 16-17-420(1)(a).

Taken to its outermost First Amendment boundaries, § 16-17-420 is most accurately characterized as "intertwining" speech and non-speech elements. *Cox v. Louisiana*, 379 U.S. at 563; *McAlpine*, 309 F. Supp at 140. Appellant argues that this might include constitutionally protected expression, but we find this is not "substantially" so. The proper functioning of schools is "a topic of great and fundamental interest to our society." *McAlpine* 309 F. Supp. at 140. Clearly the State has a legitimate interest in maintaining the integrity of its education system.[5] This objective is necessarily achieved in part by classroom discipline. Because the school environment is "fragile by [its] nature," it requires a certain level of conduct and cooperation on the part of both the student and the teacher in order to function effectively for all its participants. *S.H.B.*, 355 So.2d at 1178. Any conduct in this context that interferes with the State's legitimate objectives may be prohibited. "The fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *McAlpine*, 309 F. Supp. at 140.

Appellant urges this Court to consider a school debate scenario where an individual could be prosecuted under § 16-17-420 for expressing a "disturbing" view, which in turn might implicate other students who openly disagree with that view in a manner deemed "obnoxious." S.C. Code Ann. § 16-17-420(1). The innocent scenario suggested by Appellant is clearly not within the scope of § 16-17-420, nor would this Court construe it that way. *Tinker* permits the State to enforce its significant interest in its education

[5] The General Assembly originally enacted § 16-17-420(1) in 1919 as a statute to protect schools for "women and girls." 1919 S.C. Acts 239. The statute was amended in 1968 to apply to "any" school. 1968 S.C. Acts 2308. Today § 16-17-420 is part of Title 16, Chapter 17 of the South Carolina Code which is appropriately titled "Offenses Against Public Policy."

system by punishing behavior that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 506. Section 16-17-420 prohibits no more than this. Moreover, the United States Supreme Court has mandated a case-by-case approach to address whatever overbreadth may exist. *See Grayned*, 408 U.S. at 119-120; *Broadrick*, 413 U.S. at 615. *See also S.H.B.*, 355 So.2d at 1178. A case-by-case approach to the enforcement of the statute allows this Court to act accordingly in the unlikely event that a person genuinely exercising his constitutional right to expression – such as the debate team member envisioned by Appellant – becomes a target of § 16-17-420. *See S.H.B.*, 355 So.2d at 1178; *McAlpine*, 309 F. Supp. at 141.

Any fertile legal imagination can dream up conceivable ways in which enforcement of a statute violates First Amendment rights. *Grayned*, 408 U.S. at 111, n. 15. However, conceivable overbreadth must be substantial in order to merit overbreadth adjudication. Notwithstanding all other laws of this state, Appellant and others are welcome to express themselves in a way that "disturbs" others in any other public forum without offending § 16-17-420. Because of the state's fundamental interest in protecting its schools, § 16-17-420 draws the line on conduct that materially disturbs *normal school activity* – the very same constitutional line drawn by *Tinker* and its progeny. We therefore hold that § 16-17-420 does not punish a substantial amount of protected speech, and accordingly, does not warrant overbreadth adjudication.

II. Vagueness

Respondent contends that Appellant lacks standing to make a facial vagueness challenge to the constitutionality of § 16-17-420. We agree.

The traditional rule of standing for facial attacks on statutes, *supra* n.3, applies to facial vagueness challenges such as the one before this Court. "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Michau*, 355 S.C. 73, 76, 583 S.E.2d 756, 758 (2003) (quoting *Curtis v. State*, 345 S.C. 557, 571, 549 S.E.2d 591, 598

(2001)). The constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies. Therefore, "one to whose conduct the law clearly applies does not have standing to challenge it for vagueness" as applied to the conduct of others. *Village of Hoffman Estates*, 455 U.S. at 495; *Michau*, 355 S.C. at 77, 583 S.E.2d at 758.

There can be no doubt that Appellant's conduct falls within the most narrow application of § 16-17-420. Appellant's teacher testified to the family court that for a period of over two hours, Appellant behaved in a way that was wilfully disruptive and unnecessary. Appellant paced about the classroom and refused to remain in his desk; cursed to his teacher and other students; and harassed one student with comments about the student's mother. For over two hours, Appellant's teacher patiently attempted to reason with him regarding his classroom behavior, to no avail. Left with no other choice but to remove Appellant from the classroom so that she and the other students could focus on their educational objectives, the teacher asked another staff member to escort Appellant from the room. Appellant, however, did not stop there. Appellant began yelling and cursing, swung a punch at his teacher as he left the classroom, and continued his tirade as he was escorted down the hall.

Moreover, Appellant had prior notice that this type of conduct was prohibited. A juvenile petition from May 2004 charged Appellant for a violation of the very same statute he now alleges is unconstitutionally vague pursuant to an October 2004 juvenile petition. Accordingly, Appellant does not have standing to facially challenge § 16-17-420 on grounds of vagueness.

Because Appellant does not have standing to challenge § 16-17-420 on grounds of vagueness, we do not address the merits of his argument that the terms of § 16-17-420 are so vague that a person of common intelligence must necessarily guess at its meaning. *See Broadrick*, 413 U.S. at 607 (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). The family court's ruling that § 16-17-420 is not unconstitutionally vague is vacated.

CONCLUSION

For the foregoing reasons, we affirm the family court's decision that § 16-17-420 is not unconstitutionally overbroad. Because Appellant does not have standing to challenge § 16-17-420 for vagueness, the family court's decision on that matter is vacated.

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

sentencing, the jury was charged on four aggravating circumstances[1] and three mitigating circumstances.[2] The jury found aggravating circumstances present, and the court imposed a death sentence for both counts of murder. The court also sentenced Appellant to life in prison for the first-degree burglary.[3] This opinion consolidates Appellant's direct appeal and the sentence review required by S.C. Code. Ann. § 16-3-25 (2003). We affirm.

FACTS

The material facts are undisputed. The victims were the father and brother of the Appellant's ex-girlfriend. On the night of April 1, 2003, Appellant entered the home of the two victims and held them hostage for 4 ½ hours. Despite negotiations with local police and pleas for the release of the victims by Appellant's friends and family, Appellant shot the two victims in the head, killing them.

Appellant admitted shooting both victims and was convicted on all charges. Appellant did not request any statutory mitigators in addition to the

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[1] The aggravating circumstances were: (1) the murder was committed while in the commission of the crime or act of kidnapping; (2) the murder was committed while in the commission of the crime or act of burglary in the first degree; (3) two or more persons were murdered by the defendant pursuant to one act or one scheme or course of conduct; and (4) the murder was of a law enforcement officer during or because of the performance of his official duties. S.C. Code Ann. § 16-3-20(C)(a)(1)(b) and (c), -20(C)(a)(7), and -20(C)(a)(9) (2003). The fourth aggravator applied to only one of the victims, a sheriff's deputy returning home after his shift ended.

[2] The mitigating circumstances were: (1) the defendant has no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; and (3) the age or mentality of the defendant at the time of the crime. S.C. Code Ann. § 16-3-20(C)(b)(1), (2), and (7) (2003).

[3] No sentences were imposed for the kidnapping and weapon convictions pursuant to S.C. Code Ann. § 16-3-910 (2003) and § 16-23-490(A) (2003).

three statutory mitigating circumstances submitted to the jury, and he did not object to any of the jury charges during the sentencing phase.

Appellant now seeks a new sentencing proceeding due to the trial judge's failure to submit to the jury the statutory mitigating factor provided by S.C. Code Ann. § 16-3-20(C)(b)(6): the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

ISSUE

> Is Appellant entitled to a new sentencing proceeding because the trial judge failed to *sua sponte* charge the jury on a statutory mitigating circumstance?

ANALYSIS

Appellant argues the trial judge should have submitted to the jury the mitigator relating to capacity, without regard to whether Appellant made a specific request for that mitigating circumstance at trial. We disagree.

The proper procedure for the submission of statutory mitigating circumstances to the jury in the penalty phase of a capital case is found in State v. Victor, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989):

> Once a trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury.

Our recent cases have stated that absent a request by counsel to charge a mitigating circumstance at trial, the issue whether the mitigator should have

been charged is not preserved for review. *See* State v. Humphries, 325 S.C. 28, 36, 479 S.E.2d 52, 57 (1996); State v. Vazquez, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005); State v. Bowman, 366 S.C. 485, 494, 623 S.E.2d 378, 383 (2005); and State v. Sapp, 366 S.C. 283, 621 S.E.2d 883, n.3 (2005).

Appellant cites State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990), to support his position. In Caldwell, we held the trial judge erred by failing to charge the mitigating circumstances found in S.C. Code Ann. § 16-3-20(C)(b)(2), (6), and (7) after evidence was presented of the defendant's mental disorder, even though these mitigating charges were never requested.

Caldwell, however, does not support Appellant's position because we reviewed that error *in favorem vitae*.[4] Caldwell, 300 S.C. at 506, 388 S.E.2d at 823. We abolished the doctrine of *in favorem vitae* in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Toal, J., concurring). In Torrence we stated, "a contemporaneous objection is necessary in all trials beginning after the date of this opinion to properly preserve errors for our direct appellate review." Torrence, 305 S.C. at 69, 406 S.E.2d at 328.

Two post-Torrence cases have held that when the defendant is intoxicated at the time of the capital crime, the trial judge must submit three statutory mitigating circumstances[5] to the jury. *See* State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991); State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002). Recent cases have cited Stone as holding that a trial judge is required to charge those intoxication mitigators regardless whether they are requested at trial. *See, e.g.*, Bowman, 366 S.C. at 494, 623 S.E.2d at 383 (acknowledging holding of State v. Stone, *supra*, as requiring trial court to

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[4] Meaning literally "in favor of life," the doctrine of *in favorem vitae* allowed us to review the entire record on appeal for legal error and to address those errors even when no objection was made at trial.

[5] S.C Code Ann. § 16-3-20(C)(b)(2): the murder was committed while the defendant was under the influence of mental or emotional disturbance; (6): the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (7) the age or mentality of the defendant at the time of the crime.

submit mitigating circumstances to jury if there is evidence of intoxication, regardless of whether they are requested); Vazquez, 364 S.C. at 301, 613 S.E.2d at 363 (same).

We never explicitly stated in Young, Stone, or any other intoxication case that statutory mitigating circumstances related to intoxication must be submitted to the jury even if the defendant does not request them.[6] Our intoxication cases have not created an exception to the post-Torrence preservation requirements for challenging jury charges during a capital sentencing proceeding.

Although there is some evidence of drinking in the days leading up to the incident, intoxication at the time of murders is not at issue here. Appellant argues that this purported preservation exception in intoxication cases also applies to mitigators stemming from mental disorders. For the reasons previously stated, no such exception exists.

By failing to make a contemporaneous objection or request for the capacity mitigator, Appellant did not properly preserve this issue for our review. Accordingly, we decline to address whether the evidence supported the submission of the mitigating circumstance of Appellant's capacity.

PROPORTIONALITY REVIEW

This Court must conduct a proportionality review of Appellant's death sentence based on the record. S.C. Code Ann. § 16-3-25(A) (2003). In conducting the review, we consider similar cases in which the death penalty has been upheld. *See* S.C. Code Ann. § 16-3-25(E).

Appellant's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the jury's findings of

[6] In fact, the trial judge in Stone *refused* to charge the three statutory mitigating factors associated with intoxication and erroneously informed the jury that intoxication was not a mitigating factor. Stone, 350 S.C. at 449-450, 567 S.E.2d at 248.

aggravation. *See* S.C. Code Ann. § 16-3-25(C). Further, in relation to sentences in similar cases, Appellant's sentence was neither excessive nor disproportionate to his crime. *See* Vazquez, *supra* (involving a double murder committed in the course of robbery); State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (involving murder after a hostage situation); State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003) (involving a triple murder committed in the course of burglary); and State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (involving a double murder committed in the course of burglary).

CONCLUSION

Appellant's claim that the trial judge should have charged the jury on the statutory mitigating circumstance relating to capacity is not preserved for our review. Finally, the punishment was appropriate to the crime. Appellant's sentence is

AFFIRMED.

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

The Supreme Court of South Carolina

In the Matter of William Franklin "Troup" Partridge, III, Respondent.

ORDER

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

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 Charles V. Verner, 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. Verner shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Verner may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Charles V. Verner, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Charles V. Verner, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Verner's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Pleicones, J., not participating

Columbia, South Carolina

November 3, 2006

The Supreme Court of South Carolina

In the Matter of
Oliver W. Johnson, III, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition requesting respondent be transferred to incapacity inactive status pursuant to Rule 28(d)(1), RLDE, Rule 413, SCACR.

The petition is granted. Respondent is hereby transferred to incapacity inactive status pending a determination of his incapacity pursuant to Rule 28(b), RLDE.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
November 1, 2006

The Supreme Court of South Carolina

In the Matter of Charles N. Pearman, Respondent.

ORDER

Respondent has been charged with soliciting prostitution, in violation of S.C. Code Ann. § 16-15-90 (2003), and impersonating a law enforcement officer, in violation of S.C. Code Ann. 16-17-720 (2003). The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension, pursuant to Rule 17(a), RLDE, Rule 413, SCACR, because he has been charged with a serious crime.

IT IS ORDERED that the petition is granted and respondent is suspended, pursuant to Rule 17(a), RLDE, Rule 413, SCACR, from the practice of law in this State until further order of this Court.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina

November 3, 2006

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

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O R D E R

The South Carolina Bar has proposed amending the South Carolina Appellate Court Rules to allow the admission of foreign attorneys as "Foreign Legal Consultants." The Court believes enacting this Rule will help to increase opportunities for South Carolina attorneys to be admitted to practice in other nations.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend the South Carolina Appellate Court Rules by adding a new rule addressing the admission of foreign attorneys as Foreign Legal Consultants. The language of this new rule, Rule 424, SCACR, is set forth in the attachment to this order. This order is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

November 2, 2006

Rule 424

Licensing of Foreign Legal Consultants

(a) Qualifications for Admission. In its discretion, the Supreme Court of the State of South Carolina may license to practice in this State as a foreign legal consultant, without examination, an applicant who:

(1) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(2) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;

(3) possesses the good moral character and general fitness requisite for a member of the Bar of this State;

(4) is at least twenty-six years of age; and

(5) intends to practice as a foreign legal consultant in this State and to maintain an office in this State for that purpose.

(b) Proof Required. An applicant under this Rule shall file an application in triplicate with the Clerk of the Supreme Court. The application shall be accompanied by a non-refundable application fee of $500. The application shall include the following:

(1) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof,

and as to his or her good standing as such attorney or counselor at law or the equivalent;

(2) a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;

(3) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English; and

(4) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section (a) of this Rule as the Supreme Court of the State of South Carolina may require.

(c) Scope of Practice. A person licensed to practice as a foreign legal consultant under this Rule may render legal services in this State subject, however, to the limitations that he or she shall not:

(1) appear for a person other than himself or herself as attorney in any court, or before any magistrate, administrative body, or other judicial officer, in this State;

(2) prepare any deed, mortgage, assignment, lease, or any other instrument effecting the transfer or registration of title to real estate located in the United States of America;

(3) prepare:

(A) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or

(B) any instrument relating to the administration of a decedent's estate in the United States of America;

(4) prepare any instrument in respect to the marital or parental relations, rights, or duties of a resident of the United States of America, or the custody or care of the children of such a resident;

(5) render professional legal advice on the laws of this State, the laws of any other state, the laws of the District of Columbia, the laws of the United States of America or of any territory or possession thereof, or the laws of any foreign country other than the country in which the foreign legal consultant is admitted to practice as an attorney or the equivalent thereof;

(6) be, or in any way hold himself or herself out as, a member of the Bar of this State; or

(7) carry on his or her practice under, or utilize in connection with such practice, any name, title, or designation other than one or more of the following:

(A) his or her own name;

(B) the name of the law firm with which he or she is affiliated;

(C) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and

(D) the title "foreign legal consultant," which shall be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]" and also stating "Not a member of the South Carolina Bar."

(d) Rights and Obligations. Subject to the limitations set forth in Section (c) of this Rule, a person licensed as a foreign legal consultant under this Rule shall be considered a lawyer affiliated with the Bar of this State and shall be entitled and subject to:

(1) the rights and obligations set forth in the Rules of Professional Conduct of Rule 407, South Carolina Appellate Court Rules. With respect to continuing legal education requirements of Rule 408(a), a person licensed as a foreign legal consultant shall annually attend at least two (2) hours of approved Continuing Legal Education (CLE) courses devoted to legal ethics/professional conduct; and

(2) the rights and obligations of a member of the Bar of this State with respect to:

(A) affiliation in the same law firm with one or more members of the Bar of this State, including by:

(i) employing one or more members of the Bar of this State;

(ii) being employed by one or more members of the Bar of this State or by any partnership (or professional corporation) which includes members of the Bar of this State or which maintains an office in this State; and

(iii) being a partner in any partnership (or shareholder in any professional corporation) which includes members of the Bar of this State or which maintains an office in this State; and

(B) attorney-client privilege, work-product privilege, and similar professional privileges.

(e) Disciplinary Provisions. A person licensed to practice as a foreign legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the Bar of this State and to this end:

(1) every person licensed to practice as a foreign legal consultant under these Rules:

(A) shall be subject to control by the Supreme Court and to admonition, reprimand, or suspension of his or her license to

practice by the Supreme Court of the State of South Carolina and shall otherwise be governed by Rule 407, South Carolina Appellate Court Rules; and

(B) shall execute and file with the Clerk of the Supreme Court, in such form and manner as such court may prescribe:

(i) his or her commitment to observe the Rules of Professional Conduct Rule 407, South Carolina Appellate Court Rules, to the extent applicable to the legal services authorized under Section (c) of this Rule;

(ii) an undertaking or appropriate evidence of professional liability insurance, in such amount as the Court may prescribe, to assure his or her proper professional conduct and responsibility;

(iii) a written undertaking to notify the Supreme Court of any change in such person's good standing as a member of the foreign legal profession referred to in Section (a)(1) of this Rule and of any final action of the professional body or public authority referred to in (b)(1) of this Rule imposing any disciplinary censure, suspension, or any other sanction upon such person; and

(iv) a duly acknowledged instrument, in writing, setting forth his or her address in this State and designating the Clerk of the Supreme Court as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within or to residents of this State whenever, after due diligence, service cannot be made upon him or her at such address or at such new address in this State as he or she shall have filed in the office of such Clerk by means of a duly acknowledged supplemental instrument in writing.

(2) Service of process on the Clerk of the Supreme Court, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such Clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of $10. Service of process shall be complete when such Clerk has been so served. Such Clerk shall promptly send one of such copies to the foreign legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such foreign legal consultant at the address specified by him or her as aforesaid.

(f) License Fees. A person licensed as a foreign legal consultant shall pay license fees in the same amount as paid by active members who have been admitted to practice law in this State or any other jurisdiction for three years or more, as set forth in Rule 410(c), South Carolina Appellate Court Rules.

(g) Revocation of License. In the event the Supreme Court of the State of South Carolina determines that a person licensed as a foreign legal consultant under this Rule no longer meets the requirements for licensure set forth in Section (a)(1) or Section (a)(3) of this Rule, it shall revoke the license granted to such person hereunder.

(h) Admission to Bar. In the event a person licensed as a foreign legal consultant under this Rule is subsequently admitted as a member of the Bar of this State under the provisions of the Rules governing such admission, the license granted to such person hereunder shall be deemed terminated by the license granted to such person to practice law as a member of the Bar of this State.

(i) Application for Waiver of Provisions. The Supreme Court of the State of South Carolina, upon application, may in its discretion vary the application or waive any provision of this Rule where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age, and residence address, together with the facts relied upon and a prayer for relief. Such application shall be accompanied by a filing fee of $75.00.

WILLIAMS, J.: Edman and Debbie Hackworth appeal the trial court's grant of summary judgment in favor of Greenville County and the Greenville County Sheriff's Department. The Hackworths seek to recover $152,016 seized during the sheriff department's investigation into their alleged illegal gambling.

FACTS

During 1999, the Greenville County Sheriff's Department investigated Edman and Debbie Hackworth for suspected gambling activity. The sheriff's department executed search warrants on the Hackworth's home, one of their businesses, and two safety deposit boxes. These searches yielded evidence of the Hackworth's gambling, including *inter alia* over $160,000 in cash, computers, phones, a paper shredder, and parlay cards. On September 7, 1999, Edman and Debbie were arrested on charges of "betting, pool-setting, bookmaking and the like," and Edman was also charged with "setting up a lottery."

Ultimately, Edman reached a plea agreement with the sheriff's department whereby he would forfeit $152,016 of the seized cash and plea guilty to the lesser charge of "adventure in the lotteries" and pay a $125 fine. In exchange, all of the original charges against Debbie and Edman were *nol prossed* and approximately $14,000 was returned to them. On September 30, 1999, Edman signed a document entitled "consent forfeiture of monies derived from gambling." This document stated that it was the parties' desire to enter into a compromise settlement to avoid litigation, and that Edman voluntarily relinquished his right to $152,016 "pursuant to § 16-19-80, Code of Laws of South Carolina (1976), as amended."[1] Although the document

[1] South Carolina Code Ann. §16-19-80 (2005) states "[a]ll and every sum or sums of money staked, betted or pending on the event of any such game or games as aforesaid are hereby declared to be forfeited." The statute does not provide a process for law enforcement to follow with forfeited money.

had signature blocks for Edman, an assistant solicitor, a sheriff's deputy, and a circuit court judge, only Edman signed the document.

Edman pled guilty to "adventure in the lotteries" and paid the $125 fine. All three of the original charges against Edman and Debbie were *nol prossed*.

The Hackworths claimed the $152,016 forfeiture as a deduction from their federal income tax for 1999. The Internal Revenue Service denied this deduction, and the federal tax court affirmed the denial at the resulting tax trial. Two sheriff's department deputies served as witnesses at the Hackworth's tax trial.

The Hackworths claimed that during the tax trial they discovered that a judge did not sign the consent to forfeiture. As a result, on April 7, 2004, they initiated the present action against the sheriff's department seeking to recover the $152,016. In the present civil action, the Hackworths assert unlawful seizure, conversion by the sheriff's department, and creation of a constructive trust to protect the money. The circuit court heard oral arguments and granted the sheriff's department's motion for summary judgment based on the statute of limitations.

STANDARD OF REVIEW

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. White v. J.M. Brown Amusement Co., 360 S.C. 366, 601 S.E.2d 342 (2004). In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001).

DISCUSSION

The Hackworths argue that the trial court erred in dismissing their claim on a motion for summary judgment and that the court incorrectly interpreted the requirements of civil forfeiture pursuant to South Carolina Code Ann. Section 16-19-80 (1976) by disregarding due process rights to a hearing. We disagree.

The court granted summary judgment based on the statute of limitations. For claims filed under the Tort Claims Act, the statute of limitations is two years after the loss was or should have been discovered. See S.C. Code Ann. § 15-78-110 (2005). The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995).

> In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

On September 30, 1999, the Hackworths either knew or should have known they lost their ownership interest in the $152,016 when Edman signed the consent to forfeiture. If the Hackworths thought their property was improperly seized and retained, they should have initiated an action before September 30, 2001.

However, the Hackworths claim the statute of limitations should not run until after their federal tax case was resolved because the money was evidence at that time, and they could not get it back while the case was pending. They assert the fact that two sheriff's deputies testified for the IRS gives them reason to believe the cash could have been used as evidence

during trial. The money was never used in any of the Hackworth's court appearances.

There is no evidence in the record to support the Hackworth's position. The only evidence indicating the Hackworths either knew or should have known that the sheriff's department claimed ownership interest in the money is the "consent to forfeiture" document and the testimony that the Hackworths claimed a deduction on their 1999 tax return for the exact amount of the forfeiture. There is no testimony to suggest the cash was retained as sheriff's department property on any date other than September 30, 1999, the date of the forfeiture. Therefore, the statute of limitations began to run on that date.

The Hackworths also argue that due process requires judicial approval of the forfeiture. Citing United States v. Minor, 228 F.3d 352 (4th Cir. 2000) and United States v. Aguirre, 264 F.3d 1195 (10th Cir. 2001), the Hackworths contend that no forfeiture occurred because there was not a forfeiture hearing. However, these federal cases are distinguishable because Edman consented to forfeit the cash and thus had knowledge of the forfeiture when it occurred, whereas the forfeitures in the federal cases were involuntary and the hearing served as notice to the defendants. Even if due process requires such a hearing, we need not address this claim because the Hackworths neglected to demand such a hearing and did not challenge the voluntary forfeiture within the two-year statute of limitations. In fact, the Hackworths failed to assert their claims for over four and one half years.

Notably, Edman agreed to forfeit his gambling proceeds in exchange for his plea to a lesser charge, all charges against him and his wife being *nol prossed*, and the return of $14,000. Edman and Debbie enjoyed the full benefit of that agreement and cannot now bring suit to recover the money.

The Hackworths failed to provide evidence that would tend to support their position. All of the evidence presented to the trial judge showed the Hackworths were aware of the money's forfeiture. Therefore, the trial court was justified in granting summary judgment.

Accordingly, the circuit court's decision is

AFFIRMED.

GOOLSBY, and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert S. Brannon and Kimberly C. Brannon, Respondents,

v.

The Palmetto Bank and Howard Barnard, Defendants,

Of whom The Palmetto Bank is the Appellant.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4175
Submitted September 1, 2006 – Filed November 6, 2006

REVERSED

F. Marion Hughes, Langdon Cheves, III and Seann Gray Tzouvelekas, all of Greenville, for Appellant.

H. Michael Spivey, of Mauldin, for Respondents.

WILLIAMS, J.: On appeal, Palmetto Bank contends the trial court erred in refusing to direct a verdict in its favor on Robert and Kimberly Brannon's causes of action for breach of contract and conversion. In the alternative, Palmetto Bank contends the trial court erred in directing a verdict against Palmetto Bank on the Brannons' breach of contract claim rather than submitting the issue to the jury. Additionally, Palmetto Bank argues the trial court erred in allowing the jury to consider evidence of speculative damages. We reverse.

FACTS

On January 22, 2002, the Brannons bought a house out of foreclosure from Palmetto Bank. Two closings occurred in order to finalize this transaction. The first closing was on a 90-day note for the purpose of giving the Brannons time to sell their former house. The closing held on January 22, 2002, was to refinance the original 90-day note for $155,000.00 plus $5,000.00 in interest charged during the 90-day period by Palmetto Bank. The Brannons' monetary obligation to Palmetto Bank was secured by a mortgage lien on the residence being purchased.

The mortgage agreement required the Brannons to keep the house insured for its full insurable value and required the insurance be payable to Palmetto Bank as a loss payee. Pursuant to the mortgage, the Brannons also assigned to Palmetto Bank "the right to collect and receive any indemnity payment otherwise owed to [the Brannons] upon any policy of insurance insuring any portion of the property, regardless of whether [Palmetto Bank] is named in such policy as a person entitled to collect upon the same."

On February 19, 2002, the Brannons' home was destroyed by fire. An insurance check was issued by the carrier for $185,850.00 and was made payable to the Brannons, Palmetto Bank, and the builders replacing the Brannons' home. Mrs. Brannon took the check to Palmetto Bank, which advised her to open a general deposit account into which most of the insurance proceeds were deposited. Palmetto Bank issued a check to Mrs. Brannon for $25,000 so she could pay her builders.

On the same day the general deposit account was opened, a hold was placed on the account so that the insurance proceeds could not be withdrawn. Two days later, Palmetto Bank withdrew the sum of $160,257.78 from the deposit account and paid off the mortgage debt. Mrs. Brannon later went to Palmetto Bank to withdraw more money in order to pay her builders when she discovered the mortgage had been paid off and the deposit account was virtually empty. The Brannons then had to receive new financing for the home they were building. Apparently, the Brannons had a history of bad credit which created problems with the financing. Eventually they received financing, but at a much higher interest rate than what they had with the previous mortgage. When the Brannons learned that Palmetto Bank had used the deposit account to satisfy the mortgage debt, this litigation ensued.

At trial, testimony showed the Brannons were aware there was a possibility that the insurance proceeds could be used to pay off the mortgage debt. Palmetto Bank explained that this procedure is meant to be beneficial for both the lender and the borrower. It is beneficial to the borrower because when the existing loan gets paid off, the borrower under the new construction loan pays interest only on the amount that has been advanced rather than the full principal amount of the existing loan. It is beneficial to the lender because, after the fire has destroyed the house, the lender's only collateral is the vacant lot.

The trial court found, as a matter of law, Palmetto Bank was liable to the Brannons for breach of contract. The determination of damages owed on the breach of contract claim and the liability and damages owed on the conversion claim were submitted to the jury. Subsequently, the jury found Palmetto Bank liable on the conversion cause of action and awarded damages in the amount of $133,000. Palmetto Bank filed motions seeking a judgment notwithstanding the verdict or, in the alternative, a new trial, which were denied. This appeal followed.

STANDARD OF REVIEW

When ruling on directed verdict or JNOV motions, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom

in the light most favorable to the nonmoving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001). However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). In reviewing a grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party. Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 295-96, 504 S.E.2d 347, 350 (Ct. App. 1998). In essence, the court must determine whether a verdict for the opposing party "would be reasonably possible under the facts as liberally construed in his favor." Harvey v. Strickland, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002).

LAW/ANALYSIS

I. Directed Verdict on Breach of Contract (Mortgage and Deposit Agreement) Cause of Action

Palmetto Bank contends the trial court erred in failing to direct a verdict in its favor on the Brannons' breach of contract cause of action. In the alternative, Palmetto Bank asserts it was error to direct a verdict in favor of the Brannons and in failing to submit the issue to the jury. We agree the court erred in not directing a verdict for Palmetto Bank on the breach of contract cause of action.

Paragraph 3 of the mortgage agreement gives Palmetto Bank four options in dealing with the insurance proceeds:

> Any indemnity payment received by [Palmetto Bank] from any such policy of insurance may, at the option of [Palmetto Bank], (i) be applied by [Palmetto Bank] to payment of any sum secured by this Mortgage in such order as [Palmetto Bank] may determine or (ii) be applied in a manner determined by [Palmetto

> Bank] to the replacement, repair or restoration of the portion of the Property damaged or destroyed or (iii) be released to [the Brannons] upon such conditions as [Palmetto Bank] may determine or (iv) be used for any combination of the foregoing purposes.

The trial court found as a matter of law that Palmetto Bank's deposit of a portion of the insurance proceeds into the deposit account constituted an unconditional "release" of those proceeds under paragraph 3(iii) of the Mortgage. The trial court further found: (1) once Palmetto Bank had chosen this option under paragraph 3(iii), it had no right of set-off against the deposit account to satisfy the Mortgage debt; and (2) in setting off against the deposit account, Palmetto Bank became liable to the Brannons as a matter of law for breach of contract.

The Brannons claim Palmetto Bank unconditionally released the insurance proceeds to them and cannot now revoke the release. "Release" is defined as "the act of giving up a right or claim to the person against whom it could have been enforced." Black's Law Dictionary 1292 (7th ed. 1999). While it is true Palmetto Bank may have released a portion of the insurance proceeds to the Brannons, the remaining money was placed in a general deposit account. The agreement pertaining to the deposit account contained a paragraph entitled "Set-Off" which gave Palmetto Bank the specific right, without prior notice to the Brannons, to "set-off the funds in this account against any due and payable debt owed . . . ." By placing the funds into a deposit account with a set-off provision, Palmetto Bank was not releasing its right or claim to the insurance proceeds. Because both parties retained control over the proceeds placed in the deposit account, the release cannot be seen as absolute. To come to the conclusion of the trial court, a release must have been a complete and total release.

Option (iv) of the mortgage agreement gave Palmetto Bank the ability to choose any of the other three options in any combination it wished. Palmetto Bank chose to release a portion of the proceeds and pay off the mortgage with the remainder. Pursuant to the mortgage agreement, Palmetto Bank was within its rights to do so. See MGC Mgmt. of Charleston, Inc. v.

Kinghorn Ins. Agency, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct. App. 1999) (stating court must construe contract in a way "which will give effect to the whole instrument and each of its various parts"). Accordingly, the trial court erred in failing to direct a verdict in Palmetto Bank's favor concerning the breach of contract issue.[1]

II. Directed Verdict on Conversion Cause of Action

Palmetto Bank contends the trial court erred in failing to direct a verdict in its favor on the Brannons' conversion cause of action. We agree.

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." Crane v. Citicorp Nat'l Servs., Inc., 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003). "Conversion is a wrongful act which emanates by either a wrongful taking or wrongful detention." Id.

As a matter of law, Palmetto Bank is not liable for conversion of the insurance proceeds because its use of the funds was not an unauthorized taking as Palmetto Bank had a legal right to the funds. In fact, the case of Richardson's Rests., Inc. v. The Nat'l Bank of South Carolina, 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991), states that a bank cannot be liable

[1] Palmetto Bank also contends the trial court erred in stating Palmetto Bank waived its right to apply the insurance proceeds to the outstanding mortgage debt by placing the funds in a deposit account. However, the trial court did not make the finding Palmetto Bank waived its rights to the insurance proceeds. However, had the trial court come to such a conclusion, it would have been in error. "Waiver is the voluntary and intentional relinquishment of a known right." Mailsource, LLC v. M.A. Bailey & Assocs., Inc., 356 S.C. 370, 375, 588 S.E.2d 639, 641 (Ct. App. 2003). Palmetto Bank's action did not constitute a waiver as there was clearly no intent on its part to relinquish its rights to the insurance proceeds.

for conversion of funds deposited into a payroll account because the deposits "become part of the [b]ank's general account against which [the depositor's] account received a credit." This Court went on the say this is true, "even though [the depositor] intended to use the account for a particular purpose." Id. at 295, 304 S.E.2d at 672. This position is only bolstered by the right of set-off pursuant to the deposit agreement, as discussed above. Accordingly, the trial court erred in failing to direct a verdict in favor of Palmetto Bank on the issue of conversion.

III. Evidence of Speculative Damages

Palmetto Bank contends the trial court erred in allowing the jury to consider evidence of speculative damages. Because we reverse on the two previous issues, we need not reach the issue of speculative damages. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (An appellate court need not address remaining issues when disposition of prior issue is dispositive.).

CONCLUSION

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

REVERSED. [2]

GOOLSBY, and BEATTY, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Farm Bureau Mutual Insurance Company, Respondent,

v.

David R. Dawsey, Sr. and David R. Dawsey, Jr., Defendants,

of whom David R. Dawsey, Jr. is Appellant.

Appeal From Charleston County
Mikell R. Scarborough, Master In Equity

Opinion No. 4176
Submitted October 1, 2006 – Filed November 6, 2006

AFFIRMED

James K. Holmes, of Charleston, for Appellant.

Robert J. Thomas, of Columbia, for Respondent.

STILWELL, J.: South Carolina Farm Bureau Mutual Insurance Company filed this declaratory judgment action against David R. Dawsey, Sr. (father) and David R. Dawsey, Jr. (son) seeking a determination regarding coverage under a homeowner's insurance policy. The master in equity found the policy excluded coverage for injuries incurred by the son. The son appeals. We affirm.[1]

FACTS

The parties stipulated to the underlying facts: The father was insured under a Farm Bureau homeowner's policy. On February 22, 2002, the son drove to the father's home in North Charleston. "[D]uring th[e] visit, there was some hostility." The father fired his pistol three times at the tires on the son's truck. One of the bullets ricocheted off the driveway and hit the son in the jaw, inflicting substantial injury. The son filed a negligence action against the father. The father did not answer the complaint and is in default. Farm Bureau filed this declaratory judgment action.

The policy provides coverage for bodily injury caused by an occurrence but excludes coverage for injury "resulting from intentional acts or directions of you or any insured. The expected or unexpected results or (sic) these acts or directions are not covered." The master found the exclusion applied in this case and entered judgment for Farm Bureau.

STANDARD OF REVIEW

Because declaratory judgment actions are neither legal nor equitable, the standard of review depends on the nature of the underlying issues. Auto-Owners Ins. Co. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006), petition for cert. filed, (S.C. June 16, 2006). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. Id. In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of

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

fact unless they are found to be without evidence that reasonably supports those findings. Id. When an appeal involves stipulated or undisputed facts, an appellate court is free to determine if the trial court properly applied the law to the facts. In re Estate of Boynton, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003). In such a situation, the appellate court does not have to defer to the trial court's findings. Id. at 301-02, 584 S.E.2d at 155.

LAW/ANALYSIS

The son argues the master erred in construing the policy to exclude coverage. We disagree.

Insurance policies are subject to the general rules of contract construction. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). The court must give policy language its plain, ordinary, and popular meaning. Id. Although exclusions in a policy are construed against the insurer, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition. B.L.G. Enters. v. First Fin. Ins. Co., 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999). The court cannot torture the meaning of policy language to extend coverage not intended by the parties. State Farm Fire & Cas. Co. v. Barrett, 340 S.C. 1, 8, 530 S.E.2d 132, 135 (Ct. App. 2000).

The son argues the South Carolina Supreme Court's interpretation of the intentional acts exclusions in Miller v. Fidelity-Phoenix Insurance Co., 268 S.C. 72, 231 S.E.2d 701 (1977), and Vermont Mutual Insurance Co. v. Singleton, 316 S.C. 5, 446 S.E.2d 417 (1994), should have been applied in this case. The insurance policies in Miller and Vermont Mutual contained language excluding coverage for damage intentionally caused by the insured. The policies did not specifically exclude coverage for the unintentional consequences of intentional acts.

The Miller court developed a two-prong test to analyze coverage under an exclusion such as that found in the Miller case. To exclude coverage under the Miller test, the act causing the loss must have been intentional and

the consequences must have been intended. Miller, 268 S.C. at 75, 231 S.E.2d at 701 (providing coverage where a child set fire to a home for the excitement of seeing the fire trucks arrive but no intent to damage the home). In Vermont Mutual, the court applied the Miller test, rejecting the insurer's argument to adopt a more "contemporary" intentional act analysis. 316 S.C. at 7-8, 446 S.E.2d at 419 (providing coverage where a teenager acted in self-defense when he struck another teenager but did not intend the extensive eye injuries inflicted).

The son argues the policy language in this case excludes coverage for unexpected consequences but does not exclude coverage for unintentional consequences. Thus, the son maintains, the second prong of the Miller test should still apply to provide coverage. The son admits, however, that the terms "intend" and "expect" are "often defined synonymously." To read the policy in the manner urged by the son would require us to rewrite the policy, rather than interpret it as written. "The judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction . . . ." Thompson v. Continental Ins. Cos., 291 S.C. 47, 49, 351 S.E.2d 904, 905 (Ct. App. 1986). We agree with the master that the policy excludes coverage for the son's injuries, which were unexpected consequences of the father's intentional act of shooting at the son's tire. Therefore, the order on appeal is

AFFIRMED.

HEARN, C.J., and KITTREDGE, J., concur.