Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

February 3, 2011

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629.

The Commission will not accept applications after <u>Noon on Tuesday, March 8, 2011.</u>

A vacancy exists in the office formerly held by the late Honorable Jamie Lee Murdock, Jr., Judge of the Family Court for the Fourth Judicial Circuit, Seat 2. The successor will fill the unexpired term which will expire June 30, 2013, and the subsequent full term which will expire June 30, 2019.

A vacancy exists in the office formerly held by the Honorable Letitia H. Verdin, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 3, upon her election to the Circuit Court, Thirteenth Judicial Circuit, Seat 2. The successor will fill the unexpired term which will expire on June 30, 2016.

A vacancy will exist in the office currently held by the Honorable Robert S. Armstrong, Judge of the Family Court for the Fourteenth Judicial Circuit, Seat 3, upon Judge Armstrong's retirement on or before August 31, 2011. The successor will fill the unexpired term which will expire June 30, 2013, and the subsequent full term which expires June 30, 2019.

A vacancy exists in the office currently held by the Honorable Robert A. Smoak, Jr., Master-in-Equity of Aiken County, upon his retirement on or before May 31, 2011. The successor will fill the unexpired term which expires June 20, 2013, and the subsequent full term which expires June 30, 2019.

The term of office held by the Honorable Patrick R. Watts, Master-in-Equity of Dorchester County, expired June 30, 2010. The successor will fill the subsequent full term of that office, which will expire June 30, 2016.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/html-pages/judmerit.html. If you wish to pick up an application package, first please contact Senate Judiciary Administrative Assistant, Laurie Traywick at (803) 212-6623.

The Supreme Court of South Carolina

In the Matter of Kevin Lee Benson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1991, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 5, 2011, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 2, 2011

The Supreme Court of South Carolina

In the Matter of Ana Lisa Corson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 17, 2008, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Supreme Court of South Carolina, dated December 27, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Ana Lisa Corson shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 14, 2011

The Supreme Court of South Carolina

In the Matter of Isabel W. Smith, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 8, 1979, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated January 24, 2011, Petitioner submitted her resignation from the South Carolina Bar, along with her certificate to practice law. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Isabel W. Smith be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

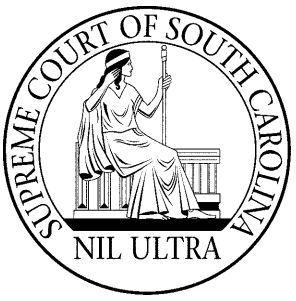
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 3, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5
February 7, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

26793 – Rebecca Price v. Michael D. Turner Granted 11/1/2010

26805 – Heather Herron v. Century BMW Pending

26846 – Mary Priester v. Preston Cromer (Ford Motor Co) Pending

26868 – State v. Norman Starnes Pending

2010-OR-00366 – State v. Marie Assaad-Faltas Pending

2010-OR-00322 – State v. Marie Assaad Faltas Pending

2010-OR-00420 – Cynthia Holmes v. East Cooper Hospital Pending

2010-OR-00455 – Joseph H. Gibbs v. State Pending

2010-OR-00694 – Michael Singleton v. State Pending

EXTENSION TO FILE PETITION – UNITED STATES SUPREME COURT

26871 – State v. Steven V. Bixby Granted

26786 – Sonya Watson v. Ford Motor Co. Granted

PETITIONS FOR REHEARING

26859 – Matrix Financial Services v. Louis M. Frazer (Kundinger)	Pending
26906 – State v. Stephen Corey Bryant	Denied 2/2/2011
26910 – M&T Group v. Palmetto Point	Denied 2/2/2011
26911 – SC DOT v. Horry County (Grainger)	Pending
26912 – Jannette Henry-Davenport v. School Dist. Of Fairfield County	Pending
2011-MO-002 – Mitchell Byrd v. Wausau	Denied 2/2/2011

EXTENSION TO FILE PETITION FOR REHEARING

26909 – Crossman Communities v. Harleysville Mutual	Granted

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2011-UP-040-State v. Joshua Shane Weatherford
(Florence, Judge Howard P. King)

2011-UP-041-State v. Leroy Adams Brown
(Richland, Judge Clifton Newman)

2011-UP-042-State v. Douglas Malcolm Strock
(Clarendon, Judge Clifton Newman)

2011-UP-043-State v. Lisa Ann Blakeney
(York, Judge John C. Hayes, III)

2011-UP-044-Mary K. Hadwin v. Ocean Air Repair & Construction, Inc.
(Charleston, Judge Thomas L. Hughston, Jr.)

2011-UP-045-Dominic Vaughn v. City of Sumter
(Sumter, Judge R. Ferrell Cothran)

2011-UP-046-Chappell F. and Huss F. v. John B. In the interest of one minor child under the age of 18
(Richland, Judge Angela R. Taylor)

PETITIONS FOR REHEARING

4705-Hudson v. Lancaster Conv.	Pending
4756-Neeltec Ent. v. Long	Denied 01/19/11
4757-Graves v. Horry-Georgetown	Denied 01/28/11
4760-State v. S. Geer	Pending
4761-Coake v. Burt	Pending
4763-Jenkins v. Few	Pending
4764-Walterboro Comm. Hospital v. Meacher	Pending
4766-State v. T. Bryant	Pending

4777-Matute v. Palmetto Health	Pending
4779-AJG Holdings v. Dunn	Pending
2010-UP-391-State v. J. Frazier	Pending
2010-UP-427-State v. S. Barnes	Denied 01/28/11
2010-UP-437-State v. T. Johnson	Denied 01/28/11
2010-UP-491-State v. G. Scott	Denied 01/24/11
2010-UP-495-Sowell v. Todd	Pending
2010-UP-503-State v. W. McLaughlin	Pending
2010-UP-507-Cue-McNeil v. Watt	Pending
2010-UP-515-McMillan v. St. Eugene	Pending
2010-UP-523-Amisub v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Denied 01/28/11
2010-UP-530-Patel v. Patel	Denied 01/28/11
2010-UP-548-State v. C. Young	Pending
2010-UP-551-Singleton Place v. Hilton Head	Denied 01/28/11
2010-UP-552-State v. E. Williams	Pending
2010-UP-563-SCDHEC v. Windy Hill Orchard	Pending
2010-UP-568-Hinson v. Stafford Park	Pending
2011-UP-032-State v. J. Hernandez	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page	Pending
4370-Spence v. Wingate	Granted 01/06/11
4474-Stringer v. State Farm	Pending
4480-Christal Moore v. The Barony House	Pending
4510-State v. Hoss Hicks	Pending
4526-State v. B. Cope	Pending
4529-State v. J. Tapp	Pending
4548-Jones v. Enterprise	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4597-Lexington County Health v. SCDOR	Pending
4598-State v. Rivera and Medero	Pending
4599-Fredrick v. Wellman	Pending
4600-Divine v. Robbins	Denied 01/06/11
4605-Auto-Owners v. Rhodes	Pending
4607-Duncan v. Ford Motor	Pending
4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Pending

4611-Fairchild v. SCDOT/Palmer	Pending
4613-Stewart v. Chas. Cnty. Sch.	Pending
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4619-State v. Blackwill-Selim	Pending
4620-State v. K. Odems	Pending
4621-Michael P. v. Greenville Cnty. DSS	Pending
4622-Carolina Renewal v. SCDOT	Pending
4631-Stringer v. State Farm	Pending
4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4639-In the interest of Walter M.	Pending
4640-Normandy Corp. v. SCDOT	Pending
4641-State v. F. Evans	Pending
4653-Ward v. Ward	Pending
4654-Sierra Club v. SCDHEC	Pending
4659-Nationwide Mut. V. Rhoden	Pending
4661-SCDOR v. Blue Moon	Pending

4670-SCDC v. B. Cartrette	Pending
4672-State v. J. Porter	Pending
4673-Bailey, James v. SCDPPPS	Pending
4675-Middleton v. Eubank	Pending
4677-Moseley v. All Things Possible	Pending
4680-State v. L. Garner	Pending
4682-Farmer v. Farmer	Pending
4687-State v. D. Syllester	Pending
4688-State v. Carmack	Pending
4691-State v. C. Brown	Pending
4692-In the matter of Manigo	Pending
4696-State v. Huckabee	Pending
4697-State v. D. Cortez	Pending
4698-State v. M. Baker	Pending
4699-Manios v. Nelson Mullins	Pending
4700-Wallace v. Day	Pending
4702-Peterson v. Porter	Pending
4706-Pitts v. Fink	Pending
4708-State v. Webb	Pending
4711-Jennings v. Jennings	Pending

4714-State v. P. Strickland	Pending
4716-Johnson v. Horry County	Pending
4721-Rutland (Est. of Rutland) v. SCDOT	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4728-State v. Lattimore	Pending
4732-Fletcher v. MUSC	Pending
4737-Hutson v. SC Ports Authority	Pending
4738-SC Farm Bureau v. Kennedy	Pending
4742-State v. Theodore Wills	Pending
4746-Crisp v. SouthCo	Pending
4752-Farmer v. Florence Cty.	Pending
4755-Williams v. Smalls	Pending
2008-UP-126-Massey v. Werner	Pending
2009-UP-199-State v. Pollard	Pending
2009-UP-265-State v. H. Williams	Denied 01/06/11
2009-UP-266-State v. McKenzie	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending
2009-UP-340-State v. D. Wetherall	Pending

2009-UP-359-State v. P. Cleveland	Denied 01/06/11
2009-UP-403-SCDOT v. Pratt	Pending
2009-UP-434-State v. Ridel	Denied 01/06/11
2009-UP-437-State v. R. Thomas	Pending
2009-UP-524-Durden v. Durden	Pending
2009-UP-539-State v. McGee	Pending
2009-UP-540-State v. M. Sipes	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2009-UP-587-Oliver v. Lexington Cnty. Assessor	Pending
2009-UP-590-Teruel v. Teruel	Denied 01/06/11
2009-UP-594-Hammond v. Gerald	Pending
2009-UP-596-M. Todd v. SCDPPPS	Denied 01/06/11
2009-UP-603-State v. M. Craig	Pending
2010-UP-080-State v. R. Sims	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-131-State v. T. Burkhart	Pending
2010-UP-138-State v. B. Johnson	Pending
2010-UP-140-Chisholm v. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending

2010-UP-154-State v. J. Giles	Pending
2010-UP-156-Alexander v. Abbeville Cty. Mem. Hos.	Pending
2010-UP-158-Ambruoso v. Lee	Pending
2010-UP-173-F. Edwards v. State	Pending
2010-UP-181-State v. E. Boggans	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-197-State v. D. Gilliam	Pending
2010-UP-215-Estate v. G. Medlin	Pending
2010-UP-220-State v. G. King	Pending
2010-UP-225-Novak v. Joye, Locklair & Powers	Pending
2010-UP-228-State v. J. Campbell	Pending
2010-UP-232-Alltel Communications v. SCDOR	Pending
2010-UP-234-In Re: Mortgage (DLJ v. Jones, Boyd)	Pending
2010-UP-238-Nexsen, David v. Driggers Marion	Denied 01/06/11
2010-UP-247-State v. R. Hoyt	Pending
2010-UP-251-SCDC v. I. James	Pending
2010-UP-253-State v. M. Green	Pending
2010-UP-256-State v. G. Senior	Pending

2010-UP-269-Adam C. v. Margaret B.	Pending
2010-UP-273-Epps v. Epps	Pending
2010-UP-281-State v. J. Moore	Pending
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending
2010-UP-289-DiMarco v. DiMarco	Pending
2010-UP-302-McGauvran v. Dorchester County	Pending
2010-UP-303-State v. N. Patrick	Pending
2010-UP-308-State v. W. Jenkins	Pending
2010-UP-317-State v. C. Lawrimore	Pending
2010-UP-330-Blackwell v. Birket	Pending
2010-UP-331-State v. Rocquemore	Pending
2010-UP-339-Goins v. State	Pending
2010-UP-340-Blackwell v. Birket (2)	Pending
2010-UP-352-State v. D. McKown	Pending
2010-UP-355-Nash v. Tara Plantation	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-362-State v. Sanders	Pending
2010-UP-369-Island Preservation v. The State & DNR	Pending
2010-UP-370-State v. J. Black	Pending

2010-UP-372-State v. Z. Fowler	Pending
2010-UP-378-State v. Parker	Pending
2010-UP-396-Floyd v. Spartanburg Dodge	Pending
2010-UP-406-State v. Larry Brent	Pending
2010-UP-419-Lagroon v. SCDLLR	Pending
2010-UP-422-CCDSS v. Crystal B.	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-440-Bon Secours v. Barton Marlow	Pending
2010-UP-448-State v. Pearlie Mae Sherald	Pending
2010-UP-449-Sherald v. City of Myrtle Beach	Pending
2010-UP-450-Riley v. Osmose Holding	Pending
2010-UP-461-In the interest of Kaleem S.	Pending
2010-UP-464-State v. J. Evans	Pending
2010-UP-474-Lindsey v. SCDC (2)	Pending
2010-UP-489-Johnson v. Mozingo	Pending
2010-UP-504-Paul v. SCDOT	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Scott Matthew Wild, Respondent.

Opinion No. 26921
Submitted January 6, 2011 – Filed February 7, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension from the practice of law not to exceed ninety (90) days. Respondent requests that any suspension be made retroactive to the date of his interim suspension, October 29, 2010. In the Matter of Wild, 390 S.C. 275, 701 S.E.2d 742 (2010). We accept the Agreement and definitely suspend respondent from the practice of law in this state for a ninety (90) day period. The suspension shall not

be imposed retroactively to the date of respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

On March 22, 2009, respondent self-reported his arrest for Aggravated Battery to ODC. The arrest occurred as a result of a bar fight between respondent and three other individuals on March 15, 2009, in Savannah, Georgia, during which one of the other individuals was struck in the head and/or face with a beer bottle. Respondent represented that alcohol was involved in the incident and independently sought treatment for alcohol abuse and anger management.

On October 26, 2010, respondent entered into a negotiated plea for Aggravated Battery and received a five (5) year probationary sentence with special conditions, including payment of restitution and community service. The sentencing order contains a provision that respondent will be considered eligible for termination of probation upon the completion of any period of suspension of his law license in South Carolina. Respondent has entered into a restitution agreement and has fully complied with the agreement by paying $40,000 in restitution. Respondent has been forthright and fully cooperative with ODC.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (lawyer shall not commit criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as lawyer in other respects) and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits his misconduct constitutes grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(4) (it shall be ground for misconduct for lawyer to be convicted of crime of moral turpitude

or serious crime), and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period. Within thirty days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Donna Seegars Givens, Respondent.

Opinion No. 26922
Submitted January 7, 2011 – Filed February 7, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Jonathan S. Gasser, of Harris & Gasser, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or definite suspension from the practice of law not to exceed nine (9) months. She requests that the period of suspension be made retroactive to the date of her interim suspension, March 4, 2010. In the Matter of Givens, 387 S.C. 20, 690 S.E2d 775 (2010). We accept the agreement and impose a nine month suspension,

retroactive to the date of respondent's interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

On or about January 10, 2010, respondent failed to tell her current medical practitioner that she was obtaining a controlled substance of like therapeutic use from another physician. As a result of this omission, respondent was prescribed a Schedule III controlled substance that would not otherwise have been prescribed.

On February 18, 2010, respondent was arrested and charged with Unlawful Prescription Drugs, Blank Prescription – 1st Offense under South Carolina Code Ann. § 44-53-395 (2002). After respondent successfully completed the Pre-Trial Intervention Program, the solicitor entered a nolle prosquei of the charge.

Matter II

While employed by a law firm, respondent represented Nationwide Insurance Company policyholders. Between October 2009 and December 2009, she submitted timesheets in one client's case for attendance at twenty (20) roster meetings in Richland County. It was later discovered that the client's case had been removed from the roster in late 2008 pursuant to Rule 40(j), SCRCP. It was further discovered that the billing for the roster meetings and related entries were fabricated as respondent had not attended any roster meetings in the case. As a result of the fabricated entries, Nationwide Insurance Company was overbilled in the approximate amount of $10,566.00. Respondent's law firm fully repaid Nationwide Insurance Company for the overbilling. The law firm represents it is not due any restitution from respondent.

LAW

Respondent admits that by her misconduct she has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5 (lawyer shall not charge unreasonable fee), Rule 1.15 (lawyer shall safeguard client funds), Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct), Rule 8.4(b) (lawyer shall not commit criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as lawyer in other respects), Rule 8.4(c) (it is professional misconduct for lawyer to commit a criminal act involving moral turpitude), Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits that her actions constitute grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine (9) months, retroactive to the date of her interim suspension. Within thirty days of the filing of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct. Within fifteen days of the filing of this opinion, respondent shall file an affidavit demonstrating she has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David C. Danielson, Respondent.

Opinion No. 26923
Submitted December 20, 2010 – Filed February 7, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

David C. Danielson, of Marietta, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of any sanction up to a two year definite suspension from the practice of law. See Rule 7(b), RLDE, Rule 413, SCACR. He requests the suspension be made retroactive to June 22, 2009, the date of his interim suspension. In the Matter of Danielson, 383 S.C. 319, 679 S.E.2d 525 (2009). Further, within one (1) year of the Court's acceptance of the Agreement, respondent agrees to make full restitution to all clients, persons, or

other entities harmed as a result of his misconduct and, before seeking reinstatement, to sign a monitoring agreement with Lawyers Helping Lawyers.

We accept the Agreement and impose a two (2) year suspension from the practice of law, not retroactive to the date of respondent's interim suspension. Further, within one (1) year of the date of this order, respondent shall pay full restitution to all clients, persons, and entities harmed as a result of the misconduct reported herein. Before seeking reinstatement, respondent shall enter into a monitoring agreement on terms recommended by Lawyers Helping Lawyers.

The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Respondent agreed to represent a client in a claim against a lender. Respondent obtained a favorable settlement for his client. Counsel for the lender prepared and transmitted a settlement package containing documents to be signed by respondent's client. Opposing counsel set a deadline for the execution and return of the settlement documents.

Respondent had difficulty contacting the client to arrange the execution of the settlement documents and became fearful that his failure to timely reach the client might result in the settlement being withdrawn. Consequently, without the prior consent or knowledge of the client, respondent signed the client's name to the settlement documents, including the release and settlement agreement, the new mortgage, and affidavit of the client. Respondent then signed as witness to the client's signature on the mortgage, falsely indicating that he had witnessed the client sign the mortgage. In addition, respondent had an employee of his law firm falsely sign as witness to the client's signature. Respondent then falsely signed as a notary public on the

mortgage. Respondent had the employee falsely witness the client's affidavit and release and settlement agreement. Respondent sent the documents to opposing counsel who had the mortgage recorded in the public record.

Subsequent to the documents being sent to opposing counsel, the client contacted respondent's firm about signing the documents. Respondent readily admitted his misconduct to his partners and self-reported the matter to Disciplinary Counsel. Thereafter, the client signed new settlement documents which were forwarded to opposing counsel. The falsely executed documents were cancelled of record and the new, properly executed documents were recorded in their place.

Matter II

Respondent notarized that he had witnessed his client's signature on an Inventory and Appraisement when, in fact, he had not witnessed the signature, but had, instead, found the signed document in his "inbox."

Matter III

In December 2006, respondent was diagnosed with depression and anxiety disorder. He received treatment until March of 2007 when he lost his health insurance and could no longer afford his medication. Respondent's depression worsened to the point where he was unable to work on his client matters and failed to communicate with his clients.

Respondent was initially diligent in his representation of Client A, but as his depression increased, respondent acknowledges he failed to communicate with this client and failed to work on this client's case. Respondent failed to comply with a Final Decision of the South Carolina Bar Resolution of Fee Disputes Board which awarded $400 to Client A.

Matter IV

Respondent was initially diligent in his representation of Client B, but as his depression increased, respondent acknowledges he failed to communicate with this client and failed to work on her case. Client B was unable to obtain a copy of her file because she could not reach respondent. Respondent also failed to respond to telephone calls and letters from the probate judge about this matter.

Matter V

Respondent met with Client C about several matters. After reviewing the matters, respondent informed Client C he could not assist him with two matters but would represent him upon execution of a fee agreement and payment of $500 for a third matter. Client C paid respondent $200 but failed to execute the fee agreement. Respondent acknowledges that, as his depression increased, he failed to communicate with Client C and failed to refund the $200 payment to Client C.

Matter VI

Respondent met with Ms. Doe to discuss representation. Ms. Doe did not retain respondent but left documents with him. Respondent acknowledges that he failed to respond to Ms. Doe's telephone calls and, as a result, she was unable to obtain the documents she left with him. Respondent represents his depression prevented him from properly handling this matter.

Matter VII

Respondent represented Client D in a divorce matter. After the final hearing, respondent failed to promptly submit the final order to the judge and failed to prepare a QUADRO order and quit claim deed. Respondent represents his depression prevented him from properly representing this client.

Matter VIII

Respondent failed to adequately communicate with Client E and was unavailable when the client attempted to contact him to retrieve documents in order to seek other representation. Respondent represents his depression prevented him from properly representing this client.

Matter IX

Respondent was retained by Client F who paid a fee of $3,000. Respondent failed to adequately communicate with Client F and failed to work on the case due to his depression. Further, respondent failed to comply with a Final Decision of the South Carolina Bar Resolution of Fee Disputes Board awarding $3,000 to Client F.

Matter X

Client G retained respondent to represent him in a matter. Respondent asserts that, due to his depression, he failed to adequately communicate with Client G and stopped working on Client G's case

Matter XI

In each of the matters reported above, respondent was subpoenaed to appear to give a statement to Disciplinary Counsel pursuant to Rule 19(c), RLDE. Respondent failed to appear in accordance with the subpoena. Further, in several of the matters, he did not respond to Disciplinary Counsel's Supplementary Notice of Full Investigation.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer

shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully fail to comply with a subpoena issued under Rule 413, SCACR, or knowingly fail to respond to a lawful demand from a disciplinary authority to include a request for a response or appearance under Rule 19, RLDE), Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR), and Rule 7(a)(10) (it shall be ground for discipline for lawyer to willfully fail to comply with a final decision of the Resolution of Fee Disputes Board). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a)(3) (lawyer shall keep client reasonably informed about status of a matter); Rule 1.4(a)(4) (lawyer shall promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall promptly deliver to client or third person any funds or other property that client or third person is entitled to receive); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); Rule 8.1 (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct).; and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

CONCLUSION

We accept the Agreement and suspend respondent from the practice of law for two (2) years, not retroactive to the date of respondent's interim suspension. Within one (1) year of the date of this order, respondent shall pay full restitution to all clients, persons, and entities harmed as a result of his misconduct reported herein. Before seeking reinstatement, respondent shall enter into a monitoring agreement on terms recommended by Lawyers Helping Lawyers. Within fifteen days of the date of this opinion, respondent shall file an

affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of J. Cameron Halford, Respondent.

Opinion No. 26924
Submitted January 7, 2011 – Filed February 7, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Cameron Halford, of Fort Mill, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of a letter of caution, admonition, or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

In a two day period in May 2008, twenty-two checks were presented on respondent's real estate trust account on insufficient funds. Upon notice from his bank, respondent immediately reviewed his most recent transactions and discovered that the mistake was due to user

error in submitting an electronic bank deposit. At the time, respondent used a scanner provided by the bank that was linked through an internet connection to the bank's computer. The device allowed the depositor to scan a deposit item in his office without having to physically go to the bank. Respondent failed to properly transmit the scanned image of a deposit before disbursing the funds at closing. Respondent acknowledges his failure to insure funds were available prior to disbursement violated Rule 1.15, Rule 407, SCACR.

In October 2008, four checks were presented on insufficient funds in respondent's litigation trust account. The bank honored two of the checks and returned two of the checks. The overdrafts were the result of two errors by respondent which related to the acceptance of fee payments by credit card. The first error occurred when respondent accidently refunded a payment to a client's credit card account rather than charging the payment to the account. The second error was respondent's failure to account for individual clients' credit card transactions fees assessed by the credit card companies. Respondent did not realize that credit card transaction fees varied depending on the amount of the transactions and the account type. Instead, respondent assumed that the credit card transaction fees were the same for each transaction. As a result, respondent overpaid several client accounts in the amount of $814.12. Respondent acknowledges his repeated mathematical errors in calculating credit card transaction fees and his failure to closely examine his monthly financial records violated Rule 1.15, RPC.

In December 2008, eleven checks written on respondent's real estate trust account were presented on insufficient funds. These overdrafts occurred as the result of a real estate closing in which respondent electronically deposited the lender's check, but did not wait for the check to clear the bank before issuing checks on the account. After disbursing the funds, respondent learned that the lender had stopped payment on the loan check due to a recording defect. Respondent acknowledges that the lender's check did not constitute "good funds" and that Rule 1.15, RPC, required he wait to disburse the funds until after the lender's check had been collected by his bank.

Although respondent ensured his trust accounts were reconciled with his monthly bank statements, he did not reconcile his client ledger balances. Review of his records for 2008 and 2009 reveal numerous negative client ledger balances. These negative ledge balances resulted from errors, not from any misappropriation. Some negative ledger balances were the result of a failure to account for the correct credit card transaction fees as discussed above. In those instances, respondent withdrew his legal fees without accounting for the actual credit card transaction fee amounts, resulting in shortages to those particular client ledgers. Respondent has restored those funds to his trust account and corrected the ledgers.

Other negative ledger balances occurred when respondent collected "flat fees" or payments toward "flat fees" and deposited them directly to his operating account. When respondent learned he was required to deposit all fees, including flat fees, into his trust account until the fees were actually earned, he converted his system to create client ledgers for his flat fee clients. Respondent's bookkeeper, however, did not transfer the previous fee payments to the new ledgers, resulting in negative client ledger balances. Respondent has now made the ledger corrections.

Respondent admits his conduct in failing to accurately document transactions with and on behalf of clients and his failure to conduct complete monthly reconciliations violated the requirements of Rule 417, SCACR. Respondent has now completed the Legal Ethics and Practice Program Trust Account School. Further, he has retained an outside accounting service to conduct his monthly reconciliations and has ensured that the service is familiar with Rule 417, SCACR.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(c) (lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or

expenses incurred) and Rule 1.15(f)(1)(A) (lawyer shall not disburse funds from an account containing the funds of more than one client or third person unless the funds to be disbursed have been deposited in the account and are collected funds). Respondent further admits that he did not comply with the financial recordkeeping provisions of Rule 417, SCACR. Respondent acknowledges his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

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

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The City of Cayce, Appellant,

v.

Norfolk Southern Railway Company, Respondent.

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

Opinion No. 26925
Heard November 17, 2010 – Filed February 7, 2011

AFFIRMED

Danny C. Crowe, Shannon F. Bobertz, and R. Hawthorne Barrett, all of Turner, Padget, Graham & Laney, of Columbia, for Appellant.

Ronald K. Wray and James M. Dedman, IV, both of Gallivan, White & Boyd, of Greenville, for Respondent.

Gray T. Culbreath, of Collins & Lacy, of Columbia, for Amicus Curiae Association of American Railroads.

CHIEF JUSTICE TOAL: The City of Cayce ("City") cited Norfolk Southern Railway Company ("Norfolk") for violating a public nuisance ordinance, Cayce, SC, CODE § 28-251. The citation was based on the condition of one of Norfolk's bridges that was covered with rust and graffiti. A municipal judge found Norfolk guilty of violating the ordinance. The circuit court reversed based on its determination the ordinance was preempted by federal law. The City appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

Norfolk is a corporation and common carrier of freight by rail. It operates trains in twenty-two states and has over 20,000 miles of track. As part of these operations, Norfolk ships goods in interstate commerce through South Carolina and maintains tracks, yards, bridges, trestles, and other facilities within the state.

Norfolk owns or has a leasehold interest in a railroad bridge crossing over U.S. Highway 321 in Cayce, South Carolina that is at the center of this dispute ("Bridge").[1] The Bridge was constructed in 1955 and has been part of Norfolk's rail operations since that time.

In a series of communications from 2005 to 2007, the City asked Norfolk to paint the Bridge due to the rust and graffiti covering the structure. The City noted the Bridge is located on "a main thoroughfare" in the City and "is an eyesore and a nuisance" that "creates a negative impression about the City and [Norfolk] for the thousands of people who drive through and reside in the area." The City asserted the Bridge's condition detracts from the value of property in the surrounding area. Norfolk declined, stating it did not have funds available for the refurbishment.

[1] The Bridge is referred to as "Bridge R 111.6" in court documents.

On May 1, 2007, the City amended its municipal ordinance, Cayce, SC, CODE § 28-251, to provide a public nuisance shall include certain structures above street grade that are "rusted." Section 28-251 provides in relevant part as follows:

> Public nuisances affecting public order shall include, but not be limited to, the following:
>
> (1) All structures bearing graffiti;
>
> . . . .
>
> (7) All privately-owned structures elevated above street grade and extending over or across public streets or highways, such as overpasses, bridges, trestles or elevated passageways, whose exterior finish is destroyed, decayed, dilapidated, deteriorated or rusted.

The 2007 amendment added only subsection (7), as subsection (1) regarding structures bearing graffiti existed in the prior version of the ordinance.[2]

Thereafter in 2007, the City cited Norfolk for violating section 28-251 based on the graffiti and rust covering the Bridge. After a bench trial, the municipal judge found Norfolk guilty of violating the ordinance and fined Norfolk $500.00.

Norfolk appealed to the circuit court, which reversed the municipal judge's ruling in an order filed July 30, 2009. The circuit court concluded the municipal ordinance is preempted by both the Interstate Commerce

[2] Section 28-261 declares public nuisances unlawful: "No person or entity shall create any nuisance or public nuisance in the city, and no person shall by action or inaction allow or permit a nuisance or public nuisance to occur or continue on any property which he owns, manages, leases, controls, possesses or occupies." Cayce, SC, CODE § 28-261.

Commission Termination Act ("ICCTA"), 49 U.S.C.A. §§ 10101-16106 (2007 & Supp. 2010) and the Federal Railroad Safety Act ("FRSA"), 49 U.S.C.A. §§ 20101-20167 (2007 & Supp. 2010). Based on its ruling regarding federal preemption, the circuit court noted it was unnecessary to reach the additional grounds raised by Norfolk in support of reversal. The City appeals from this order.

STANDARD OF REVIEW

In criminal appeals from a municipal court, the circuit court does not conduct a de novo review; rather, it reviews the case for preserved errors raised to it by an appropriate exception. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007); *Rogers v. State*, 358 S.C. 266, 594 S.E.2d 278 (Ct. App. 2004); *City of Landrum v. Sarratt*, 352 S.C. 139, 572 S.E.2d 476 (Ct. App. 2002); *see also* S.C. Code Ann. § 14-25-105 (Supp. 2009) ("There shall be no trial de novo on any appeal from a municipal court."). "Therefore, our scope of review is limited to correcting the circuit court's order for errors of law." *Suchenski*, 374 S.C. at 15, 646 S.E.2d at 880; *see also City of Aiken v. Koontz*, 368 S.C. 542, 629 S.E.2d 686 (Ct. App. 2006) (observing that in reviewing criminal cases, the appellate court's review is limited to reversal for errors of law).

ANALYSIS

On appeal, the City argues the circuit court erred in reversing the municipal court conviction because federal law does not preempt enforcement of the City's ordinance.

The City contends that, under the plain language of the City's ordinance, structures covered by rust and graffiti fall within the definition of a public nuisance. Further, there are no factual disputes involved in this appeal as both parties agree that the Bridge had extensive rust and graffiti on it when the City issued the citation. The City argues the circuit court therefore committed an error of law in concluding the ordinance is rendered inapplicable to Norfolk based on federal preemption. We disagree.

I. SUPREMACY CLAUSE

The Supremacy Clause in Article VI of the United States Constitution establishes the principle of federal preemption:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Since the decision in *M'Culloch v. Maryland*, 17 U.S. 316 (1819), it has been settled that state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *see also Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("It is basic to this constitutional command that all conflicting state provisions be without effect.").

The Supreme Court of the United States has held there are two cornerstones to federal preemption jurisprudence. *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). First, the purpose of Congress is the ultimate touchstone in every preemption case. *Id.* at 1194. Second, in all preemption cases, particularly in those in which Congress has legislated in a field that the states have traditionally occupied, the courts start with the assumption that the historical police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress. *Id.* at 1194-95.

The intent of Congress may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008); *Cipollone*, 505 U.S. at 516. In the absence of

an express congressional command, state law is preempted if the law actually conflicts with federal law, or if federal law so thoroughly occupies the legislative field as to make reasonable the inference that Congress has left no room for the states to supplement it. *Altria Group*, 129 S. Ct. at 543; *Cipollone*, 505 U.S. at 516.

Thus, "[u]nder the principle of federal law supremacy, there are three ways that federal law can preempt state law: (1) where Congress makes its intent to preempt state law explicit in statutory language; (2) where state law regulates conduct in a field that Congress intends for the federal government to occupy exclusively; or (3) where there is an actual conflict between state and federal law." *Anderson v. BNSF Ry. Co.*, 291 S.W.3d 586, 589 (Ark. 2009); *see also Priester v. Cromer*, 388 S.C. 425, 428, 697 S.E.2d 567, 569 (2010) ("A federal law may either expressly preempt a state law through specific language clearly stating its intent or it may impliedly preempt a state law through field preemption or conflict preemption.").

II. ICCTA PREEMPTION

In the current matter, the circuit court ruled the City's ordinance is preempted by the ICCTA.

"As the title of the legislation implies, ICCTA [the ICC Termination Act] abolished the Interstate Commerce Commission, while simultaneously creating the Surface Transportation Board (STB) to replace it and to perform many of the same regulatory functions." *Anderson*, 291 S.W.3d at 589.

Section 10501(a)(1) of the ICCTA generally sets forth the STB's "jurisdiction over transportation by rail carrier." 49 U.S.C.A. § 10501(a)(1) (2007). Subsection (b) provides that the jurisdiction of the STB is exclusive, and it contains an explicit preemption clause:

> **(b)** *The jurisdiction of the Board* over–
>
> **(1)** *transportation by rail carriers*, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, *and facilities of such carriers*; *and*
>
> **(2)** the construction, acquisition, *operation*, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, *or facilities*, even if the tracks are located, or intended to be located, entirely in one State,
>
> *is exclusive*. Except as otherwise provided in this part, the remedies provided under this part *with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law*.

Id. § 10501(b) (emphasis added).

When a federal statute contains an express provision regarding preemption, the preemption inquiry must focus on the plain wording of that provision, which generally contains the most reliable evidence as to whether Congress intended to preempt state law. *CSX Transp. v. Easterwood*, 507 U.S. 658 (1993).

A Georgia federal district court has remarked, "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). The ICCTA "grant[s] . . . exclusive jurisdiction over almost all matters of rail regulation to the STB." *Id.*

By its language, the ICCTA "broadly precludes state regulation of those matters [specified in 49 U.S.C.A. § 10501(b)]." *Burlington N. & Santa Fe Ry. Co. v. Dep't of Transp.*, 206 P.3d 261, 263 (Or. Ct. App. 2009).

The broad nature of Congress's preemption under the ICCTA is further evidenced by the ICCTA's expansive definitions. The ICCTA defines a "railroad" as including the following:

> **(A)** *a bridge,* car float, lighter, ferry, and intermodal equipment *used by or in connection with a railroad*;
>
> **(B)** the road used by a rail carrier and owned by it or operated under an agreement; and
>
> **(C)** a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation[.]

49 U.S.C.A. § 10102(6) (2007) (emphasis added). The ICCTA defines "transportation" to encompass:

> **(A)** a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> **(B)** services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property[.]

Id. § 10102(9). We agree with the circuit court's observation that, considering the definitions contained in section 10102, "when [s]ection 10501(b) grants the STB exclusive jurisdiction over 'railroads' and 'transportation by rail carriers,' it includes the railroad's bridges and any operations conducted thereupon for the purpose of transportation."

The municipal judge found ICCTA preemption did not apply because there was no specific federal regulation covering the appearance of railroad

bridges. However, we hold that ICCTA preemption does apply, even if there is no direct conflict with a specific regulation, if the ordinance interferes with the railroad's ability to conduct its operations or otherwise unreasonably burdens interstate commerce. Direct conflict is only one circumstance under which state law is preempted by federal law. *Anderson*, 291 S.W.3d at 589; *Priester*, 388 S.C. at 428, 697 S.E.2d at 569.

The Court of Appeals of Washington found an express conflict was not required in a case holding two city ordinances, one regulating the length of time railroad switching activities could block city streets and the other prohibiting switching during peak hours, were preempted by the ICCTA. *City of Seattle v. Burlington N. R.R. Co.*, 22 P.3d 260 (Wash. Ct. App. 2001). The court explained:

> Here, the City of Seattle claims the ordinances are merely local traffic regulations which are not expressly preempted, or preempted in any other way, specifically because there is no conflict between the ICCTA and the city's traffic ordinances. We agree that state and local governments may retain certain police powers and may apply non-discriminatory regulation to protect the public health and safety, but under the ICCTA the actions or regulations of those governments may not have the effect of foreclosing or restricting the railroad's ability to conduct its operation or otherwise unreasonably burden interstate commerce.

Id. at 262; *see also City of Auburn v. United States Gov't*, 154 F.3d 1025, 1031 (9th Cir. 1998) (stating "the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute" and holding state and local permitting laws were preempted by the ICCTA even though they concerned "environmental" rather than "economic" regulation because jurisprudence supports a broad reading of Congress's preemption intent, not a narrow one).

In the current appeal, James Carter, the Chief Engineer of Bridges and Structures for Norfolk, testified that Norfolk operates trains in twenty-two

states on over 20,000 miles of track. Carter stated Norfolk does not paint bridges for cosmetic purposes, but that Norfolk had offered to allow the City to do it, and Norfolk would have donated the expense for its employees to provide flagging services, but the City had declined the offer. Carter stated the City did not raise any structural concerns about the Bridge.

He testified the most recent inspection at the time of trial had been on April 11, 2007, and no safety or structural issues were then noted. Carter stated maintaining the structural integrity of the Bridge and other structures was Norfolk's most important consideration, and that Norfolk had to allocate its funds for safety issues rather than for aesthetic concerns. Carter stated graffiti on the Bridge did not have any impact on the Bridge's structural integrity or safety. Further, there had been no notation on the inspection report that the rust posed a safety hazard.

Carter asserted the impact of the City's ordinance on Norfolk would be more than just requiring it to paint the Bridge. He stated many of the older bridges were covered with lead paint, and any painting would require removal of the old lead paint in an environmentally safe manner. He estimated it could cost approximately $250,000 to paint the entire Bridge, including the lead removal. Carter opined that if Norfolk were required to do that for all of its bridges in South Carolina, it would cost millions of dollars, and this would have an impact upon Norfolk's ability to devote its resources to safety-related projects. Carter stated it would be difficult to operate a system of over 20,000 miles of track if the regulations in each community were different, so a uniform set of regulations was "extremely important."

The Association of American Railroads ("the Association") has filed an Amicus Curiae Brief in support of the circuit court's determination that the City's ordinance is preempted by the ICCTA. The Association states this "case presents an issue of great significance to the railroad industry as a whole."

The Association opines that, if the City's nuisance ordinance were upheld, and other municipalities across the nation similarly declared railroad

trestles, bridges, and other structures bearing graffiti or rust to be a public nuisance and subjected the railroads to criminal penalties or forced them to undertake remedial measures, "the interference with rail transportation operations throughout the national rail network, as well as the adverse economic consequences to the railroad industry, would be significant and would constitute an unreasonable burden on interstate rail transportation."

The Association argues case law makes clear that a state or a local law, whether premised on environmental, zoning, nuisance, or as here, "aesthetic" grounds, is not saved from preemption under the ICCTA by its ostensible regulatory purpose or by the descriptive nomenclature used if its effect otherwise falls with the scope of the ICCTA.

We hold the circuit court correctly determined the ICCTA preempts enforcement of the nuisance ordinance against Norfolk. Bridges are expressly considered part of the railroad's operations under the definitional section of the ICCTA and the enforcement of the City's ordinance against Norfolk will have an effect on its railroad operations that falls within the scope of the ICCTA. *See, e.g.*, *Village of Mundelein v. Wis. Cent. R.R.*, 882 N.E.2d 544, 552 (Ill. 2008) ("A state law may not frustrate the operation of federal law by claiming some purpose other than that specifically addressed by the federal law. Rather, the supremacy clause renders invalid any state legislation that frustrates the full effectiveness of federal law."); *Krentz v. Consol. Rail Corp.*, 910 A.2d 20, 34 (Pa. 2006) ("[I]t is the **effect** of the state law that matters in determining preemption, not its intent or purpose." (quoting *Teper v. Miller*, 82 F.3d 989, 995 (11th Cir. 1996) (alteration in original)); *cf. Pace v. CSX Transp., Inc.*, 613 F.3d 1066 (11th Cir. 2010) (holding Georgia property owners' nuisance claim against CSX for noise and smoke from increased traffic caused by adding a side track near their property was preempted by the ICCTA; although the owners argued they did not seek a remedy that would impact CSX's operations, the Eleventh Circuit held <u>any</u> kind of remedy was preempted by the ICCTA, which expressly covered side tracks).

Further, although the aesthetic appearance of bridges is not specifically covered in the ICCTA, the challenged provision need not be in direct conflict with the ICCTA for preemption to apply. *See, e.g.*, *Anderson v. BNSF Ry. Co.*, 291 S.W.3d 586, 592 (Ark. 2009) (holding although the ICCTA did not expressly mention railroad crossings, the jurisdiction of the ICCTA was exclusive over anything having an economic impact on the railroad and thus was preempted by the act (citing *Franks Inv. Co. v. Union Pac. R.R. Co.*, 534 F.3d 443 (5th Cir. 2008))).

The purpose of the ICCTA is to prevent the development of a patchwork of local and state regulations affecting the railroad industry, as the enactment of differing standards and requirements would inevitably be detrimental to the orderly functioning of the industry as a whole.

The Federal Railroad Administration has recently adopted Bridge Safety Standards, 75 F.R. 41282-01 (July 15, 2010) (to be codified at 49 C.F.R. pts. 213 & 237); currently available at 2010 WL 2771218. It is noted therein that "[t]here are nearly 100,000 railroad bridges in the United States" and "[t]hese bridges are owned by over 600 different entities." The standards were not in effect at the time this action arose, but they indicate the intent that federal law govern the maintenance and condition of railroad bridges. The need for uniformity is readily apparent based on the number of bridges throughout the United States and the diversity of ownership.

Although the City's public nuisance ordinance is ostensibly directed to aesthetic issues, its enforcement against Norfolk does have an impact on its operations since railroad bridges and trestles are, by federal law, considered part of the operations of the industry. Accordingly, we affirm the circuit court's determination that the ICCTA preempts enforcement of the City's ordinance against Norfolk.

CONCLUSION

We conclude the circuit court properly determined the ICCTA preempts enforcement of the City's public nuisance ordinance against Norfolk

and affirm on this basis. Consequently, we need not reach the remaining issues presented on appeal.[3]

PLEICONES, KITTREDGE, HEARN, JJ., and Acting Justice Howard P. King, concur.

[3] Because we find the ordinance is preempted based on the ICCTA, we need not consider the additional basis for preemption found by the circuit court under the FRSA. *Cf. City of Seattle v. Burlington N. R.R. Co.*, 22 P.3d 260, 263 (Wash. Ct. App. 2001) (remarking consideration of whether an ordinance was additionally preempted under the FSRA was "not necessary" after finding it was already preempted by the ICCTA). None of the remaining issues asserted by the City were ruled upon below and, therefore, were not preserved for appeal. *See Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) ("An appellate court will not consider issues on appeal which have not been preserved for appellate review."). Having ruled on the merits of the circuit court's order, it is unnecessary to entertain Norfolk's argument regarding an additional sustaining ground. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may find it unnecessary to discuss respondent's additional sustaining grounds when its affirmance is grounded in an issue addressed by the lower court.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

David Dwight Smith, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26926
Heard January 21, 2010 – Filed February 7, 2011

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for Petitioner.

Senior Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE KITTREDGE: David Dwight Smith shot and killed Robert Finley in a failed drug deal. The trial court charged the jury on the law of murder and self-defense, but refused to charge voluntary manslaughter, involuntary manslaughter, or accident. The jury convicted Smith of murder and possession of a firearm during the commission of a violent crime.[1] The court of appeals held Smith was entitled to a voluntary manslaughter charge and reversed his convictions. The court of appeals declined to address whether Smith was entitled to an involuntary manslaughter or accident charge. We granted the State's petition for a writ of certiorari. We reverse and reinstate Smith's convictions and sentence.

I.

In the early morning hours of January 12, 1997, Robert Finley (Victim) called Angie Smith's home looking for crack cocaine. Angie contacted David Dwight Smith, a known drug dealer. Angie knew Smith and knew Smith had previously sold crack cocaine to Victim. Victim owed Smith $40 from their most recent drug transaction.

When Smith and Angie arrived at the trailer, Smith sent Angie inside to facilitate the drug deal. Angie returned to the car and informed Smith that Victim wanted to deal directly with Smith. Smith grabbed a gun from under the seat, exited the car, and entered the trailer.

At trial, Angie estimated Smith was inside for approximately two minutes. The trailer door opened, and Angie saw Smith and Victim engaged in a scuffle and "falling out the door." Angie testified she heard a pop and saw Victim's body fall to the ground. Smith then got into the car and told her "you don't know nothing, you don't see nothing," and they drove away.

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[1] This was Smith's second trial on the charges. The convictions and sentences from his first trial were vacated on post-conviction relief.

Smith's testimony regarding the events leading up to his arrival at the trailer mirrored Angie's. Regarding the encounter with Victim inside the trailer, Smith testified as follows: Victim wanted $50 worth of crack cocaine. Smith placed the drugs on the counter for inspection. Victim informed Smith he had no money, but he would pay him the next day. Smith refused to again give Victim drugs on credit. Victim responded that he was taking the drugs anyway and approached Smith with a "real serious demeanor." At this point, Smith pulled his gun and pointed it at Victim, who was unarmed. Victim continued to approach Smith, stating "what are you gonna do, shoot me, give me the gun, I'll shoot myself." Victim grabbed Smith, trying to knock the gun out of Smith's hand. Smith struck Victim in the face with the gun. As the two men were struggling near the entrance to trailer, the "the gun went off."

II.

The trial court charged the jury on the law of murder and self-defense. The trial court refused to charge voluntary manslaughter because it found no evidence of sufficient legal provocation. The trial court refused to charge accident and involuntary manslaughter because it found there was no evidence Smith was acting lawfully. The court of appeals held the trial court erred in failing to give a voluntary manslaughter charge and reversed his convictions. We granted the State's petition for a writ of certiorari.

The law to be charged to the jury is to be determined by the evidence presented at trial. *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). A trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented. *Lee*, 298 S.C. at 364, 380 S.E.2d at 835.

III.

a. Voluntary Manslaughter

The trial court properly refused Smith's request for a voluntary manslaughter charge. Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Pittman*, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007). The sudden heat of passion, upon sufficient legal provocation, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. *Id.* at 572, 647 S.E.2d at 167. In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. *State v. Norris*, 253 S.C. 31, 35 168 S.E.2d 564, 566 (1969); *State v. Gardner*, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). "To warrant the court in eliminating the offense of manslaughter it should clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *Pittman*, 373 S.C. at 572, 647 S.E.2d at 168.

We recognize an overt, threatening act or physical encounter *may* constitute sufficient legal provocation. *See id.* at 573, 647 S.E.2d at 168, (citing *Gardner*, 219 S.C. at 105, 64 S.E.2d at 134) (observing that "[t]his Court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."). While Smith's assertion of legal provocation is dubious at best, the record is devoid of any evidence of heat of passion.

For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at

the time of the killing. *See State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) ("Both heat of passion and sufficient legal provocation must be present at the time of the killing."). According to Smith, he was not enraged, incapable of "cool reflection," or acting "under an uncontrollable impulse to do violence." Because of the absence of any evidence of heat of passion, the trial court properly declined the voluntary manslaughter charge.[2] We reverse the court of appeals on this issue.

b. Involuntary Manslaughter

Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. *State v. Cabrera-Pena*, 361 S.C. 372, 380-81, 605 S.E.2d 522, 526 (2004).

Smith contends he was entitled to a charge under the second definition of involuntary manslaughter because the evidence would support a finding that he was lawfully armed in self-defense at the time the fatal shot occurred. We find no such evidence.

Smith entered the trailer to sell crack cocaine, a felony, to Victim. Smith pursued the drug deal while armed with a loaded gun, knowing Victim owed him $40 from a previous drug transaction. During the confrontation, Smith brandished the gun and used it to pistol-whip Victim. According to Smith, he pistol-whipped Victim because Victim was approaching him in a

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[2] The trial court correctly observed that there was no evidence of self-defense, observing, "I just don't see how in the world that the evidence can be construed that [Smith] was without fault in bringing on the difficulty, and how he was in imminent danger of losing his life or sustaining serious bodily injury." It is not entirely clear why self-defense was charged. It appears that the State focused its objections to the requests for charges on voluntary manslaughter, involuntary manslaughter and accident.

"real serious demeanor." Victim was unarmed, the door to Victim's trailer was unlocked, and there is no evidence Smith was unable to retreat from the dangerous situation he created. Based on these facts, we find no evidence to support Smith's assertion that he was acting lawfully by arming himself in self-defense. Specifically, there is no evidence to suggest that Smith was without fault in bringing on the difficulty, that he believed or actually was in imminent danger of losing his life or sustaining serious bodily injury, or that he "had no other probable means of avoiding the danger" other than drawing the loaded weapon. Accordingly, the trial court properly refused the involuntary manslaughter instruction.

c. Accident

For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. *State v. Burriss*, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999). Because Smith was acting unlawfully, he was not entitled to an accident charge.[3]

IV.

We reverse the court of appeals' determination that Smith was entitled to a voluntary manslaughter charge. We further hold Smith was entitled to neither an involuntary manslaughter charge nor an accident charge. In reversing the court of appeals, we reinstate Smith's convictions and sentence.

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[3] Moreover, there is no evidence Smith exercised due care in the handling of the gun. *See State v. Crosby*, 355 S.C. 47, 51 n.2, 584 S.E.2d 110, 112 n.2 (2003) ("To satisfy the legal defense of accident, it must be shown that the defendant used due care in the handling of the weapon.").

REVERSED.

TOAL, C.J., PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ronald J. Sheppard, Appellant.

Appeal from Lexington County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 26927
Heard November 16, 2010 – Filed February 7, 2011

AFFIRMED

O. Grady Query and Michael W. Sautter, both of Query Sautter Gliseman & Pric, of Charleston, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Chief, Prosecution Division Jennifer D. Evans, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, Ronald J. Sheppard, the former CEO of HomeGold Financial, Inc. (HomeGold), was charged with securities fraud, obtaining property under false pretenses, and conspiracy. He was found guilty on all three charges and sentenced to a total of twenty years imprisonment. Sheppard appeals, seeking either to have his convictions vacated, or to have his sentences vacated and remanded for resentencing, arguing: (1) he was denied a fair trial because of a third party's contact with a juror; (2) the state grand jury lacked subject matter jurisdiction over the counts of obtaining property under false pretenses and conspiracy; (3) section 14-7-1820 of the South Carolina Code violates the constitutional prohibitions against ex post facto laws; and (4) the circuit court abused its discretion by imposing a sentence disproportionate to those of his co-conspirators.

FACTS/PROCEDURAL BACKGROUND

This case stems from the financial collapse and ultimate bankruptcy of HomeGold, a financial services company heavily involved with subprime mortgages. Carolina Investors, Inc. originally financed the sale of cemetery plots, but later expanded into other lending. Carolina Investors was ultimately purchased by another company, which took over Carolina Investors' lending operations. Carolina Investors continued to sell debt instruments, but the money it raised went to fund the operation of its parent company, primarily through a series of intercompany loans. In 1998, the parent company began losing money, became a publicly traded company, and changed its name to HomeGold Financial, Inc. HomeGold began losing hundreds of millions of dollars and its indebtedness to Carolina Investors continued to grow. In an effort to stabilize the company, HomeGold merged with HomeSense, Sheppard's subprime mortgage lending business, and Sheppard became its CEO. After several years of financially abusing the company, Sheppard resigned his position with HomeGold to create a new company to buy HomeGold's mortgage business. Shortly thereafter, HomeGold filed for bankruptcy.

In November 2005, a state grand jury indicted Sheppard on eleven charges stemming from his involvement with the mishandling of HomeGold's business and financial operations. The circuit court granted Sheppard's motion to dismiss eight of the eleven charges. Sheppard was found guilty and sentenced for the three remaining charges, with the sentences to run consecutively: (1) securities violation, ten years; (2) obtaining property by false pretenses, five years; and (3) conspiracy, five years.

ISSUES

Sheppard presents the following issues for review:

I. Was Sheppard deprived of his constitutional right to a fair trial before an impartial jury when a spectator made contact with a juror in an elevator?

II. Did the state grand jury have subject matter jurisdiction over the counts of obtaining property by false pretenses and conspiracy?

III. Does section 14-7-1820 of the South Carolina Code violate the constitutional prohibitions against the passage of *ex post facto* laws?

IV. Did the circuit court abuse its discretion by imposing a sentence on Sheppard that was substantially greater than the sentences of the co-conspirators?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. *State v. Bridges*, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982).

ANALYSIS

I. Contact with Juror

Sheppard argues that a spectator's contact with a juror deprived him of a fair and impartial trial because the circuit court judge failed to cure the resulting prejudice. We disagree.

Sheppard invokes the Sixth and Fourteenth Amendments of the United States Constitution in his conclusory argument that he was denied a fair trial by a spectator's comment to a juror in an elevator, and by the circuit court judge's failure to remedy any resulting prejudice. The comment itself is not in the record, and the only information about the comment is found when the circuit court judge addresses the jury:

> Madam Forelady and ladies and gentlemen of the jury, hope you had a good weekend. For the juror who reported an inappropriate comment on the elevator on Thursday, I appreciate that, I will deal with that and thank you for making that report.

Sheppard contends the judge was required to ensure Sheppard received a fair and impartial trial by interviewing the juror to ascertain the extent of any potential prejudice and by giving the entire jury a curative instruction, even in the absence of any objection or motion by defense counsel. He argues not only that the circuit court was required to address the issue without motion or objection, but also that this Court may reach the unpreserved issue because the issue is "absolutely essential to a fair trial" and resolving the question now is in the interest of judicial economy.

First, Sheppard has not properly preserved this issue for appellate review. After the judge addressed the jury regarding the comment, Sheppard made no motion or objection; instead, he immediately began cross-examining a witness. Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for

appellate review. *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). This rule also applies to constitutional arguments. *See State v. Owens*, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008) (finding constitutional claims not preserved for review without a contemporaneous objection at trial).

Second, aside from the preservation problem, Sheppard is clearly arguing for this Court to apply the plain error rule. While Sheppard does not use the phrase "plain error," he states that the circuit court judge had the obligation to investigate and cure any potential prejudice even without objection or motion from defense counsel. This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts. *See Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (recognizing South Carolina appellate courts have consistently refused to apply the plain error rule). Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review. *Johnson*, 363 S.C. at 58, 609 S.E.2d at 523. Thus, Sheppard's argument that a judge commits an abuse of discretion by not *ex mero motu*[1] addressing an issue at trial is not supported by our case law. Therefore, because Sheppard has not preserved this issue for review and because this Court does not apply the plain error rule, his argument fails.

II. State Grand Jury's Indictment

Sheppard argues the state grand jury did not have subject matter jurisdiction over the counts of obtaining property under false pretenses and conspiracy, and therefore his convictions should be vacated. We disagree.

Sheppard cloaks his argument as subject matter jurisdiction, but he is actually challenging the sufficiency of the indictment when he argues the state grand jury did not have jurisdiction over the counts of obtaining property under false pretenses and conspiracy. He contends section 14-7-

[1] *Ex mero motu* is a synonym for *sua sponte*. *State v. Dicapua*, 383 S.C. 394, 398 n.3, 680 S.E.2d 292, 294 n.3 (2009) (*citing* Black's Law Dictionary 596 (7th ed. 1999)).

1630 of the South Carolina Code does not specifically include these charges, and that these charges are not related to the securities violations that are expressly included in the grand jury's jurisdiction. For this reason, he argues, he could not have been properly charged with these crimes, and the circuit court consequently lacked subject matter jurisdiction to convict him.

Certainly, issues relating to subject matter jurisdiction may be raised at any time. *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). In *Gentry*, this Court clarified that a court's subject matter jurisdiction is that court's power "to hear and determine cases of the general class to which the proceedings in question belong." *Id.* Further, the sufficiency of an indictment is a question separate from and does not implicate subject matter jurisdiction. *Id.* at 101, 610 S.E.2d at 499. Thus, this Court held that if an indictment is challenged as insufficient or defective, that challenge must be raised before the jury is sworn. *Id.*

Here, there is no question that the circuit court has subject matter jurisdiction over the crimes charged. *See* S.C. Const. art. V, § 11 ("The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases . . . .") Despite Sheppard's phrasing and denial, he is challenging the sufficiency of the indictment when he claims the state grand jury could not consider the counts of obtaining property under false pretenses and conspiracy. As explained in *Gentry*, any challenge to the sufficiency of the indictment must be made before the jury is sworn. *Id.* at 101, 610 S.E.2d at 499. While Sheppard did timely file a motion to quash the indictment, he only challenged eight of the eleven counts, conceding the counts upon which he was ultimately convicted were within the limited subject matter jurisdiction of the state grand jury. Therefore, Sheppard mischaracterizes his argument as one of subject matter jurisdiction. Further, because he failed to timely challenge these counts in the indictment and instead went to trial on the charges, he cannot now, having lost at trial, come back to challenge the sufficiency of the indictment. *See Gentry*, 363 S.C. at 102, 610 S.E.2d at 499–500 (*quoting State v. Faile*, 43 S.C. 52, 59–60, 20 S.E. 798, 801 (1895)).

Further, we disagree with the substance of Sheppard's argument that the statute granting the state grand jury authority over securities violations does not encompass the crimes of obtaining property by false pretenses and conspiracy. While the statute establishing the jurisdiction of the state grand jury plainly evidences the General Assembly's intent to limit said jurisdiction, we do not believe it intended to hinder the grand jury's ability to investigate and indict for crimes committed in the course of conduct of an enumerated crime. *See* S.C. Code Ann. § 14-7-1630 (Supp. 2009). Subsection 7 of the statute grants jurisdiction to the state grand jury over "a crime involving a violation of Chapter 1, Title 35 of the Uniform Securities Act, or a crime related to securities fraud or a violation of the securities laws." *Id.* § 14-7-1630(7). We find the language "or a crime related to" is broad enough to encompass those crimes committed in the same course of conduct as an enumerated crime. Thus, the state grand jury has jurisdiction over the charges of obtaining property by false pretenses and conspiracy, even though those specific crimes may not be enumerated elsewhere in section 14-7-1630, because they were committed in the same course of conduct as the securities violations.

III. Section 14-7-1820 and the Ex Post Facto prohibition

Sheppard argues section 14-7-1820 of the South Carolina Code is an unconstitutional ex post facto law. However, Sheppard has not preserved this issue for appellate review. It appears from the record this argument is being made for the first time on appeal. Our law is clear than an issue may not be raised for the first time on appeal. *See I'on LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Section 14-7-1820 states, in its entirety, "This article applies to offenses committed both before and after its effective date." S.C. Code Ann. § 14-7-1820 (Supp. 2009). Sheppard argues this section violates the constitutional prohibitions against the passage of ex post facto laws because section 14-7-1630 of the South Carolina Code, the section that describes the jurisdiction of the state grand jury, did not include jurisdiction over securities violations until it was amended in 2003 in response to the HomeGold financial disaster.

Sheppard argues that because the amendment was an ex post facto law, it is unconstitutional and that section of the statute is void. Therefore, he argues, because that unconstitutional section was the only grant of authority to the state grand jury over securities violations, the state grand jury did not have subject matter jurisdiction over the counts in the indictment, and his convictions should be vacated. This argument, however, is again a thinly veiled attempt to reach subject matter jurisdiction because Sheppard has not preserved his ex post facto argument for appellate review. *See Gentry*, 363 at 101, 610 S.E.2d at 499 (a challenge to the indictment must be made before the jury is sworn).

IV. Disproportionate Sentence

Sheppard argues the circuit court erred in sentencing him to twenty years total imprisonment because his sentence was disproportionately greater than those of his co-conspirators. This argument, however, was not raised to the trial judge; therefore, the issue is not preserved for appellate review. *See State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[T]his Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.") (citations omitted).

CONCLUSION

For the foregoing reasons, the circuit court's conviction and sentence are affirmed.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frances S. Hudson, Deceased Employee, by Kenneth L. Hudson and Keith B. Hudson, Co-Executors of her Estate, as well as Matthew Deese and/or Andrew Deese, Respondents,

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company, In Liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, Carrier, Appellants.

Opinion No. 4705
Heard March 3, 2010 – Filed June 30, 2010
Withdrawn, Substituted and Refiled February 4, 2011

Appeal From Lancaster County
Kenneth G. Goode, Circuit Court Judge

AFFIRMED IN PART AND REVERSED IN PART

E. Ros Huff, Jr., of Irmo, for Appellants Lancaster Convalescent Center and Legion Insurance Company, and Mark D. Cauthen and Peter P. Leventis, both of Columbia, for Appellant South Carolina Property and Casualty Insurance Guaranty Association.

Andrew Nathan Safran and Pope D. Johnson, both of Columbia, and Ann McCrowey Mickle, of Rock Hill, for Respondents.

LOCKEMY, J.: In this workers' compensation action, Lancaster Convalescent Center (Employer) and Legion Insurance Company (Legion), in liquidation through South Carolina Property and Casualty Insurance Guaranty Association (the Guaranty Association), appeal the circuit court's decision affirming the decision of the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) to award Frances S. Hudson certain workers' compensation benefits. We affirm in part and reverse in part.

FACTS

This appeal comes to this court after several workers' compensation hearings. In 1997, Frances S. Hudson sustained an injury to her left leg while in the course and scope of her employment with Employer for which she received workers' compensation benefits. Later, in an order dated October 3, 2001, the single commissioner found Hudson permanently and totally disabled based on a combination of injuries stemming from her original 1997 work-related injury. Due to the combination of her injuries, the single commissioner found Hudson unable to perform any kind of work.

Thereafter, Hudson requested a lump-sum payment of her disability award, but Employer and Legion objected. After a hearing on the matter, the single commissioner found it was in Hudson's best interests to receive the lump-sum payment of her previous award. The single commissioner noted

that the South Carolina Code vests authority in the Workers' Compensation Commission to determine, with discretion, whether a lump-sum payment is in an employee's best interest. During the pendency of the lump-sum workers' compensation proceedings, Hudson died from cancer on June 30, 2002.

Employer and Legion appealed the single commissioner's ruling to the Appellate Panel and argued it was error to award Hudson the lump-sum award. Thereafter, the Appellate Panel affirmed all of the single commissioner's findings of facts and conclusions of law, sustaining his order in its entirety. On July 28, 2003, Legion became insolvent. Accordingly, after the ruling regarding the lump-sum payment was rendered, the circuit court stayed the appeal due to Legion's insolvency. During the stay, the Guaranty Association assumed all rights, duties, and obligations of Legion as the insolvent insurance carrier pursuant to section 38-31-60 of the South Carolina Code (Supp. 2009). Thereafter, Employer and the Guaranty Association appealed the Appellate Panel's order to the circuit court and argued it was error to award the lump-sum award, and the Appellate Panel's order must be vacated in light of Hudson's untimely death.

The Honorable Paul E. Short, then a circuit court judge, affirmed the Appellate Panel's order in its entirety by written order. The circuit court found substantial evidence supported the Appellate Panel's lump-sum award and that the award was not inconsistent with section 42-9-301 of the South Carolina Code (1985). Concerning whether Hudson's death impacted the workers' compensation proceedings, the circuit court found this issue was not preserved for review. Additionally, the circuit court found Employer and Legion's assertion regarding the abatement of Hudson's claim was unpersuasive. Employer and the Guaranty Association appealed the circuit court's decision to this court, but they subsequently withdrew the appeal. Consequently, our clerk of court signed an order of dismissal and remittitur on April 20, 2004.

At some point during the proceedings, Employer and the Guaranty Association learned of Hudson's death and ceased making payments. In response, Kenneth and Keith Hudson, as executors of their mother's estate (the Estate), requested payment of the lump-sum award. The Hudson sons raised the issue on behalf of Matthew and Andrew Deese, Hudson's

dependent grandchildren. Specifically, the Estate argued the grandchildren were entitled to payment of the lump sum, as Hudson's dependents. Employer and the Guaranty Association argued Hudson's lump-sum payment abated upon her death and maintained they were not obliged to pay any sum. The single commissioner found Judge Short's 2004 order, which addressed Hudson's lump-sum award, could not be challenged or relitigated. Specifically, the single commissioner found: (1) Hudson's disability award could reasonably fall within section 42-9-10 of the South Carolina Code (Supp. 2009); (2) all of the current beneficiaries had colorable claims to the lump-sum proceeds; and (3) the Guaranty Association failed to establish abatement under section 42-9-280 of the South Carolina Code (1985). Further, the single commissioner ordered the Guaranty Association to pay the lump sum with interest and a ten percent penalty within seven days of the order.

Again, Employer and the Guaranty Association appealed the single commissioner's order. On appeal, the Appellate Panel affirmed all of the single commissioner's factual findings and legal conclusions with the exception of the ten percent penalty imposed. Specifically, the Appellate Panel noted the Guaranty Association did not pursue a frivolous defense. Thereafter, the Estate and the Guaranty Association cross-appealed to the circuit court. The Honorable Kenneth Goode issued an order affirming the Appellate Panel with the exception of the ten percent penalty it vacated. In his order, Judge Goode concluded section 42-9-90 of the South Carolina Code (1985) compelled a penalty; accordingly, he reinstated the penalty. This appeal followed.

STANDARD OF REVIEW

"The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission." Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007). "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). Under the substantial evidence standard, the

appellate court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Forrest, 373 S.C. at 306, 644 S.E.2d at 785; see also S.C. Code § 1-23-380(5) (Supp. 2009). The appellate court may reverse or modify the Appellate Panel's decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Forrest, 373 S.C. at 306, 644 S.E.2d at 785-86. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

LAW/ANALYSIS

I. Abatement

Employer and the Guaranty Association argue the circuit court erred in affirming the Appellate Panel's decision finding Hudson's lump-sum award survived her death. However, Judge Short's order found this issue was not properly before the circuit court in 2004 because Employer and the Guaranty Association failed to raise it to the Appellate Panel after Hudson died. Employer and the Guaranty Association appealed Judge Short's ruling but later withdrew the appeal. Thus, we find Judge Short's ruling finding the abatement issue unpreserved is the law of the case. See Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Appellant may not seek relief from the prior unappealed order of the circuit court because the order has become the law of the case. Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."). Accordingly, we decline to address the issue on the merits.

II. Beneficiaries/Next of Kin Dependents

Employer argues the circuit court erred in failing to address whether all four beneficiaries have legitimate claims. The Guaranty Association argues

the circuit court erred in affirming the Appellate Panel's decision to award Hudson's lump sum to her Estate rather than to her beneficiaries pursuant to section 42-9-280 of the South Carolina Code (1985). In response, the Estate argues Employer and the Guaranty Association acknowledged and accepted the beneficiaries' valid and reasonable settlement of their respective claims to the lump-sum proceeds. Thus, based on this stipulation, the Estate argues Employer and the Guaranty Association cannot now contest the manner in which the lump-sum award will be distributed. We agree with Employer and the Guaranty Association.

We disagree with the Estate's assertion that Employer and the Guaranty Association acknowledged and accepted the beneficiaries' valid and reasonable settlement of their respective entitlements to the lump-sum proceeds. On the contrary, during the hearing before the single commissioner on January 25, 2005, Employer's counsel consistently questioned to whom the lump-sum award should go and the manner of the payment. We note there was a discussion among the parties during which they agreed to divide the award evenly between Hudson's sons and minor grandsons. The single commissioner noted Employer's counsel had no objection to the manner in which the funds were split but reserved the right to claim that the funds were payable. However, we do not find such a stipulation by Employer's counsel on the record and note he stated: "our position is the [E]state takes nothing." Thereafter, Employer and the Guaranty Association appealed the single commissioner's decision to award Hudson's lump sum to her Estate, rather than to her beneficiaries, to both the Appellate Panel and the circuit court. Therefore, we find this issue is properly preserved for our review and do not find Employer stipulated to the manner of dividing the lump-sum award. Accordingly, we will address this issue on the merits.

Pursuant to section 42-9-280:

> When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of § 42-9-10 or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his

> next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived. (emphasis added)

Here, Hudson's cause of death, cancer, was unrelated to her work injury. Pursuant to section 42-9-280, the workers' compensation commission must pay the unpaid balance of her lump-sum award to her dependent grandchildren rather than to her sons as beneficiaries of the Estate. Therefore, we find the circuit court erred in affirming the Appellate Panel's decision to award Hudson's lump sum to the Estate rather than to her beneficiaries pursuant to section 42-9-280 of the South Carolina Code (1985). Accordingly, we reverse that portion of the circuit court's order and direct all lump-sum payments to be paid directly to Hudson's dependent grandsons.

III. Interest Award

Next, Employer and the Guaranty Association argue the circuit court erred in affirming the Appellate Panel's decision to award Hudson's Estate interest on the lump-sum award. Specifically, the Guaranty Association maintains section 38-31-20(8)(h) (Supp. 2009) of the South Carolina Property and Casualty Insurance Guaranty Association Act disallows claims for interest. Section 38-31-20(8) provides:

> "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State. 'Covered claim' does not include: . . . (h) any claims for interest. (emphasis added)

In response, the Estate points to section 38-31-60 of the South Carolina Code (1985 & Supp. 2009) which reveals broad duties owed by the Guaranty Association. We agree with Employer and the Guaranty Association on this issue.

Section 38-31-60(b) states that the Guaranty Association "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." As we already indicated, interest is not covered. Accordingly, based on the plain reading of the statute, we reverse the circuit court's order affirming the Appellate Panel's decision to award interest.

IV. Penalty Imposed

Finally, Employer and the Guaranty Association argue the circuit court erred in reversing the Appellate Panel's decision not to award Hudson's Estate a ten percent penalty. Originally, the single commissioner imposed a ten percent penalty under section 42-9-90 of the South Carolina Code (Supp. 2009) based on Employer and the Guaranty Association's frivolous defense. Thereafter, the Appellate Panel reversed the penalty after finding Employer and the Guaranty Association did not pursue a frivolous defense. Finally, the circuit court reinstated the penalty and relied on Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006). The Estate argues Martin is inapplicable to the facts of their case, and therefore, the circuit court erred by reinstating the ten-percent penalty.[1]

In response, the Estate maintains the circuit court properly found that the ten percent penalty pursuant to section 42-9-90 was mandatory. Their reasoning is that Judge Short's order was final and should not have been relitigated. Further, the Estate maintains that under section 42-9-90, an employer or carrier must prove that circumstances beyond their control prevented payment of all compensation owed. Also, the Estate maintains this

[1] We find Martin analogous yet distinguishable from the present situation.

section does not afford the Commission any discretion when deciding whether to impose a penalty. We agree with the Estate.

Section 42-9-90 provides:

> If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in § 42-9-230, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in § 42-9-240, there shall be added to such unpaid installment an amount equal to ten per cent thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

Here, Employer and the Guaranty Association simply stopped paying compensation to the Estate. We agree that they had a non-frivolous defense, as the Appellate Panel found. However, as the single commissioner and Judge Goode found, the imposition of the penalty is mandatory under the statute. Therefore, we affirm the circuit court's reinstatement of the ten-percent penalty.

CONCLUSION

Judge Short's order addressing abatement on the merits is the law of the case. Therefore, we decline to address this issue on the merits. Pursuant to section 42-9-280 of the South Carolina Code, we reverse the portion of Judge Goode's order affirming the Appellate Panel's decision to pay Hudson's remaining lump sum balance to her sons as beneficiaries and order the

balance be paid to her grandsons as beneficiaries. Finally, based on applicable statutes, we reverse the interest award and affirm the ten-percent penalty imposed. Accordingly, the decision of the circuit court is

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Karriem Provet, Appellant.

Appeal From Greenville County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 4787
Heard May 18, 2010 – Filed January 31, 2011

AFFIRMED

Tricia A. Blanchette, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, Office of the Attorney General, all of Columbia; Solicitor Robert Mills Ariail, of Greenville, for Respondent.

WILLIAMS, J.: On appeal, Karriem Provet (Provet) argues the trial court erred in denying his motion to suppress the evidence resulting from a traffic stop because the police subjected him to an unreasonable search and seizure in violation of the Fourth Amendment. We affirm.

FACTS

On the night of May 1, 2002, Corporal John Owens (Owens) of the South Carolina Highway Patrol was patrolling on Interstate 85 in Greenville County, South Carolina, when he observed a 1997 Ford Expedition (the vehicle). The vehicle had a burned out tag light and was following another vehicle too closely. Subsequently, Owens commenced a traffic stop and asked Provet for his driver's license and vehicle registration. During the stop, Owens observed Provet's hands were noticeably shaking and his breathing was accelerated. Additionally, there were numerous air fresheners in the vehicle. Upon checking Provet's vehicle registration, Owens learned the vehicle was registered to a third-party. Owens then asked Provet to exit the vehicle and proceeded to perform a pat down search of Provet.

After Provet exited the vehicle, Owens asked Provet a series of questions. Owens inquired where Provet was coming from, and Provet responded he had been visiting his girlfriend at a nearby Holiday Inn. Owens testified he knew Provet was not coming from the Holiday Inn because he observed the traffic violation prior to where the Holiday Inn exit was located. Owens then asked Provet if he knew the location of the Holiday Inn exit. Provet did not know the location. Owens questioned Provet about the vehicle's third-party registration, his employment status, and the duration of his stay in Greenville. Provet informed Owens that the vehicle's owner was another girlfriend who lived in Charlotte, North Carolina. He stated that he recently graduated from a technical institution but was unemployed. Provet informed Owens he was in Greenville for two days but was not carrying any luggage. Based on Provet's responses, Owens believed Provet was deceptive, prompting Owens to call Trooper Eddie Aman (Aman), an officer assigned with the drug detection canine unit, to report to the scene.

After contacting Aman, Owens returned to Provet's vehicle to check the vehicle identification number. When looking through the front windshield,

Owens observed several air fresheners, numerous fast food bags, a cell phone, and some receipts. Consistent with Provet's admission at the commencement of the stop, Owens stated he saw no luggage in the vehicle, only one bag on the rear seat. However, Owens later stated that there was a luggage bag on the rear seat. When subsequently asked to clarify his observations regarding the bag on the rear seat at trial, Owens stated that he did not recall whether the bag was a luggage bag. Despite this apparent inconsistency regarding the presence of luggage, Owens' experience and observations caused him to conclude Provet was involved in criminal activity.

Owens returned Provet's driver's license and vehicle registration and then issued a traffic warning citation. After explaining the warning citation, Owens immediately asked Provet whether he had anything illegal in the vehicle. Provet responded in the negative. Owens then asked to search the vehicle, and Provet consented to the search. As Aman was attempting to remove a fast food bag as a precautionary measure for the drug detection canine, Provet fled the scene, running across six lanes of traffic on Interstate 85. Provet was apprehended. The drug detection canine alerted to the cocaine in the fast food bag. Provet was indicted by a Greenville County grand jury for resisting arrest and trafficking cocaine more than 100 grams.[1]

Before trial, Provet made a motion to suppress the cocaine because it was obtained through an illegal search. The trial court denied Provet's motion and concluded Owens had probable cause to conduct a traffic stop and reasonable suspicion of a serious crime. The trial court found Provet's consent was voluntarily given. A jury convicted Provet, and the trial court sentenced him to twenty-five years imprisonment. This appeal followed.

[1]South Carolina Code section 44-53-370(e)(2)(c)-(e) (2002) classifies "trafficking in cocaine" in the following weight amounts: one hundred grams or more, but less than two hundred grams; two hundred grams or more, but less than four hundred grams; and four hundred grams or more.

STANDARD OF REVIEW

In Fourth Amendment cases, the trial court's factual rulings are reviewed under the "clear error" standard. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). Under the "clear error" standard, an appellate court will not reverse a trial court's findings of fact simply because it would have decided the case differently. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). Therefore, we will affirm if there is any evidence to support the trial court's rulings. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002).

LAW/ANALYSIS

A. Detention

Provet does not appeal the trial court's ruling that Owens had probable cause to conduct a traffic stop of the vehicle based on his observation that Provet was following another vehicle too closely and had a burned out tag light. However, Provet contends his detention was unlawfully prolonged because Owens' questioning of Provet was unrelated to the traffic stop. We disagree.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. The Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing United States v. Mendenhall, 446 U.S. 544, 551 (1980)). The temporary detention during an automobile stop, even if only for a brief and limited purpose, constitutes a seizure under the Fourth Amendment. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing Whren v. United States, 517 U.S. 806, 809-10 (1996)). Generally, the decision to conduct a traffic stop is reasonable when the police have probable cause to believe a traffic violation has occurred. Whren, 517 U.S. at 810.

During the traffic stop, Owens asked Provet where he was coming from, where the Holiday Inn was located, his employment status, and the

duration of his stay in Greenville. In addition, he inquired about the vehicle's third-party registration. We conclude Owens' questions were tangentially related to the traffic stop. See State v. Rivera, 384 S.C. 356, 359, 682 S.E.2d 307, 309 (Ct. App. 2009) (concluding officer's questions concerning where the defendants were coming from, how long they had been there, where they were going, and the purpose of their trip were tangentially related to the purpose of the traffic stop). Moreover, even if Owens' questioning of Provet was unrelated to the purpose of the traffic stop, Provet's argument is not persuasive because the Fourth Amendment does not per se prohibit questions unrelated to the purpose of the traffic stop unless the unrelated questions unreasonably extend the traffic stop's duration. In this case, we conclude Owens did not unreasonably extend the traffic stop, because the entire traffic stop amounted to less than eleven minutes. Furthermore, Owens' series of questions and observations occurred prior to the conclusion of the traffic stop because Owens was waiting to hear from dispatch regarding Provet's license and registration, and a warning citation had yet to be issued. As a result, we conclude the traffic stop was not unreasonably extended. See Arizona v. Johnson, 129 S. Ct. 781, 788 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."); see also United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (approving fifteen minute traffic stop).

B. Reasonable Suspicion

Provet argues Owens did not have reasonable suspicion of a serious crime. We disagree.

Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848 (citing United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998)). Reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity. State v. Woodruff, 344 S.C. 537, 546, 544

S.E.2d 290, 295 (Ct. App. 2001) (citing United States v. Cortez, 449 U.S. 411, 417-18 (1981)). In determining whether reasonable suspicion exists, the trial court must consider the totality of the circumstances. State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). Generally stated, reasonable suspicion is a standard that requires more than a "hunch" but less than probable cause. Id. Reasonable suspicion "is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004). Therefore, courts must "consider the totality of the circumstances" and "give due weight to common sense judgments reached by officers in light of their experience and training." United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004). "Reasonableness is measured in objective terms by examining the totality of the circumstances. As a result, the nature of the reasonableness inquiry is highly fact-specific." State v. Tindall, 388 S.C. 518, 527, 698 S.E.2d 203, 208 (2010).

In support of his argument that Owens lacked reasonable suspicion, Provet cites State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009). In Rivera, an officer stopped Rivera for following another vehicle too closely. Id. at 359, 682 S.E.2d at 309. During the stop, the officer asked Rivera to step out of the vehicle and asked where he and the passenger, Medero, were coming from, how long they had been there, where they were going, and the purpose of their trip. Id. Rivera and Medero gave conflicting stories regarding the purpose of their trip. Id. The officer informed Rivera he would receive a traffic warning citation and then proceeded to call for backup. Rivera, 384 S.C. at 359-60, 682 S.E.2d at 309. The officer then discussed the transport of drugs on the interstate and asked if any weapons, drugs, or large sums of money were in the vehicle. Id. Rivera replied in the negative. Id. at 360, 682 S.E.2d at 309. The officer subsequently asked for permission to search the vehicle, and Rivera consented. Id. The search revealed heroin in the vehicle's engine. Rivera, 384 S.C. at 360, 682 S.E.2d at 309.

At trial, Rivera and Medero moved to suppress the evidence on the basis that the traffic stop was unlawfully prolonged and the consent was invalid. Id. The trial court granted the suppression motion on the basis that

the officer lacked "sufficient indicators of criminal activity to justify any continued detention" beyond the purpose of the traffic stop. Id. In granting deference to the trial court because of the "any evidence" standard of review, this court upheld the trial court's suppression of the evidence. Id. at 363, 682 S.E.2d at 311.

First, this court found the rental vehicle was lawfully detained and the officer's questioning of Rivera and Medero regarding the purpose, destination, and duration of their trip was reasonably related to the traffic stop. Rivera, 384 S.C. at 362, 682 S.E.2d at 310. However, this court found the purpose of the traffic stop was accomplished when the officer informed Rivera he would receive a warning citation. Id. As a result, our court concluded the officer's discussion concerning the transport of drugs on the interstate exceeded the scope of the traffic stop and constituted a second and illegal detention unless the continued detention was supported by reasonable suspicion. Id.

In analyzing whether the officer had reasonable suspicion, this court found Rivera and Medero's nervousness standing alone did not create suspicion of criminal behavior, and their stories were not so inconsistent as to indicate criminal behavior. Id. at 362-63, 682 S.E.2d at 310-11. Furthermore, this court found the absence of luggage in the back seat did not provide reasonable suspicion particularly when the trunk, the usual place for luggage, "was filled" with suitcases. Rivera, 384 S.C. at 363, 682 S.E.2d at 311. Finally, this court found that there was no evidence of air fresheners located in the vehicle based on the trial court's order. Id.

Similar to Rivera, Owens' questions concerning Provet's destination and the purpose of his trip were reasonably related to the traffic stop, but unlike in Rivera, there are additional factors to be considered in this case. Owens testified Provet's vehicle contained several air fresheners. Additionally, Provet admitted he did not have any luggage for his two-day stay in Greenville.

Further, we note our supreme court's recent decision in Tindall. In Tindall, an officer stopped Tindall for speeding, following another vehicle too closely, and failing to maintain his lane. Tindall, 388 S.C. at 520, 698

S.E.2d at 204. The officer asked Tindall for his driver's license, registration, insurance, and the rental car agreement. Id. at 522, 698 S.E.2d at 205. The officer then asked Tindall to exit his vehicle and to sit in the patrol car. Id. While Tindall was exiting his vehicle, the officer testified that Tindall did a "felony stretch."[2] Id. The officer subsequently patted down Tindall and placed him in the patrol car. Tindall, 388 S.C. at 522, 698 S.E.2d at 205. At this point, the officer questioned Tindall regarding his destination, and Tindall informed the officer he was visiting his brother in Durham, North Carolina. Id. The officer called in Tindall's driver's license and registration to dispatch. Id. Approximately three minutes later, dispatch reported no problems with Tindall's driver's license and vehicle, and the officer told Tindall he would write him a warning ticket. Id. However, the officer refused to issue the ticket at this point and continued to question Tindall for approximately another six to seven minutes regarding "where he was going," "the purpose of the trip," "what exit he would take to get to Durham," "whether he had ever been charged with any drug crimes," "what type of business he was in," and "various questions about his business." Tindall, 388 S.C. at 522, 698 S.E.2d at 205.

Approximately fifteen to twenty minutes into the traffic stop, the officer asked Tindall if he could search his vehicle, and Tindall replied, "I don't care" or "I don't mind." Id. at 520, 698 S.E.2d at 204. The search revealed a substantial amount of cocaine. Id. at 520-21, 698 S.E.2d at 204. Tindall was convicted of trafficking cocaine in excess of four hundred grams and assessed a $250,000 fine. Id. at 520, 698 S.E.2d at 204. On appeal to our supreme court, Tindall argued the court of appeals erred in affirming the trial court's denial of his motions to suppress the cocaine and his statement to the police. Tindall, 388 S.C. at 520, 698 S.E.2d at 204.

Our supreme court held the "officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment." Id. at 522, 698 S.E.2d at 205. The court found the purpose of the traffic stop was accomplished when the dispatcher reported

[2] According to the officer's testimony, a "felony stretch" occurs when an individual raises his hands in a stress relief action. Tindall, 388 S.C. at 522, 698 S.E.2d at 205.

no problems with Tindall's driver's license and vehicle, and the only remaining task was the issuance of the warning ticket. Id. The court concluded the continued questioning of Tindall exceeded the scope of the traffic stop and constituted a seizure under the Fourth Amendment. Id. Specifically, the court stated, "[A] reasonable person in Tindall's position – seated in the front seat of the patrol car with two officers standing at his door, another officer to his left, and a police dog in the back seat – would not have felt free to terminate the encounter." Tindall, 388 S.C. at 522-23, 698 S.E.2d at 205.

Our supreme court next analyzed whether the officer had reasonable suspicion of a serious crime when he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket. At the time of the continued detention, the officer discovered the following: (1) "Tindall was driving to Durham to meet his brother"; (2) "Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop"; (3) "Tindall did a 'felony stretch' on exiting the vehicle"; and (4) "Tindall seemed nervous." Id. at 523, 698 S.E.2d at 206. The court concluded these facts did not provide a sufficient basis for reasonable suspicion. Id. Therefore, the supreme court reversed the trial court's ruling on the motion to suppress the cocaine. Id. Additionally, the supreme court held Tindall's consent to the search of his vehicle was invalid because it was the product of an unlawful detention under the Fourth Amendment. Id.

We conclude the present case is distinguishable from Tindall. In Tindall, the officer questioned Tindall for approximately six to seven minutes after the purpose of the traffic stop was accomplished, and thus, a continued detention occurred. Tindall, 388 S.C. at 522, 698 S.E.2d at 205. Conversely, Owens' series of questions and observations occurred prior to the conclusion of the traffic stop because Owens was waiting to hear from dispatch regarding Provet's license and registration and a warning citation had yet to be issued. We conclude Owens developed his reasonable suspicion as a result of additional factors that were not present in Tindall.

In the case at hand, the trial court found reasonable suspicion existed to support Owens' further detention of Provet based on Owens ascertaining (1)

Provet was nervous as displayed by extreme shaking of the hands and accelerated breathing, (2) third-party vehicle registration is very common in drug trafficking, (3) Provet's admission to visiting one girlfriend while driving a different girlfriend's vehicle, (4) Provet's claim he was coming from the Holiday Inn even though the traffic violation occurred prior to that hotel's exit, (5) Provet's presence in Greenville for two days without any luggage, (6) the presence of numerous fast food bags, a cell phone, and some receipts in Provet's vehicle,[3] and (7) the presence of several air fresheners in the vehicle that produced a strong odor.[4]

We are keenly aware that some of the items found in Provet's vehicle are commonplace and consistent with innocent travel. However, after reviewing the record to determine if the trial court's ultimate determination is supported by the evidence and analyzing the totality of the circumstances, we conclude there is evidence to support the trial court's ruling that reasonable suspicion existed in this case. See United States v. Sokolow, 490 U.S. 1, 9 (1989) ("Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."); see also United States v. Mason, No. 07-4900, 2010 WL 4977817, (4th Cir. Dec. 8, 2010) ("But just as one corner of a picture might not reveal the picture's subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion."); United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) ("[C]ontext matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances.").

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[3] We recognize Owens' testimony was inconsistent as to the presence of luggage in Provet's vehicle. However, we find the trial court's conclusion that Provet was traveling without luggage was not prejudicial in light of Provet's own statement to Owens that he was traveling without any luggage. See State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) ("Error without prejudice does not warrant reversal.").

[4] According to Owens, numerous air fresheners are used to disguise odors from law enforcement and drug detection canines.

Provet asserts the trial court's finding of reasonable suspicion would amount to a finding of reasonable suspicion of illegal activity for a majority of the vehicles on South Carolina's roadways. However, the combination of the commonplace items (i.e., numerous air fresheners, fast food bags, and several receipts) together with the surrounding circumstances (i.e., traveling two days without any luggage and inconsistent stories about where he was coming from and going to) eliminate a substantial portion of innocent travelers. See Foreman, 369 F.3d at 781 (4th Cir. 2004) ("[A]rticulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied.").

Furthermore, we conclude the trial court did not abuse its discretion in concluding reasonable suspicion existed based on the totality of the circumstances, particularly considering Owens' four years of experience as a member of the South Carolina Highway Patrol's Aggressive Criminal Enforcement Unit. See United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993) ("Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street."); see also Foreman, 369 F.3d at 785 (holding reasonable suspicion existed to order dog sniff when (1) the defendant traveled from Norfolk, Virginia to New York City (a drug source city) and back (approximately seven hours each way) within a single day to visit his brother who was purportedly evicted; (2) the defendant was exceptionally nervous, which became more pronounced when a trooper raised the issue of drug trafficking; (3) the defendant had multiple air fresheners in his car, which are often used to disguise the odor of narcotics; and (4) the trooper had considerable experience with drug interdiction); Mason, 2010 WL 4977817, (holding reasonable suspicion existed to order a dog sniff when (1) the defendant did not pull over promptly and the officer suspected that the defendant and the passenger were deliberating whether to comply or flee before pulling over; (2) the defendant's vehicle had an "extreme" odor of air fresheners beyond the officer's normal experience from the ordinary use of air fresheners; (3) the defendant had a single key on his key ring coupled with the fact that the defendant and the passenger were coming from a major drug source city, which could indicate their participation in a "turnaround" trip as drug couriers; (4) the defendant was sweating and unusually nervous, which became more pronounced as the

traffic stop continued; and (5) the defendant and the passenger gave conflicting stories regarding their trip).

Therefore, we conclude the trial court did not err in finding reasonable suspicion existed to further detain Provet because there is evidence in the record to support the trial court's ruling.

C. Voluntary Consent

Provet also argues he did not voluntarily consent to the search of the vehicle. We disagree.

Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent. Pichardo, 367 S.C. at 105, 623 S.E.2d at 851. Undoubtedly, a law enforcement officer may request permission to search at any time. Id. The State bears the burden of establishing the voluntariness of the consent. Id. The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances. Id. A trial court's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. Pichardo, 367 S.C. at 106, 623 S.E.2d at 851-52.

We conclude Provet's consent was voluntary based on the totality of the circumstances. During the suppression hearing, Owens testified he was not going to let Provet leave when he asked for Provet's consent to search Provet's vehicle. However, Owens did not convey this statement to Provet and stated Provet should have felt free to go because his driver's license and vehicle registration were returned and his traffic warning citation was issued. Moreover, Owens testified that he and Aman were the only officers at the scene at the time of the consent, Aman arrived in an unmarked police vehicle, and the drug detection canine was inside Aman's vehicle. Also, Owens indicated he did not make any promises in exchange for Provet's consent, no physical force was used, no guns were pointed, and no threatening tone was used in obtaining Provet's consent. Thus, we conclude based on the totality of the circumstances, the trial court did not err in concluding Provet voluntarily consented to the search of the vehicle. See State v. Mattison, 352

S.C. 577, 585, 575 S.E.2d 852, 856 (Ct. App. 2003) (finding the presence of four police officers and a drug dog did not negate the defendant's consent to search his vehicle when there was no evidence of any overt actions, threats of force, or other forms of coercion).

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William Conrad Martin, Appellant.

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

Opinion No. 4788
Heard September 15, 2010 – Filed February 3, 2011

AFFIRMED

Robert T. Williams, Sr., and Benjamin A. Stitely, of Lexington, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliot, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

LOCKEMY, J.: William Conrad Martin appeals his conviction for felony driving under the influence (DUI) resulting in death. Martin argues the trial court erred in admitting certain expert testimony and declining to grant a directed verdict on felony DUI. We affirm.

FACTS

Martin was indicted for felony DUI resulting in death after the pickup truck he was driving collided with the vehicle that seventy-two-year-old Rugy Stone was riding in as a passenger. The collision caused Stone's vehicle to flip over and slide upside down into a ditch alongside the road. Stone was injured in the accident and transported to the emergency room at Palmetto Health Richland.[1]

At trial, the State proffered the testimony of Dr. Eric Brown and Dr. Raymond Bynoe who attended to Stone in the emergency room. Upon her arrival, Stone was in "severe shock," although she was conscious and complaining of chest and upper abdominal pain. Stone was also able to explain she had diabetes, hypertension, and a heart problem.

An initial examination revealed Stone had "extremely low" blood pressure and difficulty breathing. Brown and Bynoe performed an emergency intubation, inserting a breathing tube into Stone's mouth and connecting Stone to an artificial respirator. An examination of Stone's midsection revealed multiple rib fractures, and her ribs were "free-floating." A computerized tomography (CT) scan revealed bleeding in Stone's chest cavity from lacerated blood vessels behind her fractured ribs. Brown and Bynoe evacuated the blood via a chest tube. An examination of Stone's back indicated she suffered an acute compression fracture of her T8 vertebra in her upper back and two other fractures in her lower back. Despite these factures, Stone was able to move her arms and legs.

Brown and Bynoe stabilized Stone, and she remained in intensive care on an artificial respirator. Over the next two weeks, several unsuccessful attempts were made to remove Stone from the artificial respirator.

[1] TJ Shealy, the driver of the vehicle and Stone's grandson, was uninjured.

Eventually, Stone received a tracheostomy for long-term use of artificial respiration. Stone also developed pneumonia, a blood infection, and a urinary tract infection. Bynoe explained the pneumonia and blood infections were likely the result of receiving blood transfusions during her treatment. According to Bynoe, Stone's diabetes further complicated recovery because patients with diabetes have a difficult time regulating blood sugar after transfusions. During this time, Stone's body also had difficulty maintaining proper levels of nourishment. According to Bynoe, the blood infections, malnutrition, and complications with Stone's diabetes were caused by the injuries she sustained in the accident.

Approximately two weeks after the accident, Bynoe transferred Stone to Intermedical Hospital, which specializes in the long term care of patients with serious and prolonged health problems, and referred her to Dr. Daniel Love for treatment. Stone presented at Intermedical with a staph infection of the lung, a urinary tract infection, and an "unusual bacterial infection." The ability of Stone's immune system to fight these infections was compromised by the complications from her diabetes. Further, Stone was unable to process food properly. Trauma from the accident damaged her liver and prevented it from manufacturing proteins needed for digestion and also impaired the muscular motion of her intestinal tract.

Two months after the accident, Stone's breathing improved and she was able to breathe without the artificial respirator. However, Stone's back injuries had not healed, and she began to experience paralysis and eventually became paralyzed. Shortly thereafter, Stone's breathing worsened and did not improve with the use of a breathing mask. Love informed Stone and her family that he believed placing her back on the artificial respirator would only prolong her illness, and she would likely not survive her injuries and resulting complications. After consulting with her family, Stone chose not to be placed on the artificial respirator and soon after passed away.

Love testified that respiratory failure was the immediate cause of Stone's death, but "the respiratory failure was a consequence of [her] original injuries." Love explained the complications Stone suffered were a result of the injuries she sustained in the accident, and the injuries and complications combined together to cause Stone's death. Ultimately, the jury found Martin

guilty of felony DUI resulting in death. The trial court sentenced Martin to fifteen years' imprisonment and imposed a $10,100 fine. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in allowing opinion testimony from Brandon Landrum, which fell outside the realm of his qualifications as a forensic toxicologist?

2. Did the trial court err in declining to direct a verdict on felony driving under the influence resulting in death?

LAW/ANALYSIS

I. Expert Testimony

Martin argues the trial court erred in allowing Brandon Landrum to testify to the effects of drugs and alcohol on the body. Specifically, Martin maintains Landrum's training and expertise as a forensic toxicologist are insufficient to allow him to give his opinion regarding the effects of drugs and alcohol on the body. We disagree.

The qualification of a witness as an expert is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Caldwell, 283 S.C. 350, 352, 322 S.E.2d 662, 663 (1984); State v. Goode, 305 S.C. 176, 177-78, 406 S.E.2d 391, 392-93 (Ct. App. 1991). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Pursuant to Rule 702, SCRE, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Before a witness is qualified as an expert, the trial court must find (1) the expert's testimony will assist the trier of fact, (2) the

expert possesses the requisite knowledge, skill, experience, training, or education, and (3) and the expert's testimony is reliable. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). Once a witness is qualified as an expert, continued objections to the amount or quality of the expert's knowledge, skill, experience, training, or education go to weight of the expert's testimony, not its admissibility. Id.

The State proffered Landrum as an expert in forensic toxicology. Landrum explained a forensic toxicologist analyzes "blood, urine, biological[,] and non-biological samples" for the presence of alcohol, drugs, and poisons. After analyzing these samples, forensic toxicologists interpret the results for coroners, police officers, and courts. Interpreting these results involves an examination of how different levels of drugs and/or alcohol cause an individual to act or respond under their influence.

Landrum also explained the extent of his training and education regarding the effects of alcohol and drugs on the body. Landrum received in-house training at the South Carolina Law Enforcement Division (SLED), which involved studying the effects of drugs and alcohol on the body. Landrum's clinical chemistry rotation during his medical technology training included a section where he studied the impairing effects of drugs and alcohol. Landrum also attended classes at the drug recognition evaluation school at the police academy in Columbia, South Carolina. Landrum explained these classes involved studying the behavior of individuals clinically dosed with certain amounts of alcohol.

Landrum further explained the difference between forensic toxicology and pharmacology. According to Landrum, pharmacology involves testing for the presence or absence of drugs or alcohol and examining the interaction between different drugs and drugs and alcohol. Forensic toxicology "takes it a step further" and determines the level of impairment for courts. The trial court qualified Landrum as an expert in forensic toxicology.

Landrum testified his testing revealed Martin's blood alcohol concentration (BAC) was 0.167 percent. Over Martin's objection to Landrum's "qualifications," Landrum explained the effects of alcohol on an individual at several BAC levels. Landrum also testified regarding

elimination, or the rate alcohol is processed and eliminated by the body, over Martin's objection to Landrum's "expertise." Martin also tested positive for marijuana and alprazolam (Xanax). Without objection, Landrum explained the effects of marijuana and Xanax and the synergistic effects of the combination of alcohol, marijuana, and Xanax. Landrum opined an individual with a 0.167 BAC combined with marijuana and Xanax could not safely operate a motor vehicle.

Here, Martin challenges Landrum's qualifications to testify regarding the effects of drugs and alcohol.[2] We find the trial court properly qualified Landrum as an expert and allowed him to testify regarding the effects of drugs and alcohol. In illuminating his qualifications, Landrum explained a forensic toxicologist tests samples looking for the presence of alcohol, drugs, and poisons and then interprets those tests to determine an individual's level of impairment. Landrum also testified he completed several training and educational experiences which examined the effects of drugs and alcohol. Notably, Landrum explained he had been qualified as an expert in forensic toxicology on nine other occasions and each time testified regarding the effects of drugs and alcohol. Landrum further explained forensic toxicology differs from toxicology in that it determines an individual's level of impairment for courts. Accordingly, Landrum possessed the requisite experience, training, and education to be qualified as an expert in forensic toxicology who could testify regarding the effects of drugs and alcohol.

Martin's reliance on State v. Priester for the proposition that Landrum was not qualified to testify regarding the effects of drugs and alcohol is unavailing. 301 S.C. 165, 391 S.E.2d 227 (1990). In Priester, the supreme court held the trial court erred in allowing a lab technologist, who admitted "he had no training whatsoever in determining the effect of alcohol upon the human system," to testify regarding the effects of drugs and alcohol. Id. at

[2] Martin does not allege the trial court failed to determine whether Landrum's testimony was reliable or that it would assist the trier of fact. See White, 382 S.C. at 274, 676 S.E.2d at 689 ("In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact.").

168, 391 S.E.2d at 228. Here, Landrum testified he possessed the exact type of training the supreme court found lacking in Priester; accordingly, Priester is distinguishable and lends Martin no support.

Finally, even if the trial court erred in allowing Landrum's testimony regarding the effects of drugs and alcohol, Martin was not prejudiced. The State was entitled to an inference Martin was under the influence of alcohol because his BAC was 0.167 percent. See S.C. Code Ann. § 56-5-2950(G)(3) (Supp. 2009) (providing that in a criminal prosecution for felony DUI, a blood alcohol concentration of greater than 0.08 gives rise to an inference the defendant was under the influence of alcohol).

For the foregoing reasons, we hold the trial court did not abuse its discretion in qualifying Landrum as expert witness in forensic toxicology and allowing him to testify regarding the effects of the drugs and alcohol. Because Landrum was properly qualified as an expert witness, Martin's subsequent objections to the amount of Landrum's qualifications went to the weight of his testimony, not its admissibility. See White, 382 S.C. at 274, 676 S.E.2d at 689.

II. Directed Verdict

Martin contends the trial court erred in declining to direct a verdict of not guilty. According to Martin, Stone's choice to terminate medical care was an intervening cause of death. We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the [S]tate fails to produce evidence of the offense charged." Id. "When reviewing a denial of a directed verdict, this [c]ourt views the evidence and all reasonable inferences in the light most favorable to the [S]tate." Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury." Id. at 292-93, 625 S.E.2d at 648.

Section 56-5-2945(A) of the South Carolina Code (2006)[3] provides:

> A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a vehicle and when driving does any act forbidden by law or neglects any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes . . . death to a person other than himself, is guilty of a felony.

"A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008). However, "[t]he defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." Id.

In State v. Patterson, this court considered whether the trial court erred in declining to charge the jury on the law of proximate cause because the victim died after being removed from an artificial respirator and a feeding tube. 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). Patterson's girlfriend was taken to the hospital after he severely beat her with a blunt instrument. Id. at 223, 625 S.E.2d at 241. She was treated and placed on life support; however, her prognosis was poor. Id. Nine days later she was removed from life support and died soon after. Id. at 223-24, 625 S.E.2d at 241. The court noted the beating caused the victim's death and concluded "[u]nder these facts, the removal of life support cannot be considered an independent intervening cause capable of breaking the chain of causation triggered by the defendant's wrongful actions." Id. at 235, 625 S.E.2d at 247.

Here, Martin's contention that Stone's decision to forgo further use of the artificial ventilator is sufficient to relieve him of liability for her death as a matter of law is without merit. Martin drove the vehicle that collided with Stone's vehicle. Stone sustained severe internal injuries to her lungs and liver in the accident. She was unable to breathe without the use of an artificial

[3] The events in question occurred on July 29, 2007; accordingly, we apply section 56-5-2945 as it existed at that time.

respirator and to properly digest feedings. Stone's ribs were broken in multiple locations and "free floating" in her mid-section, and her back was fractured in three places. During treatment, Stone developed several interrelated complications from the emergency surgery and blood transfusions required to save her life. Although the immediate cause of death was listed as respiratory failure, Love explained the initial injuries Stone suffered and the complications from treatment combined together to cause her death.

Under these facts, Stone's decision to forgo further use of the artificial respirator cannot be an intervening cause of death sufficient to relieve Martin of liability. Although Stone died after declining further use of the artificial ventilator, the evidence establishes Stone died as a result of the injuries she suffered in the accident caused by Martin. Martin's actions were a contributing cause of death and therefore, a proximate cause of Stone's death. Accordingly, because direct evidence exists reasonably tending to prove Martin proximately caused Stone's death, we hold the trial court properly denied Martin's motion for a directed verdict.

CONCLUSION

The trial court properly qualified Landrum as an expert witness and allowed him to testify regarding the effects of drugs and alcohol. Because direct evidence exists reasonably tending to prove Martin proximately caused Stone's death, the trial court properly denied Martin's motion for a directed verdict. Accordingly, the decision of the trial court is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Karen Harris, Appellant,

v.

The University of South Carolina, Respondent.

Appeal From Beaufort County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 4789
Heard September 14, 2010 – Filed February 3, 2011

AFFIRMED

James H. Moss, of Beaufort, for Appellant.

C. Scott Graber, of Beaufort, for Respondent.

LOCKEMY, J.: Karen Harris appeals the jury's verdict in favor of the University of South Carolina (the University) on her negligence claim for damages resulting from injuries she suffered in a fall on University property. Harris argues the trial court erred in (1) charging the jury on the Limitation on Liability of Landowners Act, commonly known as the Recreational Use

Statute (the RUS)[1], (2) charging she carried the burden of proof regarding the RUS, (3) charging gross negligence, and (4) charging the law regarding the duty owed to a licensee. We affirm.

FACTS

Pritchard's Island (the Island) is an undeveloped barrier island off the coast of Beaufort County. The Island is managed by the University and is used for education, conservation, and research purposes by the University, other state institutions, and the public. The University leases the Island from the Carolina Research and Development Foundation and uses it primarily for sea turtle research. Groups and individuals must pay a fee to come to the Island and participate in the turtle education project or other educational opportunities. However, volunteers, family members of employees, and honored visitors are not required to pay.

In August 2005, Harris came to the Island to visit her son, Daniel Russo, an intern employed by the University. Harris did not pay a fee to come onto the Island. During her visit, Harris stayed in the Island's main house, which is used as a dormitory for visitors, educational facility, and staff offices. Guests can access the beach from the house through a boardwalk that connects to a set of stairs and extends over sand dunes and down to the beach. On the afternoon of August 2, 2005, Harris slipped and fell on the boardwalk stairs as she was returning to the house from the beach. According to Harris, she was carrying a beach chair, book, and a drink can when she slipped on the second step from the bottom on the stairs after crossing the dunes. Harris suffered a severely broken ankle, which required surgery and physical therapy.

In January 2006, Harris filed suit against the University, alleging the University negligently designed, constructed, and maintained the boardwalk stairs. Harris also maintained she was an invitee on the Island, and the University failed to properly warn her regarding the "dangerous condition" of the stairs. Harris alleged she suffered a permanent disability to her right ankle and was entitled to damages for her lost wages, medical bills, future

[1] S.C. Code Ann. §§ 27-3-10 to -70 (2007).

medical expenses, loss of the enjoyment of life, and her mental anguish and physical pain. At trial, the jury returned a verdict in favor of the University.[2] This appeal followed.

STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law." Felder v. K-Mart Corp., 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989). "A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." Id.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. "An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction." Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008).

LAW/ANALYSIS

I. Licensee and Invitee Jury Charges

Harris argues the trial court erred in charging the jury the law regarding licensees. Harris maintains the trial court should have determined she was an invitee as a matter of law. We disagree.

The University's duty to protect Harris from conditions on the Island largely depends on whether she was an adult trespasser, a licensee, or an invitee at the time of her injury. Singleton v. Sherer, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008). Because trespass is not an issue before this

[2] The reading of the verdict was not included in the record, and the record does not contain the verdict forms.

court, we must determine whether there was sufficient evidence for the trial court to charge the jury with the law regarding licensees and invitees.

A licensee is a social guest or "a person who is privileged to enter upon land by virtue of the possessor's consent." Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). "A licensee's presence on the property is for the primary benefit of the licensee, not the owner." Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997). "A landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities." Landry v. Hilton Head Plantation Prop. Owners Ass'n, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994).

An invitee, on the other hand, "is a person who enters onto the property of another at the express or implied invitation of the property owner." Goode, 329 S.C. at 441, 494 S.E.2d at 831. "The visitor is considered an invitee especially when he is upon a matter of mutual interest or advantage to the property owner." Sims v. Giles, 343 S.C. 708, 716, 541 S.E.2d 857, 862 (Ct. App. 2001). "The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." Id. at 718, 541 S.E.2d at 863. "The property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004). "A property owner generally does not have a duty to warn others of open and obvious conditions, but a landowner may be liable if the landowner should have anticipated the resulting harm." Id. "The basic distinction between a licensee and an invitee is that an invitee confers a benefit on the landowner." Landry, 317 S.C. at 204, 452 S.E.2d at 621.

Harris argues she was an invitee because she was expressly invited to the Island by Russo as a benefit accorded to him as a University employee. Harris also maintains that as a visitor to the Island, she was required to volunteer or participate in the Island's educational programs. The University contends Harris came to the Island after asking for permission to come, and the purpose of her visit was for recreation and to visit her son.

While Harris maintains she was an invitee on the Island, we find there was sufficient evidence for the jury to infer that Harris was a licensee. Despite alleging in her brief that she "received an express invitation" to come to the Island, Harris testified at trial that she could not recall whether Russo expressly invited her to the Island or whether she asked for permission to come. Russo also testified he was unsure whether he invited Harris or whether she asked for permission to visit him. Furthermore, while Brandy Armstrong, Russo's supervisor, testified no one came to the island for recreational purposes only, evidence in the record indicates Harris spent her time on the Island lying on the beach, reading a novel, and not participating in any educational activities.

We find the jury was properly given the opportunity to determine whether or not Harris had an express invitation to visit the Island and whether or not her presence on the Island benefited the University. Thus, the trial court did not err in charging the jury the law regarding both licensees and invitees because Harris's status at the time of her injury was a question of fact for the jury. See Hoover v. Broome, 324 S.C. 531, 538, 479 S.E.2d 62, 66 (Ct. App. 1996) (concluding that when conflicting evidence is presented as to whether someone is a licensee or invitee, the question becomes one of fact and as such, is properly left to the jury).

II. RUS

Harris argues the trial court erred in charging the RUS. We disagree.

The RUS was enacted by our legislature to "encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." S.C. Code Ann. § 27-3-10 (2007). Pursuant to section 27-3-30,

> an owner of land owes no duty of care to keep the premises safe for entry or use by persons who have sought and obtained his permission to use it for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on

> such premises to such persons entering for such purposes.

Furthermore, section 27-3-40 provides:

> Except as specifically recognized by or provided in § 27-3-60, an owner of land who permits without charge any person having sought such permission to use such property for recreational purposes does not thereby:
>
> > (a) Extend any assurance that the premises are safe for any purpose.
> > (b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
> > (c) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.

The RUS defines "recreational purpose" as including, but not limited to, any of the following: "hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, summer and winter sports and viewing or enjoying historical, archaeological, scenic, or scientific sites." S.C. Code Ann. § 27-3-20(c) (2007).

Harris argues the trial court erred in determining the RUS applied as a matter of law. She maintains (1) the Island was not open to the general public, (2) the Island was posted and barricaded from use, prohibiting the general public from access, and (3) she was not on the Island for any recreational purpose. The University argues the RUS was applicable and that Harris (1) sought and obtained permission to come to the Island, (2) was not charged for her visit, and (3) came for recreational purposes.

We find the trial court did not err in charging the RUS. While Harris maintains the RUS does not apply in situations where land is not open to the general public, the plain language of the RUS is contrary to this

interpretation. See Corbett v. City of Myrtle Beach, S.C., 336 S.C. 601, 606, 521 S.E.2d 276, 279 (Ct. App. 1999) (holding the primary rule of statutory construction is to give statutes their plain and ordinary meaning where the statute's language is unambiguous). The RUS does not provide that a landowner is required to open his land to everyone in order to benefit from the protections of the statute. Rather, the RUS limits the liability of landowners who open their land to any person having "sought and obtained" permission to enter for recreational purposes. S.C. Code Ann. § 27-3-30 (2007) (emphasis added).

Furthermore, the RUS does not provide that every person a landowner allows onto his land must be permitted to enter without charge. The statute only protects landowners who do not charge those who seek and obtain permission to come onto their land for recreational purposes. See S.C. Code Ann. § 27-3-40 (2007). The RUS also does not require, as Harris argues, that the land be free of "no trespassing" signs or that the land be used exclusively for recreational purposes. Thus, the trial court properly charged the RUS and did not err in asking the jury to determine whether Harris met the criteria in section 27-3-40. Whether Harris sought permission to enter the Island and whether her visit was for recreational purposes are questions of fact for the jury to decide.[3]

III. RUS – Burden of Proof

Harris argues the trial court erred in failing to charge the jury that the University carried the burden of proof regarding the RUS. We find this issue is not preserved for our review.

During the jury charge, the trial court failed to tell the jury that the University had the burden of proof regarding the RUS. After the charge, Harris objected:

> Harris's Counsel: I felt like that [the University] would have the burden of proof on the [RUS].

[3] Harris testified she did not pay a fee to visit the Island, and this fact was not contested at trial.

The Court: I should have told them that.

. . .

The Court: You want me to bring them back and tell them that?

Harris's Counsel: No. That's all right, Judge. I –

The Court: I should have told them that. You're right.

Harris's Counsel: I know it; but that's okay. . . .

The Court: Okay. I think – I hope they understand without my –

Harris's Counsel: I think they do.

The Court: All right.

Harris's Counsel: I argued it to them. I don't – I'm not going to worry about that.

Harris's argument is not properly before us for review because defense counsel declined the trial court's offer to recharge the jury with the correct law regarding the burden of proof. See Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (holding a party cannot acquiesce to an issue at trial and then complain on appeal).

IV. Gross Negligence Charge

Harris argues the trial court erred in charging the jury on the law regarding gross negligence. Specifically, Harris maintains the trial court failed to sufficiently define gross negligence and improperly charged the jury on the facts. We find this issue is not preserved for our review.

The trial court charged the jury:

> So the – [RUS] . . . grants to the University in the case of recreational use of land without a fee lia – uh – uh – immunity, unless it's established that the act or omission was not only negligent, but was gross negligence; that is: They knew they were doing something wrong and they went ahead and did it anyway. So if that was the case, then she still could be entitled to be paid for her injuries and damages by the University.

Harris argues this was not the correct charge on the law. She contends the trial court's charge should have included definitions of the terms "negligence" and "recklessness." Because Harris failed to object to the gross negligence charge at trial, this argument is not preserved for our review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review).

CONCLUSION

We find the trial court did not err in charging the jury on the RUS or the law regarding licensees. Furthermore, we conclude Harris's arguments that the trial court improperly charged the jury on the law regarding gross negligence and failed to charge the jury that the University carried the burden of proof regarding the RUS are not preserved for our review. Accordingly the decision of the trial court is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Holly Woods Association of Residence Owners, Respondent,

v.

Joe W. Hiller, Robert E. Hiller, David Hiller, and HHH, Ltd. of Greenville, and Holly Woods Association of Residence Owners, Inc., Defendants,

of whom

Joe W. Hiller and HHH, Ltd. of Greenville, are the Appellants.

Opinion No. 4790
Heard March 2, 2010 – Filed February 3, 2011

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

AFFIRMED

Tucker S. Player, of Columbia, for Appellants.

John T. Crawford, Jr., and Keven Kenison, both of Greenville, for Respondent.

LOCKEMY, J.: The plaintiffs in this action were property owners in the Holly Woods Development in Greenville or members of the Holly Woods Association of Residence Owners (the Association). The Association brought suit against the property developers in 2005. After a trial, the jury awarded the Association $971,000 in actual damages for its negligence claim and $1 for the breach of implied warranty of workmanlike service claim. On appeal from this tort action, Joe W. Hiller, Robert E. Hiller, and David Hiller of HHH, Ltd. of Greenville, and Joe Hiller, individually, (Appellants) argue the trial court erred in: (1) allowing the Association to present a damages estimate from its expert witness; (2) denying Appellants' motions for directed verdict and judgment non obstante verdict; (3) submitting verdict forms to the jury without separating the respective defendants; (4) failing to grant a new trial absolute; (5) finding in favor of the Association on its equitable causes of action; (6) failing to grant a mistrial; and (7) allowing the Association to amend its complaint on the day of trial. We affirm.

FACTS

On May 2, 2005, the Association brought suit against Joe Hiller and HHH, Ltd. of Greenville. The Association alleged six causes of action, including: (1) specific performance to compel defendants to turn over control of the homeowners' association to the resident owners; (2) quiet title as to the common areas in favor of the Association; (3) breach of fiduciary duty with respect to Appellants turning over control of the homeowners' association and the Holly Woods Horizontal Property Regime in good repair or with adequate reserves to make repairs; (4) negligence in the construction of the project and the infrastructure associated thereto; (5) breach of contract; and (6) violation of the South Carolina Unfair Trade Practices Act. On December 7, 2005, the Association amended its complaint and added two defendants, Robert E. Hiller and David Hiller, and added three causes of action: (1) breach of implied warranty of workmanlike service; (2) breach of implied warranty of good title and fair dealing; and (3) veil piercing as to the individual defendants for any damages recovered. Thereafter, defendant HHH, Ltd. of Greenville answered the amended complaint and argued the claims were barred by the statute of limitations, standing, estoppel, waiver, and the statute

of repose. The court held two hearings prior to trial. The first hearing was related to discovery issues, and the second hearing involved Appellants' affirmative defenses.

By court order, in July 2006, defendant Joe Hiller continued with his case pro se after his counsel's motion to be relieved was approved. The Association then filed a motion to compel discovery from Appellants, and after a hearing, Judge Cooper ordered Appellants to turn over certain documents to the Association on December 18, 2006. Subsequently, the Association filed a motion for sanctions for Appellants' failure to comply with Judge Cooper's order. Judge Few heard the Association's sanction argument and the Appellants' motion for summary judgment based on standing, the statute of limitations, and the statute of repose on January 7, 2007. After the hearing, Judge Few granted the Association's motion for sanctions against defendants pursuant to Rule 37(b), SCRCP. Additionally, he denied Appellants' summary judgment motions. Specifically, Judge Few (1) denied Appellants' motion for summary judgment based on the applicable statute of limitations because the Association claimed no damages were incurred more than three years before the commencement of this action; (2) denied Joe Hiller's motion to dismiss for lack of standing and motion to compel; (3) denied Joe Hiller's motion for sanctions; and (4) denied the Association's motion to amend its complaint to add an additional developer.

On January 8, 2007, the Association filed a motion to amend its complaint to correct a scrivener's error and remove the "Inc." from its name. Judge Miller granted the Association's motion to amend the complaint to reflect the Association's correct name. The peculiar effect of Judge Miller's ruling was that the original plaintiff became a named defendant. After trial, the jury returned a $971,000 verdict in favor of the Association for actual damages as to the negligence claim. The jury awarded $1 in actual damages on the breach of contract claim, breach of fiduciary duty claim, and breach of implied warranty of workmanlike service claim, but it did not award punitive damages. All defendants filed notices of appeal, including Joe Hiller in his individual capacity. These appeals were consolidated into this final appeal.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of this court extends merely to correction of errors of law. Small v. Pioneer Mach., Inc., 329 S.C. 448, 460, 494 S.E.2d 835, 841 (Ct. App. 1997). We will not disturb the jury's factual findings unless a review of the record discloses there is no evidence that reasonably supports the jury's findings. Id. at 461, 494 S.E.2d at 841.

When a suit involves both legal and equitable issues, each cause of action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. West v. Newberry Elec. Co-op., 357 S.C. 537, 542, 593 S.E.2d 500, 502 (Ct. App. 2004). "In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence." Id. "[A]n action to quiet title to property is an action in equity." Jones v. Leagan, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (Ct. App. 2009). Specific performance is also an equitable action. Fesmire v. Digh, 385 S.C. 296, 303-04, 683 S.E.2d 803, 807 (Ct. App. 2009).

LAW/ANALYSIS

Appellants present numerous issues on appeal. We begin our analysis of this case by examining a timeline to determine if the Association was procedurally barred from bringing its lawsuit either under the statute of repose or the statute of limitations.

I. Statute of Repose

Appellants maintain the trial court should have granted a directed verdict because the damages the Association complained of occurred more than thirteen years after construction was completed on the property. We disagree.

The version of the statute of repose in effect at the time the Association initiated its lawsuit required it bring its action within thirteen years of

substantial improvement to real property.[1] S.C. Code Ann. 15-3-640 (Supp. 2003). Specifically, section 15-3-640 provided:

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> (1) an action to recover damages for breach of a contract to construct or repair an improvement to real property;
> (2) an action to recover damages for the negligent construction or repair of an improvement to real property;
> (3) an action to recover damages for personal injury, death, or damage to property;
> (4) an action to recover damages for economic or monetary loss;
> (5) an action in contract or in tort or otherwise;
> (6) an action for contribution or indemnification for damages sustained on account of an action described in this subdivision;
> (7) an action against a surety or guarantor of a defendant described in this section;
> (8) an action brought against any current or prior owner of the real property or improvement, or against

[1] However, we note the current version prohibits "actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property" that arise more than eight years after substantial completion of the improvement. S.C. Code Ann. § 15-3-640 (Supp. 2009).

> any other person having a current or prior interest in the real property or improvement;
> (9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.
>
> This section describes an outside limitation of thirteen years after the substantial completion of the improvement, within which normal statutes of limitations continue to run. (emphasis added)

The purpose of the statute of repose is to provide a substantive right to developers to be free from liability after a certain time period. See Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) ("A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation."). Further, "[s]tatutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." Id. at 404, 438 S.E.2d at 244.

The development at issue was built in several stages. According to plats and testimony submitted in the record, buildings one through eight were built between 1978 and 1983. The rest of the buildings in the development were built in 1996 or later. Here, the Association's complaints concern the common areas of Holly Woods. Specifically, the Association based its suit on problems with the road that runs throughout the development, continued erosion which caused infrastructure problems, continued problems with the undeveloped portion of the development, defective sewer line construction, lack of firewall installation in certain units other than those in buildings one through eight, and other problems relating to the common areas of Holly

Woods. We find the statute of repose would have barred the Association from suing for construction problems relating to the infrastructure of buildings one through eight. We note the problems that form the basis of the Association's suit included general irrigation and design problems throughout the development, which ultimately led to moisture and foundation problems in building five. However, we hold the statute of repose did not bar the Association from bringing its suit in 2005 because it related to the common areas of the development built in 1996 or later.

II. Statute of Limitations and Compliance with Judge Few's Order

Appellants maintain the trial court erred in refusing to grant their directed verdict motion based on the statute of limitations. We disagree.

A. Statute of Limitations

In South Carolina, a party must commence an action within three years of the date the cause of action arises. S.C. Code Ann. § 15-3-530 (2005). The three-year statute of limitations "begins to run when the underlying cause of action reasonably ought to have been discovered." Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). Under the discovery rule, "the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Id. at 575-76, 593 S.E.2d at 627 (internal citation omitted). The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective. Id. at 576, 593 S.E.2d at 627. Therefore, this court must determine "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. S.C. Dep't of Corrs., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

The record contains evidence that the Association did not learn of several problems within the development until 2002. Therefore, the Association was allowed to present evidence of damages from 2002 to 2005. Here, Appellants argue the Association knew of problems prior to 2002.

Accordingly, Appellants maintain the Association should have brought its action earlier and was barred from bringing its action under the statute of limitations.

The Association claims it experienced a series of problems within the development. However, the Association maintains the problems existing when it brought suit were different from problems it experienced prior to 2002. Specifically, the minutes from an annual meeting of the Association's board meeting from 1991 reveal the Association knew of certain problems in 1991, including a pool leak, drainage around building five, and termite bonding. However, witnesses testified the damages that formed the basis of the Association's 2005 lawsuit stem from different problems than those that existed in 1991.

Mary Louise Reeves, secretary of the Association's Board, testified the Association was only seeking damages that occurred from 2002 to 2005. Reeves testified problems have always existed within the development and some are the same problems, but some are different problems. Richard H. Roubard, a member of the Association's Board since 1998, testified the damage around building five that existed in 1991 was corrected. Roubard testified Gray Engineering came up with a design for a culvert that went over the existing road and a head wall and drainage to pick up the run off. According to Roubard, the culvert repair resolved the 1991 drainage issues. Additionally, Roubard explained new problems with drainage arose between 1998 and 2000; however, he claimed the Association also addressed and corrected those problems. Roubard testified the Association learned of the most current drainage problems in September 2002 after a rainstorm.

Steven John Geiger, the Association's expert, also testified as to the damages the Association claimed could have been discovered in 2002 or later. Geiger categorized the condition of Holly Woods into three distinct occurrences contributing to the problems: (1) the general random nature that storm water flows across the site, (2) the presence of poor loose compressible soil, and in some cases soil that contains organic matter underlying the construction; and (3) the open excavation around the eastern and southern perimeters of building five. Geiger testified he knew about the 1991 report, but he testified the 1991 report did not affect the content of his damage report

and had nothing to do with his research. Further, he testified that the majority of the damages on Holly Woods could be attributable to conditions since 2002.

We find it is a jury question as to whether the damages the Association claimed in 2005 were different from those it experienced in the past. There is evidence from board members and Geiger that the problems, though similar in nature, were different. Therefore, we find the circuit court did not err in denying Appellants' directed verdict motion based on the statute of limitations.

B. Compliance with Judge Few's order

Judge Few issued an order prior to the Association's trial responding to Appellants' motion for summary judgment based on the statute of limitations. In his order, Judge Few ordered the Association to limit the presentation of its damages to only those incurred within three years of the commencement of its action. Appellants maintain the Association presented damages incurred as early as 1979, although Judge Few specifically ordered the Association to present damages "incurred" from 2002 to 2005. Appellants argue there is a difference between when the damages were "incurred" and when damages were "manifested." Appellants failed to raise the compliance objection contemporaneously during trial when these alleged violations of Judge Few's order occurred. Therefore, this issue is not preserved for our review. State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (holding a broad and non-contemporaneous objection is not enough to properly preserve an error for appellate review).[2]

III. Expert Witness Testimony

Appellants maintain the trial court erred in allowing the Association to present evidence from an expert witness regarding a damages estimate.

[2] Any res judicata argument in relation to Judge Few's order is not preserved. Hopkins v. Harrell, 352 S.C. 517, 522 n.1, 574 S.E.2d 747, 750 n.1 (Ct. App. 2002) (holding an issue must be raised to and ruled upon by the trial court in order to be preserved for review).

Specifically, Appellants argue the Association disclosed the damages estimate only one week prior to trial. Therefore, Appellants contend the trial court erred in allowing this testimony as it resulted in unfair surprise and substantial prejudice because Appellants could not prepare for trial. We disagree.

To prevent a trial from becoming a surprise or a guessing game for either party, discovery involves full and fair disclosure. Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997). "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Id. at 113-14, 495 S.E.2d at 217. Therefore, we must determine whether a discovery violation occurred, and if so, whether that violation prejudiced Appellants.

On appeal, Appellants maintain the Association violated Rule 33, SCRCP, concerning the use of interrogatories. Pursuant to Rule 33, a party is required to promptly update the information in the interrogatories as it becomes available. See Rule 33(b), SCRCP ("The interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party.").

First, we find no discovery violation occurred because the Association supplemented its responses to interrogatories throughout trial. We note the damages amount changed significantly throughout discovery. The first damage estimate from June 2006 totaled $653,227. Thereafter, in December 2006, the damages estimate changed to $233,681. The second damage estimate specifically stated: "Total does not include estimate for infrastructure damages currently being assessed by expert witness." Further, the Association provided Geiger's assessment report to Appellants when Geiger finalized it. Moreover, even if there was a discovery violation, we find no prejudice because Appellants failed to depose Geiger. We note Geiger only developed a final damage estimate approximately ten days before he testified because he did not finish his field investigation work until then. However, had Appellants deposed Geiger, he could have given an

approximate damages estimate. Therefore, we find the trial court did not abuse its discretion in admitting Geiger's damages estimate.

IV. Directed Verdict and JNOV Motion on Gross Negligence

Appellants argue the trial court erred in submitting the issue of gross negligence to the jury. The jury only awarded actual damages. Assuming without deciding that the trial court erred, Appellants failed to demonstrate any resulting prejudice from the alleged error. See Hall v. Palmetto Enters. II, Inc., 282 S.C. 87, 94, 317 S.E.2d 140, 145 (Ct. App. 1984) ("In the absence of prejudice, an erroneous instruction does not justify a reversal and warrant a new trial."). Accordingly, we find no error in the trial court's decision to submit gross negligence to the jury.

V. Mistrial

Appellants argue the trial court erred in failing to grant a mistrial. However, the record on appeal does not indicate Appellants moved for a mistrial. Therefore, this issue is not preserved for our review, and we decline to address it. Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

VI. Directed Verdict Based on Standing

Appellants maintain the trial court erred in failing to grant their motion for a directed verdict based on the Association's lack of standing. Specifically, Appellants contend the Association lacked standing because it possesses no interest in any property or common area in Holly Woods. We disagree.

Generally, a successor is "[a] person who succeeds to the office, rights, responsibilities, or place of another." Black's Law Dictionary (9th ed. 2009). The word successor can mean one who is entitled to succeed, or it can mean one who has in fact succeeded. Battery Homeowners Ass'n v. Lincoln Fin. Res., Inc., 309 S.C. 247, 250, 422 S.E.2d 93, 95 (1992). Here, "Holly Woods

Association of Residence Owners, Inc." was dissolved in 1987 by the South Carolina Secretary of State for failing to file tax returns. Between 1991 and 2000, the individual residence owners filed tax returns for the Holly Woods Association of Residence Owners, Inc. In 2000, the individual residence owners formed "Holly Woods Association of Residence Owners" and filed an Amended and Restated Master Deed establishing the Holly Woods Association of Residence Owners as the nonprofit corporation responsible for the management and operation of Holly Woods. We find evidence supports the trial court's determination that Holly Woods Association of Residence Owners was the successor to Holly Woods Association of Residence Owners, Inc., and therefore, had standing. Accordingly, the trial court properly denied Appellants' motion for a directed verdict on this ground.

VII. Directed Verdict on Negligence

Appellants contend the trial court erred in failing to grant a directed verdict on negligence. Specifically, they maintain the existence and scope of a duty are legal questions, and no evidence was presented pertaining to duties owed by Appellants to the Association.

We find this issue is not preserved for our review. Although Appellants moved for a directed verdict at the close of all testimony, they did not move for a directed verdict on the specific basis that no evidence indicated they owed a duty to the Association. Creech v. S.C. Wildlife & Marine Res. Dep't, 328 S.C. 24, 34, 491 S.E.2d 571, 576 (1997) (holding the appellant's failure to raise a particular issue in its directed verdict motion precludes appellate review of that issue); see also Rule 50(a), SCRCP ("A motion for a directed verdict shall state the specific grounds therefor."). Therefore, we decline to address this issue on the merits.

VIII. Directed Verdict Based on Construction Post-1981

Appellants contend the trial court erred in failing to grant a directed verdict because the Association presented no evidence that any named defendant performed any construction at Holly Woods after 1981. We disagree.

Though evidence does not demonstrate Appellants specifically performed the construction at Holly Woods after 1981, the Association had a cause of action against Appellants as developers. Furthermore, the Association is permitted to sue any party as long as the party is properly served and the Association has standing. See Sloan v. Sch. Dist. of Greenville Cnty., 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000) ("A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing."). Accordingly, we find the trial court properly declined to direct a verdict for Appellants on this basis.

IX. Directed Verdict on Equitable Causes of Action

Appellants argue the trial court erred in failing to direct a verdict on the Association's equitable causes of action for specific performance and quiet title because the Association knew problems existed prior to May 2002. We decline to address this argument on the merits. In their brief, Appellants fail to cite any case law or authority in support of their argument. An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding appellant abandoned issue when he failed to provide argument or supporting authority); Shealy v. Doe, 370 S.C. 194, 205-06, 634 S.E.2d 45, 51 (Ct. App. 2006) (declining to address an issue on appeal when appellant failed to cite any supporting authority and made conclusory arguments). Therefore, Appellants are deemed to have abandoned this issue.

X. Directed Verdict or New Trial Based on Causation or Time of Occurrence

Appellants argue the trial court erred in failing to grant their directed verdict motion because only speculative evidence was presented during the trial to support a finding of damages for the time period allowed. We disagree.

In Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981), our supreme court stated:

> Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required.

After several investigations, Geiger, a qualified expert, testified regarding the amount of damages. We find Geiger's damage assessment was enough evidence for the jury to determine an appropriate damages award with reasonable certainty. Therefore, we find the trial court properly denied Appellants' motion for a direct verdict.

XI. Improper Verdict Form

Appellants maintain the trial court erred in failing to submit a special verdict form to the jury. We disagree.

HHH, Ltd. and Joe Hiller requested they be separated on the verdict form for the jury. Specifically, they asked for the verdict form to be "divided between HHH and Joe Hiller [because] [t]here was a distinct time period when HHH did not exist." Additionally, there was a discussion as to whether joint and several liability was proper in this case because of the timeline. The trial court decided to submit the verdict form to the jury and stated it could submit a special interrogatory if the jury came back with a plaintiff's verdict. Once in deliberations, the jury submitted several questions to the court. Thereafter, the jury returned a plaintiff's verdict. After the verdict was published, the trial court asked both parties if they had anything more for the jury, and both sides responded they did not.

Here, the trial court gave the parties an opportunity to request a special interrogatory after the jury returned a plaintiff's verdict, but Appellants failed to do so. We find that Appellants had an obligation to request a special interrogatory once the jury returned its verdict. Appellants waived appellate review of this issue because they failed to request a special interrogatory

when the deciding jury was available and in place to review such a matter. See Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding a party cannot acquiesce to an issue at trial and then complain on appeal). Accordingly, we decline to address this issue.

XII. New Trial Based on Jury Prejudice

Appellants argue the trial court erred in failing to grant their motion for a new trial because the $971,000 verdict on the negligence claim was grossly excessive and a result of passion, caprice, prejudice, or some other influence outside the evidence. We disagree.

The decision of whether to grant a new trial based on a jury's passion, caprice, prejudice, or some outside influence is highly discretionary. Mims v. Florence Cnty. Ambulance Serv. Comm'n, 296 S.C. 4, 7-8, 370 S.E.2d 96, 99 (Ct. App. 1988) ("The granting of a new trial on the ground that the verdict is so excessive as to indicate caprice, passion, or prejudice on the part of the jury is committed to the sound discretion of the trial judge and his decision thereon will not be disturbed on appeal, absent a showing of an abuse of discretion."). We find no evidence of caprice, passion, or prejudice on part of the jury. Furthermore, the amount awarded in actual damages was lower than the $1.4 million damage estimate of the expert witness. Therefore, evidence exists to sustain the jury's verdict. See Wright v. Craft, 372 S.C. 1, 36, 640 S.E.2d 486, 505 (Ct. App. 2006) (finding a jury's verdict will not be overturned if any evidence exists to sustain the factual findings implicit in its decision). Accordingly, we find the trial court did not err in declining to grant a new trial absolute on this basis.

XIII. New Trial Based on Inconsistent Jury Verdict

Appellants maintain the trial court erred in failing to grant their motion for a new trial because the jury's verdict was inconsistent on its face. Specifically, Appellants argue breach of warranty of implied workmanlike service is encompassed within negligence; therefore, the jury's verdict was facially inconsistent. We disagree.

"It is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found." Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 334, 450 S.E.2d 66, 74 (Ct. App. 1994); see also Camden v. Hilton, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004) ("In South Carolina, an appellate court must uphold a jury verdict if it is possible to reconcile its various features."). The causes of action for negligence and breach of implied warranty of workmanlike service are separate and distinct and are not mutually exclusive. Furthermore, the jury awarded $971,000 in actual damages for the Association's negligence claim and only awarded $1 in actual damages for the Association's claims for breach of implied warranty of workmanlike service. Although the jury returned plaintiff verdicts on these causes of action, the respective damage awards were vastly different. However, this discrepancy does not indicate the verdicts are irreconcilable. See Orangeburg Sausage Co., 316 S.C. at 345, 450 S.E.2d at 74 ("Although the jury awarded different amounts under each theory, this does not mean the verdicts are inconsistent. Different damages are recoverable under each claim, and the trial court instructed the jury as to the appropriate measure of damages under each claim."). Therefore, we find the trial court did not err in declining to grant a new trial based on inconsistent verdicts.

XIV. Equitable Causes of Action

Appellants argue the trial court erred in finding in favor of the Association on its causes of action for specific performance and quiet title. Essentially, Appellants reiterate their standing argument. Our prior determination that the Association had standing is dispositive of this issue. Accordingly, we decline to consider this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

XV. Conversion of Plaintiff to Defendant on Day of Trial

Appellants maintain the trial court erred by allowing the Association to be converted to a defendant on the day of trial and entering a new plaintiff. We disagree.

Here, "Inc." was removed from the plaintiff's name, and the trial court found Appellants had actual notice of who the plaintiff was in this case. We agree with the trial court. Changing the name of the plaintiff in this tort action did not affect whether Appellants received proper notice. There is no evidence in the record that either party failed to comply with proper service of process.

As to the issue of adding a new defendant to the action, we note that Holly Woods Association of Resident Owners, Inc. is defunct. Further, Holly Woods Association of Resident Owners Inc. did not file a notice of appeal with our court. Therefore, this issue is moot because we cannot exercise jurisdiction over them. Accordingly, we affirm the decision of the trial court.

CONCLUSION

For the above stated reasons, the decisions of the trial court are

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.